the applicable guideline range may be relevant to this determination. The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. However, the Commission believes that such cases will be extremely rare.

In the absence of a characteristic or circumstance that distinguishes a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines, a sentence outside the guideline range is not authorized. See 18 U.S.C. § 3553(b). For example, dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range.".

This amendment revises §5K2.0 and the Introductory Commentary to Chapter Five, Part H to provide guidance as to when an offender characteristic or other circumstance (or combination of such characteristics or circumstances) that is not ordinarily relevant to a determination of whether a sentence should be outside the applicable guideline range may be relevant to this determination. **The effective date of this amendment is November 1, 1994.**

509. The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 7 by inserting the following additional sentences at the end:

"In addition, 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).".

The Commentary to §2D2.1 captioned "Background" is amended in the first paragraph by inserting "(statutory)" immediately following "Mandatory"; and by deleting "§5G1.1(b)" and inserting in lieu thereof:

"See §5G1.1(b). Note, however, that 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).".

Chapter Five, Part C, is amended by inserting an additional guideline with accompanying commentary as §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

This amendment adds a new guideline as §5C1.2, and revises the commentary in §§2D1.1 and 2D1.2, to reflect the addition of 18 U.S.C. § 3553(f) by section 80001 of the Violent Crime Control and Law Enforcement Act of 1994. **The effective date of this amendment is September 23, 1994.**

510. Section 2A2.3 is amended by inserting the following additional subsection:

"(b) Specific Offense Characteristic

(1) If the offense resulted in substantial bodily injury to an individual under the age of sixteen years, increase by 4 levels.".

The Commentary to §2A2.3 captioned "Application Notes" is amended by inserting the following additional note:

"3. 'Substantial bodily injury' means 'bodily injury which involves - (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty.' 18 U.S.C. § 113(b)(1).".

This amendment addresses the enactment of 18 U.S.C. § 113(a)(7) (pertaining to certain assaults

against minors) by section 170201 of the Violent Crime Control and Law Enforcement Act of 1994. **The effective date of this amendment is November 1, 1995.**

511. The Commentary to §2A3.1 captioned "Application Notes" is amended by inserting the following additional notes:

"6. If a victim was sexually abused by more than one participant, an upward departure may be warranted. See §5K2.8 (Extreme Conduct).

7. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.".

The Commentary to §2A3.2 captioned "Application Notes" is amended by inserting the following additional note:

"4. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.".

The Commentary to §2A3.3 captioned "Application Note" is amended by deleting "Note" and inserting in lieu thereof "Notes"; and by inserting the following additional note:

"2. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.".

The Commentary to §2A3.4 captioned "Application Notes" is amended by inserting the following additional note:

"5. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.".

Section 40111 of the Violent Crime Control and Law Enforcement Act of 1994 doubles the authorized maximum term of imprisonment for defendants convicted of sexual abuse offenses who have been convicted previously of aggravated sexual abuse, sexual abuse, or aggravated sexual contact (18 U.S.C. § 2247) and directs the Sentencing Commission to implement this provision by promulgating amendments, if appropriate, to the applicable sentencing guidelines. Although the Chapter Two sexual abuse guidelines do not provide for enhancement for repeat sex offenses, Chapter Four (Criminal History and Criminal Livelihood) does include a determination of the seriousness of the defendant's criminal record based upon prior convictions (§4A1.1). Section 4B1.1 (Career Offender) also provides substantially enhanced penalties for offenders who engage in a crime of violence (including forcible sexual offenses) or controlled substance trafficking offense, having been sentenced previously on two or more occasions for offenses of either type. Moreover, §4A1.3 (Adequacy of Criminal History category) provides that an upward departure may be considered "[i]f reliable information indicates that the criminal history category does not reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." This amendment strengthens the sexual offense guidelines by expressly listing as a basis for upward departure the fact that the defendant has a prior sentence for conduct similar to the instant sexual offense.

Section 40112 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to conduct a study and consider the adequacy of the guidelines for sexual offenses with respect to a number of factors. The provision also requires the preparation of a report to Congress analyzing federal rape sentences and obtaining comment from independent experts. See Report to Congress: Analysis of Penalties for Federal Rape Cases (March 13, 1995). The Commission found that, in general, the current guidelines provide appropriate penalties for these offenses. This amendment strengthens §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) in one respect by expressly listing as a basis for an upward departure the fact that a victim was sexually abused by more than one participant. **The effective date of this amendment is November 1, 1995.**

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

> "(2) If (A) a firearm, destructive device, or controlled substance was taken, or the taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, or controlled substance, increase by **1** level; but if the resulting offense level is less than **7**, increase to level **7**.";

and by renumbering the remaining subdivisions accordingly.

Section 2B1.1 is amended by inserting the following additional subsection:

> "(c) Cross Reference
>
> (1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of such item was an object of the offense, or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate, if the resulting offense level is greater than that determined above.".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 8 by deleting "(b)(6)" and inserting in lieu thereof "(b)(5)".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 11 by deleting "(b)(7)(B)" and inserting in lieu thereof "(b)(6)(B)".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 13 by deleting "(b)(7)(A)" and inserting in lieu thereof "(b)(6)(A)".

The Commentary to §2B1.1 captioned "Background" is amended by deleting the fourth paragraph as follows:

> " Studies show that stolen firearms are used disproportionately in the commission of crimes. The guidelines provide an enhancement for theft of a firearm to ensure that some amount of imprisonment is required. An enhancement is also provided when controlled substances are taken. Such thefts may involve a greater risk of violence, as well as a likelihood that the substance will be abused.".

The Commentary to §2B1.1 captioned "Background" is amended in the sixth (formerly the seventh) paragraph by deleting "(b)(7)(A)" and inserting in lieu thereof "(b)(6)(A)"; and in the seventh (formerly the eighth) paragraph by deleting "(b)(7)(B)" and inserting in lieu thereof "(b)(6)(B)".

This amendment addresses an inconsistency in guideline penalties between theft offenses involving the taking of firearms or controlled substances that are sentenced under §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property) and similar offenses sentenced under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) by deleting the specific offense characteristic in §2B1.1 applicable in such instances and inserting in lieu thereof a cross reference directing the application of §2D1.1, §2D2.1, §2K1.3, or §2K2.1, as appropriate, if the resulting offense level is greater. **The effective date of this amendment is November 1, 1995.**

513. Section 2B5.1(b) is amended by inserting the following additional subdivision:

"(3) If a dangerous weapon (including a firearm) was possessed in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.".

The Commentary to §2B5.1 captioned "Application Notes" is amended in Note 2 by deleting "2B5.2" and inserting in lieu thereof "2F1.1".

The Commentary to §2B5.1 captioned "Background" is amended by inserting the following additional paragraph as the second paragraph:

" Subsection (b)(3) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.".

Section 2F1.1(b)(4) is amended by inserting "(A)" immediately following "involved"; and by inserting "or (B) possession of a dangerous weapon (including a firearm) in connection with the offense," immediately following "injury,".

The Commentary to §2F1.1 captioned "Statutory Provisions" is amended by deleting "78d," immediately following "77x,".

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 12 by inserting "Hate Crime Motivation or" immediately before "Vulnerable Victim".

The Commentary to §2F1.1 captioned "Background" is amended by inserting the following additional paragraph as the sixth paragraph:

" Subsection (b)(4)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.".

Section 110512 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to amend its sentencing guidelines to provide an appropriate enhancement for a defendant convicted of a felony under Chapter 25 (Counterfeiting and Forgery) of title 18, United States Code, if the defendant used or carried a firearm during and in relation to the offense. This amendment implements this directive in a somewhat broader form.

In addition, this amendment corrects an outdated reference in the Commentary to §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) and conforms the Commentary to §2F1.1 (Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) with respect to the amended title of §3A1.1 (Hate Crime Motivation or Vulnerable Victim). **The effective date of this amendment is November 1, 1995.**

514. Section 2D1.1(b) is amended by inserting the following additional subdivision:

"(3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.".

Section 2D2.1(b) is amended by deleting "Reference" and inserting in lieu thereof "References"; and by inserting the following new subdivision:

"(2) If the offense involved possession of a controlled substance in a prison, correctional facility, or detention facility, apply §2P1.2 (Providing or Possessing Contraband in Prison).".

Section 90103 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to amend the guidelines to provide an adequate enhancement for an offense under 21 U.S.C. § 841 that

involves distributing a controlled substance in a federal prison or detention facility. This amendment addresses this directive by adding a two-level enhancement to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) for an offense involving a prison or detention facility, similar to the enhancement provided for drug distribution in other protected locations at §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy).

Section 90103 also directs the Commission to amend the guidelines to provide an appropriate enhancement for an offense of simple possession of a controlled substance under 21 U.S.C. § 844 that occurs in a federal prison or detention facility. This amendment addresses this directive by providing a cross reference in §2D2.1 (Unlawful Possession; Attempt or Conspiracy) that references §2P1.2 (Providing or Possessing Contraband in Prison) in such cases. **The effective date of this amendment is November 1, 1995.**

515. Section 2D1.1(b) is amended by inserting the following additional subdivision:

> "(4) If the defendant meets the criteria set forth in subdivisions (1)-(5) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and the offense level determined above is level 26 or greater, decrease by 2 levels.".

Section 5C1.2, effective September 23, 1994, is repromulgated with the editorial changes set forth below.

The Commentary to §5C1.2 captioned "Application Notes" is amended in Note 6 by deleting "leader, organizer" and inserting in lieu thereof "organizer, leader".

The Commentary to §5C1.2 captioned "Application Notes" is amended in Note 8 by deleting "Rule 32(a)(1), Fed. R. Crim. P." and inserting in lieu thereof "Fed. R. Crim. P. 32(c)(1), (3).".

The Commentary to §5C1.2 captioned "Background" is amended by deleting "103-" immediately before "460".

Section 80001(b) of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to promulgate guidelines and policy statements to implement section 80001(a) (providing an exception to otherwise applicable statutory minimum sentences for certain defendants convicted of specified drug offenses). Pursuant to this provision, the Commission promulgated §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) as an emergency amendment, effective September 23, 1994. Under the terms of the congressionally-granted authority, this amendment is temporary unless repromulgated in the next amendment cycle under regularly applicable amendment procedures. See Pub. L. No. 100-182, § 21, set forth as an editorial note under 28 U.S.C. § 994. This amendment repromulgates §5C1.2, as set forth in the 1994 edition of the Guidelines Manual, with minor editorial changes.

In addition, this amendment adds a new subsection to §2D1.1 to implement this provision by providing a two-level decrease in offense level for cases meeting the criteria set forth in §5C1.2(1)-(5). **The effective date of this amendment is November 1, 1995.**

516. Section 2D1.1(c) is amended in the fifth note immediately following the Drug Quantity Table by deleting the first sentence as follows:

> "In the case of an offense involving marihuana plants, if the offense involved (A) 50 or more marihuana plants, treat each plant as equivalent to 1 KG of marihuana; (B) fewer than 50 marihuana plants, treat each plant as equivalent to 100 G of marihuana.",

and by inserting in lieu thereof:

> "In the case of an offense involving marihuana plants, treat each plant, regardless of sex, as equivalent to 100 G of marihuana.".

The Commentary to §2D1.1 captioned "Background" is amended in the fourth paragraph by deleting the first three sentences as follows:

> "In cases involving fifty or more marihuana plants, an equivalency of one plant to one kilogram of marihuana is derived from the statutory penalty provisions of 21 U.S.C. § 841(b)(1)(A), (B), and (D). In cases involving fewer than fifty plants, the statute is silent as to the equivalency. For cases involving fewer than fifty plants, the Commission has adopted an equivalency of 100 grams per plant, or the actual weight of the usable marihuana, whichever is greater.",

and by inserting in lieu thereof:

> " For marihuana plants, the Commission has adopted an equivalency of 100 grams per plant, or the actual weight of the usable marihuana, whichever is greater.".

For offenses involving 50 or more marihuana plants, the existing §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) uses an equivalency of one plant = one kilogram of marihuana, reflecting the quantities associated with the five- and ten-year mandatory minimum penalties in 21 U.S.C. § 841. For offenses involving fewer than 50 marihuana plants, the guidelines use an equivalency of one plant = 100 grams of marihuana, unless the weight of the actual marihuana is greater. In actuality, a marihuana plant does not produce a yield of one kilogram of marihuana. The one plant = 100 grams of marihuana equivalency used by the Commission for offenses involving fewer than 50 marihuana plants was selected as a reasonable approximation of the actual average yield of marihuana plants taking into account (1) studies reporting the actual yield of marihuana plants (37.5 to 412 grams depending on growing conditions); (2) that all plants regardless of size are counted for guideline purposes while, in actuality, not all plants will produce useable marihuana (e.g., some plants may die of disease before maturity, and when plants are grown outdoors some plants may be consumed by animals); and (3) that male plants, which are counted for guideline purposes, are frequently culled because they do not produce the same quality of marihuana as do female plants. To enhance fairness and consistency, this amendment adopts the equivalency of 100 grams per marihuana plant for all guideline determinations. **The effective date of this amendment is November 1, 1995.**

517. Section 2D1.1(c)(10) is amended by deleting:

> "20 KG or more of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);
> 40,000 or more units of Anabolic Steroids.",

and by inserting in lieu thereof:

> "40,000 or more units of Schedule I or II Depressants or Schedule III substances.".

Section 2D1.1(c)(11) is amended by deleting:

> "At least 10 KG but less than 20 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);
> At least 20,000 but less than 40,000 units of Anabolic Steroids.",

and by inserting in lieu thereof:

> "At least 20,000 but less than 40,000 units of Schedule I or II Depressants or Schedule III substances.".

Section 2D1.1(c)(12) is amended by deleting:

> "At least 5 KG but less than 10 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);
> At least 10,000 but less than 20,000 units of Anabolic Steroids.",

and by inserting in lieu thereof:

"At least 10,000 but less than 20,000 units of Schedule I or II Depressants or Schedule III substances.".

Section 2D1.1(c)(13) is amended by deleting:

"At least 2.5 KG but less than 5 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);
At least 5,000 but less than 10,000 units of Anabolic Steroids.",

and by inserting in lieu thereof:

"At least 5,000 but less than 10,000 units of Schedule I or II Depressants or Schedule III substances.".

Section 2D1.1(c)(14) is amended by deleting:

"At least 1.25 KG but less than 2.5 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);
At least 2,500 but less than 5,000 units of Anabolic Steroids;
20 KG or more of Schedule IV substances.",

and inserting in lieu thereof:

"At least 2,500 but less than 5,000 units of Schedule I or II Depressants or Schedule III substances;
40,000 or more units of Schedule IV substances.".

Section 2D1.1(c)(15) is amended by deleting:

"At least 500 G but less than 1.25 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);
At least 1,000 but less than 2,500 units of Anabolic Steroids;
At least 8 KG but less than 20 KG of Schedule IV substances.",

and inserting in lieu thereof:

"At least 1,000 but less than 2,500 units of Schedule I or II Depressants or Schedule III substances;
At least 16,000 but less than 40,000 units of Schedule IV substances.".

Section 2D1.1(c)(16) is amended by deleting:

"At least 125 G but less than 500 G of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);
At least 250 but less than 1,000 units of Anabolic Steroids;
At least 2 KG but less than 8 KG of Schedule IV substances;
20 KG or more of Schedule V substances.",

and inserting in lieu thereof:

"At least 250 but less than 1,000 units of Schedule I or II Depressants or Schedule III substances;
At least 4,000 but less than 16,000 units of Schedule IV substances;
40,000 or more units of Schedule V substances.".

Section 2D1.1(c)(17) is amended by deleting:

"Less than 125 G of Secobarbital (or the equivalent amount of other Schedule I or II Depressants)

or Schedule III substances (except Anabolic Steroids);
Less than 250 units of Anabolic Steroids;
Less than 2 KG of Schedule IV substances;
Less than 20 KG of Schedule V substances.",

and inserting in lieu thereof:

"Less than 250 units of Schedule I or II Depressants or Schedule III substances;
Less than 4,000 units of Schedule IV substances;
Less than 40,000 units of Schedule V substances.".

Section 2D1.1(c) is amended in the notes following the Drug Quantity Table by inserting the following additional note as the sixth note:

"In the case of Schedule I or II Depressants, Schedule III substances (except anabolic steroids), Schedule IV substances, and Schedule V substances, one 'unit' means one pill, capsule, or tablet. If the substance is in liquid form, one 'unit' means 0.5 gms.".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10, Example d, by deleting "28 kilograms" and inserting in lieu thereof "56,000 units"; by deleting "50 kilograms" and inserting in lieu thereof "100,000 units"; and by deleting "100 kilograms" and inserting in lieu thereof "200,000 units".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subsection captioned "Secobarbital and Other Schedule I or II Depressants" by deleting " Secobarbital and Other"; and by deleting:

"1 gm of Amobarbital = 2 gm of marihuana
1 gm of Glutethimide = 0.4 gm of marihuana
1 gm of Methaqualone = 0.7 gm of marihuana
1 gm of Pentobarbital = 2 gm of marihuana
1 gm of Secobarbital = 2 gm of marihuana",

and inserting in lieu thereof:

"1 unit of a Schedule I or II Depressant = 1 gm of marihuana".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subsection captioned "Schedule III Substances" by deleting:

"1 gm of a Schedule III Substance
(except anabolic steroids) = 2 gm of marihuana
1 unit of anabolic steroids = 1 gm of marihuana",

and inserting in lieu thereof:

"1 unit of a Schedule III Substance = 1 gm of marihuana".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subsection captioned "Schedule IV Substances" by deleting:

"1 gm of a Schedule IV Substance = 0.125 gm of marihuana",

and inserting in lieu thereof:

"1 unit of a Schedule IV Substance = 0.0625 gm of marihuana".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subsection captioned "Schedule V Substances" by deleting:

"1 gm of a Schedule V Substance = 0.0125 gm of marihuana",

and inserting in lieu thereof:

"1 unit of a Schedule V Substance = 0.00625 gm of marihuana".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 11 in the "Typical Weight Per Unit Table" by deleting the caption "Depressants"; and by deleting "Methaqualone* 300 mg".

This amendment modifies §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) with respect to the determination of the offense levels for Schedule I and II Depressants and Schedule III, IV, and V controlled substances by applying the Drug Quantity Table according to the number of pills, capsules, or tablets rather than by the gross weight of the pills, capsules, or tablets. Schedule I and II Depressants and Schedule III, IV, and V substances are almost always in pill, capsule, or tablet form. The current guidelines use the total weight of the pill, capsule, or tablet containing the controlled substance. This method leads to anomalies because the weight of most pills is determined primarily by the filler rather than the controlled substance. Thus, heavy pills lead to higher offense levels even though there is little or no relationship between gross weight and the potency of the pill. Applying the Drug Quantity Table according to the number of pills will both simplify guideline application and more fairly assess the scale and seriousness of the offense. **The effective date of this amendment is November 1, 1995.**

518. Section 2D1.1(c) is amended in the notes following the Drug Quantity Table by inserting the following additional notes at the end:

"Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).

Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.".

Section 2D1.1(c) is amended by inserting "Notes to Drug Quantity Table:" immediately following the asterisk at the beginning of the notes to the Drug Quantity Table; and by inserting a letter designation immediately before each note in alphabetical order beginning with "(A)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 1 by inserting the following additional paragraph at the end:

"Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 8 by inserting the following additional paragraph at the end:

"Note, however, that if an adjustment from subsection (b)(2)(B) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Table in the subdivision captioned "Schedule I or II Opiates" by inserting at the end:

"1 gm of Levo-alpha-acetylmethadol (LAAM)= 3 kg of marihuana".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned "Cocaine and Other Schedule I and II Stimulants" by deleting:

"1 gm of L-Methamphetamine/Levo-methamphetamine/
L-Desoxyephedrine = 40 gm of marihuana",

and inserting in lieu thereof:

"1 gm of Khat = .01 gm of marihuana".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 12 by deleting:

"In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.",

and inserting in lieu thereof:

"In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance - actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing.".

The Commentary to §2D1.1 captioned "Application Notes" is amended by deleting Note 13 as follows:

"13. If subsection (b)(2)(B) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).".

The Commentary to §2D1.1 captioned "Application Notes" is amended by deleting Note 14 as follows:

"14. D-lysergic acid, which is generally used to make LSD, is classified as a Schedule III controlled substance (to which §2D1.1 applies) and as a listed precursor (to which §2D1.11 applies). Where the defendant is convicted under 21 U.S.C. §§ 841(b)(1)(D) or 960(b)(4) of an offense involving d-lysergic acid, apply §2D1.1 or §2D1.11, whichever results in the greater offense level. See Application Note 5 in the Commentary to §1B1.1 (Application Instructions). Where the defendant is accountable for an offense involving the manufacture of LSD, see Application Note 12 above pertaining to the determination of the scale of the offense.",

and by renumbering the remaining notes accordingly.

The Commentary to §2D1.1 captioned "Application Notes" is amended by inserting the following additional note:

"18. For purposes of the guidelines, a 'plant' is an organism having leaves and a readily observable root formation (e.g., a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).".

This is an eight-part amendment. First, this amendment adds definitions of hashish and hashish oil to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) in the notes following the Drug Quantity Table. These terms are not defined by statute or in the existing guidelines, leading to litigation as to which substances are to be classified as hashish or hashish oil, as opposed to marihuana. See United States v. Gravelle, 819 F. Supp. 1076 (S.D. Fla. 1993); United States v. Schultz, 810 F. Supp. 230 (S.D. Ohio 1992).

Second, this amendment clarifies the treatment of marihuana that has a moisture content sufficient to render it unusable without drying (e.g., a bale of marihuana left in the rain or recently harvested marihuana that has not had time to dry). In such cases, using the weight of the wet marihuana can increase the offense level for a factor that bears no relationship to the scale of the offense or the marketable form of the marihuana. Prior to the effective date of the 1993 amendments, two circuits had approved weighing wet marihuana despite the fact that the marihuana was not in a usable form. United States v. Pinedo-Montoya, 966 F.2d 591 (10th Cir. 1992); United States v. Garcia, 925 F.2d 170 (7th Cir. 1991). Although Application Note 1 in the Commentary to §2D1.1, effective November 1, 1993 (pertaining to unusable parts of a mixture or substance) should produce the appropriate result because marihuana must be dried before being used, this type of case is sufficiently distinct to warrant a specific reference in this application note to ensure correct application of the guideline.

Third, this amendment simplifies the Commentary to §2D1.1 by consolidating application notes 8 and 13.

Fourth, this amendment deletes an outdated application note in the Commentary to §2D1.1 pertaining to the classification of d-lysergic acid as a listed precursor chemical.

Fifth, this amendment addresses the issue of what constitutes a marihuana plant. Several circuits have confronted the issue of when a cutting from a marihuana plant becomes a "plant." The appellate courts generally have held that the term "plant" should be defined by "its plain and ordinary dictionary meaning. . . . [A] marihuana 'plant' includes those cuttings accompanied by root balls." United States v. Edge, 989 F.2d 871, 878 (6th Cir. 1993) (quoting United States v. Eves, 932 F.2d 856, 860 (10th Cir. 1991), appeal after remand, 30 F.3d 134 (6th Cir. 1994)). See also United States v. Malbrough, 922 F.2d 458, 465 (8th Cir. 1990) (acquiescing in the district court's apparent determination that certain marihuana cuttings that did not have their own "root system" should not be counted as plants), cert. denied, 501 S. Ct. 1258 (1991); United States v. Carlisle, 907 F.2d 94, 96 (9th Cir. 1990) (finding that cuttings were plants where each cutting had previous degrees of root formation not clearly erroneous); United States v. Angell, 794 F. Supp. 874, 875 (D. Minn. 1990) (refusing to count as plants marihuana cuttings that have no visible root structure), aff'd in part and rev'd in part, 11 F.3d 806 (8th Cir.), cert. denied, 114 S. Ct. 3747 (1994); United States v. Fitol, 733 F. Supp. 1312, 1316 (D. Minn. 1990) ("individual cuttings, planted with the intent of growing full size plants, and which had grown roots, are 'plants' both within common parlance and within Section 841(b)"); United States v. Speltz, 733 F. Supp. 1311, 1312 (D. Minn. 1990) (small marihuana plants, e.g., cuttings with roots, are nonetheless still marihuana plants), aff'd, 938 F.2d 188 (8th Cir. 1991). Because this issue arises frequently, this amendment adds an application note to the Commentary of §2D1.1 setting forth the definition of a plant for guidelines purposes.

Sixth, this amendment provides equivalencies for two additional controlled substances: (1) khat, and (2) levo-alpha-acetylmethadol (LAAM) in the Drug Equivalency Tables in the Commentary to §2D1.1.

Seventh, this amendment deletes the distinction between d- and l-methamphetamine in the Drug Equivalency Tables in the Commentary to §2D1.1. L-methamphetamine, which is a rather weak form of methamphetamine, is rarely seen and is not made intentionally, but rather results from a botched attempt to produce d-methamphetamine. Under this amendment, l-methamphetamine would be treated the same as d-methamphetamine (i.e., as if an attempt to manufacture or distribute d-methamphetamine). Currently, unless the methamphetamine is specifically tested to determine its form, litigation can result over whether the methamphetamine is l- methamphetamine or d-methamphetamine.

In addition, there is another form of methamphetamine (dl-methamphetamine) that is not listed in the Drug Equivalency Table. The listing of l-methamphetamine as a separate form of methamphetamine has led to litigation as to how dl-methamphetamine should be treated. In United States v. Carroll, 6 F.3d 735 (11th Cir. 1993), cert. denied, 114 S. Ct. 1234 (1994), a case in which the Eleventh Circuit held that dl-methamphetamine should be treated as d-methamphetamine, the majority and dissenting opinions both point out the complexity engendered by the current distinction between d- and l- methamphetamine. Under this amendment, all forms of methamphetamine are treated alike, thereby simplifying guideline application.

Eighth, this amendment revises the Commentary to §2D1.1 to provide that in a case involving negotiation for a quantity of a controlled substance, the negotiated quantity is used to determine the offense level unless the completed transaction establishes a different quantity, or the defendant establishes that he or she was not reasonably capable of producing the negotiated amount or otherwise did not intend to produce that amount. Disputes over the interpretation of this application note have produced much litigation. See, e.g., United States v. Tillman,8 F.3d 17 (11th Cir. 1993); United States v. Smiley, 997 F.2d 475 (8th Cir. 1993); United States v. Barnes, 993 F.2d 680 (9th Cir. 1993), cert. denied, 115 S. Ct. 96 (1994); United States v. Rodriguez, 975 F.2d 999 (3d Cir. 1992); United States v. Christian, 942 F.2d 363 (6th Cir. 1991), cert. denied, 502 U.S. 1045 (1992); United States v. Richardson, 939 F.2d 135 (4th Cir.), 502 U.S. 987 (1991); United States v. Ruiz, 932 F.2d 1174 (7th Cir.), cert. denied, 502 U.S. 849 (1991); United States v. Bradley, 917 F.2d 601 (1st Cir. 1990). **The effective date of this amendment is November 1, 1995.**

519. Section 2D1.11(d) is amended in the Chemical Quantity Table by deleting "Listed Precursor" wherever it occurs and inserting in lieu thereof "List I"; and by deleting "Listed Essential" wherever it appears and inserting in lieu thereof "List II".

Section 2D1.11(d) is amended in subdivisions (1)-(9) by deleting the line referencing "D-Lysergic Acid" from each subdivision as set forth below:

(1) "200 G or more of D-Lysergic Acid;",

(2) "At least 60 G but less than 200 G of D-Lysergic Acid;",

(3) "At least 20 G but less than 60 G of D-Lysergic Acid;",

(4) "At least 14 G but less than 20 G of D-Lysergic Acid;",

(5) "At least 8 G but less than 14 G of D-Lysergic Acid;",

(6) "At least 2 G but less than 8 G of D-Lysergic Acid;",

(7) "At least 1.6 G but less than 2 G of D-Lysergic Acid;",

(8) "At least 1.2 G but less than 1.6 G of D-Lysergic Acid;",

(9) "Less than 1.2 G of D-Lysergic Acid;".

Section 2D1.11(d) is amended in subdivisions (1)-(9) by inserting the following list I chemicals (formerly Listed Precursor Chemicals) in the appropriate place in alphabetical order by subdivision as follows:

(1) "17.8 KG or more of Benzaldehyde;",
"12.6 KG or more of Nitroethane;",

(2) "At least 5.3 KG but less than 17.8 KG of Benzaldehyde;",
"At least 3.8 KG but less than 12.6 KG of Nitroethane;",

(3) "At least 1.8 KG but less than 5.3 KG of Benzaldehyde;",
"At least 1.3 KG but less than 3.8 KG of Nitroethane;",

(4) "At least 1.2 KG but less than 1.8 KG of Benzaldehyde;",
"At least 879 G but less than 1.3 KG of Nitroethane;",

(5) "At least 712 G but less than 1.2 KG of Benzaldehyde;",
"At least 503 G but less than 879 G of Nitroethane;",

(6) "At least 178 G but less than 712 G of Benzaldehyde;",
"At least 126 G but less than 503 G of Nitroethane;",

(7) "At least 142 G but less than 178 G of Benzaldehyde;",
"At least 100 G but less than 126 G of Nitroethane;",

(8) "At least 107 G but less than 142 G of Benzaldehyde;",
"At least 75 G but less than 100 G of Nitroethane;",

(9) "Less than 107 G of Benzaldehyde;",
"Less than 75 G of Nitroethane;".

Section 2D1.11 is amended in the List 1 Chemical Equivalency Table by inserting the following chemicals, in the appropriate place in alphabetical order:

"1 gm of Benzaldehyde** = 1.124 gm of Ephedrine",
"1 gm of Nitroethane** = 1.592 gm of Ephedrine";

and by deleting "1 gm of D-lysergic acid = 1 gm of Ephedrine".

Section 2D1.11(d) is amended in the notes following the Chemical Quantity Table by deleting Note (A) as follows:

"(A) If more than one listed precursor chemical is involved, use the Precursor Chemical Equivalency Table to determine the offense level.",

and inserting in lieu thereof:

"(A) The List I Chemical Equivalency Table provides a method for combining different precursor chemicals to obtain a single offense level. In a case involving two or more list I chemicals used to manufacture different controlled substances or to manufacture one controlled substance by different manufacturing processes, convert each to its ephedrine equivalency from the table below, add the quantities, and use the Chemical Quantity Table to determine the base offense level. In a case involving two or more list I chemicals used together to manufacture a controlled substance in the same manufacturing process, use the quantity of the single list I chemical that results in the greatest base offense level.";

in Notes (B) and (C) by deleting "listed essential" wherever it appears and inserting in lieu thereof in each instance "list II"; in Note (C) by deleting "listed precursor" and inserting in lieu thereof "list I"; by deleting Note (D) as follows:

"(D) The Precursor Chemical Equivalency Table provides a means for combining different listed precursor chemicals to obtain a single offense level. In cases involving multiple precursor chemicals, convert each to its ephedrine equivalency from the table below, add the quantities, and apply the Chemical Quantity Table to obtain the applicable offense level.",

and inserting in lieu thereof:

"(D) In a case involving ephedrine tablets, use the weight of the ephedrine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.";

and by deleting "PRECURSOR" and inserting in lieu thereof "(E) LIST I".

Section 2D1.11(d) is amended in the List I Chemical Equivalency Table (formerly the Precursor Chemical Equivalency Table) by inserting "**" immediately after each of the following substances: "Ethylamine", "N-Methylephedrine", "N-Methylpseudoephedrine", "Norpseudoephedrine", "Phenylpropanolamine", "Pseudoephedrine", and "3,4-Methylenedioxyphenyl-2-propanone".

Section 2D1.11(d) is amended in the note following the List I Chemical Equivalency Table (formerly the Precursor Chemical Equivalency Table) designated by two asterisks by deleting "both hydriodic acid and ephedrine" and inserting in lieu thereof:

> "(A) hydriodic acid and one of the following: ephedrine, N-methylephedrine, N-methylpseudoephedrine, norpseudoephedrine, phenylpropanolamine, or pseudoephedrine; or (B) ethylamine and 3,4-methylenedioxyphenyl-2-propanone; or (C) benzaldehyde and nitroethane".

The Commentary to §2D1.11 captioned "Application Notes" is amended in Note 3 by deleting "3, 4 methylenedioxphenyl-2-propanone" wherever it appears and inserting in lieu thereof in each instance "methylamine"; and by deleting "LSD, PCP, and other Schedule I and II Hallucinogens" and inserting in lieu thereof "Cocaine and Other Schedule I and II Stimulants".

The Commentary to §2D1.11 captioned "Application Notes" is amended by deleting:

> "4. Where there are multiple listed precursor chemicals, the quantities of all listed precursors are added together for purposes of determining the base offense level, except as expressly noted (see Note A to the Chemical Quantity Table). This reflects that only one listed precursor typically is used in a given manufacturing process. For example, in the case of an offense involving 300 grams of piperidine and 800 grams of benzyl cyanide, the piperidine is converted to 600 grams of ephedrine and the benzyl cyanide is converted to 800 grams of ephedrine, using the Precursor Chemical Equivalency Table, for a total of 1400 grams of ephedrine. Applying the Chemical Quantity Table to 1400 grams (1.4 kilograms) of ephedrine results in a base offense level of 22.",

and inserting in lieu thereof:

> "4. When two or more list I chemicals are used together in the same manufacturing process, calculate the offense level for each separately and use the quantity that results in the greatest base offense level. In any other case, the quantities should be added together (using the List I Chemical Equivalency Table) for the purpose of calculating the base offense level.
>
> Examples:
>
> (a) The defendant was in possession of five kilograms of ephedrine and three kilograms of hydriodic acid. Ephedrine and hydriodic acid typically are used together in the same manufacturing process to manufacture methamphetamine. Therefore, the base offense level for each listed chemical is calculated separately and the list I chemical with the higher base offense level is used. Five kilograms of ephedrine result in a base offense level of 24; 300 grams of hydriodic acid result in a base offense level of 14. In this case, the base offense level would be 24.
>
> (b) The defendant was in possession of five kilograms of ephedrine and two kilograms of phenylacetic acid. Although both of these chemicals are used to manufacture methamphetamine, they are not used together in the same manufacturing process. Therefore, the quantity of phenylacetic acid should be converted to an ephedrine equivalency using the List I Chemical Equivalency Table and then added to the quantity of ephedrine. In this case, the two kilograms of phenylacetic acid convert to two kilograms of ephedrine (see List I Chemical Equivalency Table), resulting in a total equivalency of seven

kilograms of ephedrine.".

The Commentary to §2D1.11 is amended by deleting "listed precursor" wherever it appears and inserting in lieu thereof "list I"; and by deleting "listed essential" and inserting in lieu thereof in each instance "list II".

The Commentary to §2D1.11 captioned "Background" is amended in the second sentence by deleting "Listed precursor chemicals are critical to the formation of a controlled substance and" and inserting in lieu thereof "List I chemicals are important to the manufacture of a controlled substance and usually".

The Commentary to §2D1.11 captioned "Background" is amended by deleting the last sentence as follows:

"Listed essential chemicals are generally solvents, catalysts, and reagents, and do not become part of the finished product.",

and inserting in lieu thereof:

"List II chemicals are generally used as solvents, catalysts, and reagents.".

The Domestic Chemical Diversion Act of 1993, Pub. L. 103-200, 107 Stat. 2333, changed the designations of the listed chemicals from "listed precursor chemicals" and "listed essential chemicals" to "list I chemicals" and "list II chemicals," respectively. This amendment conforms §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) to these statutory changes.

The Act also adds pills containing ephedrine as a list I chemical. Ephedrine itself is a list I chemical under 21 U.S.C. § 802(34). Pills containing ephedrine previously were not covered by the statute and, thus, legally could be purchased "over the counter." Purchases of these pills were sometimes made in large quantities and the pills crushed and processed to extract the ephedrine (which can be used to make methamphetamine). Unlike ephedrine, which is purchased from a chemical company and is virtually 100 percent pure, these tablets contain a substantially lower percentage of ephedrine (about 25 percent). To avoid unwarranted disparity, this amendment adds a note to §2D1.11 providing that the amount of actual ephedrine contained in a pill is to be used in determining the offense level.

In addition, the Act removes three chemicals from, and adds two others to, the listed chemicals controlled under the Controlled Substances Act. Two of the chemicals removed from the list are not currently listed in §2D1.11 because the Commission was aware that they are not used in the manufacture of any controlled substance. The third chemical removed from the list, d-lysergic acid, was listed both as a listed chemical in §2D1.11 and as a controlled substance in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy). This amendment conforms §2D1.11 by deleting all references to d-lysergic acid. The two chemicals added as listed chemicals are benzaldehyde and nitroethane. Both of these chemicals are used to make methamphetamine. The base offense levels for listed chemicals in §2D1.11 are determined by reference to the most common controlled substance the chemical is used to manufacture; consequently, this amendment adds these chemicals to the Chemical Quantity Table based on information provided by the Drug Enforcement Administration regarding their use in the production of methamphetamine.

A number of the chemicals in the Chemical Quantity Table in §2D1.11 are used in the same process to make a controlled substance. A note at the end of the existing Precursor Chemical Equivalency Table addresses this situation for hydriodic acid and ephedrine. This amendment expands this note to cover other chemicals that similarly are used together.

In addition, this amendment corrects Application Note 3 of the Commentary to §2D1.11 with respect to an example of a listed chemical that is used with P2P to manufacture methamphetamine and a reference to a subdivision of the Drug Equivalency Tables in the Commentary to §2D1.1. **The effective date of this amendment is November 1, 1995.**

520. Section 2D1.12(a) is amended by inserting "(Apply the greater)" immediately after "Base Offense Level";

and by deleting "12" and inserting in lieu thereof:

"(1) 12, if the defendant intended to manufacture a controlled substance or knew or believed the prohibited equipment was to be used to manufacture a controlled substance; or

(2) 9, if the defendant had reasonable cause to believe the prohibited equipment was to be used to manufacture a controlled substance.".

The Domestic Chemical Diversion Act of 1993, Pub. L. 103-200, 107 Stat. 2333, broadens the prohibition in 21 U.S.C. § 843(a) to cover possessing, manufacturing, distributing, exporting, or importing three-neck, round-bottom flasks, tableting machines, encapsulating machines, or gelatin capsules having reasonable cause to believe they will be used to manufacture a controlled substance. Section 2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment; Attempt or Conspiracy) applies to this conduct. Consistent with the treatment of similar conduct under §§2D1.11(b)(2) and 2D1.13(b)(2), this amendment provides an alternative base offense level in §2D1.12 to address the case in which the defendant had reasonable cause to believe, but not actual knowledge or belief, that the equipment was to be used to manufacture a controlled substance. **The effective date of this amendment is November 1, 1995.**

521. Chapter Two, Part H, Subpart 1 is amended by deleting:

"Introductory Commentary

This subpart covers violations of civil rights statutes that typically penalize conduct involving death or bodily injury more severely than discriminatory or intimidating conduct not involving such injury.

The addition of two levels to the offense level applicable to the underlying offense in this subpart reflects the fact that the harm involved both the underlying conduct and activity intended to deprive a person of his civil rights. An added penalty is imposed on an offender who was a public official at the time of the offense to reflect the likely damage to public confidence in the integrity and fairness of government, and the added likely force of the threat because of the official's involvement.".

Sections 2H1.1, 2H1.3, 2H1.4, and 2H1.5 are deleted in their entirety as follows:

"§2H1.1. Conspiracy to Interfere with Civil Rights; Going in Disguise to Deprive of Rights

(a) Base Offense Level (Apply the greater):

(1) 15; or

(2) 2 plus the offense level applicable to any underlying offense.

(b) Specific Offense Characteristic

(1) If the defendant was a public official at the time of the offense, increase by 4 levels.

Commentary

Statutory Provision: 18 U.S.C. § 241.

Application Notes:

1. 'Underlying offense,' as used in this guideline, includes any offense under federal, state, or local law other than an offense that is itself covered under Chapter Two, Part H, Subpart 1, 2, or 4. For example, in the case of a conspiracy to interfere with a person's

civil rights (a violation of 18 U.S.C. § 241) that involved an aggravated assault (the use of force) to deny certain rights or benefits in furtherance of discrimination (a violation of 18 U.S.C. § 245), the underlying offense in respect to both the violation of 18 U.S.C. § 241 (to which §2H1.1 applies) and the violation of 18 U.S.C. § 245 (to which §2H1.3 applies) would be the aggravated assault.

'2 plus the offense level applicable to any underlying offense' means 2 levels above the offense level (base offense level plus any applicable specific offense characteristics and cross references) from the offense guideline in Chapter Two that most closely corresponds to the underlying offense. For example, if the underlying offense was second degree murder, which under §2A1.2 has an offense level of 33, '2 plus the offense level applicable to any underlying offense' would be 33 + 2 = 35. If the underlying offense was assault, criminal sexual conduct, kidnapping, abduction or unlawful restraint, the offense level from the guideline for the most comparable offense in §§2A2.1-2A4.2 (Assault, Criminal Sexual Abuse, and Kidnapping, Abduction, or Unlawful Restraint) would first be determined, and 2 levels then would be added. If the underlying offense was damage to property by means of arson or an explosive device, the offense level from §2K1.4 (Arson; Property Damage By Use of Explosives) would first be determined and 2 levels would be added. If the offense was property damage by other means, the offense level from §2B1.3 (Property Damage or Destruction) would first be determined and 2 levels would be added. If the offense was a conspiracy or attempt to commit arson, '2 plus the offense level applicable to any underlying offense' would be the offense level from the guideline applicable to a conspiracy or attempt to commit arson plus 2 levels.

In certain cases, the count of which the defendant is convicted may set forth conduct that constitutes more than one underlying offense (e.g., two instances of assault, or one instance of assault and one instance of arson). In such cases, determine the offense level for the underlying offense by treating each underlying offense as if contained in a separate count of conviction. To determine which of the alternative base offense levels (e.g., §2H1.1(a)(1) or (a)(2)) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to each alternative base offense level. Use whichever results in the greater offense level. Example: The defendant is convicted of one count of conspiracy to violate civil rights that included two level 12 underlying offenses (of a type not grouped together under Chapter Three, Part D). No adjustment from Chapter Three, Parts A, B, or C applies. The base offense level from §2H1.1(a)(1) is 15. The offense level for each underlying offense from §2H1.1(a)(2) is 14 (2 + 12). Under Chapter Three, Part D (Multiple Counts), the two level 14 underlying offenses result in a combined offense level of 16. This offense level is greater than the alternative base offense level of 15 under §2H1.1(a)(1). Therefore, the case is treated as if there were two counts, one for each underlying offense, with a base offense level under §2H1.1(a)(2) of 14 for each underlying offense.

2. Where the adjustment in §2H1.1(b)(1) is applied, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Background: This section applies to intimidating activity by various groups, including formally and informally organized groups as well as hate groups. The maximum term of imprisonment authorized by statute is ten years; except where death results, the maximum term of imprisonment authorized by statute is life imprisonment. The base offense level for this guideline assumes threatening or otherwise serious conduct.

§2H1.3. Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination; Damage to Religious Real Property

(a) Base Offense Level (Apply the greatest):

(1) 10, if no injury occurred; or

(2) 15, if injury occurred; or

(3) 2 plus the offense level applicable to any underlying offense.

(b) Specific Offense Characteristic

(1) If the defendant was a public official at the time of the offense, increase by 4 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 245, 247; 42 U.S.C. § 3631. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. '2 plus the offense level applicable to any underlying offense' is defined in the Commentary to §2H1.1.

2. 'Injury' means 'bodily injury,' 'serious bodily injury,' or 'permanent or life-threatening bodily injury' as defined in the Commentary to §1B1.1 (Application Instructions).

3. Where the adjustment in §2H1.3(b)(1) is applied, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

4. In the case of a violation of 42 U.S.C. § 3631, apply this guideline where the offense involved the threat or use of force. Otherwise, apply §2H1.5.

Background: The statutes covered by this guideline provide federal protection for the exercise of civil rights in a variety of contexts (e.g., voting, employment, public accommodations, etc.). The base offense level in §2H1.3(a) reflects that the threat or use of force is inherent in the offense. The maximum term of imprisonment authorized by statute is one year if no bodily injury results, ten years if bodily injury results, and life imprisonment if death results.

§2H1.4. Interference with Civil Rights Under Color of Law

(a) Base Offense Level (Apply the greater):

(1) 10; or

(2) 6 plus the offense level applicable to any underlying offense.

Commentary

Statutory Provision: 18 U.S.C. § 242.

Application Notes:

1. '6 plus the offense level applicable to any underlying offense' means 6 levels above the offense level for any underlying criminal conduct. See the discussion in the Commentary to §2H1.1.

2. Do not apply the adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Background: This maximum term of imprisonment authorized by 18 U.S.C. § 242 is one year if no bodily injury results, ten years if bodily injury results, and life imprisonment if death results. A base offense level of 10 is prescribed at §2H1.4(a)(1) providing a guideline sentence near the one-year statutory maximum for cases not resulting in death or bodily injury because of the compelling public interest in deterring and adequately punishing those who violate civil rights

under color of law. The Commission intends to recommend that this one-year statutory maximum penalty be increased. An alternative base offense level is provided at §2H1.4(a)(2). The 6-level increase under subsection (a)(2) reflects the 2-level increase that is applied to other offenses covered in this Part plus a 4-level increase for the commission of the offense under actual or purported legal authority. This 4-level increase is inherent in the base offense level of 10 under subsection (a)(1).

Enhancement under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) is inappropriate because the base offense level in §2H1.4(a) reflects that the abuse of actual or purported legal authority is inherent in the offense.

§2H1.5. Other Deprivations of Rights or Benefits in Furtherance of Discrimination

(a) Base Offense Level (Apply the greater):

(1) 6; or

(2) 2 plus the offense level applicable to any underlying offense.

(b) Specific Offense Characteristic

(1) If the defendant was a public official at the time of the offense, increase by 4 levels.

Commentary

Statutory Provision: 18 U.S.C. § 246.

Application Notes:

1. '2 plus the offense level applicable to any underlying offense' is defined in the Commentary to §2H1.1.

2. Where the adjustment in §2H1.5(b)(1) is applied, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Background: Violations of the statutes covered by this provision do not necessarily involve the use of force or threatening conduct or violations by public officials. Accordingly, the minimum base offense level (level 6) provided is lower than that of the other guidelines in this subpart.".

A replacement guideline with accompanying commentary is inserted as §2H1.1 (Offenses Involving Individual Rights).

Section 3A1.1 (Vulnerable Victim) is deleted in its entirety as follows:

"§3A1.1. Vulnerable Victim

If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels.

Commentary

Application Notes:

1. This adjustment applies to offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant. The adjustment would apply, for example, in a fraud case where the defendant marketed an ineffective cancer cure or in a robbery where

the defendant selected a handicapped victim. But it would not apply in a case where the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile. Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank.

2. Do not apply this adjustment if the offense guideline specifically incorporates this factor. For example, where the offense guideline provides an enhancement for the age of the victim, this guideline should not be applied unless the victim was unusually vulnerable for reasons unrelated to age.".

A replacement guideline with accompanying commentary is inserted as §3A1.1 (Hate Crime Motivation or Vulnerable Victim).

The Commentary to §2H4.1 captioned "Application Note" is amended in Note 1 by deleting "2 plus the offense" and inserting in lieu thereof "Offense".

This is a five-part amendment. First, the amendment adds an additional subsection to §3A1.1 (Vulnerable Victim) to implement the directive contained in Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994 by providing a three-level increase in the offense level for offenses that are "hate crimes." Second, the amendment consolidates §§2H1.1 (Offenses Involving Individual Rights), 2H1.3 (Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination; Damage to Religious Real Property), 2H1.4 (Interference with Civil Rights Under Color of Law), and 2H1.5 (Other Deprivations of Rights Benefits in Furtherance of Discrimination) into a revised §2H1.1 (Offenses Involving Individual Rights). This revised guideline provides greater consistency in offense levels for similar conduct, reflects the additional enhancement now contained in §3A1.1, and better reflects the seriousness of the underlying conduct. Third, the amendment references violations of 18 U.S.C. § 248 (the Freedom of Access to Clinic Entrances Act of 1994, Pub. L. 103-259, 108 Stat. 694) to the consolidated §2H1.1. Fourth, the amendment clarifies the operation of §3A1.1 with respect to a vulnerable victim. Fifth, the amendment addresses the directive to the Commission in section 240002 of the Violent Crime Control and Law Enforcement Act of 1994 (pertaining to elderly victims of crimes of violence).

Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to provide a minimum enhancement of three levels for offenses that the finder of fact at trial determines are hate crimes. This directive also instructs the Commission to ensure that there is reasonable consistency with other guidelines and that duplicative punishments for the same offense are avoided. The congressional directive in section 280003 requires that the three-level hate crimes enhancement apply where "the finder of fact at trial determines beyond a reasonable doubt" that the offense of conviction was a hate crime. This amendment makes the enhancement applicable if either the finder of fact at trial or, in the case of a guilty or nolo contendere plea, the court at sentencing determines that the offense was a hate crime. By broadening the applicability of the congressionally mandated enhancement, this amendment will avoid unwarranted sentencing disparity based on the mode of conviction. The Commission's general guideline promulgation authority, see 28 U.S.C. § 994, permits such a broadening of the enhancement.

The addition of a generally applicable Chapter Three hate crimes enhancement requires amendment of the civil rights offense guidelines to avoid duplicative punishments. In addition, to further the Commission's goal of simplifying the operation of the guidelines, the proposed amendment consolidates the four current civil rights offense guidelines into one guideline and adjusts these guidelines to take into account the new enhancement under §3A1.1(a).

The Freedom of Access to Clinic Entrances Act of 1994 makes it a crime to interfere with access to reproductive services or to interfere with certain religious activities. This Act criminalizes a broad array of conduct, from non-violent obstruction of the entrance to a clinic to murder. The amendment treats these violations in the same way as other offenses involving individual rights.

Section 240002 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to ensure that the guidelines provide sufficiently stringent penalties for crimes of violence against elderly victims. Upon review of the guidelines, the Commission determined that the penalties currently

provided generally appear appropriate; however, this amendment strengthens the Commentary to §3A1.1 in one area by expressly providing a basis for an upward departure if both the current offense and a prior offense involved a vulnerable victim (including an elderly victim), regardless of the type of offense.

Finally, Section 250003 of the Violent Control and Law Enforcement Act of 1994 directs the Commission to review, and if necessary, amend the sentencing guidelines to ensure that victim-related adjustments for fraud offenses against older victims are adequate. Section 250003 also directs the Commission to study and report to the Congress on this issue. See Report to Congress: Adequacy of Penalties for Fraud Offenses Involving Elderly Victims (March 13, 1995). Although the Commission found that the current guidelines generally provided adequate penalties in these cases, it noted some inconsistency in the application of §3A1.1 regarding whether this adjustment required proof that the defendant had "targeted the victim on account of the victim's vulnerability." This amendment revises the Commentary of §3A1.1 to clarify application with respect to this issue. **The effective date of this amendment is November 1, 1995.**

522. Section §2K2.1(a)(1) is amended by deleting:

> "defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense, and the instant offense involved a firearm listed in 26 U.S.C. § 5845(a)",

and inserting in lieu thereof:

> "offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense".

Section §2K2.1(a)(3) is amended by deleting:

> "defendant had one prior felony conviction of either a crime of violence or a controlled substance offense, and the instant offense involved a firearm listed in 26 U.S.C. § 5845(a)",

and inserting in lieu thereof:

> "offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant had one prior conviction of either a crime of violence or controlled substance offense".

Section §2K2.1(a)(4)(B) is amended by deleting "listed in 26 U.S.C. § 5845(a)" and inserting in lieu thereof "described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30)".

Section 2K2.1(a)(5) is amended by deleting "listed in 26 U.S.C. § 5845(a)" and inserting in lieu thereof "described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30)".

Section 2K2.1(a)(8) is amended by deleting "or (m)" and by inserting in lieu thereof "(m), (s), (t), or (x)(1)".

The Commentary to §2K2.1 captioned "Statutory Provisions" is amended by deleting "(r)" and inserting in lieu thereof "(r)-(w), (x)(1)"; and by deleting "(g)" and inserting in lieu thereof "(g), (h), (j)-(n)".

The Commentary to §2K2.1 captioned "Application Notes" is amended by deleting:

> "3. 'Firearm listed in 26 U.S.C. § 5845(a)' includes: (i) any short-barreled rifle or shotgun or any weapon made therefrom; (ii) a machinegun; (iii) a silencer; (iv) a destructive device; or (v) any 'other weapon,' as that term is defined by 26 U.S.C. § 5845(e). A firearm listed in 26 U.S.C. § 5845(a) does not include unaltered handguns or regulation-length rifles or shotguns. For a more detailed definition, refer to 26 U.S.C. § 5845.",

and inserting in lieu thereof:

"3. A 'firearm described in 26 U.S.C. § 5845(a)' includes: (i) a shotgun having a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; a rifle having a barrel or barrels of less than 16 inches in length; or a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (ii) a machinegun; (iii) a silencer; (iv) a destructive device; and (v) certain unusual weapons defined in 26 U.S.C. § 5845(e) (that are not conventional, unaltered handguns, rifles, or shotguns). For a more detailed definition, refer to 26 U.S.C. § 5845.

A 'firearm described in 18 U.S.C. § 921(a)(30)' (pertaining to semiautomatic assault weapons) does not include a weapon exempted under the provisions of 18 U.S.C. § 922(v)(3).".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 6 by deleting:

"or (v) being an alien, is illegally or unlawfully in the United States",

and inserting in lieu thereof:

"(v) being an alien, is illegally or unlawfully in the United States; or (vi) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child as defined in 18 U.S.C. § 922(d)(8)".

The Commentary to §2K2.1 captioned "Application Notes" is amended by deleting:

"12. If the defendant is convicted under 18 U.S.C. § 922(i), (j), or (k), or 26 U.S.C. § 5861(g) or (h) (offenses involving stolen firearms or ammunition), and is convicted of no other offense subject to this guideline, do not apply the adjustment in subsection (b)(4) because the base offense level itself takes such conduct into account.".

and inserting in lieu thereof:

"12. If the only offense to which §2K2.1 applies is 18 U.S.C. § 922 (i), (j), or (u), 18 U.S.C. § 924(j) or (k), or 26 U.S.C. § 5861(g) or (h) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the adjustment in subsection (b)(4) unless the offense involved a firearm with an altered or obliterated serial number. This is because the base offense level takes into account that the firearm or ammunition was stolen.

Similarly, if the only offense to which §2K2.1 applies is 18 U.S.C. § 922(k) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the adjustment in subsection (b)(4) unless the offense involved a stolen firearm or stolen ammunition. This is because the base offense level takes into account that the firearm had an altered or obliterated serial number.".

This is a five-part amendment. First, the amendment revises §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to provide increased offense levels for possession of a semiautomatic assault weapon that correspond to the offense levels currently provided for possession of machineguns and other firearms described in 26 U.S.C. § 5845(a). Second, the amendment addresses section 110201 of the Violent Crime Control Law Enforcement Act of 1994 by providing an offense level of six for the misdemeanor portion of 18 U.S.C. § 922(x)(1) (involving sale or transfer of a handgun or ammunition to a juvenile). For an offense under the felony portion of 18 U.S.C. § 922(x)(1) (involving the sale or transfer of a handgun or handgun ammunition to a juvenile knowing or having reasonable cause to believe that the handgun or ammunition was intended to be used in a crime), the enhancement in subsection (b)(5) will provide a minimum offense level of 18. Third, the amendment addresses section 110401 of the Violent

Crime Control and Law Enforcement Act of 1994 by adding to the definition of a "prohibited person" in §2K2.1 a person under the court order described in that section of the Act. Fourth, the amendment provides an offense level of six for the misdemeanors set forth in 18 U.S.C. § 922 (s) and (t) (involving violations of the Brady Act). Fifth, the amendment clarifies that Application Note 12 in §2K2.1 applies only to cases in which the base offense level is determined under §2K2.1(a)(7). **The effective date of this amendment is November 1, 1995.**

523. The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 2 by deleting:

"a sentence at or near the maximum of the applicable guideline range may be warranted",

and inserting in lieu thereof:

"an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category)".

This amendment revises §2L1.2 (Unlawfully Entering or Remaining in the United States) to authorize the court to consider an upward departure in the case of a defendant with repeated prior instances of deportation not resulting in a criminal conviction. **The effective date of this amendment is November 1, 1995.**

524. Section 2L2.1(b)(2) is amended by deleting "sets of documents" and inserting in lieu thereof "documents"; and by deleting "Sets of Documents" and inserting in lieu thereof "Documents".

Section 2L2.1(b) is amended by inserting the following additional subdivision:

"(3) If the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws, increase by 4 levels.".

The Commentary to §2L2.1 captioned "Application Notes" is amended in Note 2 by inserting "of documents" immediately before "intended"; and by deleting "documents as one set" and inserting in lieu thereof "set as one document".

The Commentary to §2L2.1 captioned "Application Notes" is amended by inserting the following additional note:

"3. Subsection (b)(3) provides an enhancement if the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws. If the defendant knew, believed, or had reason to believe that the felony offense to be committed was of an especially serious type, an upward departure may be warranted.".

Section 2L2.2 is amended by inserting the following additional subsection:

"(c) Cross Reference

(1) If the defendant used a passport or visa in the commission or attempted commission of a felony offense, other than an offense involving violation of the immigration laws, apply --

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that felony offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.".

This is a three-part amendment. First, this amendment provides an enhancement in §2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law) if the defendant trafficked in a passport or visa knowing, believing, or having reason to believe that the passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws. Second, this amendment corrects a technical error in §2L2.1(b)(2). Third, this amendment adds a cross reference to §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport) that addresses the case of a defendant who uses a passport or visa in the commission or attempted commission of a felony offense, other than an offense involving violation of the immigration laws. **The effective date of this amendment is November 1, 1995.**

525. Section 2P1.2(a)(2) is amended by inserting "methamphetamine," immediately following "PCP,".

Section 2P1.2(a)(3) is amended by inserting "methamphetamine," immediately following "PCP,".

Section 2P1.2 is amended by deleting subsection (c)(1) as follows:

> "(1) If the defendant is convicted under 18 U.S.C. § 1791(a)(1) and is punishable under 18 U.S.C. § 1791(b)(1), the offense level is 2 plus the offense level from §2D1.1, but in no event less than level 26.",

and inserting in lieu thereof:

> "(1) If the object of the offense was the distribution of a controlled substance, apply the offense level from §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy). *Provided*, that if the defendant is convicted under 18 U.S.C. § 1791(a)(1) and is punishable under 18 U.S.C. § 1791(b)(1), and the resulting offense level is less than level 26, increase to level 26.".

This amendment conforms the offense level for methamphetamine offenses in a correctional or detention facility to that of other controlled substance offenses committed in a correctional or detention facility that have the same statutory maximum penalty. This change reflects the increase in the maximum penalty for methamphetamine offenses in section 90101 of the Violent Crime Control and Law Enforcement Act of 1994. In addition, the amendment expands the cross reference in §2P1.2(c)(1) to cover distribution of all controlled substances in a correctional or detention facility. **The effective date of this amendment is November 1, 1995.**

526. Chapter Three, Part A, is amended by inserting an additional section as §3A1.4 (International Terrorism).

Section 5K2.15 (Terrorism) is deleted in its entirety as follows:

> "§5K2.15. Terrorism (Policy Statement)
>
> If the defendant committed the offense in furtherance of a terroristic action, the court may increase the sentence above the authorized guideline range.".

Section 120004 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to provide an appropriate enhancement for any felony that involves or is intended to promote international terrorism. The amendment addresses this directive by adding a Chapter Three enhancement at §3A1.4 (International Terrorism) in place of the upward departure provision at §5K2.15 (Terrorism). **The effective date of this amendment is November 1, 1995.**

527. Section 3B1.4 is deleted in its entirety as follows:

"§3B1.4. In any other case, no adjustment is made for role in the offense.

Commentary

Many offenses are committed by a single individual or by individuals of roughly equal culpability so that none of them will receive an adjustment under this Part. In addition, some participants in a criminal organization may receive increases under §3B1.1 (Aggravating Role) while others receive decreases under §3B1.2 (Mitigating Role) and still other participants receive no adjustment.".

A new §3B1.4 (Using a Minor To Commit a Crime) is inserted in lieu thereof.

This amendment implements the directive in Section 140008 of the Violent Crime Control and Law Enforcement Act of 1994 (pertaining to the use of a minor in the commission of an offense) in a slightly broader form by adding a new §3B1.4 (Using a Minor to Commit a Crime). The existing §3B1.4 (untitled) is deleted as unnecessary. **The effective date of this amendment is November 1, 1995.**

528. The Commentary to §4B1.1 captioned "Background" is amended by deleting:

"28 U.S.C. § 994(h) mandates that the Commission assure that certain 'career' offenders, as defined in the statute, receive a sentence of imprisonment 'at or near the maximum term authorized.' Section 4B1.1 implements this mandate. The legislative history of this provision suggests that the phrase 'maximum term authorized' should be construed as the maximum term authorized by statute. See S. Rep. 98-225, 98th Cong., 1st Sess. 175 (1983), 128 Cong. Rec. 26, 511-12 (1982) (text of 'Career Criminals' amendment by Senator Kennedy), 26, 515 (brief summary of amendment), 26, 517-18 (statement of Senator Kennedy).",

and inserting in lieu thereof:

"Section 994(h) of Title 28, United States Code, mandates that the Commission assure that certain 'career' offenders receive a sentence of imprisonment 'at or near the maximum term authorized.' Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid 'unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . .' 28 U.S.C. § 991(b)(1)(B). The Commission's refinement of this definition over time is consistent with Congress's choice of a directive to the Commission rather than a mandatory minimum sentencing statute ('The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers.' S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

The legislative history of this provision suggests that the phrase 'maximum term authorized' should be construed as the maximum term authorized by statute. See S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983); 128 Cong. Rec. 26,511-12 (1982) (text of 'Career Criminals' amendment by Senator Kennedy); id. at 26,515 (brief summary of amendment); id. at 26,517-18 (statement of Senator Kennedy).".

Application Note 1 of the Commentary to §4B1.2 is repromulgated without change.

This amendment repromulgates Application Note 1 of the Commentary to §4B1.2 (Definition of Terms Used in Section 4B1.1) and inserts additional background commentary in §4B1.1 (Career Offender)

explaining the Commission's rationale and authority for its implementation of this guideline. The amendment responds to a decision by the United States Court of Appeals for the District of Columbia Circuit in United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993). In Price, the court invalidated application of the career offender guideline to a defendant convicted of a drug conspiracy because 28 U.S.C. § 994(h), which the Commission cites as the mandating authority for the career offender guideline, does not expressly refer to inchoate offenses. The court indicated that it did not foreclose Commission authority to include conspiracy offenses under the career offender guideline by drawing upon its broader guideline promulgation authority in 28 U.S.C. § 994(a). See also United States v. Mendoza-Figueroa, 28 F.3d 766 (8th Cir. 1994), vacated (Sept. 2, 1994); United States v. Bellazerius, 24 F.3d 698 (5th Cir.), cert. denied, 115 S. Ct. 375 (1994). Other circuits have rejected the Price analysis and upheld the Commission's definition of "controlled substance offense." For example, the Ninth Circuit considered the legislative history to 994(h) and determined that the Senate Report clearly indicated that 994(h) was not the sole enabling statute for the career offender guidelines. United States v. Heim, 15 F.3d 830 (9th Cir.), cert. denied, 115 S. Ct. 55 (1994). See also United States v. Hightower, 25 F.3d 182 (3d Cir.), cert. denied, 115 S. Ct. 370 (1994); United States v. Damerville, 27 F.3d 254 (7th Cir.), cert. denied, 115 S. Ct. 445 (1994); United States v. Allen, 24 F.3d 1180 (10th Cir.), cert. denied, 115 S. Ct. 493 (1994); United States v. Baker, 16 F.3d 854 (8th Cir. 1994); United States v. Linnear, 40 F.3d 215 (7th Cir. 1994); United States v. Kennedy, 32 F.3d 876 (4th Cir. 1994), cert. denied, 115 S. Ct. 939 (1995); United States v. Piper, 35 F.3d 611 (1st Cir. 1994), cert. denied, 115 S. Ct. 1118 (1995). **The effective date of this amendment is November 1, 1995.**

529. The Commentary to §5D1.1 captioned "Application Notes" is amended by deleting Note 1 as follows:

> "Subsection 5D1.1(a) requires imposition of supervised release following any sentence of imprisonment for a term of more than one year or if required by a specific statute. While there may be cases within this category that do not require post release supervision, these cases are the exception and may be handled by a departure from this guideline.",

and inserting in lieu thereof:

> "Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment if a sentence of imprisonment of more than one year is imposed or if a term of supervised release is required by a specific statute. The court may depart from this guideline and not impose a term of supervised release if it determines that supervised release is neither required by statute nor required for any of the following reasons: (1) to protect the public welfare; (2) to enforce a financial condition; (3) to provide drug or alcohol treatment or testing; (4) to assist the reintegration of the defendant into the community; or (5) to accomplish any other sentencing purpose authorized by statute.".

The Commentary to §5D1.1 captioned "Application Notes" is amended by deleting Note 2 as follows:

> "2. Under §5D1.1(b), the court may impose a term of supervised release in cases involving imprisonment for a term of one year or less. The court may consider the need for a term of supervised release to facilitate the reintegration of the defendant into the community; to enforce a fine, restitution order, or other condition; or to fulfill any other purpose authorized by statute.",

and inserting in lieu thereof:

> "2. Under subsection (b), the court may impose a term of supervised release to follow a term of imprisonment of one year or less for any of the reasons set forth in Application Note 1.".

Section 5D1.2 is amended by deleting:

> "(a) If a defendant is convicted under a statute that requires a term of supervised release, the term shall be at least three years but not more than five years, or the minimum period required by statute, whichever is greater.",

and by redesignating subsection (b) as subsection (a).

Section 5D1.2(a) (formerly §5D1.2(b)) is amended by deleting "Otherwise, when" and inserting in lieu thereof "If".

Section 5D1.2 is amended by inserting the following additional subsection:

"(b) *Provided*, that the term of supervised release imposed shall in no event be less than any statutorily required term of supervised release.".

The Commentary to §5D1.2 captioned "Background" is amended in the second sentence by deleting "(a)" and inserting in lieu thereof "(b)"; and by deleting the third sentence as follows:

"Subsection (b) applies to all other statutes.".

This amendment sets forth with greater specificity the circumstances under which the court may depart from the requirements of §5D1.1 (Imposition of a Term of Supervised Release) and impose no term of supervised release. In addition, the amendment deletes, as unnecessary, the requirement in §5D1.2 (Term of Supervised Release) of a term of supervised release of three to five years whenever a statute requires any term of supervised release. Instead, the amendment provides that, in the case of a statute requiring a term of supervised release, the length of the term of supervised release shall be determined by the class of felony of which the defendant was convicted, but shall not be less than any minimum term of supervised release required by statute. **The effective date of this amendment is November 1, 1995.**

530. Section 5E1.1(a)(2) is amended by deleting "49 U.S.C. § 1472(h), (i), (j), or (n)" and inserting in lieu thereof "49 U.S.C. § 46312, § 46502, or § 46504".

The Commentary to §5E1.1 captioned "Background" is amended in the first paragraph by deleting "and of designated subdivisions of 49 U.S.C. § 1472" and inserting in lieu thereof "or 49 U.S.C. § 46312, § 46502, or § 46504".

The Commentary to §5E1.1 captioned "Background" is amended in the second paragraph by deleting "§ 1472(h), (i), (j), or (n)" wherever it appears and inserting in lieu there of in each instance "§ 46312, § 46502, or § 46504".

The Commentary to §5E1.1 captioned "Background" is amended in the fourth paragraph by deleting "Rule 32(c)(2)(D)" and inserting in lieu thereof "Rule 32(b)(4)(D)".

The Commentary to §5E1.1 is amended by inserting the following immediately before "Background":

"Application Note:

1. In the case of a conviction under certain statutes, additional requirements regarding restitution apply. See 18 U.S.C. §§ 2248 and 2259 (applying to convictions under 18 U.S.C. §§ 2241-2258 for sexual-abuse offenses and sexual exploitation of minors); 18 U.S.C. § 2327 (applying to convictions under 18 U.S.C. §§ 1028-1029, 1341-1344 for telemarketing-fraud offenses); 18 U.S.C. § 2264 (applying to convictions under 18 U.S.C. §§ 2261-2262 for domestic-violence offenses). To the extent that any of the above-noted statutory provisions conflict with the provisions of this guideline, the applicable statutory provision shall control.".

Section 40113 of the Violent Crime Control and Law Enforcement Act of 1994 requires "mandatory" restitution for offenses involving sexual abuse and sexual exploitation of children under 18 U.S.C. §§ 2241-2258. Sections 40221 and 250002 add similar "mandatory" restitution provisions for offenses involving domestic violence (18 U.S.C. § 2264) and telemarketing fraud (18 U.S.C. § 2327). These provisions also require that compliance with a restitution order be a condition of probation or supervised release, have broader definitions of loss than 18 U.S.C. § 3663, and apply "notwithstanding section 3663, and in addition to any civil or criminal penalty authorized by law." This amendment adds commentary

to §5E1.1 (Restitution) to alert courts to these statutory provisions.

In addition, this amendment conforms §5E1.1 to the redesignation of 49 U.S.C. § 1472(h), (i), (j), and (n) as 49 U.S.C. §§ 46312, 46502(a), (b), and 46504, and the redesignation of Rule 32(c)(2)(D) as Rule 32(b)(4)(D). **The effective date of this amendment is November 1, 1995.**

531. Chapter Five, Part K, Subpart Two is amended by inserting an additional policy statement as §5K2.17 (High-Capacity, Semiautomatic Firearms).

This amendment addresses the directive in section 110501 of the Violent Crime Control and Law Enforcement Act of 1994 to provide an appropriate enhancement for a crime of violence or drug trafficking crime if a semiautomatic firearm is involved.

According to data reviewed by the Commission, semiautomatic firearms are used in 50-70 percent of offenses involving a firearm. Thus, offenses involving a semiautomatic firearm represent the typical or "heartland" case under the guidelines. Consequently, the firearms enhancements in the guidelines for crimes of violence and drug trafficking can be considered to take into account the fact that firearms involved in these offenses typically are semiautomatic. Moreover, the "firepower" or "dangerousness" of semiautomatic firearms, compared to other types of firearms, varies substantially with caliber and magazine capacity. For example, a .25 caliber, six-shot semiautomatic pistol is not considered as having as much firepower as a .38 caliber, six-shot revolver or a .357 magnum, six-shot revolver. A nine-millimeter semiautomatic pistol fires a somewhat more powerful cartridge than a .38 caliber revolver and a somewhat less powerful cartridge than a .357 magnum revolver. But some nine-millimeter semiautomatic pistols hold from 14-18 cartridges, compared to six cartridges for a revolver. A high magazine capacity, nine-millimeter semiautomatic pistol can be said to have significantly more firepower than a revolver because it can fire a significantly larger number of shots without reloading.

If harm actually results (e.g., death or bodily injury), the guidelines generally take that harm into account directly. Consequently, in considering any distinction between semiautomatic firearms and other firearms, the issue is whether there is any significant difference in the risk of harm. The difference in the risk of harm also varies widely with the circumstances of the offense. For example, in a robbery at very close range, the difference in the likelihood of death or bodily injury between a revolver and semiautomatic pistol would seem to be small. In contrast, in a drive-by shooting the greater firepower of a semiautomatic weapon likely would have a more significant effect on the likelihood of death or injury.

After considering the above factors, the Commission determined that the most appropriate approach at this time was to provide a specific basis for an upward departure when a high-capacity semiautomatic firearm is possessed in connection with a crime of violence or drug trafficking offense, thereby allowing the courts the flexibility to take this factor into account as appropriate in the circumstances of the particular case. **The effective date of this amendment is November 1, 1995.**

532. Chapter Five, Part K, Subpart Two is amended by inserting an additional policy statement as §5K1.18 (Violent Street Gangs).

This amendment expressly provides a basis for an upward departure in the case of a defendant subject to a statutorily enhanced maximum penalty under 18 U.S.C. § 521 (pertaining to criminal street gangs), as enacted by section 150000 of the Violent Crime and Law Enforcement Act of 1994. **The effective date of this amendment is November 1, 1995.**

533. Section 7B1.3(g)(2) is amended by deleting "the defendant may, to the extent permitted by law, be ordered to recommence supervised release upon release from imprisonment" and inserting in lieu thereof:

> "the court may include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment. The length of such a term of supervised release shall not exceed

the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. 18 U.S.C. § 3583(h)".

The Commentary to §7B1.3 captioned "Application Notes" is amended in Note 2 by deleting:

". This statute, however, neither expressly authorizes nor precludes a court from ordering that a term of supervised release recommence after revocation. Under §7B1.3(g)(2), the court may order, to the extent permitted by law, the recommencement of a supervised release term following revocation",

and inserting in lieu thereof:

", (g)-(i). Under 18 U.S.C. § 3583(h) (effective September 13, 1994), the court, in the case of revocation of supervised release and imposition of less than the maximum imposable term of imprisonment, may order an additional period of supervised release to follow imprisonment".

The Commentary to §7B1.3 captioned "Application Notes is amended by deleting:

"3. Subsection (c) provides for the use of certain alternatives to imprisonment upon revocation. It is to be noted, however, that a court may decide that not every alternative is authorized by statute in every circumstance. For example, in United States v. Behnezhad, 907 F.2d 896 (9th Cir. 1990), the Ninth Circuit held that where a term of supervised release was revoked there was no statutory authority to impose a further term of supervised release. Under this decision, in the case of a revocation of a term of supervised release, an alternative that is contingent upon imposition of a further term of supervised release (e.g., a period of imprisonment followed by a period of community confinement or detention as a condition of supervised release) cannot be implemented. The Commission has transmitted to the Congress a proposal for a statutory amendment to address this issue.";

and by renumbering the remaining notes accordingly.

The Commentary to §7B1.4 captioned "Application Notes" is amended by deleting:

"5. Under 18 U.S.C. § 3565(a), upon a finding that a defendant violated a condition of probation by being in possession of a controlled substance, the court is required 'to revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.' Under 18 U.S.C. § 3583(g), upon a finding that a defendant violated a condition of supervised release by being in possession of a controlled substance, the court is required 'to terminate supervised release and sentence the defendant to serve in prison not less than one-third of the term of supervised release.' The Commission leaves to the court the determination of whether evidence of drug usage established solely by laboratory analysis constitutes 'possession of a controlled substance' as set forth in 18 U.S.C. §§ 3565(a) and 3583(g).

6. Under 18 U.S.C. § 3565(b), upon a finding that a defendant violated a condition of probation by the actual possession of a firearm, the court is required 'to revoke the sentence of probation and impose any other sentence that was available ... at the time of initial sentencing.'",

and inserting in lieu thereof:

"5. Upon a finding that a defendant violated a condition of probation or supervised release by being in possession of a controlled substance or firearm or by refusing to comply with a condition requiring drug testing, the court is required to revoke probation or supervised release and impose a sentence that includes a term of imprisonment. 18 U.S.C. §§ 3565(b), 3583(g).

6. In the case of a defendant who fails a drug test, the court shall consider whether the availability of appropriate substance abuse programs, or a defendant's current or past participation in such programs, warrants an exception from the requirement of mandatory revocation and imprisonment under 18 U.S.C. §§ 3565(b) and 3583(g). 18 U.S.C. §§ 3563(a), 3583(d).".

Section 110505 of the Violent Crime Control and Law Enforcement Act of 1994 amends 18 U.S.C. § 3583(e)(3) by specifying that a defendant whose supervised release term is revoked may not be required to serve more than five years in prison if the offense that resulted in the term of supervised release is a Class A felony. The provision also amends section 3583(g) by eliminating the mandatory re-imprisonment period of at least one-third of the term of supervised release if the defendant possesses a controlled substance. Additionally, the provision requires the courts to revoke probation or supervised release and impose a sentence that includes a term of imprisonment if the defendant is found to be in possession of a firearm, or refuses to participate in drug testing. Finally, the provision expressly authorizes the court to order an additional, limited period of supervision following revocation of supervised release and re-imprisonment.

Section 20414 of the Violent Crime Control and Law Enforcement Act of 1994 makes mandatory a condition of probation requiring that the defendant refrain from any unlawful use of a controlled substance. 18 U.S.C. § 3563(a)(4). The section also establishes a condition that the defendant, with certain exceptions, submit to periodic drug tests. The existing mandatory condition of probation requiring the defendant not to possess a controlled substance remains unchanged. 18 U.S.C. § 3563(a)(3). Similar requirements are made with respect to conditions of supervised release. 18 U.S.C. § 3583(d).

Section 110506 of the Violent Crime Control and Law Enforcement Act of 1994 mandates revocation of probation and imposition of a term of imprisonment if the defendant violates probation by possessing a controlled substance or a firearm, or by refusing to comply with drug testing. 18 U.S.C. § 3565(b). It does not require revocation in the case of use of a controlled substance (although use presumptively may establish possession). No minimum term of imprisonment is required other than a sentence that includes a "term of imprisonment" consistent with the sentencing guidelines and revocation policy statements. Similar requirements are set forth in 18 U.S.C. § 3583(g) with respect to conditions of supervised release.

Section 20414 permits "an exception in accordance with United States Sentencing Commission guidelines" from the mandatory revocation provisions of section 3565(b), "when considering any action against a defendant who fails a drug test administered in accordance with [section 3563(a)(4)]." The exception from the mandatory revocation provisions appears limited to a defendant who fails the test and does not appear to apply to a defendant who refuses to take the test.

This amendment conforms §§7B1.3 (Revocation of Probation or Supervised Release) and 7B1.4 (Term of Imprisonment) to these revised statutory provisions. **The effective date of this amendment is November 1, 1995.**

534. Appendix A (Statutory Index) is amended by inserting the following at the appropriate place by title and section:

"7 U.S.C. § 2018(c)	2N2.1",
"7 U.S.C. § 6810	2N2.1",
"18 U.S.C. § 36	2D1.1",
"18 U.S.C. § 37	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2A5.1, 2A5.2, 2B1.3, 2B3.1, 2K1.4",
"18 U.S.C. § 113(a)(1)	2A2.1",
"18 U.S.C. § 113(a)(2)	2A2.2",
"18 U.S.C. § 113(a)(3)	2A2.2",

"18 U.S.C. § 113(a)(5) (Class A misdemeanor provisions only)	2A2.3",
"18 U.S.C. § 113(a)(6)	2A2.2",
"18 U.S.C. § 113(a)(7)	2A2.3",
"18 U.S.C. § 470	2B5.1, 2F1.1",
"18 U.S.C. § 668	2B1.1",
"18 U.S.C. § 844(m)	2K1.3",
"18 U.S.C. § 880	2B1.1",
"18 U.S.C. § 922(x)(1)	2K2.1",
"18 U.S.C. § 924(i)	2A1.1, 2A1.2",
"18 U.S.C. § 924(j)-(n)	2K2.1",
"18 U.S.C. § 1033	2B1.1, 2F1.1, 2J1.2",
"18 U.S.C. § 1118	2A1.1, 2A1.2",
"18 U.S.C. § 1119	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1",
"18 U.S.C. § 1120	2A1.1, 2A1.2, 2A1.3, 2A1.4",
"18 U.S.C. § 1121	2A1.1, 2A1.2",
"18 U.S.C. § 1204	2J1.2",
"18 U.S.C. § 1716D	2Q2.1",
"18 U.S.C. § 2258(a),(b)	2G2.1, 2G2.2",
"18 U.S.C. § 2261	2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2B3.1, 2B3.2, 2K1.4",
"18 U.S.C. § 2262	2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2B3.1, 2B3.2, 2K1.4",
"18 U.S.C. § 2280	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2B1.3 2B3.1, 2B3.2, 2K1.4",
"18 U.S.C. § 2281	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2B1.3, 2B3.1, 2B3.2, 2K1.4",
"18 U.S.C. § 2332a	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A1.5, 2A2.1, 2A2.2, 2B1.3, 2K1.4",
"18 U.S.C. § 2423(b)	2A3.1, 2A3.2, 2A3.3",
"21 U.S.C. § 843(a)(9)	2D3.1",
"21 U.S.C. § 843(c)	2D3.1",
"21 U.S.C. § 849	2D1.2",
"21 U.S.C. § 854	2S1.2",
"21 U.S.C. § 960(d)(3), (4)	2D1.11",
"21 U.S.C. § 960(d)(5)	2D1.13",
"21 U.S.C. § 960(d)(6)	2D3.1",
"42 U.S.C. § 1307(b)	2F1.1",
"49 U.S.C. § 46308	2A5.2",
"49 U.S.C. § 46312	2Q1.2",
"49 U.S.C. § 46502(a),(b)	2A5.1",
"49 U.S.C. § 46504	2A5.2",
"49 U.S.C. § 46505	2K1.5",
"49 U.S.C. § 46506	2A5.3".

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 113(a) by inserting "(for offenses committed prior to September 13, 1994)" immediately following "2A2.1";

in the line referenced to 18 U.S.C. § 113(b) by inserting "(for offenses committed prior to September 13, 1994)" immediately following "2A2.2";

in the line referenced to 18 U.S.C. § 113(c) by inserting "(for offenses committed prior to September 13, 1994)" immediately following "2A2.2";

in the line referenced to 18 U.S.C. § 113(f) by inserting "(for offenses committed prior to September 13, 1994)" immediately following "2A2.2";

in the line referenced to 18 U.S.C. § 242 by deleting "2H1.4" and inserting in lieu thereof "2H1.1";

in the line referenced to 18 U.S.C. § 245(b) by deleting "2H1.3" and inserting in lieu thereof "2H1.1";

in the line referenced to 18 U.S.C. § 246 by deleting "2H1.5" and inserting in lieu thereof "2H1.1";

in the line referenced to 18 U.S.C. § 247 by deleting "2H1.3" and inserting in lieu thereof "2H1.1";

in the line referenced to 18 U.S.C. § 371 by inserting "2K2.1 (if a conspiracy to violate 18 U.S.C. § 924(c))," immediately before "2X1.1";

in the line referenced to 18 U.S.C. § 922(r) by deleting "(r)" and inserting in lieu thereof "(r)-(w)";

in the line referenced to 18 U.S.C. § 1153 by inserting "2A2.3," immediately before "2A3.1";

in the line referenced to 18 U.S.C. § 2114 by deleting "2114" and inserting in lieu thereof "2114(a)";

in the line referenced to 18 U.S.C. § 2423 by deleting "2423" and by inserting in lieu thereof "2423(a)"; and

in the line referenced to 42 U.S.C. § 3631 by deleting "2H1.3" and inserting in lieu thereof "2H1.1".

Appendix A (Statutory Index) is amended by deleting:

"49 U.S.C. § 1472(c)	2A5.2
49 U.S.C. § 1472(h)(2)	2Q1.2
49 U.S.C. § 1472(i)(1)	2A5.1
49 U.S.C. § 1472(j)	2A5.2
49 U.S.C. § 1472(k)(1)	2A5.3
49 U.S.C. § 1472(l)	2K1.5
49 U.S.C. § 1472(n)(1)	2A5.1".

Chapter 1, Part A, Subpart 4(d) is amended in the second sentence of the third paragraph by deleting "six" and inserting in lieu thereof "eight"; and in the third sentence of the third paragraph by deleting "seven through" and inserting in lieu thereof "nine and".

The Commentary to §1B1.5 captioned "Application Notes" is amended in Note 1 by deleting "2H1.1(a)(2)" and inserting in lieu thereof "2H1.1(a)(1)".

The Commentary to §2A2.1 captioned "Statutory Provisions" is amended by deleting "113(a)" and inserting in lieu thereof "113(a)(1)".

The Commentary to §2A2.2 captioned "Statutory Provisions" is amended by deleting "113(b), (c), (f)" and inserting in lieu thereof "113(a)(2), (3), (6)".

The Commentary to §2A5.1 captioned "Statutory Provisions" is amended by deleting "49 U.S.C. § 1472 (i), (n)" and inserting in lieu thereof "49 U.S.C. § 46502 (a), (b) (formerly 49 U.S.C. § 1472 (i), (n))".

The Commentary to §2A5.1 captioned "Background" is amended by deleting "49 U.S.C. § 1472(i)" and

inserting in lieu thereof "49 U.S.C. § 46502(a)", and by deleting "49 U.S.C. § 1472(n)" and inserting in lieu thereof "49 U.S.C. § 46502(b)".

The Commentary to §2A5.2 captioned "Statutory Provisions" is amended by deleting "49 U.S.C. § 1472(c), (j)" and inserting in lieu thereof "49 U.S.C. §§ 46308, 46504 (formerly 49 U.S.C. § 1472(c), (j))".

The Commentary to §2A5.2 captioned "Background" is amended by deleting "49 U.S.C. § 1472(l) and inserting in lieu thereof "49 U.S.C. § 46505".

The Commentary to §2A5.3 captioned "Statutory Provision" is amended by deleting "49 U.S.C. § 1472(k)(1)" and inserting in lieu thereof "49 U.S.C. § 46506 (formerly 49 U.S.C. § 1472(k)(1))".

The Commentary to §2A5.3 captioned "Application Notes" is amended in Note 1 by deleting "49 U.S.C. § 1472(k)(1)" and inserting in lieu thereof "49 U.S.C. § 46506".

The Commentary to 2C1.2 captioned "Background" is amended by deleting the third sentence as follows:

> "The maximum term of imprisonment authorized by statute for these offenses is two years.".

The Commentary to 2C1.3 captioned "Background" is amended by deleting the second sentence as follows:

> "The maximum term of imprisonment authorized by statute is two years.".

Section 2D3.1 is amended in the title by deleting "Illegal Use of Registration Number to Manufacture, Distribute, Acquire, or Dispense a Controlled Substance" and inserting in lieu thereof "Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Schedule I Substances".

The Commentary to §2D3.1 captioned "Background" is amended by deleting:

> "Background: The maximum term of imprisonment authorized by statute is four years, except in a case with a prior drug-related felony where the maximum term of imprisonment authorized by statute is eight years.".

Section 2D3.2 is amended in the title by inserting "or Listed Chemicals" immediately after "Controlled Substances".

The Commentary to §2D3.2 captioned "Background" is amended by deleting:

> "Background: These offenses are misdemeanors. The maximum term of imprisonment authorized by statute is one year.".

The Commentary to §2H2.1 captioned "Statutory Provisions" is amended by deleting "1973j" and inserting in lieu thereof "1973j(a), (b)".

The Commentary to §2K1.3 captioned "Statutory Provisions" is amended by deleting "5865" and inserting in lieu thereof "5685".

Section 2K1.5 (b)(3) is amended by deleting "49 U.S.C. § 1472(l)" and inserting in lieu thereof "49 U.S.C. § 46505".

The Commentary to §2K1.5 captioned "Statutory Provision" is amended by deleting "49 U.S.C. § 1472(l)" and inserting in lieu thereof "49 U.S.C. § 46505 (formerly 49 U.S.C. § 1472(l))".

The Commentary to §2K1.5 captioned "Background" is amended by deleting "49 U.S.C. § 1472(l)(2)" and inserting in lieu thereof "49 U.S.C. § 46505(c)".

Section 2Q2.1 is amended in the title by deleting "Specially Protected Fish, Wildlife, and Plants;

Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants", and inserting in lieu thereof "Offenses Involving Fish, Wildlife, and Plants".

Section 3D1.2(d) is amended in the third paragraph by deleting the semicolon immediately following "2B2.3" and inserting in lieu thereof a comma; and by deleting "2H1.2, 2H1.3, 2H1.4,".

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in Illustration 3 by deleting "seventy-five" and inserting in lieu thereof "75"; by deleting "heroin equivalents" and inserting in lieu thereof "marihuana equivalents (using the Drug Equivalency Tables in the Commentary to §2D1.1)"; by deleting "forty-six grams of heroin" and inserting in lieu thereof "46 kilograms of marihuana"; by deleting "thirty grams of heroin" and inserting in lieu thereof "30 kilograms of marihuana; and the third count translates into 75 kilograms of marihuana"; and by deleting "151 grams of heroin" and inserting in lieu thereof "151 kilograms of marihuana".

The Commentary to §8C2.4 captioned "Application Notes" is amended by deleting:

> "5. Special instructions regarding the determination of the base fine are contained in: §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery); §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right); §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); §2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations); §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors); §2S1.1 (Laundering of Monetary Instruments); §2S1.2 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity); and §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports).",

and inserting in lieu thereof:

> "5. Special instructions regarding the determination of the base fine are contained in §§2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery); 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right); 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); 2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations); 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors); 2S1.1 (Laundering of Monetary Instruments); and 2S1.2 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity).".

This amendment makes Appendix A (Statutory Index) more comprehensive. References are added for new offenses enacted by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796; the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, Pub. L. 103-190, 107 Stat. 2266; the Food Stamp Program Improvements Act of 1994, Pub. L. 103-225, 108 Stat. 106; the Social Security Independence and Program Improvements Act of 1994, Pub. L. 103-296 108 Stat. 1464; the Domestic Chemical Diversion Act of 1993, Pub. L. 103-200, 107 Stat. 2333; and the International Parental Kidnapping Crime Act of 1993, Pub. L. 103-173, 107 Stat. 1998. In addition, the amendment conforms Appendix A to other statutory revisions; revises the titles of §§2D3.1 (Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Schedule I Substances; Attempt or Conspiracy), 2D3.2 (Regulatory Offenses Involving Controlled Substances or Listed Chemicals; Attempt or Conspiracy), and 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants) to better reflect their scope; conforms Chapter One, Part A, Subpart (4)(d), §§1B1.5 (Interpretation of References to Other Offense Guidelines), 2A5.1 (Aircraft Piracy or Attempted Aircraft Piracy), 2A5.2 (Interference with Flight Crew Member or Flight Attendant), 2A5.3 (Committing Certain Crimes Aboard Aircraft), 2H2.1 (Obstructing an Election or Registration), 2K1.3 (Unlawful Receipt, Possession,

or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2K1.5 (Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft), 3D1.2 (Groups of Closely Related Counts), the Illustrations of the Operation of the Multiple-Count Rules following §3D1.5 (Determining the Total Punishment), and §8C2.4 (Base Fine) to revisions made by guideline or statutory amendments; and deletes obsolete background commentary in §§2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), 2C1.3 (Conflict of Interest), 2D3.1, and 2D3.2. **The effective date of this amendment is November 1, 1995.**

535. Section 5G1.3 is amended by deleting:

"(c) (Policy Statement) In any other case, the sentence for the instant offense shall be imposed to run consecutively to the prior undischarged term of imprisonment to the extent necessary to achieve a reasonable incremental punishment for the instant offense.",

and inserting in lieu thereof:

"(c) (Policy Statement) In any other case, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.".

The Commentary to §5G1.3 captioned "Application Notes" is amended in Note 1 by inserting "Consecutive sentence - subsection (a) cases." immediately before "Under"; and by deleting "where the instant offense (or any part thereof)" and inserting in lieu thereof "when the instant offense".

The Commentary to §5G1.3 captioned "Application Notes" is amended by deleting:

"2. Subsection (b) (which may apply only if subsection (a) does not apply), addresses cases in which the conduct resulting in the undischarged term of imprisonment has been fully taken into account under §1B1.3 (Relevant Conduct) in determining the offense level for the instant offense. This can occur, for example, where a defendant is prosecuted in both federal and state court, or in two or more federal jurisdictions, for the same criminal conduct or for different criminal transactions that were part of the same course of conduct.

When a sentence is imposed pursuant to subsection (b), the court should adjust for any term of imprisonment already served as a result of the conduct taken into account in determining the sentence for the instant offense. Example: The defendant has been convicted of a federal offense charging the sale of 30 grams of cocaine. Under §1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of an additional 15 grams of cocaine that is part of the same course of conduct for which the defendant has been convicted and sentenced in state court (the defendant received a nine-month sentence of imprisonment, of which he has served six months at the time of sentencing on the instant federal offense). The guideline range applicable to the defendant is 10-16 months (Chapter Two offense level of 14 for sale of 45 grams of cocaine; 2-level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge, a sentence of seven months, imposed to run concurrently with the remainder of the defendant's state sentence, achieves this result. For clarity, the court should note on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guidelines because the defendant has been credited for guideline purposes under §5G1.3(b) with six months served in state custody.

3. Where the defendant is subject to an undischarged term of imprisonment in circumstances other than those set forth in subsections (a) or (b), subsection (c) applies and the court shall impose a consecutive sentence to the extent necessary to fashion a sentence resulting in a reasonable incremental punishment for the multiple offenses. In some circumstances, such incremental punishment can be achieved by the imposition of

a sentence that is concurrent with the remainder of the unexpired term of imprisonment. In such cases, a consecutive sentence is not required. To the extent practicable, the court should consider a reasonable incremental penalty to be a sentence for the instant offense that results in a combined sentence of imprisonment that approximates the total punishment that would have been imposed under §5G1.2 (Sentencing on Multiple Counts of Conviction) had all of the offenses been federal offenses for which sentences were being imposed at the same time. It is recognized that this determination frequently will require an approximation. Where the defendant is serving a term of imprisonment for a state offense, the information available may permit only a rough estimate of the total punishment that would have been imposed under the guidelines. Where the offense resulting in the undischarged term of imprisonment is a federal offense for which a guideline determination has previously been made, the task will be somewhat more straightforward, although even in such cases a precise determination may not be possible.

It is not intended that the above methodology be applied in a manner that unduly complicates or prolongs the sentencing process. Additionally, this methodology does not, itself, require the court to depart from the guideline range established for the instant federal offense. Rather, this methodology is meant to assist the court in determining the appropriate sentence (e.g., the appropriate point within the applicable guideline range, whether to order the sentence to run concurrently or consecutively to the undischarged term of imprisonment, or whether a departure is warranted). Generally, the court may achieve an appropriate sentence through its determination of an appropriate point within the applicable guideline range for the instant federal offense, combined with its determination of whether that sentence will run concurrently or consecutively to the undischarged term of imprisonment.

Illustrations of the Application of Subsection (c):

(A) The guideline range applicable to the instant federal offense is 24-30 months. The court determines that a total punishment of 36 months' imprisonment would appropriately reflect the instant federal offense and the offense resulting in the undischarged term of imprisonment. The undischarged term of imprisonment is an indeterminate sentence of imprisonment with a 60-month maximum. At the time of sentencing on the instant federal offense, the defendant has served ten months on the undischarged term of imprisonment. In this case, a sentence of 26 months' imprisonment to be served concurrently with the remainder of the undischarged term of imprisonment would (1) be within the guideline range for the instant federal offense, and (2) achieve an appropriate total punishment (36 months).

(B) The applicable guideline range for the instant federal offense is 24-30 months. The court determines that a total punishment of 36 months' imprisonment would appropriately reflect the instant federal offense and the offense resulting in the undischarged term of imprisonment. The undischarged term of imprisonment is a six-month determinate sentence. At the time of sentencing on the instant federal offense, the defendant has served three months on the undischarged term of imprisonment. In this case, a sentence of 30 months' imprisonment to be served consecutively to the undischarged term of imprisonment would (1) be within the guideline range for the instant federal offense, and (2) achieve an appropriate total punishment (36 months).

(C) The applicable guideline range for the instant federal offense is 24-30 months. The court determines that a total punishment of 60 months' imprisonment would appropriately reflect the instant federal offense and the offense resulting in the undischarged term of imprisonment. The undischarged term of imprisonment is a 12-month determinate sentence. In this case, a sentence of 30 months' imprisonment to be served consecutively to the undischarged term of imprisonment would be the greatest sentence imposable without departure for the

instant federal offense.

(D) The applicable guideline range for the instant federal offense is 24-30 months. The court determines that a total punishment of 36 months' imprisonment would appropriately reflect the instant federal offense and the offense resulting in the undischarged term of imprisonment. The undischarged term of imprisonment is an indeterminate sentence with a 60-month maximum. At the time of sentencing on the instant federal offense, the defendant has served 22 months on the undischarged term of imprisonment. In this case, a sentence of 24 months to be served concurrently with the remainder of the undischarged term of imprisonment would be the lowest sentence imposable without departure for the instant federal offense.

4. If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense should be imposed to be served consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release (in accord with the policy expressed in §§7B1.3 and 7B1.4)",

and inserting in lieu thereof:

"2. Adjusted concurrent sentence - subsection (b) cases. When a sentence is imposed pursuant to subsection (b), the court should adjust the sentence for any period of imprisonment already served as a result of the conduct taken into account in determining the guideline range for the instant offense if the court determines that period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons. Example: The defendant is convicted of a federal offense charging the sale of 30 grams of cocaine. Under §1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 10-16 months (Chapter Two offense level of 14 for sale of 45 grams of cocaine; 2-level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result. For clarity, the court should note on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guideline range because the defendant has been credited for guideline purposes under §5G1.3(b) with six months served in state custody that will not be credited to the federal sentence under 18 U.S.C. § 3585(b).

3. Concurrent or consecutive sentence - subsection (c) cases. In circumstances not covered under subsection (a) or (b), subsection (c) applies. Under this subsection, the court may impose a sentence concurrently, partially concurrently, or consecutively. To achieve a reasonable punishment and avoid unwarranted disparity, the court should consider the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a)) and be cognizant of:

(a) the type (e.g., determinate, indeterminate/parolable) and length of the prior undischarged sentence;

(b) the time served on the undischarged sentence and the time likely to be served before release;

(c) the fact that the prior undischarged sentence may have been imposed in state

court rather than federal court, or at a different time before the same or different federal court; and

(d) any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

4. Partially concurrent sentence. In some cases under subsection (c), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence (A) when the defendant is released from the prior undischarged sentence, or (B) on a specified date, whichever is earlier. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.

5. Complex situations. Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (c) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

6. Revocations. If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense should be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release. See §7B1.3 (Revocation of Probation or Supervised Release) (setting forth a policy that any imprisonment penalty imposed for violating probation or supervised release should be consecutive to any sentence of imprisonment being served or subsequently imposed).".

The Commentary to §5G1.3 captioned "Background" is amended by deleting:

"This guideline provides direction to the court when a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment. See 18 U.S.C. § 3584. Except in the cases in which subsection (a) applies, this guideline is intended to result in an appropriate incremental punishment for the instant offense that most nearly approximates the sentence that would have been imposed had all the sentences been imposed at the same time.",

and inserting in lieu thereof:

"In a case in which a defendant is subject to an undischarged sentence of imprisonment, the court generally has authority to impose an imprisonment sentence on the current offense to run concurrently with or consecutively to the prior undischarged term. 18 U.S.C. § 3584(a). Exercise of that authority, however, is predicated on the court's consideration of the factors listed in 18 U.S.C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission.".

This is a two-part amendment. First, this amendment clarifies the application of subsections (a) and (b) of this guideline. Second, in circumstances covered by the policy statement in subsection (c), this amendment affords the sentencing court additional flexibility to impose, as appropriate, a consecutive, concurrent, or partially concurrent sentence in order to achieve a reasonable punishment for the instant offense.

Authority to impose a partially concurrent sentence is found in the Sentencing Reform Act of 1984 (SRA). In enacting 28 U.S.C. § 994(l)(1), Congress contemplated that 18 U.S.C. § 3584 would allow imposition of partially concurrent sentences, in addition to fully concurrent or consecutive sentences. ("It is the Committee's intent that, to the extent feasible, the sentences for each of the multiple offenses

be determined separately and the degree to which they should overlap be specified.") S. Rep. No. 225, 98th Cong., 1st Sess. 177 (1983). Without the ability to fashion such a sentence, the instruction to the Commission in 28 U.S.C. § 994(l)(1) to provide a reasonable incremental penalty for additional offenses could not be implemented successfully in certain situations, particularly when the defendant's release date on an undischarged term of imprisonment cannot be determined readily in advance (e.g., in the case of an indeterminate sentence subject to parole release).

Prior to the SRA, only the Bureau of Prisons had the authority to commence a federal sentence prior to the defendant's release from imprisonment on a state sentence. See, e.g., United States v. Segal, 549 F.2d 1293, 1301 (9th Cir. 1977). SRA legislative history pertaining to 18 U.S.C. § 3584 indicates that this new section was intended to authorize imposition of a federal prison sentence to run concurrently or consecutively to a state prison sentence. "This . . . [section 3584] changes the law that now applies to a person sentenced for a Federal offense who is already serving a term of imprisonment for a state offense." S. Rep. No. 225, supra at 127. "Thus, it is intended that this provision be construed contrary to the holding in United States v. Segal. . ." Id. (at 127 n.314). See United States v. Hardesty, 958 F.2d 910, 914 (stating that, under section 3584, "Congress has expressly granted federal judges the discretion to impose a sentence concurrent to a state prison term"), aff'd en banc, 977 F.2d 1347 (9th Cir. 1992). **The effective date of this amendment is November 1, 1995.**

536. Section 1B1.10(c) is amended by deleting "and 506" and inserting in lieu thereof "505, 506, and 516".

The Commentary to §1B1.10 captioned "Background" is amended in the fourth paragraph by inserting an asterisk immediately following "old guidelines"; and by inserting, as a note, following the Background Commentary:

"*So in original. Probably should be 'to fall above the amended guidelines'.".

This amendment expands the listing in §1B1.10(d) to implement the directive in 28 U.S.C. § 994(u) in respect to guideline amendments that may be considered for retroactive application. The amendment also makes an editorial addition to the Commentary to §1B1.10 (Retroactivity of Amended Guideline Range). **The effective date of this amendment is November 1, 1995.**

537. Section 2G2.1(a) is amended by deleting "25" and inserting in lieu thereof "27".

Section 2G2.1(b) is amended by deleting:

"(1) If the offense involved a minor under the age of twelve years, increase by 4 levels; otherwise, if the offense involved a minor under the age of sixteen years, increase by 2 levels.",

and inserting in lieu thereof:

"(1) If the offense involved a victim who had (A) not attained the age of twelve years, increase by 4 levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by 2 levels.".

Section 2G2.1(b) is amended by inserting after subdivision (2) the following additional subdivision:

"(3) If a computer was used to solicit participation by or with a minor in sexually explicit conduct for the purpose of producing sexually explicit material, increase by 2 levels.".

The Commentary to §2G2.1 captioned "Statutory Provisions" is amended by deleting "§ 2251(a), (b), (c)(1)(B)" and inserting in lieu thereof "§§ 2251(a), (b), (c)(1)(B), 2258(a), (b)".

Section 2G2.2(a) is amended by deleting "15" and inserting in lieu thereof "17".

Section 2G2.2(b) is amended by inserting after subdivision (4) the following additional subdivision:

"(5) If a computer was used for the transmission of the material or a notice or advertisement of the material, increase by 2 levels.".

The Commentary to §2G2.2 captioned "Statutory Provisions" is amended by inserting ", 2258(a), (b)" immediately before the period.

The Commentary to §2G2.2 captioned "Application Notes" is amended by deleting:

"1. 'Distribution,' as used in this guideline, includes any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute.

2. 'Sexually explicit conduct,' as used in this guideline, has the meaning set forth in 18 U.S.C. § 2256.",

and inserting in lieu thereof:

"1. For purposes of this guideline—

'Distribution' includes any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute.

'Pattern of activity involving the sexual abuse or exploitation of a minor' means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense, (B) involved the same or different victims, or (C) resulted in a conviction for such conduct.

'Sexual abuse or exploitation' means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor, abusive sexual contact of a minor, any similar offense under state law, or an attempt or conspiracy to commit any of the above offenses. 'Sexual abuse or exploitation' does not include trafficking in material relating to the sexual abuse or exploitation of a minor.

'Sexually explicit conduct' has the meaning set forth in 18 U.S.C. § 2256.

2. If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(4) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(4) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.

Prior convictions taken into account under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).".

The Commentary to §2G2.2 captioned "Application Notes" is amended in Note 3 by deleting "(c)(1)" and inserting in lieu thereof "subsection (c)(1)".

The Commentary to §2G2.2 captioned "Application Notes" is amended by deleting Notes 4 and 5 as follows:

"4. 'Pattern of activity involving the sexual abuse or exploitation of a minor,' for the purposes of subsection (b)(4), means any combination of two or more separate instances of the sexual abuse or the sexual exploitation of a minor, whether involving the same or different victims.

5. If the defendant sexually exploited or abused a minor at any time, whether or not such sexual abuse occurred during the course of the offense, an upward departure may be warranted. In determining the extent of such a departure, the court should take into consideration the offense levels provided in §§2A3.1, 2A3.2, and 2A3.4 most commensurate with the defendant's conduct, as well as whether the defendant has received an enhancement under subsection (b)(4) on account

of such conduct.".

Section 2G2.4(a) is amended by deleting "13" and inserting in lieu thereof "15".

Section 2G2.4(b) is amended by inserting after subdivision (2) the following additional subdivision:

"(3) If the defendant's possession of the material resulted from the defendant's use of a computer, increase by 2 levels.".

This is a four-part amendment. First, the amendment implements the congressional directives in section 2 of the Sex Crimes Against Children Prevention Act of 1995, Pub. L. 104-71, 109 Stat. 774, by providing a two-level enhancement above the currently prescribed offense level for offenses involving the sexual exploitation of minors. The two-level enhancement is provided in the base offense levels under §§2G2.1, 2G2.2, and 2G2.4.

Second, the amendment implements the congressional directive in section 3 of the above-noted Act by providing a two-level enhancement for offenses involving the sexual exploitation of a minor if a computer was used to transmit certain notices or advertisements of material involving minors engaged in sexually explicit conduct or to transport or ship that material. The enhancement in §2G2.2(b)(5) applies to the transmission of the material or of the notice or advertisement of the material. The enhancement in §2G2.4(b)(3) applies only if the defendant's possession of the material resulted from the defendant's use of a computer. In addition to these congressionally directed enhancements, the amendment adds a two-level enhancement under §2G2.1(b)(3) if a computer was used to solicit participation in sexually explicit conduct by or with a minor for the purpose of producing sexually explicit material.

Third, the amendment revises the Commentary to §2G2.2 to consolidate the definitions applicable to this guideline in the first application note and address several additional issues. The amendment revises the definition of "pattern of activity involving the sexual abuse or exploitation of a minor" to clarify that "sexual abuse or exploitation," for purposes of §2G2.2(b)(4), requires that the defendant personally had participated in such conduct. The amendment defines "sexual abuse or exploitation" to mean conduct constituting criminal sexual abuse, sexual exploitation, or abusive sexual contact and to exclude trafficking in child pornography. These revisions are consistent with United States v. Chapman, 60 F.3d 894 (1st Cir. 1995) and United States v. Ketcham, 80 F.3d 789 (3d Cir. 1996), both of which held that the defendant's transportation or distribution of child pornography is not sexual exploitation within the meaning of the "pattern of activity" enhancement in §2G2.2(b)(4). In addition, the amendment clarifies that the "pattern of activity" may include acts of sexual abuse or exploitation that were not committed during the course of the offense or that did not result in a conviction. This revision responds in part to the holding in Chapman, 60 F.3d at 901, that the "pattern of activity" enhancement is inapplicable to past sexual abuse or exploitation unrelated to the offense of conviction. The amended language expressly provides that such conduct may be considered. Accordingly, the conduct considered for purposes of the "pattern of activity" enhancement is broader than the scope of relevant conduct typically considered under §1B1.3 (Relevant Conduct). In addition, the amendment provides that an upward departure may be warranted if the defendant (1) did not engage in a "pattern of activity" but nevertheless abused a minor at any time, or (2) engaged in a "pattern of activity" but the enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation. In addition, the amendment clarifies that prior convictions counted as part of the "pattern of activity" also may be counted as part of the defendant's criminal history under Chapter Four, if those convictions meet the criteria set forth in the relevant guidelines of that chapter.

Fourth, the amendment makes the "Statutory Provisions" in the Commentary to §§2G2.1 and 2G2.2 more comprehensive by adding 18 U.S.C. § 2258(a) and (b) to the list of statutory provisions covered by those guidelines. **The effective date of this amendment is November 1, 1996.**

538. Sections 2G1.1 and 2G1.2 are deleted in their entirety as follows:

"§2G1.1. Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct

(a) Base Offense Level: 14

(b) Specific Offense Characteristic

(1) If the offense involved the use of physical force, or coercion by threats or drugs or in any manner, increase by 4 levels.

(c) Special Instruction

(1) If the offense involved the transportation of more than one person, Chapter Three, Part D (Multiple Counts) shall be applied as if the transportation of each person had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 8 U.S.C. § 1328; 18 U.S.C. §§ 2421, 2422.

Application Notes:

1. The base offense level assumes that the offense was committed for profit. In the infrequent case where the defendant did not commit the offense for profit and the offense did not involve physical force or coercion, the Commission recommends a downward departure of 8 levels.

2. The enhancement for physical force, or coercion, anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures).

3. 'Coercion,' as used in this guideline, includes any form of conduct that negates the voluntariness of the behavior of the person transported. This factor would apply, for example, where the ability of the person being transported to appraise or control conduct was substantially impaired by drugs or alcohol. In the case of transportation involving an adult, rather than a minor, this characteristic generally will not apply where the alcohol or drug was voluntarily taken.

4. For the purposes of §3B1.1 (Aggravating Role), the persons transported are considered participants only if they assisted in the unlawful transportation of others.

5. For the purposes of Chapter Three, Part D (Multiple Counts), each person transported is to be treated as a separate victim. Consequently, multiple counts involving the transportation of different persons are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one person being transported, whether specifically cited in the count of conviction or not, each such person shall be treated as if contained in a separate count of conviction.

§2G1.2. Transportation of a Minor for the Purpose of Prostitution or Prohibited Sexual Conduct

(a) Base Offense Level: 16

(b) Specific Offense Characteristics

(1) If the offense involved the use of physical force, or coercion by threats or drugs or in any manner, increase by 4 levels.

(2) If the offense involved the transportation of a minor under the age of twelve years, increase by 4 levels.

(3) If the offense involved the transportation of a minor at least twelve years of age but under the age of sixteen years, increase by 2 levels.

(4) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(c) Cross References

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production).

(2) If the offense involved criminal sexual abuse, attempted criminal sexual abuse, or assault with intent to commit criminal sexual abuse, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(3) If neither subsection (c)(1) nor (c)(2) is applicable, and the offense did not involve transportation for the purpose of prostitution, apply §2A3.2 (Criminal Sexual Abuse of a Minor or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), as appropriate.

(d) Special Instruction

(1) If the offense involved the transportation of more than one person, Chapter Three, Part D (Multiple Counts) shall be applied as if the transportation of each person had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 8 U.S.C. § 1328; 18 U.S.C. §§ 2421, 2422, 2423.

Application Notes:

1. For the purposes of Chapter Three, Part D (Multiple Counts), each person transported is to be treated as a separate victim. Consequently, multiple counts involving the transportation of different persons are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). Special instruction (d)(1) directs that if the relevant conduct of an offense of conviction includes more than one person being transported, whether specifically cited in the count of conviction or not, each such person shall be treated as if contained in a separate count of conviction.

2. The enhancement for physical force, or coercion, anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures).

3. 'Coercion,' as used in this guideline, includes any form of conduct that negates the voluntariness of the behavior of the person transported. This factor would apply, for example, where the ability of the person being transported to appraise or control conduct was substantially impaired by drugs or alcohol.

4. 'Sexually explicit conduct,' as used in this guideline, has the meaning set forth in 18 U.S.C. § 2256.

5. Subsection (b)(4) is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care

providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the child and not simply to the legal status of the defendant-child relationship.

6. If the adjustment in subsection (b)(4) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

7. The cross reference in subsection (c)(1) is to be construed broadly to include all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.".

A replacement guideline with accompanying commentary is inserted as §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct).

Chapter 1, Part A, Subpart 4(b) is amended in the fourth paragraph by deleting:

"For example, the Commentary to §2G1.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) recommends a downward departure of eight levels where a commercial purpose was not involved.".

Section 3D1.2(d) is amended in the third paragraph by deleting "2G1.2,".

This is a three-part amendment. First, this amendment consolidates §§2G1.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) and 2G1.2 (Transportation of a Minor for the Purpose of Prostitution or Prohibited Sexual Conduct) in furtherance of the Commission's goal of simplifying the operation of the guidelines. The enhancement pertaining to the age of the victim in subsection (b)(2) is increased by two levels to reflect the two-level higher base offense level of former §2G1.2. The consolidated offense guideline incorporates the cross references of §2G1.2, provides a definition of the term "victim," and clarifies that the guideline covers offenses under 18 U.S.C. § 2423(a), but not 18 U.S.C. § 2423(b) (a statutory provision referenced in Appendix A to §§2A3.1, 2A3.2, and 2A3.3).

Second, this amendment implements the congressional directive in section 4 of the Sex Crimes Against Children Prevention Act of 1995, Pub. L. 104-71, 109 Stat. 774, by providing a three-level increase in the enhancement for offenses involving the transportation of minors with intent to engage in prostitution or other prohibited sexual conduct. This three-level increase is provided in the specific offense characteristic pertaining to the age of the victim in subsection (b)(2) and is in addition to the two-level increase in this enhancement described in the first part of this amendment.

Third, this amendment addresses 18 U.S.C. § 2422(b), a new offense created by section 508 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56. That offense makes it unlawful, in interstate or foreign commerce, including through the mail, or within the special maritime or territorial jurisdiction of the United States, to knowingly persuade, induce, entice, or coerce an individual under the age of 18 years to engage in prostitution or other prohibited sexual conduct. The amendment brings this new offense within the scope of the consolidated guideline. As revised, the guideline is broadly applicable to offenses that involve "promoting prostitution or prohibited sexual conduct." That term is defined to encompass conduct covered by the new Telecommunications Act offense as well as conduct previously covered by the guideline; i.e., transporting a person, or inducing a person to travel, for the purpose of prostitution or other prohibited sexual conduct. **The effective date of this amendment is November 1, 1996.**

539. Section 3A1.4 is amended in the title by deleting "International".

Section 3A1.4(a) is amended by deleting "international" and inserting in lieu thereof "a federal crime of".

The Commentary to §3A1.4 captioned "Application Notes" is amended in Note 1 in the first sentence

by deleting "international" and inserting in lieu thereof "a federal crime of"; and in the second sentence by deleting "International" and inserting in lieu thereof "Federal crime of", and by deleting "2331" and inserting in lieu thereof "2332b(g)".

This amendment implements section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1303. That section requires the Commission to amend the sentencing guidelines so that the adjustment in §3A1.4 (relating to international terrorism) applies more broadly to a "Federal crime of terrorism," as defined in 18 U.S.C. § 2332b(g), and provides that the Commission shall have the authority to promulgate this amendment as an emergency amendment under procedures set forth in section 21(a) of the Sentencing Act of 1987. **The effective date of this amendment is November 1, 1996.**

540. Appendix A (Statutory Index) is amended by inserting at the appropriate place by title and section:

"8 U.S.C. § 1255a(c)(6)	2L2.1, 2L2.2",
"16 U.S.C. § 1372	2Q2.1",
"16 U.S.C. § 1387	2Q2.1",
"18 U.S.C. § 474A	2B5.1, 2F1.1",
"18 U.S.C. § 842(l)-(o)	2K1.3",
"18 U.S.C. § 844(b)	2K1.1",
"18 U.S.C. § 844(g)	2K1.3",
"18 U.S.C. § 844(n)	2X1.1",
"18 U.S.C. § 844(o)	2K2.4",
"18 U.S.C. § 956	2A1.5, 2X1.1",
"18 U.S.C. § 1073	2J1.5, 2J1.6",
"18 U.S.C. § 2319A	2B5.3",
"21 U.S.C. § 843(a)(4)(A)	2D1.13",
"26 U.S.C. § 7212(b)	2B1.1, 2B2.1, 2B3.1",
"41 U.S.C. § 423(e)	2C1.1, 2C1.7, 2F1.1",
"49 U.S.C. § 11902	2B4.1",
"49 U.S.C. § 11903	2F1.1",
"49 U.S.C. § 14904	2B4.1",
"49 U.S.C. § 14103(b)	2B1.1",
"49 U.S.C. § 14905(b)	2B1.1",
"49 U.S.C. § 14909	2J1.1",
"49 U.S.C. § 14912	2F1.1",
"49 U.S.C. § 16102	2F1.1",
"49 U.S.C. § 16104	2J1.1".

Appendix A (Statutory Index) is amended in the line referenced to 8 U.S.C. § 1328, by deleting ", 2G1.2";

in the line referenced to 18 U.S.C. § 32(a),(b) by inserting ", 2X1.1" immediately following "2K1.4";

in the line referenced to 18 U.S.C. § 37 by inserting ", 2X1.1" immediately following "2K1.4";

in the line referenced to 18 U.S.C. § 115(a) by inserting ", 2X1.1" immediately following "2A6.1";

in the line referenced to 18 U.S.C. § 115(b)(2) by inserting ", 2X1.1" immediately following "2A4.1";

in the line referenced to 18 U.S.C. § 115 (b)(3) by inserting ", 2X1.1" immediately following "2A2.1";

in the line referenced to 18 U.S.C. § 491 by inserting "2B5.1," immediately before "2F1.1";

in the line referenced to 18 U.S.C. § 752 by inserting ", 2X3.1" immediately following "2P1.1";

in the line referenced to 18 U.S.C. § 1203 by inserting ", 2X1.1" immediately following "2A4.1";

in the line referenced to 18 U.S.C. § 2280 by inserting ", 2X1.1" immediately following "2K1.4";

in the line referenced to 18 U.S.C. § 2281 by inserting ", 2X1.1" immediately following "2K1.4";

in the line referenced to 18 U.S.C. § 2421, by deleting ", 2G1.2";

in the line referenced to 18 U.S.C. § 2422, by deleting ", 2G1.2";

in the line referenced to 18 U.S.C. § 2423(a), by deleting "2G1.2" and inserting in lieu thereof "2G1.1";

by deleting:

"42 U.S.C. § 7413	2Q1.2, 2Q1.3",

and inserting in lieu thereof:

"42 U.S.C. § 7413(c)(1)-(4)	2Q1.2, 2Q1.3
42 U.S.C. § 7413(c)(5)	2Q1.1";

in the line referenced to 49 U.S.C. § 11904 by deleting "2B4.1" and inserting in lieu thereof "2F1.1 (2B4.1 for offenses committed prior to January 1, 1996)";

in the line referenced to 49 U.S.C. § 11907(a) by inserting "(for offenses committed prior to January 1, 1996)" immediately following "2B4.1";

in the line referenced to 49 U.S.C. § 11907(b) by inserting "(for offenses committed prior to January 1, 1996)" immediately following "2B4.1"; and

in the line referenced to 49 U.S.C. § 46502(a),(b) by inserting ", 2X1.1" immediately following "2A5.1".

The Commentary to §3B1.4 captioned "Application Notes" is amended in Note 1 by deleting "processing" and inserting in lieu thereof "procuring".

The Commentary to §5C1.2 captioned "Application Notes" is amended in Note 6 in the second sentence by deleting "a ‘organizer," and inserting in lieu thereof "an ‘organizer,".

This amendment makes Appendix A (Statutory Index) more comprehensive. References are added for additional offenses, including offenses enacted by the Marine Mammal Protection Act Amendments of 1994, Pub. L. 103-238, 108 Stat. 532; the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803; the National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106, 110 Stat. 186; and the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214. In addition, this amendment revises Appendix A to conform to the revision of existing statutes and reflect the consolidation of §§2G1.1 and 2G1.2. Finally, this amendment corrects clerical errors in §§3B1.4 and 5C1.2. **The effective date of this amendment is November 1, 1996.**

541. Section 2D1.11(d) is amended by deleting:

"(1)	List I Chemicals 17.8 KG or more of Benzaldehyde; 20 KG or more of Benzyl Cyanide; 20 KG or more of Ephedrine; 200 G or more of Ergonovine; 400 G or more of Ergotamine; 20 KG or more of Ethylamine; 44 KG or more of Hydriodic Acid; 320 KG or more of Isoafrole; 4 KG or more of Methylamine; 500 KG or more of N-Methylephedrine;	Level 28

500 KG or more of N-Methylpseudoephedrine;
12.6 KG or more of Nitroethane;
200 KG or more of Norpseudoephedrine;
20 KG or more of Phenylacetic Acid;
200 KG or more of Phenylpropanolamine;
10 KG or more of Piperidine;
320 KG or more of Piperonal;
1.6 KG or more of Propionic Anhydride;
20 KG or more of Pseudoephedrine;
320 KG or more of Safrole;
400 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
11 KG or more of Acetic Anhydride;
1175 KG or more of Acetone;
20 KG or more of Benzyl Chloride;
1075 KG or more of Ethyl Ether;
1200 KG or more of Methyl Ethyl Ketone;
10 KG or more of Potassium Permanganate;
1300 KG or more of Toluene.

(2) List I Chemicals — Level 26
At least 5.3 KG but less than 17.8 KG of Benzaldehyde;
At least 6 KG but less than 20 KG of Benzyl Cyanide;
At least 6 KG but less than 20 KG of Ephedrine;
At least 60 G but less than 200 G of Ergonovine;
At least 120 G but less than 400 G of Ergotamine;
At least 6 KG but less than 20 KG of Ethylamine;
At least 13.2 KG but less than 44 KG of Hydriodic Acid;
At least 96 KG but less than 320 KG of Isoafrole;
At least 1.2 KG but less than 4 KG of Methylamine;
At least 150 KG but less than 500 KG of N-Methylephedrine;
At least 150 KG but less than 500 KG of N-Methylpseudoephedrine;
At least 3.8 KG but less than 12.6 KG of Nitroethane;
At least 60 KG but less than 200 KG of Norpseudoephedrine;
At least 6 KG but less than 20 KG of Phenylacetic Acid;
At least 60 KG but less than 200 KG of Phenylpropanolamine;
At least 3 KG but less than 10 KG of Piperidine;
At least 96 KG but less than 320 KG of Piperonal;
At least 480 G but less than 1.6 KG of Propionic Anhydride;
At least 6 KG but less than 20 KG of Pseudoephedrine;
At least 96 KG but less than 320 KG of Safrole;
At least 120 KG but less than 400 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 3.3 KG but less than 11 KG of Acetic Anhydride;
At least 352.5 KG but less than 1175 KG of Acetone;
At least 6 KG but less than 20 KG of Benzyl Chloride;
At least 322.5 KG but less than 1075 KG of Ethyl Ether;
At least 360 KG but less than 1200 KG of Methyl Ethyl Ketone;
At least 3 KG but less than 10 KG of Potassium Permanganate;
At least 390 KG but less than 1300 KG of Toluene.

(3) List I Chemicals — Level 24
At least 1.8 KG but less than 5.3 KG of Benzaldehyde;
At least 2 KG but less than 6 KG of Benzyl Cyanide;
At least 2 KG but less than 6 KG of Ephedrine;
At least 20 G but less than 60 G of Ergonovine;
At least 40 G but less than 120 G of Ergotamine;

At least 2 KG but less than 6 KG of Ethylamine;
At least 4.4 KG but less than 13.2 KG of Hydriodic Acid;
At least 32 KG but less than 96 KG of Isoafrole;
At least 400 G but less than 1.2 KG of Methylamine;
At least 50 KG but less than 150 KG of N-Methylephedrine;
At least 50 KG but less than 150 KG of N-Methylpseudoephedrine;
At least 1.3 KG but less than 3.8 KG of Nitroethane;
At least 20 KG but less than 60 KG of Norpseudoephedrine;
At least 2 KG but less than 6 KG of Phenylacetic Acid;
At least 20 KG but less than 60 KG of Phenylpropanolamine;
At least 1 KG but less than 3 KG of Piperidine;
At least 32 KG but less than 96 KG of Piperonal;
At least 160 G but less than 480 G of Propionic Anhydride;
At least 2 KG but less than 6 KG of Pseudoephedrine;
At least 32 KG but less than 96 KG of Safrole;
At least 40 KG but less than 120 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 1.1 KG but less than 3.3 KG of Acetic Anhydride;
At least 117.5 KG but less than 352.5 KG of Acetone;
At least 2 KG but less than 6 KG of Benzyl Chloride;
At least 107.5 KG but less than 322.5 KG of Ethyl Ether;
At least 120 KG but less than 360 KG of Methyl Ethyl Ketone;
At least 1 KG but less than 3 KG of Potassium Permanganate;
At least 130 KG but less than 390 KG of Toluene.

(4) List I Chemicals — Level 22

At least 1.2 KG but less than 1.8 KG of Benzaldehyde;
At least 1.4 KG but less than 2 KG of Benzyl Cyanide;
At least 1.4 KG but less than 2 KG of Ephedrine;
At least 14 G but less than 20 G of Ergonovine;
At least 28 G but less than 40 G of Ergotamine;
At least 1.4 KG but less than 2 KG of Ethylamine;
At least 3.08 KG but less than 4.4 KG of Hydriodic Acid;
At least 22.4 KG but less than 32 KG of Isoafrole;
At least 280 G but less than 400 G of Methylamine;
At least 35 KG but less than 50 KG of N-Methylephedrine;
At least 35 KG but less than 50 KG of N-Methylpseudoephedrine;
At least 879 G but less than 1.3 KG of Nitroethane;
At least 14 KG but less than 20 KG of Norpseudoephedrine;
At least 1.4 KG but less than 2 KG of Phenylacetic Acid;
At least 14 KG but less than 20 KG of Phenylpropanolamine;
At least 700 G but less than 1 KG of Piperidine;
At least 22.4 KG but less than 32 KG of Piperonal;
At least 112 G but less than 160 G of Propionic Anhydride;
At least 1.4 KG but less than 2 KG of Pseudoephedrine;
At least 22.4 KG but less than 32 KG of Safrole;
At least 28 KG but less than 40 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 726 G but less than 1.1 KG of Acetic Anhydride;
At least 82.25 KG but less than 117.5 KG of Acetone;
At least 1.4 KG but less than 2 KG of Benzyl Chloride;
At least 75.25 KG but less than 107.5 KG of Ethyl Ether;
At least 84 KG but less than 120 KG of Methyl Ethyl Ketone;
At least 700 G but less than 1 KG of Potassium Permanganate;
At least 91 KG but less than 130 KG of Toluene.

(5) List I Chemicals — Level 20

At least 712 G but less than 1.2 KG of Benzaldehyde;
At least 800 G but less than 1.4 KG of Benzyl Cyanide;
At least 800 G but less than 1.4 KG of Ephedrine;
At least 8 G but less than 14 G of Ergonovine;
At least 16 G but less than 28 G of Ergotamine;
At least 800 G but less than 1.4 KG of Ethylamine;
At least 1.76 KG but less than 3.08 KG of Hydriodic Acid;
At least 12.8 KG but less than 22.4 KG of Isoafrole;
At least 160 G but less than 280 G of Methylamine;
At least 20 KG but less than 35 KG of N-Methylephedrine;
At least 20 KG but less than 35 KG of N-Methylpseudoephedrine;
At least 503 G but less than 879 G of Nitroethane;
At least 8 KG but less than 14 KG of Norpseudoephedrine;
At least 800 G but less than 1.4 KG of Phenylacetic Acid;
At least 8 KG but less than 14 KG of Phenylpropanolamine;
At least 400 G but less than 700 G of Piperidine;
At least 12.8 KG but less than 22.4 KG of Piperonal;
At least 64 G but less than 112 G of Propionic Anhydride;
At least 800 G but less than 1.4 KG of Pseudoephedrine;
At least 12.8 KG but less than 22.4 KG of Safrole;
At least 16 KG but less than 28 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 440 G but less than 726 G of Acetic Anhydride;
At least 47 KG but less than 82.25 KG of Acetone;
At least 800 G but less than 1.4 KG of Benzyl Chloride;
At least 43 KG but less than 75.25 KG of Ethyl Ether;
At least 48 KG but less than 84 KG of Methyl Ethyl Ketone;
At least 400 G but less than 700 G of Potassium Permanganate;
At least 52 KG but less than 91 KG of Toluene.

(6) List I Chemicals Level 18
At least 178 G but less than 712 G of Benzaldehyde;
At least 200 G but less than 800 G of Benzyl Cyanide;
At least 200 G but less than 800 G of Ephedrine;
At least 2 G but less than 8 G of Ergonovine;
At least 4 G but less than 16 G of Ergotamine;
At least 200 G but less than 800 G of Ethylamine;
At least 440 G but less than 1.76 KG of Hydriodic Acid;
At least 3.2 KG but less than 12.8 KG of Isoafrole;
At least 40 G but less than 160 G of Methylamine;
At least 5 KG but less than 20 KG of N-Methylephedrine;
At least 5 KG but less than 20 KG of N-Methylpseudoephedrine;
At least 126 G but less than 503 G of Nitroethane;
At least 2 KG but less than 8 KG of Norpseudoephedrine;
At least 200 G but less than 800 G of Phenylacetic Acid;
At least 2 KG but less than 8 KG of Phenylpropanolamine;
At least 100 G but less than 400 G of Piperidine;
At least 3.2 KG but less than 12.8 KG of Piperonal;
At least 16 G but less than 64 G of Propionic Anhydride;
At least 200 G but less than 800 G of Pseudoephedrine;
At least 3.2 KG but less than 12.8 KG of Safrole;
At least 4 KG but less than 16 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 110 G but less than 440 G of Acetic Anhydride;
At least 11.75 KG but less than 47 KG of Acetone;
At least 200 G but less than 800 G of Benzyl Chloride;
At least 10.75 KG but less than 43 KG of Ethyl Ether;

At least 12 KG but less than 48 KG of Methyl Ethyl Ketone;
At least 100 G but less than 400 G of Potassium Permanganate;
At least 13 KG but less than 52 KG of Toluene.

(7) List I Chemicals — Level 16

At least 142 G but less than 178 G of Benzaldehyde;
At least 160 G but less than 200 G of Benzyl Cyanide;
At least 160 G but less than 200 G of Ephedrine;
At least 1.6 G but less than 2 G of Ergonovine;
At least 3.2 G but less than 4 G of Ergotamine;
At least 160 G but less than 200 G of Ethylamine;
At least 352 G but less than 440 G of Hydriodic Acid;
At least 2.56 KG but less than 3.2 KG of Isoafrole;
At least 32 G but less than 40 G of Methylamine;
At least 4 KG but less than 5 KG of N-Methylephedrine;
At least 4 KG but less than 5 KG of N-Methylpseudoephedrine;
At least 100 G but less than 126 G of Nitroethane;
At least 1.6 KG but less than 2 KG of Norpseudoephedrine;
At least 160 G but less than 200 G of Phenylacetic Acid;
At least 1.6 KG but less than 2 KG of Phenylpropanolamine;
At least 80 G but less than 100 G of Piperidine;
At least 2.56 KG but less than 3.2 KG of Piperonal;
At least 12.8 G but less than 16 G of Propionic Anhydride;
At least 160 G but less than 200 G of Pseudoephedrine;
At least 2.56 KG but less than 3.2 KG of Safrole;
At least 3.2 KG but less than 4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 88 G but less than 110 G of Acetic Anhydride;
At least 9.4 KG but less than 11.75 KG of Acetone;
At least 160 G but less than 200 G of Benzyl Chloride;
At least 8.6 KG but less than 10.75 KG of Ethyl Ether;
At least 9.6 KG but less than 12 KG of Methyl Ethyl Ketone;
At least 80 G but less than 100 G of Potassium Permanganate;
At least 10.4 KG but less than 13 KG of Toluene.

(8) List I Chemicals — Level 14

3.6 KG or more of Anthranilic Acid;
At least 107 G but less than 142 G of Benzaldehyde;
At least 120 G but less than 160 G of Benzyl Cyanide;
At least 120 G but less than 160 G of Ephedrine;
At least 1.2 G but less than 1.6 G of Ergonovine;
At least 2.4 G but less than 3.2 G of Ergotamine;
At least 120 G but less than 160 G of Ethylamine;
At least 264 G but less than 352 G of Hydriodic Acid;
At least 1.92 KG but less than 2.56 KG of Isoafrole;
At least 24 G but less than 32 G of Methylamine;
4.8 KG or more of N-Acetylanthranilic Acid;
At least 3 KG but less than 4 KG of N-Methylephedrine;
At least 3 KG but less than 4 KG of N-Methylpseudoephedrine;
At least 75 G but less than 100 G of Nitroethane;
At least 1.2 KG but less than 1.6 KG of Norpseudoephedrine;
At least 120 G but less than 160 G of Phenylacetic Acid;
At least 1.2 KG but less than 1.6 KG of Phenylpropanolamine;
At least 60 G but less than 80 G of Piperidine;
At least 1.92 KG but less than 2.56 KG of Piperonal;
At least 9.6 G but less than 12.8 G of Propionic Anhydride;
At least 120 G but less than 160 G of Pseudoephedrine;
At least 1.92 KG but less than 2.56 KG of Safrole;

At least 2.4 KG but less than 3.2 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 66 G but less than 88 G of Acetic Anhydride;
At least 7.05 KG but less than 9.4 KG of Acetone;
At least 120 G but less than 160 G of Benzyl Chloride;
At least 6.45 KG but less than 8.6 KG of Ethyl Ether;
At least 7.2 KG but less than 9.6 KG of Methyl Ethyl Ketone;
At least 60 G but less than 80 G of Potassium Permanganate;
At least 7.8 KG but less than 10.4 KG of Toluene.

(9) List I Chemicals — Level 12
Less than 3.6 KG of Anthranilic Acid;
Less than 107 G of Benzaldehyde;
Less than 120 G of Benzyl Cyanide;
Less than 120 G of Ephedrine;
Less than 1.2 G of Ergonovine;
Less than 2.4 G of Ergotamine;
Less than 120 G of Ethylamine;
Less than 264 G of Hydriodic Acid;
Less than 1.92 KG of Isoafrole;
Less than 24 G of Methylamine;
Less than 4.8 KG of N-Acetylanthranilic Acid;
Less than 3 KG of N-Methylephedrine;
Less than 3 KG of N-Methylpseudoephedrine;
Less than 75 G of Nitroethane;
Less than 1.2 KG of Norpseudoephedrine;
Less than 120 G of Phenylacetic Acid;
Less than 1.2 KG of Phenylpropanolamine;
Less than 60 G of Piperidine;
Less than 1.92 KG of Piperonal;
Less than 9.6 G of Propionic Anhydride;
Less than 120 G of Pseudoephedrine;
Less than 1.92 KG of Safrole;
Less than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
Less than 66 G of Acetic Anhydride;
Less than 7.05 KG of Acetone;
Less than 120 G of Benzyl Chloride;
Less than 6.45 KG of Ethyl Ether;
Less than 7.2 KG of Methyl Ethyl Ketone;
Less than 60 G of Potassium Permanganate;
Less than 7.8 KG of Toluene.",

and inserting in lieu thereof:

"(1) List I Chemicals — Level 30
17.8 KG or more of Benzaldehyde;
20 KG or more of Benzyl Cyanide;
20 KG or more of Ephedrine;
200 G or more of Ergonovine;
400 G or more of Ergotamine;
20 KG or more of Ethylamine;
44 KG or more of Hydriodic Acid;
320 KG or more of Isosafrole;
4 KG or more of Methylamine;
500 KG or more of N-Methylephedrine;
500 KG or more of N-Methylpseudoephedrine;

12.6 KG or more of Nitroethane;
200 KG or more of Norpseudoephedrine;
20 KG or more of Phenylacetic Acid;
200 KG or more of Phenylpropanolamine;
10 KG or more of Piperidine;
320 KG or more of Piperonal;
1.6 KG or more of Propionic Anhydride;
20 KG or more of Pseudoephedrine;
320 KG or more of Safrole;
400 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;

(2) List I Chemicals Level 28

At least 5.3 KG but less than 17.8 KG of Benzaldehyde;
At least 6 KG but less than 20 KG of Benzyl Cyanide;
At least 6 KG but less than 20 KG of Ephedrine;
At least 60 G but less than 200 G of Ergonovine;
At least 120 G but less than 400 G of Ergotamine;
At least 6 KG but less than 20 KG of Ethylamine;
At least 13.2 KG but less than 44 KG of Hydriodic Acid;
At least 96 KG but less than 320 KG of Isosafrole;
At least 1.2 KG but less than 4 KG of Methylamine;
At least 150 KG but less than 500 KG of N-Methylephedrine;
At least 150 KG but less than 500 KG of N-Methylpseudoephedrine;
At least 3.8 KG but less than 12.6 KG of Nitroethane;
At least 60 KG but less than 200 KG of Norpseudoephedrine;
At least 6 KG but less than 20 KG of Phenylacetic Acid;
At least 60 KG but less than 200 KG of Phenylpropanolamine;
At least 3 KG but less than 10 KG of Piperidine;
At least 96 KG but less than 320 KG of Piperonal;
At least 480 G but less than 1.6 KG of Propionic Anhydride;
At least 6 KG but less than 20 KG of Pseudoephedrine;
At least 96 KG but less than 320 KG of Safrole;
At least 120 KG but less than 400 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
11 KG or more of Acetic Anhydride;
1175 KG or more of Acetone;
20 KG or more of Benzyl Chloride;
1075 KG or more of Ethyl Ether;
1200 KG or more of Methyl Ethyl Ketone;
10 KG or more of Potassium Permanganate;
1300 KG or more of Toluene.

(3) List I Chemicals Level 26

At least 1.8 KG but less than 5.3 KG of Benzaldehyde;
At least 2 KG but less than 6 KG of Benzyl Cyanide;
At least 2 KG but less than 6 KG of Ephedrine;
At least 20 G but less than 60 G of Ergonovine;
At least 40 G but less than 120 G of Ergotamine;
At least 2 KG but less than 6 KG of Ethylamine;
At least 4.4 KG but less than 13.2 KG of Hydriodic Acid;
At least 32 KG but less than 96 KG of Isosafrole;
At least 400 G but less than 1.2 KG of Methylamine;
At least 50 KG but less than 150 KG of N-Methylephedrine;
At least 50 KG but less than 150 KG of N-Methylpseudoephedrine;
At least 1.3 KG but less than 3.8 KG of Nitroethane;
At least 20 KG but less than 60 KG of Norpseudoephedrine;
At least 2 KG but less than 6 KG of Phenylacetic Acid;
At least 20 KG but less than 60 KG of Phenylpropanolamine;

At least 1 KG but less than 3 KG of Piperidine;
At least 32 KG but less than 96 KG of Piperonal;
At least 160 G but less than 480 G of Propionic Anhydride;
At least 2 KG but less than 6 KG of Pseudoephedrine;
At least 32 KG but less than 96 KG of Safrole;
At least 40 KG but less than 120 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 3.3 KG but less than 11 KG of Acetic Anhydride;
At least 352.5 KG but less than 1175 KG of Acetone;
At least 6 KG but less than 20 KG of Benzyl Chloride;
At least 322.5 KG but less than 1075 KG of Ethyl Ether;
At least 360 KG but less than 1200 KG of Methyl Ethyl Ketone;
At least 3 KG but less than 10 KG of Potassium Permanganate;
At least 390 KG but less than 1300 KG of Toluene.

(4) List I Chemicals — Level 24
At least 1.2 KG but less than 1.8 KG of Benzaldehyde;
At least 1.4 KG but less than 2 KG of Benzyl Cyanide;
At least 1.4 KG but less than 2 KG of Ephedrine;
At least 14 G but less than 20 G of Ergonovine;
At least 28 G but less than 40 G of Ergotamine;
At least 1.4 KG but less than 2 KG of Ethylamine;
At least 3.08 KG but less than 4.4 KG of Hydriodic Acid;
At least 22.4 KG but less than 32 KG of Isosafrole;
At least 280 G but less than 400 G of Methylamine;
At least 35 KG but less than 50 KG of N-Methylephedrine;
At least 35 KG but less than 50 KG of N-Methylpseudoephedrine;
At least 879 G but less than 1.3 KG of Nitroethane;
At least 14 KG but less than 20 KG of Norpseudoephedrine;
At least 1.4 KG but less than 2 KG of Phenylacetic Acid;
At least 14 KG but less than 20 KG of Phenylpropanolamine;
At least 700 G but less than 1 KG of Piperidine;
At least 22.4 KG but less than 32 KG of Piperonal;
At least 112 G but less than 160 G of Propionic Anhydride;
At least 1.4 KG but less than 2 KG of Pseudoephedrine;
At least 22.4 KG but less than 32 KG of Safrole;
At least 28 KG but less than 40 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 1.1 KG but less than 3.3 KG of Acetic Anhydride;
At least 117.5 KG but less than 352.5 KG of Acetone;
At least 2 KG but less than 6 KG of Benzyl Chloride;
At least 107.5 KG but less than 322.5 KG of Ethyl Ether;
At least 120 KG but less than 360 KG of Methyl Ethyl Ketone;
At least 1 KG but less than 3 KG of Potassium Permanganate;
At least 130 KG but less than 390 KG of Toluene.

(5) List I Chemicals — Level 22
At least 712 G but less than 1.2 KG of Benzaldehyde;
At least 800 G but less than 1.4 KG of Benzyl Cyanide;
At least 800 G but less than 1.4 KG of Ephedrine;
At least 8 G but less than 14 G of Ergonovine;
At least 16 G but less than 28 G of Ergotamine;
At least 800 G but less than 1.4 KG of Ethylamine;
At least 1.76 KG but less than 3.08 KG of Hydriodic Acid;
At least 12.8 KG but less than 22.4 KG of Isosafrole;
At least 160 G but less than 280 G of Methylamine;
At least 20 KG but less than 35 KG of N-Methylephedrine;

At least 20 KG but less than 35 KG of N-Methylpseudoephedrine;
At least 503 G but less than 879 G of Nitroethane;
At least 8 KG but less than 14 KG of Norpseudoephedrine;
At least 800 G but less than 1.4 KG of Phenylacetic Acid;
At least 8 KG but less than 14 KG of Phenylpropanolamine;
At least 400 G but less than 700 G of Piperidine;
At least 12.8 KG but less than 22.4 KG of Piperonal;
At least 64 G but less than 112 G of Propionic Anhydride;
At least 800 G but less than 1.4 KG of Pseudoephedrine;
At least 12.8 KG but less than 22.4 KG of Safrole;
At least 16 KG but less than 28 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 726 G but less than 1.1 KG of Acetic Anhydride;
At least 82.25 KG but less than 117.5 KG of Acetone;
At least 1.4 KG but less than 2 KG of Benzyl Chloride;
At least 75.25 KG but less than 107.5 KG of Ethyl Ether;
At least 84 KG but less than 120 KG of Methyl Ethyl Ketone;
At least 700 G but less than 1 KG of Potassium Permanganate;
At least 91 KG but less than 130 KG of Toluene.

(6) List I Chemicals — Level 20
At least 178 G but less than 712 G of Benzaldehyde;
At least 200 G but less than 800 G of Benzyl Cyanide;
At least 200 G but less than 800 G of Ephedrine;
At least 2 G but less than 8 G of Ergonovine;
At least 4 G but less than 16 G of Ergotamine;
At least 200 G but less than 800 G of Ethylamine;
At least 440 G but less than 1.76 KG of Hydriodic Acid;
At least 3.2 KG but less than 12.8 KG of Isosafrole;
At least 40 G but less than 160 G of Methylamine;
At least 5 KG but less than 20 KG of N-Methylephedrine;
At least 5 KG but less than 20 KG of N-Methylpseudoephedrine;
At least 126 G but less than 503 G of Nitroethane;
At least 2 KG but less than 8 KG of Norpseudoephedrine;
At least 200 G but less than 800 G of Phenylacetic Acid;
At least 2 KG but less than 8 KG of Phenylpropanolamine;
At least 100 G but less than 400 G of Piperidine;
At least 3.2 KG but less than 12.8 KG of Piperonal;
At least 16 G but less than 64 G of Propionic Anhydride;
At least 200 G but less than 800 G of Pseudoephedrine;
At least 3.2 KG but less than 12.8 KG of Safrole;
At least 4 KG but less than 16 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 440 G but less than 726 G of Acetic Anhydride;
At least 47 KG but less than 82.25 KG of Acetone;
At least 800 G but less than 1.4 KG of Benzyl Chloride;
At least 43 KG but less than 75.25 KG of Ethyl Ether;
At least 48 KG but less than 84 KG of Methyl Ethyl Ketone;
At least 400 G but less than 700 G of Potassium Permanganate;
At least 52 KG but less than 91 KG of Toluene.

(7) List I Chemicals — Level 18
At least 142 G but less than 178 G of Benzaldehyde;
At least 160 G but less than 200 G of Benzyl Cyanide;
At least 160 G but less than 200 G of Ephedrine;
At least 1.6 G but less than 2 G of Ergonovine;
At least 3.2 G but less than 4 G of Ergotamine;

At least 160 G but less than 200 G of Ethylamine;
At least 352 G but less than 440 G of Hydriodic Acid;
At least 2.56 KG but less than 3.2 KG of Isosafrole;
At least 32 G but less than 40 G of Methylamine;
At least 4 KG but less than 5 KG of N-Methylephedrine;
At least 4 KG but less than 5 KG of N-Methylpseudoephedrine;
At least 100 G but less than 126 G of Nitroethane;
At least 1.6 KG but less than 2 KG of Norpseudoephedrine;
At least 160 G but less than 200 G of Phenylacetic Acid;
At least 1.6 KG but less than 2 KG of Phenylpropanolamine;
At least 80 G but less than 100 G of Piperidine;
At least 2.56 KG but less than 3.2 KG of Piperonal;
At least 12.8 G but less than 16 G of Propionic Anhydride;
At least 160 G but less than 200 G of Pseudoephedrine;
At least 2.56 KG but less than 3.2 KG of Safrole;
At least 3.2 KG but less than 4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 110 G but less than 440 G of Acetic Anhydride;
At least 11.75 KG but less than 47 KG of Acetone;
At least 200 G but less than 800 G of Benzyl Chloride;
At least 10.75 KG but less than 43 KG of Ethyl Ether;
At least 12 KG but less than 48 KG of Methyl Ethyl Ketone;
At least 100 G but less than 400 G of Potassium Permanganate;
At least 13 KG but less than 52 KG of Toluene.

(8) List I Chemicals — Level 16
3.6 KG or more of Anthranilic Acid;
At least 107 G but less than 142 G of Benzaldehyde;
At least 120 G but less than 160 G of Benzyl Cyanide;
At least 120 G but less than 160 G of Ephedrine;
At least 1.2 G but less than 1.6 G of Ergonovine;
At least 2.4 G but less than 3.2 G of Ergotamine;
At least 120 G but less than 160 G of Ethylamine;
At least 264 G but less than 352 G of Hydriodic Acid;
At least 1.92 KG but less than 2.56 KG of Isosafrole;
At least 24 G but less than 32 G of Methylamine;
4.8 KG or more of N-Acetylanthranilic Acid;
At least 3 KG but less than 4 KG of N-Methylephedrine;
At least 3 KG but less than 4 KG of N-Methylpseudoephedrine;
At least 75 G but less than 100 G of Nitroethane;
At least 1.2 KG but less than 1.6 KG of Norpseudoephedrine;
At least 120 G but less than 160 G of Phenylacetic Acid;
At least 1.2 KG but less than 1.6 KG of Phenylpropanolamine;
At least 60 G but less than 80 G of Piperidine;
At least 1.92 KG but less than 2.56 KG of Piperonal;
At least 9.6 G but less than 12.8 G of Propionic Anhydride;
At least 120 G but less than 160 G of Pseudoephedrine;
At least 1.92 KG but less than 2.56 KG of Safrole;
At least 2.4 KG but less than 3.2 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 88 G but less than 110 G of Acetic Anhydride;
At least 9.4 KG but less than 11.75 KG of Acetone;
At least 160 G but less than 200 G of Benzyl Chloride;
At least 8.6 KG but less than 10.75 KG of Ethyl Ether;
At least 9.6 KG but less than 12 KG of Methyl Ethyl Ketone;
At least 80 G but less than 100 G of Potassium Permanganate;
At least 10.4 KG but less than 13 KG of Toluene.

(9) List I Chemicals Level 14

At least 2.7 KG but less than 3.6 KG of Anthranilic Acid;
At least 71.2 G but less than 107 G of Benzaldehyde;
At least 80 G but less than 120 G of Benzyl Cyanide;
At least 80 G but less than 120 G of Ephedrine;
At least 800 MG but less than 1.2 G of Ergonovine;
At least 1.6 G but less than 2.4 G of Ergotamine;
At least 80 G but less than 120 G of Ethylamine;
At least 176 G but less than 264 G of Hydriodic Acid;
At least 1.44 G but less than 1.92 KG of Isosafrole;
At least 16 G but less than 24 G of Methylamine;
At least 3.6 KG but less than 4.8 KG of N-Acetylanthranilic Acid;
At least 2.25 KG but less than 3 KG of N-Methylephedrine;
At least 2.25 KG but less than 3 KG of N-Methylpseudoephedrine;
At least 56.25 G but less than 75 G of Nitroethane;
At least 800 G but less than 1.2 KG of Norpseudoephedrine;
At least 80 G but less than 120 G of Phenylacetic Acid;
At least 800 G but less than 1.2 KG of Phenylpropanolamine;
At least 40 G but less than 60 G of Piperidine;
At least 1.44 KG but less than 1.92 KG of Piperonal;
At least 7.2 G but less than 9.6 G of Propionic Anhydride;
At least 80 G but less than 120 G of Pseudoephedrine;
At least 1.44 G but less than 1.92 KG of Safrole;
At least 1.8 KG but less than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 66 G but less than 88 G of Acetic Anhydride;
At least 7.05 KG but less than 9.4 KG of Acetone;
At least 120 G but less than 160 G of Benzyl Chloride;
At least 6.45 KG but less than 8.6 KG of Ethyl Ether;
At least 7.2 KG but less than 9.6 KG of Methyl Ethyl Ketone;
At least 60 G but less than 80 G of Potassium Permanganate;
At least 7.8 KG but less than 10.4 KG of Toluene.

(10) List I Chemicals Level 12

Less than 2.7 KG of Anthranilic Acid;
Less than 71.2 G of Benzaldehyde;
Less than 80 G of Benzyl Cyanide;
Less than 80 G of Ephedrine;
Less than 800 MG of Ergonovine;
Less than 1.6 G of Ergotamine;
Less than 80 G of Ethylamine;
Less than 176 G of Hydriodic Acid;
Less than 1.44 G of Isosafrole;
Less than 16 G of Methylamine;
Less than 3.6 KG of N-Acetylanthranilic Acid;
Less than 2.25 KG of N-Methylephedrine;
Less than 2.25 KG of N-Methylpseudoephedrine;
Less than 56.25 G of Nitroethane;
Less than 800 G of Norpseudoephedrine;
Less than 80 G of Phenylacetic Acid;
Less than 800 G of Phenylpropanolamine;
Less than 40 G of Piperidine;
Less than 1.44 KG of Piperonal;
Less than 7.2 G of Propionic Anhydride;
Less than 80 G of Pseudoephedrine;
Less than 1.44 G of Safrole;
Less than 1.8 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
Less than 66 G of Acetic Anhydride;
Less than 7.05 KG of Acetone;
Less than 120 G of Benzyl Chloride;
Less than 6.45 KG of Ethyl Ether;
Less than 7.2 KG of Methyl Ethyl Ketone;
Less than 60 G of Potassium Permanganate;
Less than 7.8 KG of Toluene.".

Section 2D1.11(d) is amended in Note E (List I Chemical Equivalency Table) by deleting "Isoafrole" and inserting in lieu thereof "Isosafrole".

The Commentary to §2D1.11 captioned "Application Notes" is amended in Note 4(a) in the first sentence by deleting "three kilograms" and inserting in lieu thereof "300 grams"; in the fourth sentence by deleting "24" and inserting in lieu thereof "26" and by deleting "14" and inserting in lieu thereof "16"; and in the fifth sentence by deleting "24" and inserting in lieu thereof "26".

This amendment implements section 302 of the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237, 110 Stat. 3099, which directs the Commission to increase by at least two levels the offense levels for offenses involving list I chemicals under 21 U.S.C. §§ 841(d)(1) and (2) and 960(d)(1) and (3). **The effective date of this amendment is May 1, 1997.**

542. Section 2H4.1(a) is amended by deleting "(Apply the greater):" and inserting in lieu thereof ": 22"; and by deleting subdivisions (1) and (2) as follows:

"(1) 15; or

(2) 2 plus the offense level applicable to any underlying offense.".

Section 2H4.1 is amended by inserting after subsection (a) the following additional subsection:

"(b) Specific Offense Characteristics

(1) (A) If any victim sustained permanent or life-threatening bodily injury, increase by 4 levels; or (B) if any victim sustained serious bodily injury, increase by 2 levels.

(2) If a dangerous weapon was used, increase by 2 levels.

(3) If any victim was held in a condition of peonage or involuntary servitude for (A) more than one year, increase by 3 levels; (B) between 180 days and one year, increase by 2 levels; or (C) more than 30 days but less than 180 days, increase by 1 level.

(4) If any other felony offense was committed during the commission of, or in connection with, the peonage or involuntary servitude offense, increase to the greater of:

(A) 2 plus the offense level as determined above, or

(B) 2 plus the offense level from the offense guideline applicable to that other offense, but in no event greater than level 43.".

The Commentary to §2H4.1 captioned "Statutory Provisions" is amended by inserting "241," before "1581".

The Commentary to §2H4.1 captioned "Application Note" is amended by deleting "Note" and inserting in lieu thereof "Notes"; by deleting:

"1. 'Offense level applicable to the underlying offense' is explained in the Commentary to §2H1.1.",

and inserting in lieu thereof:

"1. For purposes of this guideline—

'A dangerous weapon was used' means that a firearm was discharged, or that a firearm or dangerous weapon was otherwise used.

Definitions of 'firearm,' 'dangerous weapon,' 'otherwise used,' 'serious bodily injury,' and 'permanent or life-threatening bodily injury' are found in the Commentary to §1B1.1 (Application Instructions).";

and by inserting after Note 1the following additional notes:

"2. Under subsection (b)(4), 'any other felony offense' means any conduct that constitutes a felony offense under federal, state, or local law (other than an offense that is itself covered by this subpart). When there is more than one such other offense, the most serious such offense (or group of closely related offenses in the case of offenses that would be grouped together under §3D1.2(d)) is to be used. See Application Note 3 of §1B1.5 (Interpretation of References to other Offense Guidelines).

3. If the offense involved the holding of more than ten victims in a condition of peonage or involuntary servitude, an upward departure may be warranted.".

The Commentary to §2H4.1 captioned "Background" is deleted as follows:

"Background: This section covers statutes that prohibit peonage, involuntary servitude, and slave trade. For purposes of deterrence and just punishment, the minimum base offense level is 15. However, these offenses frequently involve other serious offenses. In such cases, the offense level will be increased under §2H4.1(a)(2).".

This amendment implements section 218 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-573, which directs the Commission to review the guideline for peonage, involuntary servitude and slave trade offenses and amend the guideline pursuant to that review. **The effective date of this amendment is May 1, 1997.**

543. Section 2L1.1(a)(1) is amended by deleting "20" and inserting in lieu thereof "23".

Section 2L1.1(a)(2) is amended by deleting "9" and inserting in lieu thereof "12".

Section 2L1.1(b) is amended by deleting:

"(1) If the defendant committed the offense other than for profit, and the base offense level is determined under subsection (a)(2), decrease by 3 levels.",

and inserting in lieu thereof:

"(1) If (A) the defendant committed the offense other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), and (B) the base offense level is determined under subsection (a)(2), decrease by 3 levels.".

Section 2L1.1(b)(2) is amended in the column captioned "Increase in Level" by deleting "2" in subdivision (A), and inserting in lieu thereof "3"; by deleting "4" in subdivision (B) and inserting in lieu thereof "6"; and by deleting in "6" subdivision (C) and inserting in lieu thereof "9".

Section 2L1.1(b) is amended by deleting:

"(3) If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily)

on one or more occasions prior to the instant offense, and the offense level determined above is less than level 8, increase to level 8.",

and by inserting in lieu thereof:

"(3) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by 2 levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by 4 levels.".

Section 2L1.1(b) is amended by inserting after subdivision (3) the following additional subdivisions:

"(4) (Apply the greatest):

(A) If a firearm was discharged, increase by 6 levels, but if the resulting offense level is less than level 22, increase to level 22.

(B) If a dangerous weapon (including a firearm) was brandished or otherwise used, increase by 4 levels, but if the resulting offense level is less than level 20, increase to level 20.

(C) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels, but if the resulting offense level is less than level 18, increase to level 18.

(5) If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by 2 levels, but if the resulting offense level is less than level 18, increase to level 18.

(6) If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury:

Death or Degree of Injury		Increase in Level
(1)	Bodily Injury	add 2 levels
(2)	Serious Bodily Injury	add 4 levels
(3)	Permanent or Life-Threatening Bodily Injury	add 6 levels
(4)	Death	add 8 levels.".

Section 2L1.1 is amended by inserting after subsection (b) the following additional subsection:

"(c) Cross Reference

If any person was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the special maritime and territorial jurisdiction of the United States, apply the appropriate murder guideline from Chapter Two, Part A, Subpart 1.".

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 1 by inserting at the beginning "For purposes of this guideline—";

by deleting:

"'For profit' means for financial gain or commercial advantage, but this definition does not include a defendant who commits the offense solely in return for his own entry or transportation.",

and inserting in lieu thereof:

"'The defendant committed the offense other than for profit' means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens."; and

by inserting at the end the following paragraphs:

"'Aggravated felony' is defined in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States).

'Child' has the meaning set forth in section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)).

'Spouse' has the meaning set forth in 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).

'Immigration and naturalization offense' means any offense covered by Chapter Two, Part L.".

The Commentary to §2L1.1 captioned "Application Notes" is amended by deleting:

"3. For the purposes of §3B1.2 (Mitigating Role), a defendant who commits the offense solely in return for his own entry or transportation is not entitled to a reduction for a minor or minimal role. This is because the reduction at §2L1.1(b)(1) applies to such a defendant.";

and by redesignating Note 4 as Note 3.

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 5 by deleting "dangerous or inhumane treatment, death or bodily injury, possession of a dangerous weapon, or" following "involved"; and by redesignating Note 5 as Note 4.

The Commentary to §2L1.1 captioned "Application Notes" is amended by deleting:

"6. 'Aggravated felony' is defined in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States).".

The Commentary to §2L1.1 captioned "Application Notes" is amended by inserting after Note 4, as redesignated, the following additional notes:

"5. Prior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

6. Reckless conduct to which the adjustment from subsection (b)(5) applies includes a wide variety of conduct (e.g., transporting persons in the trunk or engine compartment of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in a crowded, dangerous, or inhumane condition). If subsection (b)(5) applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2 (Reckless Endangerment During Flight). Additionally, do not apply the adjustment in subsection (b)(5) if the only reckless conduct that created a substantial risk of death or serious bodily injury is conduct for which the defendant received an enhancement under subsection (b)(4).".

The Commentary to §2L1.1 captioned "Background" is amended by deleting:

"A specific offense characteristic provides a reduction if the defendant did not commit the offense for profit. The offense level increases with the number of unlawful aliens smuggled, transported, or harbored.".

The Commentary to §2L1.1 captioned "Background" is amended in the last sentence by inserting

"smuggling, transporting, or harboring" immediately following "scale".

This amendment implements section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-566, which directs the Commission to amend the guidelines for offenses related to smuggling, transporting, or harboring illegal aliens. **The effective date of this amendment is May 1, 1997.**

544. Section 2L2.1(a) is amended by deleting "9" and inserting in lieu thereof "11".

Section 2L2.1(b) is amended by deleting:

"(1) If the defendant committed the offense other than for profit, decrease by 3 levels.",

and inserting in lieu thereof:

"(1) If the defendant committed the offense other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), decrease by 3 levels.".

Section 2L2.1(b)(2) is amended in the column captioned "Increase in Level" by deleting "2" in subdivision (A) and inserting in lieu thereof "3"; by deleting "4" in subdivision (B) and inserting in lieu thereof "6"; and by deleting "6" subdivision (C) and inserting in lieu thereof "9".

Section 2L2.1(b) is amended by inserting after subdivision (3) the following additional subdivision:

"(4) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by 2 levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by 4 levels.".

The Commentary to §2L2.1 captioned "Application Notes" is amended by deleting Note 1 as follows:

"1. 'For profit' means for financial gain or commercial advantage.",

and inserting in lieu thereof:

"1. For purposes of this guideline—

'The defendant committed the offense other than for profit' means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.

'Immigration and naturalization offense' means any offense covered by Chapter Two, Part L.

'Child' has the meaning set forth in section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)).

'Spouse' has the meaning set forth in section 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).".

The Commentary to §2L2.1 captioned "Application Notes" is amended by inserting after Note 3 the following additional notes:

"4. Prior felony conviction(s) resulting in an adjustment under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

5. If the offense involved substantially more than 100 documents, an upward departure may be warranted.".

Section 2L2.2(a) is amended by deleting "6" and inserting in lieu thereof “8”.

Section 2L2.2(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics"; and by inserting after subdivision (1) the following additional subdivision:

"(2) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by 2 levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by 4 levels.".

The Commentary to §2L2.2 captioned "Application Note" is amended by deleting "Note" and inserting in lieu thereof "Notes"; by redesignating Note 1 as Note 2; and by inserting the following as the new Note 1:

"1. For purposes of this guideline—

‘Immigration and naturalization offense’ means any offense covered by Chapter Two, Part L.".

The Commentary to §2L2.2 captioned "Application Notes" is amended by inserting after Note 2, as redesignated, the following additional note:

"3. Prior felony conviction(s) resulting in an adjustment under subsection (b)(2) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).".

This amendment implements section 211 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-569, which directs the Commission to amend the guidelines for offenses related to the fraudulent use of government-issued documents. **The effective date of this amendment is May 1, 1997.**

545. The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1(b) by deleting:

"As used in the guidelines, the definition of this term is somewhat different than that used in various statutes.".

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1(j) by inserting "protracted" before "impairment"; and by deleting "As used in the guidelines, the definition of this term is somewhat different than that used in various statutes." and inserting in lieu thereof "In addition, ‘serious bodily injury’ is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.".

The Commentary to §2A3.1 captioned "Application Notes" is amended in Note 1 by inserting "For purposes of this guideline—" before "‘Permanent"; and by inserting at the end the following:

"However, for purposes of this guideline, ‘serious bodily injury’ means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).

‘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 in fear that any person will be subject to death, serious bodily injury, or kidnaping; 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. 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 "Application Notes" is amended by deleting:

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

and by redesignating Notes 3, 4, 5, 6, and 7, as Notes 2, 3, 4, 5, and 6, respectively.

The Commentary to §2A4.1 captioned "Application Notes" is amended in Note 1 by inserting "For purposes of this guideline—" before "Definitions"; and by inserting at the end the following:

"However, for purposes of this guideline, 'serious bodily injury' means conduct other than criminal sexual abuse, which is taken into account in the specific offense characteristic under subsection (b)(5).".

Section 2B3.1(b)(1) is amended by deleting "(A)" following "If"; and by deleting "or (B) the offense involved carjacking," before "increase".

Section 2B3.1(b) is amended by redesignating subdivisions (5) and (6) as subdivisions (6) and (7), respectively; and by inserting after subdivision (4) the following new subdivision (5):

"(5) If the offense involved carjacking, increase by 2 levels.".

This amendment implements, in a broader form, section 2 of the Carjacking Correction Act of 1996, Pub.L. 104-217, 110 Stat. 3020. The Act amended 18 U.S.C. § 2119(2) to include aggravated sexual abuse under 18 U.S.C. § 2241 and sexual abuse under 18 U.S.C. § 2242 within the meaning of "serious bodily injury." In implementing this legislation, the Commission has elected to broaden the term "serious bodily injury," as used in a number of offense conduct guidelines, so that such injury will be deemed to have occurred in the case of a sexual assault. The amendment also makes a number of conforming changes in other guidelines. In addition, this amendment amends §2B3.1(b)(1) to provide cumulative enhancements if the offense involved both bank robbery and carjacking. **The effective date of this amendment is November 1, 1997.**

546. Section 1B1.1(b) is amended by inserting ", cross references, and special instructions" after "characteristics".

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1(l) by inserting at the end the following:

"The term 'instant' is used in connection with 'offense,' 'federal offense,' or 'offense of conviction,' as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (e.g., an offense before a state court involving the same underlying conduct).".

Section 4B1.1 is amended by deleting "of the instant offense" and inserting in lieu thereof "the defendant committed the instant offense of conviction".

Section 4B1.2(3) is amended by inserting "of conviction" before "subsequent".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 2 in the second paragraph by inserting "of conviction" after "instant offense".

The Commentary to §8A1.2 captioned "Application Notes" is amended in Note 3(a) by inserting at the end the following:

> "The term 'instant' is used in connection with 'offense,' 'federal offense,' or 'offense of conviction,' as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (e.g., an offense before a state court involving the same underlying conduct).".

This amendment has two primary purposes. First, it corrects a technical error in §1B1.1(b). Second, it explains the purpose of the term "instant" as that term is employed throughout the Guidelines Manual, as a modifier of the term "offense," "federal offense," or "offense of conviction." It also clarifies the usage of the term "instant offense of conviction" at several places in the Guidelines Manual. **The effective date of this amendment is November 1, 1997.**

547. Section §1B1.5(d) is amended by deleting "final offense level (i.e., the greater offense level taking into account both the Chapter Two offense level and any applicable Chapter Three adjustments)" and inserting in lieu thereof "Chapter Two offense level, except as otherwise expressly provided".

The Commentary to §1B1.5 captioned "Application Notes" is amended in Note 1 by deleting "§" before "2D1.2(a)(1)"; and by deleting ", (2), and 2H1.1(a)(1)" and inserting in lieu thereof "and (2))".

The Commentary to §1B1.5 captioned "Application Notes" is amended in Note 2 in the second sentence by deleting "greater final"; by deleting "(i.e., the greater offense level"; and by deleting "both" and inserting in lieu thereof "only".

The Commentary to §1B1.5 captioned "Application Notes" is amended in Note 2 by deleting:

> "and any applicable Chapter Three adjustments). Although the offense guideline that results in the greater offense level under Chapter Two will most frequently result in the greater final offense level, this will not always be the case. If, for example, a role or abuse of trust adjustment applies to the cross-referenced offense guideline, but not to the guideline initially applied, the greater Chapter Two offense level may not necessarily result in a greater final offense level.",

and inserting in lieu thereof:

> ", unless the offense guideline expressly provides for consideration of both the Chapter Two offense level and applicable Chapter Three adjustments. For situations in which a comparison involving both Chapters Two and Three is necessary, see the Commentary to §§2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe); 2C1.7 (Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials); 2E1.1 (Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations); and 2E1.2 (Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise).".

The Commentary to §2C1.1 captioned "Application Notes" is amended by inserting after Note 6 the following additional note:

> "7. For the purposes of determining whether to apply the cross references in this section, the 'resulting offense level' means the greater final offense level (i.e., the offense level determined by taking into account both the Chapter Two offense level and any applicable adjustments from Chapter Three, Parts A-D).".

The Commentary to §2C1.7 captioned "Application Notes" is amended by inserting after Note 5 the following additional note:

> "6. For the purposes of determining whether to apply the cross references in this section, the 'resulting offense level' means the greater final offense level (i.e., the offense level determined by taking into account both the Chapter Two offense level and any applicable adjustments from Chapter Three, Parts A-D).".

This amendment simplifies the guidelines by restricting the cross-reference comparison to the Chapter Two offense levels, unless a different procedure is expressly specified. With respect to §§2C1.1, 2C1.7, 2E1.1, and 2E1.2, the amendment, and an express provision in each of these guidelines, provide a different procedure because these guidelines are the only four offense guidelines in which the inclusion of Chapter Three adjustments in the comparison is likely to make a difference. **The effective date of this amendment is November 1, 1997.**

548. Section 1B1.10 is amended in the title by deleting "Retroactivity" and inserting in lieu thereof "Reduction in Term of Imprisonment as a Result".

Section 1B1.10(b) is amended by deleting "sentence" in both instances and inserting in lieu thereof "the term of imprisonment"; and by inserting ", except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served" after "sentenced".

The Commentary to §1B1.10 captioned "Application Notes" is amended by inserting after Note 2 the following additional notes:

"3. Under subsection (b), the amended guideline range and the term of imprisonment already served by the defendant limit the extent to which an eligible defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2). When the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate; however, in no case shall the term of imprisonment be reduced below time served. Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

5. If the limitation in subsection (b) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range, the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range.".

The Commentary to §1B1.10 captioned "Background" is amended in the third paragraph by inserting "to determine an amended guideline range under subsection (b)" after "retroactively"; and by inserting before the fourth paragraph the following additional paragraph:

"The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.".

This amendment makes a number of substantive and clarifying changes in the policy statement relating to retroactive application of an amendment that reduces a guideline range. The amendment provides that, in exercising discretion to reduce the term of imprisonment of an incarcerated defendant, a court may not reduce the term of imprisonment below time served (or, put differently, grant a greater reduction

in imprisonment than the imprisonment time remaining to be served). In those cases in which the combination of time already served and this limitation preclude a defendant from receiving the full reduction the court would be inclined to grant as a result of an amended guideline range, the amended commentary instructs that the court may weigh the equities of such a situation in connection with a separate motion for early termination of supervised release under 18 U.S.C. § 3583(e)(1). The amendment also makes clear that, contrary to the holding in United States v. Etherton, 101 F.3d 80 (9th Cir. 1996), a reduction in the term of imprisonment imposed upon revocation of supervised release is not authorized by the policy statement. Finally, the amendment makes a number of changes in the title and text of the policy statement to improve the precision of the language, adds commentary emphasizing court discretion in applying amendments that the Commission has listed for possible retroactive application, and adds background commentary more fully describing the legal consequences flowing from a Commission decision to list an amendment for possible retroactive application. **The effective date of this amendment is November 1, 1997.**

549. Section 2A2.2(b) is amended by inserting after subdivision (4) the following additional subdivision:

"(5) If the offense involved the violation of a court protection order, increase by 2 levels.".

Chapter Two, Part A, Subpart 6 is amended in the title by inserting "or Harassing" after "Threatening"; and by inserting ", Stalking, and Domestic Violence" after "Communications".

Section 2A6.1 is amended in the title by inserting "or Harassing" after "Threatening".

Section 2A6.1 is amended by deleting subsection (a) as follows:

"(a) Base Offense Level: 12",

and inserting in lieu thereof:

"(a) Base Offense Level:

(1) 12; or

(2) 6, if the defendant is convicted of an offense under 47 U.S.C. § 223(a)(1)(C), (D), or (E) that did not involve a threat to injure a person or property.".

Section 2A6.1(b) is amended by redesignating subdivision (2) as subdivision (4); and by inserting after subdivision (1) the following new subdivisions:

"(2) If the offense involved more than two threats, increase by 2 levels.

(3) If the offense involved the violation of a court protection order, increase by 2 levels.".

Section 2A6.1(b)(4), as redesignated, is amended by deleting "If specific offense characteristic §2A6.1(b)(1) does not apply, and" and inserting in lieu thereof "If (A) subsection (a)(2) and subdivisions (1), (2), and (3) do not apply, and (B)".

The Commentary to §2A6.1 captioned "Statutory Provisions" is amended by inserting "; 47 U.S.C. § 223(a)(1)(C)-(E)" after "879".

The Commentary to §2A6.1 captioned "Application Note" is amended by deleting "Note" and inserting in lieu thereof "Notes"; and by inserting after Note 1 the following additional note:

"2. In determining whether subsections (b)(1), (b)(2), and (b)(3) apply, the court shall consider both conduct that occurred prior to the offense and conduct that occurred during the offense; however, conduct that occurred prior to the offense must be

substantially and directly connected to the offense, under the facts of the case taken as a whole. For example, if the defendant engaged in several acts of mailing threatening letters to the same victim over a period of years (including acts that occurred prior to the offense), then for purposes of determining whether subsections (b)(1), (b)(2), and (b)(3) apply, the court shall consider only those prior acts of threatening the victim that have a substantial and direct connection to the offense.

For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving making a threatening or harassing communication to the same victim are grouped together under §3D1.2 (Groups of Closely Related Counts). Multiple counts involving different victims are not to be grouped under §3D1.2.

If the conduct involved substantially more than two threatening communications to the same victim or a prolonged period of making harassing communications to the same victim, an upward departure may be warranted.".

Chapter Two, Part A, Subpart 6 is amended by adding after §2A6.1 the following new guideline:

"§2A6.2. Stalking or Domestic Violence

(a) Base Offense Level: 14

(b) Specific Offense Characteristic

(1) If the offense involved one of the following aggravating factors: (A) the violation of a court protection order; (B) bodily injury; (C) possession, or threatened use, of a dangerous weapon; or (D) a pattern of activity involving stalking, threatening, harassing, or assaulting the same victim, increase by 2 levels. If the offense involved more than one of these aggravating factors, increase by 4 levels.

(c) Cross Reference

(1) If the offense involved conduct covered by another offense guideline from Chapter Two, Part A (Offenses Against the Person), apply that offense guideline, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2261-2262.

Application Notes:

1. For purposes of this guideline—

'Bodily injury' and 'dangerous weapon' are defined in the Commentary to §1B1.1 (Application Instructions).

'Pattern of activity involving stalking, threatening, harassing, or assaulting the same victim' means any combination of two or more separate instances of stalking, threatening, harassing, or assaulting the same victim, whether or not such conduct resulted in a conviction. For example, a single instance of stalking accompanied by a separate instance of threatening, harassing, or assaulting the same victim constitutes a pattern of activity for purposes of this guideline.

'Stalking' means traveling with the intent to injure or harass another person and, in the course of, or as a result of, such travel, placing the person in reasonable fear of death or serious bodily injury to the person or the person's immediate family. See 18 U.S.C. § 2261A. 'Immediate family' has the meaning set forth in 18 U.S.C. § 115(c)(2).

2. Subsection (b)(1) provides for a two-level or four-level enhancement based on the degree to which the offense involved aggravating factors listed in that subsection. If the offense involved aggravating factors more serious than the factors listed in subsection (b)(1), the cross reference in subsection (c) most likely will apply, if the resulting offense level is greater, because the more serious conduct will be covered by another offense guideline from Chapter Two, Part A. For example, §2A2.2 (Aggravated Assault) most likely would apply pursuant to subsection (c) if the offense involved assaultive conduct in which injury more serious than bodily injury occurred or if a dangerous weapon was used rather than merely possessed.

3. In determining whether subsection (b)(1)(D) applies, the court shall consider, under the totality of the circumstances, any conduct that occurred prior to or during the offense; however, conduct that occurred prior to the offense must be substantially and directly connected to the offense. For example, if a defendant engaged in several acts of stalking the same victim over a period of years (including acts that occurred prior to the offense), then for purposes of determining whether subsection (b)(1)(D) applies, the court shall look to the totality of the circumstances, considering only those prior acts of stalking the victim that have a substantial and direct connection to the offense.

   Prior convictions taken into account under subsection (b)(1)(D) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

4. For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving stalking, threatening, or harassing the same victim are grouped together (and with counts of other offenses involving the same victim that are covered by this guideline) under §3D1.2 (Groups of Closely Related Counts). For example, if the defendant is convicted of two counts of stalking the defendant's ex-spouse under 18 U.S.C. § 2261A and one count of interstate domestic violence involving an assault of the ex-spouse under 18 U.S.C. § 2261, the stalking counts would be grouped together with the interstate domestic violence count. This grouping procedure avoids unwarranted 'double counting' with the enhancement in subsection (b)(1)(D) (for multiple acts of stalking, threatening, harassing, or assaulting the same victim) and recognizes that the stalking and interstate domestic violence counts are sufficiently related to warrant grouping.

   Multiple counts that are cross referenced to another offense guideline pursuant to subsection (c) are to be grouped together if §3D1.2 would require grouping of those counts under that offense guideline. Similarly, multiple counts cross referenced pursuant to subsection (c) are not to be grouped together if §3D1.2 would preclude grouping of the counts under that offense guideline. For example, if the defendant is convicted of multiple counts of threatening an ex-spouse in violation of a court protection order under 18 U.S.C. § 2262 and the counts are cross referenced to §2A6.1 (Threatening or Harassing Communications), the counts would group together because Application Note 2 of §2A6.1 specifically requires grouping. In contrast, if the defendant is convicted of multiple counts of assaulting the ex-spouse in violation of a court protection order under 18 U.S.C. § 2262 and the counts are cross referenced to §2A2.2 (Aggravated Assault), the counts probably would not group together inasmuch as §3D1.2(d) specifically precludes grouping of counts covered by §2A2.2 and no other provision of §3D1.2 would likely apply to require grouping.

   Multiple counts involving different victims are not to be grouped under §3D1.2.

5. If the defendant received an enhancement under subsection (b)(1) but that enhancement does not adequately reflect the extent or seriousness of the conduct involved, an upward

departure may be warranted. For example, an upward departure may be warranted if the defendant stalked the victim on many occasions over a prolonged period of time.".

This is a five-part amendment. First, this amendment addresses the new offense of interstate stalking, 18 U.S.C. § 2261A, which was enacted as section 1069 of the National Defense Authorization Act for Fiscal Year 1997, Pub. L. 104–201, 110 Stat. 2422. That offense makes it unlawful to travel across a state line or within federal jurisdiction with the intent to injure or harass another person and, in the course of, or as a result of, such travel, to place that person in reasonable fear of death or serious bodily injury to that person or that person's immediate family.

The amendment adds a new guideline, §2A6.2 (Stalking or Domestic Violence), to cover the stalking offense. The new guideline provides for a base offense level of 14 and an enhancement for the presence of one or more aggravating factors that are often part of a stalking offense, including the violation of a court protection order and the presence of a pattern of stalking, harassing, threatening, or assaultive conduct. The new guideline also provides for a cross reference to other Chapter Two guidelines if the offense involved more serious conduct, such as aggravated assault or kidnapping, that would produce a greater offense level. In addition, the new guideline permits the consideration of prior stalking, harassing, threatening, or assaultive conduct if that conduct is directly and substantially related to the offense.

The new guideline also incorporates the definitions of "bodily injury" and "dangerous weapon" found in §1B1.1 (Application Instructions). The definition of bodily injury found in the guidelines differs from the definition of bodily injury in 18 U.S.C. § 2266 that is applicable to interstate stalking and interstate domestic violence offenses. The definition of "bodily injury" in 18 U.S.C. § 2266 explicitly includes sexual abuse, but the guideline definition of "bodily injury" does not. However, the Commission is fully aware that criminal sexual abuse often is part of a domestic violence offense under 18 U.S.C. §§ 2261 and 2262 and may be part of a stalking offense under 18 U.S.C. § 2261A. It is the view of the Commission that the new guideline provides an adequate mechanism for taking into account the occurrence of criminal sexual abuse in any of these offenses. This is because the guideline definition of "serious bodily injury" in §1B1.1 deems serious bodily injury -- a more serious gradient of bodily injury -- to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law. Under the new guideline, any offense that involved criminal sexual abuse almost certainly will be subject to the cross reference to another offense guideline and to the rule deeming such conduct to be serious bodily injury (for purposes of applying a serious bodily injury enhancement in that other guideline to the offense). Therefore, in all likelihood, the sentence will be enhanced for the occurrence of criminal sexual abuse because the case will be cross referenced to another guideline that enhances for serious bodily injury.

Second, the amendment changes the manner in which the offenses of interstate domestic violence, 18 U.S.C. § 2261, and interstate violation of a protection order, 18 U.S.C. § 2262, are treated under the guidelines. Instead of being referenced to the guidelines that may cover underlying conduct, the amendment brings those offenses under the ambit of the new guideline, §2A6.2. This change recognizes that the aggravating factors accounted for in the new guideline often are present in these offenses as well.

Third, the amendment adds an enhancement to §2A2.2 (Aggravated Assault), if the offense involved the violation of a court protection order, to ensure an appropriately severe offense level for stalking, domestic violence, and other cases that are sentenced under the aggravated assault guideline and involve this factor.

Fourth, the amendment addresses several new harassing telecommunications offenses, 47 U.S.C. § 223(a)(1)(C)-(E), which were enacted in section 502 of the Telecommunications Act of 1996, Pub. L. 104–104, 110 Stat. 56. Those offenses make it unlawful to make a telephone call or utilize a telecommunications device, whether or not conversation or communication ensues, without disclosing one's identity and with the intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communication; make or cause the telephone of another to repeatedly or continuously ring, with the intent to harass any person at the called number; or make repeated telephone calls or repeatedly initiate conversation with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication.

The amendment incorporates these new offenses into §2A6.1 (Threatening Communications). Recognizing that these offenses carry only a two-year maximum term of imprisonment, the amendment provides an alternative offense level of 6 (as compared to 12), if the defendant is convicted of any of these offenses and there was no threat to injure a person or property. The amendment also adds enhancements if the offense involved more than two threats or the violation of a court protection order.

Fifth, this amendment addresses a circuit conflict regarding the enhancement in §2A6.1 that provides a 6-level increase if the offense involved any conduct evidencing an intent to carry out a threat. Specifically, the conflict is whether or not conduct which occurred prior to the making of the threat can evidence an intent to carry out the threat. Compare United States v. Hornick, 942 F.2d 105 (2d Cir. 1991) ("a person cannot take action that will constitute proof of his intent to carry out a threat until after the threat has been made") cert. denied, 502 U.S. 1061 (1992) with United States v. Taylor, 88 F.3d 938 (11th Cir. 1996) ("the essential inquiry for §2A6.1(b)(1) is whether the facts of the case, taken as a whole, establish a sufficiently direct connection between the defendant's pre-threat conduct and his threat"); United States v. Sullivan, 75 F.3d 297 (7th Cir. 1996)(same); United States v. Gary, 18 F.3d 1123 (4th Cir.) (same), cert. denied 513 U.S. 844 (1994); United States v. Hines, 26 F.3d 1469 (9th Cir. 1994)(same).

The amendment essentially adopts the Eleventh Circuit's view by adding an application note to both §§2A6.1 and 2A6.2 to provide that conduct which occurred prior to the offense shall be considered in determining specified enhancements in those guidelines if the prior conduct is substantially and directly connected to the offense. **The effective date of this amendment is November 1, 1997.**

550. The Commentary to §2A2.4 captioned "Application Notes" is amended in Note 1 by inserting the following after "(Aggravated Assault).":

> "Conversely, the base offense level does not reflect the possibility that the defendant may create a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement official (although an offense under 18 U.S.C. § 758 for fleeing or evading a law enforcement checkpoint at high speed will often, but not always, involve the creation of that risk). If the defendant creates that risk and no higher guideline adjustment is applicable for the conduct creating the risk, apply §3C1.2 (Reckless Endangerment During Flight).".

This amendment clarifies the interaction of this guideline with the enhancement under §3C1.2 (Reckless Endangerment During Flight), particularly when the defendant is convicted under 18 U.S.C. § 758 of fleeing an immigration checkpoint at high speed. **The effective date of this amendment is November 1, 1997.**

551. Section 2B1.1(b) is amended by inserting after subdivision (6) the following additional subdivision:

> "(7) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit any foreign government, foreign instrumentality, or foreign agent, increase by 2 levels.".

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by inserting "1831, 1832," before "2113(b)".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 1 by inserting after the first paragraph the following additional paragraphs:

> "'Trade secret' is defined in 18 U.S.C. § 1839(3).
>
> 'Foreign instrumentality' and 'foreign agent' are defined in 18 U.S.C. § 1839(1) and (2), respectively.".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 2 by inserting after the fourth paragraph the following additional paragraph:

"In an offense involving unlawfully accessing, or exceeding authorized access to, a 'protected computer' as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), 'loss' includes the reasonable cost to the victim of conducting a damage assessment, restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service.".

The Commentary to §2B1.1 captioned "Application Notes" is amended by inserting after Note 14 the following additional notes:

"15. In cases where the loss determined under subsection (b)(1) does not fully capture the harmfulness of the conduct, an upward departure may be warranted. For example, the theft of personal information or writings (e.g., medical records, educational records, a diary) may involve a substantial invasion of a privacy interest that would not be addressed by the monetary loss provisions of subsection (b)(1).

16. In cases involving theft of information from a 'protected computer', as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), an upward departure may be warranted where the defendant sought the stolen information to further a broader criminal purpose.".

Section 2B1.3 is amended by inserting after subsection (c) the following additional subsection:

"(d) Special Instruction

(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(5), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.".

The Commentary to §2B1.3 captioned "Statutory Provisions" is amended by inserting "1030(a)(5)," before "1361,".

The Commentary to §2B1.3 captioned "Application Notes" is amended in Note 4 by inserting "or interference with a telecommunications network" after "line"; by inserting ", with attendant life-threatening delay in the delivery of emergency medical treatment or disruption of other important governmental or private services" after "hours"; by deleting "instances" and inserting in lieu thereof "cases"; by deleting "would" and inserting in lieu thereof "may"; and by inserting at the end the following:

"See §§5K2.2 (Physical Injury), 5K2.7 (Disruption of Governmental Function), and 5K2.14 (Public Welfare).".

The Commentary to §2B1.3 is amended by adding at the end the following:

"Background: Subsection (d) implements the instruction to the Commission in section 805(c) of Public Law 104-132.".

Section 2B2.3(b) is amended by inserting after subdivision (2) the following additional subdivision:

"(3) If the offense involved invasion of a protected computer resulting in a loss exceeding $2000, increase the offense level by the number of levels from the table in §2F1.1 corresponding to the loss.".

The Commentary to §2B2.3 captioned "Statutory Provision" is amended by deleting "Provision" and inserting in lieu thereof "Provisions"; and by inserting "18 U.S.C. § 1030(a)(3);" before "42 U.S.C.".

The Commentary to §2B2.3 captioned "Application Note" is amended in Note 1 by inserting "For purposes of this guideline—" before "'Firearm'"; and by inserting after the first paragraph the following additional paragraph:

"'Protected computer' means a computer described in 18 U.S.C. § 1030(e)(2)(A) or (B).".

The Commentary to §2B2.3 captioned "Application Note" is amended by deleting "Note" and inserting "Notes" and by inserting after Note 1 the following additional note:

> "2. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).".

The Commentary to §2B3.2 captioned "Statutory Provisions" is amended by inserting "1030(a)(7)," following "877,".

The Commentary to §2B3.2 captioned "Background" is amended by inserting at the end:

> "This guideline also applies to offenses under 18 U.S.C. § 1030(a)(7) involving a threat to impair the operation of a 'protected computer.'".

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

> "(c) Special Instruction
>
> (1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.".

The Commentary to §2F1.1 captioned "Statutory Provisions" is amended by inserting "1030(a)(4)," before "1031,".

The Commentary to §2F1.1 captioned "Background" is amended by inserting at the end the following additional paragraph:

> " Subsection (c) implements the instruction to the Commission in section 805(c) of Public Law 104-132.".

This amendment makes a number of changes in the theft, property destruction, trespass, extortion, and fraud guidelines to more effectively punish computer-related offenses. The amendment also addresses new offenses under 18 U.S.C. § 1030(a)(7), prohibiting extortion by threats of damage to a non-public government computer or a computer of a financial institution; 18 U.S.C. § 1831, prohibiting "economic espionage"; and 18 U.S.C. § 1832, prohibiting theft of "trade secrets," as broadly defined at 18 U.S.C. § 1839. Offenses under 18 U.S.C. § 1030(a)(7) are referenced to §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage); offenses under 18 U.S.C. §§ 1031 and 1832 are referenced to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).

Special instructions have been added to §§2B1.3 and 2F1.1 to provide that the minimum guideline sentence for those convicted under 18 U.S.C. § 1030(a)(4) and (5) is six months' imprisonment. These provisions implement a directive to the Commission in section 805(c) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 110 Stat. 1305. **The effective date of this amendment is November 1, 1997.**

552. Section 2B3.1(b)(2)(F) is amended by deleting "an express" and inserting in lieu thereof "a".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 6 by deleting "An 'express" and inserting in lieu thereof "'A"; by inserting after the first sentence the following additional sentence:

> "Accordingly, the defendant does not have to state expressly his intent to kill the victim in order for the enhancement to apply.";

by deleting "an express" after "constitute" and inserting in lieu thereof "a"; by deleting "the underlying" and inserting in lieu thereof "this"; and by deleting "significantly greater fear than that necessary to constitute an element of the offense of robbery" and inserting in lieu thereof "a fear of death".

This amendment addresses a circuit court conflict regarding the application of the "express threat of death" enhancement in §2B3.1 (Robbery). The amendment adopts the majority appellate view which holds that the enhancement applies when the combination of the defendant's actions and words would instill in a reasonable person in the position of the immediate victim (e.g.,a bank teller) a greater amount of fear than necessary to commit the robbery. See, e.g., United States v. Robinson, 86 F.3d 1197, 1202 (D.C. Cir. 1996) (enhancement applies if (1) a reasonable person in the position of the immediate victim would very likely believe the defendant made a threat and the threat was to kill, and (2) the victim likely thought his life was in peril); United States v. Murray, 65 F.3d 1161, 1167 (4th Cir. 1995) ("any combination of statements, gestures, or actions that would put an ordinary victim in reasonable fear for his or her life is an express threat of death"). **The effective date of this amendment is November 1, 1997.**

553. The Commentary to §2B4.1 captioned "Statutory Provisions" is amended by deleting "§§ 11907(a), (b)" and inserting in lieu thereof "§ 11902".

The Commentary to §2N3.1 captioned "Statutory Provisions" is amended by deleting "15 U.S.C. §§ 1983-1988, 1990c" and inserting in lieu thereof "49 U.S.C. §§ 32703-32705, 32709(b).".

The Commentary to §2Q1.2 captioned "Statutory Provisions" is amended by deleting "§ 1809(b)" and inserting in lieu thereof "§ 60123(d)".

This amendment makes technical corrections to §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), §2N3.1(Odometer Laws and Regulations), §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce), to reflect changes made to statutory references when Congress codified Title 49 (Transportation), United States Code. Pub. L. 103-272, § 1(e), July 5, 1994, 108 Stat. 1356; Pub. L. 104-88, Title I, § 102(a), December 29, 1995, 109 Stat. 850. **The effective date of this amendment is November 1, 1997.**

554. Section 2B5.1(b) is amended by inserting after subdivision (3) the following additional subdivision:

"(4) If any part of the offense was committed outside the United States, increase by 2 levels.".

The Commentary to §2B5.1 captioned "Statutory Provisions" is amended by deleting "471" and inserting in lieu thereof "470".

The Commentary to §2B5.1 captioned "Application Notes" is amended by redesignating Notes 1 through 3 as Notes 2 through 4; and by inserting as the new Note 1:

"1. For purposes of this guideline, 'United States' means each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.".

This amendment addresses section 807(h) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1308, which requires the Commission to amend the sentencing guidelines to provide an appropriate enhancement for a defendant convicted of an international counterfeiting offense under 18 U.S.C. § 470. The amendment adds a specific offense characteristic in §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) to provide a two-level enhancement if the offense occurred outside the United States. **The effective date of this amendment is November 1, 1997.**

555. Section 2D1.1(b) is amended by redesignating subdivision (4) as subdivision (6) and inserting after subdivision (3) the following additional subdivisions:

"(4) If (A) the offense involved the importation of methamphetamine or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported

unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by 2 levels.

(5) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance, or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.".

Section 2D1.1(c) is amended in subdivision (1) by deleting "30 KG" before "or more of Methamphetamine" and inserting in lieu thereof "15 KG".

Section 2D1.1(c) is amended in subdivision (2) by deleting "10 KG but less than 30 KG" before "of Methamphetamine" and inserting in lieu thereof "5 KG but less than 15 KG".

Section 2D1.1(c) is amended in subdivision (3) by deleting "3 KG but less than 10 KG" before "of Methamphetamine" and inserting in lieu thereof "1.5 G but less than 5 KG".

Section 2D1.1(c) is amended in subdivision (4) by deleting "1 KG but less than 3 KG" before "of Methamphetamine" and inserting in lieu thereof "500 G but less than 1.5 KG".

Section 2D1.1(c) is amended in subdivision (5) by deleting "700 G but less than 1 KG" before "of Methamphetamine" and inserting in lieu thereof "350 G but less than 500 G".

Section 2D1.1(c) is amended in subdivision (6) by deleting "400 G but less than 700 G" before "of Methamphetamine" and inserting in lieu thereof "200 G but less than 350 G".

Section 2D1.1(c) is amended in subdivision (7) by deleting "100 G but less than 400 G" before "of Methamphetamine" and inserting in lieu thereof "50 G but less than 200 G".

Section 2D1.1(c) is amended in subdivision (8) by deleting "80 G but less than 100 G" before "of Methamphetamine" and inserting in lieu thereof "40 G but less than 50 G".

Section 2D1.1(c) is amended in subdivision (9) by deleting "60 G but less than 80 G" before "of Methamphetamine" and inserting in lieu thereof "30 G but less than 40 G".

Section 2D1.1(c) is amended in subdivision (10) by deleting "40 G but less than 60 G" before "of Methamphetamine" and inserting in lieu thereof "20 G but less than 30 G".

Section 2D1.1(c) is amended in subdivision (11) by deleting "20 G but less than 40 G" before "of Methamphetamine" and inserting in lieu thereof "10 G but less than 20 G".

Section 2D1.1(c) is amended in subdivision (12) by deleting "10 G but less than 20 G" before "of Methamphetamine" and inserting in lieu thereof "5 G but less than 10 G".

Section 2D1.1(c) is amended in subdivision (13) by deleting "5 G but less than 10 G" before "of Methamphetamine" and inserting in lieu thereof "2.5 G but less than 5 G".

Section 2D1.1(c) is amended in subdivision (14) by deleting "5 G" before "of Methamphetamine" and inserting in lieu thereof "2.5 G".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" in the subdivision captioned "Cocaine and Other Schedule I and II Stimulants" in the entry beginning "1 gm of Methamphetamine =" by deleting "1 kg" before "of marihuana" and inserting in lieu thereof "2 kg".

The Commentary to §2D1.1 captioned "Application Notes" is amended by inserting after Note 18 the following additional notes:

"19. If the offense involved importation of methamphetamine, and an adjustment from subsection (b)(2) applies, do not apply subsection (b)(4).

20. Under subsection (b)(5), the enhancement applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b). In some cases, the enhancement under this subsection may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §5B1.3 (Conditions of Probation) and §5D1.3 (Conditions of Supervised Release).".

The Commentary to §2D1.1 captioned "Background" is amended in the second paragraph by inserting as the last sentence "Where necessary, this scheme has been modified in response to specific congressional directives to the Commission.".

This multi-part amendment responds to the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237, 110 Stat. 3099, including the directives to the Commission in sections 301 and 303 of that Act. First, as directed by section 301 of the Act, the amendment increases penalties for methamphetamine trafficking offenses. This penalty increase is accomplished by reducing by one-half the quantity of a mixture or substance containing methamphetamine corresponding to each offense level in the Drug Quantity Table. This part of the amendment makes no change, however, in the quantities of methamphetamine (actual) (i.e., "pure" methamphetamine) and "Ice" methamphetamine that correspond to the various offense levels. The Commission has arrived at these particular changes after careful analysis of recent sentencing data, including its own intensive study of methamphetamine offenses, information provided by the Strategic Intelligence Section of the Drug Enforcement Administration concerning recent methamphetamine trafficking levels, dosage unit size, price, and drug quantity, and a variety of other information.

Second, in response to the directive in section 303 of the Act, this amendment provides an enhancement of two levels, with an invited upward departure in more extreme cases, for environmental violations occurring in association with an illicit manufacturing or other drug trafficking offense.

Third, in response to evidence of a recent, substantial increase in the importation of methamphetamine and precursor chemicals used to manufacture methamphetamine, the amendment provides an enhancement of two levels directed at such activity. An exception to this enhancement is provided for defendants who have a mitigating role in the offense under §3B1.2 (Mitigating Role). **The effective date of this amendment is November 1, 1997.**

556. Section 2D1.1(d) is amended by deleting "Reference" and inserting in lieu thereof "References";

and by inserting after subdivision (1) the following additional subdivision:

"(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.".

Section 2D1.1(c)(10) is amended by deleting the period after "Schedule III substances" and inserting in lieu thereof a semicolon; and by inserting at the end the following additional subdivision:

"2,500 or more units of Flunitrazepam.".

Section 2D1.1(c)(11) is amended by deleting the period after "Schedule III substances" and inserting in lieu thereof a semicolon; and by inserting at the end the following additional subdivision:

"At least 1,250 but less than 2,500 units of Flunitrazepam.".

Section 2D1.1(c)(12) is amended by deleting the period after "Schedule III substances" and inserting in lieu thereof a semicolon; and by inserting at the end the following additional subdivision:

"At least 625 but less than 1,250 units of Flunitrazepam.".

Section 2D1.1(c)(13) is amended by deleting the period after "Schedule III substances" and inserting in lieu thereof a semicolon; and by inserting at the end the following additional subdivision:

"At least 312 but less than 625 units of Flunitrazepam.".

Section 2D1.1(c)(14) is amended by inserting after "Schedule III substances;" the following additional subdivision:

"At least 156 but less than 312 units of Flunitrazepam;";

and by inserting "(except Flunitrazepam)" after "Schedule IV substances".

Section 2D1.1(c)(15) is amended by inserting after "Schedule III substances;" the following additional subdivision:

"At least 62 but less than 156 units of Flunitrazepam;";

and by inserting "(except Flunitrazepam)" after "Schedule IV substances".

Section 2D1.1(c)(16) is amended by inserting after "Schedule III substances;" the following additional subdivision:

"Less than 62 units of Flunitrazepam;";

and by inserting "(except Flunitrazepam)" after "Schedule IV substances".

Section 2D1.1(c)(17) is amended by inserting "(except Flunitrazepam)" after "Schedule IV substances".

The Commentary to §2D1.1 captioned "Statutory Provisions" is amended by inserting "(7)," after "(3),".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" by inserting before the subdivision captioned "Schedule I or II Depressants**" the following additional subdivision:

"Flunitrazepam **

1 unit of Flunitrazepam = 16 gm of marihuana

** Provided, that the combined equivalent weight of flunitrazepam, all Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances shall not exceed 99.99 kilograms of marihuana.

The minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" in the subdivision captioned "Schedule I or II Depressants" by inserting an additional asterisk after "**" in both instances; and by inserting "(except flunitrazepam)" after "Schedule IV substances".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug

Equivalency Tables" in the subdivision captioned "Schedule III Substances" by inserting an additional asterisk after "***" in both instances; and by inserting "(except flunitrazepam)" after "Schedule IV substances".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" in the subdivision captioned "Schedule IV Substances" is amended by inserting "(except Flunitrazepam)" after "Substances"; by inserting an additional asterisk after "****" in both instances; by inserting "(except flunitrazepam)" after "Substance"; and by inserting "(except flunitrazepam)" before "and V".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned "Schedule V Substances" by inserting an additional asterisk after "*****" in both instances.

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 17 by adding at the end:

> "Similarly, in the case of a controlled substance for which the maximum offense level is less than level 38 (e.g., the maximum offense level in the Drug Quantity Table for flunitrazepam is level 20), an upward departure may be warranted if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance.".

Section 2D2.1(a)(2) is amended by inserting "flunitrazepam," after "cocaine,".

The Commentary to §2D2.1 is amended by inserting before "Background:":

> "Application Note:
>
> 1. The typical case addressed by this guideline involves possession of a controlled substance by the defendant for the defendant's own consumption. Where the circumstances establish intended consumption by a person other than the defendant, an upward departure may be warranted.".

This amendment implements the directive to the Commission in the Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. 104-305, 110 Stat. 3807. Section 2 of the Act directs the Commission to amend the guidelines to reflect the serious nature of offenses involving flunitrazepam. This amendment reflects the increases in statutory maximum penalties for offenses involving trafficking and simple possession, respectively, of flunitrazepam. In addition, the amendment contains a cross reference to cover the new offense created under this Act involving the distribution of a controlled substance to an individual in order to commit a crime of violence against that individual. **The effective date of this amendment is November 1, 1997.**

557. Section 2D1.11(d)(1)-(10), Note "E" (List Chemical Equivalency Table) of §2D1.11(d), and Note 4(a) of the Commentary to §2D1.11 captioned "Application Notes" are repromulgated without change.

Section 302 of the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237, 110 Stat. 3099, directs the Commission to increase by at least two levels the offense levels for offenses involving list I chemicals under 21 U.S.C. §§ 841(d)(1) and (2) and 960(d)(1) and (3). Pursuant to this provision, the Commission promulgated an emergency amendment to §2D1.11, effective May 1, 1997. Under the terms of the congressionally-granted authority, the emergency amendment is temporary unless repromulgated in the next amendment cycle under regularly applicable amendment procedures. See Pub.L. 100-182, § 21set forth as an editorial note under 28 U.S.C. § 994. This amendment repromulgates §2D1.11(d)(1)-(10), Note "E" (List Chemical Equivalency Table) of §2D1.11(d), and Note 4(a) of the Commentary to §2D1.11 captioned "Application Notes", as set forth in the May 1, 1997 Revised Supplement to the 1995 edition of the Guidelines Manual. **The effective date of this amendment is November 1, 1997.**

558. Section 2D1.12 is amended by redesignating subsection (b) as subsection (c); and by inserting the

following new subsection (b):

"(b) Specific Offense Characteristic

(1) If the defendant (A) intended to manufacture methamphetamine, or (B) knew, believed, or had reasonable cause to believe that prohibited equipment was to be used to manufacture methamphetamine, increase by 2 levels.".

The Commentary to §2D1.12 captioned "Application Notes" is amended in Note 2 by deleting "(b)(1)" and inserting in lieu thereof "(c)(1)".

Section 2D2.1(a)(3) is amended by inserting "or a list I chemical" after "controlled substance".

This amendment implements the directive to the Commission in section 203 of the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237, 110 Stat. 3099, to ensure that possession of equipment used to make methamphetamine is treated as a significant violation. Additionally, the amendment includes list I chemicals under §2D2.1 (Unlawful Possession; Attempt or Conspiracy), in response to section 201 of the Act, which amends 21 U.S.C. § 844 to include list I chemicals. **The effective date of this amendment is November 1, 1997.**

559. Section 2H4.1 is repromulgated without change.

This amendment implements section 218 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009, which directs the Commission to review the guideline for peonage, involuntary servitude, and slave trade offenses and amend the guideline pursuant to that review. Pursuant to the emergency amendment authority of that Act, this amendment previously was promulgated as a temporary measure effective May 1, 1997. **The effective date of this amendment is November 1, 1997.**

560. The Commentary to §2K1.5 captioned "Background" is amended by deleting:

"Except under the circumstances specified in 49 U.S.C. § 46505(c), the offense covered by this section is a misdemeanor for which the maximum term of imprisonment authorized by statute is one year.";

by deleting "An" and inserting in lieu thereof "This guideline provides an"; and by deleting "is provided" immediately after "enhancement".

This amendment strikes background commentary in guideline §2K1.5 that is no longer correct because of a recent change in statutory penalties. Specifically, the Antiterrorism Act of 1996 increased the statutory maximum penalty for violations of 49 U.S.C. § 46505(b) from not more than one year to not more than 10 years. This increase changes the classification of an offense under subsection (b) from a class A misdemeanor to a class D felony. **The effective date of this amendment is November 1, 1997.**

561. Section 2L1.1 is repromulgated with the following changes:

Section 2L1.1(b)(1)(A) is amended by deleting "the defendant committed the offense" and inserting in lieu thereof "the offense was committed".

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 1 by deleting:

"'The defendant committed the offense other than for profit' means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens. The 'number of unlawful aliens smuggled, transported, or harbored' does not include the defendant.",

and inserting in lieu thereof:

"'The offense was committed other than for profit' means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.

'Number of unlawful aliens smuggled, transported, or harbored' does not include the defendant.".

Section 5K2.0 is amended in the third paragraph by deleting "immigration violations" and inserting in lieu thereof "other guidelines"; and by deleting "for an immigration violation" and inserting in lieu thereof "under one of these other guidelines".

This amendment implements section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009, which directs the Commission to amend the guidelines for offenses related to smuggling, transporting, or harboring illegal aliens. Pursuant to the emergency amendment authority of that Act, this amendment previously was promulgated as a temporary measure effective May 1, 1997. This version of the amendment changes §2L1.1(b)(1)(A)(pertaining to a reduction for non-profit offenses) to narrow somewhat the class of cases that would qualify for the reduced offense level under that provision. This amendment also makes a conforming change to §5K2.0. **The effective date of this amendment is November 1, 1997.**

562. Section 2L1.2 is amended by deleting subsection (b) as follows:

"(b) Specific Offense Characteristics

If more than one applies, use the greater:

(1) If the defendant previously was deported after a conviction for a felony, other than a felony involving violation of the immigration laws, increase by 4 levels.

(2) If the defendant previously was deported after a conviction for an aggravated felony, increase by 16 levels.",

and inserting in lieu thereof:

"(b) Specific Offense Characteristic

(1) If the defendant previously was deported after a criminal conviction, or if the defendant unlawfully remained in the United States following a removal order issued after a criminal conviction, increase as follows (if more than one applies, use the greater):

(A) If the conviction was for an aggravated felony, increase by 16 levels.

(B) If the conviction was for (i) any other felony, or (ii) three or more misdemeanor crimes of violence or misdemeanor controlled substance offenses, increase by 4 levels.".

The Commentary to §2L1.2 captioned "Application Notes" is amended by deleting Notes 3 and 4 as follows:

"3. A 4-level increase is provided under subsection (b)(1) in the case of a defendant who was previously deported after a conviction for a felony, other than a felony involving a violation of the immigration laws.

4. A 16-level increase is provided under subsection (b)(2) in the case of a defendant who was previously deported after a conviction for an aggravated felony.";

by redesignating Notes 1 and 2 as Notes 2 and 3, respectively; by deleting in Note 3, as redesignated,

"without criminal conviction" after "deportation"; and by inserting the following as the new Note 1:

"1. For purposes of this guideline—

'Deported after a conviction,' means that the deportation was subsequent to the conviction, whether or not the deportation was in response to such conviction. An alien has previously been 'deported' if he or she has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

'Remained in the United States following a removal order issued after a conviction,' means that the removal order was subsequent to the conviction, whether or not the removal order was in response to such conviction.

'Aggravated felony,' is defined at 8 U.S.C. § 1101(a)(43) without regard to the date of conviction of the aggravated felony.

'Crime of violence' and 'controlled substance offense' are defined in §4B1.2. For purposes of subsection (b)(1)(B), 'crime of violence' includes offenses punishable by imprisonment for a term of one year or less.

'Firearms offense' means any offense covered by Chapter Two, Part K, Subpart 2, or any similar offense under state or local law.

'Felony offense' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.".

The Commentary to §2L1.2 captioned "Application Notes" is amended by redesignating Note 5 as Note 4; in Note 4, as redesignated, by deleting "(b)(1) or (b)(2)" and inserting in lieu thereof "(b)"; and by inserting after Note 4, as redesignated, the following new note:

"5. Aggravated felonies that trigger the adjustment from subsection (b)(1)(A) vary widely. If subsection (b)(1)(A) applies, and (A) the defendant has previously been convicted of only one felony offense; (B) such offense was not a crime of violence or firearms offense; and (C) the term of imprisonment imposed for such offense did not exceed one year, a downward departure may be warranted based on the seriousness of the aggravated felony.".

The Commentary to §2L1.2 captioned "Application Notes" is amended by deleting Notes 6 and 7 as follows:

"6. 'Deported after a conviction,' as used in subsections (b)(1) and (b)(2), means that the deportation was subsequent to the conviction, whether or not the deportation was in response to such conviction.

7. 'Aggravated felony,' as used in subsection (b)(2), means murder; any illicit trafficking in any controlled substance (as defined in 21 U.S.C. § 802), including any drug trafficking crime as defined in 18 U.S.C. § 924(c)(2); any illicit trafficking in any firearms or destructive devices as defined in 18 U.S.C. § 921; any offense described in 18 U.S.C. § 1956 (relating to laundering of monetary instruments); any crime of violence (as defined in 18 U.S.C. § 16, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least five years; or any attempt or conspiracy to commit any such act. The term 'aggravated felony' applies to offenses described in the previous sentence whether in violation of federal or state law and also applies to offenses described in the previous sentence in violation of foreign law for which the term of imprisonment was completed within the previous 15 years. See 8 U.S.C. § 1101(a)(43).".

This amendment implements sections 321 and 334 of the Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009. Section 321 of the Act adds to the

definition of "aggravated felony" crimes of rape and sexual abuse of a minor, as well as any crime of violence for which the term of imprisonment is at least one year. This amendment conforms the definition of "aggravated felony" in the guidelines with the amended definition in the Immigration and Nationality Act.

Section 334 directs the Sentencing Commission to promulgate amendments to the guidelines for the crimes of unlawfully remaining and illegally entering the United States corresponding to changes made in statutory penalties for these offenses in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796. This amendment enhances penalties for those who unlawfully enter or remain in the United States following conviction for an aggravated felony, any other felony, or three misdemeanor crimes of violence or controlled substance offenses. The amendment also makes clarifying changes to the commentary. **The effective date of this amendment is November 1, 1997.**

563. Section 2L2.1 is repromulgated with the following changes:

Section 2L2.1(b) is amended by deleting:

"(1) If the defendant committed the offense other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), decrease by 3 levels.",

and inserting in lieu thereof:

"(1) If the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), decrease by 3 levels.".

The Commentary to §2L2.1 captioned "Application Notes" is amended in Note 1 by deleting:

"'The defendant committed the offense other than for profit' means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.",

and inserting in lieu thereof:

"'The offense was committed other than for profit' means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.".

Section 2L2.2 is repromulgated without change.

This amendment implements section 211 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009, which directs the Commission to amend the guidelines for offenses related to the fraudulent use of government-issued documents. Pursuant to the emergency amendment authority of that Act, this amendment previously was promulgated as a temporary measure effective May 1, 1997. This version of the amendment changes §2L2.1(b)(1)(pertaining to a reduction for non-profit offenses) to narrow somewhat the class of cases that would qualify for the reduced offense level under that provision. **The effective date of this amendment is November 1, 1997.**

564. Section 3A1.1(a) is amended by inserting "of conviction" after "the offense".

The Commentary to §3A1.1 captioned "Application Notes" is amended in Note 2 by inserting at the beginning the following new paragaph:

"For purposes of subsection (b), 'victim' includes any person who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 (Relevant

Conduct).".

This amendment addresses a circuit court conflict regarding whether "victim of the offense" in §3A1.1 (Hate Crime Motivation or Vulnerable Victim) refers only to a victim of the defendant's offense of conviction or, more broadly, to a victim of any relevant conduct. The amendment adopts the majority appellate view, which holds that a sentencing court should consider the defendant's relevant conduct when determining whether the vulnerable victim enhancement applies. See, e.g., United States v. Haggard, 41 F.3d 1320, 1326 (9th Cir. 1994) (proper to consider harm caused to victims beyond the defendant's offense of conviction); United States v. Yount, 960 F.2d 955 (11th Cir. 1992).

This amendment also clarifies a possible ambiguity regarding the scope of conduct to be considered when applying the hate crime motivation enhancement in §3A1.1(a). Consistent with Congress's intent to punish a defendant whose primary objective in committing the hate crime was to harm a member of a particular class of individuals, this amendment clarifies that the enhancement in subsection (a) is limited to victims of the defendant's offense of conviction. **The effective date of this amendment is November 1, 1997.**

565. Section 3A1.4 is repromulgated without change.

Section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1303, requires the Commission to amend the sentencing guidelines so that the adjustment in §3A1.4 (relating to international terrorism) applies more broadly to "Federal crimes of terrorism," as defined in 18 U.S.C. § 2332b(g). Pursuant to this provision, the Commission promulgated §3A1.4 (Terrorism) as an emergency amendment, effective November 1, 1996. Under the terms of the congressionally granted authority, this amendment is temporary unless repromulgated in the next amendment cycle under regularly applicable amendment procedures. See Pub. L. No. 100-182, § 21, set forth as an editorial note under 28 U.S.C. § 994. This amendment repromulgates §3A1.4, as set forth in the May 1, 1997 Revised Supplement to the 1995 Guidelines Manual. **The effective date of this amendment is November 1, 1997.**

566. The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 1 by deleting in the third sentence "such testimony or statements should be evaluated in a light most favorable to the defendant." and inserting in lieu thereof:

> "the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 3(i) by deleting "conduct prohibited by 18 U.S.C. §§ 1501-1516." and inserting in lieu thereof "other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§ 1510, 1511).".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 4 by deleting "The following is a non-exhaustive list of examples of the" and inserting in lieu thereof "Some"; by deleting "that, absent a separate count of conviction for such conduct," and inserting in lieu thereof "ordinarily"; by deleting ", but ordinarily can appropriately be sanctioned by the determination of the particular" and inserting in lieu thereof "but may warrant a greater"; and by inserting the following after "guideline range":

> ". However, if the defendant is convicted of a separate count for such conduct, this enhancement will apply and increase the offense level for the underlying offense (i.e., the offense with respect to which the obstructive conduct occurred). See Application Note 7, below.
>
> The following is a non-exhaustive list of examples of the types of conduct to which this application note applies".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 6 by deleting:

"Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.".

The Commentary to §3C1.1 captioned "Application Notes" is amended by redesignating Note 7 as Note 8; and by inserting the following as new Note 7:

"7. Where the defendant is convicted both of the obstruction offense and the underlying offense (the offense with respect to which the obstructive conduct occurred), the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.".

This amendment addresses a circuit court conflict regarding the meaning of the last sentence of Application Note 1 in §3C1.1. The issue is whether that sentence requires the use of a heightened standard of proof when the court applies an enhancement for perjury. Compare United States v. Montague, 40 F.3d 1251 (D.C. Cir. 1994) (applying the clear and convincing standard) with United States v. Zajac, 62 F.3d 145 (6th Cir.) (applying the preponderance of the evidence standard), cert. denied 116 S. Ct. 681 (1995). The amendment changes the last sentence of Application Note 1 so that it no longer suggests the use of a heightened standard of proof. Instead, it clarifies that the court should be mindful that not all inaccurate testimony or statements reflect a willful attempt to obstruct justice.

The amendment also (A) modifies subdivision (i) of Application Note 3 in §3C1.1 to make the language more precise; (B) in response to concerns expressed in a Seventh Circuit opinion, clarifies the meaning of the phrase "absent a separate count of conviction" by adding an additional sentence at the end of Application Note 4, see United States v. Giacometti, 28 F.3d 698 (7th Cir. 1994); and (C) clarifies that the guidance in the last two sentences of Application Note 6 applies to a broader set of cases than the cases described in the first two sentences of Application Note 6. **The effective date of this amendment is November 1, 1997.**

567. The Commentary to §4B1.1 captioned "Application Notes" is amended in Note 2 by deleting "not" after "offense," in the first sentence; by deleting "(b)(1)(B), (b)(1)(C), and (b)(1)(D)" and inserting in lieu thereof "(B), (C), and (D)"; by deleting "where" and inserting in lieu thereof "in a case in which"; by inserting "for that defendant" after "Maximum'"; by deleting "twenty years and not thirty years" and inserting in lieu thereof "thirty years and not twenty years"; by deleting "authorizes" and inserting in lieu thereof "has"; and by deleting "maximum term of imprisonment" and inserting in lieu thereof "offense statutory maximum".

The Commentary to §4B1.1 captioned "Background" is amended by deleting:

"The legislative history of this provision suggests that the phrase 'maximum term authorized' should be construed as the maximum term authorized by statute. See S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983); 128 Cong. Rec. 26,511-12 (1982) (text of 'Career Criminals' amendment by Senator Kennedy); id. at 26,515 (brief summary of amendment); id. at 26,517-18 (statement of Senator Kennedy).".

This amendment responds to United States v. LaBonte, __ U.S. __, 117 S.Ct. 1673. In LaBonte, the Supreme Court held that the way in which the Commission defined "maximum term authorized", for purposes of fulfilling the requirement under 28 U.S.C. § 994(h) to specify sentences for certain categories of career offenders at or near the maximum term authorized for those offenders, is inconsistent with § 994(h)'s plain and unambiguous language and is therefore invalid. The Commission defined "maximum term authorized" to mean the maximum term authorized for the offense of conviction not including any sentencing enhancement provisions that apply because of the defendant's prior criminal

record. The Supreme Court held that under § 994's plain and unambiguous language, "maximum term authorized" must be read to include all applicable statutory sentencing enhancements. The proposed amendment makes a straightforward change to the commentary to §4B1.1, the career offender guideline, to reflect the LaBonte decision. Specifically, the definition of "maximum term authorized" is proposed to be changed to reflect that the "maximum term authorized" includes all sentencing enhancements that apply because of the defendant's prior criminal record. **The effective date of this amendment is November 1, 1997.**

568. Section §4B1.2(1) is amended by deleting "(1)" and inserting in lieu thereof "(a)"; by inserting a comma after "law" and after "one year"; by deleting "(i)" and inserting in lieu thereof "(1)"; and by deleting "(ii)" and inserting in lieu thereof "(2)".

Section §4B1.2(2) is amended by deleting "(2)" and inserting in lieu thereof "(b)"; by deleting "a" after "under"; and by deleting "prohibiting" and inserting in lieu thereof ", punishable by imprisonment for a term exceeding one year, that prohibits".

Section §4B1.2(3) is amended by deleting "(3)" and inserting in lieu thereof "(c)"; by deleting "(A)" and inserting in lieu thereof "(1)"; and by deleting "(B)" and inserting in lieu thereof "(2)".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 1 by inserting at the beginning "For purposes of this guideline—"; by deleting "The terms 'crime" and inserting in lieu thereof "'Crime";

and by inserting at the end the following new paragraphs:

"'Crime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included as 'crimes of violence' if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.

'Crime of violence' does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense of conviction is the unlawful possession of a firearm by a felon, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant had one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply.

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(d)(1)) is a 'controlled substance offense.'

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a 'controlled substance offense.'

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a 'controlled substance offense' if the offense of conviction established that the underlying offense (the offense facilitated) was a 'controlled substance offense.'

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a 'controlled substance offense' if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a 'controlled substance offense.'

Possessing a firearm during and in relation to a crime of violence or drug offense (18 U.S.C. § 924(c)) is a 'crime of violence' or 'controlled substance offense' if the offense of conviction

established that the underlying offense (the offense during and in relation to which the firearm was carried or possessed) was a 'crime of violence' or 'controlled substance offense.' (Note that if the defendant also was convicted of the underlying offense, the two convictions will be treated as related cases under §4A1.2 (Definitions and Instruction for Computing Criminal History)).

'Prior felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).".

The Commentary to §4B1.2 captioned "Application Notes" is amended by deleting Notes 2 and 3 as follows:

"2. 'Crime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of inquiry.

The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense of conviction is the unlawful possession of a firearm by a felon, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply.

3. 'Prior felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).";

and by inserting after Note 1 the following new Note 2:

"2. Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry.".

The Commentary to §4B1.2 captioned "Application Notes" is amended by redesignating Note 4 as Note 3.

The Commentary to §2K1.3 captioned "Application Notes" is amended in Note 2 by deleting "Note 3"

and inserting in lieu thereof "Note 1".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 5 by deleting "Note 3" and inserting in lieu thereof "Note 1".

The Commentary to §7B1.1 captioned "Application Notes" is amended in Note 2 by deleting "§4B1.2(1)" and inserting in lieu thereof "§4B1.2(a)"; and by deleting "Notes 1 and 2" and inserting in lieu thereof "Note 1".

The Commentary to §7B1.1 captioned "Application Notes" is amended in Note 3 by deleting "§4B1.2(2)" and inserting in lieu thereof "§4B1.2(b)".

This amendment addresses a circuit court conflict regarding whether the offenses of possessing a listed chemical with intent to manufacture a controlled substance or possessing a prohibited flask or equipment with intent to manufacture a controlled substance are "controlled substance offenses" under the career offender guideline. Compare United States v. Calverley, 11 F.3d 505 (5th Cir. 1993) (possession of a listed chemical with intent to manufacture a controlled substance is a controlled substance offense under §4B1.2) with United States v. Wagner, 994 F.2d 1467, 1475 (10th Cir. 1993) (possession of a listed chemical with intent to manufacture a controlled substance is not a controlled substance offense). This amendment makes each of these offenses a "controlled substance offense" under the career offender guideline. This decision is based on the Commission's view that there is such a close connection between possession of a listed chemical or prohibited flask or equipment with intent to manufacture a controlled substance and actually manufacturing a controlled substance that the former offenses are fairly considered as controlled substance trafficking offenses.

The amendment also clarifies that certain other offenses are "crimes of violence" or "controlled substance offenses" if the offense of conviction established that the underlying offense was a "crime of violence" or "controlled substance offense." See United States v. Baker, 16 F.3d 854 (8th Cir. 1994); United States v. Vea-Gonzalez, 999 F.2d 1326 (9th Cir. 1993), effectively overruled on other grounds by Custis v. United States, 114 S.Ct. 1732 (1994). Additionally, the amendment makes the following nonsubstantive changes to §4B1.2 to improve the internal consistency of the guidelines: (A) adding the phrase "punishable by a term of imprisonment of more than one year, that prohibits" in subsection (2) to make it consistent with subsection (1); and (B) conforming the second paragraph of Application Note 2 of §4B1.2 to the language of §§2K1.3 and 2K2.1. **The effective date of this amendment is November 1, 1997.**

569. Chapter Five, Part B, Subpart 1 is amended by deleting §§5B1.3 and 5B1.4 in their entirety as follows:

"§5B1.3. Conditions of Probation

(a) If a term of probation is imposed, the court shall impose a condition that the defendant shall not commit another federal, state, or local crime during the term of probation. 18 U.S.C. § 3563(a)(1). The court shall also impose a condition that the defendant not possess illegal controlled substances. 18 U.S.C. § 3563(a)(3).

(b) The court may impose other conditions that (1) are reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the purposes of sentencing and (2) involve only such deprivations of liberty or property as are reasonably necessary to effect the purposes of sentencing. 18 U.S.C. § 3563(b). Recommended conditions are set forth in §5B1.4.

(c) If a term of probation is imposed for a felony, the court shall impose at least one of the following as a condition of probation: a fine, an order of restitution, or community service, unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose

one or more of the other conditions set forth under 18 U.S.C. § 3563(b). 18 U.S.C. § 3563(a)(2).

(d) Intermittent confinement (custody for intervals of time) may be ordered as a condition of probation during the first year of probation. 18 U.S.C. § 3563(b)(11). Intermittent confinement shall be credited toward the guideline term of imprisonment at §5C1.1 as provided in the schedule at §5C1.1(e).

Commentary

A broader form of the condition required under 18 U.S.C. § 3563(a)(3) (pertaining to possession of controlled substances) is set forth as recommended condition (7) at §5B1.4 (Recommended Conditions of Probation and Supervised Release).

§5B1.4. Recommended Conditions of Probation and Supervised Release (Policy Statement)

(a) The following 'standard' conditions (1-13) are generally recommended for both probation and supervised release:

(1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

(2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) the defendant shall support his dependents and meet other family responsibilities;

(5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

(7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

(8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;

(9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(10) the defendant shall permit a probation officer to visit him at

any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

(b) The following 'special' conditions of probation and supervised release (14-24) are either recommended or required by law under the circumstances described, or may be appropriate in a particular case:

(14) Possession of Weapons

If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense, it is recommended that the court impose a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.

(15) Restitution

If the court imposes an order of restitution, it is recommended that the court impose a condition requiring the defendant to make payment of restitution or adhere to a court ordered installment schedule for payment of restitution. See §5E1.1 (Restitution).

(16) Fines

If the court imposes a fine, it is recommended that the court impose a condition requiring the defendant to pay the fine or adhere to a court ordered installment schedule for payment of the fine.

(17) Debt Obligations

If an installment schedule of payment of restitution or fines is imposed, it is recommended that the court impose a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(18) Access to Financial Information

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine, it is

recommended that the court impose a condition requiring the defendant to provide the probation officer access to any requested financial information.

(19) Community Confinement

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of probation or supervised release. See §5F1.1 (Community Confinement).

(20) Home Detention

Home detention may be imposed as a condition of probation or supervised release, but only as a substitute for imprisonment. See §5F1.2 (Home Detention).

(21) Community Service

Community service may be imposed as a condition of probation or supervised release. See §5F1.3 (Community Service).

(22) Occupational Restrictions

Occupational restrictions may be imposed as a condition of probation or supervised release. See §5F1.5 (Occupational Restrictions).

(23) Substance Abuse Program Participation

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol, it is recommended that the court impose a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

(24) Mental Health Program Participation

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment, it is recommended that the court impose a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(25) Curfew

If the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to provide just punishment for the offense, to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant, a condition of curfew is recommended. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

Commentary

Application Note:

1. Home detention, as defined by §5F1.2, may only be used as a substitute for imprisonment. See §5C1.1 (Imposition of a Term of Imprisonment). Under home detention, the defendant, with specified exceptions, is restricted to his place of residence during all non-working hours. Curfew, which limits the defendant to his place of residence during evening and nighttime hours, is less restrictive than home detention and may be imposed as a condition of probation whether or not imprisonment could have been ordered.".

A replacement guideline with accompanying commentary is inserted as §5B1.3 (Conditions of Probation).

Chapter Five, Part D, Subpart 1 is amended by deleting §5D1.3 in its entirety as follows:

"§5D1.3. Conditions of Supervised Release

(a) If a term of supervised release is imposed, the court shall impose a condition that the defendant not commit another federal, state, or local crime. 18 U.S.C. § 3583(d). The court shall also impose a condition that the defendant not possess illegal controlled substances. 18 U.S.C. § 3563(a)(3).

(b) The court may impose other conditions of supervised release, to the extent that such conditions are reasonably related to (1) the nature and circumstances of the offense and the history and characteristics of the defendant, and (2) the need for the sentence imposed to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C. §§ 3553(a)(2) and 3583(d).

(c) Recommended conditions of supervised release are set forth in §5B1.4.

Commentary

Background: This section applies to conditions of supervised release. The conditions generally recommended for supervised release are those recommended for probation. See §5B1.4. A broader form of the condition required under 18 U.S.C. § 3563(a)(3) (pertaining to possession of controlled substances) is set forth as recommended condition (7) at §5B1.4 (Recommended Conditions of Probation and Supervised Release).".

A replacement guideline with accompanying commentary is inserted as §5D1.3 (Conditions of Supervised Release).

The Commentary to §2X5.1 captioned "Application Note" is amended in Note 1 by deleting: "§5B1.4 (Recommended Conditions of Probation and Supervised Release);".

Section 5H1.3 is amended by deleting "recommended condition (24) at §5B1.4 (Recommended Conditions of Probation and Supervised Release)" and inserting in lieu thereof "§§5B1.3(d)(5) and 5D1.3(d)(5)".

Section 5H1.4 is amended in the second paragraph by deleting "recommended condition (23) at §5B1.4 (Recommended Conditions of Probation and Supervised Release)" and inserting in lieu thereof "§5D1.3(d)(4)"; and in the third paragraph by deleting "recommended condition (23) at §5B1.4 (Recommended Conditions of Probation and Supervised Release)" and inserting in lieu thereof "§5B1.3(d)(4)".

Section 8D1.3(a) is amended by deleting "shall" immediately after "organization".

Section 8D1.3(b) is amended by deleting "a fine, restitution, or community service," and inserting in lieu thereof "(1) restitution, (2) notice to victims of the offense pursuant to 18 U.S.C. § 3555, or (3) an order

requiring the organization to reside, or refrain from residing, in a specified place or area,";

and by adding at the end:

"Note: Section 3563(a)(2) of Title 18, United States Code, provides that, absent unusual circumstances, a defendant convicted of a felony shall abide by at least one of the conditions set forth in 18 U.S.C. § 3563(b)(2), (b)(3), and (b)(13). Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, those conditions were a fine ((b)(2)), an order of restitution ((b)(3)), and community service ((b)(13)). Whether or not the change was intended, the Act deleted the fine condition and renumbered the restitution and community service conditions in 18 U.S.C. § 3563(b), but failed to make a corresponding change in the referenced paragraphs under 18 U.S.C. § 3563(a)(2). Accordingly, the conditions now referenced are restitution ((b)(2)), notice to victims pursuant to 18 U.S.C. § 3555 ((b)(3)), and an order that the defendant reside, or refrain from residing, in a specified place or area ((b)(13)).".

The purposes of this amendment are twofold. First, the amendment revises the pertinent guidelines to reflect statutorily required conditions of probation and supervised release added by Section 203 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1227, and other laws. Second, the amendment revises §§5B1.3 (Conditions of Probation), 5B1.4 (Recommended Conditions of Probation and Supervised Release), and 5D1.3 (Conditions of Supervised Release) so as to better distinguish among the statutorily required, standard, and special conditions of probation and supervised release. Section 5B1.4 has been eliminated. Provisions of §5B1.4 relating to recommended conditions of probation have been incorporated into §5B1.3, and provisions of §5B1.4 relating to recommended conditions of supervised release have been incorporated into §5D1.3. **The effective date of this amendment is November 1, 1997.**

570. Section 5D1.2(a) is amended by deleting "If" and inserting in lieu thereof "Subject to subsection (b), if".

Section 5D1.2(b) is amended by deleting "Provided, that" and inserting in lieu thereof "Except as otherwise provided,"; and by deleting "in no event" and inserting in lieu thereof "not"

The Commentary to §5D1.2 is amended by inserting the following before "Background":

"Application Notes:

1. A defendant who qualifies under §5C1.2 (Applicability of Statutory Minimum Sentence in Certain Cases) is not subject to any statutory minimum sentence of supervised release. See 18 U.S.C. § 3553(f). In such a case, the term of supervised release shall be determined under subsection (a).

2. Upon motion of the Government, a defendant who has provided substantial assistance in the investigation or prosecution of another person who has committed an offense may be sentenced to a term of supervised release that is less than any minimum required by statute or the guidelines. See 18 U.S.C. § 3553(e), §5K1.1 (Substantial Assistance to Authorities).".

The Commentary to §5C1.2 captioned "Application Notes" is amended by inserting after Note 8 the following additional note:

"9. A defendant who meets the criteria under this section is exempt from any otherwise applicable statutory minimum sentence of imprisonment and statutory minimum term of supervised release.".

This amendment amends §5D1.2 (Term of Supervised Release) to make clear that a defendant who qualifies under the "safety valve" (§5C1.2, 18 U.S.C. § 3553(f)), or who is the beneficiary of a Government substantial assistance motion under 18 U.S.C. § 3553(e), is not subject to any statutory minimum term of supervised release. This issue has arisen in a number of hotline calls. This amendment also clarifies that the requirement in subsection (a), with respect to the length of a term of supervised release, is subject to the requirement in subsection (b) that the term be not less than any

statutorily required term of supervised release. **The effective date of this amendment is November 1, 1997.**

571. Chapter Five, Part E, Subpart 1 is amended by deleting §5E1.1 in its entirety as follows:

"§5E1.1. Restitution

(a) The court shall --

(1) enter a restitution order if such order is authorized under 18 U.S.C. §§ 3663-3664; or

(2) if a restitution order would be authorized under 18 U.S.C. §§ 3663-3664, except for the fact that the offense of conviction is not an offense set forth in Title 18, United States Code, or 49 U.S.C. § 46312, § 46502, or § 46504, impose a term of probation or supervised release with a condition requiring restitution.

(b) *Provided*, that the provisions of subsection (a) do not apply when full restitution has been made, or to the extent the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of a restitution requirement outweighs the need to provide restitution to any victims through the criminal process.

(c) If a defendant is ordered to make restitution and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

(d) With the consent of the victim of the offense, the court may order a defendant to perform services for the benefit of the victim in lieu of monetary restitution or in conjunction therewith. 18 U.S.C. § 3663(b)(4).

Commentary

Application Note:

1. In the case of a conviction under certain statutes, additional requirements regarding restitution apply. See 18 U.S.C. §§ 2248 and 2259 (applying to convictions under 18 U.S.C. §§ 2241-2258 for sexual-abuse offenses and sexual exploitation of minors); 18 U.S.C. § 2327 (applying to convictions under 18 U.S.C. §§ 1028-1029, 1341-1344 for telemarketing-fraud offenses); 18 U.S.C. § 2264 (applying to convictions under 18 U.S.C. §§ 2261-2262 for domestic-violence offenses). To the extent that any of the above-noted statutory provisions conflict with the provisions of this guideline, the applicable statutory provision shall control.

Background: Section 3553(a)(7) of Title 18 requires the court, 'in determining the particular sentence to be imposed,' to consider 'the need to provide restitution to any victims of the offense.' Section 3556 of Title 18 authorizes the court to impose restitution in accordance with 18 U.S.C. §§ 3663 and 3664, which authorize restitution for violations of Title 18 or 49 U.S.C. § 46312, § 46502, or § 46504. For other offenses, restitution may be imposed as a condition of probation or supervised release. See 18 U.S.C. § 3563(b)(3) as amended by Section 7110 of Pub. L. No. 100-690 (1988).

A court's authority to decline to order restitution is limited. Subsection (a)(1) of this guideline requires the court to order restitution for offenses under Title 18, United

States Code, or 49 U.S.C. § 46312, § 46502, or § 46504, unless full restitution has already been made or 'the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution . . . outweighs the need to provide restitution to any victims.' 18 U.S.C. § 3663(d). The legislative history of 18 U.S.C. § 3579, the precursor of 18 U.S.C. § 3663, states that even '[i]n those unusual cases where the precise amount owed is difficult to determine, the section authorizes the court to reach an expeditious, reasonable determination of appropriate restitution by resolving uncertainties with a view toward achieving fairness to the victim.' S. Rep. No. 532, 97th Cong., 2d Sess. 31, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, 2537. If the court does not order restitution, or orders only partial restitution, it must state its reasons for doing so. 18 U.S.C. § 3553(c). Subsection (a)(2) provides for restitution as a condition of probation or supervised release for offenses not set forth in Title 18, United States Code, or 49 U.S.C. § 46312, § 46502, or § 46504.

In determining whether to impose an order of restitution, and the amount of restitution, the court shall consider the amount of loss the victim suffered as a result of the offense, the financial resources of the defendant, the financial needs of the defendant and his dependents, and other factors the court deems appropriate. 18 U.S.C. § 3664(a).

Pursuant to Rule 32(b)(4)(D), Federal Rules of Criminal Procedure, the probation officer's presentence investigation report must contain a victim impact statement. That report must contain information about the financial impact on the victim and the defendant's financial condition. The sentencing judge may base findings on the presentence report or other testimony or evidence supported by a preponderance of the evidence. 18 U.S.C. § 3664(d).

Unless the court orders otherwise, restitution must be made immediately. 18 U.S.C. § 3663(f)(3). The court may permit the defendant to make restitution within a specified period or in specified installments, provided that the last installment is paid not later than the expiration of probation, five years after the end of the defendant's term of imprisonment, or in any other case five years after the date of sentencing. 18 U.S.C. § 3663(f)(1) and (2). The restitution order should specify the manner in which, and the persons to whom, payment is to be made.".

A replacement guideline with accompanying commentary is inserted as §5E1.1 (Restitution).

Chapter Eight, Part B, Subpart 1 is amended by deleting §8B1.1 in its entirety as follows:

"§8B1.1. Restitution - Organizations

(a) The court shall --

(1) enter a restitution order if such order is authorized under 18 U.S.C. §§ 3663-3664; or

(2) if a restitution order would be authorized under 18 U.S.C. §§ 3663-3664, except for the fact that the offense of conviction is not an offense set forth in Title 18, United States Code, or 49 U.S.C. § 1472(h), (i), (j), or (n), sentence the organization to probation with a condition requiring restitution.

(b) *Provided*, that the provisions of subsection (a) do not apply when the organization has made full restitution, or to the extent the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of a restitution requirement outweighs the need to provide restitution to any victims through the criminal process.

Commentary

Background: This guideline provides for restitution either as a sentence under 18 U.S.C. §§ 3663-3664 or as a condition of probation.".

A replacement guideline with accompanying commentary is inserted as §8B1.1 (Restitution - Organizations).

This amendment conforms the provisions of §§5E1.1 and 8B1.1 to section 204 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1227, which includes procedures for payment of full restitution to a victim of the offense. The amendment also implements the directive to the Commission in section 205 of the Act to issue guidelines to assist courts in determining an appropriate amount of "community restitution" when the defendant is convicted of certain drug offenses and there is no identifiable victim of the offense. As a starting point, the Commission has elected to issue a guideline that permits broad court discretion to determine an amount of community restitution not exceeding the fine imposed. Over time, the Commission intends to evaluate and refine this guideline in light of sentencing experience. **The effective date of this amendment is November 1, 1997.**

572. Section §5E1.2(b) is amended by deleting "Except as provided in subsections (f) and (i) below, or otherwise required by statute, the fine imposed shall be within the range" and inserting in lieu thereof "The applicable fine guideline range is that".

Section 5E1.2(c)(1) is amended by inserting "guideline" after "fine".

Section 5E1.2(c)(2) is amended by inserting "guideline" after "fine".

Section 5E1.2(d) is amended in subdivision (6) by deleting "and"; by redesignating subdivision (7) as subdivision (8); and by inserting after subdivision (6) the following new subdivision (7):

"(7) the expected costs to the government of any term of probation, or term of imprisonment and term of supervised release imposed; and".

Section 5E1.2 is amended by deleting "(e)"; by redesignating subsections (f), (g), and (h) as subsections (e), (f), and (g) respectively; and by deleting:

"(i) Notwithstanding of the provisions of subsection (c) of this section, but subject to the provisions of subsection (f) herein, the court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered.".

The Commentary to §5E1.2 captioned "Application Notes" is amended in Note 6 by deleting "§5E1.2" and inserting in lieu thereof "this section".

The Commentary to §5E1.2 captioned "Application Notes" is amended in Note 7 by deleting:

"Subsection (i) provides for an additional fine sufficient to pay the costs of any imprisonment, probation, or supervised release ordered, subject to the defendant's ability to pay as prescribed in subsection (f). In making a determination as to the amount of any fine to be imposed under this provision,"

and inserting in lieu thereof "In considering subsection (d)(7),".

This amendment indirectly addresses a circuit court conflict regarding whether a court may impose a fine for costs of imprisonment and/or supervision when it has not imposed any punitive fine. Compare, United States v. Labat, 915 F.2d 603 (10th Cir. 1990)(requiring imposition of punitive fine before costs of imprisonment fine can be imposed) with United States v. Sellers, 42 F.3d 116 (2d Cir. 1994)(not requiring imposition of punitive fine before ordering costs of imprisonment fine), cert. denied, 116 S.Ct. 93 (1995).

Recognizing that a fine for costs of imprisonment and/or supervision is not statutorily required and rarely is imposed, the Commission has elected to dispense with the requirement that courts determine a separate, additional fine for such costs. Instead, the amendment provides that the court shall take such costs into consideration in determining the appropriate amount of a punitive fine.

Because, under the amended procedure, it no longer will be necessary to determine a separate fine increment for costs associated with implementing the sentence, the issue on which the circuit courts have differed should not arise. This procedure also should substantially simplify fine calculations, thereby allowing court and probation officer resources to be used more efficiently and productively. **The effective date of this amendment is November 1, 1997.**

573. The Commentary to §5E1.3 captioned "Background" is amended by deleting the entire text as follows:

"Background: The Victims of Crime Act of 1984, Pub. L. No. 98-473, Title II, Chap. XIV, requires the courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation. Monies deposited in the fund are awarded to the states by the Attorney General for victim assistance and compensation programs. Under the Victims of Crime Act, as amended by Section 7085 of the Anti-Drug Abuse Act of 1988, the court is required to impose assessments in the following amounts with respect to offenses committed on or after November 18, 1988:

Individuals:

$5, if the defendant is an individual convicted of an infraction or a Class C misdemeanor;
$10, if the defendant is an individual convicted of a Class B misdemeanor;
$25, if the defendant is an individual convicted of a Class A misdemeanor; and
$50, if the defendant is an individual convicted of a felony.

Organizations:

$50, if the defendant is an organization convicted of a Class B misdemeanor;
$125, if the defendant is an organization convicted of a Class A misdemeanor; and
$200, if the defendant is an organization convicted of a felony. 18 U.S.C. § 3013.

With respect to offenses committed prior to November 18, 1988, the court is required to impose assessments in the following amounts:

$25, if the defendant is an individual convicted of a misdemeanor;
$50, if the defendant is an individual convicted of a felony;
$100, if the defendant is an organization convicted of a misdemeanor; and
$200, if the defendant is an organization convicted of a felony. 18 U.S.C. § 3013.

The Act does not authorize the court to waive imposition of the assessment.",

and inserting in lieu thereof:

"Application Notes:

1. This guideline applies only if the defendant is an individual. See §8E1.1 for special assessments applicable to organizations.

2. The following special assessments are provided by statute (18 U.S.C. § 3013):

For Offenses Committed By Individuals On Or After April 24, 1996:

(A) $100, if convicted of a felony;
(B) $25, if convicted of a Class A misdemeanor;
(C) $10, if convicted of a Class B misdemeanor;

(D) $5, if convicted of a Class C misdemeanor or an infraction.

For Offenses Committed By Individuals On Or After November 18, 1988 But Prior To April 24, 1996:

(E) $50, if convicted of a felony;
(F) $25, if convicted of a Class A misdemeanor;
(G) $10, if convicted of a Class B misdemeanor;
(H) $5, if convicted of a Class C misdemeanor or an infraction.

For Offenses Committed By Individuals Prior To November 18, 1988:

(I) $50, if convicted of a felony;
(J) $25, if convicted of a misdemeanor.

3. A special assessment is required by statute for each count of conviction.

Background: Section 3013 of Title 18, United States Code, added by The Victims of Crimes Act of 1984, Pub. L. No. 98-473, Title II, Chap. XIV, requires courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation.".

The Commentary to §8E1.1 captioned "Background" is amended by deleting the entire text as follows:

"Background: Pursuant to 18 U.S.C. § 3013(a), the court is required to impose assessments in the following amounts:

$50, if the organization is convicted of a Class B misdemeanor;
$125, if the organization is convicted of a Class A misdemeanor; and
$200, if the organization is convicted of a felony. 18 U.S.C. § 3013.

The Act does not authorize the court to waive imposition of the assessment.",

and inserting in lieu thereof the following:

"Application Notes:

1. This guideline applies if the defendant is an organization. It does not apply if the defendant is an individual. See §5E1.3 for special assessments applicable to individuals.

2. The following special assessments are provided by statute (see 18 U.S.C. § 3013):

For Offenses Committed By Organizations On Or After April 24, 1996:

(A) $400, if convicted of a felony;
(B) $125, if convicted of a Class A misdemeanor;
(C) $50, if convicted of a Class B misdemeanor; or
(D) $25, if convicted of a Class C misdemeanor or an infraction.

For Offenses Committed By Organizations On Or After November 18, 1988 But Prior To April 24, 1996:

(E) $200, if convicted of a felony;
(F) $125, if convicted of a Class A misdemeanor;
(G) $50, if convicted of a Class B misdemeanor; or
(H) $25, if convicted of a Class C misdemeanor or an infraction.

For Offenses Committed By Organizations Prior To November 18, 1988:

(I) $200, if convicted of a felony;
(J) $100, if convicted of a misdemeanor.

3. A special assessment is required by statute for each count of conviction.

Background: Section 3013 of Title 18, United States Code, added by The Victims of Crimes Act of 1984, Pub. L. No. 98-473, Title II, Chap. XIV, requires courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation.".

This amendment conforms §§5E1.3 (Special Assessments) and 8E1.1 (Special Assessments - Organizations) to changes made by section 210 of the Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1240, and section 601(r)(4) of Pub. L. 104-294, 110 Stat. 3502. As amended, the felony assessments for offenses committed after April 24, 1996, are raised to $100 for individuals and $400 for organizations. **The effective date of this amendment is November 1, 1997.**

574. Section 6A1.1 is amended by deleting "(c)(1)" and inserting in lieu thereof "(b)(1)".

The Commentary to 6A1.1 is amended by deleting "(c)(1)" and inserting in lieu thereof "(b)(1)".

Section 6A1.2 is amended by deleting "See Model Local Rule for Guideline Sentencing prepared by the Probation Committee of the Judicial Conference (August 1987)." and insert in lieu thereof "Rule 32(b)(6), Fed. R. Crim. P.".

The Commentary to §6A1.2 captioned "Application Note" is amended in Note 1 by deleting "111 S. Ct. 2182" and inserting in lieu thereof "501 U.S. 129, 135-39".

The Commentary to §6A1.2 captioned "Background" is amended by inserting "in writing" after "respond"; and by deleting:

"The potential complexity of factors important to the sentencing determination normally requires that the position of the parties be presented in writing. However, because courts differ greatly with respect to their reliance on written plea agreements and with respect to the feasibility of written statements under guidelines, district courts are encouraged to consider the approach that is most appropriate under local conditions. The Commission intends to reexamine this issue in light of experience under the guidelines.",

and inserting in lieu thereof "Rule 32(b)(6)(B), Fed. R. Crim. P.".

Section 6A1.3(a) is amended in the second sentence by deleting "reasonable" before "dispute".

Section 6A1.3(b) is amended by inserting "at a sentencing hearing" after "factors"; by deleting "(a)(1)" and inserting in lieu thereof "(c)(1)"; and by deleting "(effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral written objections before imposition of sentence.".

The Commentary to §6A1.3 is amended in the first paragraph by deleting "will no longer exist" and inserting in lieu thereof "no longer exists"; by deleting "will usually have" and inserting in lieu thereof "usually has";

and by deleting:

"Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979) cert. denied, 444 U.S. 1073 (1980). The sentencing court must determine

the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.",

and inserting in lieu thereof:

" Although lengthy sentencing hearings seldom should be necessary, disputes about sentencing factors must be resolved with care. When a dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. See, e.g., United States v. Ibanez, 924 F.2d 427 (2d Cir. 1991). An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See, e.g., United States v. Jimenez Martinez, 83 F.3d 488, 494-95 (1st Cir. 1996) (finding error in district court's denial of defendant's motion for evidentiary hearing given questionable reliability of affidavit on which the district court relied at sentencing); United States v. Roberts, 14 F.3d 502, 521(10th Cir. 1993) (remanding because district court did not hold evidentiary hearing to address defendants' objections to drug quantity determination or make requisite findings of fact regarding drug quantity); see also, United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.".

The Commentary to §6A1.3 is amended by deleting:

" In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. § 3661. Any information may be considered, so long as it has 'sufficient indicia of reliability to support its probable accuracy.' United States v. Marshall, 519 F. Supp. 751 (E.D. Wis. 1981), aff'd, 719 F.2d 887 (7th Cir. 1983); United States v. Fatico, 579 F.2d 707 (2d Cir. 1978) cert. denied, 444 U.S. 1073 (1980). Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered 'where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means.' United States v. Fatico, 579 F.2d at 713. Unreliable allegations shall not be considered. United States v. Weston, 448 F.2d 626 (9th Cir. 1971) cert. denied, 404 U.S. 1061 (1972).",

and inserting in lieu thereof:

" In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. See 18 U.S.C. § 3661; see also United States v. Watts, 117 U.S. 633, 635 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct); Witte v. United States, 515 U.S. 389, 399-401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution); Nichols v. United States, 511 U.S. 738, 747-48 (1994) (noting that district courts have traditionally considered defendant's prior criminal conduct even when the conduct did not result in a conviction). Any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy. Watts, 117 U.S. at 637; Nichols, 511 U.S. at 748; United States v. Zuleta-Alvarez, 922 F.2d 33 (1st Cir. 1990), cert. denied, 500 U.S. 927 (1991); United States v. Beaulieu, 893 F.2d 1177 (10th Cir.), cert. denied, 497 U.S. 1038 (1990). Reliable hearsay evidence may be considered. United States v. Petty, 982 F.2d 1365 (9th Cir. 1993), cert. denied, 510 U.S. 1040 (1994); United States v. Sciarrino, 884 F.2d 95 (3d Cir.), cert. denied, 493 U.S. 997 (1989). Out-of-court declarations by an unidentified informant may be considered where there is good cause for the non-disclosure of the informant's identity and there is sufficient corroboration by other means. United States v. Rogers, 1 F.3d 341 (5th Cir. 1993); see also United States v. Young, 981 F.2d 180 (5th Cir.), cert. denied, 508 U.S. 980 (1993); United States v. Fatico, 579 F.2d 707, 713 (2d Cir. 1978), cert. denied, 444 U.S. 1073 (1980). Unreliable allegations shall not be considered. United States v. Ortiz, 993 F.2d 204 (10th Cir. 1993).".

The Commentary to §6A1.3 is amended by deleting:

" If sentencing factors are the subject of reasonable dispute, the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed.".

This amendment makes a number of technical and conforming changes to the policy statements in Chapter Six, Part A (Sentencing Procedures) to reflect changes in Rule 32, Fed. R. Crim. P. and updates the case law references in the commentary to §6A1.3 to include references to sentencing guideline cases. **The effective date of this amendment is November 1, 1997.**

575. Appendix A (Statutory Index) is amended by inserting, in the appropriate place by title and section:

"18 U.S.C. § 514	2F1.1";
"18 U.S.C. § 611	2H2.1";
"18 U.S.C. § 669	2B1.1";
"18 U.S.C. § 758	2A2.4";
"18 U.S.C. § 1030(a)(7)	2B3.2";
"18 U.S.C. § 1035	2F1.1";
"18 U.S.C. § 1347	2F1.1";
"18 U.S.C. § 1518	2J1.2";
"18 U.S.C. § 1831	2B1.1";
"18 U.S.C. § 1832	2B1.1";
"18 U.S.C. § 2261A	2A6.2";
"21 U.S.C. § 841(b)(7)	2D1.1";
"21 U.S.C. § 960(d)(7)	2D1.11";
"47 U.S.C. § 223(a)(1)(C)	2A6.1";
"47 U.S.C. § 223(a)(1)(D)	2A6.1";
"47 U.S.C. § 223(a)(1)(E)	2A6.1";
"49 U.S.C. § 5124	2Q1.2";
"49 U.S.C. § 32703	2N3.1";
"49 U.S.C. § 32704	2N3.1";
"49 U.S.C. § 32705	2N3.1";
"49 U.S.C. § 32709(b)	2N3.1";
"49 U.S.C. § 60123(d)	2B1.3";
"49 U.S.C. § 80116	2F1.1";
"49 U.S.C. § 80501	2B1.3";

in the line referenced to "15 U.S.C. § 1281" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2B1.3";

in the line referenced to "15 U.S.C. § 1983" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2N3.1";

in the line referenced to "15 U.S.C. § 1984" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2N3.1";

in the line referenced to "15 U.S.C. § 1985" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2N3.1";

in the line referenced to "15 U.S.C. § 1986" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2N3.1";

in the line referenced to "15 U.S.C. § 1987" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2N3.1";

in the line referenced to "15 U.S.C. § 1988" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2N3.1";

in the line referenced to "15 U.S.C. § 1990c" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2N3.1";

by deleting "18 U.S.C. § 1008 2F1.1, 2S1.3";

in the line referenced to "18 U.S.C. § 1030(a)(2)" by deleting "2F1.1" and inserting in lieu thereof "2B1.1";

in the line referenced to "18 U.S.C. § 1030(a)(3)" by deleting "2F1.1" and inserting in lieu thereof "2B2.3";

in the line referenced to "18 U.S.C. § 1030(a)(5)" by deleting "2F1.1" and inserting in lieu thereof "2B1.3";

by deleting:

"18 U.S.C. § 2258(a), (b) 2G2.1, 2G2.2",

and inserting in lieu thereof:

"18 U.S.C. § 2260 2G2.1, 2G2.2";

in the line referenced to "18 U.S.C. § 2261" by deleting "2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2B3.1, 2B3.2, 2K1.4" and inserting in lieu thereof "2A6.2";

in the line referenced to "18 U.S.C. § 2262" by deleting "2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2B3.1, 2B3.2, 2K1.4" and inserting in lieu thereof "2A6.2";

in the line referenced to "21 U.S.C. § 959" by inserting ", 2D1.11" immediately after "2D1.1".

in the line referenced to "49 U.S.C. § 121" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2F1.1";

in the line referenced to "49 U.S.C. § 1809(b)" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2Q1.2";

in the line referenced to "49 U.S.C. App. § 1687(g)" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2B1.3"; and

by deleting "49 U.S.C. § 14904 2B4.1".

The Commentary to §2G2.1 captioned "Statutory Provisions" is amended by deleting "2258(a), (b)" and inserting in lieu thereof "2260".

The Commentary to §2G2.2 captioned "Statutory Provisions" is amended by deleting "2258(a), (b)" and inserting in lieu thereof "2260".

Section 2K2.1(a)(3) is amended by inserting "felony" before "prior".

This amendment makes Appendix A (Statutory Index) more comprehensive. This amendment adds references for additional offenses, including offenses created by recently enacted legislation. In addition, this amendment revises Appendix A to conform to the revision of existing statutes and to reflect the codification of Title 49, United States Code. This amendment also corrects clerical errors in §§2G2.1 and 2G2.2.

Finally, this amendment corrects a clerical error in §2K2.1(a)(3), as amended by amendment 522, effective November 1, 1995. During the execution of that amendment, which equalized offense levels for semiautomatic assault weapon possession with machinegun possession, the word "felony" was inadvertently omitted from the phrase "prior conviction" in subsection (a)(3). **The effective date of this amendment is November 1, 1997.**