

The purpose of this amendment is to clarify the relationship between §3A1.3 and §5K2.4. **The effective date of this amendment is November 1, 1989.**

251. Section 3C1.1 is amended by deleting "from Chapter Two" immediately following "the offense level".

The purpose of this amendment is to delete an incorrect reference. **The effective date of this amendment is November 1, 1989.**

252. The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 4 by deleting:

", except in determining the combined offense level as specified in Chapter Three, Part D (Multiple Counts). Under §3D1.2(e), a count for obstruction will be grouped with the count for the underlying offense. Ordinarily, the offense level for that Group of Closely Related Counts will be the offense level for the underlying offense, as increased by the 2-level adjustment specified by this section. In some instances, however, the offense level for the obstruction offense may be higher, in which case that will be the offense level for the Group. See §3D1.3(a). In cases in which a significant further obstruction occurred during the investigation or prosecution of an obstruction offense itself (one of the above listed offenses), an upward departure may be warranted (e.g., where a witness to an obstruction offense is threatened during the course of the prosecution for the obstruction offense).",

and inserting in lieu thereof:

"to the offense level for that offense except where a significant further obstruction occurred during the investigation or prosecution of the obstruction offense itself (e.g., where the defendant threatened a witness during the course of the prosecution for the obstruction offense). Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely-Related Counts). The offense level for that Group of Closely-Related Counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater."

The purpose of this amendment is to resolve an inconsistency between the commentary in this section and the Commentaries in Chapter Two, Part J. **The effective date of this amendment is November 1, 1989.**

253. Section 3D1.2(b)(3) is amended by deleting "§ 994(u)" and inserting in lieu thereof "§ 994(v)".

Section 3D1.2(d) is amended in the second paragraph by deleting ", 2D1.3", and in the third paragraph by deleting ", 2G3.2" and ", 2P1.4".

The purposes of this amendment are to correct an erroneous reference, and to delete references to two guidelines covering petty offenses that have been deleted and to a guideline that has been deleted by consolidation with another guideline. **The effective date of this amendment is November 1, 1989.**

254. The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 3 by deleting "(6)", "(7)", and "(8)" and inserting in lieu thereof "(5)", "(6)", and "(7)" respectively.

The purpose of this amendment is to correct a clerical error. **The effective date of this amendment is November 1, 1989.**

255. The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 9 by inserting immediately following the second sentence: "See §1B1.2(d) and accompanying commentary."

The purpose of this amendment is to cross reference the newly created guideline subsection dealing with a multiple object conspiracy. **The effective date of this amendment is November 1, 1989.**

256. The Commentary to §3D1.2 captioned "Background" is amended in the second paragraph by deleting:

"In general, counts are grouped together only when they involve both the same victim (or societal harm in 'victimless' offenses) and the same or contemporaneous transactions, except as provided in §3D1.2(c) or (d).",

and inserting in lieu thereof:

"Counts involving different victims (or societal harms in the case of 'victimless' crimes) are grouped together only as provided in subsection (c) or (d)."

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

257. Section 3D1.3(b) is amended in the second sentence by deleting "varying" immediately following "involve", and by inserting "of the same general type to which different guidelines apply (e.g., theft and fraud)" immediately following "offenses".

The purpose of this amendment is to enhance the clarity of the guideline. **The effective date of this amendment is November 1, 1989.**

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

"4. An adjustment under this section is not warranted where a defendant perjures himself, suborns perjury, or otherwise obstructs the trial or the administration of justice (see §3C1.1), regardless of other factors.",

and inserting in lieu thereof:

"4. Conduct resulting in an enhancement under §3C1.1 (Willfully Obstructing or Impeding Proceedings) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply."

The purposes of this amendment are to provide for extraordinary cases in which adjustments under both §3C1.1 and §3E1.1 are appropriate, and to clarify the reference to obstructive conduct. **The effective date of this amendment is November 1, 1989.**

259. Section 4A1.1(e) is amended by inserting "or while in imprisonment or escape status on such a sentence" immediately before the period at the end of the first sentence.

The Commentary to §4A1.1 captioned "Application Notes" is amended in the second sentence of Note 5 by deleting "still in confinement" and inserting in lieu thereof "in imprisonment or escape status".

The purpose of this amendment is to clarify that subsection (e) applies to defendants who are still in confinement status at the time of the instant offense (e.g., a defendant who commits the instant offense while in prison or on escape status). **The effective date of this amendment is November 1, 1989.**

260. The Commentary to §4A1.1 captioned "Application Notes" is amended in Note 4 by inserting the following additional sentence at the end: "For the purposes of this item, a 'criminal justice sentence'

means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History).".

The purpose of this amendment is to clarify the application of the guideline. **The effective date of this amendment is November 1, 1989.**

261. The Commentary to §4A1.1 captioned "Background" is amended in the third paragraph by inserting "a" immediately before "criminal", and by deleting "control" and inserting in lieu thereof "sentence".

The purpose of this amendment is to conform the commentary to the guideline. **The effective date of this amendment is November 1, 1989.**

262. Section 4A1.2(e)(1) is amended by inserting ", whenever imposed," immediately before "that resulted", and by deleting "defendant's incarceration" and inserting in lieu thereof "defendant being incarcerated".

The purpose of this amendment is to clarify that "resulted in the defendant's incarceration" applies to any part of the defendant's imprisonment and not only to the commencement of the defendant's imprisonment. **The effective date of this amendment is November 1, 1989.**

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

"(4) The applicable time period for certain sentences resulting from offenses committed prior to age eighteen is governed by §4A1.2(d)(2).".

The purpose of this amendment is to clarify the relationship between §4A1.2(d)(2) and (e). **The effective date of this amendment is November 1, 1989.**

264. Section 4A1.2(f) is amended by inserting ", or a plea of nolo contendere," immediately following "admission of guilt".

The purpose of this amendment is to clarify that a plea of nolo contendere is equivalent to a finding of guilt for the purpose of §4A1.2(f). **The effective date of this amendment is November 1, 1989.**

265. The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 8 by deleting "4A1.2(e)" and inserting in lieu thereof "4A1.2(d)(2) and (e)", and by inserting immediately following the first sentence:

"As used in §4A1.2(d)(2) and (e), the term 'commencement of the instant offense' includes any relevant conduct. See §1B1.3 (Relevant Conduct).".

The purposes of this amendment are to correct a clerical error by inserting a reference to §4A1.2(d)(2), and to clarify that "commencement of the instant offense" includes any relevant conduct. **The effective date of this amendment is November 1, 1989.**

266. Section 4B1.1 is amended by deleting "Offense Level" and inserting in lieu thereof "Offense Level*", and by inserting at the end:

"*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by 2 levels.".

The purpose of this amendment is to authorize the application of §3E1.1 (Acceptance of Responsibility) to the determination of the offense level under this section to provide an incentive for the acceptance of responsibility by defendants subject to the career offender provision. **The effective date of this amendment is November 1, 1989.**

267. The Commentary to §4B1.1 captioned "Application Note" is amended in Note 1 by deleting "felony conviction" and inserting in lieu thereof "two prior felony convictions".

The Commentary to §4B1.1 captioned "Application Note" is amended by inserting the following additional note:

- "2. 'Offense Statutory Maximum' refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense. If more than one count of conviction is of a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that authorizes the greatest maximum term of imprisonment.",

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

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

"128 Cong. Rec. 12792, 97th Cong., 2d Sess. (1982) ('Career Criminals' amendment No. 13 by Senator Kennedy), 12796 (explanation of amendment), and 12798 (remarks by Senator Kennedy)",

and inserting in lieu thereof:

"128 Cong. Rec. 26, 511-12 (1982) (text of 'Career Criminals' amendment by Senator Kennedy), 26, 515 (brief summary of amendment), 26, 517-18 (statement of Senator Kennedy)".

The purposes of this amendment are to clarify the operation of the guideline and to provide a citation to the more readily available edition of the Congressional Record. **The effective date of this amendment is November 1, 1989.**

268. Section 4B1.2(1) is amended by deleting "as used in this provision is defined under 18 U.S.C. § 16" and inserting in lieu thereof:

"means 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".

Section 4B1.2(2) is amended by deleting "as used in this provision" immediately before "means", and by deleting "identified in 21 U.S.C. §§841, 845(b), 856, 952(a), 955, 955(a), 959; and similar offenses" and inserting in lieu thereof:

"under a federal or state law prohibiting the manufacture, import, export, or distribution of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, or distribute".

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

- "1. 'Crime of violence' is defined in 18 U.S.C. § 16 to mean an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that by its nature involves a substantial risk that physical force against the person or property of another may be used in committing the offense. The Commission interprets this as follows: murder, manslaughter, kidnapping, aggravated assault, extortionate extension of credit, forcible sex offenses, arson, or robbery are covered by this provision. Other offenses are covered only if the conduct for which the defendant was specifically convicted meets the above definition. For example, conviction for an escape accomplished by force or threat of injury would be covered; conviction for an escape by stealth would not be covered. Conviction for burglary of a dwelling would be covered; conviction for burglary of other structures would not be covered.
2. 'Controlled substance offense' includes any federal or state offense that is substantially similar to any of those listed in subsection (2) of the guideline. These offenses include manufacturing, importing, distributing, dispensing, or possessing with intent to manufacture, import, distribute, or dispense, a controlled substance (or a counterfeit substance). This definition also includes aiding and abetting, conspiring, or attempting to commit such offenses, and other offenses that are substantially equivalent to the offenses listed."

and inserting in lieu thereof:

- "1. The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.
2. 'Crime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use attempted use, or threatened use, of physical force against the person of another, or (B) the conduct set forth in the count of which the defendant was convicted involved use of explosives or, by its nature, presented a serious potential risk of physical injury to another."

The caption of §4B1.2 is amended by deleting "Definitions" and inserting in lieu thereof "Definitions of Terms Used in Section 4B1.1".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 4 by deleting "\$4A1.2(e) (Applicable Time Period), §4A1.2(h) (Foreign Sentences), and §4A1.2(j) (Expunged Convictions)" and inserting in lieu thereof "\$4A1.2 (Definitions and Instructions for Computing Criminal History)", and by deleting the last sentence as follows: "Also applicable is the Commentary to §4A1.2 pertaining to invalid convictions."

The purpose of this amendment is to clarify the definitions of crime of violence and controlled substance offense used in this guideline. The definition of crime of violence used in this amendment is derived from 18 U.S.C. § 924(e). In addition, the amendment clarifies that all pertinent definitions and instructions in §4A1.2 apply to this section. **The effective date of this amendment is November 1, 1989.**

269. Section 4B1.3 is amended by deleting "from which he derived a substantial portion of his income" and inserting in lieu thereof "engaged in as a livelihood".

The Commentary to §4B1.3 captioned "Application Note" is amended by deleting "Note" and inserting in lieu thereof "Notes", and by inserting the following additional note:

- "2. 'Engaged in as a livelihood' means that (1) the defendant derived income from the

pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wage under federal law (currently 2,000 times the hourly minimum wage under federal law is \$6,700); and (2) the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that twelve-month period (e.g., the defendant engaged in criminal conduct rather than regular, legitimate employment; or the defendant's legitimate employment was merely a front for his criminal conduct).".

The Commentary to §4B1.3 captioned "Application Notes" is amended in Note 1 by deleting the last sentence as follows: "This guideline is not intended to apply to minor offenses."

The Commentary to §4B1.3 captioned "Background" is amended by deleting "proportion" and inserting in lieu thereof "portion".

The purpose of this amendment is to provide a better definition of the intended scope of this enhancement. Compare, for example, United States v. Kerr, 686 F. Supp. 1174 (W.D. Penn. 1988) with United States v. Rivera, 694 F. Supp. 1105 (S.D.N.Y. 1988). The first prong of the definition in application Note 2 above is derived from former 18 U.S.C. § 3575, the provision from which the statutory instruction underlying this guideline (28 U.S.C. § 994 (i)(2)) was itself derived. **The effective date of this amendment is November 1, 1989.**

270. Chapter Five, Part A, is amended in the Sentencing Table by deleting "0-1, 0-2, 0-3, 0-4, and 0-5" wherever it appears, and inserting in each instance "0-6".

Chapter Five, Part A, is amended in the Sentencing Table by inserting "(in months of imprisonment)" immediately under the title "Sentencing Table", by inserting "(Criminal History Points)" immediately following the caption "Criminal History Category", and by enclosing in parentheses each of the six sets of criminal history points displayed under that caption.

This amendment provides that the maximum of the guideline range is six months wherever the minimum of the guideline range is zero months. The court has discretion to impose a sentence of up to 6 months imprisonment for a Class B misdemeanor (Class B or C misdemeanors and infractions are not covered by the guidelines; see §1B1.9). It appears anomalous that the Commission guidelines allow less discretion for certain felonies and Class A misdemeanors. In fact, in certain cases, a plea to a reduced charge of a Class B misdemeanor could result in a higher potential sentence because the sentence for the felony or Class A misdemeanor might be restricted to less than 6 months by the guidelines. This can happen when the Sentencing Table provides a guideline range of 0-1 month, 0-2 months, 0-3, 0-4, or 0-5 months. These very narrow ranges are not required by statute, which allows a 6 month guideline range in such cases. This anomaly is removed by amending the guideline table to provide that whenever the lower limit of the guideline range is 0 months, the upper limit of the guideline range is six months.

In addition, this amendment makes minor editorial improvements to the title and caption of the Sentencing Table. **The effective date of this amendment is November 1, 1989.**

271. Section 5B1.4(b)(20) is amended by inserting ", but only as a substitute for imprisonment" immediately following "release".

Section 5C2.1(c)(2) is amended by deleting "or community confinement" and inserting in lieu thereof ", community confinement, or home detention".

Section 5C2.1(c)(3) is amended by inserting "or home detention" immediately following "community confinement".

Section 5C2.1(d)(2) is amended by inserting "or home detention" immediately following "community confinement".

Section 5C2.1(e) is amended by inserting the following additional subdivision:

"(3) One day of home detention for one day of imprisonment.",

and by deleting the period at the end of subsection (e)(2) and inserting a semicolon in lieu thereof.

The Commentary to §5C2.1 captioned "Application Notes" is amended in the first sentence of the second subparagraph of Note 3 by deleting "intermittent confinement or community confinement, or combination of intermittent and community confinement," and inserting in lieu thereof "intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community confinement, and home detention,".

The Commentary to §5C2.1 captioned "Application Notes" is amended in the second sentence of the second subparagraph of Note 3 by deleting "intermittent or community confinement" and inserting in lieu thereof "intermittent confinement, community confinement, or home detention".

The Commentary to §5C2.1 captioned "Application Notes" is amended in the third subparagraph of Note 3 by inserting "or home detention" immediately following "community confinement", wherever the latter appears.

The Commentary to §5C2.1 captioned "Application Notes" is amended in the last paragraph of Note 3 by inserting "or home detention" immediately following "community confinement", wherever the latter appears.

The Commentary to §5C2.1 captioned "Application Notes" is amended in Note 4 by inserting "or home detention" immediately following "community confinement", wherever the latter appears.

The Commentary to §5C2.1 captioned "Application Notes" is amended in Note 5 by deleting the last sentence as follows: "Home detention may not be substituted for imprisonment.".

Section 5F5.2 is amended by inserting ", but only as a substitute for imprisonment" immediately following "release".

The Commentary to §5F5.2 captioned "Application Notes" is amended in Note 1 by deleting:

"'Home detention' means a program of confinement and supervision that restricts the defendant to his place of residence continuously, or during specified hours, enforced by appropriate means of surveillance by the probation office. The judge may also impose other conditions of probation or supervised release appropriate to effectuate home detention. If the confinement is only during specified hours, the defendant shall engage exclusively in gainful employment, community service or treatment during the non-residential hours.",

and inserting in lieu thereof:

"'Home detention' means a program of confinement and supervision that restricts the defendant to his place of residence continuously, except for authorized absences, enforced by appropriate means of surveillance by the probation office. When an order of home detention is imposed, the defendant is required to be in his place of residence at all times except for approved absences for gainful employment, community service, religious services, medical care, educational or training programs, and such other times as may be specifically authorized. Electronic monitoring is an appropriate means of surveillance and ordinarily should be used in connection with home detention. However, alternative means of surveillance may be used so long as they are as effective as electronic monitoring.".

The Commentary to §5F5.2 captioned "Application Notes" is amended in Note 2 by deleting:

"Home detention generally should not be imposed for a period in excess of six months. However, a longer term may be appropriate for disabled, elderly or extremely ill defendants who would otherwise be imprisoned.",

and inserting in lieu thereof:

"The court may impose other conditions of probation or supervised release appropriate to effectuate home detention. If the court concludes that the amenities available in the residence of a defendant would cause home detention not to be sufficiently punitive, the court may limit the amenities available."

The Commentary to §5F5.2 captioned "Application Notes" is amended by inserting the following additional note:

"3. The defendant's place of residence, for purposes of home detention, need not be the place where the defendant previously resided. It may be any place of residence, so long as the owner of the residence (and any other person(s) from whom consent is necessary) agrees to any conditions that may be imposed by the court, *e.g.*, conditions that a monitoring system be installed, that there will be no 'call forwarding' or 'call waiting' services, or that there will be no cordless telephones or answering machines."

The Commentary to §5F5.2 is amended by inserting at the end:

Background: The Commission has concluded that the surveillance necessary for effective use of home detention ordinarily requires electronic monitoring. However, in some cases home detention may effectively be enforced without electronic monitoring, *e.g.*, when the defendant is physically incapacitated, or where some other effective means of surveillance is available. Accordingly, the Commission has not required that electronic monitoring be a necessary condition for home detention. Nevertheless, before ordering home detention without electronic monitoring, the court should be confident that an alternative form of surveillance will be equally effective.

In the usual case, the Commission assumes that a condition requiring that the defendant seek and maintain gainful employment will be imposed when home detention is ordered."

Section 5B1.1(a)(2) is amended by deleting "or community confinement" and inserting in lieu thereof ", community confinement, or home detention".

The Commentary to §5B1.1 captioned "Application Notes" is amended in Note 1 by inserting ", home detention," immediately after "community confinement" wherever the latter appears.

Chapter One, Part A, section 4(d) is amended in the third sentence of the third paragraph by deleting "or intermittent confinement" and inserting in lieu thereof ", intermittent confinement, or home detention", and in the fourth sentence of the third paragraph by inserting "or home detention" immediately following "of community confinement".

The purpose of this amendment is to conform the guidelines with Section 7305 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

272. Section 5B1.4(b) is amended by inserting the following additional paragraph at the end:

"(25) Curfew

If the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to provide just punishment for the offense, to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant, a condition of curfew is recommended. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order."

Section 5B1.4 is amended by inserting the following commentary:

"Commentary

Application Note:

1. Home detention, as defined by §5F5.2, may only be used as a substitute for imprisonment. See §5C2.1 (Imposition of a Term of Imprisonment). Under home detention, the defendant, with specified exceptions, is restricted to his place of residence during all non-working hours. Curfew, which limits the defendant to his place of residence during evening and nighttime hours, is less restrictive than home detention and may be imposed as a condition of probation whether or not imprisonment could have been ordered."

The purposes of this amendment are to set forth the conditions under which curfew is a recommended condition of probation and clarify that electronic monitoring may be used as a means of surveillance in connection with an order of curfew. **The effective date of this amendment is November 1, 1989.**

273. Section 5B1.3(c) is amended by inserting immediately before the period at the end of the first sentence:

", unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the other conditions set forth under 18 U.S.C. § 3563(b)".

The purpose of this amendment is to conform the guideline to a statutory revision. **The effective date of this amendment is November 1, 1989.**

274. Section 5B1.3(a) is amended by inserting at the end: "The court shall also impose a condition that the defendant not possess illegal controlled substances. 18 U.S.C. § 3563(a)(3)".

Section 5B1.3 is amended by inserting the following commentary:

"Commentary

A broader form of the condition required under 18 U.S.C. § 3563(a)(3) (pertaining to possession of controlled substances) is set forth as recommended condition (7) at §5B1.4 (Recommended Conditions of Probation and Supervised Release)".

The purpose of this amendment is to reference a mandatory condition of probation added by Section 7303 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

275. Section 5C2.1(e) is amended by deleting "Thirty days" and inserting in lieu thereof "One day", by deleting "one month" wherever it appears and inserting in lieu thereof in each instance "one day", and by deleting "One month" and inserting in lieu thereof "One day".

The purpose of this amendment is to enhance the internal consistency of the guidelines. **The effective date of this amendment is November 1, 1989.**

276. Section 5D3.3 is amended by deleting:

"(b) In order to fulfill any authorized purposes of sentencing, the court may impose other conditions reasonably related to (1) the nature and circumstances of the offense, and (2) the history and characteristics of the defendant. 18 U.S.C. § 3583(d)",

and inserting in lieu thereof:

- "(b) The court may impose other conditions of supervised release, to the extent that such conditions are reasonably related to (1) the nature and circumstances of the offense and the history and characteristics of the defendant, and (2) the need for the sentence imposed to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C. §§ 3553(a)(2) and 3583(d)."

The purposes of this amendment are to clarify the guideline and conform it to the statute as amended by Section 7108 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

277. Section 5D3.3(a) is amended by inserting at the end: "The court shall also impose a condition that the defendant not possess illegal controlled substances. 18 U.S.C. § 3563(a)(3)."

The Commentary to §5D3.3 captioned "Background" is amended by inserting the following additional sentence at the end:

"A broader form of the condition required under 18 U.S.C. § 3563(a)(3) (pertaining to possession of controlled substances) is set forth as recommended condition (7) at §5B1.4 (Recommended Conditions of Probation and Supervised Release)."

The purpose of this amendment is to reference a mandatory condition of supervised release added by Section 7303 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

278. Section 5E4.1 is amended by inserting the following additional subsection:

"(c) With the consent of the victim of the offense, the court may order a defendant to perform services for the benefit of the victim in lieu of monetary restitution or in conjunction therewith. 18 U.S.C. § 3663(b)(4)."

The purpose of this amendment is to insert language previously contained in §5F5.3(b) where it had been erroneously placed. **The effective date of this amendment is November 1, 1989.**

279. The Commentary to §5E4.1 captioned "Background" is amended in the first paragraph by deleting:

"See S. Rep. No. 225, 98th Cong., 1st Sess. 95-96.",

and inserting in lieu thereof:

"See 18 U.S.C. § 3563(b)(3) as amended by Section 7110 of Pub. L. No. 100-690 (1988)."

This amendment replaces a reference to legislative history with a citation to a revised statute. Section 7110 of the Anti-Drug Abuse Act of 1988 confirms the authority of a sentencing court to impose restitution as a condition of probation. Previously, such authority was inferred from 18 U.S.C. §3563(b)(20) (defendant may be ordered to "satisfy such other conditions as the court may impose") and from legislative history. **The effective date of this amendment is November 1, 1989.**

280. Section 5E4.2(a) is amended by deleting the second sentence as follows:

"If the guideline for the offense in Chapter Two prescribes a different rule for imposing fines, that rule takes precedence over this subsection."

Section 5E4.2(b) is amended by inserting at the end:

"If, however, the guideline for the offense in Chapter Two provides a specific rule for imposing a fine, that rule takes precedence over subsection (c) of this section."

The purpose of this amendment is to clarify the guideline. The last sentence of current §5E4.2(a) is in the wrong place. This amendment moves the content of this sentence to subsection (b) where it belongs. **The effective date of this amendment is November 1, 1989.**

281. Section 5E4.2(c)(3) is amended by deleting:

"1	\$ 25	\$ 250
2-3	\$100	\$1,000
4-5	\$250	\$2,500",

and inserting in lieu thereof:

"3 and below	\$100	\$5,000
4-5	\$250	\$5,000".

The purpose of this amendment is to increase the maximum in the fine table for offense levels 5 and below to \$5,000, an amount equal to the maximum fine authorized for a petty offense. Moreover, because the guidelines now cover only felonies and class A misdemeanors, the minimum fine guideline is increased to \$100. **The effective date of this amendment is November 1, 1989.**

282. The Commentary to Section 5E4.3 captioned "Background" is amended in the first paragraph by inserting at the end:

"Under the Victims of Crime Act, as amended by Section 7085 of the Anti-Drug Abuse Act of 1988, the court is required to impose assessments in the following amounts with respect to offenses committed on or after November 18, 1988:

Individuals:

\$5, if the defendant is an individual convicted of an infraction or a Class C misdemeanor;
 \$10, if the defendant is an individual convicted of a Class B misdemeanor;
 \$25, if the defendant is an individual convicted of a Class A misdemeanor; and
 \$50, if the defendant is an individual convicted of a felony.

Organizations:

\$50, if the defendant is an organization convicted of a Class B misdemeanor;
 \$125, if the defendant is an organization convicted of a Class A misdemeanor; and
 \$200, if the defendant is an organization convicted of a felony. 18 U.S.C. § 3013."

and in the second paragraph by deleting "The Act requires the court" and inserting in lieu thereof "With respect to offenses committed prior to November 18, 1988, the court is required".

The purpose of this amendment is to conform the commentary to the statute as amended by Section 7085 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

283. Section 5F5.3(a) is amended by deleting "(a)", and by inserting "and sentenced to probation" immediately following "felony".

Section 5F5.3(b) is amended by deleting:

"(b) With the consent of the victim of the offense, the court may order a defendant to perform

services for the benefit of the victim in lieu of monetary restitution. 18 U.S.C. § 3663(b)(4)."

The purposes of this amendment are to correct an erroneous statement in §5F5.3(a) and to delete §5F5.3(b), which deals with restitution, and therefore should appear at §5E4.1. **The effective date of this amendment is November 1, 1989.**

284. The Commentary to §5F5.4 captioned "Background" is amended by deleting the third paragraph as follows:

"The legislative history indicates that, although the sanction was designed to provide actual notice to victims, a court might properly limit notice to only those victims who could be most readily identified, if to do otherwise would unduly prolong or complicate the sentencing process."

The purpose of this amendment is to delete an unnecessary statement that could be subject to misinterpretation. **The effective date of this amendment is November 1, 1989.**

285. Section 5F5.5(a) is amended by deleting:

- "(2) there is a risk that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted; and
(3) imposition of such a restriction is reasonably necessary to protect the public.",

and inserting in lieu thereof:

- "(2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted.",

and by inserting "and" at the end of subsection (a)(1).

The purpose of this amendment is to clarify the guideline. **The effective date of this amendment is November 1, 1989.**

286. Chapter Five, Part G is amended by deleting §5G1.1 in its entirety as follows:

- "§5G1.1. Sentencing on a Single Count of Conviction
- (a) If application of the guidelines results in a sentence above the maximum authorized by statute for the offense of conviction, the statutory maximum shall be the guideline sentence.
- (b) If application of the guidelines results in a sentence below the minimum sentence required by statute, the statutory minimum shall be the guideline sentence.
- (c) In any other case, the sentence imposed shall be the sentence as determined from application of the guidelines.

Commentary

If the statute requires imposition of a sentence other than that required by the guidelines, the statute shall control. The sentence imposed should be consistent with the statute but as close as possible to the guidelines."

A replacement guideline with accompanying commentary is inserted as §5G1.1 (Sentencing on a Single Count of Conviction).

The purpose of this amendment is to clarify the guideline. **The effective date of this amendment is November 1, 1989.**

287. The Commentary to §5G1.2 is amended in the second paragraph by deleting "any combination of concurrent and consecutive sentences that produces the total punishment may be imposed" and inserting in lieu thereof "consecutive sentences are to be imposed to the extent necessary to achieve the total punishment".

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

288. The Commentary to §5G1.2 is amended by inserting the following additional paragraph immediately after the first paragraph:

" This section applies to multiple counts of conviction (1) contained in the same indictment or information, or (2) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding."

The purpose of this amendment is to clarify that this guideline applies in the case of separate indictments that are consolidated for purposes of sentencing. **The effective date of this amendment is November 1, 1989.**

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

"§5G1.3. Convictions on Counts Related to Unexpired Sentences

If at the time of sentencing, the defendant is already serving one or more unexpired sentences, then the sentences for the instant offense(s) shall run consecutively to such unexpired sentences, unless one or more of the instant offenses(s) arose out of the same transactions or occurrences as the unexpired sentences. In the latter case, such instant sentences and the unexpired sentences shall run concurrently, except to the extent otherwise required by law.

Commentary

This section reflects the statutory presumption that sentences imposed at different times ordinarily run consecutively. See 18 U.S.C. § 3584(a). This presumption does not apply when the new counts arise out of the same transaction or occurrence as a prior conviction.

Departure would be warranted when independent prosecutions produce anomalous results that circumvent or defeat the intent of the guidelines."

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

The purpose of this amendment is to specify the circumstances in which a consecutive sentence is required by the guidelines. **The effective date of this amendment is November 1, 1989.**

290. Section 5K1.1 is amended by deleting "made a good faith effort to provide" and inserting in lieu thereof "provided".

Section 5K1.1(a) is amended in the first sentence by deleting "conduct" immediately following "of the following".

The purpose of this amendment is to clarify the Commission's intent that departures under this policy statement be based upon the provision of substantial assistance. The existing policy statement could be interpreted as requiring only a willingness to provide such assistance. The amendment also makes an editorial correction. **The effective date of this amendment is November 1, 1989.**

291. The Commentary to §5K1.2 is deleted in its entirety as follows:

"Commentary

Background: The Commission considered and rejected the use of a defendant's refusal to assist authorities as an aggravating sentencing factor. Refusal to assist authorities based upon continued involvement in criminal activities and association with accomplices may be considered, however, in evaluating a defendant's sincerity in claiming acceptance of responsibility."

The purpose of this amendment is to delete unnecessary commentary containing an unclear example. **The effective date of this amendment is November 1, 1989.**

292. Chapter Five, Part K, Subpart 2, is amended by inserting an additional policy statement as §5K2.15 (Terrorism (Policy Statement)).

The purpose of this amendment is to add a specific policy statement concerning consideration of an upward departure when the offense is committed for a terroristic purpose. This amendment does not make a substantive change. Such conduct is currently included in the broader policy statement at §5K2.9 (Criminal Purpose) and other policy statements. See United States v. Kikumura, 706 F. Supp. 331 (D. N.J. 1989). **The effective date of this amendment is November 1, 1989.**

293. Section 6A1.1 is amended in the title by inserting at the end "(Policy Statement)".

The purpose of this amendment is to designate §6A1.1 as a policy statement. Designation of this section as a policy statement is more consistent with the nature of the subject matter. **The effective date of this amendment is November 1, 1989.**

294. Section 6A1.3 is amended in the title by inserting at the end "(Policy Statement)".

The purpose of this amendment is to designate §6A1.3 as a policy statement. Designation of this section as a policy statement is more consistent with the nature of the subject matter. **The effective date of this amendment is November 1, 1989.**

295. The Commentary to §6B1.2 is amended in the second paragraph by deleting "and does not undermine the basic purposes of sentencing.", and inserting in lieu thereof "(i.e., that such departure is authorized by 18 U.S.C. § 3553(b)). See generally Chapter 1, Part A (4)(b)(Departures)".

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

296. Appendix A (Statutory Index) is amended in the second sentence of the "Introduction" by deleting "conduct" and inserting in lieu thereof "nature of the offense conduct charged in the count", and by deleting "select" and inserting in lieu thereof "use"; and in the third sentence of the "Introduction" by deleting "the court is to apply" and inserting in lieu thereof "use", by deleting "which is" immediately

before "most applicable", and by deleting "conduct for" and inserting in lieu thereof "nature of the offense conduct charged in the count of".

The purpose of this amendment is to clarify the operation of the Statutory Index in relation to §§1B1.1 and 1B1.2(a). **The effective date of this amendment is November 1, 1989.**

297. Appendix A is amended by inserting the following additional paragraph at the end of the Introduction:

" The guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction. (See §1B1.9)."

Appendix A is amended by deleting:

"7 U.S.C. § 52	2N2.1",
"7 U.S.C. § 60	2N2.1",
"10 U.S.C. § 847	2J1.1, 2J1.5",
"16 U.S.C. § 198c	2B1.1, 2B1.3, 2B2.3",
"16 U.S.C. § 204c	2B1.1, 2B1.3",
"16 U.S.C. § 604	2B1.3",
"16 U.S.C. § 606	2B1.1, 2B1.3",
"16 U.S.C. § 668dd	2Q2.1",
"16 U.S.C. § 670j(a)(1)	2B2.3",
"16 U.S.C. § 676	2B2.3",
"16 U.S.C. § 682	2B2.3",
"16 U.S.C. § 683	2B2.3",
"16 U.S.C. § 685	2B2.3",
"16 U.S.C. § 689b	2B2.3",
"16 U.S.C. § 692a	2B2.3",
"16 U.S.C. § 694a	2B2.3",
"18 U.S.C. § 113(d)	2A2.3",
"18 U.S.C. § 113(e)	2A2.3",
"18 U.S.C. § 290	2F1.1",
"18 U.S.C. § 402	2J1.1",
"18 U.S.C. § 437	2C1.3",
"18 U.S.C. § 1164	2B1.3",
"18 U.S.C. § 1165	2B2.3",
"18 U.S.C. § 1382	2B2.3",
"18 U.S.C. § 1504	2J1.2",
"18 U.S.C. § 1726	2F1.1",
"18 U.S.C. § 1752	2B2.3",
"18 U.S.C. § 1793	2P1.4",
"18 U.S.C. § 1856	2B1.3",
"18 U.S.C. § 1863	2B2.3",
"40 U.S.C. § 193e	2B1.1, 2B1.3",
"42 U.S.C. § 1995	2J1.1",
"42 U.S.C. § 2000h	2J1.1",
"42 U.S.C. § 4912	2Q1.3".

The purposes of this amendment are to clarify that the guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction, and to delete references to statutes that apply solely to such offenses. **The effective date of this amendment is November 1, 1989.**

298. Appendix A is amended by deleting:

"18 U.S.C. § 1512	2J1.2",
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and inserting in lieu thereof:

"18 U.S.C. § 1512(a)	2A1.1, 2A1.2, 2A2.1
18 U.S.C. § 1512(b)	2A2.2, 2J1.2
18 U.S.C. § 1512(c)	2J1.2",

and by deleting:

"21 U.S.C. § 848	2D1.5",
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and inserting in lieu thereof:

"21 U.S.C. § 848(a)	2D1.5
21 U.S.C. § 848(b)	2D1.5
21 U.S.C. § 848(e)	2A1.1".

Appendix A is amended by inserting the following statutes in the appropriate place according to statutory title and section number:

"18 U.S.C. § 247	2H1.3",
"18 U.S.C. § 709	2F1.1",
"18 U.S.C. § 930	2K2.5",
"18 U.S.C. § 1460	2G3.1",
"18 U.S.C. § 1466	2G3.1",
"18 U.S.C. § 1516	2J1.2",
"18 U.S.C. § 1716C	2B5.2",
"18 U.S.C. § 1958	2A2.1, 2E1.4",
"18 U.S.C. § 1959	2E1.3",
"42 U.S.C. § 7270b	2B2.3",
"43 U.S.C. § 1733(a)	
(43 C.F.R. 4140.1(b)(1)(i))	2B2.3",
"49 U.S.C. § 1472(c)	2A5.2".

Appendix A is amended on the line beginning "18 U.S.C. § 371" by inserting "2A2.1, 2D1.4," immediately before "2T1.9".

Appendix A is amended in the line beginning "18 U.S.C. § 1005" by inserting ", 2S1.3" immediately following "2F1.1".

Appendix A is amended in the line beginning "18 U.S.C. § 1028" by inserting ", 2L1.2, 2L2.1, 2L2.3" immediately following "2F1.1".

Appendix A is amended in the line beginning "26 U.S.C. § 7203" by inserting "2S1.3," immediately before "2T1.2".

The purpose of this amendment is to make the statutory index more comprehensive. **The effective date of this amendment is November 1, 1989.**

299. Appendix A is amended in the line beginning "18 U.S.C. § 113(a)" by deleting ", 2A3.1" .

Appendix A is amended in the line beginning "18 U.S.C. § 1854" by deleting ", 2B2.3".

Appendix A is amended in the line beginning "42 U.S.C. § 2278(a)(c)" by deleting "42 U.S.C. § 2278(a)(c)" and inserting in lieu thereof "42 U.S.C. § 2278a(c)".

The purposes of this amendment are to delete incorrect references and to insert a correct reference. **The effective date of this amendment is November 1, 1989.**

300. Appendix A is amended by inserting the following statutes in the appropriate place according to statutory title and section number:

"18 U.S.C. § 2251A	2G2.3",
"21 U.S.C. § 858	2D1.10".

Appendix A is amended on the line beginning "18 U.S.C. §1464" by deleting "2G3.1" and inserting in lieu thereof "2G3.2", and by inserting the following statute in the appropriate place according to statutory title and section number:

"18 U.S.C. § 1468	2G3.2".
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Appendix A is amended on the line beginning "21 U.S.C. § 845" by deleting "2D1.3" and inserting in lieu thereof "2D1.2", and on the line beginning "21 U.S.C. § 845a" by deleting "2D1.3" and inserting in lieu thereof "2D1.2".

Appendix A is amended in the line beginning "47 U.S.C. § 223" by deleting "47 U.S.C. § 223" and inserting in lieu thereof "47 U.S.C. § 223(b)(1)(A)".

The purpose of this amendment is to reflect the creation of new offense guidelines. **The effective date of this amendment is November 1, 1989.**

301. Appendix A is amended on the line beginning "18 U.S.C. § 844(h)" by deleting ", 2K1.6" and inserting in lieu thereof "(offenses committed prior to November 18, 1988), 2K1.6, 2K1.7".

The purpose of this amendment is to reflect a revision in the offense covered by 18 U.S.C. § 844(h). **The effective date of this amendment is November 1, 1989.**

302. Sections 5C2.1, 5D3.1, 5D3.2, 5D3.3, 5E4.1, 5E4.2, 5E4.3, 5E4.4, 5F5.1, 5F5.2, 5F5.3, 5F5.4, and 5F5.5, and references thereto, are amended by deleting the number designating the subpart (*i.e.*, the digit immediately following the letter in the section designation) wherever it appears and inserting in lieu thereof "1" in each instance.

The purpose of this amendment is to correct a clerical error. **The effective date of this amendment is November 1, 1989.**

303. The Commentary to §1B1.1 captioned "Application Notes" is amended in the third sentence of Note 4 by deleting "subsection" and inserting in lieu thereof "subdivision" and by deleting "subsections (A), (B) and (C)" and inserting in lieu thereof "subdivisions (A) - (E)".

The Commentary to §1B1.2 captioned "Application Notes" is amended in Note 3 by deleting "at Sentencing)" and inserting in lieu thereof "in Imposing Sentence)".

The Commentary to §1B1.3 captioned "Application Notes" is amended in the first sentence of Note 1 by deleting "is" and inserting in lieu thereof "would be".

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 4 by deleting "(Assault)" and inserting in lieu thereof "(Aggravated Assault)", and by deleting "(Fraud)" and inserting in lieu thereof "(Fraud and Deceit)".

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 5 by deleting "§2K2.3" and inserting in lieu thereof "§2K2.2", by deleting "12" and inserting in lieu thereof "16", by deleting "convicted under" and inserting in lieu thereof "the defendant is convicted under 18 U.S.C. § 922(o) or ", by deleting "§2A3.4(b)(2)" and inserting in lieu thereof "§2A3.4(a)(2)", and by deleting "abusive contact was accomplished as defined in 18 U.S.C. § 2242, increase by 4 levels" and inserting in lieu thereof "offense was committed by the means set forth in 18 U.S.C. § 2242".

The Commentary to §1B1.3 captioned "Background" is amended in the fourth sentence of the third paragraph by deleting "are part" and inserting in lieu thereof "were part".

The Commentary to §1B1.4 captioned "Background" is amended by deleting "3557" and inserting in lieu thereof "3577".

The Commentary to §2B3.2 captioned "Application Notes" is amended in the third sentence of Note 3 by inserting "and Racketeering" immediately before the period at the end of the sentence.

The Commentary to §2B3.2 captioned "Application Notes" is amended in Note 5 by deleting "items taken" and inserting in lieu thereof "loss".

The Commentary to §2A5.2 captioned "Background" is amended by inserting "or Aboard" immediately following "Materials While Boarding".

The Introductory Commentary to Chapter 2, Part B is amended by deleting "Order and" immediately before "Safety".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 2 by deleting "(Attempt, Solicitation, or Conspiracy Not Covered by a Specific Guideline)" and inserting in lieu thereof "(Attempt, Solicitation, or Conspiracy)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 3 by deleting "§§2D1.2-2D1.4" and inserting in lieu thereof "§§2D1.2, 2D1.4, 2D1.5".

The Commentary to §2D1.1 captioned "Background" is amended in the fifth paragraph by deleting "§§5D1.1-5D1.3" and inserting in lieu thereof "Part D (Supervised Release)".

The Commentary to §2F1.1 captioned "Application Notes" is amended in the third sentence of Note 11 by deleting "Part B" and inserting in lieu thereof "Part B of this Chapter".

The Commentary to §2H1.1 captioned "Application Notes" is amended in the last sentence of Note 1 by deleting "for any" and inserting in lieu thereof "applicable to".

The Commentary to §2H1.2 captioned "Application Notes" is amended in Note 1 by deleting "explained" and inserting in lieu thereof "defined".

The Commentary to §2H1.2 captioned "Background" is amended in the second sentence by deleting ", except where death results, in which case" and inserting in lieu thereof "; except where death results,".

Section 2K1.5(c)(1) is amended by deleting "(Attempt or Conspiracy)" and inserting in lieu thereof "(Attempt, Solicitation, or Conspiracy)".

Section 2K1.6(b)(1) is amended by deleting "(Attempt or Conspiracy)" and inserting in lieu thereof "(Attempt, Solicitation, or Conspiracy)".

The Commentary to §2R1.1 captioned "Application Notes" is amended in Note 7 by inserting "Category" immediately following "Criminal History".

The Commentary to §2T1.4 captioned "Application Notes" is amended in Note 3 by inserting "Use of" immediately before "Special Skill".

The Commentary to §3B1.4 is amended by deleting "(Role in the Offense)" the first time it appears and inserting in lieu thereof "(Aggravating Role)", and by deleting "(Role in the Offense)" the second time it appears and inserting in lieu thereof "(Mitigating Role)".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 1 by deleting "25 (18 + 1 + 6) rather than 28" and inserting in lieu thereof "28 (18 + 4 + 6) rather than 31".

The Commentary to §3D1.3 captioned "Application Notes" is amended in the last sentence of Note 4 by deleting "Loss or Damage" and inserting in lieu thereof "Damage or Loss".

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in example 1 by deleting "19" and inserting in lieu thereof "22", by deleting "1-Level" and inserting in lieu thereof "4-Level", by deleting "25." and inserting in lieu thereof "28.", by deleting "(25)" and inserting in lieu thereof "(28)", and by deleting "28" and inserting in lieu thereof "31".

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in the last 2 sentences of example 3 by deleting "10" wherever it appears and inserting in lieu thereof in each instance "8".

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in example 5 by deleting "13" wherever it appears and inserting in lieu thereof "14".

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

- "2. Defendant B, a federal housing inspector, was convicted on four counts of bribery. Counts one and two charged receiving payments of \$3,000 and \$2,000 from Landlord X in return for a single action with respect to a single property. Count three charged receipt of \$1,500 from Landlord X for taking action with respect to another property, and count four charged receipt of \$1,000 from Landlord Y for taking action with respect to a third property. Counts one and two, which arise out of the same transaction, are combined into a single Group involving a \$5,000 bribe and hence an offense level of 11 (§2C1.1(a)(1), §2F1.1). Each of the two remaining counts represents a distinct Group, at offense level 10. As there are three Count Units, the offense level for the most serious (11) is increased by 3 levels. The combined offense level is 14."

by renumbering Illustrations 3, 4, and 5 as 2, 3, and 4, respectively, and by redesignating defendants "C", "D", and "E" as "B", "C", and "D", respectively.

The purposes of this amendment are to conform cross-references and illustrations of the operation of the guidelines to the guidelines, as amended, and to make editorial improvements. **The effective date of this amendment is November 1, 1989.**

304. Section 2D2.1 is amended by inserting the following additional subsection:

- "(b) Cross Reference
 - (1) If the defendant is convicted of possession of more than 5 grams of a mixture or substance containing cocaine base, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) as if the defendant had been convicted of possession of that mixture or substance with intent to distribute."

The Commentary to §2D2.1 captioned "Background" is amended by deleting the entire text as follows:

"Background: Absent a prior drug related conviction, the maximum term of imprisonment authorized by statute is one year. With a single prior drug related conviction, a mandatory minimum term of imprisonment of fifteen days is required by statute and the maximum term of imprisonment authorized is increased to two years. With two or more prior drug related convictions, a mandatory minimum term of imprisonment of ninety days is required by statute and the maximum term of imprisonment authorized is increased to three years."

and inserting in lieu thereof:

"Background: Mandatory minimum penalties for several categories of cases, ranging from

fifteen days' to five years' imprisonment, are set forth in 21 U.S.C. § 844(a). When a mandatory minimum penalty exceeds the guideline range, the mandatory minimum becomes the guideline sentence. §5G1.1(b).

Section 2D2.1(b)(1) provides a cross reference to §2D1.1 for possession of more than five grams of a mixture or substance containing cocaine base, an offense subject to an enhanced penalty under Section 6371 of the Anti-Drug Abuse Act of 1988. Other cases for which enhanced penalties are provided under Section 6371 of the Anti-Drug Abuse Act of 1988 (e.g., for a person with one prior conviction, possession of more than three grams of a mixture or substance containing cocaine base; for a person with two or more prior convictions, possession of more than one gram of a mixture or substance containing cocaine base) are to be sentenced in accordance with §5G1.1(b)."

The purpose of this amendment is to reflect revisions in 21 U.S.C. § 844(a) made by Section 6371 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

305. Chapter Five, Part F, is amended by inserting an additional guideline with accompanying commentary as §5F1.6 (Denial of Federal Benefits to Drug Traffickers and Possessors).

The purpose of this amendment is to reflect the enactment of 21 U.S.C. § 853a by Section 5301 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

306. Chapter One, Part B, is amended by inserting an additional policy statement with accompanying commentary as §1B1.10 (Retroactivity of Amended Guideline Range (Policy Statement)).

The purpose of this amendment is to implement the directive in 28 U.S.C. § 994(u). **The effective date of this amendment is November 1, 1989.**

307. Chapter One, Part A, is amended by deleting subparts 2-5 in their entirety as follows:

"2. The Statutory Mission

The Comprehensive Crime Control Act of 1984 foresees guidelines that will further the basic purposes of criminal punishment, *i.e.*, deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender. It delegates to the Commission broad authority to review and rationalize the federal sentencing process.

The statute contains many detailed instructions as to how this determination should be made, but the most important of them instructs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of 'bank robbery/committed with a gun/\$2500 taken.' An offender characteristic category might be 'offender with one prior conviction who was not sentenced to imprisonment.' The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons, to be determined by coordinating the offense behavior categories with the offender characteristic categories. The statute contemplates the guidelines will establish a range of sentences for every coordination of categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum imprisonment cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).

The sentencing judge must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the judge to depart from the guidelines and sentence outside the range. In that case, the judge must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to see if the guideline was correctly applied. If the judge departs