

from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act requires the offender to serve virtually all of any prison sentence imposed, for it abolishes parole and substantially restructures good behavior adjustments.

The law requires the Commission to send its initial guidelines to Congress by April 13, 1987, and under the present statute they take effect automatically on November 1, 1987. Pub. L. No. 98-473, § 235, reprinted at 18 U.S.C. § 3551. The Commission may submit guideline amendments each year to Congress between the beginning of a regular session and May 1. The amendments will take effect automatically 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

The Commission, with the aid of its legal and research staff, considerable public testimony, and written commentary, has developed an initial set of guidelines which it now transmits to Congress. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing

research, experience, and analysis will result in modifications and revisions to the guidelines by submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts throughout the nation.

### 3. The Basic Approach (Policy Statement)

To understand these guidelines and the rationale that underlies them, one must begin with the three objectives that Congress, in enacting the new sentencing law, sought to achieve. Its basic objective was to enhance the ability of the criminal justice system to reduce crime through an effective, fair sentencing system. To achieve this objective, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arises out of the present sentencing system which requires a judge to impose an indeterminate sentence that is automatically reduced in most cases by 'good time' credits. In addition, the parole commission is permitted to determine how much of the remainder of any prison sentence an offender actually will serve. This usually results in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence handed down by the court.

Second, Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.

Honesty is easy to achieve: The abolition of parole makes the sentence imposed by the court the sentence the offender will serve. There is a tension, however, between the mandate of uniformity (treat similar cases alike) and the mandate of proportionality (treat different cases differently) which, like the historical tension between law and equity, makes it difficult to achieve both goals simultaneously. Perfect uniformity -- sentencing every offender to five years -- destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that lumps together armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, is far too broad.

At the same time, a sentencing system tailored to fit every conceivable wrinkle of each case can become unworkable and seriously compromise the certainty of punishment and its deterrent effect. A bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, a teller or a customer, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that day, while sober (or under the influence of drugs or alcohol), and so forth.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected (and therefore may already be counted, to a different degree, in the punishment for the underlying offense); and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies, depending on how much other harm has occurred. (Thus, one cannot easily assign points for each kind of harm and simply add them up, irrespective of context and total amounts.)

The larger the number of subcategories, the greater the complexity that is created and the less workable the system. Moreover, the subcategories themselves, sometimes too broad and sometimes too narrow, will apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system of subcategories, would have to make a host of decisions about whether the underlying facts are sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different judges will apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to eliminate.

In view of the arguments, it is tempting to retreat to the simple, broad-category approach and to grant judges the discretion to select the proper point along a broad sentencing range. Obviously, however, granting such broad discretion risks correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. That is to say, such an approach risks a return to the wide disparity that Congress established the Commission to limit.

In the end, there is no completely satisfying solution to this practical stalemate. The Commission has had to simply balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any ultimate system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the moral principle of 'just deserts.' Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Thus, if a defendant is less culpable, the defendant deserves less punishment. Others argue that punishment should be imposed primarily on the basis of practical 'crime control' considerations. Defendants sentenced under this scheme should receive the punishment that most effectively lessens the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of these points of view have urged the Commission to choose between them, to accord one primacy over the other. Such a choice would be profoundly difficult. The relevant literature is vast, the arguments deep, and each point of view has much to be said in its favor. A clear-cut Commission decision in favor of one of these approaches would diminish the chance that the guidelines would find the widespread acceptance they need for effective implementation. As a practical matter, in most sentencing decisions both philosophies may prove consistent with the same result.

For now, the Commission has sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that uses

data estimating the existing sentencing system as a starting point. It has analyzed data drawn from 10,000 presentence investigations, crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and resulting statistics, and data from other relevant sources, in order to determine which distinctions are important in present practice. After examination, the Commission has accepted, modified, or rationalized the more important of these distinctions.

This empirical approach has helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, is short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit many distinctions that some may believe important, yet they include most of the major distinctions that statutes and presentence data suggest make a significant difference in sentencing decisions. Important distinctions that are ignored in existing practice probably occur rarely. A sentencing judge may take this unusual case into account by departing from the guidelines.

The Commission's empirical approach has also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of moral consensus might make it difficult to say exactly what punishment is deserved for a particular crime, specified in minute detail. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient, readily available data might make it difficult to say exactly what punishment will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a moral or crime-control perspective.

The Commission has not simply copied estimates of existing practice as revealed by the data (even though establishing offense values on this basis would help eliminate disparity, for the data represent averages). Rather, it has departed from the data at different points for various important reasons. Congressional statutes, for example, may suggest or require departure, as in the case of the new drug law that imposes increased and mandatory minimum sentences. In addition, the data may reveal inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from present practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these initial guidelines are but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission has developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, and therefore effective, sentencing system.

#### 4. The Guidelines' Resolution of Major Issues (Policy Statement)

The guideline-writing process has required the Commission to resolve a host of important policy questions, typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction will briefly discuss several of those issues. Commentary in the guidelines explains others.

##### (a) Real Offense vs. Charge Offense Sentencing.

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense with which the defendant was charged and of which he was convicted ('charge offense' sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken \$50,000, injured a teller, refused to stop when ordered, and

raced away damaging property during escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a real offense system. After all, the present sentencing system is, in a sense, a real offense system. The sentencing court (and the parole commission) take account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process, given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable, and, in the Commission's view, risked return to wide disparity in practice.

The Commission therefore abandoned the effort to devise a 'pure' real offense system and instead experimented with a 'modified real offense system,' which it published for public comment in a September 1986 preliminary draft.

This version also foundered in several major respects on the rock of practicality. It was highly complex and its mechanical rules for adding harms (e.g., bodily injury added the same punishment irrespective of context) threatened to work considerable unfairness. Ultimately, the Commission decided that it could not find a practical or fair and efficient way to implement either a pure or modified real offense system of the sort it originally wanted, and it abandoned that approach.

The Commission, in its January 1987 Revised Draft and the present guidelines, has moved closer to a 'charge offense' system. The system is not, however, pure; it has a number of real elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law have forced the Commission to write guidelines that are descriptive of generic conduct rather than tracking purely statutory language. For another, the guidelines, both through specific offense characteristics and adjustments, take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken.

Finally, it is important not to overstate the difference in practice between a real and a charge offense system. The federal criminal system, in practice, deals mostly with drug offenses, bank robberies and white collar crimes (such as fraud, embezzlement, and bribery). For the most part, the conduct that an indictment charges approximates the real and relevant conduct in which the offender actually engaged.

The Commission recognizes its system will not completely cure the problems of a real offense system. It may still be necessary, for example, for a court to determine some particular real facts that will make a difference to the sentence. Yet, the Commission believes that the instances of controversial facts will be far fewer; indeed, there will be few enough so that the court system will be able to devise fair procedures for their determination. See United States v. Fatico, 579 F.2d 707 (2d Cir. 1978) (permitting introduction of hearsay evidence at sentencing hearing under certain conditions), on remand, 458 F. Supp. 388 (E.D.N.Y. 1978), aff'd, 603 F.2d 1053 (2d Cir. 1979) (holding that the government need not prove facts at sentencing hearing beyond a reasonable doubt), cert. denied, 444 U.S. 1073 (1980).

The Commission also recognizes that a charge offense system has drawbacks of its own.

One of the most important is its potential to turn over to the prosecutor the power to determine the sentence by increasing or decreasing the number (or content) of the counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin, or theft of \$10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of \$30,000. Further, a sentencing court may control any inappropriate manipulation of the indictment through use of its power to depart from the specific guideline sentence. Finally, the Commission will closely monitor problems arising out of count manipulation and will make appropriate adjustments should they become necessary.

(b) Departures.

The new sentencing statute permits a court to depart from a guideline-specified sentence only when it finds 'an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . .'. 18 U.S.C. § 3553(b). Thus, in principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure. In this initial set of guidelines, however, the Commission does not so limit the courts' departure powers. The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, Socio-Economic Status), the third sentence of §5H1.4, and the last sentence of §5K2.12, list a few factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two basic reasons. First is the difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that in the initial set of guidelines it need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time, will be able to create more accurate guidelines that specify precisely where departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's sentencing data indicate make a significant difference in sentencing at the present time. Thus, for example, where the presence of actual physical injury currently makes an important difference in final sentences, as in the case of robbery, assault, or arson, the guidelines specifically instruct the judge to use this factor to augment the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data do not permit the Commission, at this time, to conclude that the factor is empirically important in relation to the particular offense. Of course, a factor (say physical injury) may nonetheless sometimes occur in connection with a crime (such as fraud) where it does not often occur. If, however, as the data indicate, such occurrences are rare, they are precisely the type of events that the court's departure powers were designed to cover -- unusual cases outside the range of the more typical offenses for which the guidelines were designed. Of course, the Commission recognizes that even its collection and analysis of 10,000 presentence reports are an imperfect source of data sentencing estimates. Rather than rely heavily at this time upon impressionistic accounts, however, the Commission believes it wiser to wait and collect additional data from our continuing monitoring process that may demonstrate how the guidelines work in practice before further modification.

It is important to note that the guidelines refer to two different kinds of departure.

The first kind involves instances in which the guidelines provide specific guidance for departure, by analogy or by other numerical or non-numerical suggestions. For example, the commentary to §2G1.1 (Transportation for Prostitution), recommends a downward adjustment of eight levels where commercial purpose was not involved. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions, and that the courts of appeals may prove more likely to find departures ‘unreasonable’ where they fall outside suggested levels.

A second kind of departure will remain unguided. It may rest upon grounds referred to in Chapter 5, Part K (Departures), or on grounds not mentioned in the guidelines. While Chapter 5, Part K lists factors that the Commission believes may constitute grounds for departure, those suggested grounds are not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly unusual.

(c) Plea Agreements.

Nearly ninety percent of all federal criminal cases involve guilty pleas, and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts have urged the Commission not to attempt any major reforms of the agreement process, on the grounds that any set of guidelines that threatens to radically change present practice also threatens to make the federal system unmanageable. Others, starting with the same facts, have argued that guidelines which fail to control and limit plea agreements would leave untouched a ‘loophole’ large enough to undo the good that sentencing guidelines may bring. Still other commentators make both sets of arguments.

The Commission has decided that these initial guidelines will not, in general, make significant changes in current plea agreement practices. The court will accept or reject any such agreements primarily in accordance with the rules set forth in Fed.R.Crim.P. 11(e). The Commission will collect data on the courts’ plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate.

The Commission nonetheless expects the initial set of guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. Insofar as a prosecutor and defense attorney seek to agree about a likely sentence or range of sentences, they will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which judges will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation. Since they will have before them the norm, the relevant factors (as disclosed in the plea agreement), and the reason for the agreement, they will find it easier than at present to determine whether there is sufficient reason to accept a plea agreement that departs from the norm.

(d) Probation and Split Sentences.

The statute provides that the guidelines are to ‘reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . .’ 28 U.S.C. § 994(j). Under present sentencing practice, courts sentence to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission’s view are ‘serious.’ If the guidelines were to permit courts to impose probation instead of prison in many or all such cases, the present sentences would continue to be ineffective.

The Commission's solution to this problem has been to write guidelines that classify as 'serious' (and therefore subject to mandatory prison sentences) many offenses for which probation is now frequently given. At the same time, the guidelines will permit the sentencing court to impose short prison terms in many such cases. The Commission's view is that the definite prospect of prison, though the term is short, will act as a significant deterrent to many of these crimes, particularly when compared with the status quo where probation, not prison, is the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through six, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels seven through ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.

(e) Multi-Count Convictions.

The Commission, like other sentencing commissions, has found it particularly difficult to develop rules for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The reason it is difficult is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to life sentences of imprisonment--sentences that neither 'just deserts' nor 'crime control' theories of punishment would find justified.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment when multiple offenses that are the subjects of separate counts take place.

These rules are set out in Chapter Three, Part D. They essentially provide: (1) When the conduct involves fungible items, e.g., separate drug transactions or thefts of money, the amounts are added and the guidelines apply to the total amount. (2) When nonfungible harms are involved, the offense level for the most serious count is increased (according to a somewhat diminishing scale) to reflect the existence of other counts of conviction.

The rules have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures where necessary to produce a mitigated sentence.

(f) Regulatory Offenses.

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses, but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These criminal statutes pose two problems. First, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it cannot comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission has sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses are particularly important in light of the need for enforcement of the general regulatory scheme. The Commission has sought to treat these offenses in these initial guidelines. It will address the less common regulatory offenses in the future.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses, dividing them into four categories.

First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper treatment of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense is as follows:

- (1) The guideline provides a low base offense level (6) aimed at the first type of recordkeeping or reporting offense. It gives the court the legal authority to impose a punishment ranging from probation up to six months of imprisonment.
- (2) Specific offense characteristics designed to reflect substantive offenses that do occur (in respect to some regulatory offenses), or that are likely to occur, increase the offense level.
- (3) A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will be treated like the substantive offense.

The Commission views this structure as an initial effort. It may revise its approach in light of further experience and analysis of regulatory crimes.

(g) Sentencing Ranges.

In determining the appropriate sentencing ranges for each offense, the Commission began by estimating the average sentences now being served within each category. It also examined the sentence specified in congressional statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's forthcoming detailed report will contain a comparison between estimates of existing sentencing practices and sentences under the guidelines.

While the Commission has not considered itself bound by existing sentencing practice, it has not tried to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences in many instances will approximate existing practice, but adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons now receive probation, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who now receive probation from those who receive more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a current sentencing practice of very wide variability in which some defendants receive probation while others receive several years in prison for the same offense. Moreover, inasmuch as those who currently plead guilty often receive lesser sentences, the guidelines also permit the court to impose lesser



sentences on those defendants who accept responsibility and those who cooperate with the government.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the new drug law and the career offender provisions of the sentencing law, require the Commission to promulgate rules that will lead to substantial prison population increases. These increases will occur irrespective of any guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum, or career offender, sentences), will lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons, estimate at approximately 10 percent, over a period of ten years.

(h) The Sentencing Table.

The Commission has established a sentencing table. For technical and practical reasons it has 43 levels. Each row in the table contains levels that overlap with the levels in the preceding and succeeding rows. By overlapping the levels, the table should discourage unnecessary litigation. Both prosecutor and defendant will realize that the difference between one level and another will not necessarily make a difference in the sentence that the judge imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether \$10,000 or \$11,000 was obtained as a result of a fraud. At the same time, the rows work to increase a sentence proportionately. A change of 6 levels roughly doubles the sentence irrespective of the level at which one starts. The Commission, aware of the legal requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months, also wishes to permit courts the greatest possible range for exercising discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the judge within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many, rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation as to which category an offender fell within would become more likely. Where a table has many smaller monetary distinctions, it minimizes the likelihood of litigation, for the importance of the precise amount of money involved is considerably less.

5. A Concluding Note

The Commission emphasizes that its approach in this initial set of guidelines is one of caution. It has examined the many hundreds of criminal statutes in the United States Code. It has begun with those that are the basis for a significant number of prosecutions. It has sought to place them in a rational order. It has developed additional distinctions relevant to the application of these provisions, and it has applied sentencing ranges to each resulting category. In doing so, it has relied upon estimates of existing sentencing practices as revealed by its own statistical analyses, based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from existing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with these guidelines will lead to additional information and provide a firm empirical basis for revision.

Finally, the guidelines will apply to approximately 90 percent of all cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in this initial set of guidelines. They will, however, be addressed in the near future. Their exclusion from this initial submission does not reflect any judgment about their seriousness. The Commission has also deferred promulgation of guidelines

pertaining to fines, probation and other sanctions for organizational defendants, with the exception of antitrust violations. The Commission also expects to address this area in the near future."

Replacement subparts are inserted as Subparts 2 (The Statutory Mission), 3 (The Basic Approach (Policy Statement)), 4 (The Guidelines' Resolution of Major Issues (Policy Statement)), and 5 (A Concluding Note).

This amendment updates this part to reflect the implementation of guideline sentencing on November 1, 1987, and makes various clarifying and editorial changes to enhance the usefulness of this part both as a historical overview and as an introduction to the structure and operation of the guidelines. For example, in the discussion of departures in subpart 4(b), language concerning what the Commission, in principle, might have done is deleted as unnecessary, but no substantive change is made. **The effective date of this amendment is November 1, 1990.**

308. Section 1B1.8(a) is amended by inserting "as part of that cooperation agreement" immediately following "unlawful activities of others, and"; and by deleting "so provided" and inserting in lieu thereof "provided pursuant to the agreement".

Section 1B1.8(b)(3) is amended by inserting "by the defendant" immediately before the period at the end of the sentence.

Section 1B1.8(b) is amended by renumbering subdivisions (2) and (3) as (3) and (4) respectively; and by inserting the following as subdivision (2):

"(2) concerning the existence of prior convictions and sentences in determining §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender);".

The Commentary to §1B1.8 captioned "Application Notes" is amended in Note 2 by deleting:

"The Commission does not intend this guideline to interfere with determining adjustments under Chapter Four, Part A (Criminal History) or §4B1.1 (Career Offender) (e.g., information concerning the defendant's prior convictions).",

and inserting in lieu thereof:

"Subsection (b)(2) prohibits any cooperation agreement from restricting the use of information as to the existence of prior convictions and sentences in determining adjustments under §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender)."

The Commentary to §1B1.8 captioned "Application Notes" is amended in Note 3 by deleting "408" and inserting in lieu thereof "410".

This amendment clarifies the Commission's intention that the use of information concerning the defendant's prior criminal convictions and sentences not be restricted by a cooperation agreement, makes several additional clarifying changes, and corrects a clerical error. **The effective date of this amendment is November 1, 1990.**

309. The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 2 by deleting:

"This subsection applies to offenses of types for which convictions on multiple counts would be grouped together pursuant to §3D1.2(d); multiple convictions are not required.",

and inserting in lieu thereof:

"'Offenses of a character for which §3D1.2(d) would require grouping of multiple counts,' as used in subsection (a)(2), applies to offenses for which grouping of counts would be required

under §3D1.2(d) had the defendant been convicted of multiple counts. Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts. For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales. If the defendant is convicted of multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) provide that the counts are grouped together. Although Chapter Three, Part D (Multiple Counts) applies to multiple counts of conviction, it does not limit the scope of subsection (a)(2). Subsection (a)(2) merely incorporates by reference the types of offenses set forth in §3D1.2(d); thus, as discussed above, multiple counts of conviction are not required for subsection (a)(2) to apply."

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 4 by renumbering example (4) as (5); and by inserting, immediately before "But:", the following:

"(4) The defendant is convicted of two counts of distributing a controlled substance, each count involving a separate sale of 10 grams of cocaine that is part of a common scheme or plan. In addition, a finding is made that there are two other sales, also part of the common scheme or plan, each involving 10 grams of cocaine. The total amount of all four sales (40 grams of cocaine) will be used to determine the offense level for each count under §1B1.3(a)(2). The two counts will then be grouped together under either this subsection or subsection (d) to avoid double counting."

This amendment clarifies the intended scope of §1B1.3(a)(2) in conjunction with Chapter Three, Part D (Multiple Counts) to ensure that the latter is not read to limit the former only to conduct of which the defendant was convicted. **The effective date of this amendment is November 1, 1990.**

310. The Commentary to §2A1.1 captioned "Statutory Provisions" is amended by deleting "18 U.S.C. § 1111" and inserting in lieu thereof "18 U.S.C. §§ 1111, 2113(e), 2118(c)(2)".

The Commentary to §2A1.1 is amended in the first paragraph of Application Note 1 by deleting "the 'willful, deliberate, malicious, and premeditated killing' to which 18 U.S.C. § 1111 applies" and inserting in lieu thereof: "premeditated killing"; and by deleting:

"However, the same statute applies when death results from certain enumerated felonies -- arson, escape, murder, kidnapping, treason, espionage, sabotage, rape, burglary, or robbery."

and inserting in lieu thereof:

"However, this guideline also applies when death results from the commission of certain felonies."

The Commentary to §2A1.1 captioned "Background" is amended in the first paragraph by deleting:

"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."

and inserting in lieu thereof:

"Whether a mandatory minimum term of life imprisonment is applicable to every defendant convicted of first degree murder under 18 U.S.C. § 1111 is a matter of statutory interpretation for the courts. The discussion in Application Note 1, *supra*, regarding circumstances in which a downward departure may be warranted is relevant in the event the penalty provisions of 18 U.S.C. § 1111 are construed to permit a sentence less than life imprisonment, or in the event the defendant is convicted under a statute that expressly authorizes a sentence of less than life imprisonment (e.g., 18 U.S.C. §§ 2113(e), 2118(c)(2), 21 U.S.C. § 848(e)).".

This amendment clarifies the commentary with respect to circumstances that may warrant a departure below the guideline range for offenses to which this guideline applies. This amendment also reserves for the courts the issue of whether life imprisonment is the mandatory minimum sentence for first degree murder under 18 U.S.C. § 1111. **The effective date of this amendment is November 1, 1990.**

311. Section 2A2.1 is amended in the title by deleting "Conspiracy or Solicitation to Commit Murder;" immediately before "Attempted Murder".

Section 2A2.1 is amended by deleting:

- "(a) Base Offense Level: 20
- (b) Specific Offense Characteristics
- (1) If an assault involved more than minimal planning, 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 or its use was threatened, increase by 3 levels.
- (3) If the victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

	<u>Degree of Bodily Injury</u>	<u>Increase in Level</u>
(A)	Bodily Injury	add 2
(B)	Serious Bodily Injury	add 4
(C)	Permanent or Life-Threatening Bodily Injury	add 6
(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.	

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed 9 levels.

- (4) If a conspiracy or assault was motivated by a payment or offer of money or other thing of value, increase by 2 levels.",

and inserting in lieu thereof:

- "(a) Base Offense Level:
- (1) 28, if the object of the offense would have constituted first degree murder; or
- (2) 22, otherwise.

- (b) Specific Offense Characteristics
- (1) (A) If the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if the victim sustained serious bodily injury, increase by 2 levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.
  - (2) If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by 4 levels."

The Commentary to §2A2.1 captioned "Statutory Provisions" is amended by deleting "(d), 373, 1113, 1116(a), 1117, 1751(c), (d), 1952A(a)" and inserting in lieu thereof "1113, 1116(a), 1751(c)".

The Commentary to §2A2.1 captioned "Application Note" is amended in Note 1 by deleting "'more than minimal planning,' 'firearm,' 'dangerous weapon,' 'brandished,' 'otherwise used,' 'bodily injury,' 'serious bodily injury,'" and inserting in lieu thereof "'serious bodily injury'".

The Commentary to §2A2.1 captioned "Application Note" is amended by inserting the following additional note:

- "2. 'First degree murder,' as used in subsection (a)(1), means conduct that, if committed within the special maritime and territorial jurisdiction of the United States, would constitute first degree murder under 18 U.S.C. § 1111.";

and in the caption by deleting "Note" and inserting in lieu thereof "Notes".

The Commentary to §2A2.1 captioned "Background" is amended in the first paragraph by deleting ", conspiracy to commit murder, solicitation to commit murder," immediately before "and attempted murder"; and by inserting the following additional sentence at the end:

"An attempted manslaughter, or assault with intent to commit manslaughter, is covered under §2A2.2 (Aggravated Assault)."

The Commentary to §2A2.1 captioned "Background" is amended by deleting the second and third paragraphs as follows:

" The maximum term of imprisonment authorized by statute for conspiracy to murder is life imprisonment (18 U.S.C. § 1117). The maximum term of imprisonment authorized by statute for solicitation to murder is twenty years (18 U.S.C. § 373). The statutes that prohibit attempted murder, or assaults with intent to commit murder, vary widely in the maximum term of imprisonment authorized. Assault with intent to commit murder (18 U.S.C. § 113(a)) carries a maximum authorized term of twenty years imprisonment. An attempted assassination of certain essential government officials (18 U.S.C. § 351(c)) carries a maximum authorized term of life imprisonment. An attempted murder of foreign officials (18 U.S.C. § 1116(a)) carries a maximum authorized term of twenty years imprisonment. An attempt to commit murder, other than an assault with intent to commit murder covered by 18 U.S.C. § 113(a), carries a maximum term of three years imprisonment (18 U.S.C. § 1113).

Enhancements are provided for planning, weapon use, injury, and commission of the crime for hire. All of the factors can apply in the case of an assault; only the last can apply in the case of a conspiracy that does not include an assault; and none can apply in the case of a mere solicitation."

The Commentary to §2A2.2 captioned "Application Notes" is amended in Note 3 by inserting the following additional sentence as the first sentence: "This guideline also covers attempted manslaughter and assault with intent to commit manslaughter."

The Commentary to §2A2.2 captioned "Background" is amended in the first sentence of the first paragraph by deleting "where there is no intent to kill" immediately following " assaults".

Chapter Two, Part A, Subpart 1, is amended by inserting an additional guideline with accompanying commentary as §2A1.5 (Conspiracy or Solicitation to Commit Murder).

Section 2E1.4(a)(1) is amended by deleting "23" and inserting in lieu thereof "32".

The Commentary to §2E1.4 captioned "Application Notes" is amended by deleting Note 2 as follows:

- "2. If the offense level for the underlying conduct is less than the alternative minimum base offense level specified (i.e., 23), the alternative minimum base offense level is to be used.";

and in the caption by deleting "Notes" and inserting in lieu thereof "Note".

The Commentary to §2X1.1 captioned "Application Notes" is amended in Note 1 in the paragraph beginning "Offense guidelines that expressly cover attempts" by deleting "Conspiracy or Solicitation to Commit Murder;" immediately before "Attempted Murder"; in the paragraph beginning "Offense guidelines that expressly cover conspiracies" by deleting "§2A2.1 (Assault With Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder)" and inserting in lieu thereof "§2A1.5 (Conspiracy or Solicitation to Commit Murder)"; and in the paragraph beginning "Offense guidelines that expressly cover solicitations" by deleting "§2A2.1 (Assault With Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder)" and inserting in lieu thereof "§2A1.5 (Conspiracy or Solicitation to Commit Murder)".

This amendment restructures §2A2.1, and increases the offense level for attempted murder and assault with intent to commit murder where the intended offense, if successful, would have constituted first degree murder to better reflect the seriousness of this conduct. For the same reason, the enhancement for an offense involving the offer or receipt of anything of pecuniary value for undertaking the murder is increased. For greater clarity, an additional guideline (§2A1.5) is inserted to cover conspiracy or solicitation to commit murder. Section 2E1.4 is amended to conform the offense level to that of §2A1.5. **The effective date of this amendment is November 1, 1990.**

312. Section 2B1.1(b) is amended by transposing subdivisions (4) and (5); and by renumbering the transposed subdivisions accordingly.

Section 2B1.2(b) is amended by transposing subdivisions (3) and (4); and by renumbering the transposed subdivisions accordingly.

Section 2B1.3(b) is amended by transposing subdivisions (2) and (3); and by renumbering the transposed subdivisions accordingly.

This amendment reorders the specific offense characteristics in §§2B1.1, 2B1.2, and 2B1.3 that address offenses involving U.S. mail. In cases involving the theft or destruction of U.S. mail, the theft guideline (§2B1.1), stolen property guideline (§2B1.2), property destruction guideline (§2B1.3), and forgery guideline (§2B5.2) produce identical results if the amount involved more than \$1,000, or if the offense did not involve more than minimal planning. However, because of the ordering of the specific offense characteristics, there is a 1 or 2-level difference between §§2B1.1, 2B1.2 and 2B1.3 on the one hand, and §2B5.2 on the other, in cases of stolen or destroyed mail involving more than minimal planning and a loss of \$1,000 or less. In these cases, §§2B1.1, 2B1.2 and 2B1.3 produce a result that is 1 or 2-levels lower than §2B5.2. This amendment corrects this anomaly by conforming the offense levels in §§2B1.1, 2B1.2, and 2B1.3 to that of §2B5.2 in such cases. **The effective date of this amendment is November 1, 1990.**

313. Section 2B1.3 is amended by inserting the following additional subsection:

"(c) Cross Reference

- (1) If the offense involved arson, or property damage by use of explosives, apply

§2K1.4 (Arson; Property Damage by Use of Explosives).";

and in the title by deleting "(Other than by Arson or Explosives)" immediately following "or Destruction".

The Commentary to §2B1.3 captioned "Statutory Provisions" is amended by deleting the last sentence as follows:

"Arson is treated separately in Part K, Offenses Involving Public Order and Safety."

The Commentary to §2H1.1 captioned "Application Notes" is amended in Note 1 by deleting "(Other than by Arson or Explosives)" immediately following "or Destruction".

Section 2H3.3(a)(3) is amended by deleting "(Other than by Arson or Explosives)" immediately following "or Destruction".

The Commentary to §2H3.3 captioned "Background" is amended by deleting "(Other than by Arson or Explosives)" immediately following "or Destruction".

Section 2Q1.6(a)(2) is amended by deleting "(Other Than by Arson or Explosives)" immediately following "or Destruction".

This amendment inserts a cross reference providing that offense conduct constituting arson or property destruction by explosives is to be treated under §2K1.4 (Arson, Property Destruction by Explosives). Because arson or property damage by use of explosives is an aggravated form of property destruction, just as armed robbery is an aggravated form of robbery, the use of the same "relevant conduct" standard to determine the offense level is appropriate. **The effective date of this amendment is November 1, 1990.**

314. Section 2B3.1(b)(1) is amended by deleting "offense involved robbery or attempted robbery of the" immediately following "If the"; and by inserting "was taken, or if the taking of such property was an object of the offense" immediately before ", increase".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 6 by deleting "actually" immediately following "defendant", and by inserting "; Attempted Murder" immediately following "Assault With Intent to Commit Murder".

This amendment clarifies the guideline and Commentary. **The effective date of this amendment is November 1, 1990.**

315. Section 2B2.1(b)(3) is amended by deleting "obtaining" immediately before "a firearm", and by deleting "an object" and inserting in lieu thereof "taken, or if the taking of such item was an object".

The Commentary to §2B2.1 is amended by inserting between "Commentary" and "Application Notes" the following:

"Statutory Provision: 18 U.S.C. § 1153."

The Commentary to §2B2.1 captioned "Application Notes" is amended by deleting Note 2 as follows:

- "2. Obtaining a weapon or controlled substance is to be presumed to be an object of the offense if such an item was in fact taken.";

and by renumbering Notes 3 and 4 as 2 and 3, respectively.

Section 2B2.2(b)(3) is amended by deleting "obtaining" immediately before "a firearm"; and by deleting "an object" and inserting in lieu thereof "taken, or if the taking of such item was an object".

The Commentary to §2B2.2 captioned "Application Notes" is amended by deleting Note 2 as follows:

- "2. Obtaining a weapon or controlled substance is to be presumed to be an object of the offense if such an item was in fact taken.";

and by renumbering Notes 3 and 4 as 2 and 3, respectively.

Section 2B3.1(b)(5) is amended by deleting "obtaining" immediately before "a firearm"; and by deleting "the object" and inserting in lieu thereof "taken, or if the taking of such item was an object".

The Commentary to §2B3.1 captioned "Application Notes" is amended by deleting Note 5 as follows:

- "5. Obtaining a weapon or controlled substance is to be presumed to be an object of the offense if such an item was in fact taken.";

and by renumbering Notes 6, 7, and 8 as 5, 6, and 7 respectively.

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

- " Obtaining drugs or other controlled substances is often the motive for robberies of a Veterans Administration Hospital, a pharmacy on a military base, or a similar facility. A specific offense characteristic is included for robberies where drugs or weapons were the object of the offense to take account of the dangers involved when such items are taken."

This amendment provides that the specific offense characteristic related to the taking of a firearm or controlled substance applies whenever such item is taken or is an object of the offense. Also, it inserts additional Commentary to §2B2.1 referencing a statutory provision contained in Appendix A (Statutory Index) to conform the format of this guideline to that of other offense guidelines. **The effective date of this amendment is November 1, 1990.**

316. Section 2B3.2(b)(1) is amended by deleting "§2B3.1" and inserting in lieu thereof "§2B2.1(b)(2)".

This amendment references the loss table to §2B2.1(b)(2) rather than §2B3.1. The amendment to the loss table in §2B3.1, effective November 1, 1989, inadvertently reduced the offense level for certain cases under this guideline by one level. **The effective date of this amendment is November 1, 1990.**

317. Section 2B1.1(b) is amended by inserting the following additional subdivision:

- "(7) If the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24."

The Commentary to §2B1.1 captioned "Application Notes" is amended by inserting the following additional notes:

- "9. 'Financial institution,' as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 215, 656-657, 1005-1008, 1014, and 1344; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. 'Union or employee pension fund' and 'any health, medical, or hospital insurance association,' as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large



national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

10. An offense shall be deemed to have ‘substantially jeopardized the safety and soundness of a financial institution’ if as a consequence of the offense the institution became insolvent, substantially reduced benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment or investment, or was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.”.

The Commentary to §2B1.1 captioned "Background" is amended by inserting the following additional paragraph at the end:

" Subsection (b)(7) implements, in a broader form, the statutory directive to the Commission in Section 961(m) of Public Law 101-73."

Section 2B4.1(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics"; and by inserting the following additional subdivision:

- "(2) If the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24."

The Commentary to §2B4.1 captioned "Statutory Provisions" is amended by deleting "§§ 1," and inserting in lieu thereof "§§".

The Commentary to §2B4.1 captioned "Application Notes" is amended by inserting the following additional notes:

- "3. ‘Financial institution,’ as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 215, 656-657, 1005-1008, 1014, and 1344; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. ‘Union or employee pension fund’ and ‘any health, medical, or hospital insurance association,’ as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.
4. An offense shall be deemed to have ‘substantially jeopardized the safety and soundness of a financial institution’ if as a consequence of the offense the institution became insolvent, substantially reduced benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment or investment, or was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.”.

The Commentary to §2B4.1 captioned "Background" is amended by inserting the following additional paragraph at the end:

" Subsection (b)(2) implements, in a broader form, the statutory directive to the Commission in Section 961(m) of Public Law 101-73."

Section 2F1.1(b) is amended by inserting the following additional subdivision: