

This amendment implements the instructions in Section 401 of the Crime Control Act of 1990 (Public Law 101-647), in some cases with a broader scope, by adding specific offense characteristics at subsections (b)(5) and (b)(6). With respect to the portion of the Congressional instruction pertaining to aiders or abettors, no amendment was required because §1B1.3 (Relevant Conduct) provides an offense level greater than that required by the Congressional instruction. A separate amendment (amendment 388) clarifies that maltreatment to a life threatening degree constitutes life-threatening bodily injury. In addition, this amendment replaces the current subsection (b)(5) with a revised subsection (b)(7) that addresses other offenses connected with kidnapping, abduction, or unlawful restraint in a manner that more appropriately reflects the combined seriousness of such offenses, and inserts a cross reference to address the case in which the victim was murdered. **The effective date of this amendment is November 1, 1991.**

364. Section 2B1.1(b)(7) is amended by inserting "-- (A)" immediately before "substantially"; and by deleting the comma immediately following "institution" and inserting in lieu thereof "; or (B) affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense,".

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by inserting "225," immediately before "641".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 9 by deleting "215" and inserting in lieu thereof "20"; and by deleting "1008, 1014, and 1344" and inserting in lieu thereof "1007, and 1014".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 10 by deleting:

"as a consequence of the offense the institution became insolvent, substantially reduced benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment or investment, or was so depleted of its assets as to be forced to merge with another institution in order to continue active operations",

and inserting in lieu thereof:

", as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above".

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

- "11. 'The defendant derived more than \$1,000,000 in gross receipts from the offense,' as used in subsection (b)(7)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. 'Gross receipts from the offense' includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).
12. If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the 'continuing financial crimes enterprise.'
13. If subsection (b)(7)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved 'more than minimal planning.'"

The Commentary to §2B1.1 captioned "Background" is amended in the seventh paragraph by deleting "(b)(7)" and inserting in lieu thereof "(b)(7)(A)", and by deleting "statutory directive" and inserting in lieu thereof "instruction"; and by inserting the following additional paragraph at the end:

" Subsection (b)(7)(B) implements the instruction to the Commission in Section 2507 of Public Law 101-647."

Section 2B4.1(b)(2) is amended by inserting "-- (A)" immediately before "substantially"; and by deleting the comma immediately following "institution" and inserting in lieu thereof "; or (B) affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense,".

The Commentary to §2B4.1 captioned "Statutory Provisions" is amended by inserting ", 225" immediately following "224".

The Commentary to §2B4.1 captioned "Application Notes" is amended in Note 2 by deleting "Bribery" and inserting in lieu thereof "Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right".

The Commentary to §2B4.1 captioned "Application Notes" is amended in Note 3 by deleting "215" and inserting in lieu thereof "20"; and by deleting "1008, 1014, and 1344" and inserting in lieu thereof "1007, and 1014".

The Commentary to §2B4.1 captioned "Application Notes" is amended in Note 4 by deleting:

"as a consequence of the offense the institution became insolvent, substantially reduced benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment or investment, or was so depleted of its assets as to be forced to merge with another institution in order to continue active operations",

and inserting in lieu thereof:

", as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above".

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

- "5. 'The defendant derived more than \$1,000,000 in gross receipts from the offense,' as used in subsection (b)(2)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. 'Gross receipts from the offense' includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).
6. If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the 'continuing financial crimes enterprise.'"

The Commentary to §2B4.1 captioned "Background" is amended in the second paragraph by deleting the second sentence as follows:

"As is the case for most other offenses covered by this guideline, the maximum term of imprisonment authorized is five years.";

in the seventh paragraph by deleting "(b)(2)" and inserting in lieu thereof "(b)(2)(A)", and by deleting "statutory directive" and inserting in lieu thereof "instruction"; and by inserting the following additional paragraph at the end:

" Subsection (b)(2)(B) implements the instruction to the Commission in Section 2507 of Public Law 101-647."

Section 2F1.1(b)(6) is amended by inserting "-- (A)" immediately before "substantially"; and by deleting the comma immediately following "institution" and inserting in lieu thereof "; or (B) affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense,".

The Commentary to §2F1.1 captioned "Statutory Provisions" is amended by inserting "225," immediately before "285".

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 14 by deleting "215" and inserting in lieu thereof "20"; and by deleting "1008, 1014, and 1344" and inserting in lieu thereof "1007, and 1014".

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 15 by deleting:

"as a consequence of the offense the institution became insolvent, substantially reduced benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment or investment, or was so depleted of its assets as to be forced to merge with another institution in order to continue active operations",

and inserting in lieu thereof:

", as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above".

The Commentary to §2F1.1 captioned "Application Notes" is amended by inserting the following additional notes:

16. 'The defendant derived more than \$1,000,000 in gross receipts from the offense,' as used in subsection (b)(6)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. 'Gross receipts from the offense' includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).
17. If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the 'continuing financial crimes enterprise.'
18. If subsection (b)(6)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved 'more than minimal planning.'".

The Commentary to §2F1.1 captioned "Background" is amended in the sixth paragraph by deleting "(b)(6)" and inserting in lieu thereof "(b)(6)(A)", and by deleting "statutory directive" and inserting in lieu thereof "instruction"; and by inserting the following additional paragraph at the end:

" Subsection (b)(6)(B) implements the instruction to the Commission in Section 2507 of Public Law 101-647."

This amendment implements the instruction to the Commission in Section 2507 of the Crime Control Act of 1990 (Public Law 101-647). It also reflects the new offense relating to a continuing financial crimes enterprise created by Section 2510 of the Crime Control Act of 1990. In addition, it revises the Commentary to §§2B1.1, 2B4.1, and 2F1.1 with respect to the definition of "substantially jeopardized the safety and soundness of a financial institution" so that the commentary is read to include cases in which the offense created a substantial risk of any of the harms described in addition to cases in which such harm actually occurred. **The effective date of this amendment is November 1, 1991.**

365. Section 2B3.1(b) is amended by deleting:

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

and inserting in lieu thereof:

- "(2) (A) If a firearm was discharged, increase by 7 levels; (B) if a firearm was otherwise used, increase by 6 levels; (C) if a firearm was brandished, displayed, or possessed, increase by 5 levels; (D) if a dangerous weapon was otherwise used, increase by 4 levels; (E) if a dangerous weapon was brandished, displayed, or possessed, increase by 3 levels; or (F) if an express threat of death was made, increase by 2 levels."

Section 2B3.1 (b)(3) is amended by deleting "9" and inserting in lieu thereof "11".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 1 by inserting "'bodily injury,' 'serious bodily injury,' 'permanent or life-threatening bodily injury,'" immediately before "'abducted'".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 2 by deleting "(b)(2)(C)" and inserting in lieu thereof "(b)(2)(E)".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 4 by deleting "9" and inserting in lieu thereof "11".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 7 by deleting "(b)(2)(D)" and inserting in lieu thereof "(b)(2)(F)".

This amendment increases the offense levels for use or possession of a firearm by 2 levels to better reflect the seriousness of such offenses and to reduce the disparity resulting from the exercise of prosecutorial discretion in the charging of an offense under 18 U.S.C. § 924(c) or § 929(a). In addition, this amendment revises the commentary to make the reference to the terms defined in §1B1.1 more comprehensive. **The effective date of this amendment is November 1, 1991.**

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

- "(1) If the greater of the amount obtained or demanded exceeded \$2,500, increase by the corresponding number of levels from the table in §2B2.1(b)(2).
- (2) (A) If a firearm was discharged, increase by 5 levels; (B) if a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) if a dangerous weapon (including a firearm) was brandished, displayed, or possessed, increase by 3 levels.";

by renumbering subdivisions (3) and (4) as (4) and (5) respectively; by inserting the following as subdivisions (1)-(3):

- "(1) If the offense involved an express or implied threat of death, bodily injury, or kidnapping, increase by 2 levels.
- (2) If the greater of the amount demanded or the loss to the victim exceeded \$10,000, increase by the corresponding number of levels from the table in §2B3.1(b)(6).
- (3) (A)(i) If a firearm was discharged, increase by 7 levels; (ii) if a firearm was otherwise used, increase by 6 levels; (iii) if a firearm was brandished, displayed, or possessed, increase by 5 levels; (iv) if a dangerous weapon was otherwise used, increase by 4 levels;

or (v) if a dangerous weapon was brandished, displayed, or possessed, increase by 3 levels; or

(B) If the offense involved preparation to carry out a threat of (i) death, (ii) serious bodily injury, (iii) kidnapping, or (iv) product tampering; or if the participant(s) otherwise demonstrated the ability to carry out such threat, increase by 3 levels.";

and in the last sentence of the renumbered subdivision (4) (formerly (3)) by deleting "(2)", "(3)" and "9", and inserting in lieu thereof "(3)", "(4)", and "11", respectively.

Section 2B3.2 is amended by inserting the following additional subsection:

"(c) Cross Reference

(1) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault With Intent to Commit Murder; Attempted Murder) if the resulting offense level is greater than that determined above."

The Commentary to §2B3.2 captioned "Application Notes" is amended in Note 1 by inserting "‘bodily injury,’ ‘serious bodily injury,’ ‘permanent or life-threatening bodily injury,’" immediately before "abducted"; and in Note 4 by deleting "9" and inserting in lieu thereof "11".

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

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

and inserting in lieu thereof:

"5. ‘Loss to the victim,’ as used in subsection (b)(2), means any demand paid plus any additional consequential loss from the offense (e.g., the cost of defensive measures taken in direct response to the offense).

6. In certain cases, an extortionate demand may be accompanied by conduct that does not qualify as a display of a dangerous weapon under subsection (b)(3)(A)(v) but is nonetheless similar in seriousness, demonstrating the defendant’s preparation or ability to carry out the threatened harm (e.g., an extortionate demand containing a threat to tamper with a consumer product accompanied by a workable plan showing how the product’s tamper-resistant seals could be defeated, or a threat to kidnap a person accompanied by information showing study of that person’s daily routine). Subsection (b)(3)(B) addresses such cases.

7. If the offense involved the threat of death or serious bodily injury to numerous victims (e.g., in the case of a plan to derail a passenger train or poison consumer products), an upward departure may be warranted.

8. If the offense involved organized criminal activity, or a threat to a family member of the victim, an upward departure may be warranted."

The Commentary to §2B3.2 captioned "Background" is amended in the last sentence by deleting "§ 877" and inserting in lieu thereof "18 U.S.C. § 877".

This amendment provides a specific offense characteristic to distinguish the greater seriousness of offenses that involve an express or implied threat of death, bodily injury, or kidnapping; conforms the loss table to that used in the robbery guideline to reflect that the typical case under the amended guideline will have an offense level that is more closely comparable to robbery; increases the offense levels for offenses involving use or possession of a firearm to conform to an amendment being made to the robbery guideline; adds a subdivision to the specific offense characteristic dealing with use or possession of a dangerous weapon to address cases in which the conduct is tantamount in seriousness

to the brandishing, display, or possession of a dangerous weapon, but does not qualify under the current specific offense characteristic for weapon enhancement; modifies subsection (b)(1) to provide that the greater of the amount demanded or the loss to the victim is used; adds a cross reference to §2A2.1 to address cases in which the conduct was tantamount to attempted murder; and sets forth commentary describing certain aggravating factors that may warrant an upward departure. **The effective date of this amendment is November 1, 1991.**

367. Section 2C1.1(b)(1) is amended by inserting "or extortion" immediately following "bribe".

Section 2C1.1(b)(2)(A) is amended by deleting "bribe or the benefit received, or to be received, in return for the bribe" and inserting in lieu thereof "payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest,".

Section 2C1.1(b)(2)(B) is amended by deleting "bribe" and inserting in lieu thereof "payment".

Section 2C1.1(c) is amended by deleting:

- "(1) If the bribe was for the purpose of concealing or facilitating another criminal offense, or for obstructing justice in respect to another criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to such other criminal offense if the resulting offense level is greater than that determined above.";

by renumbering subsection (c)(2) as (c)(3); and by inserting the following as subsections (c)(1) and (2):

- "(1) If the offense was committed for the purpose of facilitating the commission of another criminal offense, apply the offense guideline applicable to a conspiracy to commit that other offense if the resulting offense level is greater than that determined above.
- (2) If the offense was committed for the purpose of concealing, or obstructing justice in respect to, another criminal offense, apply §2X3.1 (Accessory After the Fact) or §2J1.2 (Obstruction of Justice), as appropriate, in respect to that other offense if the resulting offense level is greater than that determined above."

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

- "2. 'Value of the bribe or the benefit received, or to be received, in return for the bribe' means the greater of the value of the bribe or the value of the benefit received, or to be received, in return for the bribe. The 'value of the benefit received or to be received' means the net value of such benefit. For example, if a \$150,000 contract on which \$20,000 profit was made was awarded in return for a bribe, the value of the benefit received in return is \$20,000."

and inserting in lieu thereof:

- "2. 'Loss' is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) and includes both actual and intended loss. The value of 'the benefit received or to be received' means the net value of such benefit. Examples: (1) A government employee, in return for a \$500 bribe, reduces the price of a piece of surplus property offered for sale by the government from \$10,000 to \$2,000; the value of the benefit received is \$8,000. (2) A \$150,000 contract on which \$20,000 profit was made was awarded in return for a bribe; the value of the benefit received is \$20,000. Do not deduct the value of the bribe itself in computing the value of the benefit received or to be received. In the above examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.";

The Commentary to §2C1.1 captioned "Application Notes" is amended in Note 3 by deleting "§2C1.1(c)(1) or (2)." and inserting in lieu thereof "§2C1.1(c)(1), (2), or (3). In such cases, an adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply."

The Commentary to §2C1.1 captioned "Application Notes" is amended in Note 4 by deleting "bribe" and inserting in lieu thereof "unlawful payment"; and by deleting "and (2)" and inserting in lieu thereof ", (2), and (3)".

The Commentary to §2C1.1 captioned "Application Notes" is amended in Note 6 by inserting the following as the first sentence:

"Subsection (b)(1) provides an adjustment for offenses involving more than one incident of either bribery or extortion.";

by deleting "bribe" the first time it occurs and inserting in lieu thereof "incident of bribery or extortion"; and by inserting "or extortion" immediately before ", even if charged".

The Commentary to §2C1.1 captioned "Background" is amended by deleting the third paragraph as follows:

" The amount of the bribe is used as a factor in the guideline not because it directly measures harm to society, but because it is improbable that a large bribe would be given for a favor of little consequence. Moreover, for deterrence purposes, the punishment should be commensurate with the gain."

and inserting in lieu thereof:

" In determining the net value of the benefit received or to be received, the value of the bribe is not deducted from the gross value of such benefit; the harm is the same regardless of value of the bribe paid to receive the benefit. Where the value of the bribe exceeds the value of the benefit or the value of the benefit cannot be determined, the value of the bribe is used because it is likely that the payer of such a bribe expected something in return that would be worth more than the value of the bribe. Moreover, for deterrence purposes, the punishment should be commensurate with the gain to the payer or the recipient of the bribe, whichever is higher."

The Commentary to §2C1.1 captioned "Background" is amended in the fourth paragraph by deleting "bribe is" and inserting in lieu thereof "payment was".

The Commentary to §2C1.1 captioned "Background" is amended by deleting the fifth, sixth, and seventh paragraphs as follows:

"Under §2C1.1(c)(1), if the purpose of the bribe involved the facilitation of another criminal offense or the obstruction of justice in respect to another criminal offense, the guideline for §2X3.1 (Accessory After the Fact) in respect to that criminal offense will be applied, if the result is greater than that determined above. For example, if a bribe was given for the purpose of facilitating or covering up the offense of espionage, the guideline for accessory after the fact to espionage would be applied.

Under §2C1.1(c)(2), if the offense involved forcible extortion, the guideline from §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) will apply if the result is greater than that determined above.

Note that, when applying 2C1.1(c)(1) or (2), an adjustment from Chapter Three, Part B (Role in the Offense) will also apply. This normally will result in an increase of at least 2 levels."

and inserting in lieu thereof:

" Under §2C1.1(c)(1), if the payment was to facilitate the commission of another criminal offense, the guideline applicable to a conspiracy to commit that other offense will apply if the result is greater than that determined above. For example, if a bribe was given to a law enforcement officer to allow the smuggling of a quantity of cocaine, the guideline for conspiracy to import cocaine would be applied if it resulted in a greater offense level.

Under §2C1.1(c)(2), if the payment was to conceal another criminal offense or obstruct justice in respect to another criminal offense, the guideline from §2X3.1 (Accessory After the Fact) or §2J1.2 (Obstruction of Justice), as appropriate, will apply if the result is greater than that determined above. For example, if a bribe was given for the purpose of concealing the offense of espionage, the guideline for accessory after the fact to espionage would be applied.

Under §2C1.1(c)(3), if the offense involved forcible extortion, the guideline from §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) will apply if the result is greater than that determined above.

When the offense level is determined under §2C1.1(c)(1), (2), or (3), an adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply."

This amendment adds an additional factor in subsection (b)(2)(A) to take into account loss to the government from the offense; expands subsection (c) to distinguish an offense committed for the purpose of facilitating the commission of another offense from an offense committed to cover up or obstruct justice in respect to another offense; clarifies the term "value of the benefit received"; and substitutes "payment" for "bribe" and adds "or extortion" where necessary to reflect that this guideline covers both bribery and extortion under color of official right. **The effective date of this amendment is November 1, 1991.**

368. Chapter Two, Part C, is amended by inserting an additional guideline with accompanying commentary as §2C1.7 (Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).

This amendment provides an additional guideline to cover certain offenses that involve public corruption but do not fall within the guidelines of Chapter Two, Part C (Official Corruption) as currently written. In some cases, the statutes covered are used to prosecute offenses more appropriately covered under §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right), §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), or §2C1.3 (Conflict of Interest). A cross reference is provided to address such cases. **The effective date of this amendment is November 1, 1991.**

369. Section 2D1.1(c)(12) is amended by deleting the period immediately after "Schedule III substances" and inserting in lieu thereof "(except anabolic steroids);", and by inserting the following additional subdivision at the end:

"40,000 or more units of anabolic steroids."

Section 2D1.1(c)(13) is amended by deleting the period immediately after "Schedule III substances" and inserting in lieu thereof "(except anabolic steroids);", and by inserting the following additional subdivision at the end:

"At least 20,000 but less than 40,000 units of anabolic steroids."

Section 2D1.1(c)(14) is amended by deleting the period immediately after "Schedule III substances" and inserting in lieu thereof "(except anabolic steroids);", and by inserting the following additional subdivision at the end:

"At least 10,000 but less than 20,000 units of anabolic steroids."

Section 2D1.1(c)(15) is amended by deleting the period immediately after "Schedule III substances" and inserting in lieu thereof "(except anabolic steroids);", and by inserting the following additional subdivision at the end:

"At least 5,000 but less than 10,000 units of anabolic steroids."



Section 2D1.1(c)(16) is amended by inserting "(except anabolic steroids)" immediately after "Schedule III substances", and by inserting the following additional subdivision after the next to last subdivision:

"At least 2,500 but less than 5,000 units of anabolic steroids;"

Section 2D1.1(c)(17) is amended by inserting "(except anabolic steroids)" immediately after "Schedule III substances", and by inserting the following additional subdivision after the next to last subdivision:

"At least 1,000 but less than 2,500 units of anabolic steroids;"

Section 2D1.1(c)(18) is amended by inserting "(except anabolic steroids)" immediately after "Schedule III substances", and by inserting the following additional subdivision after the fourth subdivision:

"At least 250 but less than 1,000 units of anabolic steroids;"

Section 2D1.1(c)(19) is amended by inserting "(except anabolic steroids)" immediately after "Schedule III substances", and by inserting the following additional subdivision after the fourth subdivision:

"Less than 250 units of anabolic steroids;"

Section 2D1.1(c) is amended in the note following subdivision (19) by inserting the following additional paragraph at the end:

"In the case of anabolic steroids, one 'unit' means a 10 cc vial of an injectable steroid or fifty tablets. All vials of injectable steroids are to be converted on the basis of their volume to the equivalent number of 10 cc vials (e.g., one 50 cc vial is to be counted as five 10 cc vials)."

This amendment adds offenses involving anabolic steroids to §2D1.1 to reflect that Title XIX of the Crime Control Act of 1990 (Public Law 101-647) reclassified anabolic steroids as Schedule III controlled substances under 21 U.S.C. § 812(c). Because of the variety of substances involved, the Commission has determined that a measure based on quantity unit, rather than weight, provides the most appropriate measure of the scale of the offense. **The effective date of this amendment is November 1, 1991.**

370. Section 2D1.1(c) is amended in subdivision (1) by inserting ", or 30 KG or more of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (2) by inserting ", or at least 10 KG but less than 30 KG of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (3) by inserting ", or at least 3 KG but less than 10 KG of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (4) by inserting ", or at least 1 KG but less than 3 KG of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (5) by inserting ", or at least 300 G but less than 1 KG of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (6) by inserting ", or at least 100 G but less than 300 G of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (7) by inserting ", or at least 70 G but less than 100 G of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (8) by inserting ", or at least 40 G but less than 70 G of 'Ice'" immediately following "Pure Methamphetamine"; subdivision (9) by inserting ", or at least 10 G but less than 40 G of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (10) by inserting ", or at least 8 G but less than 10 G of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (11) by inserting ", or at least 6 G but less than 8 G of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (12) by inserting ", or at least 4 G but less than 6 G of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (13) by inserting ", or at least 2 G but less than 4 G of 'Ice'" immediately following "Pure Methamphetamine"; subdivision (14) by inserting ", or at least 1 G but less than 2 G of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (15) by inserting ", or at least 500 MG but less than 1 G of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (16) by inserting ", or less than 500 MG of 'Ice'" immediately following "Pure Methamphetamine"; and in the note following subdivision (19) by inserting the following as the second paragraph:

"'Ice,' for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity."

This amendment implements the instruction to the Commission in Section 2701 of the Crime Control Act of 1990 (Public Law 101-647) in a form compatible with the structure of the guidelines. **The effective date of this amendment is November 1, 1991.**

371. Chapter Two, Part D, Subpart 1, is amended by inserting additional guidelines with accompanying commentary as §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical), §2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment), and §2D1.13 (Structuring Chemical Transactions or Creating a Chemical Mixture to Evade Reporting or Recordkeeping Requirements; Presenting False or Fraudulent Identification to Obtain a Listed Chemical).

Chapter Two, Part D, Subpart 3 is amended by inserting an additional guideline with accompanying commentary as §2D3.5 (Violation of Recordkeeping or Reporting Requirements for Listed Chemicals and Certain Machines).

The Commentary to §2D1.1 captioned "Statutory Provisions" is amended by deleting "841, 960" and inserting in lieu thereof "841(a), (b)(1)-(3), 960(a), (b)".

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

- "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 860(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."

This amendment makes Chapter Two, Part D more comprehensive by providing additional guidelines to address violations involving listed chemicals, flasks, and certain machines that are used in the manufacture of controlled substances. Conforming changes are made to the Commentary to §2D1.1. **The effective date of this amendment is November 1, 1991.**

372. Chapter Two, Part G, Subpart 2 is amended by inserting additional guidelines with accompanying commentary as §2G2.4 (Receipt or Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct) and §2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials).

Section 2G2.2 is amended in the title by deleting "Transporting, Receiving, or"; and by inserting at the end "; Receiving, Transporting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic".

The Commentary to §2G2.2 captioned "Statutory Provisions" is amended by deleting "1460,".

Section 2G3.1(c)(1) is amended by deleting "(Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor)" and inserting in lieu thereof "(Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic) or §2G2.4 (Receipt or Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), as appropriate".

This amendment inserts an additional guideline at §2G2.4 to address offenses involving receipt or possession of materials depicting a minor engaged in sexually explicit conduct, as distinguished from

offenses involving trafficking in such material, which continue to be covered under §2G2.2. Offenses involving receipt or transportation of such material for the purpose of trafficking are referenced to §2G2.2 on the basis of the underlying conduct (subsection (c)(2)). Similarly, offenses in which the underlying conduct is more appropriately addressed as sexual exploitation of a minor are referenced to that guideline (subsection (c)(1)). Among the offenses covered by this guideline is a new offense created by Section 323 of the Crime Control Act of 1990 (Public Law 101-647). In addition, this amendment inserts an additional guideline at §2G2.5 to address a recordkeeping offense created by Section 311 of the Crime Control Act of 1990 (Public Law 101-647). **The effective date of this amendment is November 1, 1991.**

373. Chapter Two, Part K, Subpart 1 is amended by deleting §§2K1.3 and 2K1.6 in their entirety as follows:

"§2K1.3. Unlawfully Trafficking In, Receiving, or Transporting Explosives

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristics

If more than one applies, use the greatest:

- (1) If the defendant's conduct involved any written or oral false or fictitious statement, false record, or misrepresented identification, increase by 4 levels.
- (2) If the offense involved explosives that the defendant knew or had reason to believe were stolen, increase by 6 levels.
- (3) If the defendant knowingly distributed explosives to a person under twenty-one years of age, to a person prohibited by state law or ordinance from receiving such explosives at the place of distribution, or to a person the defendant had reason to believe intended to transport such materials into a state in violation of the law of that state, increase by 4 levels.
- (4) If the defendant was a person prohibited from receiving explosives under 18 U.S.C. § 842(i), or if the defendant knowingly distributed explosives to a person prohibited from receiving explosives under 18 U.S.C. § 842(i), increase by 10 levels.
- (5) If a recordkeeping offense reflected an effort to conceal a substantive offense involving explosives, apply the guideline for the substantive offense.

Commentary

Statutory Provisions: 18 U.S.C. §§ 842(a), (h), (i), 844(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

- 1. 'A person prohibited from receiving explosives under 18 U.S.C. § 842(i)' is anyone who is under indictment for or has been convicted of a crime punishable by imprisonment for more than one year; who is a fugitive from justice; who is an unlawful user of or addicted to marijuana, any depressant or stimulant or narcotic drug; or who has been adjudicated as a mental defective or has been committed to a mental institution.

Background: This section applies to conduct ranging from violations of a regulatory nature pertaining to licensees or persons otherwise lawfully involved in explosives commerce to more serious violations that involve substantial danger to public safety."

"§2K1.6. Shipping, Transporting, or Receiving Explosives with Felonious Intent or Knowledge; Using or Carrying Explosives in Certain Crimes

- (a) Base Offense Level (Apply the greatest):
- (1) 18; or
  - (2) If the defendant committed the offense with intent to commit another offense against a person or property, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to such other offense; or
  - (3) If death resulted, apply the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide).

Commentary

Statutory Provisions: 18 U.S.C. § 844(d); 26 U.S.C. § 5685. For additional statutory provision(s), see Appendix A (Statutory Index)."

A replacement guideline with accompanying commentary is inserted as §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials).

Chapter Two, Part K, Subpart 1 is amended by inserting an additional guideline with accompanying commentary as §2K1.6 (Licensee Recordkeeping Violations Involving Explosive Materials).

This amendment consolidates two guidelines, and revises the offense levels and characteristics to more adequately reflect the seriousness of such offenses, including enhancements for defendants previously convicted of felony crimes of violence or controlled substance offenses. In addition, the amendment inserts an additional guideline to cover certain recordkeeping offenses. **The effective date of this amendment is November 1, 1991.**

374. Chapter Two, Part K, Subpart 2 is amended by deleting §§2K2.1, 2K2.2, and 2K2.3 in their entirety as follows:

"§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition

- (a) Base Offense Level (Apply the greatest):
- (1) 18, if the defendant is convicted under 18 U.S.C. § 922(o) or 26 U.S.C. § 5861; or
  - (2) 12, if the defendant is convicted under 18 U.S.C. § 922(g), (h), or (n); or if the defendant, at the time of the offense, had been convicted in any court of an offense punishable by imprisonment for a term exceeding one year; or
  - (3) 6, otherwise.
- (b) Specific Offense Characteristics
- (1) If the defendant obtained or possessed the firearm or ammunition, other than a firearm covered in 26 U.S.C.

§ 5845(a), solely for lawful sporting purposes or collection, decrease the offense level determined above to level 6.

- (2) If the firearm was stolen or had an altered or obliterated serial number, increase by 2 levels.

(c) Cross References

- (1) If the offense involved the distribution of a firearm or possession with intent to distribute, apply §2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms) if the resulting offense level is greater than that determined above.
- (2) If the defendant used or possessed the firearm in connection with commission or attempted commission of another offense, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 922(a)(1), (a)(3), (a)(4), (a)(6), (e), (f), (g), (h), (i), (j), (k), (l), (n), and (o); 26 U.S.C. § 5861(b), (c), (d), (h), (i), (j), and (k). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. The definition of ‘firearm’ used in this section is that set forth in 18 U.S.C. § 921(a)(3) (if the defendant is convicted under 18 U.S.C. § 922) and 26 U.S.C. § 5845(a) (if the defendant is convicted under 26 U.S.C. § 5861). These definitions are somewhat broader than that used in Application Note 1(e) of the Commentary to §1B1.1 (Application Instructions). Under 18 U.S.C. § 921(a)(3), the term ‘firearm’ means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Under 26 U.S.C. § 5845(a), the term ‘firearm’ includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or weapon made from a rifle, with a barrel or barrels less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain other large bore weapons.
2. Under §2K2.1(b)(1), intended lawful use, as determined by the surrounding circumstances, provides a decrease in the offense level. Relevant circumstances include, among others, the number and type of firearms (sawed-off shotguns, for example, have few legitimate uses) and ammunition, the location and circumstances of possession, the nature of the defendant’s criminal history (e.g., whether involving firearms), and the extent to which possession was restricted by local law.

Background: Under pre-guidelines practice, there was substantial sentencing variation for these crimes. From the Commission’s investigations, it appeared that the variation was attributable primarily to the wide variety of circumstances under which these offenses occur. Apart from the nature of the defendant’s criminal history, his actual or intended use of the firearm was probably the most important factor in determining the sentence.

Statistics showed that pre-guidelines sentences averaged two to three months lower if the firearm involved was a rifle or an unaltered shotgun. This may reflect the fact that these weapons tend to be more suitable than others for recreational activities. However, some rifles

or shotguns may be possessed for criminal purposes, while some handguns may be suitable primarily for recreation. Therefore, the guideline is not based upon the type of firearm. Intended lawful use, as determined by the surrounding circumstances, is a mitigating factor.

Available pre-guidelines data were not sufficient to determine the effect a stolen firearm had on the average sentence. However, reviews of pre-guidelines cases suggested that this factor tended to result in more severe sentences. Independent studies show that stolen firearms are used disproportionately in the commission of crimes.

The firearm statutes often are used as a device to enable the federal court to exercise jurisdiction over offenses that otherwise could be prosecuted only under state law. For example, a convicted felon may be prosecuted for possessing a firearm if he used the firearm to rob a gasoline station. In pre-guidelines practice, such prosecutions resulted in high sentences because of the true nature of the underlying conduct. The cross reference at §2K2.1(c)(2) deals with such cases.

§2K2.2. Unlawful Trafficking and Other Prohibited Transactions Involving Firearms

(a) Base Offense Level:

- (1) 18, if the defendant is convicted under 18 U.S.C. § 922(o) or 26 U.S.C. § 5861;
- (2) 6, otherwise.

(b) Specific Offense Characteristics

- (1) If the offense involved distribution of a firearm, or possession with intent to distribute, and the number of firearms unlawfully distributed, or to be distributed, exceeded two, increase as follows:

| <u>Number of Firearms</u> | <u>Increase in Level</u> |
|---------------------------|--------------------------|
| (A) 3 - 4                 | add 1                    |
| (B) 5 - 7                 | add 2                    |
| (C) 8 - 12                | add 3                    |
| (D) 13 - 24               | add 4                    |
| (E) 25 - 49               | add 5                    |
| (F) 50 or more            | add 6.                   |

- (2) If any of the firearms was stolen or had an altered or obliterated serial number, increase by 2 levels.
- (3) If more than one of the following applies, use the greater:
  - (A) If the defendant is convicted under 18 U.S.C. § 922(d), increase by 6 levels; or
  - (B) If the defendant is convicted under 18 U.S.C. § 922(b)(1) or (b)(2), increase by 1 level.

(c) Cross Reference

- (1) If the defendant, at the time of the offense, had been convicted in any court of a crime punishable by imprisonment for a term exceeding one year, apply §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition) if

the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 922(a)(1), (a)(2), (a)(5), (b), (c), (d), (e), (f), (i), (j), (k), (l), (m), (o); 26 U.S.C. § 5861(a), (e), (f), (g), (j), and (l). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. The definition of 'firearm' used in this section is that set forth in 18 U.S.C. § 921(a)(3) (if the defendant is convicted under 18 U.S.C. § 922) and 26 U.S.C. § 5845(a) (if the defendant is convicted under 26 U.S.C. § 5861). These definitions are somewhat broader than that used in Application Note 1(e) of the Commentary to §1B1.1 (Application Instructions). Under 18 U.S.C. § 921(a)(3), the term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Under 26 U.S.C. § 5845(a), the term 'firearm' includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or weapon made from a rifle, with a barrel or barrels less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain other large bore weapons.
2. If the number of weapons involved exceeded fifty, an upward departure may be warranted. An upward departure especially may be warranted in the case of large numbers of military type weapons (e.g., machine guns, automatic weapons, assault rifles).

Background: This guideline applies to a variety of offenses involving firearms, ranging from unlawful distribution of silencers, machine guns, sawed-off shotguns and destructive devices, to essentially technical violations.

§2K2.3. Receiving, Transporting, Shipping or Transferring a Firearm or Ammunition With Intent to Commit Another Offense, or With Knowledge that It Will Be Used in Committing Another Offense

- (a) Base Offense Level (Apply the greatest):
  - (1) The offense level from §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the offense that the defendant intended or knew was to be committed with the firearm; or
  - (2) The offense level from §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition), or §2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms), as applicable; or
  - (3) 12.

Commentary

Statutory Provisions: 18 U.S.C. § 924(b), (f), (g)."

A replacement guideline with accompanying commentary is inserted as §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition).

Chapter Two, Part K, Subpart 2 is amended by deleting §2K2.5 in its entirety as follows:

- "§2K2.5.        Possession of Firearms and Dangerous Weapons in Federal Facilities
- (a)        Base Offense Level: 6
- (b)        Cross Reference
- (1)        If the defendant possessed the firearm or other dangerous weapon with intent to use it in the commission of another offense, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense if the resulting offense level is greater than that determined above.

Commentary

Statutory Provision: 18 U.S.C. § 930."

A replacement guideline with accompanying commentary is inserted as §2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone).

This amendment consolidates three firearms guidelines and revises the adjustments and offense levels to more adequately reflect the seriousness of such conduct, including enhancements for defendants previously convicted of felony crimes of violence or controlled substance offenses. In addition, §2K1.5 is amended to address offenses committed within a school zone or federal court facility. **The effective date of this amendment is November 1, 1991.**

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

- "(1)        20, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony; or
- (2)        9, otherwise."

Section 2L1.1(b)(1) is amended by inserting "and the base offense level is determined under subsection (a)(2)," immediately before "decrease".

The Commentary to §2L1.1 captioned "Application Notes" is amended by inserting the following additional note:

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

Section 2L1.2(b) is amended by deleting "Specific Offense Characteristic" and inserting in lieu thereof:

"Specific Offense Characteristics

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

Section 2L1.2(b)(1) is amended by deleting "sustaining" immediately before "a conviction"; and by inserting the following additional subdivision:

- "(2)        If the defendant previously was deported after a conviction for an aggravated felony, increase by 16 levels."

The Commentary to §2L1.2 captioned "Statutory Provisions" is amended by deleting "1325" and inserting in lieu thereof "1325(a)".



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

"First offenses under 8 U.S.C. § 1325 are petty offenses for which no guideline has been promulgated.",

and inserting in lieu thereof:

"A first offense under 8 U.S.C. § 1325(a) is a Class B misdemeanor for which no guideline has been promulgated. A prior sentence for such offense, however, is to be considered under the provisions of Chapter Four, Part A (Criminal History).".

The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 3 by deleting "sustaining" immediately before "a conviction"; and by deleting the last sentence as follows:

"In the case of a defendant previously deported after sustaining a conviction for an aggravated felony as defined in 8 U.S.C. § 1101(a), or for any other violent felony, an upward departure may be warranted.".

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

"4. The adjustment under §2L1.2(b)(1) is in addition to any criminal history points added for such conviction in Chapter 4, Part A (Criminal History).",

and inserting in lieu thereof:

"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.

5. An adjustment under subsection (b)(1) or (b)(2) for a prior felony conviction applies in addition to any criminal history points added for such conviction in Chapter Four, Part A (Criminal History).

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 adds a specific offense characteristic providing an increase of 16 levels above the base offense level under §2L1.2 for defendants who reenter the United States after having been deported subsequent to a conviction for an aggravated felony. Previously, such cases were addressed by a recommendation for consideration of an upward departure. This amendment also modifies §2L1.1 to provide a base offense level of 20 for a defendant who is convicted under 8 U.S.C. § 1327 for an offense involving the smuggling, transporting, or harboring of an alien who was deported after a conviction for an aggravated felony. The Commission has determined that these increased offense levels are appropriate to reflect the serious nature of these offenses. In addition, this amendment revises the Commentary to §2L1.2 to make the statutory reference more precise, and to clarify the operation of the

guidelines in respect to prior criminal history. **The effective date of this amendment is November 1, 1991.**

376. Section 2N1.1 is amended in the title by deleting "Serious" and inserting in lieu thereof "Bodily".

Section 2N1.1 is amended by deleting:

"(b) Cross Reference

- (1) If the offense involved extortion, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above."

and inserting in lieu thereof:

"(b) Specific Offense Characteristic

- (1) (A) If any victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if any victim sustained serious bodily injury, increase by 2 levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.

(c) Cross References

- (1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or §2A1.2 (Second Degree Murder) in any other case.
- (2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault With Intent to Commit Murder; Attempted Murder) if the resulting offense level is greater than that determined above.
- (3) If the offense involved extortion, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.

(d) Special Instruction

- (1) If the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim, or (B) conduct tantamount to the attempted murder of more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the defendant had been convicted of a separate count for each such victim."

The Commentary to §2N1.1 captioned "Application Note" is amended by deleting:

- "1. If death, bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).",

and inserting in lieu thereof:

- "1. The base offense level reflects that this offense typically poses a risk of death or serious bodily injury to one or more victims; or causes, or is intended to cause, bodily injury. Where the offense posed a substantial risk of death or serious bodily injury to numerous victims, or caused extreme psychological injury or substantial property damage or monetary loss, an upward departure may be warranted. In the unusual case in which the

offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.

2. The special instruction in subsection (d)(1) applies whether the offense level is determined under subsection (b)(1) or by use of a cross reference in subsection (c).";

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

The Commentary to §2N1.1 captioned "Background" is deleted in its entirety as follows:

"Background: The base offense level reflects the risk of death or serious injury posed to significant numbers of people by this type of product tampering.".

This amendment adds a specific offense characteristic for permanent, life-threatening, or serious bodily injury, and adds cross references for cases in which the offense resulted in death or was tantamount to attempted murder. In addition, a special instruction is added to address certain conduct involving multiple victims. Finally, the title of this guideline is revised to reflect more accurately the coverage of the guideline, and the background commentary is revised to clarify the "heartland" conduct to which the guideline applies. **The effective date of this amendment is November 1, 1991.**

377. Section 2R1.1(a) is amended by deleting "9" and inserting in lieu thereof "10".

Section 2R1.1(b)(2) is amended by deleting "less than \$1,000,000 or more than \$4,000,000" and inserting in lieu thereof "more than \$400,000"; and by deleting:

|                               |               |
|-------------------------------|---------------|
| "(A) Less than \$1,000,000    | subtract 1    |
| (B) \$1,000,000 - \$4,000,000 | no adjustment |
| (C) More than \$4,000,000     | add 1         |
| (D) More than \$15,000,000    | add 2         |
| (E) More than \$50,000,000    | add 3",       |

and inserting in lieu thereof:

|                             |          |
|-----------------------------|----------|
| "(A) More than \$400,000    | add 1    |
| (B) More than \$1,000,000   | add 2    |
| (C) More than \$2,500,000   | add 3    |
| (D) More than \$6,250,000   | add 4    |
| (E) More than \$15,000,000  | add 5    |
| (F) More than \$37,500,000  | add 6    |
| (G) More than \$100,000,000 | add 7.". |

Section 2R1.1 is amended by deleting:

- "(c) Fines

A fine shall be imposed in addition to any term of imprisonment. The guideline fine range for an individual conspirator is from 4 to 10 percent of the volume of commerce, but not less than \$20,000. The fine range for an organization is from 20 to 50 percent of the volume of commerce, but not less than \$100,000.",

and inserting in lieu thereof:

- "(c) Special Instruction for Fines

- (1) For an individual, the guideline fine range shall be from one to five percent of the volume of commerce, but not less than \$20,000.".

The Commentary to §2R1.1 captioned "Application Notes" is amended by deleting:

- "1. Because the guideline sentences depend on the volume of commerce done by each firm, role in the offense is implicitly taken into account. Accordingly, the provisions of §3B1.1 (Aggravating Role) are to be applied only in unusual circumstances. An increase for role under §3B1.1 might be appropriate only where a defendant actually coerced others into participating in a conspiracy -- an unusual circumstance. Conversely, a decrease for role under §3B1.2 (Mitigating Role) would not be appropriate merely because an individual defendant or his firm did not profit substantially from the violation. An individual defendant should be considered for a downward adjustment for a mitigating role in the offense only if he was responsible in some minor way for his firm's participation in the conspiracy. A complementary bidder who did not win a bid would not for that reason qualify for a downward adjustment, but a low-level employee who participated in only one of several agreements constituting a conspiracy would.",

and inserting in lieu thereof:

- "1. The provisions of §3B1.1 (Aggravating Role) and §3B1.2 (Mitigating Role) should be applied to an individual defendant as appropriate to reflect the individual's role in committing the offense. For example, if a sales manager organizes or leads the price-fixing activity of five or more participants, a 4-level increase is called for under §3B1.1. An individual defendant should be considered for a downward adjustment under §3B1.2 for a mitigating role in the offense only if he was responsible in some minor way for his firm's participation in the conspiracy."

The Commentary to §2R1.1 captioned "Background" is amended in the third paragraph by deleting "four" and inserting in lieu thereof "six".

The Commentary to §2R1.1 captioned "Background" is amended by deleting the fourth paragraph as follows:

" The guideline imprisonment terms represent a substantial change from pre-guidelines practice. Under pre-guidelines practice, approximately 39 percent of all individuals convicted of antitrust violations were imprisoned. Considering all defendants sentenced, the average time served under pre-guidelines practice was only forty-five days. The guideline prison terms are, however, consistent with the parole guidelines. The fines specified in the guideline represent substantial increases over pre-guidelines practice. Under pre-guidelines practice, the average fine for individuals was only approximately \$27,000; for corporations, it was approximately \$160,000."

This amendment increases the offense levels for antitrust violations to make them more comparable to the offense levels for fraud with similar amounts of loss. The base offense level for antitrust violations starts higher than the base offense level for fraud violations to reflect the serious nature of and the difficulty of detecting such violations, but the offense levels for antitrust offenses based on volume of commerce increase less rapidly than the offense levels for fraud, in part, because, on the average, the level of mark-up from an antitrust violation may tend to decline with the volume of commerce involved. This amendment also reduces the minimum guideline fine level based on the volume of commerce to reflect a marginal shift from fines to imprisonment as the more effective means to deter antitrust offenses. The provision addressing fines for organizational defendants in the current guideline is deleted. Such fines are addressed by the provisions pertaining to the sentencing of organizational defendants that are added by a separate amendment (amendment 422). **The effective date of this amendment is November 1, 1991.**

378. Section 2S1.1(a)(1) is amended by deleting "or (a)(2)(A)" and inserting in lieu thereof ", (a)(2)(A), or (a)(3)(A)".

Section 2S1.1(b)(1) is amended by inserting "or believed" immediately following "knew".

The Commentary to §2S1.1 captioned "Background" is amended in the third paragraph by deleting "or (a)(2)(A)" and inserting in lieu thereof ", (a)(2)(A), or (a)(3)(A)"; and by deleting "did not merely conceal a serious crime that had already taken place, but" immediately before "encouraged".

This amendment revises this guideline to reflect the enactment of subsection (a)(3) of 18 U.S.C. § 1956 that authorizes undercover "sting" operations in money laundering cases. Such cases differ from those prosecuted under subsection (a)(1) in that the money being laundered is not actually criminal proceeds, but is government "sting" money that an undercover officer represents to be criminal proceeds. In all other respects, subsections (a)(1) and (a)(3) are the same. **The effective date of this amendment is November 1, 1991.**

379. Section 2S1.3(a)(1) is amended by deleting:

- "(B) made false statements to conceal or disguise the evasion of reporting requirements; or
- (C) reasonably should have believed that the funds were criminally derived property;"

and inserting in lieu thereof:

- "(B) knowingly filed, or caused another to file, a report containing materially false statements; or"

Section 2S1.3(b)(1) is amended by deleting "5 levels." and inserting in lieu thereof "4 levels. If the resulting offense level is less than level 13, increase to level 13."

The Commentary to §2S1.3 captioned "Statutory Provisions" is amended by deleting "18 U.S.C. § 1005"; and by deleting "5316," immediately before "5322".

The Commentary to §2S1.3 captioned "Application Notes" is amended by deleting:

- "2. Subsection (a)(1)(C) applies where a reasonable person would have believed from the circumstances that the funds were criminally derived property. Subsection (b)(1) applies if the defendant knew or believed the funds were criminally derived property. Subsection (b)(1) applies in addition to, and not in lieu of, subsection (a)(1)(C). Where subsection (b)(1) applies, subsection (a)(1)(C) also will apply. It is possible that a defendant 'believed' or 'reasonably should have believed' that the funds were criminally derived property even if, in fact, the funds were not so derived (e.g., in a 'sting' operation where the defendant is told the funds were derived from the unlawful sale of controlled substances).";

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

The Commentary to §2S1.3 captioned "Background" is amended by deleting the second and third paragraphs as follows:

" A base offense level of 13 is provided for those offenses where the defendant either structured the transaction to evade reporting requirements, made false statements to conceal or disguise the activity, or reasonably should have believed that the funds were criminally derived property. A lower alternative base offense level of 5 is provided in all other cases. The Commission anticipates that such cases will involve simple recordkeeping or other more minor technical violations of the regulatory scheme governing certain monetary transactions committed by defendants who reasonably believe that the funds at issue emanated from legitimate sources.

Where the defendant actually knew or believed that the funds were criminally derived property, subsection (b)(1) provides for a 5 level increase in the offense level."

and inserting in lieu thereof:

" A base offense level of 13 is provided for those offenses where the defendant either structured the transaction to evade reporting requirements or knowingly filed, or caused another to file, a report containing materially false statements. A lower alternative base offense level of 5 is provided in all other cases.

Where the defendant actually knew or believed that the funds were criminally derived property, subsection (b)(1) provides for the greater of a 4-level increase or an increase to level 13."

Chapter Two, Part S is amended by inserting an additional guideline with accompanying commentary as §2S1.4 (Failure to File Currency and Monetary Instrument Report).

This amendment clarifies the scope of the specific offense characteristics in §2S1.3 and modifies subsection (b)(1) so that it does not produce a result that exceeds the comparable offense level under §2S1.2. In addition, this amendment creates an additional offense guideline (§2S1.4) for offenses involving Currency and Monetary Instrument Reports (CMIR). Currently, such offenses are covered by §2S1.3, which deals with all currency transaction reporting requirements. CMIR violations are committed by individuals who, when entering or leaving the country, knowingly conceal \$10,000 or more in cash or bearer instruments on their persons or in their personal effects and knowingly fail to file the report required by the U.S. Customs Service. Such criminal conduct is sufficiently different from the other offenses covered by §2S1.3 to merit treatment in a separate guideline. **The effective date of this amendment is November 1, 1991.**

380. Section 2X3.1(a) is amended by inserting the following additional sentence at the end:

*"Provided, that where the conduct is limited to harboring a fugitive, the offense level shall not be more than level 20."*

This amendment distinguishes harboring a fugitive from other forms of accessory after the fact by providing a lower maximum offense level for such cases reflective, in part, of the lower statutory maximum provided for such offenses. **The effective date of this amendment is November 1, 1991.**

381. The Commentary to §4A1.1 captioned "Application Notes" is amended by inserting the following additional sentence as the second sentence of Note 4 and the third sentence of Note 5:

*"Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. See §4A1.2(n)."*

The Commentary to §4A1.1 captioned "Application Notes" is amended in the third (formerly second) sentence of Note 4 by inserting the following immediately before the period at the end of the sentence:

*"having a custodial or supervisory component, although active supervision is not required for this item to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (e.g., a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. See §4A1.2(m)."*

Section 4A1.2(a) is amended by inserting the following additional subdivision:

*"(4) Where a defendant has been convicted of an offense, but not yet sentenced, such conviction shall be counted as if it constituted a prior sentence under §4A1.1(c) if a sentence resulting from that conviction otherwise would be countable. In the case of a conviction for an offense set forth in §4A1.2(c)(1), apply this provision only where the sentence for such offense would be countable regardless of type or length.*

‘Convicted of an offense,’ for the purposes of this provision, means that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.”.

Section 4A1.2(k)(2) is amended by deleting the last sentence as follows:

"It may also affect the time period under which certain sentences are counted as provided in §4A1.2(e)(1).";

by inserting "(A)" immediately after "(2)"; and by inserting the following additional subdivision:

"(B) Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in §4A1.2(d)(2) and (e). For the purposes of determining the applicable time period, use the following: (i) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (see §4A1.2(e)(1)); (ii) in the case of any other confinement sentence for an offense committed prior to the defendant’s eighteenth birthday, the date of the defendant’s last release from confinement on such sentence (see §4A1.2(d)(2)(A)); and (iii) in any other case, the date of the original sentence (see §4A1.2(d)(2)(B) and (e)(2)).”.

Section 4A1.2 is amended by inserting the following additional subsections:

"(l) Sentences on Appeal

Prior sentences under appeal are counted except as expressly provided below. In the case of a prior sentence, the execution of which has been stayed pending appeal, §4A1.1(a), (b), (c), (d), and (f) shall apply as if the execution of such sentence had not been stayed; §4A1.1(e) shall not apply.

(m) Effect of a Violation Warrant

For the purposes of §4A1.1(d), a defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (e.g., a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence if that sentence is otherwise countable, even if that sentence would have expired absent such warrant.

(n) Failure to Report for Service of Sentence of Imprisonment

For the purposes of §4A1.1(d) and (e), failure to report for service of a sentence of imprisonment shall be treated as an escape from such sentence.

(o) Felony Offense

For the purposes of §4A1.2(c), a ‘felony offense’ means any federal, state, or local offense punishable by death or a term of imprisonment exceeding one year, regardless of the actual sentence imposed.”.

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 1 by inserting the following additional paragraph:

"Under §4A1.2(a)(4), a conviction for which the defendant has not yet been sentenced is treated as if it were a prior sentence under §4A1.1(c) if a sentence resulting from such conviction otherwise would have been counted. In the case of an offense set forth in §4A1.2(c)(1) (which lists certain misdemeanor and petty offenses), a conviction for which the defendant has not yet been sentenced is treated as if it were a prior sentence under §4A1.2(a)(4) only where the offense is similar to the instant offense (because sentences for other offenses set forth in §4A1.2(c)(1) are counted only if they are of a specified type and length).”.

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 2 by inserting, immediately after "stated maximum", the following:

"(e.g., in the case of a determinate sentence of five years, the stated maximum is five years; in the case of an indeterminate sentence of one to five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed the defendant's twenty-first birthday, the stated maximum is the amount of time in pre-trial detention plus the amount of time between the date of sentence and the defendant's twenty-first birthday)".

The Commentary to §4A1.2 is amended in Note 11 by inserting the following additional paragraph at the end:

"Where a revocation applies to multiple sentences, and such sentences are counted separately under §4A1.2(a)(2), add the term of imprisonment imposed upon revocation to the sentence that will result in the greatest increase in criminal history points. Example: A defendant was serving two probationary sentences, each counted separately under §4A1.2(a)(2); probation was revoked on both sentences as a result of the same violation conduct; and the defendant was sentenced to a total of 45 days of imprisonment. If one sentence had been a 'straight' probationary sentence and the other had been a probationary sentence that had required service of 15 days of imprisonment, the revocation term of imprisonment (45 days) would be added to the probationary sentence that had the 15-day term of imprisonment. This would result in a total of 2 criminal history points under §4A1.1(b) (for the combined 60-day term of imprisonment) and 1 criminal history point under §4A1.1(c) (for the other probationary sentence)."

Section 4A1.3(d) is amended by deleting ", sentencing, or appeal" and inserting in lieu thereof "or sentencing".

This amendment clarifies the meaning of the term "under a criminal justice sentence" as used in §4A1.1; inserts a new subdivision in §4A1.2(a) to address the case in which the defendant has been convicted of a prior offense, but has not yet been sentenced for that offense; inserts an additional subdivision in §4A1.2(k) to clarify the determination of the applicable time periods in revocation cases; inserts additional subsections in §4A1.2 to address the counting of sentences stayed pending appeal, the effect of a violation warrant on the counting of points under §4A1.1(d), the counting of a failure to report for service of sentence under §4A1.1(d) and (e), and the definition of a felony offense as used in §4A1.2(c); adds an example to Application Note 2 in the Commentary to §4A1.2 to illustrate the meaning of "stated maximum" sentence; adds an additional application note in the Commentary to §4A1.2 addressing the counting of points in complex revocation cases; and conforms the Commentary of §4A1.3 to the addition of §4A1.2(l). **The effective date of this amendment is November 1, 1991.**

382. Section 4A1.1 is amended by inserting the following additional subsection:

"(f) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was considered related to another sentence resulting from a conviction of a crime of violence, up to a total of 3 points for this item. *Provided*, that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion."

Section 4A1.1 is amended in the first sentence by deleting "(e)" and inserting in lieu thereof "(f)".

Section 4A1.1(c) is amended by deleting "included" and inserting in lieu thereof "counted".

The Commentary to §4A1.1 captioned "Application Notes" is amended by inserting the following additional note:

"6. §4A1.1(f). Where the defendant received two or more prior sentences as a result of convictions for crimes of violence that are treated as related cases but did not arise from the same occasion (i.e., offenses committed on different occasions that were part of a



single common scheme or plan or were consolidated for trial or sentencing; see Application Note 3 of the Commentary to §4A1.2), one point is added under §4A1.1(f) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c). A total of up to 3 points may be added under §4A1.1(f). ‘Crime of violence’ is defined in §4B1.2(1); see §4A1.2(p).

For example, a defendant’s criminal history includes two robbery convictions for offenses committed on different occasions that were consolidated for sentencing and therefore are treated as related. If the defendant received a five-year sentence of imprisonment for one robbery and a four-year sentence of imprisonment for the other robbery (consecutively or concurrently), a total of 3 points is added under §4A1.1(a). An additional point is added under §4A1.1(f) because the second sentence did not result in any additional point(s) (under §4A1.1(a), (b), or (c)). In contrast, if the defendant received a one-year sentence of imprisonment for one robbery and a nine-month consecutive sentence of imprisonment for the other robbery, a total of 3 points also is added under §4A1.1(a) (a one-year sentence of imprisonment and a consecutive nine-month sentence of imprisonment are treated as a combined one-year-nine-month sentence of imprisonment). But no additional point is added under §4A1.1(f) because the sentence for the second robbery already resulted in an additional point under §4A1.1(a). Without the second sentence, the defendant would only have received two points under §4A1.1(b) for the one-year sentence of imprisonment).

Section 4A1.2(a)(2) is amended by deleting "the criminal history" and inserting in lieu thereof "§4A1.1(a), (b), and (c)".

Section 4A1.2 is amended by inserting the following additional subsection:

"(p) Crime of Violence Defined

For the purposes of §4A1.1(f), the definition of ‘crime of violence’ is that set forth in §4B1.2(1)."

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 3 by deleting:

"Cases are considered related if they (1) occurred on a single occasion,"

and inserting in lieu thereof:

"Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (1) occurred on the same occasion,"

and by deleting:

"For example, if the defendant commits a number of offenses on independent occasions separated by arrests, and the resulting criminal cases are consolidated and result in a combined sentence of eight years, counting merely three points for this factor will not adequately reflect either the seriousness of the defendant’s criminal history or the frequency with which he commits crimes. In such circumstances, the court should consider whether departure is warranted. See §4A1.3.",

and inserting in lieu thereof:

"For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were treated as related because the cases were consolidated for sentencing, the assignment of a single set of points may not adequately reflect the seriousness of the defendant’s criminal history or the frequency with which he has committed crimes. In such circumstances, an upward departure may be warranted. Note

that the above example refers to serious non-violent offenses. Where prior related sentences result from convictions of crimes of violence, §4A1.1(f) will apply."

This amendment provides for a specific enhancement under §4A1.2(f) in certain cases having prior convictions of crimes of violence not arising from the same incident that otherwise would be treated as related under §4A1.2. In addition, the definition of related cases in Application Note 3 in the Commentary to §4A1.2 is amended to provide that cases separated by an intervening arrest for one of the offenses are not treated as related cases. **The effective date of this amendment is November 1, 1991.**

383. Section 5E1.1 is amended by redesignating subsections (b) and (c) as (c) and (d), respectively; and by deleting:

"(a) Restitution shall be ordered for convictions under Title 18 of the United States Code or under 49 U.S.C. § 1472(h), (i), (j) or (n) in accordance with 18 U.S.C. § 3663(d), and may be ordered as a condition of probation or supervised release in any other case,"

and inserting in lieu thereof:

"(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), 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."

The Commentary to §5E1.1 captioned "Background" is amended in the first paragraph by deleting the last sentence as follows:

"An order of restitution may be appropriate in offenses not specifically referenced in 18 U.S.C. § 3663 where victims require relief more promptly than the civil justice system provides."

The Commentary to §5E1.1 captioned "Background" is amended in the second paragraph by deleting "5E1.1 requires the court to order restitution for offenses under Title 18, or 49 U.S.C. § 1472(h), (i), (j) or (n), unless" and inserting in lieu thereof "(a)(1) of this guideline requires the court to order restitution for offenses under Title 18, United States Code, or 49 U.S.C. § 1472(h), (i), (j) or (n), unless full restitution has already been made or".

The Commentary to §5E1.1 captioned "Background" is amended in the sixth paragraph by deleting "how and to whom" and by inserting in lieu thereof "the manner in which, and the persons to whom,".

The Commentary to §5E1.1 captioned "Background" is amended by inserting the following additional paragraph at the end:

" 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. § 1472(h), (i), (j), or (n)."

This amendment expands §5E1.1 to require restitution as a condition of probation or supervised release for offenses not set forth in Title 18 and 49 U.S.C. § 1472(h), (i), (j), and (n). Currently, §5E1.1

permits, but does not require, restitution to be ordered as a condition of probation or supervised release for offenses not set forth in Title 18, United States Code, or 49 U.S.C. § 1472(h) (i), (j), and (n). **The effective date of this amendment is November 1, 1991.**

384. Section 5E1.2(c) is amended by deleting:

- "(1) The minimum of the fine range is the greater of:
  - (A) the amount shown in column A of the table below; or
  - (B) the pecuniary gain to the defendant, less restitution made or ordered.
- (2) Except as specified in (4) below, the maximum of the fine range is the greater of:
  - (A) the amount shown in column B of the table below;
  - (B) twice the gross pecuniary loss caused by the offense; or
  - (C) three times the gross pecuniary gain to all participants in the offense."

and inserting in lieu thereof:

- "(1) The minimum of the fine range is the amount shown in column A of the table below.
- (2) Except as specified in (4) below, the maximum of the fine range is the amount shown in column B of the table below."

The Commentary to §5E1.2 captioned "Application Notes" is amended in Note 3 by deleting the first two paragraphs as follows:

"Alternative fine limits are provided in subsection (c). The terms 'pecuniary gain' and 'pecuniary loss' are taken from 18 U.S.C. § 3571(d). The Commission does not intend precise or detailed calculation of the gain or loss in using the alternative fine limits.

Where it is readily ascertainable that the defendant cannot, and is not likely to become able to, pay a fine greater than the maximum fine set forth in Column B of the Fine Table in subsection (c)(3), calculation of the alternative maximum fines under subsections (c)(2)(B) (twice the gross pecuniary loss caused by the offense) and (c)(2)(C) (three times the gross pecuniary gain to all participants in the offense) is unnecessary. In such cases, a statement that 'the alternative maximums of the fine table were not calculated because it is readily ascertainable that the defendant cannot, and is not likely to become able to, pay a fine greater than the maximum set forth in the fine table' is recommended in lieu of such calculations."

The Commentary to §5E1.2 captioned "Application Notes" is amended by deleting:

- "4. 'Restitution made or ordered' refers to restitution for the instant offense made before or at the time of sentencing, as well as any restitution ordered at the time of sentencing for the instant offense."

and inserting in lieu thereof:

- "4. The Commission envisions that for most defendants, the maximum of the guideline fine range from subsection (c) will be at least twice the amount of gain or loss resulting from the offense. Where, however, two times either the amount of gain to the defendant or the amount of loss caused by the offense exceeds the maximum of the fine guideline, an upward departure from the fine guideline may be warranted.

Moreover, where a sentence within the applicable fine guideline range would not be sufficient to ensure both the disgorgement of any gain from the offense that otherwise would not be disgorged (e.g., by restitution or forfeiture) and an adequate punitive fine, an upward departure from the fine guideline range may be warranted."

The Commentary to §5E1.2 captioned "Background" is deleted in its entirety as follows:

"Background: These guidelines permit a relatively wide range of fines. The Commission may promulgate more detailed guidelines for the imposition of fines after analyzing practice under these initial guidelines.

Recent legislation provides for substantial increases in fines. 18 U.S.C. § 3571(b). With few restrictions, 42 U.S.C. § 10601(b), and (c) authorize fine payments up to \$100 million to be deposited in the Crime Victims Fund in the United States Treasury. With vigorous enforcement, higher fines should be effective punitive and deterrent sanctions.

A larger multiple of the gain than of the loss is used in subsection (c)(2) because most offenses result in losses to society that exceed the gain to the participants. In addition, in many such cases restitution will not be feasible. These larger fines authorized under subsection (c)(2) are, of course, subject to the absolute limits on fines that are imposed by statute.

The Commission has not attempted to define gain or loss precisely. It is expected that the terms will be used flexibly and consistently with their use in the criminal code, including former 18 U.S.C. § 3623(c)(1)."

This amendment is designed to simplify the operation of this guideline and conserve probation and court resources by eliminating the need for the determination of loss and gain under this section in most cases. Experience has shown that for the vast majority of defendants, the amount from the fine table in subsection (c)(3) or the amount from subsection (c)(4), as applicable, is more than twice the gain or loss from the offense. This amendment provides that the guideline fine range is to be determined from subsection (c)(3) or (c)(4), as applicable. In the unusual case in which twice the defendant's gain from the offense or twice the loss caused by the offense exceeds the maximum of the guideline range, an upward departure may be considered. **The effective date of this amendment is November 1, 1991.**

385. Chapter Five, Part G is amended by deleting §5G1.3 in its entirety as follows:

"§5G1.3. Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment

If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status), the sentence for the instant offense shall be imposed to run consecutively to the unexpired term of imprisonment.

Commentary

Under this guideline, the court shall impose a consecutive sentence where the instant offense (or any part thereof) was committed while the defendant was serving an unexpired term of imprisonment.

Where the defendant is serving an unexpired term of imprisonment, but did not commit the instant offense while serving that term of imprisonment, the sentence for the instant offense may be imposed to run consecutively or concurrently with the unexpired term of imprisonment. The court may consider imposing a sentence for the instant offense that results in a combined sentence 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. 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. It is not intended that the above methodology be applied in a manner that unduly complicates or prolongs the sentencing process."

A replacement guideline with accompanying commentary is inserted as §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment).

This amendment provides additional structure and guidance for the decision to impose a consecutive or concurrent sentence upon a defendant subject to an undischarged term of imprisonment to reduce the potential for unwarranted disparity in such determinations. **The effective date of this amendment is November 1, 1991.**

386. The Introductory Commentary to Chapter Five, Part H is amended by deleting:

" Congress has directed the Commission to consider whether certain specific offender characteristics 'have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence' and to take them into account only to the extent they are determined relevant by the Commission. 28 U.S.C. § 994(d).",

and inserting in lieu thereof:

" The following policy statements address the relevance of certain offender characteristics to the determination of whether a sentence should be outside the applicable guideline range and, in certain cases, to the determination of a sentence within the applicable guideline range. Under 28 U.S.C. § 994(d), the Commission is directed to consider whether certain specific offender characteristics 'have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence' and to take them into account only to the extent they are determined to be relevant by the Commission.

The Commission has determined that certain factors are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such factors as necessarily inappropriate to the determination of the sentence within the applicable guideline range or to the determination of various other incidents of an appropriate sentence (e.g., the appropriate conditions of probation or supervised release)."

Section 5H1.1 is amended by deleting:

"Age is not ordinarily relevant in determining whether a sentence should be outside the guidelines. Neither is it ordinarily relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options. Age may be a reason to go below the guidelines when the offender is elderly and infirm and where a form of punishment (e.g., home confinement) might be equally efficient as and less costly than incarceration. If, independent of the consideration of age, a defendant is sentenced to probation or supervised release, age may be relevant in the determination of the length and conditions of supervision."

and inserting in lieu thereof:

"Age (including youth) is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse).

The guidelines are not applicable to a person sentenced as a juvenile delinquent under the provisions of 18 U.S.C. § 5037."

Section 5H1.2 is amended by deleting:

"Education and vocational skills are not ordinarily relevant in determining whether a sentence should be outside the guidelines, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor. See §3B1.3 (Abuse of Position of Trust or Use of Special Skill). Neither are education and vocational skills relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options. If, independent of consideration of education and vocational skills, a defendant is sentenced to probation or supervised release, these considerations may be relevant in the determination of the length and conditions of supervision for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the type or length of community service."

and by inserting in lieu thereof:

"Education and vocational skills are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor. See §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Education and vocational skills may be relevant in determining the conditions of probation or supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service."

Section 5H1.3 is amended by deleting:

"Mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the guidelines, except as provided in the general provisions in Chapter Five. Mental and emotional conditions, whether mitigating or aggravating, may be relevant in determining the length and conditions of probation or supervised release."

and inserting in lieu thereof:

"Mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range, except as provided in Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; e.g., participation in a mental health program (see recommended condition (24) at §5B1.4 (Recommended Conditions of Probation and Supervised Release))."

Section 5H1.4 is amended by deleting:

"Physical Condition, Including Drug Dependence and Alcohol Abuse (Policy Statement)

Physical condition is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall. However, an extraordinary physical impairment may be a reason to impose a sentence other than imprisonment.

Drug dependence or alcohol abuse is not a reason for imposing a sentence below the guidelines. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program. If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the supervisory body to judge the success of the program.

This provision would also apply in cases where the defendant received a sentence of probation. The substance abuse condition is strongly recommended and the length of probation should be adjusted accordingly. Failure to comply would normally result in revocation of probation.",

and inserting in lieu thereof:

"Physical Condition, Including Drug or Alcohol Dependence or Abuse (Policy Statement)

Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Drug or alcohol dependence or abuse is not a reason for imposing a sentence below the guidelines. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (see recommended condition (23) at §5B1.4 (Recommended Conditions of Probation and Supervised Release)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the supervisory body to judge the success of the program.

Similarly, where a defendant who is a substance abuser is sentenced to probation, it is strongly recommended that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program (see recommended condition (23) at §5B1.4 (Recommended Conditions of Probation and Supervised Release))."

Section 5H1.5 is amended by deleting:

"Employment record is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall. Employment record may be relevant in determining the type of sentence to be imposed when the guidelines provide for sentencing options. If, independent of the consideration of employment record, a defendant is sentenced to probation or supervised release, considerations of employment record may be relevant in the determination of the length and conditions of supervision.",

and inserting in lieu thereof:

"Employment record is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

Employment record may be relevant in determining the conditions of probation or supervised release (e.g., the appropriate hours of home detention)."

Section 5H1.6 is amended by deleting:

"Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the guidelines. Family responsibilities that are complied with are relevant in determining whether to impose restitution and fines. Where the guidelines provide probation as an option, these factors may be relevant in this determination. If a defendant is sentenced to probation or supervised release, family ties and responsibilities that are met may be relevant in the determination of the length and conditions of supervision.",

and inserting in lieu thereof:

"Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine."

Chapter Five, Part H is amended by inserting an additional policy statement as §5H1.11 (Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)).

This amendment expresses the Commission's intent that the factors set forth in this part are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range; but that, unless expressly stated, these policy statements do not mean that the Commission views such factors as necessarily inappropriate to the determination of the sentence within the applicable guideline range. The language within these sections is revised for clarity and consistency. In addition, this amendment adds language that expressly states that the guidelines do not apply to defendants sentenced as juvenile delinquents; and sets forth the Commission's position that physical appearance, including physique, military, civic, charitable, or public service, employment-related contributions, and record of prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. **The effective date of this amendment is November 1, 1991.**

387. The Commentary to §6A1.3 is amended by inserting the following additional paragraph as the third paragraph:

"The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."

This amendment expresses the Commission's approval of the use of a preponderance of the evidence standard in resolving disputes regarding application of the guidelines to the facts of a case. **The effective date of this amendment is November 1, 1991.**

388. The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1 in the first sentence by inserting immediately before the colon:

"and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement)".

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 2 by deleting the first two sentences as follows:

"Definitions or explanations of terms may also appear within the commentary to specific guidelines. Such commentary is not of general applicability.",

and inserting in lieu thereof:

"Definitions of terms also may appear in other sections. Such definitions are not designed for general applicability; therefore, their applicability to sections other than those expressly referenced must be determined on a case by case basis.";

and by beginning a new paragraph with the third sentence.

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

"'Firearm' means any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive.",

and inserting in lieu thereof:



"'Firearm' means (i) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device.";

and by inserting "a" immediately before "'BB' or pellet gun".

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note (1)(f) by inserting ", other than conduct to which §3C1.1 (Obstructing or Impeding the Administration of Justice) applies." immediately following "conceal the offense".

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

"In the case of a kidnapping, for example, maltreatment to a life-threatening degree (e.g., by denial of food or medical care) would constitute life-threatening bodily injury."

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1(k) by deleting "18 U.S.C. § 921(a)(4)" and inserting in lieu thereof "26 U.S.C. § 5845(f)"; and by deleting "proceeding" and inserting in lieu thereof "preceding".

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

"(l) 'Offense' means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context."

This amendment revises the definition of firearm in Note 1(e) to track more closely the definition of firearm in 18 U.S.C. § 921; clarifies Note 1(f) to prevent inappropriate "double counting;" clarifies in Note 1(h) that maltreatment to a life-threatening degree constitutes life-threatening bodily injury; conforms the statutory reference in Note 1(k) to conform to that used in §2K2.1; and inserts an additional subdivision in Note 1 (subdivision (l)) that describes how the term "offense" is used in the guidelines. In addition, this amendment corrects clerical errors and makes editorial improvements. **The effective date of this amendment is November 1, 1991.**

389. The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 2 in the first sentence by inserting "that were part of the same course of conduct or common scheme or plan as the offense of conviction" immediately following "'Such acts and omissions"; and by inserting ", that were part of the same course of conduct or common scheme or plan as the offense of conviction" immediately following "otherwise accountable".

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 2 by inserting the following additional paragraph at the end:

"As noted above, subsection (a)(2) applies to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts. For example, the defendant sells 30 grams of cocaine (a violation of 21 U.S.C. § 841) on one occasion and, as part of the same course of conduct or common scheme or plan, attempts to sell an additional 15 grams of cocaine (a violation of 21 U.S.C. 846) on another occasion. The defendant is convicted of one count charging the completed sale of 30 grams of cocaine. The two offenses (sale of cocaine and attempted sale of cocaine), although covered by different statutory provisions, are of a character for which §3D1.2(d) would require the grouping of counts, had the defendant been convicted of both counts. Therefore, subsection (a)(2) applies and the total amount of cocaine (45 grams) involved is used to determine the offense level."

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 4 by inserting "; Property Damage by Use of Explosives" immediately following "Arson".

The Commentary to §1B1.3 captioned "Application Notes is amended in Note 5 by deleting:

"E.g., in §2K2.2, a base offense level of 16 is used 'if the defendant is convicted under 18 U.S.C. § 922(o) or 26 U.S.C. § 5861.'",

and inserting in lieu thereof:

"For example, in §2K1.5, subsection (b)(1) applies 'If the defendant is convicted under 49 U.S.C. § 1472(l)(2).'",

by deleting:

"Examples of this usage are found in §2K1.3(b)(4) ('If the defendant was a person prohibited from receiving explosives under 18 U.S.C. § 842(i), or if the defendant knowingly distributed explosives to a person prohibited from receiving explosives under 18 U.S.C. § 842(i), increase by 10 levels'); and",

and inserting in lieu thereof "An example of this usage is found in"; and by inserting the following additional paragraph at the end:

"An express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute. For example, §2K1.5(b)(1) (which is applicable only if the defendant is convicted under 49 U.S.C. § 1472(l)(2)) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) where the defendant was convicted of accessory after the fact to a violation of 49 U.S.C. § 1472(l)(2)."

The Commentary to §1B1.3 captioned "Application Notes" is amended by inserting the following additional notes:

- "6. In the case of a partially completed offense (e.g., an offense involving an attempted theft of \$800,000 and a completed theft of \$30,000), the offense level is to be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 in the Commentary to §2X1.1. Note, however, that Application Note 4 is not applicable where the offense level is determined under §2X1.1(c)(1).
7. For the purposes of subsection (a)(2), offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction.

Examples: (1) The defendant was convicted for the sale of cocaine and sentenced to state prison. Immediately upon release from prison, he again sold cocaine to the same person, using the same accomplices and modus operandi. The instant federal offense (the offense of conviction) charges this latter sale. In this example, the offense conduct relevant to the state prison sentence is considered as prior criminal history, not as part of the same course of conduct or common scheme or plan as the offense of conviction. The prior state prison sentence is counted under Chapter Four (Criminal History and Criminal Livelihood). (2) The defendant engaged in two cocaine sales constituting part of the same course of conduct or common scheme or plan. Subsequently, he is arrested by state authorities for the first sale and by federal authorities for the second sale. He is convicted in state court for the first sale and sentenced to imprisonment; he is then convicted in federal court for the second sale. In this case, the cocaine sales are not separated by an intervening sentence. Therefore, under subsection (a)(2), the cocaine sale associated with the state conviction is considered as relevant conduct to the instant

federal offense. The state prison sentence for that sale is not counted as a prior sentence; see §4A1.2(a)(1).

Note, however, in certain cases, offense conduct associated with a previously imposed sentence may be expressly charged in the offense of conviction. Unless otherwise provided, such conduct will be considered relevant conduct under subsection (a)(1), not (a)(2)."

The Commentary to §1B1.3 captioned "Background" is amended by deleting the last paragraph as follows:

"This guideline and §1B1.4 clarify the intent underlying §1B1.3 as originally promulgated."

This amendment makes editorial improvements in Application Notes 1 and 2; inserts an additional paragraph in Application Note 2 to clarify that "offenses of a character for which §3D1.2(d) would require grouping of multiple counts" is not limited to offenses proscribed by the same statutory provision; conforms a reference in Application Note 4 to the correct title of the guideline; conforms examples in Application Note 5 to amended guidelines and clarifies how a direction to apply a particular factor only if the defendant is convicted of a particular statute applies to the offenses of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, and misprision of felony; inserts an additional application note (Note 6) that highlights the provision in §2X1.1 dealing with cases of partially completed conduct; inserts an additional application note (Note 7) that clarifies the treatment of conduct for which the defendant has previously been sentenced; and deletes a surplus sentence of Background Commentary more appropriately contained in Appendix C in the paragraph describing the reason for amendment 3. **The effective date of this amendment is November 1, 1991.**

390. The Commentary to §1B1.8 captioned "Application Notes" is amended by inserting the following additional notes:

5. This guideline limits the use of certain incriminating information furnished by a defendant in the context of a defendant-government agreement for the defendant to provide information concerning the unlawful activities of other persons. The guideline operates as a limitation on the use of such incriminating information in determining the applicable guideline range, and not merely as a restriction of the government's presentation of such information (e.g., where the defendant, subsequent to having entered into a cooperation agreement, repeats such information to the probation officer preparing the presentence report, the use of such information remains protected by this section).
6. Unless the cooperation agreement relates to the provision of information concerning the unlawful activities of others, this guideline does not apply (i.e., an agreement by the defendant simply to detail the extent of his own unlawful activities, not involving an agreement to provide information concerning the unlawful activity of another person, is not covered by this guideline)."

This amendment clarifies the operation of this guideline. **The effective date of this amendment is November 1, 1991.**

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

3. If the offense created a substantial risk of death or serious bodily injury to more than one person, an upward departure may be warranted."

This amendment adds commentary to address the case in which an attempted murder results in a substantial risk of death or serious bodily injury to more than one person. **The effective date of this amendment is November 1, 1991.**

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

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

Section 2A3.2(b)(1) is amended by deleting "1 level" and inserting in lieu thereof "2 levels".

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

"2. If the adjustment in subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).";

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

Section 2A3.4(b) is amended by inserting the following additional subdivision:

"(3) If the victim was in the custody, care, or supervisory control of the defendant, increase by 2 levels."

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

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

This amendment provides for consistency among §§2A3.1, 2A3.2, and 2A3.4 with respect to an adjustment for a victim in the custody, care, or supervisory control of the defendant. In addition, the amendment adds an application note clarifying that when this adjustment applies, an adjustment from §3B1.3 will not apply. **The effective date of this amendment is November 1, 1991.**

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

"In cases of partially completed conduct, the loss is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy). E.g., in the case of the theft of a government check or money order, loss refers to the loss level that would have occurred if the check or money order had been cashed. Similarly, if a defendant is apprehended in the process of taking a vehicle, the loss refers to the value of the vehicle even if the vehicle is recovered immediately.",

and inserting in lieu thereof:

"Examples: (1) In the case of a theft of a check or money order, the loss is the loss that would have occurred if the check or money order had been cashed. (2) In the case of a defendant apprehended taking a vehicle, the loss is the value of the vehicle even if the vehicle is recovered immediately.

In the case of a partially completed offense (e.g., an offense involving a completed theft that is part of a larger, attempted theft), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both; see Application Note 4 in the Commentary to §2X1.1."

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 4 by deleting "Attempts" and inserting in lieu thereof "Attempt, Solicitation, or Conspiracy"; and by inserting "and Deceit" immediately following "Fraud".

The Commentary to §2F1.1 is amended by deleting Notes 7 and 8 as follows:

- "7. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). In keeping with the Commission's policy on attempts, if a probable or intended loss that the defendant was attempting to inflict can be determined, that figure would be used if it was larger than the actual loss. For example, if the fraud consisted of attempting to sell \$40,000 in worthless securities, or representing that a forged check for \$40,000 was genuine, the 'loss' would be treated as \$40,000 for purposes of this guideline.
8. The amount of loss need not be precise. The court is not expected to identify each victim and the loss he suffered to arrive at an exact figure. The court need only make a reasonable estimate of the range of loss, given the available information. The estimate may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations. Estimates based upon aggregate 'market loss' (e.g., the aggregate decline in market value of a stock resulting from disclosure of information that was wrongfully withheld or misrepresented) are especially appropriate for securities cases. The offender's gross gain from committing the fraud is an alternative estimate that ordinarily will understate the loss.";

by deleting Note 10 as follows:

- "10. In a few instances, the total dollar loss that results from the offense may overstate its seriousness. Such situations typically occur when a misrepresentation is of limited materiality or is not the sole cause of the loss. Examples would include understating debts to a limited degree in order to obtain a substantial loan which the defendant genuinely expected to repay; attempting to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it; and making a misrepresentation in a securities offering that enabled the securities to be sold at inflated prices, but where the value of the securities subsequently declined in substantial part for other reasons. In such instances, a downward departure may be warranted.";

by renumbering Note 9 as Note 10; by inserting the following as Notes 7, 8 and 9:

- "7. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). Consistent with the provisions of §2X1.1 (Attempt, Solicitation or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss. Frequently, loss in a fraud case will be the same as in a theft case. For example, if the fraud consisted of selling or attempting to sell \$40,000 in worthless securities, or representing that a forged check for \$40,000 was genuine, the loss would be \$40,000.

There are, however, instances where additional factors are to be considered in determining the loss or intended loss:

- (a) Fraud Involving Misrepresentation of the Value of an Item or Product Substitution

A fraud may involve the misrepresentation of the value of an item that does have some value (in contrast to an item that is worthless). Where, for example, a defendant fraudulently represents that stock is worth \$40,000 and the stock is worth only \$10,000, the loss is the amount by which the stock was overvalued (i.e., \$30,000). In a case involving a misrepresentation concerning the quality of a consumer product, the loss is the difference between the amount paid by the victim for the product and the amount for which the victim could resell the product received.

(b) Fraudulent Loan Application and Contract Procurement Cases

In fraudulent loan application cases and contract procurement cases where the defendant's capabilities are fraudulently represented, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered, or can expect to recover, from any assets pledged to secure the loan.

In some cases, the loss determined above may significantly understate or overstate the seriousness of the defendant's conduct. For example, where the defendant substantially understated his debts to obtain a loan, which he nevertheless repaid, the loss determined above (zero loss) will tend not to reflect adequately the risk of loss created by the defendant's conduct. Conversely, a defendant may understate his debts to a limited degree to obtain a loan (e.g., to expand a grain export business), which he genuinely expected to repay and for which he would have qualified at a higher interest rate had he made truthful disclosure, but he is unable to repay the loan because of some unforeseen event (e.g., an embargo imposed on grain exports) which would have caused a default in any event. In such a case, the loss determined above may overstate the seriousness of the defendant's conduct.

(c) Consequential Damages in Procurement Fraud and Product Substitution Cases

In contrast to other types of cases, loss in a procurement fraud or product substitution case includes not only direct damages, but also consequential damages that were reasonably foreseeable. For example, in a case involving a defense product substitution offense, the loss includes the government's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or retrofitting the product so that it can be used for its intended purpose, plus the government's reasonably foreseeable cost of rectifying the actual or potential disruption to government operations caused by the product substitution. Similarly, in the case of fraud affecting a defense contract award, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable. Inclusion of reasonably foreseeable consequential damages directly in the calculation of loss in procurement fraud and product substitution cases reflects that such damages frequently are substantial in such cases.

(d) Diversion of Government Program Benefits

In a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses.

(e) Davis-Bacon Act Cases

In a case involving a Davis-Bacon Act violation (a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the loss is the difference between the legally required and actual wages paid.

8. For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar

operations. The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss.

9. In the case of a partially completed offense (e.g., an offense involving a completed fraud that is part of a larger, attempted fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both; see Application Note 4 in the Commentary to §2X1.1.";

and in the renumbered Note 10 (formerly Note 9) by deleting:

"Dollar loss often does not fully capture the harmfulness and seriousness of the conduct. In such instances, an upward departure may be warranted."

and inserting in lieu thereof:

"In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted.";

by deleting subdivision (f) as follows:

"(f) completion of the offense was prevented, or the offense was interrupted before it caused serious harm.";

by deleting the semicolon at the end of subdivision (e) and inserting in lieu thereof a period; and by inserting the following additional paragraph at the end:

"In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense. This may occur, for example, where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it."

This amendment provides a more precise reference in the commentary of these guidelines to the discussion in §2X1.1 that applies in the case of a partially completed offense. In addition, the amendment reorders the material in these notes, and divides them into separate paragraphs for greater clarity. The amendment also conforms the wording of Application Note 7 of the Commentary to §2F1.1 to Application Note 2 of the Commentary to §2B1.1 to make clear that the treatment of attempts in cases of fraud and theft is identical. Finally, this amendment provides additional guidance with respect to the determination of loss, and makes editorial improvements. **The effective date of this amendment is November 1, 1991.**

394. Section 2D1.1(b)(1) is amended by deleting "during commission of the offense" immediately after "possessed".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 3 by deleting ". The adjustment is to be applied even if several counts are involved and the weapon was present in any of them." and inserting in lieu thereof ", 2D1.6, 2D1.7(b)(1).".

Section 2D1.8(b)(1) is amended by deleting "during commission of the offense" immediately after "possessed".

This amendment clarifies that the provisions of §1B1.3(a)(2) apply to the adjustments in §§2D1.1(b)(1) and 2D1.8(b)(1), and updates the list of referenced offense guidelines in Application Note 3 of the Commentary to §2D1.1. **The effective date of this amendment is November 1, 1991.**

395. Section 2D1.1(c) is amended in the Drug Quantity Table by deleting "Pure PCP" wherever it appears and inserting in lieu thereof "PCP (actual)"; and by deleting "Pure Methamphetamine" wherever it appears and inserting in lieu thereof "Methamphetamine (actual)".

Section 2D1.1(c) is amended in the note designated by a single asterisk by inserting the following additional sentences as the third and fourth sentences of the first paragraph:

"The terms 'PCP (actual)' and 'Methamphetamine (actual)' refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual).";

and in the last sentence of the first paragraph by deleting "pure PCP or methamphetamine" and inserting in lieu thereof "PCP (actual) or methamphetamine (actual)".

Section 2D1.1(c) is amended by deleting "Schedule I or II Depressants" wherever it appears and inserting in lieu thereof "Secobarbital (or the equivalent amount of other Schedule I or II Depressants)".

This amendment clarifies the operation of the guideline in cases involving methamphetamine or PCP by replacing the terms "Pure PCP" and "pure methamphetamine" with "PCP (actual)" and "methamphetamine (actual)," and by providing an example of their application. This amendment also clarifies the interaction of the guideline and drug equivalency tables with respect to Schedule I and II Depressants by using Secobarbital as the referenced substance. **The effective date of this amendment is November 1, 1991.**

396. The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the first paragraph by deleting "grams of a substance containing heroin" and inserting in lieu thereof "kilograms of marihuana"; in the second paragraph by deleting:

"If all the drugs are 'equivalents' of the same drug, e.g., stimulants that are grouped with cocaine, convert them to that drug. In other cases, convert each of the drugs to either the heroin or marihuana equivalents, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level. Use the marihuana equivalents when the only substances involved are 'Schedule I Marihuana,' 'Schedule III Substances,' 'Schedule IV Substances,' 'Schedule V Substances' or 'Schedule I or II Depressants.' Otherwise, use the heroin equivalents."

and inserting in lieu thereof:

"In each case, convert each of the drugs to its marihuana equivalent, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level.";

in the first example by deleting:

"a. The defendant is convicted of selling seventy grams of a substance containing PCP (Level 22) and 250 milligrams of a substance containing LSD (Level 18). Both PCP and LSD are grouped together in the Drug Equivalency Tables under the heading 'LSD, PCP, and Other Schedule I and II Hallucinogens,' which provide PCP equivalencies. The 250 milligrams of LSD is equivalent to twenty-five grams of PCP. The total is therefore ninety-five grams of PCP, for which the Drug Quantity Table provides an offense level of 24."

and inserting in lieu thereof:

"a. The defendant is convicted of selling 70 grams of a substance containing PCP (Level 22) and 250 milligrams of a substance containing LSD (Level 18). The PCP converts to 70 kilograms of marihuana; the LSD converts to 25 kilograms of marihuana. The total is therefore equivalent to 95 kilograms of marihuana, for which the Drug Quantity Table provides an offense level of 24.";

and in the third example by deleting:



- "c. The defendant is convicted of selling eighty grams of cocaine (Level 16) and five kilograms of marihuana (Level 14). The cocaine is equivalent to sixteen grams of heroin; the marihuana, to five grams of heroin. The total equivalent is twenty-one grams of heroin, which has an offense level of 18 in the Drug Quantity Table."

and inserting in lieu thereof:

- "c. The defendant is convicted of selling 80 grams of cocaine (Level 16) and five kilograms of marihuana (Level 14). The cocaine is equivalent to 16 kilograms of marihuana. The total is therefore equivalent to 21 kilograms of marihuana, which has an offense level of 18 in the Drug Quantity Table."

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 by inserting the following additional paragraph as the third paragraph:

"For certain types of controlled substances, the marihuana equivalencies in the Drug Equivalency Tables are 'capped' at specified amounts (e.g., the combined equivalent weight of all Schedule V controlled substances shall not exceed 999 grams of marihuana). Where there are controlled substances from more than one schedule (e.g., a quantity of a Schedule IV substance and a quantity of a Schedule V substance), determine the marihuana equivalency for each schedule separately (subject to the cap, if any, applicable to that schedule). Then add the marihuana equivalencies to determine the combined marihuana equivalency (subject to the cap, if any, applicable to the combined amounts)."

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 by inserting the following additional example immediately after example (c):

- "d. The defendant is convicted of selling 28 kilograms of a Schedule III substance, 50 kilograms of a Schedule IV substance, and 100 kilograms of a Schedule V substance. The marihuana equivalency for the Schedule III substance is 56 kilograms of marihuana (below the cap of 59.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule III substances). The marihuana equivalency for the Schedule IV substance is subject to a cap of 4.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule IV substances (without the cap it would have been 6.25 kilograms). The marihuana equivalency for the Schedule V substance is subject to the cap of 999 grams of marihuana set forth as the maximum equivalent weight for Schedule V substances (without the cap it would have been 1.25 kilograms). The combined equivalent weight, determined by adding together the above amounts, is subject to the cap of 59.99 kilograms of marihuana set forth as the maximum combined equivalent weight for Schedule III, IV, and V substances. Without the cap, the combined equivalent weight would have been 61.99 (56 + 4.99 + .999) kilograms."

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 by deleting:

"DRUG EQUIVALENCY TABLES

Schedule I or II Opiates

|   |                   |
|---|-------------------|
| 1 gm of Alpha-Methylfentanyl =  | 10 gm of heroin   |
| 1 gm of Dextromoramide =  | 0.67 gm of heroin |
| 1 gm of Dipipanone =  | 0.25 gm of heroin |
| 1 gm of 3-Methylfentanyl =  | 10 gm of heroin   |
| 1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =                       | 0.7 gm of heroin  |
| 1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP =              | 0.7 gm of heroin  |
| 1 gm of Alphaprodine =  | 0.1 gm of heroin  |
| 1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) = | 2.5 gm of heroin  |
| 1 gm of Hydromorphone/Dihydromorphanone =                                     | 2.5 gm of heroin  |
| 1 gm of Levorphanol =   | 2.5 gm of heroin  |
| 1 gm of Meperidine/Pethidine =  | 0.05 gm of heroin |
| 1 gm of Methadone =   | 0.5 gm of heroin  |
| 1 gm of 6-Monoacetylmorphine =  | 1 gm of heroin    |

|  |                    |
|--|--------------------|
| 1 gm of Morphine =                             | 0.5 gm of heroin   |
| 1 gm of Oxycodone =                            | 0.5 gm of heroin   |
| 1 gm of Oxymorphone =                          | 5 gm of heroin     |
| 1 gm of Racemorphan =                          | 0.8 gm of heroin   |
| 1 gm of Codeine =                              | 0.08 gm of heroin  |
| 1 gm of Dextropropoxyphene/Propoxyphene-Bulk = | 0.05 gm of heroin  |
| 1 gm of Ethylmorphine =                        | 0.165 gm of heroin |
| 1 gm of Hydrocodone/Dihydrocodeinone =         | 0.5 gm of heroin   |
| 1 gm of Mixed Alkaloids of Opium/Papaveretum = | 0.25 gm of heroin  |
| 1 gm of Opium =                                | 0.05 gm of heroin  |

Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)

|  |  |
|--|--|
| 1 gm of Cocaine =  | 0.2 gm of heroin                       |
| 1 gm of N-Ethylamphetamine =   | 0.4 gm of cocaine/0.08 gm of heroin    |
| 1 gm of Fenethylamine =  | 0.2 gm of cocaine/0.04 gm of heroin    |
| 1 gm of Amphetamine =  | 1.0 gm of cocaine/0.2 gm of heroin     |
| 1 gm of Dextroamphetamine =  | 1.0 gm of cocaine/0.2 gm of heroin     |
| 1 gm of Methamphetamine =  | 5.0 gm of cocaine/1.0 gm of heroin     |
| 1 gm of Methamphetamine (Pure) =   | 50 gm of cocaine/10 gm of heroin       |
| 1 gm of L-Methamphetamine/Levo-methamphetamine/<br>L-Desoxyephedrine=                                      | 0.2 gm of cocaine/0.04 gm of heroin    |
| 1 gm of 4-Methylaminorex ("Euphoria")=   | 0.5 gm of cocaine/0.1 gm of heroin     |
| 1 gm of Methylphenidate (Ritalin)=   | 0.5 gm of cocaine/0.1 gm of heroin     |
| 1 gm of Phenmetrazine =  | 0.4 gm of cocaine/0.08 gm of heroin    |
| 1 gm Phenylacetone/P <sub>2</sub> P (when possessed for the purpose<br>of manufacturing methamphetamine) = | 2.08 gm of cocaine/0.416 gm of heroin  |
| 1 gm Phenylacetone/P <sub>2</sub> P (in any other case) =  | 0.375 gm of cocaine/0.075 gm of heroin |
| 1 gm of Cocaine Base ("Crack") =   | 100 gm of cocaine/20 gm of heroin      |

LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)

|   |                             |
|---|-----------------------------|
| 1 gm of Bufotenine =  | 0.07 gm of heroin or PCP    |
| 1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =            | 100 gm of heroin or PCP     |
| 1 gm of Diethyltryptamine/DET =                                 | 0.08 gm of heroin or PCP    |
| 1 gm of Dimethyltryptamine/DMT =                                | 0.1 gm of heroin or PCP     |
| 1 gm of Mescaline =   | 0.01 gm of heroin or PCP    |
| 1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) = | 0.001 gm of heroin or PCP   |
| 1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) = | 0.0001 gm of heroin or PCP  |
| 1 gm of Peyote (Dry) =  | 0.0005 gm of heroin or PCP  |
| 1 gm of Peyote (Wet) =  | 0.00005 gm of heroin or PCP |
| 1 gm of Phencyclidine/PCP =                                     | 1 gm of heroin              |
| 1 gm of Phencyclidine (Pure PCP) =                              | 10 gm of heroin or PCP      |
| 1 gm of Psilocin =  | 0.5 gm of heroin or PCP     |
| 1 gm of Psilocybin =  | 0.5 gm of heroin or PCP     |
| 1 gm of Pyrrolidine Analog of Phencyclidine/PHP =               | 1 gm of heroin or PCP       |
| 1 gm of Thiophene Analog of Phencyclidine/TCP =                 | 1 gm of heroin or PCP       |
| 1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =                  | 2.5 gm of heroin or PCP     |
| 1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =                 | 1.67 gm of heroin or PCP    |
| 1 gm of 3,4-Methylenedioxyamphetamine/MDA =                     | 0.05 gm of heroin or PCP    |
| 1 gm of 3,4-Methylenedioxymethamphetamine/MDMA =                | 0.035 gm of heroin or PCP   |
| 1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA=             | 0.03 gm of heroin or PCP    |
| 1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =               | 0.68 gm of heroin or PCP    |

Schedule I Marihuana

|  |  |
|--|--|
| 1 gm of Marihuana/Cannabis =                             | 1 mg of heroin                         |
| 1 gm of Marihuana/Cannabis, granulated, powdered, etc. = | 1 mg of heroin/1 gm of marihuana       |
| 1 gm of Hashish Oil =                                    | 0.05 gm of heroin/50 gm of marihuana   |
| 1 gm of Cannabis Resin or Hashish =                      | 5 mg of heroin/5 gm of marihuana       |
| 1 gm of Tetrahydrocannabinol, Organic =                  | 0.167 gm of heroin/167 gm of marihuana |
| 1 gm of Tetrahydrocannabinol, Synthetic =                | 0.167 gm of heroin/167 gm of marihuana |

Schedule I or II Depressants

|                         |                                      |
|-------------------------|--------------------------------------|
| 1 gm of Methaqualone =  | 0.7 mg of heroin/700 mg of marihuana |
| 1 gm of Amobarbital =   | 2 mg of heroin/2 gm of marihuana     |
| 1 gm of Pentobarbital = | 2 mg of heroin/2 gm of marihuana     |
| 1 gm of Secobarbital =  | 2 mg of heroin/2 gm of marihuana     |

Schedule III Substances

|                        |                                  |
|------------------------|----------------------------------|
| 1 gm of Allobarbitol = | 2 mg of heroin/2 gm of marihuana |
|------------------------|----------------------------------|

|                                  |  |
|----------------------------------|--|
| 1 gm of Aprobarbital =           | 2 mg of heroin/2 gm of marihuana       |
| 1 gm of Barbiturate =            | 2 mg of heroin/2 gm of marihuana       |
| 1 gm of Benzphetamine=           | 4 mg of heroin/4 gm of marihuana       |
| 1 gm of Butabarbital =           | 2 mg of heroin/2 gm of marihuana       |
| 1 gm of Butalbital =             | 2 mg of heroin/2 gm of marihuana       |
| 1 gm of Butobarbital/butethal =  | 2 mg of heroin/2 gm of marihuana       |
| 1 gm of Cyclobarbital =          | 2 mg of heroin/2 gm of marihuana       |
| 1 gm of Cyclopentobarbital =     | 2 mg of heroin/2 gm of marihuana       |
| 1 gm of Glutethimide =           | 0.4 mg of heroin/0.4 gm of marihuana   |
| 1 gm of Heptabarbital =          | 2 mg of heroin/2 gm of marihuana       |
| 1 gm of Hexethal =               | 2 mg of heroin/2 gm of marihuana       |
| 1 gm of Hexobarbital =           | 2 mg of heroin/2 gm of marihuana       |
| 1 gm of Metharbital =            | 2 mg of heroin/2 gm of marihuana       |
| 1 gm of Talbutal =               | 2 mg of heroin/2 gm of marihuana       |
| 1 gm of Thalbarbital =           | 2 mg of heroin/2 gm of marihuana       |
| 1 gm of Thiamylal =              | 2 mg of heroin/2 gm of marihuana       |
| 1 gm of Thiobarbital =           | 2 mg of heroin/2 gm of marihuana       |
| 1 gm of Thiopental =             | 2 mg of heroin/2 gm of marihuana       |
| 1 gm of Vinbarbital =            | 2 mg of heroin/2 gm of marihuana       |
| 1 gm of Vinylbital =             | 2 mg of heroin/2 gm of marihuana       |
| 1 gm of Phendimetrazine =        | 2 mg of heroin/2 gm of marihuana       |
| 1 ml of Paregoric=               | 0.25 mg of heroin/0.25 gm of marihuana |
| 1 ml of Hydrocodone Cough Syrup= | 1 mg of heroin/1 gm of marihuana       |

Schedule IV Substances

|   |  |
|---|--|
| 1 gm of Phentermine =                       | 0.125 mg of heroin/0.125 gm of marihuana |
| 1 gm of Pentazocine =                       | 0.125 mg of heroin/0.125 gm of marihuana |
| 1 gm of Barbital =                          | 0.125 mg of heroin/0.125 gm of marihuana |
| 1 gm of Diazepam =                          | 0.125 mg of heroin/0.125 gm of marihuana |
| 1 gm of Phenobarbital =                     | 0.125 mg of heroin/0.125 gm of marihuana |
| 1 gm of Methohexital =                      | 0.125 mg of heroin/0.125 gm of marihuana |
| 1 gm of Methylphenobarbital/Mephobarbital = | 0.125 mg of heroin/0.125 gm of marihuana |
| 1 gm of Nitrazepam =                        | 0.125 mg of heroin/0.125 gm of marihuana |

Schedule V Substances

|  |                                |
|--|--------------------------------|
| 1 gm of codeine cough syrup =<br>marihuana." | 0.0125 mg of heroin/12.5 mg of |
|--|--------------------------------|

and inserting in lieu thereof:

"DRUG EQUIVALENCY TABLESSchedule I or II Opiates

|   |                     |
|---|---------------------|
| 1 gm of Heroin =  | 1 kg of marihuana   |
| 1 gm of Alpha-Methylfentanyl =  | 10 kg of marihuana  |
| 1 gm of Dextromoramide =  | 670 gm of marihuana |
| 1 gm of Dipipanone =  | 250 gm of marihuana |
| 1 gm of 3-Methylfentanyl =  | 10 kg of marihuana  |
| 1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =                           | 700 gm of marihuana |
| 1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/<br>PEPAP =              | 700 gm of marihuana |
| 1 gm of Alphaprodine =  | 100 gm of marihuana |
| 1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-<br>piperidinyl] Propanamide) = | 2.5 kg of marihuana |
| 1 gm of Hydromorphone/Dihydromorphinone =   | 2.5 kg of marihuana |
| 1 gm of Levorphanol =   | 2.5 kg of marihuana |
| 1 gm of Meperidine/Pethidine =  | 50 gm of marihuana  |
| 1 gm of Methadone =   | 500 gm of marihuana |
| 1 gm of 6-Monoacetylmorphine =  | 1 kg of marihuana   |
| 1 gm of Morphine =  | 500 gm of marihuana |
| 1 gm of Oxycodone =   | 500 gm of marihuana |
| 1 gm of Oxymorphone =   | 5 kg of marihuana   |
| 1 gm of Racemorphan =   | 800 gm of marihuana |
| 1 gm of Codeine =   | 80 gm of marihuana  |
| 1 gm of Dextropropoxyphene/Propoxyphene-Bulk =                                    | 50 gm of marihuana  |
| 1 gm of Ethylmorphine =   | 165 gm of marihuana |
| 1 gm of Hydrocodone/Dihydrocodeinone =  | 500 gm of marihuana |
| 1 gm of Mixed Alkaloids of Opium/Papaveretum =                                    | 250 gm of marihuana |
| 1 gm of Opium =   | 50 gm of marihuana  |

Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)

|  |                     |
|--|---------------------|
| 1 gm of Cocaine =  | 200 gm of marihuana |
| 1 gm of N-Ethylamphetamine =   | 80 gm of marihuana  |
| 1 gm of Fenethylamine =  | 40 gm of marihuana  |
| 1 gm of Amphetamine =  | 200 gm of marihuana |
| 1 gm of Dextroamphetamine =  | 200 gm of marihuana |
| 1 gm of Methamphetamine =  | 1 kg of marihuana   |
| 1 gm of Methamphetamine (Actual) =   | 10 kg of marihuana  |
| 1 gm of "Ice" =  | 10 kg of marihuana  |
| 1 gm of L-Methamphetamine/Levo-methamphetamine/<br>L-Desoxyephedrine=                                      | 40 gm of marihuana  |
| 1 gm of 4-Methylaminorex ("Euphoria")=   | 100 gm of marihuana |
| 1 gm of Methylphenidate (Ritalin)=   | 100 gm of marihuana |
| 1 gm of Phenmetrazine =  | 80 gm of marihuana  |
| 1 gm Phenylacetone/P <sub>2</sub> P (when possessed for the purpose<br>of manufacturing methamphetamine) = | 416 gm of marihuana |
| 1 gm Phenylacetone/P <sub>2</sub> P (in any other case) =  | 75 gm of marihuana  |
| 1 gm of Cocaine Base ("Crack") =   | 20 kg of marihuana  |

LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)

|   |                      |
|---|----------------------|
| 1 gm of Bufotenine =  | 70 gm of marihuana   |
| 1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =            | 100 kg of marihuana  |
| 1 gm of Diethyltryptamine/DET =                                 | 80 gm of marihuana   |
| 1 gm of Dimethyltryptamine/DMT =                                | 100 gm of marihuana  |
| 1 gm of Mescaline =   | 10 gm of marihuana   |
| 1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) = | 1 gm of marihuana    |
| 1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) = | 0.1 gm of marihuana  |
| 1 gm of Peyote (Dry) =  | 0.5 gm of marihuana  |
| 1 gm of Peyote (Wet) =  | 0.05 gm of marihuana |
| 1 gm of Phencyclidine/PCP =                                     | 1 kg of marihuana    |
| 1 gm of Phencyclidine (actual) /PCP (actual) =                  | 10 kg of marihuana   |
| 1 gm of Psilocin =  | 500 gm of marihuana  |
| 1 gm of Psilocybin =  | 500 gm of marihuana  |
| 1 gm of Pyrrolidine Analog of Phencyclidine/PHP =               | 1 kg of marihuana    |
| 1 gm of Thiophene Analog of Phencyclidine/TCP =                 | 1 kg of marihuana    |
| 1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =                  | 2.5 kg of marihuana  |
| 1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =                 | 1.67 kg of marihuana |
| 1 gm of 3,4-Methylenedioxyamphetamine/MDA =                     | 50 gm of marihuana   |
| 1 gm of 3,4-Methylenedioxymethamphetamine/MDMA =                | 35 gm of marihuana   |
| 1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA=             | 30 gm of marihuana   |
| 1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =               | 680 gm of marihuana  |

Schedule I Marihuana

|  |                     |
|--|---------------------|
| 1 gm of Marihuana/Cannabis, granulated, powdered, etc. = | 1 gm of marihuana   |
| 1 gm of Hashish Oil =                                    | 50 gm of marihuana  |
| 1 gm of Cannabis Resin or Hashish =                      | 5 gm of marihuana   |
| 1 gm of Tetrahydrocannabinol, Organic =                  | 167 gm of marihuana |
| 1 gm of Tetrahydrocannabinol, Synthetic =                | 167 gm of marihuana |

Secobarbital and Other Schedule I or II Depressants\*

|                         |                     |
|-------------------------|---------------------|
| 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   |

\**Provided*, that the combined equivalent weight of all Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances shall not exceed 59.99 kilograms of marihuana.

Schedule III Substances\*\*

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

\*\**Provided*, that the combined equivalent weight of all Schedule III substances, Schedule I or II depressants, Schedule IV substances, and Schedule V substances shall not exceed 59.99 kilograms of marihuana.

Schedule IV Substances\*\*\*

|                                   |                       |
|-----------------------------------|-----------------------|
| 1 gm of a Schedule IV Substance = | 0.125 gm of marihuana |
|-----------------------------------|-----------------------|

\*\*\**Provided*, that the combined equivalent weight of all Schedule IV and V substances shall not exceed 4.99 kilograms of marihuana.

Schedule V Substances\*\*\*\*

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

\*\*\*\**Provided*, that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana."

The Commentary to §2D1.1 captioned "Background" is amended by inserting the following additional paragraph as the fourth paragraph:

" 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. The decision to treat each plant as equal to 100 grams is premised on the fact that the average yield from a mature marihuana plant equals 100 grams of marihuana. In controlled substance offenses, an attempt is assigned the same offense level as the object of the attempt (see §2D1.4). Consequently, the Commission adopted the policy that, in the case of fewer than fifty marihuana plants, each plant is to be treated as the equivalent of an attempt to produce 100 grams of marihuana, except where the actual weight of the usable marihuana is greater."

This amendment substitutes a single conversion for Schedule III substances (1 gm of a Schedule III substance = 2 gms of marihuana) that will simplify application of the guidelines as well as address currently unlisted Schedule III substances. Because the equivalencies for Schedule III substances are not statutorily based, nor are the pharmacological equivalencies as clear as with Schedule I or II Substances, a generic listing was deemed appropriate. For the same reasons, the amendment provides a single conversion for Schedule IV substances (1 gm of a Schedule IV substance = 0.125 gm of marihuana) and Schedule V substances (1 gm of a Schedule V substance = 0.0125 gm of marihuana). The amendment also adds a conversion for anabolic steroids consistent with their treatment in the Drug Quantity Table. In addition, the amendment adds footnotes to the Drug Equivalency Tables for Schedule I or II depressants and Schedule III, IV, and V substances to remove an ambiguity in guideline application by expressly limiting the combined equivalent weight of such substances to the marihuana amount consistent with the highest offense level for such substances provided in the Drug Quantity Table. See United States v. Gurgliolo, 894 F.2d 56 (3d Cir. 1990). The amendment inserts an additional listing under "Secobarbital and Other Schedule I and II Depressants" to reflect that glutethimide has been changed from a Schedule III to a Schedule II controlled substance under 21 C.F.R. §1308.12. In addition, the amendment simplifies the application of the Drug Equivalency Table by referencing the conversions to one substance (marihuana) rather than to four substances; the use of one referent rather than four makes no substantive change but will make the required computations easier and reduce the likelihood of computational error. Finally, the amendment sets forth the rationale for the Commission's treatment of fewer than fifty marihuana plants. **The effective date of this amendment is November 1, 1991.**

397. Section 2D1.7 is amended in the title by deleting "Interstate Sale and Transporting" and inserting in lieu thereof "Sale or Transportation".

Section 2D1.7 is amended by inserting the following additional subsection:

"(b) Cross Reference

- (1) If the offense involved a controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) or §2D2.1 (Unlawful Possession), as appropriate, if the resulting offense level is greater than that determined above."

The Commentary to §2D1.7 captioned "Statutory Provision" is amended by deleting "21 U.S.C. § 857" and inserting in lieu thereof "21 U.S.C. § 863 (formerly 21 U.S.C. § 857)".

The Commentary to §2D1.7 is amended by inserting the following at the end:

"Application Note:

1. The typical case addressed by this guideline involves small-scale trafficking in drug paraphernalia (generally from a retail establishment that also sells items that are not unlawful). In a case involving a large-scale dealer, distributor, or manufacturer, an upward departure may be warranted. Conversely, where the offense was not committed for pecuniary gain (e.g., transportation for the defendant's personal use), a downward departure may be warranted."

This amendment revises the title of the guideline to address the expanded coverage of the underlying statute, as amended by Section 2401 of the Crime Control Act of 1990 (Public Law 101-647), adds a cross reference to address cases in which the underlying conduct involves a controlled substance offense, and adds an application note to specify the "heartland" types of cases addressed by the offense level set forth in the guideline. **The effective date of this amendment is November 1, 1991.**

398. Amendment: Section 2E2.1 is amended in the title by deleting ", Financing, or Collecting an Extortionate Extension of Credit" and inserting in lieu thereof "or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means".

Section 2E2.1(b)(3)(A) is amended by deleting "the commission of the offense or an escape from the scene of the crime" and inserting in lieu thereof "commission of the offense or to facilitate escape".

This amendment corrects an error in the title of this section, and conforms the wording in subsection (b)(3)(A) with the wording used in subsection (b)(3)(B) and other guidelines. **The effective date of this amendment is November 1, 1991.**

399. The Commentary to §2E5.2 captioned "Application Notes" is amended in Note 1 by deleting "had a fiduciary obligation under the Employee Retirement Income Security Act" and inserting in lieu thereof "was a fiduciary of the benefit plan"; and by deleting "would" and inserting in lieu thereof "will".

The Commentary to §2E5.2 captioned "Application Notes" is amended by deleting Note 2 as follows:

- "2. 'Fiduciary of the benefit plan' is defined in 29 U.S.C. § 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan.";

by inserting the text of former Note 2 as the last sentence of Note 1; and, in the caption, by deleting "Notes" and inserting in lieu thereof "Note".

This amendment makes an editorial improvement in the language of this commentary. **The effective date of this amendment is November 1, 1991.**

400. Section 2G1.2(b) is amended by inserting the following additional subdivision:

- "(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."

Sections 2G1.2(c) and (d) are transposed and redesignated accordingly.

Section 2G1.2(c) (formerly §2G1.2(d)) is amended in the caption by deleting "Reference" and inserting in lieu thereof "References"; and by inserting the following additional subsections:

- "(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 or Assault with the Intent 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."

Section 2G1.2(c)(1) (formerly §2G1.2(d)(1)) is amended by deleting "the defendant" immediately before "causing".

The Commentary to §2G1.2 captioned "Application Notes" is amended by renumbering Note 5 as Note 7, and by inserting the following additional notes:

- "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)."

The commentary to §2G1.2 captioned "Application Notes" is amended in Note 1 by deleting "(c)(1)" and inserting in lieu thereof "(d)(1)"; and in Note 7 (formerly Note 5) by deleting "(d)(1)" and inserting in lieu thereof "subsection (c)(1)".

The Commentary to §2G2.1 captioned "Application Notes" is amended in Note 2 by deleting "Specific offense characteristic" and inserting in lieu thereof "Subsection".

The Commentary to §2G2.1 captioned "Application Notes" is amended by deleting:

- "3. If specific offense characteristic (b)(2) applies, no adjustment is to be made under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).",

and inserting in lieu thereof:

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

This amendment adds a specific offense characteristic and commentary to provide consistent treatment for similar conduct among the guidelines in this part, conforms the language used in §2G1.2(c)(1) (formerly §2G1.2(d)(1)) with the language used elsewhere in the guidelines, and makes editorial changes to improve clarity. In addition, as statutes referenced to §2G1.2 may be used as "jurisdictional" statutes in some cases to prosecute conduct that is more appropriately covered under other guidelines (§§2A3.1, 2A3.2, and 2A3.4), this amendment inserts cross references as §2G1.2(c)(2) and (3) to provide consistent offense levels in such cases. **The effective date of this amendment is November 1, 1991.**

401. The Commentary to §2J1.2 captioned "Application Notes" is amended in Note 1 by deleting:

", an indictment or verdict based upon perjury, false testimony, or other false evidence,"

and inserting in lieu thereof:

"; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence;"

The Commentary to §2J1.2 captioned "Application Notes" is amended by inserting the following additional note:

"5. The inclusion of 'property damage' under subsection (b)(1) is designed to address cases in which property damage is caused or threatened as a means of intimidation or retaliation (*e.g.*, to intimidate a witness from, or retaliate against a witness for, testifying). Subsection (b)(1) is not intended to apply, for example, where the offense consisted of destroying a ledger containing an incriminating entry."

The Commentary to §2J1.2 captioned "Background" is amended in the second paragraph by deleting:

"assist another person to escape punishment for a crime he has committed, an alternative reference to the guideline for accessory after the fact",

and inserting in lieu thereof:

"avoid punishment for an offense that the defendant has committed or to assist another person to escape punishment for an offense, a cross reference to §2X3.1 (Accessory After the Fact) is provided. Use of this cross reference will provide an enhanced offense level when the obstruction is in respect to a particularly serious offense, whether such offense was committed by the defendant or another person".

The Commentary to §2J1.3 captioned "Application Notes" is amended in Note 1 by deleting:

", an indictment or verdict based upon perjury, false testimony, or other false evidence,"

and inserting in lieu thereof:

"; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence;"

The Commentary to §2J1.5 captioned "Application Notes" is amended in Note 1 by deleting:

", an indictment or verdict based upon perjury, false testimony, or other false evidence,"

and inserting in lieu thereof:

"; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence;"

The Commentary to §2J1.8 captioned "Application Notes" is amended in Note 1 by deleting:

", an indictment or verdict based upon perjury, false testimony, or other false evidence,"

and inserting in lieu thereof:

"; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence;"

This amendment clarifies the types of circumstances to which §§2J1.2(b)(1) and 2J1.2(c)(1) apply. This amendment also clarifies the scope of the enhancement for "substantial interference with the administration of justice" in §§2J1.2, 2J1.3, 2J1.5, and 2J1.8. **The effective date of this amendment is November 1, 1991.**



402. Section 2J1.3 is amended by inserting the following additional subsection:

"(d) Special Instruction

- (1) In the case of counts of perjury or subornation of perjury arising from testimony given, or to be given, in separate proceedings, do not group the counts together under §3D1.2 (Groups of Closely-Related Counts)."

The Commentary to §2J1.3 captioned "Application Notes" is amended by inserting the following additional note:

- "5. 'Separate proceedings,' as used in subsection (d)(1), includes different proceedings in the same case or matter (e.g., a grand jury proceeding and a trial, or a trial and retrial), and proceedings in separate cases or matters (e.g., separate trials of codefendants), but does not include multiple grand jury proceedings in the same case."

This amendment provides a special instruction addressing the appropriate treatment of multiple instances of perjury under Chapter Three, Part D (Multiple Counts). **The effective date of this amendment is November 1, 1991.**

403. The Commentary to §2J1.6 captioned "Application Notes" is amended by deleting:

- "2. By statute, a term of imprisonment imposed for this offense runs consecutively to any other term of imprisonment imposed. 18 U.S.C. § 3146(b)(1).";

by renumbering Note 3 as Note 2; and by inserting the following additional notes:

- "3. In the case of a failure to appear for service of sentence, any term of imprisonment imposed on the failure to appear count is to be imposed consecutively to any term of imprisonment imposed for the underlying offense. See §5G1.3(a). The guideline range for the failure to appear count is to be determined independently and the grouping rules of §§ 3D1.2-3D1.5 do not apply.

Otherwise, in the case of a conviction on both the underlying offense and the failure to appear, the failure to appear is treated under §3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense; and the failure to appear count and the count(s) for the underlying offense are grouped together under §3D1.2(c). Note that although 18 U.S.C. § 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, it does require that any sentence of imprisonment on a failure to appear count be imposed consecutively to any other sentence of imprisonment. Therefore, in such cases, the combined sentence must be constructed to provide a 'total punishment' that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2). For example, where the combined applicable guideline range for both counts is 30-37 months and the court determines a 'total punishment' of 36 months is appropriate, a sentence of thirty months for the underlying offense plus a consecutive six months sentence for the failure to appear count would satisfy these requirements.

4. In some cases, the defendant may be sentenced on the underlying offense (the offense in respect to which the defendant failed to appear) before being sentenced on the failure to appear offense. In such cases, criminal history points for the sentence imposed on the underlying offense are to be counted in determining the guideline range on the failure to appear offense only where the offense level is determined under subsection (a)(1) (i.e., where the offense constituted a failure to report for service of sentence)."

This amendment inserts an application note (Note 3) to clarify the interaction of §§2J1.6, 3C1.1, 5G1.2, and 5G1.3; and inserts an application note (Note 4) to clarify the interaction of §§2J1.6 and 4A1.1. **The effective date of this amendment is November 1, 1991.**

404. Section 2K1.1 is amended in the title by deleting "Explosives" and inserting in lieu thereof "Explosive Materials".

Section 2K1.2 is amended in the title by deleting "Explosives" and inserting in lieu thereof "Explosive Materials".

The Commentary to §2K1.4 captioned "Application Notes" is amended by inserting the following additional note:

- "3. 'Explosives,' as used in the title of this guideline, includes any explosive, explosive material, or destructive device."

Section 2K1.5(c)(1) is amended by inserting "or possessed" immediately following "used"; and by inserting ", as appropriate," immediately before "if the".

This amendment revises the titles of §2K1.1 and §2K1.2, and the Commentary to §2K1.4 to clarify that the term explosives, as used in those guidelines, includes explosives materials. In addition, this amendment clarifies the application of the cross reference in §2K1.5(c)(1). **The effective date of this amendment is November 1, 1991.**

405. The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 2 by deleting "§2B3.1(b)(2)" and inserting in lieu thereof "§2B3.1(b)(2)(A)-(F)"; and by inserting the following additional paragraphs at the end:

*Provided*, that where the maximum of the guideline range from Chapter Five, Part A (Sentencing Table) determined by an offense level adjusted under the procedure described in the preceding paragraph, plus the term of imprisonment required under 18 U.S.C. § 924(c) or § 929(a), is less than the maximum of the guideline range that would apply to the underlying offense absent such adjustment, the procedure described in the preceding paragraph does not apply. Instead, the guideline range applicable to the underlying offense absent such adjustment is to be used after subtracting the term of imprisonment imposed under 18 U.S.C. § 924(c) or § 929(a) from both the minimum and maximum of such range.

Example: A defendant, is to be sentenced under the robbery guideline; his unadjusted offense level from §2B3.1 is 30, including a 7-level enhancement for discharging a firearm; no Chapter Three adjustments are applicable; and his criminal history category is Category IV. His unadjusted guideline range from Chapter Five, Part A (Sentencing Table) is 135-168 months. This defendant has also been convicted under 18 U.S.C. § 924(c) arising from the possession of a weapon during the robbery, and therefore must be sentenced to an additional consecutive five-year term of imprisonment. The defendant's adjusted guideline range, which takes into account the conviction under 18 U.S.C. § 924(c) by eliminating the 7-level weapon enhancement, is 70-87 months. Because the maximum of the defendant's adjusted guideline range plus the five year consecutive sentence (87 months + 60 months = 147 months) is less than the maximum of the defendant's unadjusted guideline range (168 months), the defendant is to be sentenced using the unadjusted guideline range after subtracting the 60 month sentence to be imposed under 18 U.S.C. § 924(c) from both the minimum and maximum of the unadjusted range (e.g., 135 months - 60 months = 75 months; 168 months - 60 months = 108 months). A sentence imposed for the underlying offense using the guideline range determined in this manner (75-108 months) when combined with the consecutive sentence imposed under 18 U.S.C. § 924(c) or § 929(a), will produce the appropriate total term of imprisonment."

This amendment provides an additional instruction for the determination of the offense level in cases in which the defendant is convicted under 18 U.S.C. § 924(c) or §929(a) in addition to a count for the offense in respect to which the firearm was used or possessed. The amendment is designed to prevent the anomalous result of the total punishment being less when there are convictions on both such counts than if the defendant was convicted only of the offense in respect to which the weapon was used or possessed. **The effective date of this amendment is November 1, 1991.**

406. The Commentary to §2P1.1 captioned "Application Notes" is amended by inserting the following additional note:

"6. If the adjustment in subsection (b)(1) applies as a result of conduct that involves an official victim, do not apply §3A1.2 (Official Victim)."

This amendment addresses the issue raised in United States v. Dugan, 912 F.2d 942 (8th Cir. 1990) concerning the interaction between §2P1.1(b)(1) and §3A1.2 by expressly providing that where an enhancement from subsection (b)(1) applies, §3A1.2 does not apply. **The effective date of this amendment is November 1, 1991.**

407. Section 2Q2.1(b)(3)(A) is amended by deleting "specially protected" immediately before "fish".

This amendment removes language inadvertently retained when this guideline was consolidated with the former §2Q2.2. **The effective date of this amendment is November 1, 1991.**

408. The Commentary to §2T1.2 captioned "Background" is amended in the third paragraph by deleting:

"difficulty of computing the tax loss, which may become the subject of protracted civil litigation. It is expected that the measure used will generally understate the tax due, and will not call for a sentence approaching the maximum unless very large incomes are involved. Thus, the burden will remain on the prosecution to provide a more accurate estimate of the tax loss if it seeks enhanced punishment",

and inserting in lieu thereof:

"potential difficulty of determining the amount of tax the taxpayer owed. It is expected that this alternative measure generally will understate the amount of tax owed".

This amendment clarifies the meaning of the commentary and deletes surplus material. **The effective date of this amendment is November 1, 1991.**

409. Section 2T1.6 is amended by inserting the following additional subsection:

"(b) Cross Reference

- (1) Where the offense involved embezzlement by withholding tax from an employee's earnings and willfully failing to account to the employee for it, apply §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) if the resulting offense level is greater than that determined above."

The Commentary to §2T1.6 captioned "Application Note" is amended in Note 1 by deleting "In such instances, an upward departure may be warranted" and inserting in lieu thereof "Subsection (b)(1) addresses such cases".

This amendment replaces the recommendation in the commentary of this guideline concerning consideration of an upward departure where the court finds that the offense involved embezzlement of an employee's funds with a cross reference that provides for the application of §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) in such cases where that guideline results in the greater offense level. **The effective date of this amendment is November 1, 1991.**

410. Section 2T3.1(a) is amended by deleting "Level from §2T4.1 (Tax Table) corresponding to the tax loss." and inserting in lieu thereof:

- "(1) The level from §2T4.1 (Tax Table) corresponding to the tax loss, if the tax loss exceeded \$1,000; or
- (2) 5, if the tax loss exceeded \$100 but did not exceed \$1,000; or
- (3) 4, if the tax loss did not exceed \$100."

Section 2T3.1 is amended by inserting the following additional subsection:

- "(b) Specific Offense Characteristic
  - (1) If sophisticated means were used to impede discovery of the nature or existence of the offense, increase by 2 levels."

Section 2T3.2(a) is amended by deleting "Level from §2T4.1 (Tax Table) corresponding to the tax loss." and inserting in lieu thereof:

- "(1) The level from §2T4.1 (Tax Table) corresponding to the tax loss, if the tax loss exceeded \$1,000; or
- (2) 5, if the tax loss exceeded \$100 but did not exceed \$1,000; or
- (3) 4, if the tax loss did not exceed \$100."

Section 2T3.2 is amended by inserting the following additional subsection:

- "(b) Specific Offense Characteristic
  - (1) If sophisticated means were used to impede discovery of the nature or existence of the offense, increase by 2 levels."

This amendment lowers the offense level for the least serious offenses (evasion of import duty of \$1,000 or less without use of sophisticated means) to provide an offense level equal to the offense level for theft of the same amount without more than minimal planning. In addition, it adds an adjustment for "sophisticated means" to conform with other tax evasion guidelines (e.g., §2T1.1). **The effective date of this amendment is November 1, 1991.**

411. Section 2X1.1(a) and (b)(3) are amended by deleting "object" wherever it appears and inserting in lieu thereof in each instance "substantive".

Section 2X1.1(b)(1) is amended by inserting "substantive" immediately before "offense".

Section 2X1.1(b)(2) is amended by inserting "substantive" immediately before "offense".

Section 2X1.1(b)(3) is amended by deleting "the offense" the first two times it appears and inserting in lieu thereof in each instance "the substantive offense".

The Commentary to §2X1.1 captioned "Application Notes" is amended in Note 2 by deleting:

"Under §2X1.1(a) the base offense level will be the same as that for the object offense which the defendant solicited, or conspired or attempted to commit.",

and inserting in lieu thereof:

"'Substantive offense,' as used in this guideline, means the offense that the defendant was convicted of soliciting, attempting, or conspiring to commit. Under §2X1.1(a), the base offense level will be the same as that for the substantive offense."

The Commentary to §2X1.1 is amended by deleting "object" wherever it appears and inserting in lieu thereof "substantive".

The Commentary to §2X1.1 captioned "Application Notes" is amended in Note 4 in the second paragraph by deleting "or (2)" and inserting in lieu thereof ", (b)(2), or (b)(3)(A)".

The Commentary to §2X1.1 captioned "Background" is amended by deleting "necessary acts of" and inserting in lieu thereof "acts necessary for".

This amendment replaces the term "object offense" with the more commonly used term "substantive offense," and makes clarifying and editorial changes. **The effective date of this amendment is November 1, 1991.**

412. Section 2X5.1 is amended by inserting, immediately before the period at the end of the second sentence, the following:

" , except that any guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline shall remain applicable".

The Commentary to §2X5.1 is amended by inserting, immediately after "Commentary", the following:

"Application Note:

1. Guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline include: §5B1.3 (Conditions of Probation); §5B1.4 (Recommended Conditions of Probation and Supervised Release); §5D1.1 (Imposition of a Term of Supervised Release); §5D1.2 (Term of Supervised Release); §5D1.3 (Conditions of Supervised Release); §5E1.1 (Restitution); §5E1.3 (Special Assessments); §5E1.4 (Forfeiture); Chapter Five, Part F (Sentencing Options); §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment); Chapter Five, Part H (Specific Offender Characteristics); Chapter Five, Part J (Relief from Disability); Chapter Five, Part K (Departures); Chapter Six, Part A (Sentencing Procedures); Chapter Six, Part B (Plea Agreements)."

The Commentary to §2X5.1 captioned "Background" is amended by inserting the following additional paragraph:

" The sentencing guidelines apply to convictions under 18 U.S.C. § 13 (Assimilative Crimes Act) and 18 U.S.C. § 1153 (Indian Major Crimes Act); see 18 U.S.C. § 3551(a), as amended by section 1602 of Public Law 101-647."

This amendment inserts an application note to clarify that, in the case of an offense for which there is no sufficiently analogous offense guideline, any guidelines and policy statements that can be meaningfully applied in the absence of a Chapter Two offense guideline remain applicable. This amendment also clarifies the applicability of the sentencing guidelines to convictions under 18 U.S.C. §§ 13 (Assimilative Crimes Act) and 1153 (Indian Major Crimes Act). Section 1602 of the Crime Control Act of 1990 (Public Law 101-647) resolved this issue by amending 18 U.S.C. § 3551(a) to provide expressly that Chapter 227 of Title 18, United States Code (including the sentencing guidelines) applies to convictions under these statutes. **The effective date of this amendment is November 1, 1991.**

413. The Commentary to §3A1.3 captioned "Application Notes" is amended by deleting:

- "2. This adjustment applies to any offense in which a victim was physically restrained in the course of the offense, except where such restraint is an element of the offense, specifically incorporated into the base offense level, or listed as a specific offense characteristic."

and inserting in lieu thereof:

- "2. Do not apply this adjustment where the offense guideline specifically incorporates this factor, or where the unlawful restraint of a victim is an element of the offense itself (e.g., this adjustment does not apply to offenses covered by §2A4.1 (Kidnapping, Abduction, Unlawful Restraint))."

This amendment clarifies the application of this guideline. **The effective date of this amendment is November 1, 1991.**

414. The Commentary to §3B1.1 captioned "Application Notes" is amended in Note 1 by inserting the following additional sentence at the end:

- "A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant."

This amendment clarifies the operation of this guideline in accord with the holding in United States v. Carroll, 893 F.2d 1502 (6th Cir. 1990). **The effective date of this amendment is November 1, 1991.**

415. The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 1 in the last sentence by deleting ", the defendant's testimony and" and inserting in lieu thereof "in respect to alleged false testimony or statements by the defendant, such testimony or".

This amendment more precisely states the meaning of this commentary. **The effective date of this amendment is November 1, 1991.**

416. The Commentary to §3C1.2 captioned "Application Notes" is amended by redesignating note 3 as note 4; and by inserting the following additional note:

- "3. 'During flight' is to be construed broadly and includes preparation for flight. Therefore, this adjustment also is applicable where the conduct occurs in the course of resisting arrest."

This amendment clarifies that reckless endangerment in the course of resisting arrest that does not receive a 3-level enhancement under §3A1.2 (Official Victim) may be considered under this section. **The effective date of this amendment is November 1, 1991.**

417. Section 3D1.2(d) is amended in the second paragraph by inserting ", 2C1.7" immediately following "2C1.2"; by inserting ", 2D1.11, 2D1.13" immediately following "2D1.5"; and by deleting "2K2.2" and inserting in lieu thereof "2K2.1".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 2 by inserting the following immediately after the second sentence:

- "For offenses in which there are no identifiable victims (e.g., drug or immigration offenses, where society at large is the victim), the 'victim' for purposes of subsections (a) and (b) is the societal interest that is harmed. In such cases, the counts are grouped together when the societal interests that are harmed are closely related. Where one count, for example, involves unlawfully

entering the United States and the other involves possession of fraudulent evidence of citizenship, the counts are grouped together because the societal interests harmed (the interests protected by laws governing immigration) are closely related. In contrast, where one count involves the sale of controlled substances and the other involves an immigration law violation, the counts are not grouped together because different societal interests are harmed.";

and by deleting the last sentence as follows:

"Thus, for so-called 'victimless' crimes (crimes in which society at large is the victim), the grouping decision must be based primarily upon the nature of the interest invaded by each offense."

The Commentary to §3D1.2 captioned "Application Notes" is amended by deleting Note 8, inserting the text of deleted Note 8 as the second paragraph of Note 5, and by renumbering Note 9 as Note 8.

The Commentary to §3D1.2 captioned "Application Notes" is amended in the third (formerly second) paragraph of Note 5 by deleting "accessory after the fact for" and inserting in lieu thereof "a conspiracy to commit".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 6 by inserting the following additional paragraph as the second paragraph:

"A conspiracy, attempt, or solicitation to commit an offense is covered under subsection (d) if the offense that is the object of the conspiracy, attempt, or solicitation is covered under subsection (d)."

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in example 1 by deleting "gun was discharged" and inserting in lieu thereof "firearm was displayed".

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in example 2 by deleting:

"The base offense level is 6, and there is an aggravator of 1 level for property value. However, because the conduct involved repeated acts with some planning, the offense level is raised to 8 (§2F1.1(b)(2)(B)). The combined offense level therefore is 8."

and inserting in lieu thereof:

"The base offense level is 6; 1 level is added because of the value of the property (§2F1.1(b)(1)); and 2 levels are added because the conduct involved repeated acts with some planning (§2F1.1(b)(2)(A)). The resulting offense level is 9."

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in example 4 by deleting "§2B4.1 (Commercial Bribery)" and inserting in lieu thereof "§2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery)".

This amendment revises §3D1.2(d) to reflect amendments to the offense guidelines of Chapter Two; clarifies the commentary in Note 1 to expressly state that a conspiracy, attempt, or solicitation to commit an offense covered under subsection (d) is also covered under subsection (d); clarifies the commentary in Note 2 with respect to the meaning of the term "victim" where society at large is the victim; merges former Note 8 with Note 5 for greater clarity; conforms two illustrations of the operation of the guidelines to the guidelines, as amended; corrects an inaccurate illustration; and corrects a reference to the title of an offense guideline. **The effective date of this amendment is November 1, 1991.**

418. The Commentary to Chapter Five, Part A (Sentencing Table) captioned "Application Notes" is amended in Note 3 by inserting ", except as provided in §§4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal)" immediately before the period at the end of the first sentence.

This amendment conforms the commentary of this section to the provisions concerning the determination of the criminal history category set forth in §§4B1.1 and 4B1.4. No substantive change results. **The effective date of this amendment is November 1, 1991.**

419. Section 5F1.3 is amended by deleting:

"If the defendant was convicted of a felony and sentenced to probation, the court must order one or more of the following sanctions: a fine, restitution, or community service. 18 U.S.C. § 3563(a)(2)."

This amendment deletes a sentence in this guideline that is unnecessary and no longer accurate because of a change in the statute. The correct reference is found at §5B1.3(a). **The effective date of this amendment is November 1, 1991.**

420. Chapter Five, Part K, Subpart 2 is amended by inserting an additional policy statement as §5K2.16 (Voluntary Disclosure of Offense (Policy Statement)).

This amendment sets forth an additional policy statement regarding a mitigating factor that may warrant a downward departure. **The effective date of this amendment is November 1, 1991.**

421. Appendix A (Statutory Index) is amended by inserting, in the appropriate place by title and section, the following:

|                             |                       |
|-----------------------------|-----------------------|
| "8 U.S.C. § 1160(b)(7)(A)   | 2L2.1, 2L2.2";        |
| "18 U.S.C. § 225            | 2B1.1, 2B4.1, 2F1.1"; |
| "18 U.S.C. § 403            | 2J1.1";               |
| "18 U.S.C. § 1032           | 2B4.1, 2F1.1";        |
| "18 U.S.C. § 1346           | 2C1.7";               |
| "18 U.S.C. § 1517           | 2J1.2";               |
| "18 U.S.C. § 2257           | 2G2.5";               |
| "21 U.S.C. § 841(g)(1)      | 2D1.11, 2D1.13";      |
| "21 U.S.C. § 843(a)(4)(B)   | 2D1.13";              |
| "21 U.S.C. § 843(a)(6), (7) | 2D1.12";              |
| "21 U.S.C. § 843(a)(8)      | 2D1.13";              |
| "21 U.S.C. § 859            | 2D1.2";               |
| "21 U.S.C. § 860            | 2D1.2";               |
| "21 U.S.C. § 861            | 2D1.2";               |
| "21 U.S.C. § 863            | 2D1.7";               |
| "42 U.S.C. § 1320a-7b       | 2B1.1, 2B4.1, 2F1.1". |

Appendix A (Statutory Index) is amended in the line beginning "18 U.S.C. § 371" by inserting "2C1.7," immediately before "2D1.4";

by deleting:

"18 U.S.C. § 842(a)-(i) 2K1.3",

and inserting in lieu thereof:

|                         |         |
|-------------------------|---------|
| "18 U.S.C. § 842(a)-(e) | 2K1.3   |
| 18 U.S.C. § 842(f)      | 2K1.6   |
| 18 U.S.C. § 842(g)      | 2K1.6   |
| 18 U.S.C. § 842(h), (i) | 2K1.3"; |

by deleting:



|                     |                       |
|---------------------|-----------------------|
| "18 U.S.C. § 844(a) | 2K1.3                 |
| 18 U.S.C. § 844(b)  | 2K1.1, 2K1.2, 2K1.3"; |

in the line beginning "18 U.S.C. § 844(d)" by deleting "§2K1.6" and inserting in lieu thereof "§2K1.3";

by deleting:

|                          |              |
|--------------------------|--------------|
| "18 U.S.C. § 922(a)(1)   | 2K2.1, 2K2.2 |
| 18 U.S.C. § 922(a)(2)    | 2K2.2        |
| 18 U.S.C. § 922(a)(3)    | 2K2.1        |
| 18 U.S.C. § 922(a)(4)    | 2K2.1        |
| 18 U.S.C. § 922(a)(5)    | 2K2.2        |
| 18 U.S.C. § 922(a)(6)    | 2K2.1        |
| 18 U.S.C. § 922(b)-(d)   | 2K2.2        |
| 18 U.S.C. § 922(e)       | 2K2.1, 2K2.2 |
| 18 U.S.C. § 922(f)       | 2K2.1, 2K2.2 |
| 18 U.S.C. § 922(g)       | 2K2.1        |
| 18 U.S.C. § 922(h)       | 2K2.1        |
| 18 U.S.C. § 922(i)-(l)   | 2K2.1, 2K2.2 |
| 18 U.S.C. § 922(m)       | 2K2.2        |
| 18 U.S.C. § 922(n)       | 2K2.1        |
| 18 U.S.C. § 922(o)       | 2K2.1, 2K2.2 |
| 18 U.S.C. § 923(a)       | 2K2.2        |
| 18 U.S.C. § 924(a)(1)(A) | 2K2.2        |
| 18 U.S.C. § 924(a)(1)(C) | 2K2.1, 2K2.2 |
| 18 U.S.C. § 924(a)(3)(A) | 2K2.2        |
| 18 U.S.C. § 924(b)       | 2K2.3",      |

and inserting in lieu thereof:

|                         |         |
|-------------------------|---------|
| "18 U.S.C. § 922(a)-(p) | 2K2.1   |
| 18 U.S.C. § 922(q)      | 2K2.5   |
| 18 U.S.C. § 922(r)      | 2K2.1   |
| 18 U.S.C. § 923         | 2K2.1   |
| 18 U.S.C. § 924(a)      | 2K2.1   |
| 18 U.S.C. § 924(b)      | 2K2.1"; |

by deleting:

|                     |         |
|---------------------|---------|
| "18 U.S.C. § 924(f) | 2K2.3   |
| 18 U.S.C. § 924(g)  | 2K2.3", |

and inserting in lieu thereof:

|                     |                                |
|---------------------|--------------------------------|
| "18 U.S.C. § 924(e) | 2K2.1 ( <u>see</u> also 4B1.4) |
| 18 U.S.C. § 924(f)  | 2K2.1                          |
| 18 U.S.C. § 924(g)  | 2K2.1";                        |

in the line beginning "18 U.S.C. § 1005" by deleting ", 2S1.3";

in the line beginning "18 U.S.C. § 1341" by inserting "2C1.7," immediately before "2F1.1";

in the line beginning "18 U.S.C. § 1342" by inserting "2C1.7," immediately before "2F1.1";

in the line beginning "18 U.S.C. § 1343" by inserting "2C1.7," immediately before "2F1.1";

in the line beginning "18 U.S.C. § 1460" by deleting "2G2.2,";

in the line beginning "18 U.S.C. § 1543" by inserting "2L2.3," immediately before "2L2.4";

in the line beginning "18 U.S.C. § 1716" by inserting "2K1.3," immediately before "2K3.2";

in the line beginning "18 U.S.C. § 2252" by inserting ", 2G2.4" immediately following "2G2.2";

by deleting:

"21 U.S.C. § 841(d) 2D1.1",

and inserting in lieu thereof:

"21 U.S.C. § 841(d)(1), (2) 2D1.11  
21 U.S.C. § 841(d)(3) 2D1.13";

by deleting:

"21 U.S.C. § 842(a) 2D3.1, 2D3.2, 2D3.3",

and inserting in lieu thereof:

"21 U.S.C. § 842(a)(1) 2D3.1  
21 U.S.C. § 842(a)(2) 2D3.3  
21 U.S.C. § 842(a)(9), (10) 2D3.5";

in the line beginning "21 U.S.C. § 843(a)(1), (2), (4)" by deleting ", (1), (2), (4)" and inserting in lieu thereof "(1), (2)";

by deleting:

"21 U.S.C. § 960 2D1.1",

and inserting in lieu thereof:

"21 U.S.C. § 960(a), (b) 2D1.1  
21 U.S.C. § 960(d)(1), (2) 2D1.11";

in the line beginning 26 U.S.C. § 5685 by deleting "2K1.6," and by deleting "2K2.2" and inserting in lieu thereof "2K2.1";

by deleting:

"26 U.S.C. § 5861(a) 2K2.2  
26 U.S.C. § 5861(b) 2K2.1  
26 U.S.C. § 5861(c) 2K2.1  
26 U.S.C. § 5861(d) 2K2.1  
26 U.S.C. § 5861(e) 2K2.2  
26 U.S.C. § 5861(f) 2K2.2  
26 U.S.C. § 5861(g) 2K2.2  
26 U.S.C. § 5861(h) 2K2.1  
26 U.S.C. § 5861(i) 2K2.1  
26 U.S.C. § 5861(j) 2K2.1, 2K2.2  
26 U.S.C. § 5861(k) 2K2.1  
26 U.S.C. § 5861(l) 2K2.2  
26 U.S.C. § 5871 2K2.1, 2K2.2",

and inserting in lieu thereof:

"26 U.S.C. § 5861(a)-(l) 2K2.1  
26 U.S.C. § 5871 2K2.1";

by deleting:

"31 U.S.C. § 5316(a) 2S1.3",

and inserting in lieu thereof:

"31 U.S.C. § 5316 2S1.4";

by deleting:

"46 U.S.C. § App. 1903 2D1.1",

and inserting in lieu thereof:

"46 U.S.C. App. § 1903(a) 2D1.1  
46 U.S.C. App. § 1903(g) 2D1.1  
46 U.S.C. App. § 1903(j) 2D1.4"; and

in the line beginning "47 U.S.C. § 605" by inserting "2B5.3," immediately before "2H3.1".

The Commentary to §2D1.2 captioned "Statutory Provisions" is amended by deleting "21 U.S.C. §§ 845, 845a, 845b" and inserting in lieu thereof "21 U.S.C. §§ 859 (formerly 21 U.S.C. § 845), 860 (formerly 21 U.S.C. § 845a), 861 (formerly 21 U.S.C. § 845b)".

The Commentary to §2D3.1 captioned "Statutory Provision" is amended by deleting "843(a). For additional statutory provision(s), see Appendix A (Statutory Index)." and inserting in lieu thereof "842(a)(1), 843(a)(1), (2)."; and by deleting "Provision" and inserting in lieu thereof "Provisions".

The Commentary to §2D3.2 captioned "Statutory Provision" is amended by deleting "842" and inserting in lieu thereof "842(b), 843(a)(3)"; and by deleting "Provision" and inserting in lieu thereof "Provisions".

The Commentary to §2D3.3 captioned "Statutory Provision" is amended by deleting "842" and inserting in lieu thereof "842(a)(2)".

This amendment makes the statutory index more comprehensive, and conforms it to the offense guidelines, as amended. **The effective date of this amendment is November 1, 1991.**

422. The Guidelines Manual is amended by inserting an additional chapter containing guidelines, policy statements, and accompanying commentary as Chapter Eight (Sentencing of Organizations).

Section 2B4.1 is amended by inserting the following additional subsection:

"(c) Special Instruction for Fines - Organizations

- (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the unlawful payment; or (C) the consequential damages resulting from the unlawful payment."

Section 2C1.1 is amended by inserting the following additional subsection:

"(d) Special Instruction for Fines - Organizations

- (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the unlawful payment; or (C) the consequential damages resulting from the unlawful payment."

Section 2C1.2 is amended by inserting the following additional subsection:

"(c) Special Instruction for Fines - Organizations

- (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the value of the unlawful payment."

Section 2E5.1 is amended by inserting the following additional subsection:

"(c) Special Instruction for Fines - Organizations

- (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) if a bribe, the value of the benefit received or to be received in return for the unlawful payment; or (C) if a bribe, the consequential damages resulting from the unlawful payment."

Section 2E5.6 is amended by inserting the following additional subsection:

"(c) Special Instruction for Fines - Organizations

- (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) if a bribe, the value of the benefit received or to be received in return for the unlawful payment; or (C) if a bribe, the consequential damages resulting from the unlawful payment."

Section 2R1.1 is amended by inserting the following additional subsection:

"(d) Special Instructions for Fines - Organizations

- (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use 20 percent of the volume of affected commerce.
- (2) When applying §8C2.6 (Minimum and Maximum Multipliers), neither the minimum nor maximum multiplier shall be less than 0.75.
- (3) In a bid-rigging case in which the organization submitted one or more complementary bids, use as the organization's volume of commerce the greater of (A) the volume of commerce done by the organization in the goods or services that were affected by the violation, or (B) the largest contract on which the organization submitted a complementary bid in connection with the bid-rigging conspiracy."

The Commentary to §2R1.1 captioned "Application Notes" is amended by deleting:

- "3. In setting the fine for an organization, the court should consider whether the organization encouraged or took steps to prevent the violation, whether high-level management was aware of the violation, and whether the organization previously engaged in antitrust violations."

and inserting in lieu thereof:

- "3. The fine for an organization is determined by applying Chapter Eight (Sentencing of Organizations). In selecting a fine for an organization within the guideline fine range, the court should consider both the gain to the organization from the offense and the loss caused by the organization. It is estimated that the average gain from price-fixing is 10 percent of the selling price. The loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices. Because the loss from price-fixing exceeds the gain, subsection (d)(1) provides that 20 percent of the volume of affected commerce is

to be used in lieu of the pecuniary loss under §8C2.4(a)(3). The purpose for specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss. In cases in which the actual monopoly overcharge appears to be either substantially more or substantially less than 10 percent, this factor should be considered in setting the fine within the guideline fine range."

The Commentary to §2R1.1 captioned "Background" is amended by deleting the last paragraph as follows:

" Substantial fines are an essential part of the sanction. It is estimated that the average additional profit attributable to price fixing is 10 percent of the selling price. The Commission has specified that a fine from two to five times that amount be imposed on organizational defendants as a deterrent because of the difficulty in identifying violators. Additional monetary penalties can be provided through private treble damage actions. A lower fine is specified for individuals. The Commission believes that most antitrust defendants have the resources and earning capacity to pay these fines, at least over time. The statutory maximum fine is \$250,000 for individuals and \$1,000,000 for organizations, but is increased when there are convictions on multiple counts.",

and inserting in lieu thereof:

" Substantial fines are an essential part of the sentence. For an individual, the guideline fine range is from one to five percent of the volume of commerce, but not less than \$20,000. For an organization, the guideline fine range is determined under Chapter Eight (Sentencing of Organizations), but pursuant to subsection (d)(2), the minimum multiplier is at least 0.75. This multiplier, which requires a minimum fine of 15 percent of the volume of commerce for the least serious case, was selected to provide an effective deterrent to antitrust offenses. At the same time, this minimum multiplier maintains incentives for desired organizational behavior. Because the Department of Justice has a well-established amnesty program for organizations that self-report antitrust offenses, no lower minimum multiplier is needed as an incentive for self-reporting. A minimum multiplier of at least 0.75 ensures that fines imposed in antitrust cases will exceed the average monopoly overcharge.

The Commission believes that most antitrust defendants have the resources and earning capacity to pay the fines called for by this guideline, at least over time on an installment basis. The statutory maximum fine is \$350,000 for individuals and \$10,000,000 for organizations, but is increased when there are convictions on multiple counts."

Section 2S1.1 is amended by inserting the following additional subsection:

"(c) Special Instruction for Fines - Organizations

- (1) In lieu of the applicable amount from the table in subsection (d) of §8C2.4 (Base Fine), use:
  - (A) the greater of \$250,000 or 100 percent of the value of the funds if subsections (a)(1) and (b)(1) are used to determine the offense level; or
  - (B) the greater of \$200,000 or 70 percent of the value of the funds if subsections (a)(2) and (b)(1) are used to determine the offense level; or
  - (C) the greater of \$200,000 or 70 percent of the value of the funds if subsection (a)(1) but not (b)(1) is used to determine the offense level; or
  - (D) the greater of \$150,000 or 50 percent of the value of the funds if subsection (a)(2) but not (b)(1) is used to determine the offense level."

Section 2S1.2 is amended by inserting the following additional subsection:

"(c) Special Instruction for Fines - Organizations

- (1) In lieu of the applicable amount from the table in subsection (d) of §8C2.4 (Base Fine), use:
  - (A) the greater of \$175,000 or 60 percent of the value of the funds if subsection (b)(1)(A) is used to determine the offense level; or
  - (B) the greater of \$150,000 or 50 percent of the value of the funds if subsection (b)(1)(B) is used to determine the offense level."

Section 2S1.3 is amended by inserting the following additional subsection:

"(c) Special Instruction for Fines - Organizations

- (1) In lieu of the applicable amount from the table in subsection (d) of §8C2.4 (Base Fine), use:
  - (A) the greater of \$125,000 or 30 percent of the value of the funds if subsections (a)(1) and (b)(1) are used to determine the offense level; or
  - (B) the greater of \$50,000 or 20 percent of the value of the funds if subsection (a)(1) but not (b)(1) are used to determine the offense level."

Section 2S1.4 is amended by inserting the following additional subsection:

"(c) Special Instruction for Fines - Organizations

- (1) In lieu of the applicable amount from the table in subsection (d) of §8C2.4 (Base Fine), use:
  - (A) the greater of \$50,000 or 20 percent of the value of the funds if subsection (b)(1) or (b)(2) is used to determine the offense level; or
  - (B) the greater of \$15,000 or 10 percent of the value of the funds, otherwise."

This amendment adds guidelines and policy statements to address the sentencing of organizational defendants. **The effective date of this amendment is November 1, 1991.**

423. Section 1B1.10(c) is amended by deleting:

"(c) *Provided*, however, that a reduction in a defendant's term of imprisonment --

- (1) is not authorized unless the maximum of the guideline range applicable to the defendant (from Chapter Five, Part A) has been lowered by at least six months; and
- (2) may, in no event, exceed the number of months by which the maximum of the guideline range applicable to the defendant (from Chapter Five, Part A) has been lowered."

and inserting in lieu thereof:

- "(c) *Provided*, that a reduction in a defendant's term of imprisonment may, in no event, exceed the number of months by which the maximum of the guideline range applicable to the defendant (from Chapter Five, Part A) has been lowered."

Section 1B1.10(d) is amended by deleting "and 341" and inserting in lieu thereof "341, 379, and 380".

The Commentary to §1B1.10 captioned "Background" is amended in the fourth paragraph by deleting:

"The requirement in subsection (c)(1) that the maximum of the guideline range be lowered by at least six months for a reduction to be considered",

and inserting in lieu thereof:

"The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion".

This amendment expands the listing in subsection (d) to implement the directive in 28 U.S.C. § 994(u) in respect to the guideline amendments effective November 1, 1991. In addition, the amendment modifies subsection (c) to simplify the operation of this policy statement, expand eligibility under the policy statement to a few additional cases, and remove the potential for an anomalous result. **The effective date of this amendment is November 1, 1991.**

424. Chapter Five, Part F, is amended by inserting an additional policy statement as §5F1.7 (Shock Incarceration Program (Policy Statement)).

This amendment adds a policy statement at §5F1.7 to reflect the provisions and implementation of 18 U.S.C. § 4046. **The effective date of this amendment is November 1, 1991.**

425. The Commentary to §6A1.2 is amended by inserting, immediately after "Commentary", the following:

"Application Note:

1. Under Rule 32, Fed.R.Crim. P., if the court intends to consider a sentence outside the applicable guideline range on a ground not identified as a ground for departure either in the presentence report or a pre-hearing submission, it shall provide reasonable notice that it is contemplating such ruling, specifically identifying the ground for the departure. Burns v. United States, \_\_ U.S. \_\_, 111 S.Ct. 2182 (1991).";

and by inserting "Background:" immediately before "In order".

This amendment adds an application note to reflect the recent Supreme Court decision in Burns v. United States, \_\_ U.S. \_\_, 111 S.Ct. 2182 (1991). **The effective date of this amendment is November 1, 1991.**

426. The Commentary to §2T1.3 captioned "Application Notes" is amended by inserting the following additional note:

- "4. The amount by which the greater of gross income and taxable income was understated, plus 100 percent of the total amount of any false credits claimed against tax is calculated as follows: (1) determine the amount, if any, by which the gross income was understated; (2) determine the amount, if any, by which the taxable income was understated; and (3) determine the amount of any false credit(s) claimed (a tax 'credit' is an item that reduces the amount of tax directly; in contrast, a 'deduction' is an item that reduces the amount of taxable income). Use the amount determined under step (1) or (2), whichever is greater, plus any amount determined under step (3)."

This amendment clarifies the operation of the guideline. **The effective date of this amendment is November 1, 1991.**

427. Section 7B1.3 is amended by redesignating subsection (c)(1)(1) as (c)(1)(A), (c)(1)(2) as (c)(1)(B), (c)(2)(1) as (c)(2)(A), and (c)(2)(2) as (c)(2)(B).

The Commentary to §7B1.3 captioned "Application Notes" is amended in Note 2 by deleting "§7B1.3(f)(2)" and inserting in lieu thereof "§7B1.3(g)(2)".

The Commentary to §7B1.3 captioned "Application Notes" is amended in Note 3 by deleting "No. 89-10529 (9th Cir. July 3, 1990)" and inserting in lieu thereof "907 F.2d 896 (9th Cir. 1990)".

The Commentary to §7B1.3 captioned "Application Notes" is amended by inserting the following additional note:

- "7. 'Maximum term of imprisonment imposable upon revocation,' as used in subsection (g)(2), refers to the maximum term of imprisonment authorized by statute for the violation of supervised release, not to the maximum of the guideline range."

This amendment clarifies the operation of this policy statement, makes editorial improvements, and corrects a clerical error. **The effective date of this amendment is November 1, 1991.**

428. The Commentary to §5F1.5 captioned "Background" is amended by deleting the last paragraph as follows:

" The Comprehensive Crime Control Act expressly authorizes promulgation of policy statements regarding the appropriate use of conditions of probation and supervised release. 28 U.S.C. § 994(a)(2)(B). The Act does not expressly grant the authority to issue guidelines on the subject. The appellate review provisions of the Act, however, authorize appeals of occupational restrictions that deviate from the minimum and maximum limitations 'established in the guideline' (emphasis added)."

This amendment deletes an outdated paragraph. Section 7103(b)(3) of Public Law 100-690 amended 28 U.S.C. § 994 by adding subsection (a)(1)(E), which expressly authorizes the Commission to promulgate guidelines addressing occupational restrictions as a condition of probation or supervised release. **The effective date of this amendment is November 1, 1991.**

429. The Commentary to §1B1.5 captioned "Application Note" is amended in Note 1 by deleting "2D1.2(a)(1), 2H1.2(a)(2)" and inserting in lieu thereof "2D1.2(a)(1), (2), and 2H1.1(a)(2)"; by deleting "§§2A4.1(b)(5)(B), 2Q1.2(b)(5)" and inserting in lieu thereof "§2A4.1(b)(7)"; and by inserting the following additional paragraph:

"A reference may also be to a specific subsection of another guideline; e.g., the reference in §2D1.10(a)(1) to '3 plus the offense level from the Drug Quantity Table in §2D1.1'. In such case, only the specific subsection of that other guideline is used."

The Commentary to §1B1.5 captioned "Application Note" is amended by inserting the following additional notes:

- "2. A reference may require that the offense level be determined under another offense guideline. In such case, the adjustments in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), and E (Acceptance of Responsibility) are also to be determined in respect to that other offense guideline. For example, a defendant convicted of possession of a firearm by a felon, to which §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) applies, is found to have used that firearm in the



commission of a robbery. The cross reference at §2K2.1(c) directs that the robbery offense guideline be used. The adjustments in Chapter Three, Parts A, B and E are to be applied as if the offense of conviction had directly referenced the robbery guideline.

3. A reference to another guideline may direct that such reference is to be used only if it results in a greater offense level. In such cases, the greater offense level means the greater final offense level (*i.e.*, the greater offense level taking into account both the Chapter Two offense level 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.
4. A reference may direct that, if the conduct involved another offense, the offense guideline for such other offense is to be applied. Where 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. For example, if a defendant convicted of possession of a firearm by a felon, to which §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) applies, is found to have possessed that firearm during commission of a series of offenses, the cross reference at §2K2.1(c) is applied to the offense resulting in the greatest offense level.";

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

This amendment clarifies the operation of this guideline. **The effective date of this amendment is November 1, 1991.**

430. The Commentary to §2H1.1 captioned "Application Notes" is amended by inserting the following additional paragraph as the first paragraph of Note 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."

The Commentary to §2H1.1 captioned "Application Notes" is amended in Note 1 by inserting the following additional paragraph at the end:

"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."

The Commentary to §2H1.1 captioned "Application Notes" is amended in the first sentence of the second paragraph of Note 1 (formerly the first paragraph) by deleting "contained in the particular guideline in Chapter Two) for any underlying criminal conduct" and inserting in lieu thereof "and cross references) from the offense guideline in Chapter Two that most closely corresponds to the underlying offense"; in the last sentence of the second paragraph of Note 1 (formerly the first paragraph) by deleting "an offense" and "that offense" and inserting in lieu thereof "arson" in each instance.

This amendment clarifies the operation of this guideline. **The effective date of this amendment is November 1, 1991.**

431. The Commentary to §2J1.7 captioned "Background" is amended by deleting the first paragraph as follows:

"An enhancement under 18 U.S.C. § 3147 may be imposed only upon application of the government; it cannot be imposed on the court's own motion. In this respect, it is similar to a separate count of conviction and, for this reason, is placed in Chapter Two of the guidelines.",

and inserting in lieu thereof:

"An enhancement under 18 U.S.C. § 3147 may be imposed only after sufficient notice to the defendant by the government or the court, and applies only in the case of a conviction for a federal offense that is committed while on release on another federal charge."

This amendment corrects the description in the Background Commentary of the operation of the statute to which this guideline applies. **The effective date of this amendment is November 1, 1991.**

432. The Commentary to §2N2.1 captioned "Application Notes" is amended in Note 1 by inserting "or reckless" immediately before "conduct".

The Commentary to §2N2.1 captioned "Application Notes" is amended in Note 4 by deleting "anabolic steroids" and inserting in lieu thereof "human growth hormones", and by inserting at the end:

"Offenses involving anabolic steroids are covered by Chapter Two, Part D (Offenses Involving Drugs). In the case of an offense involving a substance purported to be an anabolic steroid, but not containing any active ingredient, apply §2F1.1 (Fraud and Deceit) with 'loss' measured by the amount paid, or to be paid, by the victim for such substance."

This amendment clarifies Application Note 1 with respect to reckless conduct, conforms Application Note 4 to reflect that offenses involving anabolic steroids will be covered under §2D1.1 (Amendment 369), and clarifies the treatment of an offense involving a substance purported to be an anabolic steroid, but containing no active ingredient. **The effective date of this amendment is November 1, 1991.**

433. Section 4B1.2(2) is amended by deleting "or distribution" and inserting in lieu thereof "distribution, or dispensing"; and by deleting "or distribute" and inserting in lieu thereof "distribute, or dispense".

Section 4B1.2(3) is amended by deleting "Part A of this Chapter" and inserting in lieu thereof "§4A1.1(a), (b), or (c)".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 2 by inserting "(i.e., expressly charged)" immediately following "set forth"; by inserting the following at the end:

"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 is the unlawful possession of a firearm by a felon, the specific offense characteristics of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms

or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provide 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."

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 2 by inserting "(including any explosive material or destructive device)" immediately following "explosives".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 3 by inserting the following additional sentences at the end:

"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)."

This amendment clarifies that the application of §4B1.2 is determined by the offense of conviction (i.e., the conduct charged in the count of which the defendant was convicted); clarifies that the offense of unlawful possession of a weapon is not a crime of violence for the purposes of this section; clarifies the definition of a prior adult conviction; makes the definitions in §4B1.2(2) more comprehensive; and clarifies the application of §4B1.2(3) by specifying the particular provisions of Chapter Four, Part A to which this subsection refers. **The effective date of this amendment is November 1, 1991.**

434. The Commentary to §1B1.2 captioned "Application Notes" is amended in Note 1 in the second sentence of the second paragraph by deleting "as part of a plea of guilty or nolo contendere" and inserting in lieu thereof "that is set forth in a written plea agreement or made between the parties on the record during a plea proceeding"; in the second sentence of the third paragraph by deleting "the plea" and inserting in lieu thereof "a plea agreement"; and in the third sentence of the third paragraph by inserting "agreement" immediately following "plea".

This amendment clarifies the meaning of the term "stipulation" used in §1B1.2(a) and (c). **The effective date of this amendment is November 1, 1991.**

435. Section 2G2.2 is amended in the title by deleting "Advertising, or" and inserting in lieu thereof "Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor;"

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

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

"(4) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels."

Section 2G2.2(b)(2) is amended by inserting "by" immediately following "event".

The Commentary to §2G2.2 captioned "Statutory Provisions" is amended by deleting "2252" and inserting in lieu thereof "2252(a)(1)-(3)".

The Commentary to §2G2.2 captioned "Application Notes" is amended by redesignating Note 4 as Note 5; by inserting the following as Note 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.";

and in Note 5 (formerly Note 4) by inserting "exploited or" immediately before "abused"; by deleting "is warranted" and inserting in lieu thereof "may be warranted"; and by inserting ", as well as whether the defendant has received an enhancement under subsection (b)(4) on account of such conduct" immediately after "conduct".

This amendment implements the instructions to the Commission in Section 632 of Public Law 102-141, the Treasury, Postal Service and General Government Appropriations Act of 1992. **The effective date of this amendment is November 27, 1991.**

436. Section 2G2.4 is amended in the title by deleting "Receipt or" immediately before "Possession".

Section 2G2.4(a) is amended by deleting "10" and inserting in lieu thereof "13".

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

- "(2) If the offense involved possessing ten or more books, magazines, periodicals, films, video tapes, or other items, containing a visual depiction involving the sexual exploitation of a minor, increase by 2 levels.";

and in the caption by deleting "Characteristic" and inserting in lieu thereof "Characteristics".

Section 2G2.4(c)(2) is amended by inserting "shipping," immediately before "advertising, or"; and by deleting "Advertising, or" and inserting in lieu thereof "Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor;".

The Commentary to §2G2.4 captioned "Statutory Provision" is amended by deleting "2252" and inserting in lieu thereof "2252(a)(4)".

The Commentary to §2G2.4 captioned "Application Note" is deleted in its entirety as follows:

"Application Note:

1. This guideline assumes that the offense involved a small number of prohibited items. If the defendant possessed 50 or more books, magazines, periodicals, films, video tapes, or other items containing a visual depiction involving the sexual exploitation of a minor, and subsection (c)(1) or (c)(2) does not apply, an upward departure may be warranted."

This amendment implements the instructions to the Commission in Section 632 of Public Law 102-141, the Treasury, Postal Service and General Government Appropriations Act of 1992. **The effective date of this amendment is November 27, 1991.**

437. Section 2G3.1(a) is amended by deleting "6" and inserting in lieu thereof "10".

Section 2G3.1(c) is amended by deleting "Advertising, or" and inserting in lieu thereof "Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor;"; and by deleting "Receipt or" immediately before "Possession".

The Commentary to §2G3.1 captioned "Background" is amended by deleting "11" and inserting in lieu thereof "15".

This amendment implements the instructions to the Commission in Section 632 of Public Law 102-141, the Treasury, Postal Service and General Government Appropriations Act of 1992. **The effective date of this amendment is November 27, 1991.**

438. Section 1B1.2(a) is amended by deleting "conviction by a plea of guilty or nolo contendere" and inserting in lieu thereof "a plea agreement (written or made orally on the record)".

Section 1B1.2(c) is amended by deleting "conviction by a plea of guilty or nolo contendere" and inserting in lieu thereof "plea agreement (written or made orally on the record)".

The Commentary to §1B1.2 captioned "Application Notes" is amended in Note 5 by deleting "jury's verdict" and inserting in lieu thereof "verdict or plea".

This amendment revises the language of this guideline to clarify the meaning of the term "stipulation," complementing an amendment to the commentary of this guideline effective November 1, 1991 (amendment 434). Both this amendment and amendment 434 were made in response to Braxton v. United States, 111 S.Ct. 1854 (1991). In addition, the term "jury's verdict" in the commentary of this section is deleted and replaced with the more appropriate term "verdict or plea". **The effective date of this amendment is November 1, 1992.**

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

- "(1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;
- (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;
- (3) all harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts or omissions; and",

and inserting in lieu thereof:

- "(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
- (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;
- (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;
- (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and".

The Commentary to §1B1.3 captioned "Application Notes" is amended by renumbering Notes 2-7 as Notes 3-8, respectively; and by deleting Note 1 as follows:

- "1. Conduct 'for which the defendant would be otherwise accountable,' as used in subsection (a)(1), includes conduct that the defendant counseled, commanded, induced, procured, or willfully caused. (Cf. 18 U.S.C. § 2.) In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the