

defendant 'would be otherwise accountable' also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant. Because a count may be broadly worded and include the conduct of many participants over a substantial period of time, the scope of the jointly-undertaken criminal activity, and hence relevant conduct, is not necessarily the same for every participant. Where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant's offense level under this guideline.

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

Illustrations of Conduct for Which the Defendant is Accountable

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

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

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

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

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

Defendants H or I if those acts were beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity he agreed to jointly undertake with Defendants H and I (i.e., the importation of the single shipment of marijuana).",

and inserting in lieu thereof:

- "1. The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.
2. A 'jointly undertaken criminal activity' is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both:

- (i) in furtherance of the jointly undertaken criminal activity; and
- (ii) reasonably foreseeable in connection with that criminal activity.

Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the 'jointly undertaken criminal activity') is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement). The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement), the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.

The requirement of reasonable foreseeability applies only in respect to the conduct (*i.e.*, acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

Illustrations of Conduct for Which the Defendant is Accountable

(a) Acts and omissions aided or abetted by the defendant

- (1) Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (*i.e.*, the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.

In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B) (applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity (the scope of which was the importation of the shipment of marihuana). A finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.

(b) Acts and omissions aided or abetted by the defendant; requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable

- (1) Defendant C is the getaway driver in an armed bank robbery in which \$15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature

of the offense).

As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).

- (c) Requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable; scope of the criminal activity
- (1) Defendant D pays Defendant E a small amount to forge an endorsement on an \$800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain \$15,000 worth of merchandise. Defendant E is convicted of forging the \$800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the \$15,000 because the fraudulent scheme to obtain \$15,000 was not in furtherance of the criminal activity he jointly undertook with Defendant D (i.e., the forgery of the \$800 check).
 - (2) Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$20,000. Defendant G fraudulently obtains \$35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount (\$55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable in connection with that criminal activity.
 - (3) Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. Defendant J is accountable for the entire single shipment of marihuana he helped import under subsection (a)(1)(A) and any acts and omissions in furtherance of the importation of that shipment that were reasonably foreseeable (see the discussion in example (a)(1) above). He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I because those acts were not in furtherance of his jointly undertaken criminal activity (the importation of the single shipment of marihuana).
 - (4) Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count

charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because the scope of his jointly undertaken criminal activity is limited to that amount. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.

- (5) Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not in furtherance of her jointly undertaken criminal activity (*i.e.*, the one delivery).
- (6) Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity.
- (7) Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R.
- (8) Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity. In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be

accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, in cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities."

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 3 (formerly Note 2) by deleting the first sentence as follows:

"Such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction,' as used in subsection (a)(2), refers to acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that were part of the same course of conduct or common scheme or plan as the offense of conviction."

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 6 (formerly Note 5) in the first paragraph by deleting:

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

and inserting in lieu thereof:

"For example, in §2S1.1, subsection (a)(1) applies if the defendant 'is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A).'",

and in the second paragraph by deleting:

"For example, §2K1.5(b)(1) (which is applicable only if the defendant is convicted under 49 U.S.C. § 1472(1)(2)) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) where the defendant was convicted of accessory after the fact to a violation of 49 U.S.C. § 1472(1)(2).",

and inserting in lieu thereof:

"For example, §2S1.1(a)(1) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) where the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)."

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

- "9. 'Common scheme or plan' and 'same course of conduct' are two closely-related concepts.
(A) Common scheme or plan. For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi. For example, the conduct of five defendants who together defrauded a group of investors by computer manipulations that unlawfully transferred funds over an eighteen-month period would qualify as a common scheme or plan on the basis of any of the above listed factors; i.e., the commonality of victims (the same investors were defrauded on an ongoing basis), commonality of offenders (the conduct constituted an ongoing conspiracy), commonality of purpose (to defraud the group of investors), or similarity of modus operandi (the same or similar computer manipulations

were used to execute the scheme).

(B) Same course of conduct. Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses and the time interval between the offenses. The nature of the offenses may also be a relevant consideration (e.g., a defendant's failure to file tax returns in three consecutive years appropriately would be considered as part of the same course of conduct because such returns are only required at yearly intervals).

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

This amendment clarifies and more fully illustrates the operation of this guideline. Material is moved from the commentary to the guideline itself and rephrased for greater clarity, the discussion of the application of this provision in the commentary is expanded, and additional examples are inserted. In addition, this amendment provides definitions of the terms "same course of conduct" and "common scheme or plan." Finally, this amendment conforms an example in Application Note 6 of the Commentary to a revision of a Chapter Two offense guideline. **The effective date of this amendment is November 1, 1992.**

440. Section 1B1.5 is amended by deleting:

"Unless otherwise expressly indicated, a reference to another guideline, or an instruction to apply another guideline, refers to the entire guideline, i.e., the base offense level plus all applicable specific offense characteristics and cross references."

and inserting in lieu thereof:

- "(a) A cross reference (an instruction to apply another offense guideline) refers to the entire offense guideline (i.e., the base offense level, specific offense characteristics, cross references, and special instructions).
- (b) (1) An instruction to use the offense level from another offense guideline refers to the offense level from the entire offense guideline (i.e., the base offense level, specific offense characteristics, cross references, and special instructions), except as provided in subdivision (2) below.
- (2) An instruction to use a particular subsection or table from another offense guideline refers only to the particular subsection or table referenced, and not to the entire offense guideline.
- (c) If the offense level is determined by a reference to another guideline under subsection (a) or (b)(1) above, the adjustments in Chapter Three (Adjustments) also are determined in respect to the referenced offense guideline, except as otherwise expressly provided.
- (d) A reference to another guideline under subsection (a) or (b)(1) above may direct that it be applied only if it results in the greater offense level. In such case, the greater offense level means the greater final offense level (i.e., the greater offense level taking into account both the Chapter Two offense level and any applicable Chapter Three adjustments)."

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

"are to be construed to incorporate the specific offense characteristics and cross references",
and inserting in lieu thereof:

"incorporate the specific offense characteristics, cross references, and special instructions".

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

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

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

This amendment clarifies the operation of this guideline and moves an instruction currently contained in the commentary into the guideline itself. **The effective date of this amendment is November 1, 1992.**

441. Section 1B1.8(b) is amended in subdivision (3) by deleting "or" immediately following the semicolon; in subdivision (4) by deleting the period at the end and inserting in lieu thereof "; or"; and by inserting the following additional subdivision:

"(5) in determining whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities)."

The Commentary to §1B1.8 captioned "Application Notes" is amended in Note 1 by deleting the third sentence as follows:

"Although this guideline, consistent with the general structure of these guidelines, affects only the determination of the guideline range, the policy of the Commission is that where a defendant as a result of a cooperation agreement with the government to assist in the investigation or prosecution of other offenders reveals information that implicates him in unlawful conduct not already known to the government, such defendant should not be subject to an increased sentence by virtue of that cooperation where the government agreed that the information revealed would not be used for such purpose.",

and inserting in lieu thereof:

"Although the guideline itself affects only the determination of the guideline range, the policy of the Commission, as a corollary, is that information prohibited from being used to determine the applicable guideline range shall not be used to increase the defendant's sentence above the applicable guideline range by upward departure. In contrast, subsection (b)(5) provides that consideration of such information is appropriate in determining whether, and to what extent, a downward departure is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities); e.g., a court may refuse to depart below the applicable guideline range on the basis of such information."

The Commentary to §1B1.8 captioned "Application Notes" is amended in Note 3 in the second sentence by deleting:

"is governed by the provisions of Rule 11 of the Federal Rules of Criminal Procedure and Rule 410",

and inserting in lieu thereof:

"in a sentencing proceeding is restricted by Rule 11(e)(6) (Inadmissibility of Pleas, Plea Discussions, and Related Statements) of the Federal Rules of Criminal Procedure and Rule 410 (Inadmissibility of Pleas, Plea Discussions, and Related Statements)".

The Commentary to §1B1.8 captioned "Application Notes" is amended in Note 5 in the second sentence by deleting "repeats" and inserting in lieu thereof "provides".

This amendment clarifies the operation of this guideline. Information protected by this guideline may not be used to determine the applicable guideline range. An upward departure on the basis of such information would be contrary to the Commission's policy (and, consequently, would be appealable under 18 U.S.C. § 3742(a)(2) and (3). See Williams v. United States, 112 S.Ct. 1112 (1992)). In contrast, the use of information covered by this guideline is appropriate in considering whether, and to what extent, a downward departure under §5K1.1 (Substantial Assistance to Authorities) is appropriate. In addition, this amendment makes minor editorial improvements. **The effective date of this amendment is November 1, 1992.**

442. Chapter One, Part B, is amended by inserting an additional policy statement with accompanying commentary as §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)).

This amendment inserts a policy statement addressing the use of the Guidelines Manual when the Guidelines Manual has been amended between the date the offense was committed and the date of sentencing. **The effective date of this amendment is November 1, 1992.**

443. Section 2A2.4(c)(1) is amended by deleting "defendant is convicted under 18 U.S.C. § 111 and the" immediately before "conduct".

Section 2K1.5(b)(1) is amended by deleting:

"defendant is convicted under 49 U.S.C. § 1472(1)(2) (i.e., the defendant acted willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life)",

and inserting in lieu thereof:

"offense was committed willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life".

This amendment deletes the requirement of a conviction under a specific statute for these specific offense characteristics to apply and, consistent with the overall structure of the guidelines, provides for their application on the basis of the underlying conduct. **The effective date of this amendment is November 1, 1992.**

444. Section 2A3.1 is amended in the title by deleting "or Assault with the Intent" immediately following "Attempt".

Section 2A3.1(b)(3) is amended by deleting:

"in the custody, care, or supervisory control of the defendant, was a corrections employee, or",

and by inserting in lieu thereof:

"(A) in the custody, care, or supervisory control of the defendant; or (B)".

Section 2A3.1 is amended by inserting the following additional subsection:

"(c) Special Instruction

- (1) If the offense occurred in a correctional facility and the victim was a corrections employee, the offense shall be deemed to have an official victim for purposes of subsection (a) of §3A1.2 (Official Victim)."

The Commentary to §2A3.1 captioned "Application Notes" is amended by renumbering Note 3 as Note 4; and by inserting the following additional note:

- "3. Subsection (b)(3), as it pertains to a victim in the custody, care, or supervisory control of the defendant, is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship."

Section 2A3.2 is amended by inserting the following additional subsection:

"(c) Cross Reference

- (1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse)."

The Commentary to §2A3.2 captioned "Application Notes" is amended by renumbering Note 2 as Note 3; and by inserting the following as Note 2:

- "2. Subsection (b)(1) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship."

Section 2A3.4 is amended by inserting the following additional subsection:

"(c) Cross References

- (1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).
- (2) If the offense involved criminal sexual abuse of a minor or attempt to commit criminal sexual abuse of a minor (as defined in 18 U.S.C. § 2243(a)), apply §2A3.2 (Criminal Sexual Abuse of a Minor or Attempt to Commit Such Acts), if the resulting offense level is greater than that determined above."

The Commentary to §2A3.4 captioned "Application Notes" is amended by renumbering Note 3 as Note 4; and by inserting the following as Note 3:

- "3. Subsection (b)(3) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example,

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

Section 2G1.2(c)(2) is amended by deleting "or Assault with the Intent" immediately before "to Commit Criminal Sexual Abuse".

The Commentary to §2X1.1 captioned "Application Notes" is amended in Note 1 in the second paragraph by deleting "or Assault with the Intent" immediately before "to Commit Criminal Sexual Abuse".

This amendment cross references §2A3.2 to §2A3.1, and §2A3.4 to §§2A3.1 and 2A3.2. A review of cases sentenced under these guidelines indicated that a significant proportion of cases sentenced under §2A3.2 and §2A3.4 clearly involved conduct that would more appropriately be covered under an offense guideline applicable to more serious sexual abuse cases. The addition of these cross references is designed to address this issue. In addition, this amendment removes an anomaly between §2A3.1(b)(3) and §3A1.2(a), and adds application notes to clarify the scope of §§2A3.1(b)(3), 2A3.2(b)(1), and 2A3.4(b)(3), using language derived from application notes pertaining to similar specific offense characteristics in Chapter Two, Part G. **The effective date of this amendment is November 1, 1992.**

445. The Commentary to §2A4.1 captioned "Application Notes" is amended by inserting the following additional note:

"5. In the case of a conspiracy, attempt, or solicitation to kidnap, §2X1.1 (Attempt, Solicitation, or Conspiracy) requires that the court apply any adjustment that can be determined with reasonable certainty. Therefore, for example, if an offense involved conspiracy to kidnap for the purpose of committing murder, subsection (b)(7) would reference first degree murder (resulting in an offense level of 43, subject to a possible 3-level reduction under §2X1.1(b)). Similarly, for example, if an offense involved a kidnapping during which a participant attempted to murder the victim under circumstances that would have constituted first degree murder had death occurred, the offense referenced under subsection (b)(7) would be the offense of first degree murder."

This amendment clarifies the operation of this guideline. **The effective date of this amendment is November 1, 1992.**

446. Section 2D1.1(b)(2) is amended by deleting "is convicted of violating 21 U.S.C. § 960(a)" and inserting in lieu thereof "unlawfully imported or exported a controlled substance"; and by inserting "or export" immediately following "to import".

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

"1 gm of Aminorex =	100 gm of marihuana
1 gm of Methcathinone =	380 gm of marihuana
1 gm of N-N-Dimethylamphetamine =	40 gm of marihuana";

and in the subdivision captioned "LSD, PCP, and Other Schedule I and II Hallucinogens" by inserting the following additional entry as the last entry:

"1 gm of Phenylcyclohexamine (PCE) = 5.79 kg of marihuana".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" by inserting an asterisk immediately following each of the following subdivision

captions: "Schedule I or II Opiates", "Cocaine and Other Schedule I or II Stimulants (and their immediate precursors)", and "LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)"; and by inserting the following additional sentence at the end of each of the above noted subdivisions:

*"*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12."*

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

"15. Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 C.F.R. § 1308.13-15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 C.F.R. § 1308.13-15 is the appropriate classification."

The Commentary to §2D1.1 captioned "Background" is amended in the fifth paragraph by deleting "mandated by" and inserting in lieu thereof "derived from".

This amendment deletes the requirement of a conviction under a specific statute for the specific offense characteristic in subsection (b)(2) to apply and, consistent with the overall structure of the guidelines, provides for the application of this specific offense characteristic on the basis of the underlying conduct. In addition, this amendment adds equivalencies for four controlled substances to make the Drug Equivalency Tables more comprehensive, adds notes to the Drug Equivalency Tables to make clear the interaction between the minimum offense level for certain types of controlled substances in the Drug Quantity Table and the instructions for determining a combined offense level in a case with multiple controlled substances, and clarifies the treatment of certain pharmaceutical preparations that are classified as Schedule III, IV, or V substances under 21 C.F.R. § 1308.13-15. **The effective date of this amendment is November 1, 1992.**

447. Sections 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, 2D3.3, 2D3.4, and 2D3.5 are amended in their titles by inserting at the end thereof in each instance "; Attempt or Conspiracy".

Section 2D1.4, including accompanying commentary, is deleted as follows:

"§2D1.4. Attempts and Conspiracies

- (a) Base Offense Level: If a defendant is convicted of a conspiracy or an attempt to commit any offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed.

Commentary

Statutory Provisions: 21 U.S.C. §§ 846, 963. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. If the defendant is convicted of a conspiracy that includes transactions in controlled substances in addition to those that are the subject of substantive counts of conviction, each conspiracy transaction shall be included with those of the substantive counts of

conviction to determine scale. If the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing. If the defendant is convicted of conspiracy, see Application Note 1 to §1B1.3 (Relevant Conduct).

2. Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the sentencing judge shall approximate the quantity of the controlled substance. In making this determination, the judge may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.
3. See Commentary to §2D1.1 regarding weapon possession."

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 3 by deleting "reference §2D1.1, i.e., §§2D1.2, 2D1.4, 2D1.5, 2D1.6, 2D1.7(b)(1)" and inserting in lieu thereof "are referenced to §2D1.1; see §§2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), 2D1.12(b)(1), and 2D2.1(b)(1)".

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

"If the amount seized does not reflect the scale of the offense, see Application Note 2 of the Commentary to §2D1.4. If the offense involved negotiation to traffic in a controlled substance, see Application Note 1 of the Commentary to §2D1.4.",

and inserting in lieu thereof:

"Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

If the offense involved both a substantive drug offense and an attempt or conspiracy (e.g., sale of five grams of heroin and an attempt to sell an additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the offense.

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

The Commentary to §2D1.1 captioned "Background" is amended in the fifth sentence of the fourth paragraph by deleting "(see §2D1.4)" immediately following "object of the attempt".

The Commentary to §2D1.6 captioned "Application Note" is amended in the first sentence of Note 1 by deleting "Commentary to §2D1.1, and Application Notes 1 and 2 of the Commentary to §2D1.4," and inserting in lieu thereof "Commentary to §2D1.1".

Section 2D1.11(c) is amended by deleting ", or §2D1.4 (Attempts and Conspiracies), as appropriate," immediately before "if the resulting".

Section 2D1.12(b) is amended by deleting ", or §2D1.4 (Attempts and Conspiracies), as appropriate,"

immediately before "if the resulting".

The Commentary to §2X1.1 captioned "Application Notes" is amended in Note 1 by deleting "§2D1.4 (Attempts and Conspiracies)" wherever it appears and inserting in lieu thereof in each instance:

"§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)".

This amendment clarifies and simplifies the guideline provisions dealing with attempts and conspiracies in drug cases and conforms the structure of these provisions to that of other offense guidelines that specifically address attempts and conspiracies (*i.e.*, offense guidelines referenced by §2X1.1(c)). **The effective date of this amendment is November 1, 1992.**

448. Section 2D1.8 is amended by deleting subsections (a) and (b) as follows:

- "(a) Base Offense Level: 16
- (b) Specific Offense Characteristic
 - (1) If a firearm or other dangerous weapon was possessed, increase by 2 levels.",

and inserting in lieu thereof:

- "(a) Base Offense Level:
 - (1) The offense level from §2D1.1 applicable to the underlying controlled substance offense, except as provided below.
 - (2) If the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises, the offense level shall be 4 levels less than the offense level from §2D1.1 applicable to the underlying controlled substance offense, but not greater than level 16.
- (b) Special Instruction
 - (1) If the offense level is determined under subsection (a)(2), do not apply an

adjustment under §3B1.2 (Mitigating Role)."

The Commentary to §2D1.8 captioned "Application Note" is amended by deleting Note 1 as follows:

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

and inserting in lieu thereof:

"1. Subsection (a)(2) does not apply unless the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises. For example, subsection (a)(2) would not apply to a defendant who possessed a dangerous weapon in connection with the offense, a defendant who guarded the cache of controlled substances, a defendant who arranged for the use of the premises for the purpose of facilitating a drug transaction, a defendant who allowed the use of more than one premises, a defendant who made telephone calls to facilitate the underlying controlled substance offense, or a defendant who otherwise assisted in the commission of the underlying controlled substance offense. Furthermore, subsection (a)(2) does not apply unless the defendant initially leased, rented, purchased, or otherwise acquired a possessory interest in the premises for a legitimate purpose. Finally, subsection (a)(2) does not apply if the defendant had previously allowed any premises to be used as a drug establishment without regard to whether such prior misconduct resulted in a conviction."

This amendment is designed to reduce unwarranted disparity by requiring consideration in the guideline of the scale of the underlying controlled substance offense. The amendment parallels an amendment to §2D1.6 made in 1990 (amendment 320). **The effective date of this amendment is November 1, 1992.**

449. The Commentary to §2E1.4 captioned "Background" is amended by deleting:

"The statute does not require that a murder covered by this section has been committed. The maximum term of imprisonment authorized by statute ranges from five years to life imprisonment.",

and inserting in lieu thereof:

"This guideline and the statute to which it applies do not require that a murder actually have been committed."

This amendment makes editorial improvements, and deletes a reference to the length of the maximum term of imprisonment authorized by statute for the offense covered by this section that is no longer accurate. **The effective date of this amendment is November 1, 1992.**

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

"If the defendant previously has been convicted of smuggling, transporting, or harboring an unlawful alien, or a related offense, increase by 2 levels.",

and inserting in lieu thereof:

"If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

<u>Number of Unlawful Aliens Smuggled, Transported, or Harbored</u>	<u>Increase in Level</u>
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(A)	6-24	add 2
(B)	25-99	add 4
(C)	100 or more	add 6."

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 1 by inserting the following additional sentence at the end:

"The 'number of unlawful aliens smuggled, transported, or harbored' does not include the defendant."

The Commentary to §2L1.1 captioned "Application Notes" is amended by deleting Notes 2, 3, and 4 as follows:

- "2. 'Convicted of smuggling, transporting, or harboring an unlawful alien, or a related offense' includes any conviction for smuggling, transporting, or harboring an unlawful alien, and any conviction for aiding and abetting, conspiring or attempting to commit such offense.
3. If the defendant was convicted under 8 U.S.C. § 1328, apply the applicable guideline from Part G (see Statutory Index) rather than this guideline.
4. The adjustment under §2L1.1(b)(2) for a previous conviction is in addition to any points added to the criminal history score for such conviction in Chapter Four, Part A (Criminal History). This adjustment is to be applied only if the previous conviction occurred prior to the last overt act of the instant offense.";

and by renumbering Notes 5, 6, 7, 8 and 9, as Notes 2, 3, 4, 5, and 6, respectively.

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 4 (formerly Note 7) by inserting "drug trafficking, or other serious criminal behavior," immediately following "subversive activity,".

The Commentary to §2L1.1 captioned "Application Notes" is amended by deleting the text of Note 5 (formerly Note 8) as follows:

"The Commission has not considered offenses involving large numbers of aliens or dangerous or inhumane treatment. An upward departure should be considered in those circumstances.",

and inserting in lieu thereof:

"If the offense involved dangerous or inhumane treatment, death or bodily injury, possession of a dangerous weapon, or substantially more than 100 aliens, an upward departure may be warranted."

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

"A second specific offense characteristic provides an enhancement if the defendant was previously convicted of a similar offense.",

and inserting in lieu thereof:

"The offense level increases with the number of unlawful aliens smuggled, transported, or harbored. In large scale cases, an additional adjustment from §3B1.1 (Aggravating Role) typically will apply to the most culpable defendants."

The title of §2L2.1 is amended by deleting "Evidence of Citizenship or Documents Authorizing Entry" and inserting in lieu thereof "Documents Relating to Naturalization, Citizenship, or Legal Resident Status; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law".

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

"(2) If the offense involved six or more sets of documents, increase as follows:

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

The Commentary to §2L2.1 captioned "Statutory Provisions" is amended by deleting "18 U.S.C. §§ 1425-1427, 1546. For additional statutory provision(s), see Appendix A (Statutory Index)" and inserting in lieu thereof "8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (4), 1325(b), (c); 18 U.S.C. §§ 1015, 1028, 1425-1427, 1546".

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

"2. Where it is established that multiple documents are part of a set intended for use by a single person, treat the set as one document."

The title of §2L2.2 is amended by deleting "Evidence of Citizenship or Documents Authorizing Entry for Own Use" and inserting in lieu thereof "Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law".

The Commentary to §2L2.2 captioned "Statutory Provisions" is amended by deleting "18 U.S.C. §§ 1423, 1425, 1546. For additional statutory provision(s), see Appendix A (Statutory Index)" and inserting in lieu thereof "8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (5), 1325(b), (c); 18 U.S.C. §§ 911, 1015, 1028, 1423-1426, 1546".

Section 2L2.3(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics"; and by inserting the following additional specific offense characteristic:

"(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."

Prior to this amendment, §2L1.1 provided the same offense level for a defendant who smuggles, transports, or harbors 1, 5, 25, 50, or any number of unlawful aliens. The inclusion of specific offense characteristic (b)(2) in §2L1.1 in the guidelines as initially promulgated in April 1987 was intended to conform the guidelines to the offense level indicated by past practices data for "ongoing criminal conduct." However, further study has convinced the Commission that the specific offense characteristic "prior conviction for the same or similar offense" is not a good proxy for such conduct. Moreover, the inclusion of a prior criminal record variable in the offense guideline is inconsistent with the general treatment of prior record as a separate dimension in the guidelines.

This amendment addresses these issues by providing an enhancement in the guideline for the number of aliens smuggled, transported, or harbored as a more direct measure of the scope of the offense. Consistent with the Commission's general approach throughout the guidelines, the offense level increases gradually with the number of aliens. It should be noted that §3B1.1 (Aggravating Role) generally provides an additional increase of 2, 3, or 4 levels for organizers, managers, and supervisors

in large-scale cases. The enhancement in this amendment pertaining to the number of aliens is designed to work in conjunction with the operation of the role enhancements from §3B1.1. Sections 2L2.1 and 2L2.3 are amended to follow the same structure.

In addition, this amendment expands the titles of §§2L2.1 and 2L2.2, and the statutory provisions to these sections, to include additional statutes appropriately covered by these guidelines. **The effective date of this amendment is November 1, 1992.**

451. Section 2N2.1 is amended by inserting the following additional subsection:

- "(b) Cross References
 - (1) If the offense involved fraud, apply §2F1.1 (Fraud and Deceit).
 - (2) If the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline, apply that other offense guideline if the resulting offense level is greater than that determined above."

The Commentary to §2N2.1 captioned "Application Notes" is amended by deleting Note 2 as follows:

- "2. If the offense involved theft, fraud, bribery, revealing trade secrets, or destruction of property, apply the guideline applicable to the underlying conduct, rather than this guideline."

and inserting in lieu thereof:

- "2. The cross reference at subsection (b)(1) addresses cases in which the offense involved fraud. The cross reference at subsection (b)(2) addresses cases in which the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline (e.g., theft, bribery, revealing trade secrets, or destruction of property)."

This amendment inserts cross references to cover cases more appropriately addressed by other offense guidelines. Previously, a similar instruction addressing such cases was contained in the commentary to this section. **The effective date of this amendment is November 1, 1992.**

452. Section 2Q2.1(b)(1) is amended by deleting "involved a commercial purpose" and inserting in lieu thereof "(A) was committed for pecuniary gain or otherwise involved a commercial purpose; or (B) involved a pattern of similar violations".

Section 2Q2.1(b)(2) is amended by deleting:

"involved fish, wildlife, or plants that were not quarantined as required by law",

and inserting in lieu thereof:

"(A) involved fish, wildlife, or plants that were not quarantined as required by law; or (B) otherwise created a significant risk of infestation or disease transmission potentially harmful to humans, fish, wildlife, or plants".

Section 2Q2.1(b)(3)(B) is amended by deleting:

"a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to a discrete subpopulation",

and inserting in lieu thereof:

"(i) marine mammals that are listed as depleted under the Marine Mammal Protection Act (as

set forth in 50 C.F.R. § 216.15); (ii) fish, wildlife, or plants that are listed as endangered or threatened by the Endangered Species Act (as set forth in 50 C.F.R. Part 17); or (iii) fish, wildlife, or plants that are listed in Appendix I to the Convention on International Trade in Endangered Species of Wild Fauna or Flora (as set forth in 50 C.F.R. Part 23)".

The Commentary to §2Q2.1 is amended by inserting, immediately before "Background", the following:

"Application Notes:

1. 'For pecuniary gain' means for receipt of, or in anticipation of receipt of, anything of value, whether monetary or in goods or services. Thus, offenses committed for pecuniary gain include both monetary and barter transactions. Similarly, activities designed to increase gross revenue are considered to be committed for pecuniary gain.
2. The acquisition of fish, wildlife, or plants for display to the public, whether for a fee or donation and whether by an individual or an organization, including a governmental entity, a private non-profit organization, or a private for-profit organization, shall be considered to involve a 'commercial purpose.'
3. For purposes of subsection (b)(2), the quarantine requirements include those set forth in 9 C.F.R. Part 92, and 7 C.F.R. Chapter III. State quarantine laws are included as well.
4. When information is reasonably available, 'market value' under subsection (b)(3)(A) shall be based on the fair-market retail price. Where the fair-market retail price is difficult to ascertain, the court may make a reasonable estimate using any reliable information, such as the reasonable replacement or restitution cost or the acquisition and preservation (e.g., taxidermy) cost. Market value, however, shall not be based on measurement of aesthetic loss (so called 'contingent valuation' methods).
5. If the offense involved the destruction of a substantial quantity of fish, wildlife, or plants, and the seriousness of the offense is not adequately measured by the market value, an upward departure may be warranted."

The Commentary to §2Q2.1 captioned "Background" is amended by deleting the last two sentences as follows:

"Enhancements are provided where the offense involved a commercial purpose, and where the fish, wildlife, or plants were not quarantined as required by law. An additional enhancement is provided where the market value of the species exceeded \$2,000 or the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the population of the species or to a discrete subpopulation of the species."

This amendment is designed to strengthen the deterrent effect of the sanctions for violations covered by this guideline. The amendment expands the specific offense characteristic in subsection (b)(1) to cover categories of offenses that appear to be equally serious to those committed for a commercial purpose. In addition, the amendment expands the specific offense characteristic in subsection (b)(2) to cover other comparable types of risk of harm. Furthermore, the amendment modifies the specific offense characteristic in subsection (b)(3) to better encompass the types of cases that the Commission intended to cover. **The effective date of this amendment is November 1, 1992.**

453. The Introductory Commentary to Chapter Two, Part T, Subpart 3, is amended by deleting "This part" and inserting in lieu thereof "This Subpart"; by deleting:

". These guidelines are primarily aimed at revenue collection or trade regulation. They are",

and inserting in lieu thereof:

", and is designed to address violations involving revenue collection or trade regulation. It is";

by deleting "legislation generally applies" and inserting in lieu thereof "criminal statutes apply"; and by deleting:

"or for imposing a sentence above that specified in these guidelines",

and inserting in lieu thereof:

"if applicable, or for imposing a sentence above that specified in the guideline in this Subpart".

Section 2T3.1 is amended in the title by inserting at the end "; Receiving or Trafficking in Smuggled Property".

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

"(c) Cross Reference

- (1) If the offense involves a contraband item covered by another offense guideline, apply that offense guideline if the resulting offense level is greater than that determined above."

The Commentary to §2T3.1 captioned "Application Notes" is amended in the third sentence of Note 2 by deleting "the court should impose a sentence above the guideline" and inserting in lieu thereof "an upward departure may be warranted".

Section 2T3.2, including accompanying commentary, is deleted as follows:

"§2T3.2. Receiving or Trafficking in Smuggled Property

(a) Base Offense Level:

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

For purposes of this guideline, the 'tax loss' is the amount of the duty.

(b) Specific Offense Characteristic

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

Commentary

Statutory Provision: 18 U.S.C. § 545. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

- 1. Particular attention should be given to those items for which entry is prohibited, limited, or restricted. Especially when such items are harmful or protective quotas are in effect, the duties evaded on such items may not adequately reflect the harm to society or protected industries resulting from their importation. In such instances, the court should impose a sentence above the guideline. A sentence based upon an alternative measure of the 'duty' evaded, such as the increase in market value due to importation, or 25 percent of the items' fair market value in the United States if the increase in market value due to importation is not readily ascertainable, might be considered."

Section 8C2.1(a) is amended by deleting ", 2T3.2" immediately following "2T3.1".

This amendment inserts a cross reference in §2T3.1 to cover cases more appropriately addressed by other offense guidelines. Previously, a similar instruction was set forth in the Introductory Commentary to this part. In addition, this amendment consolidates §§2T3.1 and 2T3.2 into one guideline as each contains the same offense levels and adjustments. **The effective date of this amendment is November 1, 1992.**

454. The Commentary to §3A1.1 captioned "Application Notes" is amended in Note 1 by inserting the following additional sentence at the end:

"Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank."

This amendment clarifies the circumstances in which the vulnerable victim adjustment is intended to be applied. **The effective date of this amendment is November 1, 1992.**

455. Section 3A1.2(a) is amended by deleting:

"a law enforcement or corrections officer; a former law enforcement or corrections officer; an officer or employee included in 18 U.S.C. § 1114; a former officer or employee included in 18 U.S.C. § 1114",

and inserting in lieu thereof:

"a government officer or employee; a former government officer or employee".

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

"are not expressly covered by this section. The court should make an upward departure of at least three levels in those unusual cases in which such persons are victims",

and inserting in lieu thereof:

"although covered by this section, do not represent the heartland of the conduct covered. An upward departure to reflect the potential disruption of the governmental function in such cases typically would be warranted".

The Commentary to §3A1.2 captioned "Application Notes" is amended in Note 4 by deleting "law enforcement or corrections officer or other person covered under 18 U.S.C. § 1114" and inserting in lieu thereof "government officer or employee"; and by inserting the following additional sentence at the end:

"This adjustment also would not apply in the case of a robbery of a postal employee because the offense guideline for robbery contains an enhancement (§2B3.1(a)) that takes such conduct into account."

This amendment expands the coverage of this guideline to apply in the case of any government officer or employee, former government officer or employee, or a member of the immediate family of any of the above, who is targeted because of the official conduct or position of that officer or employee. **The effective date of this amendment is November 1, 1992.**

456. The Introductory Commentary to Chapter Three, Part B is amended by deleting the third sentence of the first paragraph as follows:

"However, where the defendant has received mitigation by virtue of being convicted of an offense significantly less serious than his actual criminal conduct, e.g., the defendant is convicted of

unlawful possession of a controlled substance but his actual conduct involved drug trafficking, a further reduction in the offense level under §3B1.2 (Mitigating Role) ordinarily is not warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense."

The Commentary to §3B1.2 captioned "Application Notes" is amended by inserting the following additional note:

- "4. If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of 14 under §2D1.1) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of 6 under §2D2.1), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine."

This amendment clarifies a situation in which a defendant is not ordinarily eligible for a reduction under §3B1.2 (Mitigating Role) and moves the discussion of this issue from the Introductory Commentary of Chapter Three, Part B, to the Commentary of §3B1.2, where it more appropriately belongs. **The effective date of this amendment is November 1, 1992.**

457. The Commentary to §3C1.1 captioned "Application Notes" is amended by inserting the following additional note:

- "7. Under this section, the defendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused."

The Commentary to §3C1.2 captioned "Application Notes" is amended by inserting the following additional notes:

- "5. Under this section, the defendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.
6. If death or bodily injury results or the conduct posed a substantial risk of death or bodily injury to more than one person, an upward departure may be warranted. See Chapter Five, Part K (Departures)."

This amendment clarifies the scope of the conduct for which the defendant is accountable under §§3C1.1 and 3C1.2. In addition, this amendment adds an application note to the Commentary of §3C1.2 that describes circumstances in which an upward departure may be warranted. **The effective date of this amendment is November 1, 1992.**

458. Section 3D1.2(d) is amended in the second paragraph by inserting "§§2L1.1, 2L2.1, 2L2.3;" in the appropriate place by section; by inserting "§2Q2.1" in the appropriate place by section; and by deleting ", 2T3.2" immediately following "2T3.1".

Section 3D1.2(d) is amended in the third paragraph by deleting "§§2L1.1, 2L2.1, 2L2.2, 2L2.3" and inserting in lieu thereof "2L2.2".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 3 by deleting example 7 as follows:

- "(7) The defendant is convicted of two counts, each for unlawfully bringing one alien into the United States, but on different occasions. The counts are not to be grouped together."

This amendment revises §3D1.2(d) to reflect amendments to §§2L1.1, 2L2.1, and 2L2.3 (amendment 450); to clarify that offenses under §2Q2.1 are to be grouped under this subsection; and to delete the reference to §2T3.2 made obsolete by the deletion of that guideline (amendment 453). **The effective date of this amendment is November 1, 1992.**

459. Section 3E1.1 is amended by deleting:

- "(a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels.
- (b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial.
- (c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right."

and inserting in lieu thereof:

- "(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:
 - (1) timely providing complete information to the government concerning his own involvement in the offense; or
 - (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,decrease the offense level by 1 additional level."

The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 1 by deleting "for this provision" and inserting in lieu thereof "under subsection (a)"; by deleting subdivision (c) as follows:

- "(c) voluntary and truthful admission to authorities of involvement in the offense and related conduct;"

by redesignating subdivisions (a) and (b) as subdivisions (b) and (c), respectively; by inserting the following as subdivision (a):

- "(a) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility;"

in subdivision (f) by deleting "and" immediately following "offense;"

by redesignating subdivision (g) as subdivision (h); and by inserting the following as subdivision (g):

"(g) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and".

The Commentary to §3E1.1 captioned "Application Notes" is amended by deleting Note 3 as follows:

"3. Entry of a plea of guilty prior to the commencement of trial combined with truthful admission of involvement in the offense and related conduct will constitute significant evidence of acceptance of responsibility for the purposes of this section. However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility.",

and by inserting in lieu thereof:

"3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(a)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right."

The Commentary to §3E1.1 captioned "Application Notes" is amended by inserting the following additional note:

"6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking one or both of the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b)(1) or (2) will occur particularly early in the case. For example, to qualify under subsection (b)(2), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently."

The Commentary to §3E1.1 captioned "Background" is amended by deleting "a recognition and affirmative acceptance of personal responsibility for the offense and related conduct" and inserting in lieu thereof "acceptance of responsibility for his offense"; and by inserting the following additional paragraph at the end:

" Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the steps specified in subsection (b). Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range."

Section 4B1.1 is amended in the last sentence by deleting "2-levels" and inserting in lieu thereof "the number of levels corresponding to that adjustment".

Section 4B1.4(b) is amended by deleting the last sentence as follows:

"*If §3E1.1 (Acceptance of Responsibility) applies, reduce by 2 levels.",

and inserting in lieu thereof:

"*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment."

This amendment provides an additional reduction of one level for certain defendants whose acceptance of responsibility includes assistance to the government in the investigation or prosecution of their own misconduct. In addition, it replaces the term "offense and related conduct" with the term "offense" and provides guidance as to the meaning of this term in the context of this guideline. **The effective date of this amendment is November 1, 1992.**

460. Section 4A1.3 is amended in the fourth paragraph by deleting "a Category IV criminal history" wherever it appears and inserting in lieu thereof in each instance "Criminal History Category IV"; and by deleting:

"The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for a Category VI criminal history is not adequate to reflect the seriousness of the defendant's criminal history. In such a case, a decision above the guideline range for a defendant with a Category VI criminal history may be warranted. However, this provision is not symmetrical. The lower limit of the range for a Category I criminal history is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for a Category I criminal history on the basis of the adequacy of criminal history cannot be appropriate.",

and inserting in lieu thereof:

"The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant's criminal history. In such a case, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses. On the other hand, a defendant with nine prior 60-day jail sentences for offenses such as petty larceny, prostitution, or possession of gambling slips has a higher number of criminal history points (18 points) than the typical Criminal History Category VI defendant, but not necessarily a more serious criminal history overall. Where the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.

However, this provision is not symmetrical. The lower limit of the range for Criminal History Category I is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate."

This amendment provides additional guidance concerning upward departure from Criminal History Category VI on the basis of adequacy of criminal history category, and makes minor editorial changes. **The effective date of this amendment is November 1, 1992.**

461. Section 4B1.2(3) is amended by deleting the last sentence as follows:

"The date that a defendant sustained a conviction shall be the date the judgment of conviction was entered.",

and inserting in lieu thereof:

"The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere."

The Commentary to §4B1.2 captioned "Application Notes" is amended by deleting the text of Note 2 as follows:

"'Crime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of inquiry.

The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense is the unlawful possession of a firearm by a felon, the specific offense characteristics of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provide an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply."

and inserting in lieu thereof:

"'Crime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of inquiry.

The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense is the unlawful possession of a firearm by a felon, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply."

This amendment conforms the definition of "sustaining a conviction" in §4B1.2 to the definition of "convicted of an offense" in §4A1.2. In addition, this amendment ratifies a previous amendment to the commentary to §4B1.2 (amendment 433, effective November 1, 1991) and corrects a clerical error in a reference in that commentary to §2K2.1. The previous amendment to the text of Application Note 2 clarified that application of §4B1.2 is governed by the offense of conviction, and that the offense of being a felon in possession of a firearm is not a crime of violence within the meaning of this guideline. As a clarifying and conforming change, the previous commentary amendment reflected Commission intent that the term "crime of violence," as that term is used in §§4B1.1 and 4B1.2, be interpreted consistently with that term as used in other provisions of the Guidelines Manual. For example, §4B1.4, as promulgated by amendment 355, effective November 1, 1990, provides an increased offense level for a "felon-in-possession" defendant who is subject to an enhanced sentence under 18 U.S.C. § 924(e) and who used or possessed the firearm in connection with a crime of violence (§4B1.4(b)(3)(A)). This

action to ratify a previous commentary amendment was taken because of concerns raised by United States v. Stinson, 957 F.2d 813 (11th Cir. 1992), in which the court stated it would not follow amendment 433 because the commentary amendment was not submitted to Congress. **The effective date of this amendment is November 1, 1992.**

462. Chapter Five, Part A, is amended in the Sentencing Table at Offense Level 7, Criminal History Category I, by deleting "1-7" and inserting in lieu thereof "0-6"; and at Offense Level 8, Criminal History Category I, by deleting "2-8" and inserting in lieu thereof "0-6".

Chapter Five, Part A is amended in the Sentencing Table by designating four zones as follows: Zone A (containing all guideline ranges having a minimum of zero months); Zone B (containing all guideline ranges having a minimum of at least one but not more than six months); Zone C (containing all guideline ranges having a minimum of eight, nine, or ten months); and Zone D (containing all guideline ranges having a minimum of twelve months or more).

Section 5B1.1 is amended by deleting:

- "(a) Subject to the statutory restrictions in subsection (b) below, sentence of probation is authorized:
- (1) if the minimum term of imprisonment in the range specified by the Sentencing Table in Part A, is zero months;
 - (2) if the minimum term of imprisonment specified by the Sentencing Table is at least one but not more than six months, provided that the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in §5C1.1(c)(2) (Imposition of a Term of Imprisonment).",

and inserting in lieu thereof:

- "(a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is authorized if:
- (1) the applicable guideline range is in Zone A of the Sentencing Table; or
 - (2) the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment)."

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

- "(a) Where the minimum term of imprisonment specified in the guideline range from the Sentencing Table is zero months. In such case, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.
- (b) Where the minimum term of imprisonment specified in the guideline range from the Sentencing Table is at least one but not more than six months.",

and inserting in lieu thereof:

- "(a) Where the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months). In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.

- (b) Where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months).";

and by deleting "Offense Level is 8 and the Criminal History Category is I" and inserting in lieu thereof "offense level is 7 and the criminal history category is II".

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

"Where the minimum term of imprisonment specified in the guideline range from the Sentencing Table is more than six months",

and inserting in lieu thereof:

"Where the applicable guideline range is in Zone C or D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is eight months or more)".

The Commentary to §5B1.1 captioned "Background" is amended by deleting "1st Sess. 89). Subsection" and inserting in lieu thereof "1st Sess. 89 (1983)). Section".

Section 5C1.1(a) is amended by inserting "applicable" immediately before "guideline range".

Section 5C1.1(b) is amended by deleting "minimum term of imprisonment in the applicable guideline range in the Sentencing Table is zero months" and inserting in lieu thereof "applicable guideline range is in Zone A of the Sentencing Table".

Sections 5C1.1 is amended by deleting:

- (c) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is at least one but not more than six months, the minimum term may be satisfied by (1) a sentence of imprisonment; (2) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in §5C1.1(e); or (3) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e), provided that at least one-half of the minimum term, but in no event less than one month, is satisfied by imprisonment.
- (d) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than six months but not more than ten months, the minimum term may be satisfied by (1) a sentence of imprisonment; or (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment.",

and inserting in lieu thereof:

- (c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by --
- (1) a sentence of imprisonment; or
 - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or

- (3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e).
- (d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by --
 - (1) a sentence of imprisonment; or
 - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment."

Section 5C1.1 is amended by deleting:

- "(f) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than ten months, the guidelines require that the minimum term be satisfied by a sentence of imprisonment.",

and inserting in lieu thereof:

- "(f) If the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment."

The Commentary to §5C1.1 captioned "Application Notes" is amended in Note 1 by deleting the first sentence as follows:

"Subsection 5C1.1(a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the guideline range specified in the Sentencing Table.",

and inserting in lieu thereof:

"Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range specified in the Sentencing Table in Part A of this Chapter."

The Commentary to §5C1.1 captioned "Application Notes" is amended in Note 2 by deleting:

"Subsection 5C1.1(b) provides that where the minimum term of imprisonment specified in the guideline range from the Sentencing Table is zero months",

and inserting in lieu thereof:

"Subsection (b) provides that where the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months)";

and by deleting "may, for example," and inserting in lieu thereof ", for example, may".

The Commentary to §5C1.1 captioned "Application Notes" is amended in Note 3 by deleting:

"Subsection 5C1.1(c) provides that where the minimum term of imprisonment specified in the guideline range from the Sentencing Table is at least one but not more than six months",

and inserting in lieu thereof:

"Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing

Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months)";

by deleting:

"For example, where the guideline range is 3-9 months, a sentence of probation with a condition requiring at least three",

and inserting in lieu thereof:

"For example, where the guideline range is 4-10 months, a sentence of probation with a condition requiring at least four";

by deleting "one-half of the minimum term specified in the guideline range from the Sentencing Table, but in no event less than one month," and inserting in lieu thereof "one month"; by deleting "two months followed by a term of supervised release with a condition requiring two" and inserting in lieu thereof "one month followed by a term of supervised release with a condition requiring three"; and by deleting:

"For example, where the guideline range is 3-9 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under §5C1.1(c)(2)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under §5C1.1(c)(3))",

and inserting in lieu thereof:

"For example, where the guideline range is 4-10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2))".

The Commentary to §5C1.1 captioned "Application Notes" is amended in Note 4 by deleting:

"Subsection 5C1.1(d) provides that where the minimum term specified in the guideline range from the Sentencing Table is more than six but not more than ten months",

and inserting in lieu thereof:

"Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (*i.e.*, the minimum term specified in the applicable guideline range is eight, nine, or ten months)";

and by deleting "under §5C1.1(d)" wherever it appears and inserting in lieu thereof in each instance "under subsection (d)".

The Commentary to §5C1.1 captioned "Application Notes" is amended in Note 5 by deleting "Subsection 5C1.1(e)" and inserting in lieu thereof "Subsection (e)".

The Commentary to §5C1.1 captioned "Application Notes" is amended in Note 7 by deleting "§5C1.1(c)" and inserting in lieu thereof "subsections (c)".

The Commentary to §5C1.1 captioned "Application Notes" is amended by deleting Note 8 as follows:

"8. Subsection 5C1.1(f) provides that, if the minimum term of imprisonment set forth in the Sentencing Table is more than ten months, the minimum term must be satisfied by a sentence of imprisonment without the use of any of the incarceration alternatives in §5C1.1(e).",

and inserting in lieu thereof:

- "8. Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is twelve months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e)."

This amendment expands the number of categories in the Sentencing Table in Criminal History Category I in which the court has discretion to impose a sentence without imprisonment or confinement conditions. In addition, it removes the requirement that a "split sentence" include a term of imprisonment of at least one-half of the minimum of the guideline range for less serious categories of offenses and offenders and substitutes a requirement that such term of imprisonment be at least one month. Finally, this amendment reformats these sections to make their operation clearer. **The effective date of this amendment is November 1, 1992.**

463. Chapter Five, Part E, is amended by inserting an additional policy statement as §5E1.5 (Costs of Prosecution (Policy Statement)).

This amendment makes the Guidelines Manual more comprehensive by adding a section to provide notice of certain statutory requirements pertaining to the imposition of the costs of prosecution. **The effective date of this amendment is November 1, 1992.**

464. Section 5F1.6 is amended by deleting "21 U.S.C. § 853a" and inserting in lieu thereof "21 U.S.C. § 862".

The Commentary to §5F1.6 captioned "Application Notes" is amended in Note 1 by deleting "21 U.S.C. § 853a(d)" and inserting in lieu thereof "21 U.S.C. § 862(d)".

The Commentary to §5F1.6 captioned "Background" is amended by deleting "21 U.S.C. § 853a" wherever it appears and inserting in lieu thereof in each instance "21 U.S.C. § 862"; by deleting "21 U.S.C. § 853a(a)(1)" and inserting in lieu thereof "21 U.S.C. § 862(a)(1)"; by deleting "(a)(2)" and inserting in lieu thereof "(b)(1)"; by deleting "21 U.S.C. § 853a(a)(1)(C)" and inserting in lieu thereof "21 U.S.C. § 862(a)(1)(C)"; and by deleting "21 U.S.C. § 853a(c)" and inserting in lieu thereof "21 U.S.C. § 862(c)".

This amendment conforms the references to the statutory provisions underlying this guideline as such provisions were renumbered by the Comprehensive Crime Control Act of 1990. **The effective date of this amendment is November 1, 1992.**

465. Section 5G1.3 is amended by deleting subsection (b) as follows:

- "(b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that constituted part of the same course of conduct as the instant offense and have been fully taken into account in the determination of the offense level for the instant offense, or if the prior undischarged term of imprisonment resulted from a federal offense and was imposed pursuant to the Sentencing Reform Act, the sentence for the instant offense shall be imposed to result in a combined sentence equal to the total punishment that would have been imposed under §5G1.2 (Sentencing on Multiple Counts of Conviction) had all the sentences been imposed at the same time."

and inserting in lieu thereof:

- "(b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the

offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment."

Section 5G1.3(c) is amended by inserting "(Policy Statement)" immediately before "In"; and by deleting "unexpired" and inserting in lieu thereof "undischarged".

The Commentary to §5G1.3 captioned "Application Notes" is amended by deleting Notes 2-4 as follows:

- "2. Subsection (b) (which applies only if subsection (a) does not apply), applies in two situations. First, it applies if the sentence resulting in the undischarged term of imprisonment was a federal sentence imposed pursuant to the Sentencing Reform Act. In such cases, the court shall fashion a sentence equal to the total punishment that would have been imposed had both sentences been imposed at the same time. Second, it applies if the conduct resulting in the undischarged term of imprisonment was part of the same course of conduct as the instant offense and has been fully taken into account in determining the offense level for the instant offense (e.g., where a defendant is prosecuted in both federal and state court for the same criminal conduct; or where a defendant is prosecuted in federal and state court for different criminal transactions that are part of the same course of conduct, such as two drug sales, but the conduct underlying both transactions is fully taken into account under §1B1.3 (Relevant Conduct) in determining the offense level for the instant offense).
3. When a sentence is imposed pursuant to subsection (b), the court should adjust for any term of imprisonment already served as a result of the conduct taken into account in determining the instant sentence (e.g., if the appropriate total punishment determined under this subsection for all offenses is 30 months and the defendant has already served 10 months of the prior undischarged term of imprisonment, the court should impose a sentence of 20 months concurrent with the prior undischarged term).
4. Where the defendant is serving an unexpired term of imprisonment in circumstances other than those set forth in subsections (a) or (b), the court shall impose a consecutive sentence to the extent necessary to fashion a sentence resulting in incremental punishment for the multiple offenses. To the extent practicable, the court shall impose a sentence for the instant offense that results in a combined sentence that approximates the total punishment that would have been imposed under §5G1.2 (Sentencing on Multiple Counts of Conviction) had all of the offenses been federal offenses for which sentences were being imposed at the same time. Where the defendant is serving a term of imprisonment for a state offense, the information available may permit only a rough estimate of the total punishment that would have been imposed under the guidelines. It is not intended that the above methodology be applied in a manner that unduly complicates or prolongs the sentencing process. In fashioning an appropriate incremental punishment, the court should consider whether the offense was committed while the defendant was on bail or other release status from another offense. In such cases, a reasonable incremental penalty appropriately would include an additional enhancement equivalent to that provided in §2J1.7 (Commission of Offense While on Release).",

and inserting in lieu thereof:

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

When a sentence is imposed pursuant to subsection (b), the court should adjust for any term of imprisonment already served as a result of the conduct taken into account in

determining the sentence for the instant offense. Example: The defendant has been convicted of a federal offense charging the sale of 40 grams of cocaine. Under §1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of an additional 15 grams of cocaine that is part of the same course of conduct for which the defendant has been convicted and sentenced in state court (the defendant received a nine-month sentence of imprisonment, of which he has served six months at the time of sentencing on the instant federal offense). The guideline range applicable to the defendant is 10-16 months (Chapter Two offense level of 14 for sale of 55 grams of cocaine; 2-level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge, a sentence of seven months, imposed to run concurrently with the remainder of the defendant's state sentence, achieves this result. For clarity, the court should note on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guidelines because the defendant has been credited for guideline purposes under §5G1.3(b) with six months served in state custody.

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

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

Illustrations of the Application of Subsection (c):

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

with the remainder of the undischarged term of imprisonment would (1) be within the guideline range for the instant federal offense, and (2) achieve an appropriate total punishment (36 months).

- (B) The applicable guideline range for the instant federal offense is 24-30 months. The court determines that a total punishment of 36 months' imprisonment would appropriately reflect the instant federal offense and the offense resulting in the undischarged term of imprisonment. The undischarged term of imprisonment is a six-month determinate sentence. At the time of sentencing on the instant federal offense, the defendant has served three months on the undischarged term of imprisonment. In this case, a sentence of 30 months' imprisonment to be served consecutively to the undischarged term of imprisonment would (1) be within the guideline range for the instant federal offense, and (2) achieve an appropriate total punishment (36 months).
- (C) The applicable guideline range for the instant federal offense is 24-30 months. The court determines that a total punishment of 60 months' imprisonment would appropriately reflect the instant federal offense and the offense resulting in the undischarged term of imprisonment. The undischarged term of imprisonment is a 12-month determinate sentence. In this case, a sentence of 30 months' imprisonment to be served consecutively to the undischarged term of imprisonment would be the greatest sentence imposable without departure for the instant federal offense.
- (D) The applicable guideline range for the instant federal offense is 24-30 months. The court determines that a total punishment of 36 months' imprisonment would appropriately reflect the instant federal offense and the offense resulting in the undischarged term of imprisonment. The undischarged term of imprisonment is an indeterminate sentence with a 60-month maximum. At the time of sentencing on the instant federal offense, the defendant has served 22 months on the undischarged term of imprisonment. In this case, a sentence of 24 months to be served concurrently with the remainder of the undischarged term of imprisonment would be the lowest sentence imposable without departure for the instant federal offense."

This amendment deletes the prong of §5G1.3(b) pertaining to the sentencing of a defendant subject to an undischarged term of imprisonment previously imposed pursuant to the Sentencing Reform Act because the Commission found a number of problems in implementation. Cases previously addressed by this prong henceforth will be addressed by subsection (c), which is designed to produce a similar result but requires less precise calculations. Consistent with the structure of the Guidelines Manual, subsection (c) is expressly designated a policy statement. In addition, this amendment provides additional commentary explaining, and providing examples of, the operation of this section. **The effective date of this amendment is November 1, 1992.**

466. Chapter 5, Part H is amended by inserting an additional policy statement as §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)).

Chapter 1, Part A, Subpart 4(b) is amended in the first paragraph by inserting "§5H1.12 (Lack of Guidance as a Youth and Similar Circumstances)," immediately following "§5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status),".

This amendment provides that the factors specified are not appropriate grounds for departure. **The effective date of this amendment is November 1, 1992.**

467. Section 6B1.2(a) is amended by inserting "or the sentencing guidelines" immediately following "statutory purposes of sentencing".

Section 6B1.2(a) is amended by inserting the following additional paragraph at the end:

"Provided, that a plea agreement that includes the dismissal of a charge or a plea agreement not to pursue a potential charge shall not preclude the conduct underlying such charge from being considered under the provisions of §1B1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted."

The Commentary to §6B1.2 is amended in the first paragraph by deleting:

"This section makes clear that a court may accept a plea agreement provided that the judge complies with the obligations imposed by Rule 11(e), Fed. R. Crim. P. A judge",

and inserting in lieu thereof "The court".

The Commentary to §6B1.2 is amended in the second paragraph by deleting:

"will accept a recommended sentence or a plea agreement requiring imposition of a specific sentence only if the court is satisfied either that the contemplated sentence is within the guidelines or, if not, that the recommended sentence or agreement",

and inserting in lieu thereof:

"should accept a recommended sentence or a plea agreement requiring imposition of a specific sentence only if the court is satisfied either that such sentence is an appropriate sentence within the applicable guideline range or, if not, that the sentence".

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

" A defendant who enters a plea of guilty in a timely manner will enhance the likelihood of his receiving a reduction in offense level under §3E1.1 (Acceptance of Responsibility). Further reduction in offense level (or sentence) due to a plea agreement will tend to undermine the sentencing guidelines.

The second paragraph of subsection (a) provides that a plea agreement that includes the dismissal of a charge, or a plea agreement not to pursue a potential charge, shall not prevent the conduct underlying that charge from being considered under the provisions of §1B1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted. This paragraph prevents a plea agreement from restricting consideration of conduct that is within the scope of §1B1.3 (Relevant Conduct) in respect to the count(s) of which the defendant is convicted; it does not in any way expand or modify the scope of §1B1.3 (Relevant Conduct)."

This amendment clarifies that a plea agreement to dismiss a charge or not to pursue a potential charge does not insulate the conduct underlying such charge from the operation of §1B1.3 (Relevant Conduct) in respect to the count(s) of which the defendant is convicted. In addition, this amendment makes clearer the Commission's policy that plea agreements should not undermine the sentencing guidelines.

The effective date of this amendment is November 1, 1992.

468. Appendix A (Statutory Index) is amended by deleting:

"8 U.S.C. § 1325 2L1.2",

and inserting in lieu thereof:

"8 U.S.C. § 1325(a) 2L1.2
8 U.S.C. § 1325(b) 2L2.1, 2L2.2
8 U.S.C. § 1325(c) 2L2.1, 2L2.2";

in the line beginning "18 U.S.C. § 245(b)" by inserting ", 2J1.2" immediately following "2H2.1";

in the line beginning "18 U.S.C. § 371" by deleting "2D1.4," immediately following "2C1.7,";

in the line beginning "18 U.S.C. § 545" by deleting ", 2T3.2";

in the line beginning "18 U.S.C. § 547" by deleting ", 2T3.2";

in the line beginning "18 U.S.C. § 549" by deleting ", 2T3.2";

in the line beginning "18 U.S.C. § 656" by inserting ", 2F1.1" immediately following "2B1.1";

in the line beginning "18 U.S.C. § 657" by inserting ", 2F1.1" immediately following "2B1.1";

in the line beginning "18 U.S.C. § 1028" by deleting "2L1.2, 2L2.1" and inserting in lieu thereof "2L2.1, 2L2.2";

by deleting:

"18 U.S.C. § 1346 2C1.7";

in the line beginning "18 U.S.C. § 2331(a)" by deleting "18 U.S.C. § 2331(a)" and inserting in lieu thereof "18 U.S.C. § 2332(a)";

by deleting:

"18 U.S.C. § 2331(b) 2A2.1",

and inserting in lieu thereof:

"18 U.S.C. § 2332(b)(1) 2A2.1
18 U.S.C. § 2332(b)(2) 2A1.5";

in the line beginning "18 U.S.C. § 2331(c)" by deleting "18 U.S.C. § 2331(c)" and inserting in lieu thereof "18 U.S.C. § 2332(c)";

in the line beginning "19 U.S.C. § 1464" by deleting ", 2T3.2";

in the line beginning "21 U.S.C. § 846" by deleting "2D1.4" and inserting in lieu thereof "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, 2D3.3, 2D3.4, 2D3.5";

in the line beginning "21 U.S.C. § 963" by deleting "2D1.4" and inserting in lieu thereof "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, 2D3.3, 2D3.4, 2D3.5";

in the line beginning "31 U.S.C. § 5322" by inserting ", 2S1.4" immediately following "2S1.3";

and in the line beginning "46 U.S.C. App. § 1903(j)" by deleting "2D1.4" and inserting in lieu thereof "2D1.1".

The Commentary to §2B4.1 captioned "Background" is amended in the sixth paragraph by deleting "§§77d-1 and 77d-2" and inserting in lieu thereof "78dd-1 and 78dd-2".

The Commentary to §2C1.7 captioned "Statutory Provisions" is amended by deleting ", 1346".

The Commentary to §2C1.7 captioned "Application Notes" is amended in Note 1 by inserting "(A)" immediately following "involve"; and by deleting ", 1346), or" and inserting in lieu thereof "(A), or (B)".

The Commentary to §2C1.7 captioned "Background" is amended by deleting ", 1341-1343, and 1346" and inserting in lieu thereof "and 1341-1343".

The Commentary to §2T1.1 captioned "Background" is amended in the fifth paragraph by deleting "28 U.S.C. § 994(n)" and inserting in lieu thereof "28 U.S.C. § 994(i)(2)".

This amendment makes the statutory index more comprehensive, and conforms it to the amendments of the Chapter Two offense guidelines. In addition, it corrects clerical errors and makes an editorial improvement. **The effective date of this amendment is November 1, 1992.**

469. Section 1B1.10(d) is amended by deleting "and 380" and inserting in lieu thereof "380, 433, and 461".

This amendment expands the listing in subsection (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, 1992.**

470. The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 7 in the first paragraph by inserting the following additional sentence as the second sentence:

"As in theft cases, loss is the value of the money, property, or services unlawfully taken; it does not, for example, include interest the victim could have earned on such funds had the offense not occurred."

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 7(b) by deleting:

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

and inserting in lieu thereof:

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

This amendment clarifies that interest is not included in the determination of loss. In addition, it clarifies that in fraudulent loan application cases, as in other types of fraud, if the intended loss is greater than the actual loss, the intended loss is used. Finally, it makes an editorial improvement in this commentary by deleting an unnecessary phrase. **The effective date of this amendment is November 1, 1992.**

471. The Commentary to §2K1.3 captioned "Application Notes" is amended by inserting the following additional note:

"11. As used in subsections (b)(3) and (c)(1), 'another felony offense' and 'another offense' refer to offenses other than explosives or firearms possession or trafficking offenses. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted."

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 15 by deleting "or (a)(5)" and inserting in lieu thereof "(a)(4)(B), or (a)(6)".

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

- "18. As used in subsections (b)(5) and (c)(1), 'another felony offense' and 'another offense' refer to offenses other than explosives or firearms possession or trafficking offenses. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted."

This amendment clarifies the meaning of the terms "another felony offense" and "another offense," and corrects a clerical error. **The effective date of this amendment is November 1, 1992.**

472. The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 8 by deleting the last sentence as follows:

"If the government is able to show that a sentence imposed outside this time period is evidence of similar misconduct or the defendant's receipt of a substantial portion of income from criminal livelihood, the court may consider this information in determining whether to depart and sentence above the applicable guideline range."

and by inserting in lieu thereof:

"If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (Adequacy of Criminal History Category)."

This amendment clarifies that dissimilar, serious prior offenses outside the applicable time period may be considered in determining whether an upward departure is warranted under §4A1.3. The amendment provides additional Commission guidance on an issue that has produced conflicting decisions among the courts of appeals. Compare, e.g., United States v. Leake, 908 F.2d 550, 554 (9th Cir. 1990) (upward departure impermissible for remote prior convictions dissimilar to instant offense) and United States v. Samuels, 938 F.2d 210, 215 (D.C. Cir. 1991) (suggesting the same) with United States v. Williams, 910 F.2d 1574, 1579 (7th Cir. 1990) (although older prior crimes dissimilar to instant offense, upward departure permissible if convictions are reliable information of increased recidivism risk), rev'd on other grounds, 112 S. Ct. 1112 (1992) and United States v. Russell, 905 F.2d 1439, 1444 (10th Cir. 1990) (same). **The effective date of this amendment is November 1, 1992.**

473. The Commentary to §7B1.1 captioned "Application Notes" is amended by deleting Notes 2 and 3 as follows:

- "2. 'Crime of violence' has the same meaning as set forth in §4B1.2(1), and includes any offense under federal or state law punishable by imprisonment for a term exceeding one year that --
- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
 - (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.