

71. The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1(c) by deleting "firearm or other dangerous weapon" and inserting in lieu thereof "dangerous weapon (including a firearm)".

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1(d) by inserting the following additional sentence at the end: "Where an object that appeared to be a dangerous weapon was brandished, displayed, or possessed, treat the object as a dangerous weapon."

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1(g) by deleting "firearm or other dangerous weapon" the first time it appears and inserting in lieu thereof "dangerous weapon (including a firearm)".

The Commentary to §1B1.1 captioned "Application Notes" is amended by inserting the following additional note:

- "5. Where two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision, use the provision that results in the greater offense level. E.g., in §2A2.2(b)(2), if a firearm is both discharged and brandished, the provision applicable to the discharge of the firearm would be used."

The purposes of this amendment are to clarify the definition of a dangerous weapon; and to clarify that when two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision, the provision that results in the greater offense level is to be used. **The effective date of this amendment is November 1, 1989.**

72. The Commentary to §1B1.1 captioned "Application Notes" is amended by inserting the following additional note:

- "6. In the case of a defendant subject to a sentence enhancement under 18 U.S.C. § 3147 (Penalty for an Offense Committed While on Release), see §2J1.7 (Commission of Offense While on Release)."

The purpose of this amendment is to clarify the treatment of a specific enhancement provision. **The effective date of this amendment is November 1, 1989.**

73. Section 1B1.2(a) is amended in the first sentence by deleting "The court shall apply" and inserting in lieu thereof "Determine"; and in the second sentence by deleting "the court shall apply" and inserting in lieu thereof "determine", and by deleting "guideline in such chapter" and inserting in lieu thereof "offense guideline section in Chapter Two".

The purposes of this amendment are to clarify the guideline and to make the phraseology of this subsection more consistent with that of §§1B1.1 and 1B1.2(b). **The effective date of this amendment is November 1, 1989.**

74. Section 1B1.2(a) is amended in the first sentence by inserting immediately before the period: "(i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted)".

The Commentary to §1B1.2 captioned "Application Notes" is amended in the first paragraph of Note 1 by deleting:

- "As a general rule, the court is to apply the guideline covering the offense conduct most applicable to the offense of conviction. Where a particular statute proscribes a variety of conduct

which might constitute the subject of different guidelines, the court will decide which guideline applies based upon the nature of the offense conduct charged.",

and inserting in lieu thereof:

"As a general rule, the court is to use the guideline section from Chapter Two most applicable to the offense of conviction. The Statutory Index (Appendix A) provides a listing to assist in this determination. When a particular statute proscribes only a single type of criminal conduct, the offense of conviction and the conduct proscribed by the statute will coincide, and there will be only one offense guideline referenced. When a particular statute proscribes a variety of conduct that might constitute the subject of different offense guidelines, the court will determine which guideline section applies based upon the nature of the offense conduct charged in the count of which the defendant was convicted."

The purpose of this amendment is to clarify the guideline and commentary. **The effective date of this amendment is November 1, 1989.**

75. Section 1B1.2(a) is amended by deleting the last sentence as follows:

"Similarly, stipulations to additional offenses are treated as if the defendant had been convicted of separate counts charging those offenses.",

and by inserting the following additional subsections:

"(c) A conviction by a plea of guilty or nolo contendere containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s).

(d) A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit."

The Commentary to §1B1.2 captioned "Application Notes" is amended in the second paragraph of Note 1 by deleting:

"Similarly, if the defendant pleads guilty to one robbery but admits the elements of two additional robberies as part of a plea agreement, the guideline applicable to three robberies is to be applied.",

and by inserting the following additional notes:

"4. Subsections (c) and (d) address circumstances in which the provisions of Chapter Three, Part D (Multiple Counts) are to be applied although there may be only one count of conviction. Subsection (c) provides that in the case of a stipulation to the commission of additional offense(s), the guidelines are to be applied as if the defendant had been convicted of an additional count for each of the offenses stipulated. For example, if the defendant is convicted of one count of robbery but, as part of a plea agreement, admits to having committed two additional robberies, the guidelines are to be applied as if the defendant had been convicted of three counts of robbery. Subsection (d) provides that a conviction on a conspiracy count charging conspiracy to commit more than one offense is treated as if the defendant had been convicted of a separate conspiracy count for each offense that he conspired to commit. For example, where a conviction on a single count of conspiracy establishes that the defendant conspired to commit three robberies, the guidelines are to be applied as if the defendant had been convicted on one count of

conspiracy to commit the first robbery, one count of conspiracy to commit the second robbery, and one count of conspiracy to commit the third robbery.

5. Particular care must be taken in applying subsection (d) because there are cases in which the jury's verdict does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense. Note, however, if the object offenses specified in the conspiracy count would be grouped together under §3D1.2(d) (e.g., a conspiracy to steal three government checks) it is not necessary to engage in the foregoing analysis, because §1B1.3(a)(2) governs consideration of the defendant's conduct."

The purpose of this amendment is to add a guideline subsection (subsection (d)) expressly providing that a conviction of conspiracy to commit more than one offense is treated for guideline purposes as if the defendant had been convicted of a separate conspiracy count for each offense that the defendant conspired to commit. The current instruction in Application Note 9 of §3D1.2 is inadequate. For consistency, material now contained at §1B1.2(a) concerning stipulations to having committed additional offenses is moved to a new subsection (subsection (c)).

Additional commentary (Application Note 5) is provided to address cases in which the jury's verdict does not specify how many or which offenses were the object of the conspiracy of which the defendant was convicted. Compare United States v. Johnson, 713 F.2d 633, 645-46 (11th Cir. 1983) (conviction stands if there is sufficient proof with respect to any one of the objectives) cert. denied sub nom. Wilkins v. United States, 465 U.S. 1081 (1984) with United States v. Tarnopol, 561 F.2d 466 (3d Cir. 1977) (failure of proof with respect to any one of the objectives renders the conspiracy conviction invalid). In order to maintain consistency with other §1B1.2(a) determinations, this decision should be governed by a reasonable doubt standard. A higher standard of proof should govern the creation of what is, in effect, a new count of conviction for the purposes of Chapter Three, Part D (Multiple Counts). Because the guidelines do not explicitly establish standards of proof, the proposed new application note calls upon the court to determine which offense(s) was the object of the conspiracy as if it were "sitting as a trier of fact." The foregoing determination is not required, however, in the case of offenses that are grouped together under §3D1.2(d) (e.g., fraud and theft) because §1B1.3(a)(2) governs consideration of the defendant's conduct. **The effective date of this amendment is November 1, 1989.**

76. Section 1B1.3 is amended in subsection (a)(3) by deleting "or risk of harm" immediately following "all harm", and by deleting "if the harm or risk was caused intentionally, recklessly or by criminal negligence, and all harm or risk" and inserting in lieu thereof "and all harm".

Section 1B1.3(a) is amended by deleting:

- "(4) the defendant's state of mind, intent, motive and purpose in committing the offense; and",

by renumbering subsection (a)(5) as (a)(4), and by inserting "and" at the end of subsection (a)(3) immediately following the semicolon.

The Commentary to §1B1.3 captioned "Background" is amended by deleting:

" Subsection (a)(4) requires consideration of the defendant's 'state of mind, intent, motive or purpose in committing the offense.' The defendant's state of mind is an element of the offense that may constitute a specific offense characteristic. See, e.g., §2A1.4 (Involuntary Manslaughter) (distinction made between recklessness and criminal negligence). The guidelines also incorporate broader notions of intent or purpose that are not elements of the offense, e.g., whether the offense was committed for profit, or for the purpose of facilitating a more serious

offense. Accordingly, such factors must be considered in determining the applicable guideline range."

and inserting in lieu thereof:

" Subsection (a)(4) requires consideration of any other information specified in the applicable guideline. For example, §2A1.4 (Involuntary Manslaughter) specifies consideration of the defendant's state of mind; §2K1.4 (Arson; Property Damage By Use of Explosives) specifies consideration of the risk of harm created."

The purpose of this amendment is to delete language pertaining to "risk of harm" and "state of mind" as unnecessary. Cases in which the guidelines specifically address risk of harm or state of mind are covered in the amended guideline under subsection (a)(4) [formerly subsection (a)(5)]. In addition, the amendment deletes reference to harm committed "intentionally, recklessly, or by criminal negligence" as unnecessary and potentially confusing. **The effective date of this amendment is November 1, 1989.**

77. Section 1B1.3 is amended by deleting the introductory sentence as follows: "The conduct that is relevant to determining the applicable guideline range includes that set forth below."

Section 1B1.3(b) is amended by deleting:

"(b) Chapter Four (Criminal History and Criminal Livelihood). To determine the criminal history category and the applicability of the career offender and criminal livelihood guidelines, the court shall consider all conduct relevant to a determination of the factors enumerated in the respective guidelines in Chapter Four."

and inserting in lieu thereof:

"(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines."

The Commentary to §1B1.3 captioned "Background" is amended in the second paragraph by deleting "Chapter Four" and inserting in lieu thereof "Chapters Four and Five", and by deleting "that Chapter" and inserting in lieu thereof "those Chapters".

The purpose of this amendment is to clarify the guideline. **The effective date of this amendment is November 1, 1989.**

78. The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 1 by deleting:

"If the conviction is for conspiracy, it includes conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant. If the conviction is for solicitation, misprision or accessory after the fact, it includes all conduct relevant to determining the offense level for the underlying offense that was known to or reasonably should have been known by the defendant. See generally §§2X1.1-2X4.1."

and inserting in lieu thereof:

"In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant 'would be otherwise accountable' also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant. Because a count may be broadly worded and

include the conduct of many participants over a substantial period of time, the scope of the jointly-undertaken criminal activity, and hence relevant conduct, is not necessarily the same for every participant. Where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant's offense level under this guideline.

In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant 'would be otherwise accountable' includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.

Illustrations of Conduct for Which the Defendant is Accountable

a. Defendant A, one of ten off-loaders hired by Defendant B, was convicted of importation of marihuana, as a result of his assistance in off-loading a boat containing a one-ton shipment of marihuana. Regardless of the number of bales of marihuana that he actually unloaded, and notwithstanding any claim on his part that he was neither aware of, nor could reasonably foresee, that the boat contained this quantity of marihuana, Defendant A is held accountable for the entire one-ton quantity of marihuana on the boat because he aided and abetted the unloading, and hence the importation, of the entire shipment.

b. Defendant C, the getaway driver in an armed bank robbery in which \$15,000 is taken and a teller is injured, is convicted of the substantive count of bank robbery. Defendant C is accountable for the money taken because he aided and abetted the taking of the money. He is accountable for the injury inflicted because he participated in concerted criminal conduct that he could reasonably foresee might result in the infliction of injury.

c. Defendant D pays Defendant E a small amount to forge an endorsement on an \$800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain \$15,000 worth of merchandise. Defendant E is convicted of forging the \$800 check. Defendant E is not accountable for the \$15,000 because the fraudulent scheme to obtain \$15,000 was beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity he jointly undertook with Defendant D.

d. Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$20,000. Defendant G fraudulently obtains \$35,000. Each is convicted of mail fraud. Each defendant is accountable for the entire amount (\$55,000) because each aided and abetted the other in the fraudulent conduct. Alternatively, because Defendants F and G engaged in concerted criminal activity, each is accountable for the entire \$55,000 loss because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable.

e. Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. For the purposes of determining the offense level under this guideline, Defendant J is accountable for the entire single shipment of marihuana he conspired to help import and any acts or omissions in furtherance of the importation that were reasonably foreseeable. He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I if those acts were beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity he agreed to jointly undertake with Defendants H and I (i.e., the importation of the single shipment of marihuana)."

The purpose of this amendment is to clarify the definition of conduct for which the defendant is "otherwise accountable." **The effective date of this amendment is November 1, 1989.**

79. Section 1B1.5 is amended by deleting "adjustments for" immediately following "all applicable", and by inserting "and cross references" immediately before the period at the end of the sentence.

The Commentary to §1B1.5 captioned "Application Note" is amended in Note 1 by inserting "and cross references" immediately before "as well as the base offense level".

The purpose of this amendment is to clarify the guideline and commentary. **The effective date of this amendment is November 1, 1989.**

80. The Commentary to §1B1.5 captioned "Application Note" is amended in Note 1 by deleting the last sentence as follows: "If the victim was vulnerable, the adjustment from §3A1.1 (Vulnerable Victim) also would apply."

The purpose of this amendment is to delete an unnecessary sentence. No substantive change is made. **The effective date of this amendment is November 1, 1989.**

81. Section 1B1.9 is amended in the title by deleting "Petty Offenses" and inserting in lieu thereof "Class B or C Misdemeanors and Infractions".

Section 1B1.9 is amended by deleting "(petty offense)" immediately following "infraction".

The Commentary to §1B1.9 captioned "Application Notes" is amended in the first sentence of Note 1 by deleting "petty offense" and inserting in lieu thereof "Class B or C misdemeanor or an infraction", in the second sentence of Note 1 by deleting "A petty offense is any offense for which the maximum sentence that may be imposed does not exceed six months' imprisonment." and inserting in lieu thereof "A Class B misdemeanor is any offense for which the maximum authorized term of imprisonment is more than thirty days but not more than six months; a Class C misdemeanor is any offense for which the maximum authorized term of imprisonment is more than five days but not more than thirty days; an infraction is any offense for which the maximum authorized term of imprisonment is not more than five days.", in the first sentence of Note 2 by deleting "petty offenses" and inserting in lieu thereof "Class B or C misdemeanors or infractions", in the second sentence of Note 2 by deleting "petty" and inserting in lieu thereof "such", in the third sentence of Note 2 by deleting "petty offense" and inserting in lieu thereof "Class B or C misdemeanor or infraction" and, in Note 3 by deleting:

"3. All other provisions of the guidelines should be disregarded to the extent that they purport to cover petty offenses."

The Commentary to §1B1.9 captioned "Background" is amended by deleting:

"voted to adopt a temporary amendment to exempt all petty offenses from the coverage of the guidelines. Consequently, to the extent that some published guidelines may appear to cover petty offenses, they should be disregarded even if they appear in the Statutory Index",

and inserting in lieu thereof:

"exempted all Class B and C misdemeanors and infractions from the coverage of the guidelines".

The purposes of this amendment are to conform the guideline to a revision in the statutory definition of a petty offense, and to convert the wording of the Commission's emergency amendment at §1B1.9 (effective June 15, 1988) to that appropriate for a permanent amendment. Section 7089 of the Anti-

Drug Abuse Act of 1988 revises the definition of a petty offense so that it no longer exactly corresponds with a Class B or C misdemeanor or infraction. Under the revised definition, a Class B or C misdemeanor or infraction that has an authorized fine of more than \$5,000 for an individual (or more than \$10,000 for an organization) will not be a petty offense. This legislative revision does not affect the maximum terms of imprisonment authorized. The maximum authorized term of imprisonment remains controlled by the grade of the offense (*i.e.*, the maximum term of imprisonment remains five days for an infraction, thirty days for a Class C misdemeanor, and six months for a Class B misdemeanor). Because the statutory grade of the offense (*i.e.*, a Class B or C misdemeanor or an infraction) is the more relevant definition for guideline purposes, this amendment deletes the references in §1B1.9 to "petty offenses" and in lieu thereof inserts references to "Class B and C misdemeanors and infractions." **The effective date of this amendment is November 1, 1989.**

82. The Commentary to §2A1.1 captioned "Statutory Provision" is amended by deleting "Provision" and inserting in lieu thereof "Provisions", and by inserting "; 21 U.S.C. § 848(e)" at the end immediately before the period.

The Commentary to §2A1.1 captioned "Application Note" is amended in the caption by deleting "Note" and inserting in lieu thereof "Notes", and by inserting the following additional note:

- "2. If the defendant is convicted under 21 U.S.C. § 848(e), a sentence of death may be imposed under the specific provisions contained in that statute. This guideline applies when a sentence of death is not imposed."

The Commentary to §2A1.1 captioned "Background" is amended by deleting "statute" and inserting in lieu thereof "18 U.S.C. § 1111", and by inserting immediately after the first sentence:

"Prior to the applicability of the Sentencing Reform Act of 1984, a defendant convicted under this statute and sentenced to life imprisonment could be paroled (*see* 18 U.S.C. § 4205(a)). Because of the abolition of parole by that Act, the language of 18 U.S.C. § 1111(b) (which was not amended by the Act) appears on its face to provide a mandatory minimum sentence of life imprisonment for this offense. Other provisions of the Act, however, classify this offense as a Class A felony (*see* 18 U.S.C. § 3559(a)(1)), for which a term of imprisonment of any period of time is authorized as an alternative to imprisonment for the duration of the defendant's life (*see* 18 U.S.C. §§ 3559(b), 3581(b)(1), *as amended*); hence, the relevance of the discussion in Application Note 1, *supra*, regarding circumstances in which a sentence less than life may be appropriate for a conviction under this statute."

The Commentary to §2A1.1 captioned "Background" is amended by inserting the following additional paragraph at the end:

" The maximum penalty authorized under 21 U.S.C. § 848(e) is death or life imprisonment. If a term of imprisonment is imposed, the statutorily required minimum term is twenty years."

The purpose of this amendment is to incorporate new first-degree murder offenses created by Section 7001 of the Anti-Drug Abuse Act of 1988 where the death penalty is not imposed. This amendment also clarifies the existing commentary to this guideline. **The effective date of this amendment is November 1, 1989.**

83. Section 2A2.1 is amended in subsection (b)(2)(B) by deleting "a firearm or a dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)", and in subsection (b)(2)(C) by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

The purposes of this amendment are to clarify that a firearm is a type of dangerous weapon and to remove the inconsistency in the language between specific offense characteristic subdivisions (b)(2)(B) and (b)(2)(C). **The effective date of this amendment is November 1, 1989.**

84. Section 2A2.1(b)(3) is amended by inserting the following additional subdivisions:

"(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels;
or

(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels."

The Commentary to §2A2.1 captioned "Application Notes" is amended in the caption by deleting "Notes" and inserting in lieu thereof "Note", and by deleting:

"2. If the degree of bodily injury falls between two injury categories, use of the intervening level (i.e., interpolation) is appropriate."

The purpose of this amendment is to provide intermediate adjustment levels for the degree of bodily injury. **The effective date of this amendment is November 1, 1989.**

85. Section 2A2.2 is amended in subsection (b)(2)(B) by deleting "a firearm or a dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)", and in subsection (b)(2)(C) by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

The purposes of this amendment are to clarify that a firearm is a type of dangerous weapon and to remove the inconsistency in language between specific offense characteristic subdivisions (b)(2)(B) and (b)(2)(C). **The effective date of this amendment is November 1, 1989.**

86. Section 2A2.2(b)(3) is amended by inserting the following additional subdivisions:

"(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels;
or

(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels."

The Commentary to §2A2.2 captioned "Application Notes" is amended by deleting:

"3. If the degree of bodily injury falls between two injury categories, use of the intervening level (i.e., interpolation) is appropriate."

and by renumbering Note 4 as Note 3.

The purpose of this amendment is to provide intermediate adjustment levels for the degree of bodily injury. **The effective date of this amendment is November 1, 1989.**

87. Section 2A2.3(a)(1) is amended by deleting "striking, beating, or wounding" and inserting in lieu thereof "physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened".

The Commentary to §2A2.3 captioned "Application Notes" is amended by deleting:

- "2. 'Striking, beating, or wounding' means conduct sufficient to violate 18 U.S.C. § 113(d).",

and inserting in lieu thereof:

- "2. Definitions of 'firearm' and 'dangerous weapon' are found in the Commentary to §1B1.1 (Application Instructions).".

The Commentary to §2A2.3 captioned "Background" is amended by deleting the last sentence as follows: "The distinction for striking, beating, or wounding reflects the statutory distinction found in 18 U.S.C. § 113(d) and (e).".

The purpose of this amendment is to provide a clearer standard by replacing the phrase "striking, wounding, or beating" (a statutory phrase dealing with a petty offense) with "physical contact." The amendment also provides an enhanced offense level for the case in which a weapon is possessed and its use is threatened. **The effective date of this amendment is November 1, 1989.**

88. The Commentary to §2A2.3 captioned "Statutory Provisions" is amended by deleting "113(d), 113(e)".

The purpose of this amendment is to delete references to petty offenses. **The effective date of this amendment is November 1, 1989.**

89. The Commentary to §2A2.4 captioned "Application Notes" is amended in Note 1 by deleting the first sentence as follows:

"Do not apply §3A1.2 (Official Victim).",

and by inserting the following additional sentence at the end:

"Therefore, do not apply §3A1.2 (Official Victim) unless subsection (c) requires the offense level to be determined under §2A2.2 (Aggravated Assault).".

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

90. Section 2A2.4(b)(1) is amended by deleting "striking, beating, or wounding", and inserting in lieu thereof "physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened".

The Commentary to §2A2.4 captioned "Application Notes" is amended by deleting:

- "2. 'Striking, beating, or wounding' is discussed in the Commentary to §2A2.3 (Minor Assault).",

and inserting in lieu thereof:

- "2. Definitions of 'firearm' and 'dangerous weapon' are found in the Commentary to §1B1.1 (Application Instructions)."

The purpose of this amendment is to provide a clearer standard by replacing the phrase "striking, wounding, or beating" (a statutory phrase dealing with a petty offense) with "physical contact." The amendment also provides an enhanced offense level for the case in which a weapon is possessed and its use is threatened. **The effective date of this amendment is November 1, 1989.**

91. Section 2A3.1(b)(1) is amended by deleting:

"criminal sexual abuse was accomplished as defined in 18 U.S.C. § 2241",

and inserting in lieu thereof:

"offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b)".

The Commentary to §2A3.1 captioned "Application Notes" is amended in Note 2 by deleting:

"'Accomplished as defined in 18 U.S.C. § 2241' means accomplished by force, threat, or other means as defined in 18 U.S.C. § 2241(a) or (b) (i.e., by using force against that person; by threatening or placing that other person",

and inserting in lieu thereof:

"'The means set forth in 18 U.S.C. § 2241(a) or (b)' are: by using force against the victim; by threatening or placing the victim",

by deleting the parenthesis immediately before the period at the end of the Note, and by inserting the following additional sentence at the end of the Note:

"This provision would apply, for example, where any dangerous weapon was used, brandished, or displayed to intimidate the victim."

The Commentary to §2A3.1 captioned "Background" is amended in the fifth sentence of the first paragraph by deleting the comma immediately following "force" and inserting in lieu thereof a

semicolon, and by deleting "kidnapping," and inserting in lieu thereof "or kidnapping;", and in the last sentence of the last paragraph by deleting "serious physical" and inserting in lieu thereof "permanent, life-threatening, or serious bodily".

The purpose of this amendment is to clarify the guideline and commentary. **The effective date of this amendment is November 1, 1989.**

92. Section 2A3.1(b)(4) is amended by inserting immediately before the period at the end of the sentence: "; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels".

The purpose of this amendment is to provide an intermediate adjustment level for degree of bodily injury. **The effective date of this amendment is November 1, 1989.**

93. The Commentary to §2A3.2 captioned "Statutory Provision" and "Background" is amended by deleting "2243" wherever it appears and inserting in lieu thereof "2243(a)".

The Commentary to §2A3.2 captioned "Background" is amended by deleting "statutory rape, *i.e.*," immediately following "applies to", and by deleting "victim's incapacity to give lawful consent" and inserting in lieu thereof "age of the victim".

The purposes of this amendment are to clarify that the relevant factor is the age of the victim, and to provide a more specific reference to the underlying statute. **The effective date of this amendment is November 1, 1989.**

94. Section 2A3.3 is amended in the title by deleting "(Statutory Rape)" immediately following "a Ward".

The Commentary to §2A3.3 captioned "Statutory Provision" is amended by deleting "§ 2243" and inserting in lieu thereof "§ 2243(b)".

The purposes of this amendment are to delete inapt language from the title and to provide a more specific reference to the underlying statute. **The effective date of this amendment is November 1, 1989.**

95. Chapter Two, Part A is amended by deleting §2A3.4 in entirety as follows:

"§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the abusive sexual contact was accomplished as defined in 18 U.S.C. § 2241 (including, but not limited to, the use or display of any dangerous weapon), increase by 9 levels.

(2) If the abusive sexual contact was accomplished as defined in 18 U.S.C. § 2242, increase by 4 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2244, 2245.

Application Notes:

1. 'Accomplished as defined in 18 U.S.C. § 2241' means accomplished by force, threat, or other means as defined in 18 U.S.C. § 2241(a) or (b) (i.e., by using force against that person; by threatening or placing that other person in fear that any person will be subject to death, serious bodily injury, or kidnapping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct).
2. 'Accomplished as defined in 18 U.S.C. § 2242' means accomplished by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or when the victim is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.

Background: This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under §2A3.1-3.3). Enhancements are provided for the use of force or threats. The maximum term of imprisonment authorized by statute for offenses covered in this section is five years (if accomplished as defined in 18 U.S.C. § 2241), three years (if accomplished as defined in 18 U.S.C. § 2242), and six months otherwise. The base offense level applies to conduct that is consensual."

A replacement guideline with accompanying commentary is inserted as §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact).

The purposes of the amendment are to make the offense levels under this guideline consistent with the structure of related guidelines (§§2A3.1, 2A3.2, 2G1.2, 2G2.1, and 2G2.2) and to reflect the increased maximum sentences for certain conduct covered by this guideline. The amendment increases all offense levels, but in particular provides enhanced punishment for victimization of minors and children. **The effective date of this amendment is November 1, 1989.**

96. Section 2A4.1(b)(2) is amended by inserting immediately before the period at the end of the sentence: "; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels".

The purpose of this amendment is to provide an intermediate adjustment level for the degree of bodily injury. **The effective date of this amendment is November 1, 1989.**

97. The Commentary to §2A5.2 captioned "Application Note" is amended by deleting:

"Application Note:

1. If an assault occurred, apply the most analogous guideline from Part A, Subpart 2 (Assault) if the offense level under that guideline is greater."

The purpose of this amendment is to simplify the guideline by deleting redundant material. **The effective date of this amendment is November 1, 1989.**

98. The Commentary to §2A5.3 captioned "Application Notes" is amended in Note 1 by deleting "that the defendant is convicted of violating" and inserting in lieu thereof "of which the defendant is convicted".

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

99. Section 2B1.1(b)(1) is amended by deleting:

	<u>"Loss</u>	<u>Increase in Level</u>
(A)	\$100 or less	no increase
(B)	\$101 - \$1,000	add 1
(C)	\$1,001 - \$2,000	add 2
(D)	\$2,001 - \$5,000	add 3
(E)	\$5,001 - \$10,000	add 4
(F)	\$10,001 - \$20,000	add 5
(G)	\$20,001 - \$50,000	add 6
(H)	\$50,001 - \$100,000	add 7
(I)	\$100,001 - \$200,000	add 8
(J)	\$200,001 - \$500,000	add 9
(K)	\$500,001 - \$1,000,000	add 10
(L)	\$1,000,001 - \$2,000,000	add 11
(M)	\$2,000,001 - \$5,000,000	add 12
(N)	over \$5,000,000	add 13",

and inserting in lieu thereof:

	<u>"Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A)	\$100 or less	no increase
(B)	More than \$100	add 1
(C)	More than \$1,000	add 2
(D)	More than \$2,000	add 3
(E)	More than \$5,000	add 4
(F)	More than \$10,000	add 5
(G)	More than \$20,000	add 6
(H)	More than \$40,000	add 7
(I)	More than \$70,000	add 8
(J)	More than \$120,000	add 9

(K)	More than \$200,000	add 10
(L)	More than \$350,000	add 11
(M)	More than \$500,000	add 12
(N)	More than \$800,000	add 13
(O)	More than \$1,500,000	add 14
(P)	More than \$2,500,000	add 15
(Q)	More than \$5,000,000	add 16
(R)	More than \$10,000,000	add 17
(S)	More than \$20,000,000	add 18
(T)	More than \$40,000,000	add 19
(U)	More than \$80,000,000	add 20."

The purposes of this amendment are to conform the theft and fraud loss tables to the tax evasion table in order to remove an unintended inconsistency between these tables in cases where the amount is greater than \$40,000, to increase the offense levels for larger losses to provide additional deterrence and better reflect the seriousness of the conduct, and to eliminate minor gaps in the loss table. **The effective date of this amendment is November 1, 1989.**

100. Section 2B1.1(b)(6) is amended by deleting "organized criminal activity" and inserting in lieu thereof "an organized scheme to steal vehicles or vehicle parts".

The Commentary to §2B1.1 captioned "Application Notes" is amended by deleting:

- "8. 'Organized criminal activity' refers to operations such as car theft rings or 'chop shops,' where the scope of the activity is clearly significant.",

and inserting in lieu thereof:

- "8. Subsection (b)(6), referring to an 'organized scheme to steal vehicles or vehicle parts,' provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or 'chop shop.' 'Vehicles' refers to all forms of vehicles, including aircraft and watercraft."

The Commentary to §2B1.1 captioned "Background" is amended in the last paragraph by deleting:

"A minimum offense level of 14 is provided for organized criminal activity, *i.e.*, operations such as car theft rings or 'chop shops,' where the scope of the activity is clearly significant but difficult to estimate. The guideline is structured so that if reliable information enables the court to estimate a volume of property loss that would result in a higher offense level, the higher offense level would govern.",

and inserting in lieu thereof:

"A minimum offense level of 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial (*i.e.*, the value of the stolen property, combined with an enhancement for 'more than minimal planning' would itself result in an offense level of at least 14), but the value of the property is particularly difficult to

ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of 'organized scheme' is used as an alternative to 'loss' in setting the offense level."

The purpose of this amendment is to clarify the coverage of a specific offense characteristic. **The effective date of this amendment is November 1, 1989.**

101. The Commentary to §2B1.1 captioned "Background" is amended in the first paragraph by deleting "§5A1.1" and inserting in lieu thereof "Chapter Five, Part A".

The purpose of this amendment is to correct a clerical error. **The effective date of this amendment is November 1, 1989.**

102. Section 2B1.2 is amended in the title by inserting ", Transporting, Transferring, Transmitting, or Possessing" immediately after "Receiving".

Section 2B1.2(b)(3)(A) is amended by inserting "receiving and" immediately before "selling".

The Commentary to §2B1.2 captioned "Application Notes" is amended by deleting:

- "1. If the defendant is convicted of transporting stolen property, either §2B1.1 or this guideline would apply, depending upon whether the defendant stole the property.",

and by renumbering Notes 2 and 3 as Notes 1 and 2 respectively.

The purpose of this amendment is to clarify the nature of the cases to which this guideline applies. **The effective date of this amendment is November 1, 1989.**

103. Section 2B1.2 is amended by renumbering subsection (b)(4) as (b)(5), and by inserting the following new subsection (b)(4):

- "(4) If the property included undelivered United States mail and the offense level as determined above is less than level 6, increase to level 6."

The Commentary to §2B1.2 captioned "Application Notes", as amended, is further amended by inserting the following additional note:

- "3. 'Undelivered United States mail' means mail that has not actually been received by the addressee or his agent (e.g., it includes mail that is in the addressee's mail box)."

The purpose of this amendment is to add a specific offense characteristic where stolen property involved "undelivered mail" to conform to §2B1.1. **The effective date of this amendment is November 1, 1989.**

104. Section 2B1.2(b)(5)[formerly (b)(4)] is amended by deleting "organized criminal activity" and inserting in lieu thereof "an organized scheme to receive stolen vehicles or vehicle parts".

The Commentary to §2B1.2 captioned "Application Notes" is amended by inserting the following additional note:

- "4. Subsection (b)(5), referring to an 'organized scheme to receive stolen vehicles or vehicle parts,' provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or 'chop shop.' 'Vehicles' refers to all forms of vehicles, including aircraft and watercraft. See Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)."

The purpose of this amendment is to clarify the coverage of a specific offense characteristic. **The effective date of this amendment is November 1, 1989.**

105. Section 2B2.1(b)(2) is amended by deleting:

	<u>"Loss</u>	<u>Increase in Level</u>
(A)	\$2,500 or less	no increase
(B)	\$2,501 - \$10,000	add 1
(C)	\$10,001 - \$50,000	add 2
(D)	\$50,001 - \$250,000	add 3
(E)	\$250,001 - \$1,000,000	add 4
(F)	\$1,000,001 - \$5,000,000	add 5
(G)	more than \$5,000,000	add 6",

and inserting in lieu thereof:

	<u>"Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A)	\$2,500 or less	no increase
(B)	More than \$2,500	add 1
(C)	More than \$10,000	add 2
(D)	More than \$50,000	add 3
(E)	More than \$250,000	add 4
(F)	More than \$800,000	add 5
(G)	More than \$1,500,000	add 6
(H)	More than \$2,500,000	add 7
(I)	More than \$5,000,000	add 8."

The purposes of this amendment are to eliminate minor gaps in the loss table and to conform the offense levels for larger losses to the amended loss table at §2B1.1. **The effective date of this amendment is November 1, 1989.**

106. Section 2B2.1(b)(4) is amended by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

The Commentary to §2B2.1 captioned "Application Notes" is amended in Note 4 by deleting "with respect to a firearm or other dangerous weapon" and inserting in lieu thereof "to possession of a dangerous weapon (including a firearm) that was".

The purpose of this amendment is to clarify the guideline and commentary. **The effective date of this amendment is November 1, 1989.**

107. Section 2B2.2(b)(4) is amended by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

The Commentary to §2B2.2 captioned "Application Notes" is amended in Note 4 by deleting "with respect to a firearm", and inserting in lieu thereof "to possession of a dangerous weapon (including a firearm) that was".

The purpose of this amendment is to clarify the guideline and commentary. **The effective date of this amendment is November 1, 1989.**

108. Section 2B2.3(b)(2) is amended by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

The purpose of this amendment is to clarify the guideline. **The effective date of this amendment is November 1, 1989.**

109. Section 2B2.3(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics".

The Commentary to §2B2.3 captioned "Statutory Provisions" is amended by deleting "Provisions" and inserting in lieu thereof "Provision", and by deleting "18 U.S.C. §§ 1382, 1854" and inserting in lieu thereof "42 U.S.C. § 7270b".

The purposes of this amendment are to correct a clerical error, to delete a reference to a petty offense and an incorrect statutory reference, and to insert an additional statutory reference. **The effective date of this amendment is November 1, 1989.**

110. Section 2B3.1(a) is amended by deleting "18" and inserting in lieu thereof "20".

Section 2B3.1(b) is amended by deleting subdivisions (1) and (2) as follows:

"(1) If the loss exceeded \$2,500, increase the offense level as follows:

	<u>Loss</u>	<u>Increase in Level</u>
(A)	\$2,500 or less	no increase
(B)	\$2,501 - \$10,000	add 1
(C)	\$10,001 - \$50,000	add 2
(D)	\$50,001 - \$250,000	add 3

(E)	\$250,001 - \$1,000,000	add 4
(F)	\$1,000,001 - \$5,000,000	add 5
(G)	more than \$5,000,000	add 6

Treat the loss for a financial institution or post office as at least \$5,000.

- (2) (A) If a firearm was discharged increase by 5 levels; (B) if a firearm or a dangerous weapon was otherwise used, increase by 4 levels; (C) if a firearm or other dangerous weapon was brandished, displayed or possessed, increase by 3 levels."

and inserting in lieu thereof:

- "(1) If the offense involved robbery or attempted robbery of the property of a financial institution or post office, increase by 2 levels.

- (2) (A) If a firearm was discharged, increase by 5 levels; (B) if a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) if a dangerous weapon (including a firearm) was brandished, displayed, or possessed, increase by 3 levels; or (D) if an express threat of death was made, increase by 2 levels."

and by inserting the following additional subdivision:

- "(6) If the loss exceeded \$10,000, increase the offense level as follows:

<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A) \$10,000 or less	no increase
(B) More than \$10,000	add 1
(C) More than \$50,000	add 2
(D) More than \$250,000	add 3
(E) More than \$800,000	add 4
(F) More than \$1,500,000	add 5
(G) More than \$2,500,000	add 6
(H) More than \$5,000,000	add 7."

The Commentary to §2B3.1 captioned "Application Notes" is amended by deleting:

- "2. Pursuant to the last sentence of §2B3.1(b)(1), robbery or attempted robbery of a bank or post office results in a minimum one-level enhancement. There is no special enhancement for banks and post offices if the loss exceeds \$10,000, however."

and inserting in lieu thereof:

- "2. When an object that appeared to be a dangerous weapon was brandished, displayed, or possessed, treat the object as a dangerous weapon for the purposes of subsection (b)(2)(C)."

The Commentary to §2B3.1 captioned "Application Notes" is amended by inserting the following additional note:

- "8. An 'express threat of death,' as used in subsection (b)(2)(D), may be in the form of an oral or written statement, act, gesture, or combination thereof. For example, an oral or written demand using words such as 'Give me the money or I will kill you', 'Give me the money or I will pull the pin on the grenade I have in my pocket', 'Give me the money or I will shoot you', 'Give me your money or else (where the defendant draws his hand across his throat in a slashing motion)', or 'Give me the money or you are dead' would constitute an express threat of death. The court should consider that the intent of the underlying provision is to provide an increased offense level for cases in which the offender(s) engaged in conduct that would instill in a reasonable person, who is a victim of the offense, significantly greater fear than that necessary to constitute an element of the offense of robbery."

The Commentary to §2B3.1 captioned "Background" is amended in the first paragraph by deleting the third sentence as follows:

"Banks and post offices carry a minimum 1 level enhancement for property loss because such institutions generally have more cash readily available, and whether the defendant obtains more or less than \$2,500 is largely fortuitous."

The purposes of this amendment are to increase the offense level for robbery to better reflect the seriousness of the offense and past practice, to provide an increased enhancement for the robbery of the property of a financial institution or post office, to provide an enhancement for an express threat of death, and to provide that an object that appeared to be a dangerous weapon is to be treated as a dangerous weapon for the purposes of subsection (b)(2)(C). **The effective date of this amendment is November 1, 1989.**

111. Section 2B3.1(b)(3) is amended by inserting the following additional subdivisions:

- "(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels;
or
(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels."

The Commentary to §2B3.1 captioned "Application Notes" is amended by deleting:

- "4. If the degree of bodily injury falls between two injury categories, use of the intervening level (i.e., interpolation) is appropriate."

and by renumbering Notes 5-8 as 4-7, respectively.

The purpose of this amendment is to provide intermediate adjustment levels for the degree of bodily injury. **The effective date of this amendment is November 1, 1989.**

112. Section 2B3.2 is amended in subsection (b)(2)(B) by deleting "a firearm or a dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)", and in subsection (b)(2)(C) by

deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

The purposes of this amendment are to clarify that a firearm is a type of dangerous weapon and to remove the inconsistency in language between specific offense characteristic subdivisions (b)(2)(B) and (b)(2)(C). **The effective date of this amendment is November 1, 1989.**

113. Section 2B3.2(b)(3) is amended by inserting the following additional subdivisions:

- "(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels;
or
- (E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels."

The Commentary to §2B3.2 captioned "Application Notes" is amended by deleting:

- "4. If the degree of bodily injury falls between two injury categories, use of the intervening level (i.e., interpolation) is appropriate."

and by renumbering Notes 5 and 6 as 4 and 5, respectively.

The purpose of this amendment is to provide intermediate adjustment levels for the degree of bodily injury. **The effective date of this amendment is November 1, 1989.**

114. Section 2B3.3(b) is amended by deleting "Characteristics" and inserting in lieu thereof "Characteristic".

The purpose of this amendment is to correct a clerical error. **The effective date of this amendment is November 1, 1989.**

115. Section 2B5.1 is amended in the title by inserting "Bearer" immediately before "Obligations".

The Commentary to §2B5.1 captioned "Application Notes" is amended by renumbering Note 2 as Note 3, and by inserting the following new note 2:

- "2. 'Counterfeit,' as used in this section, means an instrument that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety. Offenses involving genuine instruments that have been altered are covered under §2B5.2."

The Commentary to §2B5.1 captioned "Application Notes" is amended in the renumbered Note 3 by deleting ", paste corners of notes on notes of a different denomination," immediately before "or otherwise produce".

The purpose of this amendment is to clarify the coverage and operation of this guideline. The amendment revises the title of §2B5.1 to make the coverage of the guideline clear from the title, and adopts the definition of "counterfeit" used in 18 U.S.C. § 513. "Altered" obligations (e.g., the corner of a note of one denomination pasted on a note of a different denomination) are covered under §2B5.2. **The effective date of this amendment is November 1, 1989.**

116. Section 2B5.2 is amended in the title by inserting "Altered or" immediately following "Involving" and by inserting "Counterfeit Bearer" immediately following "Other than".

The purpose of this amendment is to clarify the coverage of this guideline. **The effective date of this amendment is November 1, 1989.**

117. Section 2B6.1(b) is amended by renumbering subsection (b)(2) as (b)(3) and inserting the following new subsection (b)(2):

"(2) If the defendant was in the business of receiving and selling stolen property, increase by 2 levels."

The purpose of this amendment is to resolve an inconsistency between this section and §2B1.2 created by the lack of an enhancement in this section for a person in the business of selling stolen property. This amendment eliminates this inconsistency by adding a 2-level increase if the defendant was in the business of selling stolen property. Two levels rather than four levels is the applicable increase to conform to §2B1.2 because the base offense level of §2B6.1 already incorporates the adjustment for more than minimal planning. **The effective date of this amendment is November 1, 1989.**

118. Section 2B6.1(b)(3)[formerly (b)(2)] is amended by deleting "organized criminal activity" and inserting in lieu thereof "an organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts".

The Commentary to §2B6.1 captioned "Application Note" is amended by deleting:

"1. See Commentary to §2B1.1 (Larceny, Embezzlement, and other Forms of Theft) regarding the adjustment in subsection (b)(2) for organized criminal activity, such as car theft rings and 'chop shop' operations."

and inserting in lieu thereof:

"1. Subsection (b)(3), referring to an 'organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts,' provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or 'chop shop.' 'Vehicles' refers to all forms of vehicles, including aircraft and watercraft. See Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)."

The purpose of this amendment is to clarify the coverage of a specific offense characteristic. **The effective date of this amendment is November 1, 1989.**

119. Section 2B6.1(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics".

The Commentary to §2B6.1 captioned "Statutory Provisions" and "Background" is amended by deleting "2320" wherever it appears and inserting in lieu thereof in each instance "2321".

The purpose of this amendment is to correct clerical errors. **The effective date of this amendment is November 1, 1989.**

120. Section 2C1.1(b)(1) is amended by deleting "action received" and inserting in lieu thereof "benefit received, or to be received,".

The Commentary to §2C1.1 captioned "Application Notes" is amended in Note 2 in the first sentence by deleting "action received" and inserting in lieu thereof "benefit received, or to be received," and by deleting "action (i.e., benefit or favor)" and inserting in lieu thereof "benefit"; in the second sentence by deleting "action received in return" and inserting in lieu thereof "benefit received or to be received", and by deleting "such action" and inserting in lieu thereof "such benefit"; and in the third sentence by deleting "action" and inserting in lieu thereof "benefit".

The purpose of this amendment is to clarify the guideline and commentary. **The effective date of this amendment is November 1, 1989.**

121. Section 2C1.1(b) is amended by deleting "(1)" and "(2)" and inserting in lieu thereof "(A)" and "(B)" respectively; and by deleting "Apply the greater" and inserting in lieu thereof:

"(1) If the offense involved more than one bribe, increase by 2 levels.

(2) (If more than one applies, use the greater):".

The Commentary to §2C1.1 captioned "Application Notes" is amended by deleting the text of Note 6 as follows:

"When multiple counts are involved, each bribe is to be treated as a separate, unrelated offense not subject to §3D1.2(d) or §3D1.3(b). Instead, apply §3D1.4. However, if a defendant makes several payments as part of a single bribe, that is to be treated as a single bribery offense involving the total amount of the bribe.",

and inserting in lieu thereof:

"Related payments that, in essence, constitute a single bribe (e.g., a number of installment payments for a single action) are to be treated as a single bribe, even if charged in separate counts.".

Section 2C1.2(b) is amended by deleting "(1)" and "(2)" and inserting in lieu thereof "(A)" and "(B)" respectively; and by deleting "Apply the greater" and inserting in lieu thereof:

"(1) If the offense involved more than one gratuity, increase by 2 levels.

(2) (If more than one applies, use the greater):".

The Commentary to §2C1.2 captioned "Application Notes" is amended by deleting the text of Note 4 as follows:

"When multiple counts of receiving a gratuity are involved, each count is to be treated as a separate, unrelated offense not subject to §3D1.2(d) or §3D1.3(b). Instead, apply §3D1.4.",

and inserting in lieu thereof:

"Related payments that, in essence, constitute a single gratuity (e.g., separate payments for

airfare and hotel for a single vacation trip) are to be treated as a single gratuity, even if charged in separate counts."

Section 3D1.2(d) is amended in the listing of offense sections in the third paragraph by deleting "§2C1.1," and in the listing of offense sections in the second paragraph by inserting in order by section number "§§2C1.1, 2C1.2;".

The Introductory Commentary to Chapter Three, Part D, is amended in the fifth paragraph by deleting ", robbery, and bribery" and inserting in lieu thereof "and robbery", and in the seventh paragraph by deleting ", robbery, or bribery" and inserting in lieu thereof "or robbery".

Under the current bribery guideline, there is no enhancement for repeated instances of bribery if the conduct involves the same course of conduct or common scheme or plan and the same victim (as frequently is the case where the government is the victim) because such cases are grouped under §3D1.2(b). In contrast, the fraud and theft guidelines generally provide a 2-level increase in cases of repeated instances under the second prong of the "more than minimal planning" definition.

Unlike the theft and fraud guidelines, it is arguable that the value of any bribe that was part of the same course of conduct or a common scheme or plan as the offense of conviction, but not included in the count of conviction, is excluded from consideration. This is because §1B1.3(a)(2), which authorizes consideration of conduct not expressly included in the offense of conviction but part of the same course of conduct or common scheme or plan, applies only to offenses grouped under §3D1.2(d). Thus, if the defendant pleads to one count of a bribery offense involving one \$10,000 bribe in satisfaction of a 15 count indictment involving an additional \$80,000 in separate bribes that were part of the same course of conduct, the current bribery guideline, unlike the theft and fraud guidelines, would not take into account the additional \$80,000, and there would be no increase for repeated instances.

The current guideline may also create various anomalies because the multiple count rule (which applies only where the offenses are not grouped under §3D1.2(b)) increases the offense level differently than the monetary table. For example, an elected public official who takes three unrelated \$200 bribes has an offense level of 21; the same defendant who took two unrelated \$500,000 bribes would have an offense level of 20.

The purpose of this amendment is to address the above noted issues. A specific offense characteristic is added to provide a 2-level increase where the offense involved more than one bribe or gratuity. In addition, such offenses will be grouped under §3D1.2(d) which allows for aggregation of the amount of the bribes from the same course of conduct or common scheme or plan under §1B1.3(a)(2) (as in theft and fraud offenses). **The effective date of this amendment is November 1, 1989.**

122. The Commentary to §2C1.1 captioned "Background" is amended in the eighth paragraph by deleting "extortions, conspiracies, and attempts" and inserting in lieu thereof "extortion, or attempted extortion,".

The purpose of this amendment is to correct a technical error. This section expressly covers extortion and attempted extortion; conspiracy is covered through the operation of §2X1.1. **The effective date of this amendment is November 1, 1989.**