

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of submission to Congress of amendments to the sentencing guidelines, including previous temporary, "emergency" amendments, effective November 1, 1996, and May 1, 1997, which are re-promulgated as permanent, non-emergency amendments.

SUMMARY: Pursuant to its authority under 28 U.S.C. § 994(p), the Sentencing Commission on May 1, 1997, submitted to the Congress for review a report containing amendments to the sentencing guidelines, policy statements, and official commentary together with reasons for the amendments.

DATES: Pursuant to 28 U.S.C. § 994(p), the Commission has specified an effective date of November 1, 1997, for these amendments, subject to their acceptability to Congress.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Information Specialist, Telephone: (202) 273-4590.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission, an independent agency in the judicial branch of the United States Government, is empowered by 28 U.S.C. § 994(a) to promulgate sentencing guidelines and policy statements for federal sentencing courts. The statute further directs the Commission to review periodically and revise guidelines previously promulgated and authorizes it to submit guideline amendments to the Congress no later than the first day of May each year. See 28 U.S.C. § 994(o), (p). Additionally, a number of the amendments included in this report are authorized and directed by, or otherwise respond to, a variety of enactments of the 104th Congress. Absent action of Congress to the contrary, the amendments become effective on the date specified by the Commission (*i.e.*, November 1, 1997) by operation of law.

Notices of the amendments submitted to the Congress on May 1, 1997, were published on January 2, 1997 (62 F.R. 151), and February 25, 1997 (62 F.R. 8487). A public hearing on the proposed amendments was held in Washington, D.C., on March 18, 1997. After review of the hearing testimony and additional public comment, the Commission promulgated the following amendments,

each having been approved by at least four voting Commissioners.

In connection with its ongoing process of guideline review, the Commission welcomes comment on any aspect of the sentencing guidelines, policy statements, and official commentary.

Authority: 28 U.S.C. § 994 (a), (o), (p), (x).

Richard P. Conaboy,
Chairman.

Amendments to the Sentencing Guidelines

Pursuant to section 994(p) of Title 28, United States Code, the United States Sentencing Commission hereby submits to the Congress the following amendments to the sentencing guidelines and the reasons therefor. As authorized by such section, the Commission specifies an effective date of November 1, 1997, for these amendments.

Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary

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

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

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

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

"However, for purposes of this guideline, 'serious bodily injury' means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a)."; and by inserting after Note 1 the following additional paragraph:

"The means set forth in 18 U.S.C. § 2241(a) or (b)" are: by using force against the victim; by threatening or placing the victim in fear that any person will be subject to death, serious

bodily injury, or kidnapping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, where any dangerous weapon was used, brandished, or displayed to intimidate the victim."

The Commentary to § 2A3.1 captioned "Application Notes" is amended by deleting Note 2; and by renumbering Notes 3 through 7 as Notes 2 through 6, respectively.

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

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

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

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

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

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

2. *Amendment:* Section 1B1.1(b) is amended by inserting ", cross references, and special instructions" following "characteristics".

The Commentary to § 1B1.1 captioned "Application Notes" is amended in Note 1(l) by inserting as the last sentence "The term 'instant' is used in

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

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

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

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

The Commentary to § 8A1.2 captioned "Application Notes" is amended in Note 3(a) by inserting as the last sentence "The term 'instant' is used in connection with 'offense,' 'federal offense,' or 'offense of conviction,' as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (e.g., an offense before a state court involving the same underlying conduct)."

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

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

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

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

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

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

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

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

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

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

Reason for Amendment: This amendment simplifies the guidelines by restricting the cross-reference comparison to the Chapter Two offense levels, unless a different procedure is expressly specified. With respect to §§ 2C1.1, 2C1.7, 2E1.1, and 2E1.2, the amendment, and an express provision in each of these guidelines, provide a different procedure because these guidelines are the only four offense

guidelines in which the inclusion of Chapter Three adjustments in the comparison is likely to make a difference.

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

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

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

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

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

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

connection with a sentence under the amended guideline range.”.

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

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

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

describing the legal consequences flowing from a Commission decision to list an amendment for possible retroactive application.

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

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

Chapter Two, Part A, Subpart 6 Is Amended in the Title by Inserting “or Harassing” After “Threatening”; and by Inserting “, Stalking, and Domestic Violence” After “Communications”

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

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

“(a) Base Offense Level: 12”, and inserting in lieu thereof:

“(a) Base Offense Level:
(1) 12; or
(2) 6, if the defendant is convicted of an offense under 47 U.S.C. § 223(a)(1) (C), (D), or (E) that did not involve a threat to injure a person or property.”.

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

“(2) If the offense involved more than two threats, increase by 2 levels.
(3) If the offense involved the violation of a court protection order, increase by 2 levels.”.

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

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

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

“2. In determining whether subsections (b)(1), (b)(2), and (b)(3) apply, the court shall consider conduct that occurred prior to or during the offense; however, conduct that occurred prior to the offense must be substantially and directly connected to the offense, under the facts of the case taken as a whole. For example, if the defendant engaged in several acts of mailing threatening letters to the same victim over a period of years (including acts that occurred prior to the offense), then for purposes of determining

whether subsections (b)(1), (b)(2), and (b)(3) apply, the court shall consider only those prior acts of threatening the victim that have a substantial and direct connection to the offense.

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

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

Chapter Two, Part A, Subpart 6 Is Amended by Adding After § 2A6.1 the Following New Guideline

“Section 2A6.2. Stalking or Domestic Violence

(a) Base Offense Level: 14

(b) Specific Offense Characteristic

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

(c) Cross Reference

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

Commentary

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

Application Notes

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

‘Stalking’ means traveling with the intent to injure or harass another person

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

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

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

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

4. For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving stalking, threatening, or harassing the same victim are grouped together (and with counts of other offenses involving the same victim that are covered by this guideline) under § 3D1.2 (Groups of Closely Related Counts). For example, if the defendant is convicted of two counts of stalking the defendant's ex-spouse under 18 U.S.C. § 2261A, and one count of interstate domestic violence involving an assault of the ex-spouse under 18 U.S.C. § 2261, the stalking counts would be grouped together and with the interstate domestic violence count. This

grouping procedure avoids unwarranted 'double counting' with the enhancement in subsection (b)(1)(D) (for multiple acts of stalking, threatening, harassing, or assaulting the same victim) and recognizes that the stalking and interstate domestic violence counts are sufficiently related to warrant grouping.

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

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

5. If the defendant received an enhancement under subsection (b)(1) but that enhancement does not adequately reflect the extent or seriousness of the conduct involved, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant stalked the victim on many occasions over a prolonged period of time."

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

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

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

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

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

any person at the called number or who receives the communication.

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

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

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

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

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

adjustment is applicable for the conduct creating the risk, apply § 3C1.2 (Reckless Endangerment During Flight)."

Reason for Amendment: This amendment clarifies the interaction of this guideline with the enhancement under § 3C1.2 (Reckless Endangerment During Flight), particularly when the defendant is convicted under 18 U.S.C. § 758 of fleeing an immigration checkpoint at high speed.

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

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

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

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

"'Trade secret' is defined in 18 U.S.C. § 1839(3).

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

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

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

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

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

16. In cases involving theft of information from a 'protected computer', as defined in 18 U.S.C. § 1030(e)(2) (A) or (B), an upward

departure may be warranted where the defendant sought the stolen information to further a broader criminal purpose."

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

"(d) Special Instruction

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

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

The Commentary to § 2B1.3 captioned "Application Notes" is amended in Note 4 by inserting "or interference with a telecommunications network" following "line"; by inserting ", with attendant, life-threatening delay in the delivery of emergency medical treatment or disruption of other important governmental or private services" following "hours"; by deleting "instances" and inserting in lieu thereof "cases"; by deleting "would" and inserting in lieu thereof "may"; and by inserting as the last sentence "See §§ 5K2.2 (Physical Injury), 5K2.7 (Disruption of Governmental Function), and 5K2.14 (Public Welfare)."

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

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

Section 2B2.3(b) is amended by inserting after subdivision (2) the following additional subdivision: "(3) If the offense involved invasion of a protected computer resulting in a loss exceeding \$2000, increase the offense level by the number of levels from the table in § 2F1.1 corresponding to the loss."

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

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

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

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

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

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

The Commentary to § 2B3.2 captioned "Background" is amended by inserting as the last sentence the following:

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

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

"(c) Special Instruction

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

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

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

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

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

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

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

The Commentary to § 2B3.1 captioned "Application Notes" is amended in

Note 6 by deleting "An 'express'" and inserting in lieu thereof "A"; by inserting after the first sentence the following additional sentence:

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

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

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

9. Amendment: Section 2B5.1(b) is amended by inserting after subdivision (3) the following additional subdivision:

"(4) If any part of the offense was committed outside the United States, increase by 2 levels."

The Commentary to § 2B5.1 captioned "Statutory Provisions" is amended by deleting "471" and inserting in lieu thereof "470".

The Commentary to § 2B5.1 captioned "Application Notes" is amended by redesignating Note 1 as Note 2; and by inserting the following new Note 1:

"1. For purposes of this guideline, 'United States' means each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa."

Reason for Amendment: This amendment addresses section 807(h) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132,

110 Stat. 1308, which requires the Commission to amend the sentencing guidelines to provide an appropriate enhancement for a defendant convicted of an international counterfeiting offense under 18 U.S.C. § 470. The amendment adds a specific offense characteristic in § 2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) to provide a two-level enhancement if the offense occurred outside the United States.

10. Amendment: Section 2D1.1(b) is amended by redesignating subdivision (4) as subdivision (6) and inserting after subdivision (3) the following additional subdivisions:

"(4) If (A) the offense involved the importation of methamphetamine or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under § 3B1.2 (Mitigating Role), increase by 2 levels.

(5) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance, or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels."

Section 2D1.1(c) is amended in subdivision (1) by deleting "30 KG" before "or more of Methamphetamine" and inserting in lieu thereof "15 KG".

Section 2D1.1(c) is amended in subdivision (2) by deleting "10 KG but less than 30 KG" before "of Methamphetamine" and inserting in lieu thereof "5 KG but less than 15 KG".

Section 2D1.1(c) is amended in subdivision (3) by deleting "3 KG but less than 10 KG" before "of Methamphetamine" and inserting in lieu thereof "1.5 G but less than 5 KG".

Section 2D1.1(c) is amended in subdivision (4) by deleting "1 KG but less than 3 KG" before "of Methamphetamine" and inserting in lieu thereof "500 G but less than 1.5 KG".

Section 2D1.1(c) is amended in subdivision (5) by deleting "700 G but less than 1 KG" before "of Methamphetamine" and inserting in lieu thereof "350 G but less than 500 G".

Section 2D1.1(c) is amended in subdivision (6) by deleting "400 G but less than 700 G" before "of Methamphetamine" and inserting in lieu thereof "200 G but less than 350 G".

Section 2D1.1(c) is amended in subdivision (7) by deleting "100 G but less than 400 G" before "of Methamphetamine" and inserting in lieu thereof "50 G but less than 200 G".

Section 2D1.1(c) is amended in subdivision (8) by deleting "80 G but

less than 100 G" before "of Methamphetamine" and inserting in lieu thereof "40 G but less than 50 G".

Section 2D1.1(c) is amended in subdivision (9) by deleting "60 G but less than 80 G" before "of Methamphetamine" and inserting in lieu thereof "30 G but less than 40 G".

Section 2D1.1(c) is amended in subdivision (10) by deleting "40 G but less than 60 G" before "of Methamphetamine" and inserting in lieu thereof "20 G but less than 30 G".

Section 2D1.1(c) is amended in subdivision (11) by deleting "20 G but less than 40 G" before "of Methamphetamine" and inserting in lieu thereof "10 G but less than 20 G".

Section 2D1.1(c) is amended in subdivision (12) by deleting "10 G but less than 20 G" before "of Methamphetamine" and inserting in lieu thereof "5 G but less than 10 G".

Section 2D1.1(c) is amended in subdivision (13) by deleting "5 G but less than 10 G" before "of Methamphetamine" and inserting in lieu thereof "2.5 G but less than 5 G".

Section 2D1.1(c) is amended in subdivision (14) by deleting "5 G" before "of Methamphetamine" and inserting in lieu thereof "2.5 G".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" in the subdivision captioned "Cocaine and Other Schedule I and II Stimulants" in the entry beginning "1 gm of Methamphetamine =" by deleting "1 kg" before "of marihuana" and inserting in lieu thereof "2 kg".

The Commentary to § 2D1.1 captioned "Application Notes" is amended by inserting after Note 18 the following additional notes:

"19. If the offense involved importation of methamphetamine, and an adjustment from subsection (b)(2) applies, do not apply subsection (b)(4).

20. Under subsection (b)(5), the enhancement applies if the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 6903(b). In some cases, the enhancement under this subsection may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In

such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under § 5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under § 5B1.3 (Conditions of Probation) and § 5D1.3 (Conditions of Supervised Release)."

The Commentary to § 2D1.1 captioned "Background" is amended in the second paragraph by inserting as the last sentence "Where necessary, this scheme has been modified in response to specific congressional directives to the Commission."

Reason for Amendment: This multi-part amendment responds to the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237, 110 Stat. 3099, including the directives to the Commission in sections 301 and 303 of that Act. First, as directed by section 301 of the Act, the amendment increases penalties for methamphetamine trafficking offenses. This penalty increase is accomplished by reducing by one-half the quantity of a mixture or substance containing methamphetamine corresponding to each offense level in the Drug Quantity Table. This part of the amendment makes no change, however, in the quantities of methamphetamine (actual) (i.e., "pure" methamphetamine) and "Ice" methamphetamine that correspond to the various offense levels. The Commission has arrived at these particular changes after careful analysis of recent sentencing data, including its own intensive study of methamphetamine offenses, information provided by the Strategic Intelligence Section of the Drug Enforcement Administration concerning recent methamphetamine trafficking levels, dosage unit size, price, and drug quantity, and a variety of other information.

Second, in response to the directive in section 303 of the Act, this amendment provides an enhancement of two levels, with an invited upward departure in more extreme cases, for environmental violations occurring in association with an illicit manufacturing or other drug trafficking offense.

Third, in response to evidence of a recent, substantial increase in the importation of methamphetamine and precursor chemicals used to manufacture methamphetamine, the amendment provides an enhancement of two levels directed at such activity. An exception to this enhancement is provided for defendants who have a

mitigating role in the offense under § 3B1.2 (Mitigating Role).

11. *Amendment:* Section 2D1.1(d) is amended by deleting "Reference" and inserting in lieu thereof "References"; and by inserting after subdivision (1) the following additional subdivision:

"(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply § 2X1.1 (Attempt, Solicitation or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above."

Section 2D1.1(c)(10) is amended by deleting the period after "Schedule III substances" and inserting in lieu thereof a semicolon; and by inserting at the end the following additional subdivision: "2,500 or more units of Flunitrazepam."

Section 2D1.1(c)(11) is amended by deleting the period after "Schedule III substances" and inserting in lieu thereof a semicolon; and by inserting at the end the following additional subdivision: "At least 1,250 but less than 2,500 units of Flunitrazepam."

Section 2D1.1(c)(12) is amended by deleting the period after "Schedule III substances" and inserting in lieu thereof a semicolon; and by inserting at the end the following additional subdivision: "At least 625 but less than 1,250 units of Flunitrazepam."

Section 2D1.1(c)(13) is amended by deleting the period after "Schedule III substances" and inserting in lieu thereof a semicolon; and by inserting at the end the following additional subdivision: "At least 312 but less than 625 units of Flunitrazepam."

Section 2D1.1(c)(14) is amended by inserting after "Schedule III substances;" the following additional subdivision:

"At least 156 but less than 312 units of Flunitrazepam;"; and by inserting "(except Flunitrazepam)" after "Schedule IV substances".

Section 2D1.1(c)(15) is amended by inserting after "Schedule III substances;" the following additional subdivision:

"At least 62 but less than 156 units of Flunitrazepam;"; and by inserting "(except Flunitrazepam)" after "Schedule IV substances".

Section 2D1.1(c)(16) is amended by inserting after "Schedule III substances;" the following additional subdivision:

"Less than 62 units of Flunitrazepam;";

and by inserting “(except Flunitrazepam)” after “Schedule IV substances”.

Section 2D1.1(c)(17) is amended by inserting “(except Flunitrazepam)” after “Schedule IV substances”.

The Commentary to § 2D1.1 captioned “Statutory Provisions” is amended by inserting “(7),” following “(3),”.

The Commentary to § 2D1.1 captioned “Application Notes” is amended in Note 10 in the “Drug Equivalency Tables” by inserting before the subdivision captioned “Schedule I or II Depressants **” the following additional subdivision:

“Flunitrazepam **
1 unit of Flunitrazepam = 16 gm of marihuana

** Provided, that the combined equivalent weight of flunitrazepam, all Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances shall not exceed 99.99 kilograms of marihuana.

The minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.”.

The Commentary to § 2D1.1 captioned “Application Notes” is amended in Note 10 in the “Drug Equivalency Tables” in the subdivision captioned “Schedule I or II Depressants” by inserting an additional asterisk following “**” in both instances; and by

inserting “(except flunitrazepam)” following “Schedule IV substances”.

The Commentary to § 2D1.1 captioned “Application Notes” is amended in Note 10 in the “Drug Equivalency Tables” in the subdivision captioned “Schedule III Substances” by inserting an additional asterisk following “* * *” in both instances; and by inserting “(except flunitrazepam)” following “Schedule IV substances”.

The Commentary to § 2D1.1 captioned “Application Notes” is amended in Note 10 in the “Drug Equivalency Tables” in the subdivision captioned “Schedule IV Substances” is amended by inserting “(except flunitrazepam)” following “Substances”; by inserting an additional asterisk following “*****” in both instances; by inserting “(except flunitrazepam)” following “Substance”; and by inserting “(except flunitrazepam)” before “and V”.

The Commentary to § 2D1.1 captioned “Application Notes” is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned “Schedule V Substances” by inserting an additional asterisk following “*****” in both instances.

The Commentary to § 2D1.1 captioned “Application Notes” is amended in Note 17 by inserting as the last sentence:

“Similarly, in the case of a controlled substance for which the maximum offense level is less than level 38 (e.g., the maximum offense level in the Drug Quantity Table for flunitrazepam is level 20), an upward departure may be

warranted if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance.”.

Section 2D2.1(a)(2) is amended by inserting “flunitrazepam,” following “cocaine,”.

The Commentary to § 2D2.1 is amended by inserting before “Background:” the following:

“Application Note:

1. The typical case addressed by this guideline involves possession of a controlled substance by the defendant for the defendant’s own consumption. Where the circumstances establish intended consumption by a person other than the defendant, an upward departure may be warranted.”.

Reason for Amendment: This amendment implements the directive to the Commission in the Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. 104-305, 110 Stat. 3807. Section 2 of the Act directs the Commission to amend the guidelines to reflect the serious nature of offenses involving flunitrazepam. This amendment reflects the increases in statutory maximum penalties for offenses involving trafficking and simple possession, respectively, of flunitrazepam. In addition, the amendment contains a cross reference to cover the new offense created under this Act involving the distribution of a controlled substance to an individual in order to commit a crime of violence against that individual.

12. Amendment: Section 2D1.11(d) is amended by deleting subdivisions (1)–(9) in their entirety and inserting in lieu thereof the following:

“(1) List I Chemicals	Level 30.
17.8 KG or more of Benzaldehyde;	
20 KG or more of Benzyl Cyanide;	
20 KG or more of Ephedrine;	
200 G or more of Ergonovine;	
400 G or more of Ergotamine;	
20 KG or more of Ethylamine;	
44 KG or more of Hydriodic Acid;	
320 KG or more of Isosafrole;	
4 KG or more of Methylamine;	
500 KG or more of N-Methylephedrine;	
500 KG or more of N-Methylpseudoephedrine;	
12.6 KG or more of Nitroethane;	
200 KG or more of Norpseudoephedrine;	
20 KG or more of Phenylacetic Acid;	
200 KG or more of Phenylpropanolamine;	
10 KG or more of Piperidine;	
320 KG or more of Piperonal;	
1.6 KG or more of Propionic Anhydride;	
20 KG or more of Pseudoephedrine;	
320 KG or more of Safrole;	
400 KG or more of 3, 4-Methylenedioxyphe-nyl-2-propanone.	
(2) List I Chemicals	Level 28.

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

List II Chemicals

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

(3) List I Chemicals Level 26.

At least 1.8 KG but less than 5.3 KG of Benzaldehyde;
At least 2 KG but less than 6 KG of Benzyl Cyanide;
At least 2 KG but less than 6 KG of Ephedrine;
At least 20 G but less than 60 G of Ergonovine;
At least 40 G but less than 120 G of Ergotamine;
At least 2 KG but less than 6 KG of Ethylamine;
At least 4.4 KG but less than 13.2 KG of Hydriodic Acid;
At least 32 KG but less than 96 KG of Isosafrole;
At least 400 G but less than 1.2 KG of Methylamine;
At least 50 KG but less than 150 KG of N-Methylephedrine;
At least 50 KG but less than 150 KG of N-Methylpseudoephedrine;
At least 1.3 KG but less than 3.8 KG of Nitroethane;
At least 20 KG but less than 60 KG of Norpseudoephedrine;
At least 2 KG but less than 6 KG of Phenylacetic Acid;
At least 20 KG but less than 60 KG of Phenylpropanolamine;
At least 1 KG but less than 3 KG of Piperidine;
At least 32 KG but less than 96 KG of Piperonal;
At least 160 G but less than 480 G of Propionic Anhydride;
At least 2 KG but less than 6 KG of Pseudoephedrine;
At least 32 KG but less than 96 KG of Safrole;
At least 40 KG but less than 120 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

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

(4) List I Chemicals Level 24.

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

List II Chemicals

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

(5) List I Chemicals Level 22.

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

List II Chemicals

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

(6) List I Chemicals Level 20.

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

List II Chemicals

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

(7) List I Chemicals Level 18.

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

List II Chemicals

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

(8) List I Chemicals Level 16.

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

List II Chemicals

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

(9) List I Chemicals Level 14.

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

List II Chemicals

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

(10) List I Chemicals Level 12.

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

List II Chemicals

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

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

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

Reason for Amendment: This amendment implements section 302 of the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237, 110 Stat. 3099, which directs the Commission to increase by at least two levels the offense levels for offenses involving list I chemicals under 21 U.S.C. §§ 841(d)(1) and (2) and 960(d)(1) and (3). Pursuant to the emergency amendment authority of that Act, this amendment previously was promulgated as a temporary measure effective May 1, 1997. The amendment also corrects the spelling of “Isosafrole” and corrects and conforms an illustration in an application note.

13. Amendment: Section 2D1.12 is amended by redesignating subsection (b) as subsection (c); and by inserting the following new subsection (b):

“(b) Specific Offense Characteristic

(1) If the defendant (A) intended to manufacture methamphetamine, or (B)

knew, believed, or had reasonable cause to believe that prohibited equipment was to be used to manufacture methamphetamine, increase by 2 levels.”.

The Commentary to § 2D1.12 captioned “Application Notes” is amended in Note 2 by deleting “(b)(1)” and inserting in lieu thereof “(c)(1)”.

Section 2D2.1(a)(3) is amended by inserting “or a list I chemical” after “controlled substance”.

Reason for Amendment: This amendment implements the directive to the Commission in section 203 of the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237, 110 Stat. 3099, to ensure that possession of equipment used to make methamphetamine is treated as a significant violation. Additionally, the amendment includes list I chemicals under § 2D2.1 (Unlawful Possession; Attempt or Conspiracy), in response to section 201 of the Act, which amends 21 U.S.C. § 844 to include list I chemicals.

14. Amendment: Section 2H4.1(a) is amended by deleting “(Apply the greater):” and inserting in lieu thereof “:22”; and by deleting subdivisions (1) and (2).

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

“(b) Specific Offense Characteristics

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

victim sustained serious bodily injury, increase by 2 levels.

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

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

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

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

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

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

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

“1. For purposes of this guideline—
 ‘A dangerous weapon was used’ means that a firearm was discharged, or that a firearm or dangerous weapon was otherwise used.

Definitions of ‘firearm,’ ‘dangerous weapon,’ ‘otherwise used,’ ‘serious bodily injury,’ and ‘permanent or life-threatening bodily injury’ are found in

the Commentary to § 1B1.1 (Application Instructions)."; and by inserting after Note 1 the following additional notes:

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

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

The Commentary to § 2H4.1 captioned "Background" is deleted in its entirety.

Reason for Amendment: This amendment implements section 218 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-573, which directs the Commission to review the guideline for peonage, involuntary servitude, and slave trade offenses and amend the guideline pursuant to that review. Pursuant to the emergency amendment authority of that Act, this amendment previously was promulgated as a temporary measure effective May 1, 1997.

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

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

Section 2L1.1(b) is amended by deleting subdivision (1) and inserting in lieu thereof:

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

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

Section 2L1.1 is amended by deleting subsection (b)(3) and inserting in lieu thereof:

"(3) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony

immigration and naturalization offense, increase by 2 levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by 4 levels."

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

"(4) (Apply the greatest):

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

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

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

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

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

Death or degree of injury	Increase in level
(1) Bodily Injury	Add 2 levels.
(2) Serious Bodily Injury	Add 4 levels.
(3) Permanent or Life-Threatening Bodily Injury	Add 6 levels.
(4) Death	Add 8 levels."

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

"(c) Cross Reference

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

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

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

and inserting in lieu thereof:

"'The offense was committed other than for profit' means that there was no

payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens."

by making the second sentence the second paragraph; by deleting "The number" and inserting in lieu thereof "Number"; and by inserting at the end the following additional paragraphs:

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

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

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

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

The Commentary to § 2L1.1 captioned "Application Notes" is amended by deleting Note 3; and by redesignating Notes 4 and 5 as Notes 3 and 4, respectively.

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

The Commentary to § 2L1.1 captioned "Application Notes" is amended by deleting Note 6.

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

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

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

The Commentary to § 2L1.1 captioned "Background" is amended by deleting the second and third sentences as follows:

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

The Commentary to § 2L1.1 captioned "Background" is amended in the last sentence by inserting "smuggling, transporting, or harboring" following "scale".

Reason for Amendment: This amendment implements section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009, which directs the Commission to amend the guidelines for offenses related to smuggling, transporting, or harboring illegal aliens. Pursuant to the emergency amendment authority of that Act, this amendment previously was promulgated as a temporary measure effective May 1, 1997. This version of the amendment changes § 2L1.1(b)(1)(A)(pertaining to a reduction for non-profit offenses) to narrow somewhat the class of cases that would qualify for the reduced offense level under that provision.

16. Amendment: Section 2L1.2 is amended by deleting subsection (b) and inserting in lieu thereof:

"(b) Specific Offense Characteristic

(1) If the defendant previously was deported after a criminal conviction, or if the defendant unlawfully remained in the United States following a removal order issued after a criminal conviction, increase as follows (if more than one applies, use the greater):

(A) If the conviction was for an aggravated felony, increase by 16 levels.

(B) If the conviction was for (i) any other felony, or (ii) three or more misdemeanor crimes of violence or misdemeanor controlled substance offenses, increase by 4 levels."

The Commentary to § 2L1.2 captioned "Application Notes" is amended by redesignating Notes 1 and 2 as Notes 2 and 3, respectively; by deleting in Note 3, as redesignated, "without criminal conviction" after "deportation"; and by inserting the following as the new Note 1:

"1. For purposes of this guideline—
'Deported after a conviction,' means that the deportation was subsequent to the conviction, whether or not the deportation was in response to such conviction. An alien has previously been 'deported' if he or she has been removed or has departed the United States while an order of exclusion,

deportation, or removal was outstanding.

'Remained in the United States following a removal order issued after a conviction,' means that the removal order was subsequent to the conviction, whether or not the removal order was in response to such conviction.

'Aggravated felony,' is defined at 8 U.S.C. § 1101(a)(43) without regard to the date of conviction of the aggravated felony.

'Crime of violence' and 'controlled substance offense' are defined in § 4B1.2. For purposes of subsection (b)(1)(B), 'crime of violence' includes offenses punishable by imprisonment for a term of one year or less.

'Firearms offense' means any offense covered by Chapter Two, Part K, Subpart 2, or any similar offense under state or local law.

'Felony offense' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year."

The Commentary to § 2L1.2 captioned "Application Notes" is amended by deleting Notes 3 and 4; by redesignating Note 5 as Note 4; in Note 4, as redesignated, by deleting "(b)(1) or (b)(2)" and inserting in lieu thereof "(b)"; and by inserting after Note 4, as redesignated, the following new note:

"5. Aggravated felonies that trigger the adjustment from subsection (b)(1)(A) vary widely. If subsection (b)(1)(A) applies, and (A) the defendant has previously been convicted of only one felony offense; (B) such offense was not a crime of violence or firearms offense; and (C) the term of imprisonment imposed for such offense did not exceed one year, a downward departure may be warranted based on the seriousness of the aggravated felony."

The Commentary to § 2L1.2 captioned "Application Notes" is amended by deleting Notes 6 and 7.

Reason for Amendment: This amendment implements sections 321 and 334 of the Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-627, 635. Section 321 of the Act adds to the definition of "aggravated felony" crimes of rape and sexual abuse of a minor, as well as any crime of violence for which the term of imprisonment is at least one year. This amendment conforms the definition of "aggravated felony" in the guidelines with the amended definition in the Immigration and Nationality Act.

Section 334 directs the Sentencing Commission to promulgate amendments to the guidelines for the crimes of unlawfully remaining and illegally entering the United States corresponding to changes made in

statutory penalties for these offenses in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796. This amendment enhances penalties for those who unlawfully enter or remain in the United States following conviction for an aggravated felony, any other felony, or three misdemeanor crimes of violence or controlled substance offenses. The amendment also makes clarifying changes to the commentary.

17. Amendment: Section 2L2.1(a) is amended by deleting '9' and inserting in lieu thereof '11'.

Section 2L2.1(b) is amended by deleting subdivision (1) and inserting in lieu thereof:

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

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

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

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

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

"1. For purposes of this guideline"

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

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

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

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

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

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

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

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

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

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

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

"1. For purposes of this guideline—'Immigration and naturalization offense' means any offense covered by Chapter Two, Part L."

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

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

Reason for Amendment: This amendment implements section 211 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009, which directs the Commission to amend the guidelines for offenses related to the fraudulent use of government-issued documents. Pursuant to the emergency amendment authority of that Act, this amendment previously was promulgated as a temporary measure effective May 1, 1997. This version of the amendment changes § 2L2.1(b)(1) (pertaining to a reduction for non-profit offenses) to narrow somewhat the class of cases that would qualify for the reduced offense level under that provision.

18. Amendment: Section 3A1.1(a) is amended by inserting "of conviction" after "the offense".

The Commentary to § 3A1.1 captioned "Application Notes" is amended in Note 2 by inserting at the beginning the following new paragraph:

"For purposes of subsection (b), 'victim' includes any person who is a victim of the offense of conviction and any conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct)."

Reason for Amendment: This amendment addresses a circuit court conflict regarding whether "victim of the offense" in § 3A1.1 (Hate Crime Motivation or Vulnerable Victim) refers only to a victim of the defendant's offense of conviction or, more broadly, to a victim of any relevant conduct. The amendment adopts the majority appellate view, which holds that a sentencing court should consider the defendant's relevant conduct when determining whether the vulnerable victim enhancement applies. See, e.g., *United States v. Haggard*, 41 F.3d 1320, 1326 (9th Cir. 1994) (proper to consider harm caused to victims beyond the defendant's offense of conviction); *United States v. Yount*, 960 F.2d 955 (11th Cir. 1992).

This amendment also clarifies a possible ambiguity regarding the scope of conduct to be considered when applying the hate crime motivation enhancement in § 3A1.1(a). Consistent with Congress's intent to punish a defendant whose primary objective in committing the hate crime was to harm a member of a particular class of individuals, this amendment clarifies that the enhancement in subsection (a) is limited to victims of the defendant's offense of conviction.

19. Amendment: Section 3A1.4 is amended in the title by deleting "International".

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

The Commentary to § 3A1.4 captioned "Application Notes" is amended in Note 1 in the first sentence by deleting "international" and inserting in lieu thereof "a federal crime of"; in the second sentence by deleting "'International'" and inserting in lieu thereof "'Federal crime of'"; and by deleting "2331" and inserting in lieu thereof "2332b(g)".

Reason for Amendment: Section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1303, requires the Commission to amend the sentencing guidelines so that the adjustment in § 3A1.4 (relating to international terrorism) applies more broadly to "Federal crimes of terrorism," as defined in 18 U.S.C. § 2332b(g). Pursuant to this provision,

the Commission promulgated § 3A1.4 (Terrorism) as an emergency amendment, effective November 1, 1996. Under the terms of the congressionally granted authority, this amendment is temporary unless repromulgated in the next amendment cycle under regularly applicable amendment procedures. See Pub. L. No. 100-182, § 21, set forth as an editorial note under 28 U.S.C. § 994. This amendment repromulgates § 3A1.4, as set forth in the 1996 Interim Publication of the Guidelines Manual.

20. Amendment: The Commentary to § 3C1.1 captioned "Application Notes" is amended in Note 1 by deleting in the third sentence "such testimony or statements should be evaluated in a light most favorable to the defendant." and inserting in lieu thereof:

"the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice."

The Commentary to § 3C1.1 captioned "Application Notes" is amended in Note 3(i) by deleting "conduct prohibited by 18 U.S.C. §§ 1501-1516." and inserting in lieu thereof "other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§ 1510, 1511)."

The Commentary to § 3C1.1 captioned "Application Notes" is amended in Note 4 by deleting "The following is a non-exhaustive list of examples of the" and inserting in lieu thereof "Some"; by deleting "that, absent a separate count of conviction for such conduct," and inserting in lieu thereof "ordinarily"; by deleting "but ordinarily can appropriately be sanctioned by the determination of the particular" and inserting in lieu thereof "but may warrant a greater"; and by inserting the following after "guideline range":

". However, if the defendant is convicted of a separate count for such conduct, this enhancement will apply and increase the offense level for the underlying offense (i.e., the offense with respect to which the obstructive conduct occurred). See Application Note 7, below.

The following is a non-exhaustive list of examples of the types of conduct to which this application note applies".

The Commentary to § 3C1.1 captioned "Application Notes" is amended in Note 6 by deleting the last two sentences of Note 6.

The Commentary to § 3C1.1 captioned "Application Notes" is amended by

redesignating Note 7 as Note 8; and by inserting the following as new Note 7:

"7. Where the defendant is convicted both of the obstruction offense and the underlying offense (the offense with respect to which the obstructive conduct occurred), the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of § 3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater."

Reason for Amendment: This amendment addresses a circuit court conflict regarding the meaning of the last sentence of Application Note 1 in § 3C1.1. The issue is whether that sentence requires the use of a heightened standard of proof when the court applies an enhancement for perjury. Compare *United States versus Montague*, 40 F.3d 1251 (D.C. Cir. 1994) (applying the clear and convincing standard) with *United States versus Zajac*, 62 F.3d 145 (6th Cir.) (applying the preponderance of the evidence standard), cert. denied 116 S. Ct. 681 (1995). The amendment changes the last sentence of Application Note 1 so that it no longer suggests the use of a heightened standard of proof. Instead, it clarifies that the court should be mindful that not all inaccurate testimony or statements reflect a willful attempt to obstruct justice.

The amendment also (A) modifies subdivision (i) of Application Note 3 in § 3C1.1 to make the language more precise; (B) in response to concerns expressed in a Seventh Circuit opinion, clarifies the meaning of the phrase "absent a separate count of conviction" by adding an additional sentence at the end of Application Note 4, see *United States v. Giacometti*, 28 F.3d 698 (7th Cir. 1994); and (C) clarifies that the guidance in the last two sentences of Application Note 6 applies to a broader set of cases than the cases described in the first two sentences of Application Note 6.

21. Amendment: Section § 4B1.2(1) is amended by deleting "(1)" and inserting in lieu thereof "(a)"; by inserting a comma following "law" and following "one year"; by deleting "(i)" and inserting in lieu thereof "(1)"; and by deleting "(ii)" and inserting in lieu thereof "(2)".

Section § 4B1.2(2) is amended by deleting "(2)" and inserting in lieu thereof "(b)"; by deleting "a" following "under"; and by deleting "prohibiting"

and inserting in lieu thereof "punishable by a term of imprisonment of more than one year, that prohibits".

Section § 4B1.2(3) is amended by deleting "(3)" and inserting in lieu thereof "(c)"; by deleting "(A)" and inserting in lieu thereof "(1)"; and by deleting "(B)" and inserting in lieu thereof "(2)".

The Commentary to § 4B1.2 captioned "Application Notes" is amended in Note 1 by inserting at the beginning "For purposes of this guideline—"; and by deleting "The terms 'crime' and inserting in lieu thereof 'Crime'; and by inserting at the end the following new paragraphs:

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

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

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(d)(1)) is a 'controlled substance offense.'

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a 'controlled substance offense.'

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a 'controlled substance offense' if the offense of conviction established that the underlying offense (the offense facilitated) was a 'controlled substance offense.'

Using a communications facility in committing, causing, or facilitating a

drug offense (21 U.S.C. § 843(b)) is a 'controlled substance offense' if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a 'controlled substance offense.'

Possessing a firearm during and in relation to a crime of violence or drug offense (18 U.S.C. § 924(c)) is a 'crime of violence' or 'controlled substance offense' if the offense of conviction established that the underlying offense (the offense during and in relation to which the firearm was carried or possessed) was a 'crime of violence' or 'controlled substance offense.' (Note that if the defendant also was convicted of the underlying offense, the two convictions will be treated as related cases under § 4A1.2 (Definitions and Instruction for Computing Criminal History)).

'Prior felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult)."

The Commentary to § 4B1.2 captioned "Application Notes" is amended by deleting Notes 2 and 3; and by inserting after Note 1 the following new Note 2:

"2. Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of § 4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry."

The Commentary to § 4B1.2 captioned "Application Notes" is amended by redesignating Note 4 as Note 3.

Reason for Amendment: This amendment addresses a circuit court conflict regarding whether the offenses of possessing a listed chemical with intent to manufacture a controlled substance or possessing a prohibited flask or equipment with intent to manufacture a controlled substance are

"controlled substance offenses" under the career offender guideline. Compare *United States v. Calverley*, 11 F.3d 505 (5th Cir. 1993) (possession of a listed chemical with intent to manufacture a controlled substance is a controlled substance offense under § 4B1.2) with *United States v. Wagner*, 994 F.2d 1467, 1475 (10th Cir. 1993) (possession of a listed chemical with intent to manufacture a controlled substance is not a controlled substance offense). This amendment makes each of these offenses a "controlled substance offense" under the career offender guideline. This decision is based on the Commission's view that there is such a close connection between possession of a listed chemical or prohibited flask or equipment with intent to manufacture a controlled substance and actually manufacturing a controlled substance that the former offenses are fairly considered as controlled substance trafficking offenses.

The amendment also clarifies that certain other offenses are "crimes of violence" or "controlled substance offenses" if the offense of conviction established that the underlying offense was a "crime of violence" or "controlled substance offense." See *United States v. Baker*, 16 F.3d 854 (8th Cir. 1994); *United States v. Veaz-Gonzalez*, 999 F.2d 1326 (9th Cir. 1993), effectively overruled on other grounds by *Custis v. United States*, 114 S.Ct. 1732 (1994). Additionally, the amendment makes the following nonsubstantive changes to § 4B1.2 to improve the internal consistency of the guidelines: (A) adding the phrase "punishable by a term of imprisonment of more than one year, that prohibits" in subsection (2) to make it consistent with subsection (1); and (B) conforming the second paragraph of Application Note 2 of § 4B1.2 to the language of §§ 2K1.3 and 2K2.1.

22. *Amendment*: Section 5B1.3 is amended by deleting it in its entirety and inserting in lieu thereof:

Section 5B1.3. Conditions of Probation

(a) Mandatory Conditions—

(1) For any offense, the defendant shall not commit another federal, state or local offense (see 18 U.S.C. § 3563(a));

(2) For a felony, the defendant shall pay a fine, make restitution, or work in community service as directed by the court 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 conditions set forth under discretionary conditions (see 18 U.S.C. § 3563(a));

(3) For any offense, the defendant shall not unlawfully possess a controlled substance (see 18 U.S.C. § 3563(a));

(4) For a domestic violence crime as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a public, private, or non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (see 18 U.S.C. § 3563(a));

(5) For any offense, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (see 18 U.S.C. § 3563(a));

(6) (A) The defendant shall make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013;

(7) The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments (see 18 U.S.C. § 3563(a));

(8) If the court has imposed a fine, the defendant shall pay the fine or adhere to a court-established payment schedule (see 18 U.S.C. § 3563(a)).

(b) The court may impose other conditions of probation to the extent that such conditions (1) Are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (C) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (D) the need to protect the public from further crimes of the defendant; and (E) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve only such deprivations of liberty or property as are reasonably

necessary for the purposes of sentencing indicated in 18 U.S.C. § 3553(a) (see 18 U.S.C. § 3563(b)).

(c) The following "standard" conditions are recommended for probation. Several of the conditions are expansions of the conditions required by statute:

(1) The defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

(2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

(3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) The defendant shall support the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);

(5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) The defendant shall notify the probation officer at least ten days prior to any change of residence or employment;

(7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;

(8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;

(9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(10) The defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(11) The defendant shall notify the probation officer within seventy-two

hours of being arrested or questioned by a law enforcement officer;

(12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

(13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

(14) The defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment;

(d) The following 'special' conditions of probation are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(1) Possession of Weapons

If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense—a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.

(2) Debt Obligations

If an installment schedule of payment of restitution or fines is imposed—a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(3) Access to Financial Information

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine—a condition requiring the defendant to provide the probation officer access to any requested financial information.

(4) Substance Abuse Program Participation

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol—a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

(5) Mental Health Program Participation
If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment—a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(e) Additional Conditions
The following 'special conditions' may be appropriate on a case-by-case basis:

(1) Community Confinement

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of probation.

(2) Home Detention

Home detention may be imposed as a condition of probation but only as a substitute for imprisonment. See § 5F1.2 (Home Detention).

(3) Community Service

Community service may be imposed as a condition of probation. See § 5F1.3 (Community Service).

(4) Occupational Restrictions

Occupational restrictions may be imposed as a condition of probation. See § 5F1.5 (Occupational Restrictions).

(5) Curfew

A condition imposing a curfew may be imposed 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. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(6) Intermittent Confinement

Intermittent confinement (custody for intervals of time) may be ordered as a condition of probation during the first year of probation."

Section 5B1.4 is deleted in its entirety.

Section 5D1.3 is amended by deleting it in its entirety and inserting in lieu thereof:

"Section 5D1.3. Conditions of Supervised Release

(a) Mandatory Conditions:

(1) The defendant shall not commit another federal, state or local offense (see 18 U.S.C. § 3583(d));

(2) The defendant shall not unlawfully possess a controlled substance (see 18 U.S.C. § 3583(d));

(3) The defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. § 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (see 18 U.S.C. § 3583(d));

(4) The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (see 18 U.S.C. § 3583(d));

(5) If a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (see 18 U.S.C. § 3624(e));

(6)(A) The defendant shall make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013.

(b) The court may impose other conditions of supervised release to the extent that such conditions (1) Are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission.

(c) The following 'standard' conditions are recommended for supervised release. Several of the conditions are expansions of the conditions required by statute:

(1) The defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

(2) The defendant shall report to the probation officer as directed by the

court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

(3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) The defendant shall support the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);

(5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) The defendant shall notify the probation officer at least ten days prior to any change of residence or employment;

(7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;

(8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;

(9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(10) The defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

(13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm

the defendant's compliance with such notification requirement;

(14) The defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment;

(15) The defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.

(d) The following 'special' conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(1) Possession of Weapons

If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense—a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.

(2) Debt Obligations

If an installment schedule of payment of restitution or fines is imposed—a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(3) Access to Financial Information

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine—a condition requiring the defendant to provide the probation officer access to any requested financial information.

(4) Substance Abuse Program Participation

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol—a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

(5) Mental Health Program Participation

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment—a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(e) Additional Conditions

The following 'special conditions' may be appropriate on a case-by-case basis:

(1) Community Confinement

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. See § 5F1.1 (Community Confinement).

(2) Home Detention

Home detention may be imposed as a condition of supervised release, but only as a substitute for imprisonment. See § 5F1.2 (Home Detention).

(3) Community Service

Community service may be imposed as a condition of supervised release. See § 5F1.3 (Community Service).

(4) Occupational Restrictions

Occupational restrictions may be imposed as a condition of supervised release. See § 5F1.5 (Occupational Restrictions).

(5) Curfew

A condition imposing a curfew may be imposed 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. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order."

Reason for Amendment: The purposes of this amendment are twofold. First, the amendment revises the pertinent guidelines to reflect statutorily required conditions of probation and supervised release added by Section 203 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1227, and other laws. Second, the amendment revises §§ 5B1.3, 5B1.4, 5D1.3, and 8B1.1 so as to better distinguish among the statutorily required, standard, and special conditions of probation and supervised release.

23. Amendment: Section 5D1.2(a) is amended by deleting "If" and inserting in lieu thereof "Subject to subsection (b), if".

Section 5D1.2(b) is amended by deleting "Provided, that" and inserting in lieu thereof "Except as otherwise provided,"; and by deleting "in no event" and inserting in lieu thereof "not"

The Commentary to § 5D1.2 is amended by inserting the following before "Background":

"Application Notes:

1. A defendant who qualifies under § 5C1.2 (Applicability of Statutory Minimum Sentence in Certain Cases) is not subject to any statutory minimum sentence of supervised release. See 18 U.S.C. § 3553(f). In such a case, the term of supervised release shall be determined under subsection (a).

2. Upon motion of the Government, a defendant who has provided substantial assistance in the investigation or prosecution of another person who has committed an offense may be sentenced to a term of supervised release that is less than any minimum required by statute or the guidelines. See 18 U.S.C. § 3553(e), § 5K1.1 (Substantial Assistance to Authorities)."

The Commentary to § 5C1.2 captioned "Application Notes" is amended by inserting after Note 8 the following additional note:

"9. A defendant who meets the criteria under this section is exempt from any otherwise applicable statutory minimum sentence of imprisonment and statutory minimum term of supervised release."

Reason for Amendment: This amendment amends § 5D1.2 (Term of Supervised Release) to make clear that a defendant who qualifies under the "safety valve" (§ 5C1.2, 18 U.S.C. § 3553(f)), or who is the beneficiary of a Government substantial assistance motion under 18 U.S.C. § 3553(e), is not subject to any statutory minimum term of supervised release. This issue has arisen in a number of hotline calls. This amendment also clarifies that the requirement in subsection (a), with respect to the length of a term of supervised release, is subject to the requirement in subsection (b) that the term be not less than any statutorily required term of supervised release.

24. Amendment: Section 5E1.1 is amended by deleting it in its entirety and inserting in lieu thereof:

"§ 5E1.1. Restitution

(a) In the case of an identifiable victim, the court shall—

(1) Enter a restitution order for the full amount of the victim's loss in the case of an identifiable victim of the offense, if such order is authorized under 18 U.S.C. § 2248, § 2259, § 2264, § 2327, § 3663, or § 3663A; or

(2) Impose a term of probation or supervised release with a condition requiring restitution for the full amount of the victim's loss, in the case of an identifiable victim of the offense, if the offense is not an offense for which

restitution is authorized under 18 U.S.C. § 3663(a)(1) but otherwise meets the criteria for an order of restitution under that section.

(b) Provided, that the provisions of subsection (a) do not apply—

(1) When full restitution has been made; or

(2) In the case of a restitution order under § 3663; a restitution order under 18 U.S.C. § 3663A that pertains to an offense against property described in 18 U.S.C. § 3663A(c)(1)(A)(ii); or a condition of restitution imposed pursuant to subsection (a)(2) above, to the extent the court finds, from facts on the record, that (A) The number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(c) If a defendant is ordered to make restitution to an identifiable victim and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

(d) In the case where there is no identifiable victim and the defendant was convicted under 21 U.S.C. § 841, § 848(a), § 849, § 856, § 861, or § 863, the court, taking into consideration the amount of public harm caused by the offense and other relevant factors, shall order an amount of community restitution not to exceed the fine imposed under § 5E1.2.

(e) A restitution order may direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments. See 18 U.S.C. § 3664(f)(3)(A). An in-kind payment may be in the form of (A) return of property; (B) replacement of property; or (C) if the victim agrees, services rendered to the victim or to a person or organization other than the victim. See 18 U.S.C. § 3664(f)(4).

(f) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(g) Special Instruction

(1) This guideline applies only to a defendant convicted of an offense committed on or after November 1, 1997. Notwithstanding the provisions of § 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), use the former § 5E1.1 (set forth in Appendix C, amendment 568) in lieu of this guideline in any other case.

Commentary

Application Note:

1. The court shall not order community restitution under subsection (d) if it appears likely that such an award would interfere with a forfeiture under Chapter 46 or 96 of Title 18, United States Code, or under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*). See 18 U.S.C. § 3663(c)(4).

Furthermore, a penalty assessment under 18 U.S.C. § 3013 or a fine under Subchapter C of Chapter 227 of Title 18, United States Code, shall take precedence over an order of community restitution under subsection (d). See 18 U.S.C. § 3663(c)(5).

Background: Section 3553(a)(7) of Title 18, United States Code, requires the court, "in determining the particular sentence to be imposed," to consider "the need to provide restitution to any victims of the offense." Orders of restitution are authorized under 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, and 3663A. For offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation or supervised release.

Subsection (d) implements the instruction to the Commission in section 205 of the Antiterrorism and Effective Death Penalty Act of 1996. This provision directs the Commission to develop guidelines for community restitution in connection with certain drug offenses where there is no identifiable victim but the offense causes "public harm."

To the extent that any of the above-noted statutory provisions conflict with the provisions of this guideline, the applicable statutory provision shall control."

Section 8B1.1 is amended by deleting it in its entirety and inserting in lieu thereof:

"Section 8B1.1. Restitution—Organizations

(a) The court shall—

(1) Enter a restitution order for the full amount of the victim's loss in the case of an identifiable victim of the offense, if such order is authorized under 18 U.S.C. § 2248, § 2259, § 2264, § 2327, § 3663, or § 3663A; or

(2) Impose a term of probation or supervised release with a condition requiring restitution for the full amount of the victim's loss, in the case of an identifiable victim of the offense, if the offense is not an offense for which restitution is authorized under 18 U.S.C. § 3663(a)(1) but otherwise meets the criteria for an order of restitution under that section.

(b) Provided, that the provisions of subsection (a) do not apply—

(1) When full restitution has been made; or

(2) In the case of a restitution order under § 3663; a restitution order under 18 U.S.C. § 3663A that pertains to an offense against property described in 18 U.S.C. § 3663A(c)(1)(A)(ii); or a condition of restitution imposed pursuant to subsection (a)(2) above, to the extent the court finds, from facts on the record, that (A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(c) If a defendant is ordered to make restitution to an identifiable victim and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

(d) A restitution order may direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments. See 18 U.S.C. § 3664(f)(3)(A). An in-kind payment may be in the form of (A) return of property; (B) replacement of property; or (C) if the victim agrees, services rendered to the victim or to a person or organization other than the victim. See 18 U.S.C. § 3664(f)(4).

(e) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(f) Special Instruction

(1) This guideline applies only to a defendant convicted of an offense committed on or after November 1, 1997. Notwithstanding the provisions of

§ 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), use the former § 8B1.1 (set forth in Appendix C, amendment 568) in lieu of this guideline in any other case.

Commentary

Background: Section 3553(a)(7) of title 18, United States Code, requires the court, 'in determining the particular sentence to be imposed,' to consider 'the need to provide restitution to any victims of the offense.' Orders of restitution are authorized under 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, and 3663A. For offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation."

Reason for Amendment: This amendment conforms the provisions of §§ 5E1.1 and 8B1.1 to section 204 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1227, which includes procedures for payment of full restitution to a victim of the offense. The amendment also implements the directive to the Commission in section 205 of the Act to issue guidelines to assist courts in determining an appropriate amount of "community restitution" when the defendant is convicted of certain drug offenses and there is no identifiable victim of the offense. As a starting point, the Commission has elected to issue a guideline that permits broad court discretion to determine an amount of community restitution not exceeding the fine imposed. Over time, the Commission intends to evaluate and refine this guideline in light of sentencing experience.

25. Amendment: Section § 5E1.2(b) is amended by deleting "Except as provided in subsections (f) and (i) below, or otherwise required by statute, the fine imposed shall be within the range" and inserting in lieu thereof "The applicable fine guideline range is that".

Section 5E1.2(c)(1) is amended by inserting "guideline" following "fine".

Section 5E1.2(c)(2) is amended by inserting "guideline" following "fine".

Section 5E1.2(d) is amended in subdivision (6) by deleting "and"; by renumbering subdivision (7) as subdivision (8); and by inserting after subdivision (6) the following new subdivision (7):

"(7) The expected costs to the government of any term of probation, or term of imprisonment and term of supervised release imposed; and".

Section 5E1.2 is amended by deleting "(e)"; by redesignating subsections (f),

(g), and (h) as subsections (e), (f), and (g) respectively; and by deleting section (i).

The Commentary to § 5E1.2 captioned "Application Notes" is amended in Note 7 by deleting:

"Subsection (i) provides for an additional fine sufficient to pay the costs of any imprisonment, probation, or supervised release ordered, subject to the defendant's ability to pay as prescribed in subsection (f). In making a determination as to the amount of any fine to be imposed under this provision,"

and inserting in lieu thereof "In considering subsection (d)(7)."

Reason for Amendment: This amendment indirectly addresses a circuit court conflict regarding whether a court may impose a fine for costs of imprisonment and/or supervision when it has not imposed any punitive fine. Compare, *United States v. Labat*, 915 F.2d 603 (10th Cir. 1990) (requiring imposition of punitive fine before costs of imprisonment fine can be imposed) with *United States v. Sellers*, 42 F.3d 116 (2d Cir. 1994) (not requiring imposition of punitive fine before ordering costs of imprisonment fine), cert. denied, 116 S.Ct. 93 (1995).

Recognizing that a fine for costs of imprisonment and/or supervision is not statutorily required and rarely is imposed, the Commission has elected to dispense with the requirement that courts determine a separate, additional fine for such costs. Instead, the amendment provides that the court shall take such costs into consideration in determining the appropriate amount of a punitive fine.

Because, under the amended procedure, it no longer will be necessary to determine a separate fine increment for costs associated with implementing the sentence, the issue on which the circuit courts have differed should not arise. This procedure also should substantially simplify fine calculations, thereby allowing court and probation officer resources to be used more efficiently and productively.

26. Amendment: The Commentary to § 5E1.3 captioned "Background" is amended by deleting it in its entirety and inserting in lieu thereof:

"Application Notes:

1. This guideline applies only if the defendant is an individual. See § 8E1.1 for special assessments applicable to organizations.

2. The following special assessments are provided by statute (18 U.S.C. 3013): For Offenses Committed By Individuals On Or After April 24, 1996:

(A) \$100, if convicted of a felony;

(B) \$25, if convicted of a Class A misdemeanor;

(C) \$10, if convicted of a Class B misdemeanor;

(D) \$5, if convicted of a Class C misdemeanor or an infraction.

For Offenses Committed By Individuals On Or After November 18, 1988 But Prior To April 24, 1996:

(E) \$50, if convicted of a felony;

(F) \$25, if convicted of a Class A misdemeanor;

(G) \$10, if convicted of a Class B misdemeanor;

(H) \$5, if convicted of a Class C misdemeanor or an infraction.

For Offenses Committed By Individuals Prior To November 18, 1988:

(I) \$50, if convicted of a felony;

(J) \$25, if convicted of a misdemeanor.

3. A special assessment is required by statute for each count of conviction.

Background: Section 3013 of Title 18, United States Code, added by The Victims of Crimes Act of 1984, Pub. L. No. 98-473, Title II, Chap. XIV, requires courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation."

The Commentary to § 8E1.1 captioned "Background" is amended by deleting it in its entirety and inserting in lieu thereof the following:

"Application Notes:

1. This guideline applies if the defendant is an organization. It does not apply if the defendant is an individual. See § 5E1.3 for special assessments applicable to individuals.

2. The following special assessments are provided by statute (see 18 U.S.C. § 3013):

For Offenses Committed By Organizations On Or After April 24, 1996:

(A) \$400, if convicted of a felony;

(B) \$125, if convicted of a Class A misdemeanor;

(C) \$50, if convicted of a Class B misdemeanor; or

(D) \$25, if convicted of a Class C misdemeanor or an infraction.

For Offenses Committed By Organizations On Or After November 18, 1988 But Prior To April 24, 1996:

(E) \$200, if convicted of a felony;

(F) \$125, if convicted of a Class A misdemeanor;

(G) \$50, if convicted of a Class B misdemeanor; or

(H) \$25, if convicted of a Class C misdemeanor or an infraction.

For Offenses Committed By Organizations Prior To November 18, 1988:

(I) \$200, if convicted of a felony;

(J) \$100, if convicted of a misdemeanor.

3. A special assessment is required by statute for each count of conviction.

Background: Section 3013 of Title 18, United States Code, added by The Victims of Crimes Act of 1984, Pub. L. No. 98-473, Title II, Chap. XIV, requires courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation."

Reason for Amendment: This amendment conforms §§ 5E1.3 (Special Assessments) and 8E1.1 (Special Assessments—Organizations) to changes made by section 210 of the Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1240, and section 601(r)(4) of Pub. L. 104-294, 110 Stat. 3502. As amended, the felony assessments for offenses committed after April 24, 1996, are raised to \$100 for individuals and \$400 for organizations.

27. *Amendment:* Section 6A1.1 is amended by deleting "(c)(1)" and inserting in lieu thereof "(b)(1)".

The Commentary to 6A1.1 is amended by deleting "(c)(1)" and inserting in lieu thereof "(b)(1)".

Section 6A1.2 is amended by deleting "See Model Local Rule for Guideline Sentencing prepared by the Probation Committee of the Judicial Conference (August 1987)." and insert in lieu thereof "Rule 32 (b)(6), Fed. R. Crim. P."

The Commentary to § 6A1.2 captioned "Application Note" is amended in Note

1 by deleting "111 S. Ct. 2182" and inserting in lieu thereof "501 U.S. 129, 135-39".

The Commentary to § 6A1.2 captioned "Background" is amended by inserting "in writing" following "respond"; and by deleting:

"The potential complexity of factors important to the sentencing determination normally requires that the position of the parties be presented in writing. However, because courts differ greatly with respect to their reliance on written plea agreements and with respect to the feasibility of written statements under guidelines, district courts are encouraged to consider the approach that is most appropriate under local conditions. The Commission intends to reexamine this issue in light of experience under the guidelines.", and inserting in lieu thereof "Rule 32 (b)(6), Fed. R. Crim. P."

Section 6A1.3(a) is amended in the second sentence by deleting "reasonable" before "dispute".

Section § 6A1.3(b) is amended by inserting "at a sentencing hearing" following "factors"; by deleting "(a)(1)" and inserting in lieu thereof "(c)(1)"; and by deleting "(effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral written objections before imposition of sentence."

The Commentary to § 6A1.3 is amended in the seventh sentence of the first paragraph by deleting "reasonable" before "dispute".

The Commentary to § 6A1.3 is amended by deleting the last paragraph in its entirety.

Reason for Amendment: This amendment makes a number of technical and conforming changes to the policy statements in Chapter Six, Part A (Sentencing Procedures) to reflect changes in Rule 32, Fed. R. Crim. P.

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