

A crime of violence includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth in the violation charged involved use of explosives or, by its nature, presented a serious potential risk of physical injury to another. A crime of violence also includes the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

3. 'Controlled substance offense' includes any offense under a federal or state law prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with the intent to manufacture, import, export, distribute, or dispense. A controlled substance offense also includes the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."

and by inserting in lieu thereof:

- "2. 'Crime of violence' is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). See §4B1.2(1) and Application Notes 1 and 2 of the Commentary to §4B1.2.
3. 'Controlled substance offense' is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). See §4B1.2(2) and Application Note 1 of the Commentary to §4B1.2."

This amendment clarifies the Commission's intent that the terms "crime of violence" and "controlled substance offense" in §7B1.1 have the same meaning as these terms have in §4B1.2. **The effective date of this amendment is November 1, 1992.**

474. Section 1B1.11(b) is amended by inserting the following additional subdivision:

- "(3) If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses."

The Commentary to §1B1.11 captioned "Application Note" is amended by inserting the following additional note:

- "2. Under subsection (b)(1), the last date of the offense of conviction is the controlling date for ex post facto purposes. For example, if the offense of conviction (i.e., the conduct charged in the count of the indictment or information of which the defendant was convicted) was determined by the court to have been committed between October 15, 1991 and October 28, 1991, the date of October 28, 1991 is the controlling date for ex post facto purposes. This is true even if the defendant's conduct relevant to the determination of the guideline range under §1B1.3 (Relevant Conduct) included an act that occurred on November 2, 1991 (after a revised Guideline Manual took effect).";

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

The Commentary to §1B1.11 captioned "Background" is amended by inserting the following additional sentence as the first sentence of the first paragraph:

"Subsections (a) and (b)(1) provide that the court should apply the Guidelines Manual in effect on the date the defendant is sentenced unless the court determines that doing so would violate the ex post facto clause in Article I, § 9 of the United States Constitution.";

and by inserting the following additional paragraphs at the end:

" Subsection (b)(2) provides that the Guidelines Manual in effect on a particular date shall be applied in its entirety.

Subsection (b)(3) provides that where the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses, even if the revised edition results in an increased penalty for the first offense. Because the defendant completed the second offense after the amendment to the guidelines took effect, the ex post facto clause does not prevent determining the sentence for that count based on the amended guidelines. For example, if a defendant pleads guilty to a single count of embezzlement that occurred after the most recent edition of the Guidelines Manual became effective, the guideline range applicable in sentencing will encompass any relevant conduct (e.g., related embezzlement offenses that may have occurred prior to the effective date of the guideline amendments) for the offense of conviction. The same would be true for a defendant convicted of two counts of embezzlement, one committed before the amendments were enacted, and the second after. In this example, the ex post facto clause would not bar application of the amended guideline to the first conviction; a contrary conclusion would mean that such defendant was subject to a lower guideline range than if convicted only of the second offense. Decisions from several appellate courts addressing the analogous situation of the constitutionality of counting pre-guidelines criminal activity as relevant conduct for a guidelines sentence support this approach. See United States v. Ykema, 887 F.2d 697 (6th Cir. 1989) (upholding inclusion of pre-November 1, 1987, drug quantities as relevant conduct for the count of conviction, noting that habitual offender statutes routinely augment punishment for an offense of conviction based on acts committed before a law is passed), cert. denied, 493 U.S. 1062 (1990); United States v. Allen, 886 F.2d 143 (8th Cir. 1989) (similar); see also United States v. Cusack, 901 F.2d 29 (4th Cir. 1990) (similar).

Moreover, the approach set forth in subsection (b)(3) should be followed regardless of whether the offenses of conviction are the type in which the conduct is grouped under §3D1.2(d). The ex post facto clause does not distinguish between groupable and nongroupable offenses, and unless that clause would be violated, Congress' directive to apply the sentencing guidelines in effect at the time of sentencing must be followed. Under the guideline sentencing system, a single sentencing range is determined based on the defendant's overall conduct, even if there are multiple counts of conviction (see §§3D1.1-3D1.5, 5G1.2). Thus, if a defendant is sentenced in January 1992 for a bank robbery committed in October 1988 and one committed in November 1991, the November 1991 Guidelines Manual should be used to determine a combined guideline range for both counts. See generally United States v. Stephenson, 921 F.2d 438 (2d Cir. 1990) (holding that the Sentencing Commission and Congress intended that the applicable version of the guidelines be applied as a 'cohesive and integrated whole' rather than in a piecemeal fashion).

Consequently, even in a complex case involving multiple counts that occurred under several different versions of the Guidelines Manual, it will not be necessary to compare more than two manuals to determine the applicable guideline range -- the manual in effect at the time the last offense of conviction was completed and the manual in effect at the time of sentencing."

This amendment expands §1B1.11 to address what has become a frequently asked hotline question and troublesome application issue -- the application of amended guidelines to multiple count cases in which the effective date of guideline revision(s) occurs between the offenses of conviction. The issue has also produced litigation before several appellate courts. See United States v. Castro, 972 F.2d 1107 (9th Cir. 1992), cert. denied, 113 S. Ct. 1350 (1993); United States v. Seligsohn, 981 F.2d 1418 (3d Cir. 1992); United States v. Hartzog, 983 F.2d 604 (4th Cir. 1993). This amendment extends the Commission's "one book" rule to multiple count cases and sets forth the rationale for this policy. **The effective date of this amendment is November 1, 1993.**

475. Chapter One, Part B, is amended by inserting an additional policy statement as §1B1.12 (Persons Sentenced Under the Federal Juvenile Delinquency Act (Policy Statement)).

Section 5H1.1 is amended by deleting the last paragraph as follows:

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

This amendment adds a policy statement as §1B1.12 to address the determination of the maximum imposable sentence in the case of a juvenile delinquent. The Supreme Court's decision in United States v. R.L.C., 112 S. Ct. 1329 (1992), requires calculation of the guideline range in order to determine the maximum sentence imposable on a juvenile delinquent. **The effective date of this amendment is November 1, 1993.**

476. The Commentary to §2A1.1 captioned "Background" is deleted as follows:

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

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

This amendment deletes commentary that highlighted the question of whether 18 U.S.C. § 1111 provides a mandatory minimum term of life imprisonment. Since this commentary was written, appellate courts uniformly have held that 18 U.S.C. § 1111 does provide a mandatory minimum term of life imprisonment. See United States v. Sands, 968 F.2d 1058 (10th Cir. 1992), cert. denied, 113 S. Ct. 987 (1993); United States v. LaFleur, 952 F.2d 1537 (9th Cir.), modified and reh'g denied, 971 F.2d 200 (9th Cir. 1991); United States v. Gonzalez, 922 F.2d 1044 (2d Cir.), cert. denied, 112 S. Ct. 660 (1991); United States v. Donley, 878 F.2d 735 (3d Cir. 1989), cert. denied, 494 U.S. 1058 (1990). In addition, this amendment deletes, as unnecessary, several sentences of commentary that merely recite statutory penalties. **The effective date of this amendment is November 1, 1993.**

477. Section 2A3.1 is amended by redesignating subsection (c) as subsection (d); and by inserting the following additional subsection:

"(c) Cross Reference

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder)."

Section 2A3.1(b)(2) is amended by deleting "otherwise, (B) if the victim was under the age of sixteen" and inserting in lieu thereof "or (B) if the victim had attained the age of twelve years but had not attained the age of sixteen years".

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

- "5. If the defendant was convicted (A) of more than one act of criminal sexual abuse and the counts are grouped under §3D1.2 (Groups of Closely Related Counts), or (B) of only one such act but the court determines that the offense involved multiple acts of criminal sexual abuse of the same victim or different victims, an upward departure would be warranted."

This amendment adds a cross reference to §2A3.1 to address the circumstance in which a victim is murdered during the offense. In addition, an editorial change in §2A3.1(b)(2) is made to conform the phraseology used in this subsection to that used elsewhere in the guidelines. This amendment also authorizes an upward departure where the offense involved multiple acts of criminal sexual abuse that do not result in an increase in offense level under the multiple count rules in Chapter Three, Part D. **The effective date of this amendment is November 1, 1993.**

478. The Commentary to §2A4.1 captioned "Background" is amended in the third paragraph by deleting:

"or to facilitate the commission of another offense. Should the application of this guideline result in a penalty less than the result achieved by applying the guideline for the underlying offense, apply the guideline for the underlying offense (e.g., §2A3.1, Criminal Sexual Abuse).",

and inserting in lieu thereof:

"(subsection (b)(1)) or involves another federal, state, or local offense that results in a greater offense level (subsections (b)(7) and (c)(1))."

The Commentary to §2K1.3 captioned "Application Notes" is amended in Note 4 by inserting "(federal, state, or local)" immediately following "any offense".

The Commentary to §2K1.3 captioned "Application Notes" is amended in Note 8 by inserting "(which may be a federal, state, or local offense)" immediately before "is".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 7 by inserting "(federal, state, or local)" immediately following "any offense".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 14 by inserting "(which may be a federal, state, or local offense)" immediately before "is".

The Commentary to §2K2.1 captioned "Application Notes" is amended by inserting the following additional note:

"19. The enhancement under subsection (b)(4) for a stolen firearm or a firearm with an altered or obliterated serial number applies whether or not the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number."

This amendment clarifies that the terms "another offense" and "other offense" in §2A4.1(b)(7), and "felony offense," "another felony offense," "another offense," and "other offense" in §§2K1.3 and 2K2.1, refer to federal, state, or local offenses. In addition, this amendment clarifies that the enhancement in §2K2.1(b)(4) applies whether or not the defendant knew or had reason to believe the firearm was stolen or had an altered or obliterated serial number. **The effective date of this amendment is November 1, 1993.**

479. Section 2A4.2 is amended by inserting the following additional subsection:

"(b) Cross Reference

(1) If the defendant was a participant in the kidnapping offense, apply §2A4.1 (Kidnapping; Abduction; Unlawful Restraint)."

The Commentary to §2A4.2 is amended by inserting the following immediately before "Background".

"Application Note:

1. A 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted."

Section 2B3.2(c) is amended by deleting "Reference" and inserting in lieu thereof "References"; by renumbering subdivision (1) as subdivision (2); and by inserting the following additional subdivision:

- "(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder)."

Section 2B3.3 is amended by inserting the following additional subsection:

"(c) Cross References

- (1) If the offense involved extortion under color of official right, apply §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right).
- (2) If the offense involved extortion by force or threat of injury or serious damage, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage)."

Section 2D1.1 is amended by inserting the following additional subsection:

"(d) Cross Reference

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder)."

Section 2E2.1 is amended by inserting the following additional subsection:

"(c) Cross Reference

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder)."

This amendment adds a cross reference to §2A4.2 to address the circumstance in which the defendant was a participant in the underlying kidnapping offense. This amendment also adds cross references to §§2B3.2, 2D1.1, and 2E2.1 to address the circumstance in which a victim is murdered during the offense. Finally, this amendment adds cross references to §2B3.3 to ensure the selection of the appropriate guideline. **The effective date of this amendment is November 1, 1993.**

480. Section 2A5.2(a)(1) is amended by deleting "defendant intentionally endangered" and inserting in lieu thereof "offense involved intentionally endangering".

Section 2A5.2(a)(2) is amended by deleting "defendant recklessly endangered" and inserting in lieu thereof "offense involved recklessly endangering".

Section 2A6.1(b)(1) is amended by deleting "defendant engaged in" and inserting in lieu thereof "offense involved".

Section 2A6.1(b)(2) is amended by deleting "the defendant's conduct" and inserting in lieu thereof "the offense".

This amendment deletes language that could be construed as a limitation on the scope of conduct for which a defendant is accountable under §1B1.3 (Relevant Conduct) and replaces it with language consistent with that used in other offense guidelines. **The effective date of this amendment is November 1, 1993.**

481. Section 2B1.1 is amended in the title by inserting "; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property" at the end thereof.

Section 2B1.1(b)(2) is amended by inserting "(A)" immediately following "If"; and by inserting "or the taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, or controlled substance," immediately following "taken,".

Section 2B1.1(b)(4) is amended by inserting "(A)" immediately following "If"; and by inserting "or the taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail," immediately following "taken,".

Section 2B1.1(b)(5) is amended by inserting "(A)" immediately before "If"; and by inserting "; or (B) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 4 levels." immediately following "levels".

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by inserting "553(a)(1)," immediately following "225,"; by inserting "662, 664," immediately before "1702"; and by deleting "2317" and inserting in lieu thereof "-2317; 29 U.S.C. § 501(c)".

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

"In stolen property offenses (receiving, transporting, transferring, transmitting, or possessing stolen property), the loss is the value of the stolen property determined as in a theft offense."

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

"14. If the offense involved theft or embezzlement from an employee pension or welfare benefit plan (a violation of 18 U.S.C. § 664) and the defendant was a fiduciary of the benefit plan, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply. '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.

If the offense involved theft or embezzlement from a labor union (a violation of 29 U.S.C. § 501(c)) and the defendant was a union officer or occupied a position of trust in the union as set forth in 29 U.S.C. § 501(a), an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply."

The Commentary to §2B1.1 captioned "Background" is amended in the first paragraph by deleting "property taken" and inserting in lieu thereof "the property stolen"; by deleting "theft offenses," and inserting in lieu thereof "theft and other offenses involving stolen property"; and by deleting "loss from the theft" and inserting in lieu thereof "loss".

Section 2B1.2 is deleted in its entirety as follows:

"§2B1.2. Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property

- (a) Base Offense Level: 4
- (b) Specific Offense Characteristics
 - (1) If the value of the stolen property exceeded \$100, increase by the corresponding number of levels from the table in §2B1.1.
 - (2) If the property included a firearm, destructive device, or controlled substance, increase by 1 level; but if the resulting offense level is less than 7, increase to 7.
 - (3) If the property included undelivered United States mail and the offense level as determined above is less than level 6, increase to level 6.
 - (4) (A) If the offense was committed by a person in the business of receiving and selling stolen property, increase by 4 levels; or
 - (B) If the offense involved more than minimal planning, increase by 2 levels.
 - (5) If the offense involved an organized scheme to receive stolen vehicles or vehicle parts, and the offense level as determined above is less than level 14, increase to level 14.

Commentary

Statutory Provisions: 18 U.S.C. §§ 553(a)(1), 659, 662, 1708, 2312-2317. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. 'More than minimal planning,' 'firearm,' and 'destructive device' are defined in the Commentary to §1B1.1 (Application Instructions).
2. Valuation of property is discussed in the Commentary to §2B1.1.
3. 'Undelivered United States mail' means mail that has not actually been received by the addressee or his agent (e.g., it includes mail that is in the addressee's mail box).
4. Subsection (b)(5), referring to an 'organized scheme to receive stolen vehicles or vehicle parts,' provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or 'chop shop.' 'Vehicles' refers to all forms of vehicles, including aircraft and watercraft. See Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).

Background: The treatment accorded receiving stolen property parallels that given theft. Persons who receive stolen property for resale receive a sentence enhancement because the amount of property is likely to underrepresent the scope of their criminality and the extent to which they encourage or facilitate other crimes."

Section 2B2.1 is amended in the title by inserting "or a Structure Other than a Residence" at the end thereof.

Section 2B2.1(a) is amended by deleting "Base Offense Level: 17" and inserting in lieu thereof:

"Base Offense Level:

- (1) 17, if a residence; or
- (2) 12, if a structure other than a residence."

The Commentary to §2B2.1 captioned "Statutory Provision" is amended by deleting "Provision: 18 U.S.C. § 1153" and inserting in lieu thereof "Provisions: 18 U.S.C. §§ 1153, 2113(a), 2115, 2117, 2118(b). For additional statutory provision(s), see Appendix A (Statutory Index)".

Section 2B2.2 is deleted in its entirety as follows:

"§2B2.2. Burglary of Other Structures

- (a) Base Offense Level: 12
- (b) Specific Offense Characteristics
 - (1) If the offense involved more than minimal planning, increase by 2 levels.
 - (2) If the loss exceeded \$2,500, increase by the corresponding number of levels from the table in §2B2.1.
 - (3) If a firearm, destructive device, or controlled substance was taken, or if the taking of such item was an object of the offense, increase by 1 level.
 - (4) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2113(a), 2115, 2117, 2118(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. 'More than minimal planning,' 'firearm,' 'destructive device,' and 'dangerous weapon' are defined in the Commentary to §1B1.1 (Application Instructions).
2. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).
3. Subsection (b)(4) does not apply to possession of a dangerous weapon (including a firearm) that was stolen during the course of the offense.

Background: The offense level for burglary is significantly higher than that for theft for low losses, but is approximately the same for very high losses. Weapon possession, but not use, is a specific offense characteristic because use of a weapon (including to threaten) ordinarily would make the offense robbery. Weapon use would be a ground for upward departure."

Chapter Two, Part B, Subpart 5 is amended in the title by deleting ", FORGERY," immediately before "AND".

Section 2B5.2 is deleted in its entirety as follows:

"§2B5.2. Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

Apply §2F1.1 (Fraud and Deceit).

Commentary

Statutory Provisions: 18 U.S.C. §§ 471-473, 500, 510, 1003, 2314, 2315. For additional statutory provision(s), see Appendix A (Statutory Index)."

Section 2B5.3 is amended in the title by inserting "or Trademark" at the end thereof.

The Commentary to §2B5.3 captioned "Statutory Provisions" is amended by deleting "2319" and inserting in lieu thereof "2318-2320".

The Commentary to §2B5.3 captioned "Background" is amended in the first paragraph by inserting "and trademark" immediately following "copyright".

Section 2B5.4 is deleted in its entirety as follows:

"§2B5.4. Criminal Infringement of Trademark

(a) Base Offense Level: 6

(b) Specific Offense Characteristic

(1) If the retail value of the infringing items exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).

Commentary

Statutory Provisions: 18 U.S.C. §§ 2318, 2320.

Background: The Commission concluded that trademark infringement is roughly comparable to copyright infringement."

Section 2D3.2 is amended in the title by deleting "Manufacture of Controlled Substance in Excess of or Unauthorized by Registration Quota; Attempt or Conspiracy" and inserting in lieu thereof "Regulatory Offenses Involving Controlled Substances; Attempt or Conspiracy".

The Commentary to §2D3.2 captioned "Statutory Provisions" is amended by deleting "842(b), 843(a)(3)" and inserting in lieu thereof "842(a)(2), (9), (10), (b), 954, 961".

The Commentary to §2D3.2 captioned "Background" is amended by deleting "This offense is a misdemeanor" and inserting in lieu thereof "These offenses are misdemeanors".

Sections 2D3.3, 2D3.4, and 2D3.5 are deleted in their entirety as follows:

"§2D3.3. Illegal Use of Registration Number to Distribute or Dispense a Controlled Substance to Another Registrant or Authorized Person; Attempt or Conspiracy

(a) Base Offense Level: 4

Commentary

Statutory Provision: 21 U.S.C. § 842(a)(2).

Background: This offense is a misdemeanor. The maximum term of imprisonment authorized by statute is one year.

§2D3.4. Illegal Transfer or Transshipment of a Controlled Substance; Attempt or Conspiracy

(a) Base Offense Level: 4

Commentary

Statutory Provisions: 21 U.S.C. §§ 954, 961.

Background: This offense is a misdemeanor. The maximum term of imprisonment authorized by statute is one year.

§2D3.5. Violation of Recordkeeping or Reporting Requirements for Listed Chemicals and Certain Machines; Attempt or Conspiracy

(a) Base Offense Level: 4

Commentary

Statutory Provisions: 21 U.S.C. § 842(a)(9), (10)."

Section 2E1.5 is deleted in its entirety as follows:

"§2E1.5. Hobbs Act Extortion or Robbery

Apply §2B3.1 (Robbery), §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), §2B3.3 (Blackmail and Similar Forms of Extortion), or §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right), as applicable.

Commentary

Statutory Provision: 18 U.S.C. § 1951."

Section 2E3.1 is amended in the title by deleting "Engaging in a Gambling Business" and inserting in lieu thereof "Gambling Offenses".

Section 2E3.1(a) is amended by deleting "12" and inserting in lieu thereof:

- "(1) 12, if the offense was (A) engaging in a gambling business; (B) transmission of wagering information; or (C) committed as part of, or to facilitate, a commercial gambling operation; or
- (2) 6, otherwise."

The Commentary to §2E3.1 captioned "Statutory Provision" is amended by deleting "Provision: 18 U.S.C. § 1955" and inserting in lieu thereof "Provisions: 15 U.S.C. §§ 1172-1175; 18 U.S.C. §§ 1082, 1301-1304, 1306, 1511, 1953, 1955. For additional statutory provision(s), see Appendix A (Statutory Index)".

Sections 2E3.2 and 2E3.3 are deleted in their entirety as follows:

"§2E3.2. Transmission of Wagering Information

(a) Base Offense Level: 12

Commentary

Statutory Provision: 18 U.S.C. § 1084.

§2E3.3. Other Gambling Offenses

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristic
 - (1) If the offense is committed as part of, or to facilitate, a commercial gambling operation, increase by 6 levels.

Commentary

Statutory Provisions: 15 U.S.C. §§ 1172-1175; 18 U.S.C. §§ 1082, 1301-1304, 1306, 1511, 1953. For additional statutory provision(s), see Appendix A (Statutory Index).

Background: This section includes a wide variety of conduct. A specific offense characteristic has been included to distinguish commercial from other gambling offenses."

Section 2E5.1 is amended in the title by inserting "; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations" at the end thereof.

Section 2E5.1(b)(1) is amended by inserting "or labor organization" immediately following "plan".

The Commentary to §2E5.1 captioned "Statutory Provision" is amended by deleting "Provision: 18 U.S.C. § 1954" and inserting in lieu thereof "Provisions: 18 U.S.C. § 1954; 29 U.S.C. § 186".

The Commentary to §2E5.1 captioned "Background" is amended by inserting ", or labor organizations" immediately following "plans"; and by deleting the last sentence as follows:

"A more severe penalty is warranted in a bribery where the payment is the primary motivation for an action to be taken, as opposed to graft, where the prohibited payment is given because of a person's actions, duties, or decisions without a prior understanding that the recipient's performance will be directly influenced by the gift."

Section 2E5.2 is deleted in its entirety as follows:

"§2E5.2. Theft or Embezzlement from Employee Pension and Welfare Benefit Plans

Apply §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).

Commentary

Statutory Provision: 18 U.S.C. § 664.

Application Note:

1. In the case of a defendant who was a fiduciary of the benefit plan, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply. '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.

Background: This section covers theft or conversion from employee benefit plans by fiduciaries,

or by any person, including borrowers to whom loans are disbursed based upon materially defective loan applications, service providers who are paid on inflated billings, and beneficiaries paid as the result of fraudulent claims."

Section 2E5.3 is amended in the title by inserting "; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act" at the end thereof.

Section 2E5.3(a)(2) is amended by deleting "relating to the operation of an employee benefit plan, apply §2E5.2" and inserting in lieu thereof ", apply §2B1.1".

The Commentary to §2E5.3 captioned "Statutory Provision" is amended by deleting "Provision: 18 U.S.C. § 1027" and inserting in lieu thereof "Provisions: 18 U.S.C. § 1027; 29 U.S.C. §§ 439, 461, 1131. For additional statutory provision(s), see Appendix A (Statutory Index)".

The Commentary to §2E5.3 captioned "Background" is amended by inserting the following additional sentence as the second sentence:

"It also covers failure to maintain proper documents required by the LMRDA or falsification of such documents."

Sections 2E5.4, 2E5.5, and 2E5.6 are deleted in their entirety as follows:

§2E5.4. Embezzlement or Theft from Labor Unions in the Private Sector

Apply §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).

Commentary

Statutory Provision: 29 U.S.C. § 501(c).

Application Note:

1. In the case of a defendant who was a union officer or occupied a position of trust in the union, as set forth in 29 U.S.C. § 501(a), an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) would apply.

Background: This section includes embezzlement or theft from a labor organization. It is directed at union officers and persons employed by a union.

§2E5.5. Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act

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

(1) 6; or

(2) If the offense was committed to facilitate or conceal a theft or embezzlement, or an offense involving a bribe or gratuity, apply §2E5.4 or §2E5.6, as applicable.

Commentary

Statutory Provisions: 29 U.S.C. §§ 439, 461. For additional statutory provision(s), see Appendix A (Statutory Index).

Background: This section covers failure to maintain proper documents required by the LMRDA or falsification of such documents. This offense is a misdemeanor.

- §2E5.6. Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations
- (a) Base Offense Level:
- (1) 10, if a bribe; or
- (2) 6, if a gratuity.
- (b) Specific Offense Characteristic
- (1) Increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater.
- (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.

Commentary

Statutory Provision: 29 U.S.C. § 186.

Application Notes:

1. 'Bribe' refers to the offer or acceptance of an unlawful payment with the specific understanding that it will corruptly affect an official action of the recipient.
2. 'Gratuity' refers to the offer or acceptance of an unlawful payment other than a bribe.
3. 'Value of the improper benefit to the payer' is explained in the Commentary to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right)."

Section 2F1.1 is amended in the title by inserting "; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States" at the end thereof.

The Commentary to §2F1.1 captioned "Statutory Provisions" is amended by inserting "471-473, 500, 510," immediately following "289,"; and by inserting ", 2314, 2315" immediately following "1344".

Section 2J1.3 is amended in the title by inserting "; Bribery of Witness" at the end thereof.

Section 2J1.3(b)(2) is amended by deleting "perjury or subornation of perjury" and inserting in lieu thereof "perjury, subornation of perjury, or witness bribery".

Section 2J1.3(c)(1) is amended by deleting "perjury or subornation of perjury" and inserting in lieu thereof "perjury, subornation of perjury, or witness bribery".

The Commentary to §2J1.3 captioned "Statutory Provisions" is amended by inserting "201 (b)(3), (4)," immediately before "1621".

The Commentary to §2J1.3 captioned "Application Notes" is amended in Note 3 by inserting ", subornation of perjury, or witness bribery" immediately following "perjury".

The Commentary to §2J1.3 captioned "Background" is amended by deleting "perjury and subornation of perjury" and inserting in lieu thereof "perjury, subornation of perjury, and witness bribery".

Section 2J1.8 is deleted in its entirety as follows:

"§2J1.8. Bribery of Witness

- (a) Base Offense Level: 12
- (b) Specific Offense Characteristic
 - (1) If the offense resulted in substantial interference with the administration of justice, increase by 3 levels.
- (c) Cross Reference
 - (1) If the offense involved bribery of a witness in respect to a criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 201(b)(3), (4).

Application Notes:

1. 'Substantial interference with the administration of justice' includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.
2. For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation or trial of the witness bribery count.
3. In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense with respect to which the bribery occurred), see the Commentary to Chapter Three, Part C (Obstruction), and to §3D1.2(c) (Groups of Closely Related Counts).

Background: This section applies to witness bribery. The offense levels correspond to those for perjury (§2J1.3)."

Section 2K1.1 is amended in the title by inserting "; Improper Storage of Explosive Materials" at the end thereof.

The Commentary to §2K1.1 captioned "Statutory Provisions" is amended by deleting "842(k), 844(b)" and inserting in lieu thereof "842(j), (k), 844(b). For additional statutory provision(s), see Appendix A (Statutory Index)".

Section 2K1.2 is deleted in its entirety as follows:

"§2K1.2. Improper Storage of Explosive Materials

- (a) Base Offense Level: 6

Commentary

Statutory Provision: 18 U.S.C. § 842(j). For additional statutory provision(s), see Appendix A (Statutory Index).

Background: The above-referenced provision is a misdemeanor. The maximum term of imprisonment authorized by statute is one year."

Section 2K1.7 is deleted in its entirety as follows:

"§2K1.7. Use of Fire or Explosives to Commit a Federal Felony

- (a) If the defendant, whether or not convicted of another crime, was convicted under 18 U.S.C. § 844(h), the term of imprisonment is that required by statute.
- (b) Special Instruction for Fines
 - (1) Where there is a federal conviction for the underlying offense, the fine guideline shall be the fine guideline that would have been applicable had there only been a conviction for the underlying offense. This guideline shall be used as a consolidated fine guideline for both the underlying offense and the conviction underlying this section.

Commentary

Statutory Provision: 18 U.S.C. § 844(h).

Application Notes:

1. The statute requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.
2. Imposition of a term of supervised release is governed by the provisions of §5D1.1 (Imposition of a Term of Supervised Release).
3. Where a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the use of fire or explosives is not to be applied in respect to the guideline for the underlying offense.
4. Subsection (b) sets forth special provisions concerning the imposition of fines. Where there is also a conviction for the underlying offense, a consolidated fine guideline is determined by the offense level that would have applied to the underlying offense absent a conviction under 18 U.S.C. § 844(h). This is required because the offense level for the underlying offense may be reduced in that any specific offense characteristic for use of fire or explosives would not be applied (see Application Note 3). The Commission has not established a fine guideline range for the unusual case in which there is no conviction for the underlying offense, although a fine is authorized under 18 U.S.C. § 3571."

Section 2K2.4 is amended in the title by deleting "Firearms or Armor-Piercing Ammunition" and inserting in lieu thereof "Firearm, Armor-Piercing Ammunition, or Explosive".

Section 2K2.4(a) is amended by deleting "§ 924(c)" and inserting in lieu thereof "§ 844(h), § 924(c)".

The Commentary to §2K2.4 captioned "Statutory Provisions" is amended by inserting "844(h)," immediately before "924(c)".

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 2 in the first paragraph by deleting "a firearm" and inserting in lieu thereof "an explosive or firearm"; and by deleting the comma immediately following "(Robbery)".

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 4 by deleting "§ 924(c)" wherever it occurs and inserting in lieu thereof in each instance "§ 844(h), § 924(c)".

The Commentary to §2K2.4 captioned "Background" is amended by deleting "924(c)" and inserting in lieu thereof "844(h), 924(c)"; and by inserting "explosive or" immediately before "firearm".

Chapter Two, Part K, Subpart 3 is amended in the title by deleting "TRANSPORTATION OF HAZARDOUS MATERIALS" and inserting in lieu thereof "MAILING INJURIOUS ARTICLES".

Section 2K3.1 is deleted in its entirety as follows:

"§2K3.1. Unlawfully Transporting Hazardous Materials in Commerce

Apply the guideline provision for §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification).

Commentary

Statutory Provision: 49 U.S.C. § 1809(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Background: This conduct involves the same risks as the conduct covered under §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification). Accordingly, that guideline applies."

Section 2L2.1 is amended in the title by deleting "Documents" and inserting in lieu thereof "a Document"; and by inserting ", or a United States Passport" immediately following "Status".

Section 2L2.1(b)(2) is amended by inserting "or passports" immediately following "documents"; and by inserting "/Passports" immediately following "Documents".

The Commentary to §2L2.1 captioned "Statutory Provisions" is amended by inserting "1542, 1544," immediately following "1427,".

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

Section 2L2.2 is amended in the title by inserting "; Fraudulently Acquiring or Improperly Using a United States Passport" at the end thereof.

The Commentary to §2L2.2 captioned "Statutory Provisions" is amended by inserting "1542-1544," immediately before "1546."

Sections 2L2.3 and 2L2.4 are deleted in their entirety as follows:

"§2L2.3. Trafficking in a United States Passport

(a) Base Offense Level: 9

(b) Specific Offense Characteristics

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

- (2) If the offense involved six or more passports, increase as follows:

	<u>Number of Passports</u>	<u>Increase in Level</u>
(A)	6-24	add 2
(B)	25-99	add 4
(C)	100 or more	add 6.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1542, 1544. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

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

§2L2.4. Fraudulently Acquiring or Improperly Using a United States Passport

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristic
- (1) If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, increase by 2 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1543, 1544. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. For the purposes of Chapter Three, Part D (Multiple Counts), a conviction for unlawfully entering or remaining in the United States (§2L1.2) arising from the same course of conduct is treated as a closely related count, and is therefore grouped with an offense covered by this guideline."

Section 2M2.1 is amended in the title by inserting ", or Production of Defective," immediately following "Destruction of".

The Commentary to §2M2.1 captioned "Statutory Provisions" is amended by inserting ", 2154" immediately following "2153".

Section 2M2.2 is deleted in its entirety as follows:

"§2M2.2. Production of Defective War Material, Premises, or Utilities

- (a) Base Offense Level: 32

Commentary

Statutory Provision: 18 U.S.C. § 2154."

Section 2M2.3 is amended in the title by inserting ", or Production of Defective," immediately following "Destruction of".

The Commentary to §2M2.3 captioned "Statutory Provisions" is amended by inserting ", 2156" immediately following "2155".

Section 2M2.4 is deleted in its entirety as follows:

"§2M2.4. Production of Defective National Defense Material, Premises, or Utilities

(a) Base Offense Level: 26

Commentary

Statutory Provision: 18 U.S.C. § 2156."

Section 2M3.3 is amended in the title by inserting "; Disclosure of Classified Cryptographic Information; Unauthorized Disclosure to a Foreign Government or a Communist Organization of Classified Information by Government Employee; Unauthorized Receipt of Classified Information" at the end thereof.

Section 2M3.3(a)(1) is amended by deleting "was transmitted" immediately following "information".

The Commentary to §2M3.3 captioned "Statutory Provisions" is amended by deleting ". For additional statutory provision(s), see Appendix A (Statutory Index)" and inserting in lieu thereof ", 798; 50 U.S.C. § 783(b), (c)".

The Commentary to §2M3.3 captioned "Background" is amended by inserting the following additional paragraph at the end:

" This section also covers statutes that proscribe the disclosure of classified information concerning cryptographic or communication intelligence to the detriment of the United States or for the benefit of a foreign government, the unauthorized disclosure to a foreign government or a communist organization of classified information by a government employee, and the unauthorized receipt of classified information."

Sections 2M3.6, 2M3.7, and 2M3.8 are deleted in their entirety as follows:

"§2M3.6. Disclosure of Classified Cryptographic Information

(a) Base Offense Level:

(1) 29, if top secret information was disclosed; or

(2) 24, otherwise.

Commentary

Statutory Provision: 18 U.S.C. § 798.

Application Note:

1. See Commentary to §2M3.1.

Background: The statute covered in this section proscribes the disclosure of classified information concerning cryptographic or communication intelligence to the detriment of the United States or for the benefit of a foreign government.

§2M3.7. Unauthorized Disclosure to Foreign Government or a Communist Organization of Classified Information by Government Employee

(a) Base Offense Level:

- (1) 29, if top secret information was disclosed; or
- (2) 24, otherwise.

Commentary

Statutory Provision: 50 U.S.C. § 783(b).

Application Note:

1. See Commentary to §2M3.1.

§2M3.8. Receipt of Classified Information

(a) Base Offense Level:

- (1) 29, if top secret information was received; or
- (2) 24, otherwise.

Commentary

Statutory Provision: 50 U.S.C. § 783(c).

Application Note:

1. See Commentary to §2M3.1."

Section 2Q1.2 is amended in the title by inserting "; Unlawfully Transporting Hazardous Materials in Commerce" at the end thereof.

The Commentary to §2Q1.2 captioned "Statutory Provisions" is amended by inserting "; 49 U.S.C. § 1809(b)" immediately following "1822(b)".

This amendment deletes 25 offense guidelines by consolidating them with other offense guidelines that cover similar offense conduct and have identical or very similar base offense levels and adjustments. Consolidation of offense guidelines in this manner has a number of practical advantages: it shortens and simplifies the Guidelines Manual and reduces the likelihood of inconsistency in phraseology and definitions from section to section; it will reduce possible confusion and litigation as to which guideline applies to particular conduct; it will reduce the number of conforming amendments required whenever similar sections are amended; and it will aid the development of case law because cases involving similar or identical concepts and definitions can be referenced under one guideline rather than different guidelines. **The effective date of this amendment is November 1, 1993.**

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

"Loss does not include the interest that could have been earned had the funds not been stolen.";

and by inserting the following additional paragraphs as the second and third paragraphs:

"Where the offense involved making a fraudulent loan or credit card application, or other unlawful conduct involving a loan or credit card, the loss is to be determined under the principles set forth in the Commentary to §2F1.1 (Fraud and Deceit).

In certain cases, an offense may involve a series of transactions without a corresponding increase in loss. For example, a defendant may embezzle \$5,000 from a bank and conceal this embezzlement by shifting this amount from one account to another in a series of nine

transactions over a six-month period. In this example, the loss is \$5,000 (the amount taken), not \$45,000 (the sum of the nine transactions), because the additional transactions did not increase the actual or potential loss."

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

- "3. The loss need not be determined with precision, and may be inferred from any reasonably reliable information available, including the scope of the operation."

and inserting in lieu thereof:

- "3. 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 upon the approximate number of victims and the average loss to each victim, or on more general factors such as the scope and duration of the offense."

The Commentary to §2B5.3 is amended by inserting the following immediately before "Background":

"Application Note:

1. 'Infringing items' means the items that violate the copyright or trademark laws (not the legitimate items that are infringed upon)."

The Commentary to §2B6.1 captioned "Application Note" is amended in the caption by deleting "Note" and inserting in lieu thereof "Notes"; and by inserting the following additional Note:

- "2. The 'corresponding number of levels from the table in §2F1.1 (Fraud and Deceit),' as used in subsection (b)(1), refers to the number of levels corresponding to the retail value of the motor vehicles or parts involved."

Section 2F1.1(b)(3) is amended by deleting "or process" and by inserting in lieu thereof ", or process not addressed elsewhere in the guidelines".

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 5 in the first sentence by inserting a comma immediately following "decree"; and by inserting the following additional sentence at the end:

"This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in §2J1.7 (Offense Committed While on Release)) or a violation of probation (addressed in §4A1.1 (Criminal History Category))."

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 7(b) in the second paragraph by inserting the following additional sentence at the end:

"Where the loss determined above significantly understates or overstates the seriousness of the defendant's conduct, an upward or downward departure may be warranted."

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 10 by deleting "the primary" and inserting in lieu thereof "a primary"; by inserting "; or the fraud caused or risked reasonably foreseeable, substantial non-monetary harm" immediately following "was non-monetary"; by deleting "physical or psychological harm" and inserting in lieu thereof "reasonably foreseeable, physical or psychological harm or severe emotional trauma"; by deleting the period immediately following "institution" and inserting in lieu thereof a semicolon; by inserting a new subdivision, immediately following subdivision (e), as follows:

- "(f) the offense involved the knowing endangerment of the solvency of one or more victims.";

and by inserting the following additional sentence at the end of the last paragraph:

"In such cases, a downward departure may be warranted."

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 11 by deleting the last two sentences as follows:

"The statutes provide for increased maximum terms of imprisonment for the use or possession of device-making equipment and the production or transfer of more than five identification documents or fifteen access devices. The court may find it appropriate to enhance the sentence for violations of these statutes in a manner similar to the treatment of analogous counterfeiting offenses under Part B of this Chapter."

and inserting in lieu thereof:

"Where the primary purpose of the offense involved the unlawful production, transfer, possession, or use of identification documents for the purpose of violating, or assisting another to violate, the laws relating to naturalization, citizenship, or legal resident status, apply §2L2.1 or §2L2.2, as appropriate, rather than §2F1.1. In the case of an offense involving false identification documents or access devices, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct."

This amendment makes the definitions of loss in §§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) and 2F1.1 (Fraud and Deceit) more consistent. Although the term "reasonably reliable information" is deleted from §2B1.1 (there is no corresponding term in §2F1.1), no substantive change results because the reliability of the information considered in respect to all cases is already addressed in §6A1.3 (Resolution of Disputed Factors). In addition, this amendment provides additional guidance for the determination of loss in cases that are referenced to §2B1.1, but have loss characteristics closely resembling offenses referenced to §2F1.1, and in cases in which simply adding the amounts from a series of transactions does not reflect the amount taken or put at risk. This amendment also clarifies the meaning of the term "infringing items" in §2B5.3, and expressly provides that the reference in §2B6.1 to the table in §2F1.1 is to be applied using the retail value of the stolen parts. In addition, this amendment clarifies the operation of §2F1.1(b)(3) to avoid inappropriate double counting. Finally, this amendment revises the Commentary to §2F1.1 by expanding Application Note 10 to provide guidance in cases in which the monetary loss does not adequately reflect the seriousness of the offense, and by clarifying Application Note 11 and conforming the phraseology in this application note to that used elsewhere in the guidelines. **The effective date of this amendment is November 1, 1993.**

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

Section 2B3.1 is amended by inserting the following additional subsection:

"(c) Cross Reference

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder)."

The Commentary to §2B3.1 captioned "Statutory Provisions" is amended by inserting ", 2119" immediately following "2118(a)".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 1 by inserting the following additional paragraph at the end:

"'Carjacking' means the taking or attempted taking of a motor vehicle from the person or presence of another by force and violence or by intimidation."

The Commentary to §2B3.1 captioned "Application Notes" is amended by deleting Note 6 as follows:

- "6. If the defendant was convicted under 18 U.S.C. § 2113(e) and in committing the offense or attempting to flee or escape, a participant killed any person, apply §2A1.1 (First Degree Murder). Otherwise, if death results, see Chapter Five, Part K (Departures).";

and by renumbering Note 7 as Note 6.

This amendment adds a specific offense characteristic for carjacking to §2B3.1, references 18 U.S.C. § 2119 (carjacking offenses) to this guideline, and adds a cross reference to this guideline to address the circumstance in which a victim is murdered during the offense. **The effective date of this amendment is November 1, 1993.**

484. The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 1 by deleting "21 U.S.C. § 841." and inserting in lieu thereof:

"21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.

An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection."

This amendment addresses an inter-circuit conflict regarding the meaning of the term "mixture or substance," as used in §2D1.1 by expressly providing that this term does not include portions of a drug mixture that have to be separated from the controlled substance before the controlled substance can be used. This issue has arisen, subsequent to the United States Supreme Court decision in Chapman v. United States, 111 S. Ct. 1919 (1991), in two types of cases. The first type of case involves a controlled substance bonded to, or suspended in, another substance (e.g., cocaine mixed with beeswax); however, the controlled substance is not usable until it is separated from the other substance. See, e.g., United States v. Mahecha-Onofre, 936 F.2d 623 (1st Cir.), cert. denied, 112 S. Ct. 648 (1991); United States v. Restrepo-Contreras, 942 F.2d 96 (1st Cir. 1991), cert. denied, 112 S. Ct. 955 (1992). The second type of case involves the waste produced from an illicit laboratory used to manufacture a controlled substance or chemicals confiscated before the chemical processing of the controlled substance is completed. The waste product is typically water or chemicals used to either remove impurities or form a precipitate (the precipitate, in some cases, being the controlled substance). Typically, a small amount of controlled substance remains in the waste water; often this amount is too small to quantify and is listed as a trace amount (no weight given) in DEA reports. In these types of cases, the waste product is not consumable. The chemicals seized before the end of processing are also not usable in that form because further processing must take place before they can be used. See, e.g., United States v. Sherrod, 964 F.2d 1501 (5th Cir.), cert. denied sub nom. Cooper v. United States, 113 S. Ct. 832 (1992) (White and Blackmun, JJ., dissenting from denial of cert.), and cert. denied sub nom. United States v. Sewell, 113 S. Ct. 1367 (1993) (White and Blackmun, JJ., opinion dissenting from denial of cert.). **The effective date of this amendment is November 1, 1993.**

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

- "16. Where (A) the amount of the controlled substance for which the defendant is accountable under §1B1.3 (Relevant Conduct) results in a base offense level greater than 36, (B) the court finds that this offense level overrepresents the defendant's culpability in the criminal activity, and (C) the defendant qualifies for a mitigating role adjustment under

§3B1.2 (Mitigating Role), a downward departure may be warranted. The court may depart to a sentence no lower than the guideline range that would have resulted if the defendant's Chapter Two offense level had been offense level 36. Provided, that a defendant is not eligible for a downward departure under this provision if the defendant:

- (a) has one or more prior felony convictions for a crime of violence or a controlled substance offense as defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1);
- (b) qualifies for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill);
- (c) possessed or induced another participant to use or possess a firearm in the offense;
- (d) had decision-making authority;
- (e) owned the controlled substance or financed any part of the offense; or
- (f) sold the controlled substance or played a substantial part in negotiating the terms of the sale.

Example: A defendant, who the court finds meets the criteria for a downward departure under this provision, has a Chapter Two offense level of 40, a 2-level reduction for a minor role from §3B1.2, and a 3-level reduction for acceptance of responsibility from §3E1.1. His final offense level is 35. If the defendant's Chapter Two offense level had been 36, the 2-level reduction for a minor role and 3-level reduction for acceptance of responsibility would have resulted in a final offense level of 31. Therefore, under this provision, a downward departure not to exceed 4 levels (from level 35 to level 31) would be authorized."

Where a defendant's base offense level is greater than level 36 and the defendant had a minimal or minor role in the offense (and meets certain other qualifications), the quantity of the controlled substance for which the defendant is held accountable under §1B1.3 (Relevant Conduct) may overrepresent the defendant's culpability in the criminal activity. To address this issue, this amendment adds an application note to §2D1.1 that authorizes a downward departure in the specific circumstances described and sets forth the extent of a departure authorized on this basis. **The effective date of this amendment is November 1, 1993.**

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

- "17. If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted."

This amendment adds an application note to §2D1.1 authorizing a downward departure if, in a reverse sting operation, the court finds that the government agent set a price for the controlled substance that was substantially below market value and thereby significantly inflated the quantity of controlled substance purchased by the defendant beyond the amount the defendant otherwise could have afforded. **The effective date of this amendment is November 1, 1993.**

487. Section 2D1.1(c) is amended in the notes following the Drug Quantity Table by inserting the following additional paragraph as the third paragraph.

"'Cocaine base,' for the purposes of this guideline, means 'crack.' 'Crack' is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form."

This amendment provides that, for purposes of the guidelines, "cocaine base" means "crack." The amendment addresses an inter-circuit conflict. Compare, e.g., United States v. Shaw, 936 F.2d 412 (9th Cir. 1991) (cocaine base means crack) with United States v. Jackson, 968 F.2d 158 (2d Cir) (cocaine base has a scientific, chemical definition that is more inclusive than crack), cert. denied, 113 S. Ct. 664 (1992). Under this amendment, forms of cocaine base other than crack (e.g., coca paste, an intermediate step in the processing of coca leaves into cocaine hydrochloride, scientifically is a base form of cocaine, but it is not crack) will be treated as cocaine. **The effective date of this amendment is November 1, 1993.**

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

"In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table."

The Commentary to §2D1.1 captioned "Application Notes" is amended in note 11 by deleting the first entry in the "Typical Weight Per Unit Table" as follows:

"LSD (Lysergic acid diethylamide) 0.05 mg".

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

"18. LSD on a blotter paper carrier medium typically is marked so that the number of doses ('hits') per sheet readily can be determined. When this is not the case, it is to be presumed that each 1/4 inch by 1/4 inch section of the blotter paper is equal to one dose.

In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted."

The Commentary to §2D1.1 captioned "Background" is amended by inserting the following paragraphs at the end:

"Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.

The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in Chapman v. United States, 111 S. Ct. 1919 (1991) (holding that the term 'mixture or substance' in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is

absorbed). At the same time, the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence (see Chapman; §5G1.1(b))."

The Commission has found that the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself (e.g., LSD is typically placed on blotter paper which generally weighs from 5 to 10 milligrams per dose; the weight of the LSD itself per dose is generally from 0.02 to 0.08 milligram; the Drug Enforcement Administration describes a standard dose of LSD as containing 0.05 milligram of LSD). As a result, basing the offense level on the entire weight of the LSD and carrier medium produces unwarranted disparity among offenses involving the same quantity of actual LSD but different carrier weights, as well as sentences that are disproportionate to those for other, more dangerous controlled substances, such as PCP, heroin, and cocaine. Under the guidelines prior to the amendment, for example, 100 grams of heroin or 500 grams of cocaine (weights that correspond to several thousand doses, the number depending upon the purity) result in the same offense level as 125 doses of LSD on blotter paper (which has an average weight of 8 milligrams per dose) or 1 dose of LSD on a sugar cube (2000 milligrams per dose).

Consequently, in cases involving LSD contained in a carrier medium, this amendment establishes a weight per dose of 0.4 milligram to be used for purposes of determining the base offense level. The dosage weight of LSD selected by the Commission exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in Chapman v. United States, 111 S. Ct. 1919 (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP (for example, 2000 doses of LSD at 0.5 milligram per dose equals 1 gram of LSD -- corresponding to the lower limit of offense level 26; similarly, 2000 doses of PCP at 5 milligrams per dose, the standard amount of actual PCP in a dose, equals 10 grams of actual PCP -- corresponding to the lower limit of offense level 26). Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the definition of mixture or substance for purposes of applying any mandatory minimum sentence (see Chapman; §5G1.1(b)). **The effective date of this amendment is November 1, 1993.**

489. The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 2 by deleting:

"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."

and inserting in lieu thereof:

"In a few cases, the offense level for the underlying offense determined under the preceding paragraph may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (i.e., the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a)."

This amendment simplifies the operation of §2K2.4 in order to reduce erroneous application by deleting the proviso in Application Note 2 and, in lieu thereof, authorizing an upward departure in the unusual case in which the combined sentence for an underlying offense and a firearms or explosives offense (under 18 U.S.C. § 844(h), §924(c), or § 929(a)) is less than the maximum of the guideline range that would have resulted if there had been no additional conviction for the firearms or explosives offense. **The effective date of this amendment is November 1, 1993.**

490. Sections 2S1.3 and 2S1.4 are deleted in their entirety as follows:

"§2S1.3. Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements

(a) Base Offense Level:

(1) 13, if the defendant:

(A) structured transactions to evade reporting requirements; or

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

(2) 5, otherwise.

(b) Specific Offense Characteristics

- (1) If the defendant knew or believed that the funds were criminally derived property, increase by 4 levels. If the resulting offense level is less than level 13, increase to level 13.
 - (2) If the base offense level is from (a)(1) above and the value of the funds exceeded \$100,000, increase the offense level as specified in §2S1.1(b)(2).
- (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.

Commentary

Statutory Provisions: 26 U.S.C. § 7203 (if a willful violation of 26 U.S.C. § 6050I); 31 U.S.C. §§ 5313, 5314, 5322, 5324. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. ‘Criminally derived property’ means any property constituting, or derived from, proceeds obtained from a criminal offense. See 18 U.S.C. § 1957(f)(2).

Background: The offenses covered by this guideline relate to records and reports of certain transactions involving currency and monetary instruments. The maximum prison sentence for these offenses is ten years if there is any pattern of unlawful activity, and five years otherwise.

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.

Except in rare cases, the dollar value of the transactions not reported is an important indicator of several factors that are pertinent to the sentence, including the size of the criminal enterprise, and the extent to which the defendant aided the enterprise.

§2S1.4. Failure to File Currency and Monetary Instrument Report

- (a) Base Offense Level: 9
- (b) Specific Offense Characteristics
 - (1) If the defendant knew or believed that the funds were criminally derived property, increase by 4 levels.

- (2) If the defendant knew or believed that the funds were intended to be used to promote criminal activity, increase by 4 levels.
 - (3) If the value of the funds exceeded \$100,000, increase the offense level as specified in §2S1.1(b)(2).
- (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.

Commentary

Statutory Provision: 31 U.S.C. § 5316. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. 'Criminally derived property' means any property constituting, or derived from, proceeds obtained from a criminal offense. See 18 U.S.C. § 1957(f)(2)."

A replacement guideline with accompanying commentary is inserted as "§2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports)".

This amendment consolidates existing §§2S1.3 and 2S1.4 and modifies these guidelines to assure greater consistency of punishment for similar offenses and greater sensitivity to indicia of offense seriousness. **The effective date of this amendment is November 1, 1993.**

491. Chapter Two, Part T, Subpart 1 is amended in the title by inserting ", EMPLOYMENT TAXES, ESTATE TAXES, GIFT TAXES, AND EXCISE TAXES (OTHER THAN ALCOHOL, TOBACCO, AND CUSTOMS TAXES)" at the end thereof.

Section 2T1.1 is amended in the title by inserting "; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents" at the end thereof.

Section 2T1.1(a) is amended by deleting:

"Base Offense Level: Level from §2T4.1 (Tax Table) corresponding to the tax loss.

For purposes of this guideline, the 'tax loss' is the greater of: (A) the total amount of tax that the taxpayer evaded or attempted to evade; and (B) the 'tax loss' defined in §2T1.3.",

and inserting in lieu thereof:

"(a) Base Offense Level:

- (1) Level from §2T4.1 (Tax Table) corresponding to the tax loss; or
- (2) 6, if there is no tax loss."

Section 2T1.1(b)(2) is amended by deleting "nature" and inserting in lieu thereof "existence".

Section 2T1.1 is amended by inserting the following additional subsection:

"(c) Special Instructions

For the purposes of this guideline --

- (1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed).

Notes:

(A) If the offense involved filing a tax return in which gross income was underreported, the tax loss shall be treated as equal to 28% of the unreported gross income (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(B) If the offense involved improperly claiming a deduction or an exemption, the tax loss shall be treated as equal to 28% of the amount of the improperly claimed deduction or exemption (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(C) If the offense involved improperly claiming a deduction to provide a basis for tax evasion in the future, the tax loss shall be treated as equal to 28% of the amount of the improperly claimed deduction (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

- (2) If the offense involved failure to file a tax return, the tax loss is the amount of tax that the taxpayer owed and did not pay.

Note: If the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income (25% if the taxpayer is a corporation) less any tax withheld or otherwise paid, unless a more accurate determination of the tax loss can be made.

- (3) If the offense involved willful failure to pay tax, the tax loss is the amount of tax that the taxpayer owed and did not pay.
- (4) If the offense involved improperly claiming a refund to which the claimant was not entitled, the tax loss is the amount of the claimed refund to which the claimant was not entitled.
- (5) The tax loss is not reduced by any payment of the tax subsequent to the commission of the offense."

The Commentary to §2T1.1 captioned "Statutory Provision" is amended by deleting "Provision: 26 U.S.C. § 7201" and inserting in lieu thereof "Provisions: 26 U.S.C. §§ 7201, 7203 (other than a violation based upon 26 U.S.C. § 6050I), 7206 (other than a violation based upon 26 U.S.C. § 6050I or § 7206(2)), and 7207".

The Commentary to §2T1.1 captioned "Application Notes" is amended by deleting Notes 1 and 4 as follows:

- "1. False statements in furtherance of the evasion (see §§2T1.3, 2T1.5, and 2T1.8) are considered part of the offense for purposes of this guideline."
- "4. The guideline refers to §2T1.3 to provide an alternative minimum standard for the tax loss, which is based on a percentage of the dollar amounts of certain misstatements made in returns filed by the taxpayer. This alternative standard may be easier to determine, and should make irrelevant the issue of whether the taxpayer was entitled to offsetting adjustments that he failed to claim.";

and by renumbering the remaining notes accordingly.

The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 1 (formerly Note 2) by deleting "For purposes of the guideline, the tax loss is the amount of tax that the taxpayer evaded or attempted to evade" and inserting in lieu thereof "'Tax loss' is defined in subsection (c)"; by deleting "deficiency" and inserting in lieu thereof "figures"; and by inserting the following additional paragraphs at the end:

"Notes under subsections (c)(1) and (c)(2) address certain situations in income tax cases in which the tax loss may not be reasonably ascertainable. In these situations, the 'presumptions' set forth are to be used unless the government or defense provides sufficient information for a more accurate assessment of the tax loss. In cases involving other types of taxes, the presumptions in the notes under subsections (c)(1) and (c)(2) do not apply.

Example 1: A defendant files a tax return reporting income of \$40,000 when his income was actually \$90,000. Under Note (A) to subsection (c)(1), the tax loss is treated as \$14,000 (\$90,000 of actual gross income minus \$40,000 of reported gross income = \$50,000 x 28%) unless sufficient information is available to make a more accurate assessment of the tax loss.

Example 2: A defendant files a tax return reporting income of \$60,000 when his income was actually \$130,000. In addition, the defendant claims \$10,000 in false tax credits. Under Note (A) to subsection (c)(1), the tax loss is treated as \$29,600 (\$130,000 of actual gross income minus \$60,000 of reported gross income = \$70,000 x 28% = \$19,600, plus \$10,000 of false tax credits) unless sufficient information is available to make a more accurate assessment of the tax loss.

Example 3: A defendant fails to file a tax return for a year in which his salary was \$24,000, and \$2,600 in income tax was withheld by his employer. Under the note to subsection (c)(2), the tax loss is treated as \$2,200 (\$24,000 of gross income x 20% = \$4,800, minus \$2,600 of tax withheld) unless sufficient information is available to make a more accurate assessment of the tax loss.

In determining the tax loss attributable to the offense, the court should use as many methods set forth in subsection (c) and this commentary as are necessary given the circumstances of the particular case. If none of the methods of determining the tax loss set forth fit the circumstances of the particular case, the court should use any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed."

The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 3 (formerly Note 5) by deleting "or local" and inserting in lieu thereof "local, or foreign".

The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 4 (formerly Note 6) by deleting "§2T1.1(b)(2)" and inserting in lieu thereof "subsection (b)(2)"; by inserting a comma immediately following "applied"; and by inserting "or fictitious entities" immediately following "shells".

The Commentary to §2T1.1 captioned "Application Notes" is amended by inserting the following additional notes:

- "5. A 'credit claimed against tax' is an item that reduces the amount of tax directly. In

contrast, a 'deduction' is an item that reduces the amount of taxable income.

6. 'Gross income,' for the purposes of this section, has the same meaning as it has in 26 U.S.C. § 61 and 26 C.F.R. § 1.61.
7. If the offense involves both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together."

The Commentary to §2T1.1 captioned "Background" is amended by deleting:

" This guideline relies most heavily on the amount of tax evaded because the chief interest protected by the statute is the collection of taxes. A greater evasion is obviously more harmful to the treasury, and more serious than a smaller one with otherwise similar characteristics. Furthermore, as the potential benefit from tax evasion increases, the sanction necessary to deter also increases.

The overlapping imprisonment ranges in the Sentencing Table are intended to minimize the significance of disputes. The consequence of an inexact estimate of the tax loss is never severe, even when the tax loss is near the boundary of a range. For example, although the difference between \$39,999 and \$40,001 results in a change from level 10 to level 11, any sentence of eight to twelve months would be within the guidelines regardless of the offense level determination made by the court. Indeed, any sentence between ten and twelve months would be within the guidelines for a tax loss ranging from \$20,000 to \$150,000. As a consequence, for all dollar amounts, the Sentencing Table affords the court considerable latitude in evaluating other factors, even when the amount of the tax loss is uncertain.

Under pre-guidelines practice, roughly half of all tax evaders were sentenced to probation without imprisonment, while the other half received sentences that required them to serve an average prison term of twelve months. This guideline is intended to reduce disparity in sentencing for tax evasion and to somewhat increase average sentence length. As a result, the number of purely probationary sentences will be reduced. The Commission believes that any additional costs of imprisonment that may be incurred as a result of the increase in the average term of imprisonment for tax evasion are inconsequential in relation to the potential increase in revenue. According to estimates current at the time this guideline was originally developed (1987), income taxes are underpaid by approximately \$90 billion annually.

Although under pre-guidelines practice some large-scale evaders served as much as five years in prison, the average sentence length for defendants sentenced to a term of imprisonment did not increase rapidly with the amount of tax evaded. Thus, the average time served by those sentenced to a term of imprisonment for evading less than \$10,000 in taxes was about nine months, while the corresponding figure for those evading over \$100,000 in taxes was about sixteen months. Guideline sentences should result in small increases in the average length of imprisonment for most tax cases that involve less than \$100,000 in tax evaded. The increase is expected to be somewhat larger for cases involving more taxes.

Failure to report criminally derived income is included as a factor for deterrence purposes. Criminally derived income is generally difficult to establish, so that the tax loss in such cases will tend to be substantially understated. An enhancement for offenders who violate the tax laws as part of a pattern of criminal activity from which they derive a substantial portion of their income also serves to implement the mandate of 28 U.S.C. § 994(i)(2). Estimates from pre-guidelines practice were that, on average, the presence of this factor increased time served by the equivalent of 2 levels.

Although tax evasion always involves some planning, unusually sophisticated efforts to conceal the evasion decrease the likelihood of detection and therefore warrant an additional sanction for deterrence purposes. Analyses of pre-guidelines data for other frauds and property crimes showed that careful planning or sophistication generally resulted in an average increase of at least 2 levels."

and inserting in lieu thereof:

" This guideline relies most heavily on the amount of loss that was the object of the offense. Tax offenses, in and of themselves, are serious offenses; however, a greater tax loss is obviously more harmful to the treasury and more serious than a smaller one with otherwise similar characteristics. Furthermore, as the potential benefit from the offense increases, the sanction necessary to deter also increases.

Under pre-guidelines practice, roughly half of all tax evaders were sentenced to probation without imprisonment, while the other half received sentences that required them to serve an average prison term of twelve months. This guideline is intended to reduce disparity in sentencing for tax offenses and to somewhat increase average sentence length. As a result, the number of purely probationary sentences will be reduced. The Commission believes that any additional costs of imprisonment that may be incurred as a result of the increase in the average term of imprisonment for tax offenses are inconsequential in relation to the potential increase in revenue. According to estimates current at the time this guideline was originally developed (1987), income taxes are underpaid by approximately \$90 billion annually. Guideline sentences should result in small increases in the average length of imprisonment for most tax cases that involve less than \$100,000 in tax loss. The increase is expected to be somewhat larger for cases involving more taxes.

Failure to report criminally derived income is included as a factor for deterrence purposes. Criminally derived income is generally difficult to establish, so that the tax loss in such cases will tend to be substantially understated. An enhancement for offenders who violate the tax laws as part of a pattern of criminal activity from which they derive a substantial portion of their income also serves to implement the mandate of 28 U.S.C. § 994(i)(2).

Although tax offenses always involve some planning, unusually sophisticated efforts to conceal the offense decrease the likelihood of detection and therefore warrant an additional sanction for deterrence purposes."

Sections 2T1.2 and 2T1.3 are deleted in their entirety as follows:

"§2T1.2. Willful Failure To File Return, Supply Information, or Pay Tax

(a) Base Offense Level:

- (1) 1 level less than the level from §2T4.1 (Tax Table) corresponding to the tax loss; or
- (2) 5, if there is no tax loss.

For purposes of this guideline, 'tax loss' means the total amount of tax that the taxpayer owed and did not pay, but, in the event of a failure to file in any year, not less than 10 percent of the amount by which the taxpayer's gross income for that year exceeded \$20,000.

(b) Specific Offense Characteristics

- (1) If the defendant failed to report or to correctly identify the source of income exceeding \$10,000 in any year from criminal activity, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.
- (2) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.

(c) Cross Reference

- (1) If the defendant is convicted of a willful violation of 26 U.S.C. § 6050I, apply §2S1.3 (Failure to Report Monetary Transactions) in lieu of this guideline.

Commentary

Statutory Provision: 26 U.S.C. § 7203 (other than a willful violation of 26 U.S.C. § 6050I).

Application Notes:

1. 'Criminal activity' means any conduct constituting a criminal offense under federal, state, or local law.
2. 'Sophisticated means,' as used in §2T1.2(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts or transactions through corporate shells.
3. In determining the total tax loss attributable to the offense (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. See Application Note 3 of the Commentary to §2T1.1.

Background: Violations of 26 U.S.C. § 7203 are usually serious misdemeanors that are similar to tax evasion, except that there need be no affirmative act in support of the offense. They are rarely prosecuted unless the defendant also owed taxes that he failed to pay.

Because the conduct generally is tantamount to tax evasion, the guideline is similar to §2T1.1. Because the offense is a misdemeanor, the offense level has been set at one below the level corresponding to evasion of the same amount of taxes.

An alternative measure of the tax loss, 10 percent of gross income in excess of \$20,000, has been provided because of the 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.

The intended impact of this guideline is to increase the average time served for this offense, and to increase significantly the number of violators who receive a term of imprisonment. Under pre-guidelines practice, the average time served for this offense was approximately 2.5 months, including those who were not sentenced to prison. Considering only those who did serve a term of imprisonment, the average term was about six to seven months.

§2T1.3. Fraud and False Statements Under Penalty of Perjury

(a) Base Offense Level:

- (1) Level from §2T4.1 (Tax Table) corresponding to the tax loss, if the offense was committed in order to facilitate evasion of a tax; or
- (2) 6, otherwise.

For purposes of this guideline, the 'tax loss' is 28 percent of 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. If the taxpayer is a corporation, use 34 percent in lieu of 28 percent.

- (b) Specific Offense Characteristics
- (1) If the defendant failed to report or to correctly identify the source of income exceeding \$10,000 in any year from criminal activity, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.
 - (2) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.

Commentary

Statutory Provision: 26 U.S.C. § 7206, except § 7206(2). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. 'Criminal activity' means any conduct constituting a criminal offense under federal, state, or local law.
2. 'Sophisticated means,' as used in §2T1.3(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts or transactions through corporate shells.
3. In determining the total tax loss attributable to the offense (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. See Application Note 3 of the Commentary to §2T1.1.
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).

Background: This guideline covers conduct that usually is analogous to tax evasion, although the elements differ. Accordingly, the offense is treated much like tax evasion.

Existence of a tax loss is not an element of these offenses. Furthermore, in instances where the defendant is setting the groundwork for evasion of a tax that is expected to become due in the future, he may make false statements that underreport income that as of the time of conviction may not yet have resulted in a tax loss. In order to gauge the seriousness of these offenses, the guidelines establish a rule for determining a 'tax loss' based on the nature and magnitude of the false statements made. Use of this approach also avoids complex problems of proof and invasion of privacy when returns of persons other than the defendant and co-defendants are involved."

Section 2T1.4(a)(1) is amended by deleting "resulting tax loss, if any" and inserting in lieu thereof "tax loss".

Section 2T1.4(a)(2) is amended by deleting "otherwise" and inserting in lieu thereof "if there is no tax loss".

Section 2T1.4(a) is amended by deleting "§2T1.3" and inserting in lieu thereof "§2T1.1".

Section 2T1.4(b)(1) is amended by inserting "(A)" immediately following "If"; and by inserting "; or (B) the defendant was in the business of preparing or assisting in the preparation of tax returns" immediately before ", increase".

Section 2T1.4(b)(2) is amended by deleting "nature" and inserting in lieu thereof "existence".

Section 2T1.4(b) is amended by deleting:

- "(3) If the defendant was in the business of preparing or assisting in the preparation of tax returns, increase by 2 levels."

The Commentary to §2T1.4 captioned "Statutory Provision" is amended by inserting "(other than a violation based upon 26 U.S.C. § 6050I)" immediately following "§ 7206(2)".

The Commentary to §2T1.4 captioned "Application Notes" is amended by deleting Notes 1, 3, and 4 as follows:

- "1. Subsection (b)(1) applies to persons who derive a substantial portion of their income through the promotion of tax fraud or tax evasion, e.g., through promoting fraudulent tax shelters."
- "3. Subsection (b)(3) applies to persons who regularly act as tax preparers or advisers for profit. Do not employ §3B1.3 (Abuse of Position of Trust or Use of Special Skill) if this adjustment applies. Subsection (b)(1) may also apply to such persons.
4. In certain instances, such as promotion of a tax shelter scheme, the defendant may advise other persons to violate their tax obligations through filing returns that find no support in the tax laws. If this type of conduct can be shown to have resulted in the filing of false returns (regardless of whether the principals were aware of their falsity), the misstatements in all such returns will contribute to one aggregate 'tax loss.'";

by renumbering Note 2 as Note 3; and by inserting the following as Notes 1 and 2:

- "1. For the general principles underlying the determination of tax loss, see §2T1.1(c) and Application Note 1 of the Commentary to §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents). In certain instances, such as promotion of a tax shelter scheme, the defendant may advise other persons to violate their tax obligations through filing returns that find no support in the tax laws. If this type of conduct can be shown to have resulted in the filing of false returns (regardless of whether the principals were aware of their falsity), the misstatements in all such returns will contribute to one aggregate 'tax loss.'
2. Subsection (b)(1) has two prongs. The first prong applies to persons who derive a substantial portion of their income through the promotion of tax schemes, e.g., through promoting fraudulent tax shelters. The second prong applies to persons who regularly prepare or assist in the preparation of tax returns for profit. If an enhancement from this subsection applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill)."

The Commentary to §2T1.4 captioned "Application Notes" is amended in Note 3 (formerly Note 2) by inserting "or fictitious entities" immediately following "corporate shells".

The Commentary to §2T1.4 captioned "Background" is amended by deleting "tax preparers and advisers" and inserting in lieu thereof "those in the business of preparing or assisting in the preparation of tax returns and those who make a business of promoting tax fraud"; and by deleting "§2T1.3" and inserting in lieu thereof "§2T1.1".

Section 2T1.5 is deleted in its entirety as follows:

"§2T1.5. Fraudulent Returns, Statements, or Other Documents

(a) Base Offense Level: 6

Commentary

Statutory Provision: 26 U.S.C. § 7207.

Background: The offense is a misdemeanor. It is to be distinguished from 26 U.S.C. § 7206(1) (§2T1.3), which is a felony involving a false statement under penalty of perjury. The offense level has been set at 6 in order to give the sentencing judge considerable latitude because the conduct could be similar to tax evasion."

Section 2T1.9 is amended in the title by deleting "Impair, Impede" and inserting in lieu thereof "Impede, Impair, Obstruct,".

Section 2T1.9(a)(1) is amended by deleting "§2T1.3, as applicable" and inserting in lieu thereof "§2T1.4, as appropriate".

Section 2T1.9(b)(1) is amended by inserting "to impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or collection of revenue" immediately following "violence".

Section 2T1.9(b)(2) is amended by deleting "impede or impair the Internal Revenue Service in the assessment and" and inserting in lieu thereof "impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or"; and by inserting the following additional sentence at the end:

"Do not, however, apply this adjustment if an adjustment from §2T1.4(b)(1) is applied."

The Commentary to §2T1.9 captioned "Application Notes" is amended in Note 2 by deleting "§2T1.3 (whichever is applicable to the underlying conduct)" and inserting in lieu thereof "§2T1.4 (whichever guideline most closely addresses the harm that would have resulted had the conspirators succeeded in impeding, impairing, obstructing, or defeating the Internal Revenue Service)".

The Commentary to §2T1.9 captioned "Application Notes" is amended by inserting the following additional note:

"4. Subsection (b)(2) provides an enhancement where the conduct was intended to encourage persons, other than the participants directly involved in the offense, to violate the tax laws (e.g., an offense involving a 'tax protest' group that encourages persons to violate the tax laws, or an offense involving the marketing of fraudulent tax shelters or schemes)."

Section 2T4.1 is amended by deleting:

<u>Tax Loss</u> (Apply the Greatest)	<u>Offense Level</u>
(A) \$2,000 or less	6
(B) More than \$2,000	7
(C) More than \$5,000	8
(D) More than \$10,000	9
(E) More than \$20,000	10
(F) More than \$40,000	11
(G) More than \$70,000	12
(H) More than \$120,000	13
(I) More than \$200,000	14
(J) More than \$350,000	15
(K) More than \$500,000	16

(L)	More than \$800,000	17
(M)	More than \$1,500,000	18
(N)	More than \$2,500,000	19
(O)	More than \$5,000,000	20
(P)	More than \$10,000,000	21
(Q)	More than \$20,000,000	22
(R)	More than \$40,000,000	23
(S)	More than \$80,000,000	24.",

and inserting in lieu thereof:

	<u>"Tax Loss (Apply the Greatest)</u>	<u>Offense Level</u>
(A)	\$1,700 or less	6
(B)	More than \$1,700	7
(C)	More than \$3,000	8
(D)	More than \$5,000	9
(E)	More than \$8,000	10
(F)	More than \$13,500	11
(G)	More than \$23,500	12
(H)	More than \$40,000	13
(I)	More than \$70,000	14
(J)	More than \$120,000	15
(K)	More than \$200,000	16
(L)	More than \$325,000	17
(M)	More than \$550,000	18
(N)	More than \$950,000	19
(O)	More than \$1,500,000	20
(P)	More than \$2,500,000	21
(Q)	More than \$5,000,000	22
(R)	More than \$10,000,000	23
(S)	More than \$20,000,000	24
(T)	More than \$40,000,000	25
(U)	More than \$80,000,000	26.".

This amendment consolidates §§2T1.1, 2T1.2, 2T1.3, and 2T1.5, thereby eliminating the confusion that has arisen in some cases regarding which guideline applies. In addition, by adopting a uniform definition of tax loss, this amendment eliminates the anomaly of using actual tax loss in some cases and an amount that differs from actual tax loss in others. Furthermore, this amendment consolidates §2T1.4(b)(1) and (b)(3) to reflect the substantial overlap between these subsections. Finally, this amendment adopts a revised "tax loss" table to provide increased deterrence for tax offenses. **The effective date of this amendment is November 1, 1993.**

492. The Commentary to §3B1.3 captioned "Application Notes" is amended by deleting Note 1 as follows:

- "1. The position of trust must have contributed in some substantial way to facilitating the crime and not merely have provided an opportunity that could as easily have been afforded to other persons. This adjustment, for example, would not apply to an embezzlement by an ordinary bank teller."

and inserting in lieu thereof:

- "1. 'Public or private trust' refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this enhancement to apply, the position of trust must have contributed in some significant way to facilitating the commission or

concealment of the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult). This adjustment, for example, would apply in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment would not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors.

Notwithstanding the preceding paragraph, because of the special nature of the United States mail an adjustment for an abuse of a position of trust will apply to any employee of the U.S. Postal Service who engages in the theft or destruction of undelivered United States mail."

This amendment reformulates the definition of an abuse of position of trust to better distinguish cases warranting this enhancement. **The effective date of this amendment is November 1, 1993.**

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

"Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of §1B1.3 (Relevant Conduct)."

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 6 in the first sentence of the first paragraph by inserting "(A)" immediately before "have been reversed"; by deleting the comma following "law"; and by inserting "or (B) have been ruled constitutionally invalid in a prior case" immediately before "are not to be counted";

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 6 by deleting the second sentence as follows:

"Also, sentences resulting from convictions that a defendant shows to have been previously ruled constitutionally invalid are not to be counted.",

and inserting in lieu thereof:

"With respect to the current sentencing proceeding, this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (e.g., 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions).";

and by beginning a new paragraph with the third sentence.

The Commentary to §4A1.2 captioned "Background" is amended by deleting the second paragraph as follows:

"The Commission leaves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction."

This amendment expressly provides that the term "part of the instant offense" in §4A1.2(a)(1) means relevant conduct as defined in §1B1.3 (Relevant Conduct) to avoid double counting and ensure consistency with other guideline provisions.

This amendment also clarifies the Commission's intent with respect to whether §4A1.2 confers on defendants a right to attack prior convictions collaterally at sentencing, an issue on which the appellate courts have differed. Compare, e.g., United States v. Canales, 960 F.2d 1311, 1316 (5th Cir. 1992) (Section 4A1.2 commentary indicates Commission intended to grant sentencing courts discretion to entertain initial defendant challenges to prior convictions); United States v. Jacobetz, 955 F.2d 786, 805 (2d Cir.) (similar), cert. denied, 113 S. Ct. 104 (1992); United States v. Cornog, 945 F.2d 1504, 1511

(11th Cir. 1991) (similar) with United States v. Hewitt, 942 F.2d 1270, 1276 (8th Cir. 1991) (commentary indicates defendants may only challenge use of prior convictions at sentencing by showing such conviction previously ruled invalid). This amendment addresses this inter-circuit conflict in interpreting the commentary by stating more clearly that the Commission does not intend to enlarge a defendant's right to attack collaterally a prior conviction at the current sentencing proceeding beyond any right otherwise recognized in law. **The effective date of this amendment is November 1, 1993.**

494. The Commentary to §5G1.3 captioned "Application Notes" is amended in the second paragraph of Note 2 by deleting "40" and inserting in lieu thereof "30", and by deleting "55" and inserting in lieu thereof "45".

The Commentary to §5G1.3 captioned "Application Notes" is amended by inserting the following additional note:

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

This amendment adds an application note to §5G1.3 to provide guidance in the case of a defendant who was on federal or state probation, parole, or supervised release at the time of the instant federal offense and has had such term of supervision revoked prior to sentencing on the instant federal offense. In addition, this amendment corrects a mathematical error in an example. **The effective date of this amendment is November 1, 1993.**

495. The Commentary to §6B1.2 is amended by inserting the following additional paragraph at the end:

" The Commission encourages the prosecuting attorney prior to the entry of a plea of guilty or nolo contendere under Rule 11 of the Federal Rules of Criminal Procedure to disclose to the defendant the facts and circumstances of the offense and offender characteristics, then known to the prosecuting attorney, that are relevant to the application of the sentencing guidelines. This recommendation, however, shall not be construed to confer upon the defendant any right not otherwise recognized in law."

This amendment adds commentary to §6B1.2 recommending that the prosecuting attorney disclose to the defendant the facts and circumstances of the offense and offender characteristics then known to the prosecuting attorney that are relevant to the application of the guidelines in order to encourage plea negotiations that realistically reflect probable outcomes. **The effective date of this amendment is November 1, 1993.**

496. Appendix A (Statutory Index) is amended in the second paragraph of the introduction by deleting "or an attempt" and inserting in lieu thereof ", attempt, or solicitation".

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

"16 U.S.C. § 742j-1(a)	2Q2.1",
"16 U.S.C. § 773e(a)(2), (3),(4),(6)	2A2.4",
"16 U.S.C. § 773g	2A2.4",
"16 U.S.C. § 916c	2Q2.1",
"16 U.S.C. § 916f	2Q2.1",
"16 U.S.C. § 973c(a)(8), (10),(11),(12)	2A2.4",

"16 U.S.C. § 973e	2A2.4",
"16 U.S.C. § 1417(a)(5),(6), (b)(2)	2A2.4",
"16 U.S.C. § 3606	2A2.4",
"16 U.S.C. § 3637(a)(2), (3),(4),(6),(c)	2A2.4",
"16 U.S.C. § 4223	2Q2.1",
"16 U.S.C. § 4224	2Q2.1",
"16 U.S.C. § 4910(a)	2Q2.1",
"16 U.S.C. § 4912(a)(2)(A)	2Q2.1",
"16 U.S.C. § 5009(5),(6), (7),(8)	2A2.4",
"16 U.S.C. § 5010(b)	2A2.4",
"18 U.S.C. § 43	2B1.3",
"18 U.S.C. § 228	2J1.1",
"18 U.S.C. § 924(h)	2K2.1",
"18 U.S.C. § 2119	2B3.1",
"18 U.S.C. § 2322	2B6.1",
"22 U.S.C. § 2197(n)	2F1.1",
"26 U.S.C. § 7208	2F1.1",
"26 U.S.C. § 7212(a) (omnibus clause)	2J1.2, 2T1.1",
"26 U.S.C. § 7232	2F1.1",
"29 U.S.C. § 530	2B3.2",
"29 U.S.C. § 1131	2E5.3",
"30 U.S.C. § 1461(a)(3), (4),(5),(7)	2A2.4",
"30 U.S.C. § 1463	2A2.4",
"42 U.S.C. § 1973gg-10	2H2.1",
"42 U.S.C. § 9151(2),(3), (4),(5),	2A2.4",
"42 U.S.C. § 9152(d)	2A2.4",
"46 U.S.C. App. § 1707a (f)(2)	2B1.1",
"49 U.S.C. App. § 1687(g)	2B1.3".

Appendix A (Statutory Index) is amended by deleting:

"7 U.S.C. § 13(a)	2B1.1
7 U.S.C. § 13(b)	2F1.1
7 U.S.C. § 13(c)	2F1.1
7 U.S.C. § 13(e)	2F1.2",

and inserting in lieu thereof:

"7 U.S.C. § 13(a)(1)	2B1.1
7 U.S.C. § 13(a)(2)	2F1.1
7 U.S.C. § 13(a)(3)	2F1.1
7 U.S.C. § 13(a)(4)	2F1.1
7 U.S.C. § 13(c)	2C1.3
7 U.S.C. § 13(d)	2F1.2
7 U.S.C. § 13(f)	2F1.2";

in the lines referenced to 15 U.S.C. §§ 1172, 1173, 1174, 1175, and 1176 by deleting "2E3.3" and inserting in lieu thereof "2E3.1";

in the lines referenced to 16 U.S.C. §§ 1029 and 1030 by deleting "2A2.2, 2A2.3, 2Q2.1" and inserting in lieu thereof "2A2.4";

in the line referenced to 16 U.S.C. § 1857(1)(D) by deleting "2A2.3" and inserting in lieu thereof "2A2.4";

in the line referenced to 16 U.S.C. § 1857(1)(E) by deleting "2A2.2, 2A2.3" and inserting in lieu thereof "2A2.4";

in the line referenced to 16 U.S.C. § 1857(1)(F) by deleting "2A2.3" and inserting in lieu thereof "2A2.4";

in the line referenced to 16 U.S.C. § 1857(1)(H) by deleting "2A2.2, 2A2.3" and inserting in lieu thereof "2A2.4";

by deleting:

"16 U.S.C. § 1857(2) 2Q2.1";

in the line referenced to 16 U.S.C. § 1859 by deleting "2A2.2, 2A2.3, 2Q2.1" and inserting in lieu thereof "2A2.4";

in the line referenced to 16 U.S.C. § 2435(4) by deleting "2A2.3" and inserting in lieu thereof "2A2.4";

in the lines referenced to 16 U.S.C. §§ 2435(5), 2435(6), 2435(7), and 2438 by deleting "2A2.2, 2A2.3" and inserting in lieu thereof "2A2.4";

in the line referenced to 18 U.S.C. § 32(a),(b) by deleting "2A1.1-2A2.3" and inserting in lieu thereof "2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3".

in the lines referenced to 18 U.S.C. §§ 201(b)(3) and 201(b)(4) by deleting "2J1.8" and inserting in lieu thereof "2J1.3";

in the lines referenced to 18 U.S.C. §§ 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 488, 493, 494, 497, 498, 499, 500, 502, 503, 505, 506, 507, 508, 509, 510, and 513 by deleting "2B5.2" and inserting in lieu thereof "2F1.1";

in the lines referenced to 18 U.S.C. §§ 553(a)(1) and 553(a)(2) by deleting "2B1.2" and inserting in lieu thereof "2B1.1";

in the line referenced to 18 U.S.C. § 641 by deleting ", 2B1.2";

in the line referenced to 18 U.S.C. § 642 by deleting "2B5.2" and inserting in lieu thereof "2F1.1";

in the line referenced to 18 U.S.C. § 659 by deleting ", 2B1.2";

in the line referenced to 18 U.S.C. § 662 by deleting "2B1.2" and inserting in lieu thereof "2B1.1";

in the line referenced to 18 U.S.C. § 664 by deleting "2E5.2" and inserting in lieu thereof "2B1.1";

in the line referenced to 18 U.S.C. § 666(a)(1)(C) by deleting "18 U.S.C. § 666(a)(1)(C)" and inserting in lieu thereof "18 U.S.C. § 666(a)(2)";

in the line referenced to 18 U.S.C. § 667 by deleting ", 2B1.2";

in the line referenced to 18 U.S.C. § 798 by deleting ", 2M3.6";

in the line referenced to 18 U.S.C. § 842(j) by deleting "2K1.2" and inserting in lieu thereof "2K1.1";

in the line referenced to 18 U.S.C. § 844(h) by deleting "2K1.4 (offenses committed prior to November 18, 1988), 2K1.6, 2K1.7" and inserting in lieu thereof "2K2.4 (2K1.4 for offenses committed prior to November 18, 1988)";

in the lines referenced to 18 U.S.C. §§ 1003 and 1010 by deleting "2B5.2,";

in the line referenced to 18 U.S.C. § 1024 by deleting "2B1.2" and inserting in lieu thereof "2B1.1";

in the line referenced to 18 U.S.C. § 1028 by deleting ", 2L2.3, 2L2.4";

in the line referenced to 18 U.S.C. § 1082 by deleting "2E3.3" and inserting in lieu thereof "2E3.1";

in the line referenced to 18 U.S.C. § 1084 by deleting "2E3.2" and inserting in lieu thereof "2E3.1";

in the line referenced to 18 U.S.C. § 1153 by deleting "2B2.2,";

in the line referenced to 18 U.S.C. § 1163 by deleting ", 2B1.2";

in the lines referenced to 18 U.S.C. §§ 1301, 1302, 1303, 1304, 1306, and 1511 by deleting "2E3.3" and inserting in lieu thereof "2E3.1";

in the line referenced to 18 U.S.C. § 1541 by deleting "2L2.3" and inserting in lieu thereof "2L2.1";

in the lines referenced to 18 U.S.C. §§ 1542, 1543, and 1544 by deleting "2L2.3, 2L2.4" and inserting in lieu thereof "2L2.1, 2L2.2";

in the line referenced to 18 U.S.C. § 1704 by deleting "2B5.2,";

in the line referenced to 18 U.S.C. § 1708 by deleting "2B1.2,";

in the line referenced to 18 U.S.C. § 1716C by deleting "2B5.2" and inserting in lieu thereof "2F1.1";

in the lines referenced to 18 U.S.C. §§ 1852 and 1854 by deleting "2B1.2,";

in the line referenced to 18 U.S.C. § 1951 by deleting "2E1.5" and inserting in lieu thereof "2B3.1, 2B3.2, 2B3.3, 2C1.1";

in the line referenced to 18 U.S.C. § 1953 by deleting "2E3.3" and inserting in lieu thereof "2E3.1";

in the line referenced to 18 U.S.C. § 2113(a) by deleting "2B2.2" and inserting in lieu thereof "2B2.1";

in the line referenced to 18 U.S.C. § 2113(c) by deleting ", 2B1.2";

in the lines referenced to 18 U.S.C. §§ 2115, 2116, 2117, and 2118(b) by deleting "2B2.2" and inserting in lieu thereof "2B2.1";

in the line referenced to 18 U.S.C. § 2154 by deleting "2M2.2" and inserting in lieu thereof "2M2.1";

in the line referenced to 18 U.S.C. § 2156 by deleting "2M2.4" and inserting in lieu thereof "2M2.3";

in the line referenced to 18 U.S.C. § 2197 by deleting "2B5.2,";

in the line referenced to 18 U.S.C. § 2276 by deleting "2B2.2" and inserting in lieu thereof "2B2.1";

in the lines referenced to 18 U.S.C. §§ 2312 and 2313 by deleting ", 2B1.2";

in the lines referenced to 18 U.S.C. §§ 2314 and 2315 by deleting "2B1.2, 2B5.2,";

in the lines referenced to 18 U.S.C. §§ 2316 and 2317 by deleting ", 2B1.2";

in the lines referenced to 18 U.S.C. §§ 2318 and 2320 by deleting "2B5.4" and inserting in lieu thereof "2B5.3";

in the line referenced to 20 U.S.C. § 1097(a) by deleting "2B5.2,";

by deleting:

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

and inserting in lieu thereof:

"21 U.S.C. § 842(a)(2),(9),(10)	2D3.2";
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in the line referenced to 21 U.S.C. § 846 by deleting ", 2D3.3, 2D3.4, 2D3.5";

in the lines referenced to 21 U.S.C. §§ 954 and 961 by deleting "2D3.4" and inserting in lieu thereof "2D3.2";

in the line referenced to 21 U.S.C. § 963 by deleting ", 2D3.3, 2D3.4, 2D3.5";

in the line referenced to 22 U.S.C. § 4221 by deleting "2B5.2" and inserting in lieu thereof "2F1.1";

in the line referenced to 26 U.S.C. § 7203 by deleting "2T1.2" and inserting in lieu thereof "2T1.1";

in the line referenced to 26 U.S.C. § 7206(1),(3),(4),(5) by deleting "2T1.3" and inserting in lieu thereof "2S1.3, 2T1.1";

in the line referenced to 26 U.S.C. § 7206(2) by inserting "2S1.3," immediately before "2T1.4";

in the line referenced to 26 U.S.C. § 7207 by deleting "2T1.5" and inserting in lieu thereof "2T1.1";

in the line referenced to 26 U.S.C. § 7211 by deleting "2T1.3" and inserting in lieu thereof "2T1.1";

in the line referenced to 26 U.S.C. § 7212(a) by deleting "2A2.2, 2A2.3" and inserting in lieu thereof "2A2.4";

in the line referenced to 29 U.S.C. § 186 by deleting "2E5.6" and inserting in lieu thereof "2E5.1";

in the lines referenced to 29 U.S.C. §§ 431, 432, 433, 439, and 461 by deleting "2E5.5" and inserting in lieu thereof "2E5.3";

in the line referenced to 29 U.S.C. § 501(c) by deleting "2E5.4" and inserting in lieu thereof "2B1.1";

in the line referenced to 31 U.S.C. § 5316 by deleting "2S1.4" and inserting in lieu thereof "2S1.3";

in the line referenced to 31 U.S.C. § 5322 by deleting ", 2S1.4";

in the line referenced to 33 U.S.C. § 1232(b)(2) by deleting "2A2.2, 2A2.3" and inserting in lieu thereof "2A2.4";

in the line referenced to 33 U.S.C. § 1415(b) by inserting "§2Q1.2," immediately before "2Q1.3";

in the line referenced to 46 U.S.C. § 3718(b) by deleting "2K3.1" and inserting in lieu thereof "2Q1.2";

in the lines referenced to 49 U.S.C. §§ 1472(h)(2) and 1809(b) by deleting "2K3.1" and inserting in lieu thereof "2Q1.2";

in the line referenced to 50 U.S.C. § 783(b) by deleting "2M3.7" and inserting in lieu thereof "2M3.3";
and

in the line referenced to 50 U.S.C. § 783(c) by deleting "2M3.8" and inserting in lieu thereof "2M3.3".

The Commentary to §2J1.1 captioned "Statutory Provision" is amended by deleting "Provision: 18 U.S.C. § 401" and inserting lieu thereof "Provisions: 18 U.S.C. §§ 401, 228".

The Commentary to §2J1.1 captioned "Application Note" is amended in the caption by deleting "Note" and inserting lieu thereof "Notes"; and by inserting the following additional note:

- "2. For offenses involving the willful failure to pay court-ordered child support (violations of 18 U.S.C. § 228), the most analogous guideline is §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). The amount of the loss is the amount of child support that the defendant willfully failed to pay. Note: This guideline applies to second and subsequent offenses under 18 U.S.C. § 228. A first offense under 18 U.S.C. § 228 is not covered by this guideline because it is a Class B misdemeanor."

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

"Offense guidelines that expressly cover attempts include: §2A2.1 (Assault With Intent to Commit Murder; Attempted Murder); §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse); §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts); §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts); §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact); §2A4.2 (Demanding or Receiving Ransom Money); §2A5.1 (Aircraft Piracy or Attempted Aircraft Piracy); §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right); §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking, Including Possession with Intent to Commit These Offenses; Attempt or Conspiracy); §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy); §2D1.5 (Continuing Criminal Enterprise; Attempt or Conspiracy); §2D1.6 (Use of Communication Facility in Committing Drug Offense; Attempt or Conspiracy); §2D1.7 (Unlawful Sale or Transportation of Drug Paraphernalia; Attempt or Conspiracy); §2D1.8 (Renting or Managing a Drug Establishment; Attempt or Conspiracy); §2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy); §2D1.10 (Endangering Human Life While Illegally Manufacturing a Controlled Substance; Attempt or Conspiracy); §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy); §2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment; Attempt or Conspiracy); §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; Attempt or Conspiracy); §2D2.1 (Unlawful Possession; Attempt or Conspiracy); §2D2.2 (Acquiring a Controlled Substance by Forgery, Fraud, Deception, or Subterfuge; Attempt or Conspiracy); §2D3.1 (Illegal Use of Registration Number to Manufacture, Distribute, Acquire, or Dispense a Controlled Substance; Attempt or Conspiracy); §2D3.2 (Manufacture of Controlled Substance in Excess of or Unauthorized by Registration Quota; Attempt or Conspiracy); §2D3.3 (Illegal Use of Registration Number to Distribute or Dispense a Controlled Substance to Another Registrant or Authorized Person; Attempt or Conspiracy); §2D3.4 (Illegal Transfer or Transshipment of a Controlled Substance; Attempt or Conspiracy); and §2D3.5 (Violation of Recordkeeping or Reporting Requirements for Listed Chemicals and Certain Machines; Attempt or Conspiracy); §2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan); §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Serious Injury); §2Q1.4 (Tampering or Attempted Tampering with Public Water System).

Offense guidelines that expressly cover conspiracies include: §2A1.5 (Conspiracy or Solicitation to Commit Murder); §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking, Including Possession with Intent to Commit These Offenses; Attempt or Conspiracy); §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy); §2D1.5 (Continuing Criminal Enterprise; Attempt or Conspiracy); §2D1.6 (Use of Communication Facility in Committing Drug Offense; Attempt or Conspiracy); §2D1.7 (Unlawful Sale or Transportation of Drug Paraphernalia; Attempt or

Conspiracy); §2D1.8 (Renting or Managing a Drug Establishment; Attempt or Conspiracy); §2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy); §2D1.10 (Endangering Human Life While Illegally Manufacturing a Controlled Substance; Attempt or Conspiracy); §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy); §2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment; Attempt or Conspiracy); §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; Attempt or Conspiracy); §2D2.1 (Unlawful Possession; Attempt or Conspiracy); §2D2.2 (Acquiring a Controlled Substance by Forgery, Fraud, Deception, or Subterfuge; Attempt or Conspiracy); §2D3.1 (Illegal Use of Registration Number to Manufacture, Distribute, Acquire, or Dispense a Controlled Substance; Attempt or Conspiracy); §2D3.2 (Manufacture of Controlled Substance in Excess of or Unauthorized by Registration Quota; Attempt or Conspiracy); §2D3.3 (Illegal Use of Registration Number to Distribute or Dispense a Controlled Substance to Another Registrant or Authorized Person; Attempt or Conspiracy); §2D3.4 (Illegal Transfer or Transshipment of a Controlled Substance; Attempt or Conspiracy); and §2D3.5 (Violation of Recordkeeping or Reporting Requirements for Listed Chemicals and Certain Machines; Attempt or Conspiracy); §2H1.1 (Conspiracy to Interfere with Civil Rights; Going in Disguise to Deprive of Rights); §2T1.9 (Conspiracy to Impair, Impede or Defeat Tax).

Offense guidelines that expressly cover solicitations include: §2A1.5 (Conspiracy or Solicitation to Commit Murder); §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right); §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); §2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan).",

and inserting in lieu thereof:

"Offense guidelines that expressly cover attempts include:

§§2A2.1, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A4.2, 2A5.1;
 §§2C1.1, 2C1.2;
 §§2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13,
 2D2.1, 2D2.2, 2D3.1, 2D3.2;
 §2E5.1;
 §2N1.1;
 §2Q1.4.

Offense guidelines that expressly cover conspiracies include:

§2A1.5;
 §§2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13,
 2D2.1, 2D2.2, 2D3.1, 2D3.2;
 §2H1.1;
 §2T1.9.

Offense guidelines that expressly cover solicitations include:

§2A1.5;
 §§2C1.1, 2C1.2;
 §2E5.1."

The Commentary to §2X3.1 captioned "Application Notes" is amended in Note 1 in the second sentence by deleting "Note 1" and inserting in lieu thereof "Note 10".

The Commentary to §2X4.1 captioned "Application Notes" is amended in Note 1 in the second sentence by deleting "Note 1" and inserting in lieu thereof "Note 10".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 6 by inserting "; Bribery of Witness" immediately following "of Perjury"; by deleting "§2J1.8 (Bribery of Witness, or §2J1.9 (Payment to Witness))" and inserting in lieu thereof "§2J1.9 (Payment to Witness), §2X3.1 (Accessory After the Fact), or §2X4.1 (Misprision of Felony)"; and by deleting "or prosecution" and inserting in lieu thereof ", prosecution, or sentencing".

Section 3D1.2(d) is amended in the second paragraph by deleting "2B1.2,", "2B5.2,", "2B5.4,", "2E5.2, 2E5.4, 2E5.6", ", 2L2.3", and "2T1.2, 2T1.3,"; and in the third paragraph by deleting "2B2.2,", "2E1.5,", "2L2.4,", and "2M3.6, 2M3.7, 2M3.8,".

Section 8C2.1(a) is amended by deleting "2B1.2,", "2B5.4,", ", 2D3.4", "2E3.2, 2E3.3,", "2E5.2,", ", 2E5.4, 2E5.5, 2E5.6", "2K1.2,", ", 2S1.4", "2T1.2, 2T1.3," and "2T1.5,".

The Commentary to §8C2.4 captioned "Application Notes" is amended in Note 5 by inserting "; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations" immediately following "Plan"; and by deleting "§2S1.3 (Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements); and §2S1.4 (Failure to File Currency and Monetary Instrument Report)" and inserting in lieu thereof "and §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports)".

This amendment makes Appendix A more comprehensive, conforms it to the consolidation of offense guidelines under amendments 481, 490, and 491, and deletes references to several Class B and C misdemeanor offenses to which the guidelines do not apply. In addition, this amendment conforms §3D1.2(d), §8C2.1, and the Commentary to §§2X1.1, 3C1.1, and 8C2.4 to the consolidation of offense guidelines under amendments 481, 490, and 491. In addition, this amendment reformats the Commentary to 2X1.1 for ease in application; corrects an omission in the second paragraph of the Introduction to Appendix A; revises Application Note 6 of the Commentary to §3C1.1 to make the listing of offense guidelines more comprehensive and correct the omission of a reference to the sentencing of the instant offense; and revises a reference in the Commentary to §§2X3.1 and 2X4.1 to conform to a previous revision in the referenced provision. **The effective date of this amendment is November 1, 1993.**

497. The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 4 by inserting the following additional paragraph as the second paragraph:

"Absent an instruction to the contrary, the adjustments from different guideline sections are applied cumulatively (added together). For example, the adjustments from §2F1.1(b)(2) (more than minimal planning) and §3B1.1 (aggravating role) are applied cumulatively."

This amendment clarifies the Commission's intent that, absent an instruction to the contrary, adjustments from different guideline sections are to be applied cumulatively. **The effective date of this amendment is November 1, 1993.**

498. The Commentary to §1B1.7 is amended by deleting the second paragraph as follows:

" In stating that failure to follow certain commentary 'could constitute an incorrect application of the guidelines,' the Commission simply means that in seeking to understand the meaning of the guidelines courts likely will look to the commentary for guidance as an indication of the intent of those who wrote them. In such instances, the courts will treat the commentary much like legislative history or other legal material that helps determine the intent of a drafter."

and inserting in lieu thereof:

" [C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a

plainly erroneous reading of, that guideline.’ Stinson v. United States, 113 S. Ct. 1913, 1915 (1993).”.

This amendment revises the commentary to this section to reflect the decision of the Supreme Court in Stinson v. United States, 113 S. Ct. 1913, 1915 (1993). **The effective date of this amendment is November 1, 1993.**

499. The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" in the subdivision captioned "LSD, PCP, and other Schedule I and II Hallucinogens" by deleting:

"Phencyclohexamine (PCE) = 5.79 kg of marihuana"

and inserting in lieu thereof:

"N-ethyl-1-phenylcyclohexylamine (PCE)= 1 kg of marihuana".

This amendment revises the equivalency for PCE to reflect a reassessment of the potency of this controlled substance by the Drug Enforcement Administration. In addition, this amendment corrects an error in the scientific name for this controlled substance. **The effective date of this amendment is November 1, 1993.**

500. The Commentary to §3B1.1 captioned "Application Notes" is amended by renumbering Notes 2 and 3 as 3 and 4, respectively; and by inserting the following additional note:

"2. To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.”.

This amendment clarifies the operation of this section to resolve a split among the courts of appeal. Compare United States v. Carroll, 893 F.2d 1502 (6th Cir. 1990) (requiring degree of control over other persons for §3B1.1 to apply); United States v. Fuller, 897 F.2d 1217 (1st Cir. 1990) (same); United States v. Mares-Molina, 913 F.2d 770 (9th Cir. 1990) (same) and United States v. Fuentes, 954 F.2d 151 (3d Cir.) (same), cert. denied, 112 S.Ct. 2950 (1992) with United States v. Chambers, 985 F.2d 1263 (4th Cir.) (defendant may be a "manager" even though he did not directly supervise other persons), petition for cert. filed, No. 92-8737 (U.S. May 17, 1993). **The effective date of this amendment is November 1, 1993.**

501. The Commentary to §5E1.1 captioned "Background" is amended in the second paragraph by inserting the following additional sentence as the first sentence:

"A court’s authority to decline to order restitution is limited.”;

by inserting, immediately after "18 U.S.C. § 3663(d).", the following:

"The legislative history of 18 U.S.C. § 3579, the precursor of 18 U.S.C. § 3663, states that even ‘[i]n those unusual cases where the precise amount owed is difficult to determine, the section authorizes the court to reach an expeditious, reasonable determination of appropriate restitution by resolving uncertainties with a view toward achieving fairness to the victim.’ S. Rep. No. 532, 97th Cong., 2d Sess. 31, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, 2537.”;

and by inserting the following additional sentence as the last sentence:

"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)."

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

" A court's authority to deny restitution is limited. Even 'in those unusual cases where the precise amount owed is difficult to determine, section 3579(d) authorizes the court to reach an expeditious, reasonable determination of appropriate restitution by resolving uncertainties with a view toward achieving fairness to the victim.' S. Rep. No. 532, 97th Cong., 2d Sess. 31, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, 2537.;"

and by deleting the seventh paragraph as follows:

" 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 updates the background commentary of §5E1.1 to reflect the redesignation of 18 U.S.C. § 3579 as 18 U.S.C. § 3663. In addition, it moves material from the fifth and seventh paragraphs to the second paragraph to enhance clarity. **The effective date of this amendment is November 1, 1993.**

502. Section 1B1.10(d) is amended by deleting "and 461" and inserting in lieu thereof "454, 461, 484, 488, 490, and 499".

This amendment expands the listing in §1B1.10(d) to implement the directive in 28 U.S.C. § 994(u) in respect to guideline amendments that may be considered for retroactive application. **The effective date of this amendment is November 1, 1993.**

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

"A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (e.g., in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted."

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 9(B) by deleting "and the time interval between the offenses" and inserting in lieu thereof:

", the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity".

This amendment clarifies the operation of §1B1.3 with respect to the defendant's accountability for the actions of other conspirators prior to the defendant joining the conspiracy. The amendment is in accord with the rule stated in recent caselaw. See, e.g., United States v. Carreon, 11 F.3d 1225 (5th Cir. 1994); United States v. Petty, 982 F.2d 1374, 1377 (9th Cir. 1993); United States v. O'Campo, 973 F.2d 1015, 1026 (1st Cir. 1992). Cf. United States v. Miranda-Ortiz, 926 F.2d 172, 178 (2d Cir. 1991); United States v. Edwards, 945 F.2d 1387, 1393 (7th Cir. 1991) (applying earlier versions of §1B1.3). In addition, this amendment adds a well-phrased formulation, developed by the Ninth Circuit in United

States v. Hahn, 960 F.2d 903 (9th Cir. 1992), addressing the circumstances in which multiple acts constitute the "same course of conduct." **The effective date of this amendment is November 1, 1994.**

504. Section 1B1.10(a) is amended by deleting "guidelines" and inserting in lieu thereof "Guidelines Manual"; by deleting "may be considered" and inserting in lieu thereof "is authorized"; by inserting "and thus is not authorized" immediately following "policy statement"; and by deleting "subsection (d)" wherever it appears and inserting in lieu thereof in each instance "subsection (c)".

Section 1B1.10(b) is amended by inserting ", and to what extent," immediately before "a reduction"; and by deleting:

"originally imposed had the guidelines, as amended, been in effect at that time",

and inserting in lieu thereof:

"imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced".

Section 1B1.10 is amended by deleting:

"(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.";

and by redesignating subsection (d) as subsection (c).

Section 1B1.10(c)(formerly subsection (d)) is amended by inserting "371," immediately before "379"; and by deleting "and 499" and inserting in lieu thereof "499, and 506".

The Commentary to §1B1.10 captioned "Application Note" is amended by deleting "Note" and inserting in lieu thereof "Notes"; and by deleting:

"1. Although eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) of this section, the amended guideline range referred to in subsections (b) and (c) of this section is to be determined by applying all amendments to the guidelines (i.e., as if the defendant was being sentenced under the guidelines currently in effect).",

and inserting in lieu thereof:

- "1. Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range.
2. In determining the amended guideline range under subsection (b), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected."

The Commentary to §1B1.10 captioned "Background" is amended in the third paragraph by deleting "subsection (d)" and inserting in lieu thereof "subsection (c)".

This amendment simplifies the operation of §1B1.10 by providing that, in determining an amended guideline range, the court will use only those amendments expressly designated as retroactive. In addition, this amendment deletes §1B1.10(c), a rather complex subsection, as an unnecessary restriction on the court's consideration of a revised sentence, redesignates §1B1.10(d) as §1B1.10(c), and makes a number of minor clarifying revisions. This amendment also expands the listing in §1B1.10(c)

(formerly §1B1.10(d)) to implement the directive in 28 U.S.C. § 994(u) with respect to guideline amendments that may be considered for retroactive application. **The effective date of this amendment is November 1, 1994.**

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

- "(1) 300 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 42
1500 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
15 KG or more of Cocaine Base;
300 KG or more of PCP, or 30 KG or more of PCP (actual);
300 KG or more of Methamphetamine, or 30 KG or more of Methamphetamine (actual), or 30 KG or more of "Ice";
3 KG or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
120 KG or more of Fentanyl;
30 KG or more of a Fentanyl Analogue;
300,000 KG or more of Marihuana;
60,000 KG or more of Hashish;
6,000 KG or more of Hashish Oil.
- (2) At least 100 KG but less than 300 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 40
At least 500 KG but less than 1500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 5 KG but less than 15 KG of Cocaine Base;
At least 100 KG but less than 300 KG of PCP, or at least 10 KG but less than 30 KG of PCP (actual);
At least 100 KG but less than 300 KG of Methamphetamine, or at least 10 KG but less than 30 KG of Methamphetamine (actual), or at least 10 KG but less than 30 KG of "Ice";
At least 1 KG but less than 3 KG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 40 KG but less than 120 KG of Fentanyl;
At least 10 KG but less than 30 KG of a Fentanyl Analogue;
At least 100,000 KG but less than 300,000 KG of Marihuana;
At least 20,000 KG but less than 60,000 KG of Hashish;
At least 2,000 KG but less than 6,000 KG of Hashish Oil.
- (3) At least 30 KG but less than 100 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 38
At least 150 KG but less than 500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 1.5 KG but less than 5 KG of Cocaine Base;
At least 30 KG but less than 100 KG of PCP, or at least 3 KG but less than 10 KG of PCP (actual);
At least 30 KG but less than 100 KG of Methamphetamine, or at least 3 KG but less than 10 KG of Methamphetamine (actual), or at least 3 KG but less than 10 KG of "Ice";
At least 300 G but less than 1 KG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 12 KG but less than 40 KG of Fentanyl;
At least 3 KG but less than 10 KG of a Fentanyl Analogue;
At least 30,000 KG but less than 100,000 KG of Marihuana;
At least 6,000 KG but less than 20,000 KG of Hashish;
At least 600 KG but less than 2,000 KG of Hashish Oil."

and inserting in lieu thereof:

<p>"(1) 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); 150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); 1.5 KG or more of Cocaine Base; 30 KG or more of PCP, or 3 KG or more of PCP (actual); 30 KG or more of Methamphetamine, or 3 KG or more of Methamphetamine (actual), or 3 KG or more of 'Ice'; 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); 12 KG or more of Fentanyl; 3 KG or more of a Fentanyl Analogue; 30,000 KG or more of Marihuana; 6,000 KG or more of Hashish; 600 KG or more of Hashish Oil.";</p>	<p>Level 38</p>
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and by renumbering subdivisions 4-19 as 2-17, respectively.

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 14 by deleting "860(b)(4)" and inserting in lieu thereof "960(b)(4)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 16 by deleting "40" and inserting in lieu thereof "38"; by deleting "35" wherever it appears and inserting in lieu thereof in each instance "33"; and by deleting "4 levels" and inserting in lieu thereof "2 levels".

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

"19. In an extraordinary case, an upward departure above offense level 38 on the basis of drug quantity may be warranted. For example, an upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level 38."

The Commentary to §2D1.6 captioned "Application Note" is amended in Note 1 by deleting "(§2D1.1(c)(16))" and inserting in lieu thereof "(§2D1.1(c)(14))"; and by deleting "(§2D1.1(c)(19))" and inserting in lieu thereof "(§2D1.1(c)(17))".

This amendment sets the upper limit of the Drug Quantity Table in §2D1.1 at level 38. The Commission has determined that the extension of the Drug Quantity Table above level 38 for quantity itself is not required to ensure adequate punishment given that organizers, leaders, managers, and supervisors of such offenses will receive a 4-, 3-, or 2-level enhancement for their role in the offense, and any participant will receive an additional 2-level enhancement if a dangerous weapon is possessed in the offense. The Commission, however, has not foreclosed the possibility of an upward departure above offense level 38 on the basis of drug quantity in an extraordinary case. In addition, this amendment corrects a typographical error in a statutory reference. **The effective date of this amendment is November 1, 1994.**

506. The Commentary to §4B1.1 captioned "Application Notes" is amended in Note 2 by deleting:

"'Offense Statutory Maximum' refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense.",

and inserting in lieu thereof:

"'Offense Statutory Maximum,' for the purposes of this guideline, refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), (b)(1)(C), and (b)(1)(D)). For example, where the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the 'Offense Statutory Maximum' for the purposes of this guideline is twenty years and not thirty years."

This amendment defines the term "offense statutory maximum" in §4B1.1 to mean the statutory maximum prior to any enhancement based on prior criminal record (i.e., an enhancement of the statutory maximum sentence that itself was based upon the defendant's prior criminal record will not be used in determining the alternative offense level under this guideline). This rule avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions. It is noted that when the instruction to the Commission that underlies §4B1.1 (28 U.S.C. § 994(h)) was enacted by the Congress in 1984, the enhanced maximum sentences provided for recidivist drug offenders (e.g., under 21 U.S.C. § 841) did not exist. **The effective date of this amendment is November 1, 1994.**

507. The Commentary to §5G1.2 is amended in the fourth paragraph by deleting "3D1.2" and inserting in lieu thereof "3D1.1"; and by inserting the following additional sentences at the end:

"Note, however, that even in the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. See 18 U.S.C. § 3624(e)."

This amendment revises the Commentary to §5G1.2 to clarify that the Commission's interpretation is that 18 U.S.C. § 3624(e) requires multiple terms of supervised release to run concurrently in all cases. This interpretation is in accord with the view stated in United States v. Gullickson, 982 F.2d 1231, 1236 (8th Cir. 1993). In contrast, two courts of appeals have cited the current commentary as supporting the view that, notwithstanding the language in 18 U.S.C. § 3624(e) stating that terms of supervised release run concurrently, a court may order that supervised release terms run consecutively under certain circumstances. See United States v. Shorthouse, 7 F.3d 149 (9th Cir. 1993); United States v. Maxwell, 966 F.2d 545, 551 (10th Cir. 1992). **The effective date of this amendment is November 1, 1994.**

508. The Introductory Commentary to Chapter Five, Part H, is amended in the second paragraph by inserting the following additional sentences at the end:

"Furthermore, although these factors are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases. See §5K2.0 (Grounds for Departure)."

Section 5K2.0 is amended by inserting the following additional paragraph as the fourth paragraph:

"An offender characteristic or other circumstance that is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing."

Section 5K2.0 is amended by inserting the following commentary at the end:

"Commentary

The last paragraph of this policy statement sets forth the conditions under which an offender characteristic or other circumstance that is not ordinarily relevant to a departure from