Sunshine Act Meetings

Federal Register

Vol. 57, No. 1

Thursday, January 2, 1992

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FOREIGN CLAIMS SETTLEMENT COMMISSION

F.C.S.C. Meeting Notice No. 4–92; Notice of Meetings

Announcement in Regard to Commission Meetings and Hearings

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR Part 504), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of open meetings and oral hearings for the transaction of Commission business and other matters specified, as follows:

Date and Time, Subject Matter

Wed., January 22, 1992, at 10:30 a.m.
Consideration of Proposed Decisions on claims against Iran.

Subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

All meetings are held at the Foreign Claims Settlement Commission, 601 D Street, NW., Washington, DC. Requests for information, or advance notices of intention to observe a meeting, may be directed to: Administrative Officer, Foreign Claims Settlement Commission, 601 D Street, NW., Room 10000, Washington, DC 20579. Telephone: (202) 208–7727.

Dated at Washington, DC on December 30, 1991.

Judith H. Lock,

Administrative Officer.

[FR Doc. 91-31328 Filed 12–31–91; 12:53 pm]

BILLING CODE 4410-01-M

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of December 30, 1991 and January 6, 13, and 20, 1992.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Open and Closed.

MATTERS TO BE CONSIDERED:

Week of December 30

There are no Commission meetings scheduled for the Week of December 30.

Week of January 6—Tentative

Friday, January 10

1:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of January 13—Tentative

Thursday, January 16

9:30 a.m.
Collegial Discussion of Items of Commissioner Interest (Public Meeting)

2:30 p.m.
Periodic Briefing on EEO Program (Public Meeting)

Friday, January 17

10:00 a.m.
Briefing on Status of Implementation of Safety Goal Policy Statement (Public Meeting)

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

2:00 p.m.
Briefing on Progress of Research in the Area of Organization and Management (Public Meeting)

Week of January 20—Tentative

Tuesday, January 21

1:30 p.m.
Briefing on Site Decommissioning Management Plan (Public Meeting)

Thursday, January 23

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Note.—Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

TO VERIFY THE STATUS OF MEETING CALL (RECORDING): (301) 504–1292.

CONTACT PERSON FOR MORE INFORMATION: William Hill (301) 504–1661.

Dated: Dated: December 27, 1991.

William H. Hill, Jr.,

Office of the Secretary.

[FR Doc. 91-31327 Filed 12–30–91; 11:02 am]

BILLING CODE 7590-01-M

Corrections

Federal Register
Vol. 57, No. 1
Thursday, January 2, 1992

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF ENERGY

[FE Docket No. 91-30-NG]

Wes Cana Marketing (U.S.) Inc.; Blanket Authorization To Import and Export Natural Gas, Including Liquefied Natural Gas

Correction

In notice document 91-23720 appearing on page 49890 in the issue of Wednesday, October 2, 1991, in the first column, in the file line at the end of the document, "FR Doc. 91-23750" should read "FR Doc. 91-23720".

BILLING CODE 1505-01-D

FEDERAL RESERVE SYSTEM

12 CFR Part 226

[Reg. Z; TIL-1]

Truth in Lending; Update to Official Staff Commentary

Correction

In rule document 91-7888, beginning on page 13751, in the issue of Thursday, April 4, 1991, make the following correction:

§ 226.9 [Corrected]

On page 13756, in the first column, in the sixth line, "§ 2265b(f)(3)(iii)," should read "§ 226.5b(f)(3)(iii),".

BILLING CODE 1505-01-D

FEDERAL HOUSING FINANCE BOARD

12 CFR Part 932

[No. 91-559]

Eligibility and Financial Disclousure Requirements for Directors of the Federal Home Loan Banks

Correction

In the issue of Friday, November 22, 1991, on page 58964, in the second column, in the correction of rule document 91-26825, in the second line, "page 56920" should read "page 56929".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 91D-0123]

Draft Guideline for Submitting Supporting Chemistry Documentation in Radiopharmaceutical Drug Applications; Availability

Correction

In notice document 91-30150, beginning on page 65737, in the issue of Wednesday, December 18, 1991, make the following corrections:

1. On page 65738, in the first column, in the second full paragraph, in the seventh line, "through" should read "though".

2. On the same page, in the same column, in the third full paragraph, in the fourth line, "Docket" should read "Dockets".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

Medicare Program; Meetings of the Advisory Committee on Medicare-Physician Relationships

Correction

In notice document 91-25169 beginning on page 52272 in the issue of Friday, October 18, 1991, on page 52273, in the second column, in the file line at the end of the document, "FR Doc. 91-25166" should read "FR Doc. 91-25169".

BILLING CODE 1505-01-D

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Humanities National Council; Meeting

Correction

In notice document 91-25167 appearing on page 52302 in the issue of Friday, October 18, 1991, in the second column, in the file line at the end of the document, "FR Doc. 91-25617" should read "FR Doc. 91-25167".

BILLING CODE 1505-01-D

federal register

Thursday
January 2, 1992

Part II

Reader Aids

Cumulative List of Public Laws—First Session of the 102d Congress

CUMULATIVE LIST OF PUBLIC LAWS

This is the cumulative list of public laws for the first session of the 102d Congress. The List of Public Laws will resume when bills are enacted into law during the second session of the 102d Congress, which convenes on January 3, 1992. Any comments may be addressed to the Director, Office of the Federal Register, Washington, DC 20408.

Public Law	Bill	Approval Date	105 Stat.	Title	Price
102-1	H.J. Res. 77	Jan. 14	3	Authorization for Use of Military Force Against Iraq Resolution	$1.00
102-2	H.R. 4	Jan. 30	5	To extend the time for performing certain acts under the internal revenue laws for individuals performing services as part of the Desert Shield Operation.	$1.00
102-3	H.R. 3	Feb. 6	7	Veterans' Compensation Amendments of 1991	$1.00
102-4	H.R. 556	Feb. 6	11	Agent Orange Act of 1991	$1.00
102-5	H.J. Res. 30	Feb. 15	21	To designate February 7, 1991, as "National Girls and Women in Sports Day"	$1.00
102-6	S.J. Res. 76	Mar. 1	23	Commending the Peace Corps and the current and former Peace Corps volunteers on the thirtieth anniversary of the establishment of the Peace Corps.	$1.00
102-7	S.J. Res. 51	Mar. 5	25	To designate the week beginning March 4, 1991, as "Federal Employees Recognition Week".	$1.00
102-8	S.J. Res. 55	Mar. 8	26	Commemorating the two hundredth anniversary of United States-Portuguese diplomatic relations.	$1.00
102-9	S.J. Res. 58	Mar. 11	28	To designate March 4, 1991, as "Vermont Bicentennial Day"	$1.00
102-10	S. 379	Mar. 12	29	National and Community Service Technical Amendments Act of 1991	$1.00
102-11	S.J. Res. 84	Mar. 12	33	Disapproving the action of the District of Columbia Council in approving the Schedule of Heights Amendment Act of 1990.	$1.00
102-12	H.R. 555	Mar. 18	34	Soldiers' and Sailors' Civil Relief Act Amendments of 1991	$1.00
102-13	H.J. Res. 98	Mar. 18	43	Designating March 4 through 10, 1991, as "National School Breakfast Week"	$1.00
102-14	H.J. Res. 104	Mar. 20	44	To designate March 26, 1991, as "Education Day, U.S.A."	$1.00
102-15	H.J. Res. 133	Mar. 21	46	Authorizing and requesting the President to designate the second full week in March 1991 as "National Employ the Older Worker Week".	$1.00
102-16	H.R. 180	Mar. 22	48	To amend title 38, United States Code, with respect to veterans education and employment programs, and for other purposes.	$1.00
102-17	H.J. Res. 167	Mar. 22	57	Designating June 14, 1991, and June 14, 1992, each as "Baltic Freedom Day"	$1.00
102-18	S. 419	Mar. 23	58	Resolution Trust Corporation Funding Act of 1991	$1.00
102-19	S.J. Res. 59	Mar. 25	67	Designating March 25, 1991, as "Greek Independence Day: A National Day of Celebration of Greek and American Democracy".	$1.00
102-20	H.R. 1176	Mar. 27	68	Foreign Relations Persian Gulf Conflict Emergency Supplemental Authorization Act, Fiscal Year 1991.	$1.00
102-21	H.R. 1284	Mar. 28	70	Emergency Supplemental Assistance for Israel Act of 1991	$1.00
102-22	H.R. 1316	Mar. 28	71	Performance Management and Recognition System Amendments of 1991	$1.00
102-23	S.J. Res. 53	Mar. 28	73	To designate April 9, 1991 and April 9, 1992, as "National Former Prisoner of War Recognition Day".	$1.00
102-24	S.J. Res. 83	Mar. 28	74	Entitled "National Day of Prayer and Thanksgiving"	$1.00
102-25	S. 725	Apr. 6	75	Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991	$1.50
102-26	H.R. 1285	Apr. 9	123	Higher Education Technical Amendments of 1991	$1.00
102-27	H.R. 1281	Apr. 10	130	Dire Emergency Supplemental Appropriations for Consequences of Operation Desert Shield/Desert Storm, Food Stamps, Unemployment Compensation Administration, Veterans Compensation and Pensions, and Other Urgent Needs Act of 1991.	$1.00
102-28	H.R. 1282	Apr. 10	161	Operation Desert Shield/Desert Storm Supplemental Appropriations Act, 1991	$1.00
102-29	H.J. Res. 222	Apr. 18	169	To provide for a settlement of the railroad labor-management disputes between certain railroads represented by the National Carriers' Conference Committee of the National Railway Labor Conference and certain of their employees.	$1.00
102-30	H.J. Res. 134	Apr. 18	172	To designate the weeks of April 14 through 21, 1991, and May 3 through 10, 1992, as "Jewish Heritage Week".	$1.00
102-31	H.J. Res. 197	Apr. 18	173	To designate the week of April 15 through 21, 1991, as "National Education First Week"	$1.00
102-32	S. 534	Apr. 23	175	To authorize the President to award a gold medal on behalf of the Congress to General H. Norman Schwarzkopf, and to provide for the production of bronze duplicates of such medal for sale to the public.	$1.00
102-33	S. 565	Apr. 23	177	To authorize the President to award a gold medal on behalf of the Congress to General Colin L. Powell, and to provide for the production of bronze duplicates of such medal for sale to the public.	$1.00
102-34	S.J. Res. 119	Apr. 23	179	To designate April 22, 1991, as "Earth Day" to promote the preservation of the global environment.	$1.00
102-35	S.J. Res. 16	Apr. 24	181	Designating the Week of April 21-27, 1991, as "National Crime Victims' Rights Week"	$1.00
102-36	H.J. Res. 218	Apr. 26	182	To designate the week beginning April 21, 1991, and the week beginning April 19, 1992, each as "National Organ and Tissue Donor Awareness Week".	$1.00
102-37	S.J. Res. 64	Apr. 26	183	To authorize the President to proclaim the last Friday of April 1991, as "National Arbor Day".	$1.00
102-38	S.J. Res. 98	May 3	184	To express appreciation for the benefit brought to the Nation by Amtrak during its twenty years of existence.	$1.00
102-39	S.J. Res. 102	May 3	186	Designating the second week in May 1991 as "National Tourism Week"	$1.00
102-40	H.R. 598	May 7	187	Department of Veterans Affairs Health-Care Personnel Act of 1991	$1.75
102-41	H.J. Res. 214	May 8	242	Recognizing the Astronauts Memorial at the John F. Kennedy Space Center as the national memorial to astronauts who die in the line of duty.	$1.00
102-42	H.J. Res. 173	May 14	243	To designate May 1991 and May 1992 as "Asian/Pacific American Heritage Month"	$1.00
102-43	H.J. Res. 194	May 14	244	Designating May 12, 1991, as "Infant Mortality Awareness Day"	$1.00
102-44	H.J. Res. 109	May 15	245	Designating each of the weeks beginning May 12, 1991, and May 10, 1992, as "Emergency Medical Services Week".	$1.00
102-45	H.R. 2122	May 17	247	Emergency Supplemental Persian Gulf Refugee Assistance Act of 1991	$1.00
102-46	S. 258	May 17	249	To correct an error in the Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990.	$1.00
102-47	H.J. Res. 154	May 20	250	Designating the month of May 1991, as "National Foster Care Month"	$1.00

Public Law	Bill	Approval Date	105 Stat	Title	Price
102-48	S.J. Res. 134	May 21	251	Designating May 22, 1991, as "National Desert Storm Reservists Day"	$1.00
102-49	S.J. Res. 127	May 22	253	To designate the month of May 1991, as "National Huntington's Disease Awareness Month".	$1.00
102-50	S. 248	May 24	254	Niobrara Scenic River Designation Act of 1991	$1.00
102-51	H.J. Res. 141	May 29	259	Designating the week beginning May 13, 1991, as "National Senior Nutrition Week"	$1.00
102-52	H.R. 2127	June 6	260	Rehabilitation Act Amendments of 1991	$1.00
102-53	H.R. 831	June 10	266	To designate the Owens Finance Station of the United States Postal Service in Cleveland, Ohio, as the "Jesse Owens Building of the United States Postal Service".	$1.00
102-54	H.R. 232	June 13	267	To amend title 38, United States Code, with respect to veterans programs for housing and memorial affairs, and for other purposes.	$1.00
102-55	H.R. 2251	June 13	290	Dire Emergency Supplemental Appropriations From Contributions of Foreign Governments And/Or Interest for Humanitarian Assistance to Refugees and Displaced Persons In and Around Iraq as a Result of the Recent Invasion of Kuwait and for Peacekeeping Activities and Other Urgent Needs Act of 1991.	$1.00
102-56	H.J. Res. 219	June 13	296	To designate the week beginning June 9, 1991, as "National Scleroderma Awareness Week".	$1.00
102-57	H.J. Res. 91	June 18	297	Designating June 10 through 16, 1991, as "Pediatric AIDS Awareness Week"	$1.00
102-58	H.R. 971	June 18	299	To designate the facility of the United States Postal Service located at 630 East 105th Street, Cleveland, Ohio, as the "Luke Easter Post Office".	$1.00
102-59	S. 483	June 18	300	Entitled the "Taconic Mountains Protection Act of 1991"	$1.00
102-60	S.J. Res. 111	June 18	302	Marking the seventy-fifth anniversary of chartering by Act of Congress of the Boy Scouts of America.	$1.00
102-61	S. 292	June 19	303	Saguaro National Monument Expansion Act of 1991	$1.00
102-62	S. 64	June 27	305	Education Council Act of 1991	$1.00
102-63	S.J. Res. 159	June 28	319	To designate the month of June 1991, as "National Forest System Month"	$1.00
102-64	S. 909	June 28	320	Semiconductor International Protection Extension Act of 1991	$1.00
102-65	H.R. 2332	July 2	322	To amend the Immigration Act of 1990 to extend for 4 months the application deadline for special temporary protected status for Salvadorans.	$1.00
102-66	H.J. Res. 259	July 2	323	Designating July 2, 1991, as "National Literacy Day"	$1.00
102-67	H.R. 749	July 9	325	To authorize the Secretary of the Interior to accept a donation of land for addition to the Ocmulgee National Monument in the State of Georgia.	$1.00
102-68	H.J. Res. 72	July 9	326	To designate December 7, 1991, as "National Pearl Harbor Remembrance Day"	$1.00
102-69	H.J. Res. 138	July 10	327	Designating the week beginning July 21, 1991, as "Lyme Disease Awareness Week"	$1.00
102-70	H.J. Res. 149	July 10	329	Designating March 1991 and March 1992 both as "Women's History Month"	$1.00
102-71	S. 674	July 10	330	To designate the building in Monterey, Tennessee, which houses the primary operations of the United States Postal Service as the "J.E. (Eddie) Russell Post Office Building", and for other purposes.	$1.00
102-72	H.J. Res. 255	July 23	331	Designating the week beginning July 21, 1991, as the "Korean War Veterans Remembrance Week".	$1.00
102-73	H.R. 751	July 25	333	National Literacy Act of 1991	$1.00
102-74	H.J. Res. 279	July 26	363	To declare it to be the policy of the United States that there should be a renewed and sustained commitment by the Federal Government and the American people to the importance of adult education.	$1.00
102-75	H.R. 427	July 26	365	To disclaim any interests of the United States in certain lands on San Juan Island, Washington, and for other purposes.	$1.00
102-76	H.R. 998	July 26	368	To designate the building in Vacherie, Louisiana, which houses the primary operations of the United States Postal Service as the "John Richard Haydel Post Office Building".	$1.00
102-77	H.R. 2347	July 26	369	To redesignate the Midland General Mail Facility in Midland, Texas, as the "Carl O. Hyde General Mail Facility", and for other purposes.	$1.00
102-78	S.J. Res. 121	Aug. 2	370	Designating September 12, 1991, as "National D.A.R.E. Day"	$1.00
102-79	H.J. Res. 181	Aug. 6	372	Designating the third Sunday of August of 1991 as "National Senior Citizens Day"	$1.00
102-80	S.J. Res. 40	Aug. 6	373	Designating the week beginning September 8, 1991, and the week beginning September 6, 1992, each as "National Historically Black Colleges Week".	$1.00
102-81	S.J. Res. 142	Aug. 6	374	To designate the week beginning July 28, 1991, as "National Juvenile Arthritis Awareness Week".	$1.00
102-82	H.R. 153	Aug. 6	375	To amend title 38, United States Code, to make miscellaneous administrative and technical improvements in the operation of the United States Court of Veterans Appeals, and for other purposes.	$1.00
102-83	H.R. 2525	Aug. 6	378	Department of Veterans Affairs Codification Act	$1.25
102-84	H.R. 1779	Aug. 10	411	To designate the Federal building being constructed at 77 West Jackson Boulevard in Chicago, Illinois, as the "Ralph H. Metcalfe Federal Building".	$1.00
102-85	S.J. Res. 179	Aug. 10	412	To designate the week beginning August 25, 1991, as "National Parks Week"	$1.00
102-86	H.R. 1047	Aug. 14	414	Veterans' Benefits Programs Improvement Act of 1991	$1.00
102-87	H.R. 1448	Aug. 14	427	To amend the Act of May 12, 1920 (41 Stat. 596), to allow the city of Pocatello, Idaho, to use certain lands for a correctional facility for women, and for other purposes.	$1.00
102-88	H.R. 1455	Aug. 14	429	Intelligence Authorization Act, Fiscal Year 1991	$1.00
102-89	H.R. 2031	Aug. 14	446	Rural Telephone Cooperative Associations ERISA Amendments Act of 1991	$1.00
102-90	H.R. 2506	Aug. 14	447	Legislative Branch Appropriations Act, 1992	$1.00
102-91	H.R. 2901	Aug. 14	472	To authorize the transfer by lease of 4 naval vessels to the Government of Greece	$1.00
102-92	H.J. Res. 166	Aug. 14	473	To designate September 13, 1991, as "Commodore John Barry Day"	$1.00
102-93	H.J. Res. 264	Aug. 14	475	Designating August 1, 1991, as "Helsinki Human Rights Day"	$1.00
102-94	H.J. Res. 309	Aug. 14	478	Designating August 29, 1991, as "National Sarcoidosis Awareness Day"	$1.00
102-95	S. 1593	Aug. 14	479	National Commission on Libraries and Information Science Act Amendments of 1991	$1.00
102-96	S. 1594	Aug. 14	481	Terry Beirn Community Based AIDS Research Initiative Act of 1991	$1.00
102-97	S.J. Res. 72	Aug. 14	483	To designate the week of September 15, 1991, through September 21, 1991, as "National Rehabilitation Week".	$1.00
102-98	H.R. 904	Aug. 17	485	African American History Landmark Theme Study Act	$1.00
102-99	H.R. 991	Aug. 17	487	Defense Production Act Extension and Amendments of 1991	$1.00
102-100	H.R. 1006	Aug. 17	491	Federal Maritime Commission Authorization Act of 1991	$1.00
102-101	H.R. 1143	Aug. 17	493	To authorize a study of nationally significant places in American labor history	$1.00
102-102	H.R. 2123	Aug. 17	495	District of Columbia Budgetary Efficiency Act of 1991	$1.00

Public Law	Bill	Approval Date	105 Stat.	Title	Price
102-103	H.R. 2313	Aug. 17	497	To amend the School Dropout Demonstration Assistance Act of 1988 to extend authorization of appropriations through fiscal year 1993, and for other purposes.	$1.00
102-104	H.R. 2427	Aug. 17	510	Energy and Water Development Appropriations Act, 1992	$1.00
102-105	H.R. 2968	Aug. 17	537	To waive the period of Congressional review for certain District of Columbia acts	$1.00
102-106	H.R. 2969	Aug. 17	539	District of Columbia Emergency Deficit Reduction Act of 1991	$1.00
102-107	H.R. 3201	Aug. 17	541	Emergency Unemployment Compensation Act of 1991	$1.00
102-108	S. 1608	Aug. 17	549	To make Technical Amendments to the Nutrition Information and Labeling Act, and for other purposes.	$1.00
102-109	H.J. Res. 332	Sept. 30	551	Making continuing appropriations for the fiscal year 1992, and for other purposes	$1.00
102-110	S. 296	Oct. 1	555	Armed Forces Immigration Adjustment Act of 1991	$1.00
102-111	H.R. 3291	Oct. 1	559	Making appropriations for the government of the District of Columbia and other activities chargeable in whole or in part against the revenues of said District for the fiscal year ending September 30, 1992, and for other purposes.	$1.00
102-112	H.J. Res. 23	Oct. 3	576	To authorize the President to issue a proclamation designating each of the weeks beginning on November 24, 1991, and November 22, 1992, as "National Family Week".	$1.00
102-113	H.J. Res. 233	Oct. 3	577	Designating September 20, 1991, as "National POW/MIA Recognition Day", and authorizing display of the National League of Families POW/MIA flag.	$1.00
102-114	S.J. Res. 73	Oct. 3	579	Designating October 1991 as "National Domestic Violence Awareness Month"	$1.00
102-115	S.J. Res. 125	Oct. 3	581	To designate October 1991 as "Polish-American Heritage Month"	$1.00
102-116	S.J. Res. 126	Oct. 3	583	To designate the Second Sunday in October of 1991 as "National Children's Day"	$1.00
102-117	S.J. Res. 151	Oct. 3	585	To designate October 6, 1991, and October 6, 1992, as "German-American Day"	$1.00
102-118	S. 363	Oct. 4	586	To authorize the addition of 15 acres to Morristown National Historical Park	$1.00
102-119	S. 1106	Oct. 7	587	Individuals with Disabilities Education Act Amendments of 1991	$1.00
102-120	S.J. Res. 95	Oct. 7	609	Designating October 1991 as "National Breast Cancer Awareness Month"	$1.00
102-121	S.J. Res. 78	Oct. 8	611	To designate the month of November 1991 and 1992 as "National Hospice Month"	$1.00
102-122	S.J. Res. 156	Oct. 8	612	To designate the week of October 6, 1991, through October 12, 1991, as "Mental Illness Awareness Week".	$1.00
102-123	S.J. Res. 172	Oct. 9	614	To authorize and request the President to proclaim each of the months of November 1991 and 1992 as "National American Indian Heritage Month".	$1.00
102-124	S. 1773	Oct. 9	616	To extend until October 18, 1991, the legislative reinstatement of the power of Indian tribes to exercise criminal jurisdiction over Indians.	$1.00
102-125	H.J. Res. 189	Oct. 10	617	Designating October 8, 1991, as "National Firefighters Day"	$1.00
102-126	H.J. Res. 305	Oct. 10	618	To designate the month of October 1991, as "Country Music Month"	$1.00
102-127	S. 868	Oct. 10	619	Veterans' Educational Assistance Amendments of 1991	$1.00
102-128	S.J. Res. 132	Oct. 10	624	To designate the week of October 13, 1991, through October 19, 1991, as "National Radon Action Week".	$1.00
102-129	H.R. 2935	Oct. 15	625	To designate the building located at 6600 Lorain Avenue in Cleveland, Ohio, as the "Patrick J. Patton United States Post Office Building".	$1.00
102-130	H.R. 2387	Oct. 17	626	Striped Bass Act of 1991	$1.00
102-131	H.J. Res. 303	Oct. 17	628	To designate October 1991 as "Crime Prevention Month"	$1.00
102-132	H.R. 3259	Oct. 18	630	To authorize appropriations for drug abuse education and prevention programs relating to youth gangs and to runaway and homeless youth; and for other purposes.	$1.00
102-133	S.J. Res. 107	Oct. 18	632	To designate October 15, 1991, as "National Law Enforcement Memorial Dedication Day".	$1.00
102-134	H.J. Res. 230	Oct. 21	633	Designating October 16, 1991, and October 16, 1992, each as "World Food Day"	$1.00
102-135	H.R. 3280	Oct. 24	635	Decennial Census Improvement Act of 1991	$1.00
102-136	H.R. 2426	Oct. 25	637	Military Construction Appropriations Act, 1992	$1.00
102-137	H.R. 972	Oct. 28	646	To make permanent the legislative reinstatement, following the decision of Duro against Reina (58 U.S.L.W. 4643, May 29, 1990), of the power of Indian tribes to exercise criminal jurisdiction over Indians.	$1.00
102-138	H.R. 1415	Oct. 28	647	Foreign Relations Authorization Act, Fiscal Years 1992 and 1993	$2.75
102-139	H.R. 2519	Oct. 28	736	Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1992.	$1.50
102-140	H.R. 2608	Oct. 28	782	Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1992.	$1.50
102-141	H.R. 2622	Oct. 28	834	Treasury, Postal Service and General Government Appropriations Act, 1992	$1.50
102-142	H.R. 2698	Oct. 28	878	Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1992.	$1.25
102-143	H.R. 2942	Oct. 28	917	Department of Transportation and Related Agencies Appropriations Act, 1992	$1.50
102-144	H.J. Res. 340	Oct. 28	966	To designate October 19 through 27, 1991 as "National Red Ribbon Week for a Drug-Free America".	$1.00
102-145	H.J. Res. 360	Oct. 28	968	Making further continuing appropriations for the fiscal year 1992, and for other purposes	$1.00
102-146	S.J. Res. 131	Oct. 28	972	Designating October 1991 as "National Down Syndrome Awareness Month"	$1.00
102-147	S.J. Res. 192	Oct. 28	974	Designating October 30, 1991 as "Refugee Day"	$1.00
102-148	H.R. 470	Oct. 30	976	To authorize the Secretary of Transportation to release the restrictions, requirements, and conditions imposed in connection with the conveyance of certain lands to the city of Gary, Indiana.	$1.00
102-149	S.J. Res. 160	Oct. 30	978	Designating the week beginning October 20, 1991, as "World Population Awareness Week".	$1.00
102-150	H.R. 1720	Oct. 31	980	District of Columbia Mental Health Program Assistance Act of 1991	$1.00
102-151	S. 1823	Nov. 5	983	To amend the Veterans' Benefit and Services Act of 1988 to authorize the Department of Veterans Affairs to use for the operation and maintenance of the National Memorial Cemetery of Arizona funds appropriated during fiscal year 1992 for the National Cemetery System.	$1.00
102-152	H.R. 1046	Nov. 12	985	Veterans' Compensation Rate Amendments of 1991	$1.00
102-153	H.J. Res. 280	Nov. 12	989	To designate the week beginning November 10, 1991, as "Hire a Veteran Week"	$1.00
102-154	H.R. 2686	Nov. 13	990	Department of the Interior and Related Agencies Appropriations Act, 1992	$1.50
102-155	H.J. Res. 175	Nov. 13	1038	To designate the weeks beginning December 1, 1991, and November 29, 1992, as "National Home Care Week".	$1.00
102-156	H.J. Res. 177	Nov. 13	1039	To designate November 16, 1991, as "Dutch-American Heritage Day"	$1.00
102-157	H.J. Res. 281	Nov. 13	1040	Approving the extension of nondiscriminatory treatment with respect to the products of the Mongolian People's Republic.	$1.00

Public Law	Bill	Approval Date	105 Stat.	Title	Price
102-158	H.J. Res. 282	Nov. 13	1041	Approving the extension of nondiscriminatory treatment with respect to the products of the People's Republic of Bulgaria.	$1.00
102-159	S. 1848	Nov. 13	1042	Dropout Prevention Technical Correction Amendment of 1991	$1.00
102-160	S.J. Res. 36	Nov. 13	1043	To designate the months of November 1991, and November 1992, as "National Alzheimer's Disease Month".	$1.00
102-161	S.J. Res. 145	Nov. 13	1045	Designating the week beginning November 10, 1991, as "National Women Veterans Recognition Week".	$1.00
102-162	S.J. Res. 188	Nov. 13	1047	Designating November 1991 as "National Red Ribbon Month"	$1.00
102-163	H.J. Res. 374	Nov. 15	1048	Making further continuing appropriations for the fiscal year 1992, and for other purposes	$1.00
102-164	H.R. 3575	Nov. 15	1049	Emergency Unemployment Compensation Act of 1991	$1.00
102-165	H.J. Res. 140	Nov. 18	1070	Designating November 19, 1991, as "National Philanthropy Day"	$1.00
102-166	S. 1745	Nov. 21	1071	Civil Rights Act of 1991	$1.00
102-167	H.R. 3350	Nov. 26	1101	United States Commission on Civil Rights Reauthorization Act of 1991	$1.00
102-168	H.R. 3402	Nov. 26	1102	Health Information, Health Promotion, and Vaccine Injury Compensation Amendments of 1991.	$1.00
102-169	H.J. Res. 215	Nov. 26	1105	Acknowledging the sacrifices that military families have made on behalf of the Nation and designating November 25, 1991, as "National Military Families Recognition Day".	$1.00
102-170	H.R. 3839	Nov. 26	1107	Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1992.	$1.25
102-171	S. 374	Nov. 26	1143	Aroostook Band of Micmacs Settlement Act	$1.00
102-172	H.R. 2521	Nov. 26	1150	Department of Defense Appropriations Act, 1992	$2.00
102-173	S. 1475	Nov. 27	1217	Protection and Advocacy for Mentally Ill Individuals Amendments Act of 1991	$1.00
102-174	S.J. Res. 207	Nov. 27	1220	To designate the period commencing on November 24, 1991, and ending on November 30, 1991, and the period commencing on November 22, 1992, and ending on November 28, 1992, each as "National Adoption Week".	$1.00
102-175	H.R. 2270	Dec. 2	1222	Senior Executive Service Improvements Act	$1.00
102-176	H.J. Res. 125	Dec. 2	1224	To designate the week beginning November 24, 1991, and the week beginning November 22, 1992, each as "National Family Caregivers Week".	$1.00
102-177	H.J. Res. 130	Dec. 2	1226	Designating January 1, 1992, as "National Ellis Island Day"	$1.00
102-178	H.J. Res. 327	Dec. 2	1227	Designating 1992 as the "Year of the Gulf of Mexico"	$1.00
102-179	S. 1568	Dec. 2	1229	To amend the Act incorporating The American Legion so as to redefine eligibility for membership therein.	$1.00
102-180	S. 1720	Dec. 2	1230	Navajo-Hopi Relocation Housing Program Reauthorization Act of 1991	$1.00
102-181	H.R. 3728	Dec. 3	1232	To provide for a 6-month extension of the Commission on the Bicentennial of the Constitution.	$1.00
102-182	H.R. 1724	Dec. 4	1233	To provide for the termination of the application of title IV of the Trade Act of 1974 to Czechoslovakia and Hungary.	$1.00
102-183	H.R. 2038	Dec. 4	1260	Intelligence Authorization Act, Fiscal Year 1992	$1.00
102-184	H.R. 3394	Dec. 4	1278	Tribal Self-Governance Demonstration Project Act	$1.00
102-185	H.R. 3624	Dec. 4	1280	To amend the Tariff Act of 1930 to provide appropriate procedures for the appointment of the Chairman of the United States International Trade Commission.	$1.00
102-186	S. 1563	Dec. 4	1282	National Sea Grant College Program Authorization Act of 1991	$1.00
102-187	S.J. Res. 187	Dec. 4	1285	To make a technical correction in Public Law 101-549	$1.00
102-188	S.J. Res. 217	Dec. 4	1286	To authorize and request the President to proclaim 1992 as the "Year of the American Indian".	$1.00
102-189	H.J. Res. 201	Dec. 4	1288	Designating the week beginning December 1, 1991, and the week beginning November 15, 1992, each as "Geography Awareness Week".	$1.00
102-190	H.R. 2100	Dec. 5	1290	National Defense Authorization Act for Fiscal Years 1992 and 1993	$9.50
102-191	H.R. 2629	Dec. 5	1589	Women's Business Development Act of 1991	$1.00
102-192	S.J. Res. 184	Dec. 5	1592	Designating the month of November 1991, as "National Accessible Housing Month"	$1.00
102-193	H.R. 3919	Dec. 6	1593	To temporarily extend the Defense Production Act of 1950	$1.00
102-194	S. 272	Dec. 9	1594	High-Performance Computing Act of 1991	$1.00
102-195	H.R. 1988	Dec. 9	1605	National Aeronautics and Space Administration Authorization Act, Fiscal Year 1992	$1.00
102-196	H.R. 3370	Dec. 9	1620	To direct the Secretary of the Interior to carry out a study and make recommendations to the Congress regarding the feasibility of establishing a Native American cultural center in Oklahoma City, Oklahoma.	$1.00
102-197	H.J. Res. 346	Dec. 9	1622	Approving the extension of nondiscriminatory treatment with respect to the products of the Union of Soviet Socialist Republics.	$1.00
102-198	S. 1284	Dec. 9	1623	To make certain technical corrections in the Judicial Improvements Act of 1990 and other provisions of law relating to the courts.	$1.00
102-199	H.R. 525	Dec. 10	1628	To amend the Federal charter for the Boys' Clubs of America to reflect the change of the name of the organization to the Boys & Girls Clubs of America.	$1.00
102-200	H.R. 829	Dec. 10	1630	To amend title 28, United States Code, to make changes in the composition of the Eastern and Western Districts of Virginia.	$1.00
102-201	H.R. 848	Dec. 10	1631	Little Bighorn Battlefield National Monument	$1.00
102-202	H.R. 990	Dec. 10	1634	To authorize additional appropriations for land acquisition at Monocacy National Battlefield, Maryland.	$1.00
102-203	H.R. 3322	Dec. 10	1635	To designate the building in St. Louis, Missouri, which is currently known as the Wellston Station, as the "Gwen B. Giles Post Office Building".	$1.00
102-204	H.R. 3531	Dec. 10	1636	Patent and Trademark Office Authorization Act of 1991	$1.00
102-205	H.R. 3709	Dec. 10	1643	To waive the period of Congressional review for certain District of Columbia acts	$1.00
102-206	H.J. Res. 191	Dec. 10	1644	Designating January 5, 1992 through January 11, 1992 as "National Law Enforcement Training Week".	$1.00
102-207	H.J. Res. 212	Dec. 10	1646	To designate the week beginning February 16, 1992, as "National Visiting Nurse Associations Week".	$1.00
102-208	H.J. Res. 300	Dec. 10	1648	Designating the month of May 1992 as "National Trauma Awareness Month"	$1.00
102-209	H.J. Res. 356	Dec. 10	1649	Designating December 1991 as "Bicentennial of the District of Columbia Month"	$1.00
102-210	H.J. Res. 372	Dec. 10	1651	Designating December 21, 1991, as "Basketball Centennial Day"	$1.00
102-211	H.R. 690	Dec. 11	1652	To authorize the National Park Service to acquire and manage the Mary McLeod Bethune Council House National Historic Site, and for other purposes.	$1.00
102-212	H.R. 794	Dec. 11	1655	To establish the Silvio O. Conte National Fish and Wildlife Refuge along the Connecticut River, and for other purposes.	$1.00

Public Law	Bill	Approval Date	105 Stat.	Title	Price
102-213	H.R. 948	Dec. 11	1662	To designate the United States courthouse located at 120 North Henry Street in Madison, Wisconsin, as the "Robert W. Kastenmeier United States Courthouse".	$1.00
102-214	H.R. 1099	Dec. 11	1663	Lamprey River Study Act of 1991	$1.00
102-215	H.R. 3012	Dec. 11	1664	White Clay Creek Study Act	$1.00
102-216	H.R. 3169	Dec. 11	1666	To lengthen from five to seven years the expiration period applicable to legislative authority relating to construction of commemorative works on Federal land in the District of Columbia and its environs.	$1.00
102-217	H.R. 3245	Dec. 11	1667	Chattahoochee National Forest Protection Act of 1991	$1.00
102-218	H.R. 3327	Dec. 11	1671	To amend title 38, United States Code, to provide for the designation of an Assistant Secretary of the Department of Veterans Affairs as the Chief Minority Affairs Officer of the Department.	$1.00
102-219	H.R. 3387	Dec. 11	1673	To amend the Pennsylvania Avenue Development Corporation Act of 1972 to authorize appropriations for implementation of the development plan for Pennsylvania Avenue between the Capitol and the White House, and for other purposes.	$1.00
102-220	H.R. 3604	Dec. 11	1674	Greer Spring Acquisition and Protection Act of 1991	$1.00
102-221	H.R. 3932	Dec. 11	1676	To improve the operational efficiency of the James Madison Memorial Fellowship Foundation, and for other purposes.	$1.00
102-222	S. 2050	Dec. 11	1677	To ensure that the ceiling established with respect to health education assistance loans does not prohibit the provision of Federal loan insurance to new and previous borrowers under such loan program, and for other purposes.	$1.00
102-223	S. 2098	Dec. 11	1678	To authorize the President to appoint Major General Jerry Ralph Curry to the Office of Administrator of the Federal Aviation Administration.	$1.00
102-224	S.J. Res. 198	Dec. 11	1680	To recognize contributions Federal civilian employees provided during the attack on Pearl Harbor and during World War II.	$1.00
102-225	H.R 3881	Dec. 11	1682	To expand the boundaries of Stones River National Battlefield, Tennessee, and for other purposes.	$1.00
102-226	H.R. 2105	Dec. 11	1685	To designate an area as the "Myrtle Foester Whitmire Division of the Aransas National Wildlife Refuge".	$1.00
102-227	H.R. 3909	Dec. 11	1686	Tax Extension Act of 1991	$1.00
102-228	H.R. 3807	Dec. 12	1691	Conventional Forces in Europe Treaty Implementation Act of 1991	$1.00
102-229	H.J. Res. 157	Dec. 12	1701	Dire Emergency Supplemental Appropriations and Transfers for Relief From the Effects of Natural Disasters, for Other Urgent Needs, and for Incremental Cost of "Operation Desert Shield/Desert Storm" Act of 1992.	$1.00
102-230	H.R. 3576	Dec. 12	1720	To amend the Cranston-Gonzalez National Affordable Housing Act to reserve assistance under the HOME Investment Partnerships Act for certain insular areas.	$1.00
102-231	H.R. 1476	Dec. 12	1722	San Carlos Indian Irrigation Project Divestiture Act of 1991	$1.00
102-232	H.R. 3049	Dec. 12	1733	Miscellaneous and Technical Immigration and Naturalization Amendments of 1991	$1.00
102-233	H.R. 3435	Dec. 12	1761	Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991	$1.00
102-234	H.R. 3595	Dec. 12	1793	Medicaid Voluntary Contribution and Provider-Specific Tax Amendments of 1991	$1.00
102-235	S. 367	Dec. 12	1808	Nontraditional Employment for Women Act	$1.00
102-236	S. 1532	Dec. 12	1812	Abandoned Infants Assistance Act Amendments of 1991	$1.00
102-237	H.R. 3029	Dec. 13	1818	Food, Agriculture, Conservation, and Trade Act Amendments of 1991	$2.75
102-238	S. 1193	Dec. 17	1908	Technical Amendments to Various Indian Laws Act of 1991	$1.00
102-239	S. 1891	Dec. 17	1912	To permit the Secretary of Health and Human Services to waive certain recovery requirements with respect to the construction or remodeling of facilities, and for other purposes.	$1.00
102-240	H.R. 2950	Dec. 18	1914	Intermodal Surface Transportation Efficiency Act of 1991	$9.50
102-241	H.R. 1776	Dec. 19	2208	Coast Guard Authorization Act of 1991	$1.00
102-242	S. 543	Dec. 19	2236	Federal Deposit Insurance Corporation Improvement Act of 1991	$4.50
102-243	S. 1462	Dec. 20	2394	Telephone Consumer Protection Act of 1991	$1.00

NOTE: The text of laws may be ordered in individual pamphlet form (referred to as "slip laws") from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202-512-2470). Some laws may not yet be available for purchase.

federal register

Thursday
January 2, 1992

Part III

United States Sentencing Commission

Sentencing Guidelines and Policy Statements for Federal Courts; Notice

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment. Notice of hearing.

SUMMARY: The Commission is considering promulgating amendments to the sentencing guidelines, policy statements, and commentary. The proposed amendments and a synopsis of issues to be addressed are set forth below. The Commission may report amendments to the Congress on or before May 1, 1992. Comment is sought on all proposals, alternative proposals, and any other aspect of the sentencing guidelines, policy statements, and commentary.

DATES: Public comment should be received by the Commission no later than March 2, 1992, in order to be considered by the Commission in the promulgation of amendments due to the Congress by May 1, 1992.

The Commission has scheduled a public hearing on these amendments for February 25, 1992, at 9:30 a.m.

ADDRESSES: Comments should be sent to: United States Sentencing Commission, 1331 Pennsylvania Avenue, NW., suite 1400, Washington, DC 20004, Attention: Guideline Comment. The hearing will be held at the Ceremonial Courtroom, United States Courthouse, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Information Specialist, telephone: (202) 626-8500.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the U.S. Government. The Commission is empowered under 28 U.S.C. 994(a) to promulgate sentencing guidelines and policy statements for federal sentencing courts. The statute further directs the Commission to periodically review 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) and (p).

Ordinarily, the Administrative Procedure Act rule-making requirements are inapplicable to judicial agencies; however, 28 U.S.C. 994(x) makes the Administrative Procedure Act rule-making provisions of 5 U.S.C. 553 applicable to the promulgation of sentencing guidelines by the Commission.

The proposed amendments are presented in one of three formats, each of which is followed by a statement explaining the reason for the amendment. First, the majority of the amendments are proposed as specific revisions of a guideline, policy statement, or commentary. Second, for some amendments, the Commission has published alternative methods of addressing an issue. Commentators are encouraged to state their preference among listed alternatives or to suggest a new alternative. Third, the Commission has highlighted certain issues for comment and invites suggestions for specific amendment language.

Section 1B1.10 of the United States Sentencing Commission Guidelines Manual sets forth the Commission's policy statement regarding retroactivity of amended guideline ranges. Comment is requested regarding whether any of the proposed amendments should be made retroactive under this policy statement.

In amendments presenting alternative methods addressing an issue, double brackets denote the alternative methods. In displaying certain proposed amendments, single brackets are used to denote material to be deleted; *italics* are used to denote material to be added.

Although the amendments below are specifically proposed for public comment and possible submission to the Congress by May 1, 1992, the Commission emphasizes that it welcomes comment on any aspect of the sentencing guidelines, policy statements, and commentary, whether or not the subject of a proposed amendment.

The amendments below are derived from a variety of sources, including: Monitoring and hotline data and case law review; and the recommendations of the Judicial Conference of the United States, the Department of Justice, the Federal Defenders, the Commission's Practitioners Advisory Group, individual judges, probation officers, attorneys, and others.

Note: Publication of an amendment for comment does not necessarily indicate the view of the Commission or any individual Commissioner on the merits of the proposed amendment.

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

William W. Wilkins, Jr.,

Chairman.

Section 1B1.3. Relevant Conduct

1(A). Proposed Amendment: Section 1B1.3(a)(1) is amended by deleting:

"All acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the",

and inserting in lieu thereof:

"(A) All acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) In the case of a jointly-undertaken criminal activity, whether or not charged as a conspiracy, all reasonably foreseeable acts and omissions of others in furtherance of the jointly-undertaken criminal activity,

that occurred during the";

Section 1B1.3(a)(2) is amended by deleting "such acts and omissions" and inserting in lieu thereof "acts and omissions described in subdivisions (1)(A) and (1)(B) above".

The Commentary to section 1B1.3 captioned "Application Notes" is amended in Note 1 by deleting the first paragraph and inserting in lieu thereof:

"A 'jointly-undertaken criminal activity' is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy. In the case of a jointly-undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that both was in furtherance of the jointly-undertaken criminal activity, and was reasonably foreseeable to the defendant. Because a count may be broadly worded and include the conduct of many participants over a period of time, the scope of the jointly-undertaken criminal activity is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant.

Thus, a determination of the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement) is required. The conduct of others that was in furtherance of, and reasonably foreseeable in connection with, the criminal activity that the defendant agreed to jointly undertake is relevant conduct under this provision. The conduct of others that was not in furtherance of the jointly-undertaken criminal activity, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement), the court may consider any explicit or implicit (tacit) agreement, including any agreement fairly imputed to the defendant by his conduct and that of other participants in the criminal activity. For example, where a defendant benefited directly, or expected to benefit directly, from the conduct of others that occurred prior, contemporaneous, or subsequent to the defendant's joining the criminal activity, such conduct ordinarily may be imputed to be within the scope of the criminal activity the defendant agreed to jointly undertake.

The concept of reasonable foreseeability has no bearing on conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes. The concept of reasonable foreseeability is considered only in relation to the conduct of other participants that is in furtherance of the jointly-undertaken criminal activity.".

The Commentary to section 1B1.3 captioned "Application Notes" is amended in Note 1 in the fifth (formerly second) paragraph by deleting " 'would be otherwise accountable' " and inserting in lieu thereof "is accountable";

The Commentary to section 1B1.3 captioned "Application Notes" is amended in Note 1 in example (a) by deleting "boat" wherever it appears and inserting in lieu thereof in each instance "ship"; by deleting "any claim on his part" and inserting in lieu thereof "his claim"; and by inserting the following additional paragraph:

"Because the defendant aided and abetted the unloading of the marihuana shipment, no determination of the reasonable foreseeability of the acts of others in unloading the shipment is required. If it were found that the defendant's actions, in this example, did not constitute aiding or abetting the importation of the entire shipment, the defendant appropriately would still be accountable for the entire one-ton quantity because the facts of the case (nine other off-loaders, marihuana in bales) clearly establish that a one-ton quantity of marihuana was reasonably foreseeable.".

The Commentary to section 1B1.3 captioned "Application Notes" is amended in Note 1 in example (e) in the last sentence by deleting "if" and inserting in lieu thereof "because"; by inserting ("i.e., the importation of the single shipment of marihuana) that" immediately following "criminal activity"; and by deleting "(i.e., the importation of the single shipment of marihuana)".

The Commentary to section 1B1.3 captioned "Application Notes" is amended in Note 1 by inserting, immediately after example (e), the following additional paragraphs:

"Where the defendant enters an ongoing conspiracy, as in this example, the scope of the specific criminal activity that the defendant agreed to undertake, and thus the defendant's accountability for prior acts of other conspirators, must be determined. One factor that appropriately may be considered in determining the scope of the criminal activity undertaken by the defendant, particularly in a conspiracy that involves repeated conduct (e.g., a series of drug sales over time), is the benefit or expected benefit to the defendant. Where the defendant benefits directly, or expects to benefit directly, from the prior conduct, such conduct ordinarily will be within the scope of the defendant's criminal activity. Where there is no direct benefit, such conduct ordinarily will not be within the scope of the defendant's criminal activity.

f. Defendant J knows about her boyfriend's ongoing drug trafficking activity, but agrees to participate in this activity on only one occasion. Defendant J is held accountable only for the drug quantity involved on that one occasion.

g. Defendant K is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as the defendant sells. The defendant is not accountable for the quantities of drugs sold by the other street-level drug dealers, even if all share a common source of supply, because he is not engaged in a jointly-undertaken criminal activity with them. In contrast, Defendant L, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant L's behavior meets the criteria for a jointly-undertaken criminal activity. Therefore, Defendant L is accountable for the quantities of drugs sold by the four other dealers during the course of his agreement with them.".

The Commentary to section 1B1.3 captioned "Application Notes" is amended in Note 2 by deleting the first sentence.

Reason for Amendment: This amendment clarifies the operation of this guideline. Material is moved from the commentary to the guideline itself and rephrased for greater clarity, the discussion of the scope of this provision in the commentary is expanded, and additional examples are inserted.

Illustration of Section 1B1.3 as Amended by Proposed Amendment 1

Section 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in chapter Two, and (iv) adjustments in chapter Three, shall be determined on the basis of the following:

(1) [All acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the]

(A) All acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) In the case of a jointly-undertaken criminal activity, whether or not charged as a conspiracy, all reasonably foreseeable acts and omissions of others in furtherance of the jointly-undertaken criminal activity,

That occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

(2) Solely with respect to offenses of a character for which section 3D1.2(d) would require grouping of multiple counts, all [such acts and omissions] *acts and omissions described in subdivisions (1)(A) and (1)(B) above* that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) All harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts or omissions; and

(4) Any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Commentary

Application Notes:

1. [Conduct "for which the defendant would be otherwise accountable," as used in subsection (a)(1), includes conduct that the defendant counseled, commanded, induced, procured, or willfully caused. (Cf. 18 U.S.C. 2.) In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant "would be otherwise accountable" also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant. Because a count may be broadly worded and include the conduct of many participants over a substantial period of time, the scope of the jointly-undertaken criminal activity, and hence relevant conduct, is not necessarily the same for every participant. Where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant's offense level under this guideline.]

A "jointly-undertaken criminal activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy. In the case of a jointly-undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that both was in furtherance of the jointly-undertaken criminal activity, and was reasonably foreseeable to the defendant. Because a count may be broadly worded and include the conduct of many participants over a period of time, the scope of the jointly-undertaken criminal activity is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant.

Thus, a determination of the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement) is required. The conduct of others that was in furtherance of, and reasonably foreseeable in connection with, the criminal activity that the defendant agreed to jointly undertake is relevant conduct under this provision. The conduct of others that was not in furtherance of the jointly-undertaken criminal activity, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement), the court may consider any explicit or implicit (tacit) agreement, including any agreement fairly imputed to the defendant by his conduct and that of other participants in the criminal activity. For example, where a defendant benefited directly, or expected to benefit directly, from the conduct of others that occurred prior, contemporaneous, or subsequent to the defendant's joining the criminal activity, such conduct ordinarily may be imputed to be within the scope of the criminal activity the defendant agreed to jointly undertake.

The concept of reasonable foreseeability has no bearing on conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes. The concept of reasonable foreseeability is considered only in relation to the conduct of other participants that is in furtherance of the jointly-undertaken criminal activity.

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

Illustrations of Conduct for Which the Defendant is Accountable

* * * * *

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

Because the defendant aided and abetted the unloading of the marihuana shipment, no determination of the reasonable foreseeability of the acts of others in unloading the shipment is required. If it were found that the defendant's actions, in this example, did not constitute aiding or abetting the importation of the entire shipment, the defendant appropriately would still be accountable for the entire one-ton quantity because the facts of the case (nine other off-loaders, marihuana in bales) clearly establish that a one-ton quantity of marihuana was reasonably foreseeable.

* * * * *

e. Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. For the purposes of determining the offense level under this guideline, Defendant J is accountable for the entire single shipment of marihuana he conspired to help import and any acts or omissions in furtherance of the importation that were reasonably foreseeable. He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I (if) *because* those acts were beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity *(i.e., the importation of the single shipment of marihuana)* that he agreed to jointly undertake with Defendants H and I [(i.e., the importation of the single shipment of marihuana)].

Where the defendant enters an ongoing conspiracy, as in this example, the scope of the specific criminal activity that the defendant agreed to undertake, and thus the defendant's accountability for prior acts of other conspirators, must be determined. One factor that appropriately may be considered in determining the scope of the criminal activity undertaken by the defendant, particularly in a conspiracy that involves repeated conduct (e.g., a series of drug sales over time), is the benefit or expected benefit to the defendant. Where the defendant benefits directly, or expects to benefit directly, from the prior conduct, such conduct ordinarily will be within the scope of the defendant's criminal activity. Where there is no direct benefit, such conduct ordinarily will not be within the scope of the defendant's criminal activity.

f. Defendant J knows about her boyfriend's ongoing drug trafficking activity, but agrees to participate in this activity on only one occasion. Defendant J is held accountable only for the drug quantity involved on that one occasion.

g. Defendant K is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as the defendant sells. The defendant is not accountable for the quantities of drugs sold by the other street-level drug dealers, even if all share a common source of supply, because he is not engaged in a jointly-undertaken criminal activity with them. In contrast, Defendant L, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant L's behavior meets the criteria for a jointly-undertaken criminal activity. Therefore, Defendant L is accountable for the quantities of drugs sold by the four other dealers during the course of his agreement with them.

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

* * * * *

(B). Proposed Amendment: The Commentary to section 1B1.3 captioned "Application Notes" is amended by inserting the following additional notes:

"8. 'Common scheme or plan' and 'same course of conduct' are two closely-related concepts.

(A) Common scheme or plan. For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other, and linked by common evidence. Factors that appropriately are considered in this determination include common victims, common accomplices, common purpose, and similar modus operandi. For example, the conduct of five defendants who together defrauded a group of investors by computer manipulations that unlawfully transferred funds over an eighteen-month period would qualify as a common scheme or plan on the basis of any of the above listed factors; i.e., the commonality of victims (the same investors were defrauded on an ongoing basis), commonality of offenders (the conduct constituted an ongoing conspiracy), commonality of purpose (to defraud the group of investors), and similarity of modus operandi (the same or similar computer manipulations were used to execute the scheme). Offenses may meet the criteria of a common scheme or plan whether or not they fall within the time frame that would also qualify them as part of the same course of conduct.

(B) Same course of conduct. Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors appropriate to consider in this determination are the time interval between the offenses and the similarity of the offenses. As section 1B1.3(a)(2) applies only to offenses of a character that would be grouped under § 3D1.2(d), such offenses will be similar in character (e.g., a series of thefts, a series of thefts and forgeries, or a series of drug sales). As a general—but not absolute—standard, offenses that are similar in character and are committed at intervals of 120 days or less appropriately are considered as part of the same course of conduct. Note that in the case of a series of such offenses committed at intervals of 120 days or less (e.g., a series of four thefts each 90 days apart) all the offenses ordinarily would be considered part of the same course of conduct even though the total time from the first to last offense may have exceeded 120 days.

Due to the nature of tax offenses, a different time interval between offenses is ordinarily appropriate for this determination. For example, a failure to file income tax returns for consecutive years, or the filing of fraudulent income tax returns in consecutive years, ordinarily would constitute the same course of conduct because such returns are required only at yearly intervals. The determination of the same course of conduct or common scheme or plan in tax cases is addressed in Application Note 3 of the Commentary to section 2T1.1 (Tax Evasion).

Although the term 'same course of conduct' may also be used in connection with dissimilar offenses committed within a short span of time (e.g., a 'spree' in which a defendant assaults a neighbor, steals a car, and unlawfully possesses a controlled substance within a period of several hours appropriately might be considered the same course of conduct), this facet of the term has no applicability to cases under section 1B1.3(a)(2) because § 1B1.3(a)(2) only applies to offenses of a similar character.".

Reason for Amendment: This amendment provides guidance as to the scope of the terms "same course of conduct" and "common scheme or plan."

Section 1B1.8. Use of Certain Information

2(A). Proposed Amendment: The Commentary to section 1B1.8 captioned "Application Notes" is amended in Note 1 by deleting "this guideline" and inserting in lieu thereof "the guideline itself", by inserting "(an upward departure, or a sentence at a higher point within the applicable guideline range)" immediately following "increased sentence", and by inserting the following additional sentence at the end:

"In contrast, in determining whether a downward departure from the applicable guideline range is warranted pursuant to a government motion under § 5K1.1 (Substantial Assistance to Authorities) and the extent of any such downward departure, consideration of such information is appropriate.".

Reason for Amendment: This amendment clarifies the operation of the guideline and policy statements contained in the accompanying commentary. Under this section, (1) information covered by the guideline may not be used to determine the applicable guideline range; (2) an upward departure on the basis of such information would be contrary to the Commission's policy statement contained in Application Note 1 (and, consequently, would be appealable as unreasonable); and (3) the use of such information to set a higher sentence within the applicable guideline range also would be contrary to the Commission's policy statement contained in Application Note 1. In contrast, use of such information would be appropriate in considering whether, and to what extent, a downward departure under section 5K1.1 (Substantial Assistance to Authorities) is warranted.

(B). Proposed Amendment: Section 1B1.8(a) is amended in the first sentence by inserting "or the defendant" immediately following "others".

The Commentary to section 1B1.8 captioned "Application Notes" is amended in Note 1 in the second sentence by inserting "or himself" immediately following "co-conspirators", and in the third sentence by inserting "or to disclose additional unlawful conduct of himself" immediately following "offenders".

Reason for Amendment: Section 1B1.8 currently does not permit the government to agree not to use self-incriminating information against a defendant who wishes to plead and cooperate unless the cooperation consists of "providing information concerning unlawful activities of others." As a result, some have argued that defendants who have no such information have no incentive to plead guilty and cooperate other than the two-level reduction for acceptance of responsibility. This amendment broadens § 1B1.8 to provide that incriminating information provided by the defendant as part of a cooperation argument with the government shall not be used to determine the applicable guideline range in cases in which the only information provided pertains to the defendant's own unlawful activities.

Proposed New Section: Section 1B1.12 Persons Sentenced Under the Federal Juvenile Delinquency Act (Policy Statement)

3. Proposed Amendment: Chapter One, part B, is amended by inserting at the end:

Section 1B1.12. Persons Sentenced Under the Federal Juvenile Delinquency Act (Policy Statement)

(a) The sentencing guidelines do not apply to a defendant sentenced under the Federal Juvenile Delinquency Act (18 U.S.C. §§ 5031-5042). Nevertheless, the guidelines can provide an appropriate starting point for considering a sentence in such cases.

(b) A sentence for a juvenile delinquent that is above the guideline range applicable to an otherwise similarly situated adult defendant should be accompanied by specific reasons justifying such sentence.

(c) To the extent that a juvenile delinquent's age and youthfulness, and lesser culpability associated with such age and youthfulness, distinguish the juvenile delinquent from an otherwise similarly situated adult defendant, a sentence that is below the guideline range applicable to an otherwise similarly situated adult defendant may be appropriate.".

Reason for Amendment: This amendment adds a policy statement addressing the sentencing of juvenile delinquents. Currently, the guidelines provide no direction for the sentencing of juvenile delinquents. This amendment is consistent with the thrust of 18 U.S.C. 3553(b), which provides: "In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to applicable policy statements of the Sentencing Commission."

Chapter Two, Part A, Subpart 3—Criminal Sexual Abuse

4(A). Proposed Amendment: Section 2A3.2 is amended by inserting the following additional subsection:

"(c) Cross Reference

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

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

"(c) Cross References

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

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

Reason for Amendment: This amendment cross references section 2A3.2 to section 2A3.1, and section 2A3.4 to sections 2A3.1 and 2A3.2. A review of cases sentenced under these guidelines indicates that a significant proportion of cases sentenced under section 2A3.2 and section 2A3.4 clearly involved conduct that would more appropriately be covered under an offense guideline applicable to more serious sexual abuse cases. The proposed cross references are designed to address this issue.

A report concerning the sexual abuse guidelines and related guidelines involving minor victims is available for inspection at the Commission's offices.

(B). Proposed Amendment: Section 2A3.1(b)(3) is amended by inserting:

"(A)" immediately following "victim was"; and by deleting "was a corrections employee, or" and inserting in lieu thereof ", or (B)".

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

"(d) Special Instruction

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

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

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

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

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

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

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

Reason for Amendment: This amendment removes an anomaly between section 2A3.1(b)(3) and section 3A1.2(a). In addition, this amendment adds application notes to clarify the scope of sections 2A3.1(b)(3), 2A3.2(b)(1), and 2A3.4(b)(3), using language derived from application notes pertaining to similar specific offense characteristics in chapter Two, part G.

Section 2B1.1 Larceny, Embezzlement, and Other Forms of Theft;

Section 2F1.1 Fraud and Deceit

5. Proposed Amendment: Section 2B1.1(b) is amended by deleting subdivision (5); by renumbering subdivisions (6) and (7) as (5) and (6); and by deleting subdivision (1) in its entirety and inserting in lieu thereof the following:

"(1) If the loss exceeded $100, increase the offense level as follows:

Loss (Apply the greatest)	Increase in level
(A) $100 or less	no increase
(B) More than $100	add 1
(C) More than $1,000	add 2
(D) More than $2,000	add 3
(E) More than $3,500	add 4
(F) More than $6,000	add 5
(G) More than $11,000	add 6
(H) More than $20,000	add 7
(I) More than $35,000	add 8
(J) More than $60,000	add 9
(K) More than $100,000	add 10
(L) More than $175,000	add 11
(M) More than $300,000	add 12
(N) More than $500,000	add 13
(O) More than $900,000	add 14
(P) More than $1,500,000	add 15
(Q) More than $2,750,000	add 16
(R) More than $5,000,000	add 17
(S) More than $8,500,000	add 18
(T) More than $15,000,000	add 19
(U) More than $25,000,000	add 20
(V) More than $45,000,000	add 21
(W) More than $80,000,000	add 22."

The Commentary to section 2B1.1 captioned "Application Notes" is amended by deleting " 'More than minimal planning,' 'firearm,' " and inserting in lieu thereof " 'Firearm' "; and by deleting Application Note 13 in its entirety.

The Commentary to section 2B1.1 captioned "Background" is amended by deleting the second paragraph in its entirety.

Section 2F1.1(b) is amended by deleting subdivision (2); by renumbering subdivisions (3) through (6) as (2) through (5); and by deleting subdivision (1) in its entirety and inserting in lieu thereof the following:

"(1) If the loss exceeded $2,000, increase the offense level as follows:

Loss (Apply the greatest)	Increase in level
(A) $2,000 or less	no increase
(B) More than $2,000	add 1
(C) More than $3,500	add 2
(D) More than $6,000	add 3
(E) More than $11,000	add 4
(F) More than $20,000	add 5
(G) More than $35,000	add 6
(H) More than $60,000	add 7
(I) More than $100,000	add 8
(J) More than $175,000	add 9
(K) More than $300,000	add 10
(L) More than $500,000	add 11
(M) More than $900,000	add 12
(N) More than $1,500,000	add 13
(O) More than $2,750,000	add 14
(P) More than $5,000,000	add 15
(Q) More than $8,500,000	add 16
(R) More than $15,000,000	add 17
(S) More than $25,000,000	add 18
(T) More than $45,000,000	add 19
(U) More than $80,000,000	add 20."

The Commentary to section 2F1.1 captioned "Application Notes" is amended by deleting Application Notes 2 and 3 in their entirety and by renumbering Application Notes 4 through 18 as Application Notes 2 through 16.

The Commentary to section 2F1.1 captioned "Background" is amended by deleting the second and third paragraphs in their entirety.

Reason for Amendment: This amendment seeks to increase the clarity of sections 2B1.1 and 2F1.1 and to cause their application to be more uniform. The specific offense characteristic of "more than minimal planning" has proven difficult to apply consistently in practice. This amendment would eliminate the specific offense characteristic of "more than minimal planning" and build the two-level increase for "more than minimal planning" into the loss tables. This would be accomplished by extending the loss tables by two additional levels, thereby spreading out the loss amounts. The effect would be to provide no increase for "more than minimal planning" at the lowest loss amounts, to provide for a full two-level increase at the highest loss amounts, and to taper the two-level increase into the loss tables as loss amounts increase.

Additional Issues for Comment: 1. As the Commission considers revisions to the loss table in sections 2B1.1 and 2F1.1, it will consider comparable changes to other guideline sections that contain loss tables, including section 2T4.1. The Commission requests comment with regard to the conforming changes appropriate if the loss tables are revised in sections 2B1.1 and 2F1.1.

2. In connection with this amendment the Commission is considering a number

of possible loss tables. Comment is requested on the tables set forth below. The tables differ with regard to the rate at which the loss amounts increase. The tables in the proposed amendment above contain loss amounts that increase at approximately a constant rate. Tables 1 and 2 below are constructed such that the rate of increase gradually declines, with the more rapid rate of decline in Table 2. If Table 1 or Table 2 is used for section 2F1.1, a comparable table will be used for section 2B1.1.

Table 3 below is constructed with two-level rather than one-level increases. A table with two-level increases is being considered because it should reduce the frequency with which sentencing hearings would be necessary in order to determine the applicable offense level. By reducing the length of the table and increasing the spread between loss amounts, factual disputes should arise less frequently relative to the appropriate offense level. If a table such as Table 3 is used for section 2F1.1, a comparable table will be used for section 2B1.1.

Table 1: Alternative Fraud Table

(1) If the loss exceeded $2,000, increase the offense level as follows:

Loss (Apply the greatest)	Increase in level
(A) $2,000 or less	no increase
(B) More than $2,000	add 1
(C) More than $4,000	add 2
(D) More than $8,000	add 3
(E) More than $16,000	add 4
(F) More than $31,000	add 5
(G) More than $60,000	add 6
(H) More than $110,000	add 7
(I) More than $200,000	add 8
(J) More than $365,000	add 9
(K) More than $650,000	add 10
(L) More than $1,200,000	add 11
(M) More than $2,000,000	add 12
(N) More than $3,350,000	add 13
(O) More than $5,500,000	add 14
(P) More than $9,000,000	add 15
(Q) More than $15,000,000	add 16
(R) More than $23,000,000	add 17
(S) More than $36,000,000	add 18
(T) More than $54,000,000	add 19
(U) More than $80,000,000	add 20.

Table 2: Alternative Fraud Table

(1) If the loss exceeded $2,000, increase the offense level as follows:

Loss (Apply the greatest)	Increase in level
(A) $2,000 or less	no increase
(B) More than $2,000	add 1
(C) More than $4,000	add 2
(D) More than $7,500	add 3
(E) More than $15,000	add 4
(F) More than $25,000	add 5
(G) More than $50,000	add 6
(H) More than $90,000	add 7
(I) More than $160,000	add 8
(J) More than $285,000	add 9
(K) More than $500,000	add 10
(L) More than $885,000	add 11
(M) More than $1,500,000	add 12
(N) More than $2,500,000	add 13
(O) More than $4,500,000	add 14
(P) More than $7,500,000	add 15
(Q) More than $12,000,000	add 16
(R) More than $20,000,000	add 17
(S) More than $32,000,000	add 18
(T) More than $50,000,000	add 19
(U) More than $80,000,000	add 20.

Table 3: Alternative Fraud Table

(1) If the loss exceeded $3,500, increase the offense level as follows:

Loss (Apply the greatest)	Increase in level
(A) $3,500 or less	no increase
(B) More than $3,500	add 2
(C) More than $11,000	add 4
(D) More than $35,000	add 6
(E) More than $110,000	add 8
(F) More than $350,000	add 10
(G) More than $1,100,000	add 12
(H) More than $3,300,000	add 14
(I) More than $10,000,000	add 16
(J) More than $30,000,000	add 18
(K) More than $80,000,000	add 20.

Section 2B1.1. Larceny, Embezzlement, and Other Forms of Theft

Section 2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery

Section 2F1.1. Fraud and Deceit

6. Proposed Amendment: Section 2B1.1(b) is amended by renumbering subdivision (7) as (8), and by inserting the following as subdivision (7):

"(7) If the offense affected a financial institution, increase by 4 levels.".

Section 2B4.1(b) is amended by renumbering subdivision (2) as (3), and by inserting the following as subdivision (2):

"(2) If the offense affected a financial institution, increase by 4 levels.".

Section 2F1.1 is amended by renumbering subdivision (5) as (6), and by inserting the following as subdivision (5):

"(5) If the offense affected a financial institution, increase by 4 levels.".

Reason for Amendment: This amendment would increase the sentences for financial institution fraud, theft, and bribery over the entire range of offense levels, including those at the lower and middle levels, in addition other enhancements already in these guidelines. Under this amendment, embezzlement of $5,000 from a financial institution, for example, would have an offense level four levels higher than embezzlement of the same amount from an individual or from another type of institution. The purpose of this amendment would be to reflect the increases by Congress during the past several years in the maximum terms of imprisonment from 20 to 30 years for violations of title 18 bank fraud and embezzlement offenses.

Section 2D.1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)

7. Issue for Comment: The Commission requests comment regarding the removal or modification of the current limitations on offense levels for the distribution of Schedule III, IV, and V controlled substances, anabolic steroids, and Schedule I and II depressants, so that violations involving large quantities of these substances would result in higher offense levels. Currently, for example, a defendant who violates the law by selling hundreds of kilograms of a Schedule I or II depressant or a Schedule III substance receives the same offense level (level 20) as a defendant who sells 20 kilograms. Schedule I and II depressants include, for example, methqualone (Schedule I) and glutethimide (recently moved to Schedule II from Schedule III), which are used with codeine preparations as a heroin substitute. Schedule III substances, which have a five-year statutory maximum, include codeine preparations such as Tylenol or aspirin with codeine. Section 2D1.1 also limits the offense levels for Schedule IV substances (level 12 for 20 kilograms or more), which have a three-year statutory maximum sentence of imprisonment, and Schedule V substances (level 8 for 20 kilograms or more), which have a one-year statutory maximum sentence of imprisonment.

Chapter Two, Part L—Offenses Involving Immigration, Naturalization, and Passports

8. Proposed Amendment: Section 2L1.1(b)(2) is amended by deleting:

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

and inserting in lieu thereof:

"If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, and a decrease from subsection (b)(1) does not apply, increase as follows:

Number of unlawful aliens smuggled, transported, or harbored	Increase in level
6–11	add 1
12–24	add 2
25–49	add 3
50–99	add 4
100 or more	add 5."

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

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

The Commentary to section 2L1.1 captioned "Application Notes" is amended in Note 8 in the first sentence by deleting "large numbers of aliens or".

The Commentary to section 2L1.1 captioned "Application Notes" is amended by deleting Notes 2, 3 and 4, and renumbering Notes 5, 6, 7, 8 and 9, as 2, 3, 4, 5, and 6 respectively.

The Commentary to section 2L1.1 captioned "Background" is amended by deleting the last sentence and inserting in lieu thereof:

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

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

"(2) If the offense involved six or more sets of documents, and a decrease from subsection (b)(1) does not apply, increase as follows:

Number of sets of documents	Increase in level
6–11	add 1
12–24	add 2
25–49	add 3
50–99	add 4
100 or more	add 5.".

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

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

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

"(2) If the offense involved six or more passports, and a decrease from subsection (b)(1) does not apply, increase as follows:

Number of passports	Increase in level
6–11	add 1
12–24	add 2
25–49	add 3
50–99	add 4
100 or more	add 5.".

Section 3D1.2(d) is amended in the second paragraph by inserting "sections 2L1.1, 2L2.1, 2L2.3" in the appropriate place by section; and in the third paragraph by deleting "2L1.1, 2L2.1," and "2L2.3,".

The Commentary to section 3D1.2 captioned "Application Notes" is amended in Note 3 by deleting example 7.

Reason for Amendment: Currently, section 2L1.1 provides the same offense level for a defendant who smuggles, transports, or harbors 1, 5, 25, 50, or any number of unlawful aliens. The addition of specific offense characteristic (b)(2) to section 2L1.1 in the April 1987 guidelines was intended to conform the guidelines to the offense level indicated by past practices data for "ongoing criminal conduct". However, the specific offense characteristic "prior conviction for the same or similar offense" is not a good proxy for such conduct. Moreover, the inclusion of a prior criminal record variable in the offense guideline seems inconsistent with the general treatment of prior record as a separate dimension in the guidelines.

This amendment addresses this issue by substituting the number of aliens smuggled, transported, or harbored as a more direct measure of the scope of the offense. Consistent with the Commission's general approach, the offense level increases gradually with the number of aliens. It should also be noted that § 3B1.1 (Aggravating Role) generally provides an additional increase of 2, 3, or 4 levels for organizers, managers, and supervisors in large-scale cases because such operations typically involve lower-level participants. Thus, the proposed table in section 2L1.1(b)(2) (pertaining to the number of aliens) is designed to work in conjunction with the operation of enhancements from section 3B1.1.

Additional Issues for Comment: The Commission requests comment on whether enhancements for death or bodily injury should be incorporated into this guideline and, if so, the appropriate levels for such enhancements, and whether the level of enhancement should vary with the defendant's state of mind (e.g., knowing, reckless, criminally negligent). Or, are such issues best addressed as guideline departures? The Commission also requests comment on whether an enhancement for a firearm or other dangerous weapon should be included and, if so, whether the definition and enhancement in section 2D1.1 should be used; or whether this factor also is better addressed as a guideline departure. The Commission also requests comment on whether these guidelines should include any additional specific offense characteristics.

Section 2N2.1. Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product

9. Proposed Amendment: [[Option 1: Section 2N2.1 is amended by inserting the following additional subsection:

"(b) Cross Reference

(1) If the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline, apply that other offense guideline if the resulting offense level is greater than that determined above.".

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

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

and inserting in lieu thereof:

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

[[Option 2: Section 2N2.1 is deleted in its entirety, and the following is inserted in lieu thereof:

"Section 2N2.1. Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product

(a) Base Offense Level: 6

(b) Special Offense Characteristics

(1) If the defendant committed the offense after a prior conviction under the Federal Food, Drug and Cosmetic Act or similar state law, increase by 2 levels.

(2) If the offense involved violation of any judicial or administrative order, injunction, decree or process, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(3) If the offense created or involved a public health risk or was committed with reckless disregard for such risk, increase by 4 levels. If the resulting offense level is less than level 13, increase to level 13.

"(c) Cross Reference

(1) If the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline, apply that other offense guideline if the resulting offense level is greater than that determined above.

Commentary

Application Notes:

1. The base offense level assumes a regulatory violation. If only negligence was involved, a downward departure may be warranted. If willful conduct was involved, an upward departure may be warranted. See chapter Five, part K (Departures).

2. Subsection (b)(1) applies to offenders convicted of a second offense under 21 U.S.C. 333(a)(2), which is a felony, and to offenders who have been convicted of similar state offenses.

3. The term 'public health risk' in subsection (b)(3) includes, for example, the risk of illness, adverse side effects, or allergic reaction. It also includes the risk that affected persons will forego needed treatment. Subsection (b)(3) applies to such risk even if the adverse consequences are of short-term duration or not particularly grave. If the offense involved a risk of particularly serious bodily injury or death, an upward departure may be warranted.

4. If death, bodily injury, extreme psychological injury (other than as a result of a public health risk), property damage, or monetary loss resulted, an upward departure may be warranted. See chapter Five, part K (Departures).

5. The Commission has not yet promulgated a guideline for violations of 21 U.S.C. 331(t) (the Prescription Drug Marketing Act).".]]

Reason for Amendment: Option 1 converts the "instruction" in Application Note 2 of the Commentary to a cross reference in the guideline itself to conform with the structure of the remainder of the guidelines. Option 2 incorporates Option 1, but in addition provides specific offense characteristics and revised commentary to distinguish the different circumstances under which this offense can be committed.

Section 2Q1.2 Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification

10. Proposed Amendment: Section 2Q1.2(b)(4) is amended by inserting the following at the end: "Do not apply this adjustment if an adjustment from (b)(1) applies."

Reason for Amendment: The purpose of this amendment is to clarify the intent of the guideline and eliminate "double-counting." A review of cases sentenced under this guideline indicates that some courts have increased the offense level under subdivision (b)(1), based upon a "discharge, release, or emission" without a permit or in violation of a permit, and also increased the offense level under subdivision (b)(4), because the discharge, release, or emission occurred "without a permit or in violation of a permit." Yet, in some cases, the "discharge, release, or emission" is not a violation of law unless it occurs "without a permit or in violation of a permit." Accordingly, it has been contended that applying both of these subsections in the same case is inappropriate double-counting.

Additional Issues for Comment: 1. In conjunction with this amendment, the Commission is reconsidering the appropriate adjustment for offenses involving a discharge, release, or emission of a pollutant. Currently, the guideline provides a 4-level, or 6-level increase under subsections (b)(1)(A) and (b)(1)(B), respectively. Comment is requested on whether these adjustments should be increased by 2–4 levels each to provide an 6 or 8 level increase, and 8 or 10 level increase, respectively; or whether other adjustments should be made to the specific characteristics in subdivisions (b)(1) and (b)(4) to address the perception of double counting.

2. If the proposed amendment is adopted, a comparable amendment to section 2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification) may be warranted. Comment is requested whether the Commission should make changes in the structure and specific offense characteristics of section 2Q1.3 consistent with any changes made in section 2Q1.2.

Section 2Q2.1 Specially Protected Fish, Wildlife, and Plants; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants

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

Section 2Q2.1(b)(2) is amended by inserting "(A)" immediately before "involved" and by inserting "or (B) otherwise created a significant risk of infestation or disease transmission potentially harmful to humans, fish, wildlife, or plants" immediately following "law".

Section 2Q2.1(b)(3)(B) is amended by deleting "a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to a discrete subpopulation" and inserting in lieu thereof "(i) marine mammals that are listed as depleted under the Marine Mammal Protection Act (as set forth in 50 CFR 216.15), (ii) fish, wildlife, or plants that are listed as endangered or threatened by the Endangered Species Act (as set forth in 50 CFR part 17), or (iii) fish, wildlife, or plants that are listed as endangered in appendix I to the Convention on International Trade in Endangered Species of Wild Fauna or Flora (as set forth in 50 CFR part 23)".

The Commentary to section 2Q2.1 is amended by inserting in the appropriate place the following:

"Application Notes:

1. An offense 'committed for pecuniary gain' includes market transactions, barter transactions, and activities designed to increase gross revenue or reduce losses (e.g., when a farmer destroys migratory birds to prevent their consumption of cereal grains).

2. For purposes of subsection (b)(2), the quarantine requirements include those set forth in 9 CFR part 92, and 7 CFR chapter III.

3. For purposes of subsection (b)(3)(A), 'market value' may be determined from any reliable information available.".

The Commentary to section 2Q2.1 captioned "Background" is amended by deleting "involved a commercial purpose" and inserting in lieu thereof "was committed for pecuniary gain", and by deleting "species exceeded $2,000 or the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the population of the species or to a discrete subpopulation of the species" and inserting in lieu thereof "fish, wildlife, or plants exceeded $2,000, or involved certain endangered, threatened, or depleted species".

Reason for Amendment: This amendment is designed to strengthen the deterrent effect of the sanctions for violations covered by this guideline. The amendment expands the specific offense characteristic in subsection (b)(1) to cover other categories of offenses that appear to be equally serious to those committed for a commercial purpose. In addition, the amendment expands the specific offense characteristic in subsection (b)(2) to cover other comparable types of risk of harm. Furthermore, the amendment modifies the specific offense characteristic in subsection (b)(3) to better encompass the types of cases that the Commission intended to cover; experience has shown that courts have had difficulty applying this subsection.

Additional Issues for Comment: 1. Should an additional specific offense characteristic be added, providing for a two-level increase if the offense involved more than minimal planning? If so, should the increase be an alternative to, or in addition to, the increase for the specific offense characteristic in section 2Q2.1(b)(1)?

2. When the specific offense characteristic in section 2Q2.1(b)(1) is applicable, should the magnitude of the increase in levels be greater? If so, should there be a three-level or a four-level increase?

Chapter Two, Part S—Money Laundering and Monetary Transaction Reporting

12. Proposed Amendment: Section 2S1.4 is amended in the title by inserting at the end "; Willful Failure to File Form 8300; Filing False Form 8300".

The Commentary to section 2S1.4 captioned "Statutory Provision" is amended by inserting "26 U.S.C. 7203, 7206;" immediately before "31 U.S.C. 5316"; and in the caption by deleting "Provision" and inserting in lieu thereof "Provisions".

The Commentary to section 2S1.4 captioned "Application Notes" is amended by deleting "Note" and inserting in lieu thereof "Notes", and by inserting the following additional note:

"2. Violations of 26 U.S.C. 7203 and 7206 are covered by this offense guideline if they involve (A) willfully failing to file a Form 8300 (a willful violation of 26 U.S.C. 6050I), or (B) willfully filing a false Form 8300.".

Conforming Amendments: The Commentary to section 2S1.3 captioned "Statutory Provisions" is amended by deleting "26 U.S.C. 7203 (if a willful violation of 26 U.S.C. 6050I);".

The Commentary to sections 2T1.1–2T1.4 and Statutory Index are amended to reference the inclusion of certain violations of 26 U.S.C. 7203 and 7206 in section 2S1.4.

Section 3D1.2(d) is amended in the second paragraph by inserting ", section 2S1.4" immediately following "2S1.3".

Reason for Amendment: Certain violations of 26 U.S.C. 7203 and 7206 are more closely comparable to violations covered by section 2S1.4, added in November 1991, than to the guidelines presently referenced to these violations. This amendment expands the title and statutory provisions of section 2S1.4 to cover these violations and makes conforming revisions.

Chapter Two, Part T—Offenses Involving Taxation

13. Proposed Amendment: Section 2T1.1 is amended in the title by inserting "; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents" immediately after "Evasion".

Section 2T1.1(a) is deleted and the following is inserted in lieu thereof:

"(a) Base Offense Level (Apply the Greater):

(1) Level from section 2T4.1 (Tax table) corresponding to the tax loss; or

(2) 6.

For purposes of this guideline, the 'tax loss' is the total amount of tax that was the object of the evasion or fraud, or that the defendant owned and willfully did not pay.".

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

The Commentary to section 2T1.1 captioned "Application Notes" is amended by deleting Application Note 1, and by renumbering Notes 2, 3, 4, 5, and 6 as Notes 1, 2, 3, 4, and 5, respectively.

The Commentary to section 2T1.1 captioned "Application Notes" is amended in Note 1 (formerly Note 2) by deleting "the taxpayer evaded or attempted to evade" and inserting in lieu thereof "was the object of the evasion or fraud, or that the defendant owned and willfully did not pay", and by inserting the following at the end:

"In typical circumstances, tax loss can be calculated as indicated in the following examples:

If the offense involved improperly claiming a deduction (i.e., an item that reduces the amount of taxable income) or an exemption, or causing another to improperly claim a deduction or exemption, the tax loss is the amount of the improper deduction or exemption multiplied by the applicable tax rate(s).

If the offense involved improperly claiming a tax credit (i.e., an item that reduces the amount of tax directly), the tax loss is the amount of the improper tax credit.

If the offense involved filing a return in which gross income was underreported, there shall be a rebuttable presumption that the tax loss is equal to the underreported income multipled by the applicable tax rate(s).

If the offense involved failing to file a tax return, there shall be a rebuttable presumption that the tax loss is the gross income, minus the applicable amount for personal exemption and the amount of the applicable standard deduction, multiplied by the applicable tax rate(s).

If the offense involved improperly claiming a deduction designed to provide a basis for tax evasion or tax fraud in the future, there shall be a rebuttable presumption that the tax loss is the amount of the deduction multipled by the applicable tax rate for the tax year for which the return was filed.".

The Commentary to section 2T1.1 captioned "Background" is amended in the first paragraph by deleting "evaded" and inserting in lieu thereof "loss", by deleting "evasion" the first time it appears and inserting in lieu thereof "tax loss", and by inserting "or tax fraud" immediately before "increases,".

The Commentary to section 2T1.1 captioned "Background" is amended in the fourth paragraph by deleting the first two sentences, and in the fifth paragraph by deleting the last sentence.

The Commentary to section 2T1.1 captioned "Background" is amended in the sixth paragraph by inserting "and tax fraud" immediately following "tax evasion", by inserting "or fraud" immediately following "the evasion", and by deleting the last sentence.

Sections 2T1.2 and 2T1.3 are deleted in their entirety.

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

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

Section 2T1.4(b)(3) is deleted.

The Commentary to section 2T1.4 captioned "Application Notes" is amended by deleting Notes 3 and 4, by renumbering Application Notes 1 and 2 as 2 and 3, respectively; and by inserting the following as Note 1:

"1. For the general principles underlying the determination of tax loss, see Application Note 1 of the Commentary to section 2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents). In certain instances, such as promotion of a tax shelter scheme, the defendant may advise other persons to violate their tax obligations through filing returns that find no support in the tax laws. If this type of conduct can be shown to have resulted in the filing of false returns (regardless of whether the principals were aware of their falsity), the misstatements in all such returns will contribute to one aggregate 'tax loss.' ".

The Commentary to section 2T1.4 captioned "Application Notes" is amended in Application Note 2 (formerly note 1) by inserting "has two prongs. The first prong" immediately after "(b)(1)", and by inserting the following as the last sentence:

"The second prong applies to persons who regularly act as tax preparers or advisers for profit; if an enhancement from this prong is applied, do not apply Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill).".

The Commentary to Section 2T1.4 captioned "Background" is amended by inserting "and those who make a business of promoting tax fraud" immediately following "advisers" and by deleting "section 2T1.3" and inserting in lieu thereof "section 2T1.1".

Section 2T1.5 is deleted in its entirety.

Section 2T1.9(a)(1) is amended by deleting "section 2T1.3" and inserting in lieu thereof "section 2T1.4".

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

Section 2T1.9(b)(2) is amended by deleting "impede or impair the Internal Revenue Service in the assessment and" and inserting in lieu thereof "impair, impede, or defeat the ascertainment, computations, assessment, or" and by inserting the following as the last sentence:

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

The Commentary to section 2T1.9 captioned "Application Notes" is amended by deleting "section 2T1.3" and inserting in lieu thereof "section 2T1.4", and by inserting the following additional note:

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

Reason for Amendment: This amendment consolidates and clarifies the guidelines in chapter Two, part T, subpart 1, thereby eliminating the confusion that has arisen in some cases regarding which guideline section was applicable. In addition, this amendment eliminates the anomaly of using actual tax loss only in some cases, and using an amount that differed from actual tax loss in other cases. Furthermore, this amendment clarifies the conditions under which the specific offense characteristics of section 2T1.9 are applicable and clarifies the relationship between the loss calculation under section 2T1.4 and section 2T1.9.

14. Proposed Amendment: Section 2T1.1(b)(1) is amended by deleting "income exceeding $10,000 in any year from criminal activity, increase by 2 levels. If" and inserting in lieu thereof:

"income:

(A) From criminal activity involving or related to the manufacture, importation, or distribution of controlled substances (including money laundering), increase by 5 levels; if the resulting offense level is less than level 17, increase to level 17; or

B) Exceeding $10,000 in any year from any other criminal activity, increase by 2 levels; if"

Section 2T1.2(b)(1) is amended by deleting "income exceeding $10,000 in any year from criminal activity, increase by 2 levels. If" and inserting in lieu thereof:

"income:

(A) From criminal activity involving or related to the manufacture, importation, or distribution of controlled substances (including money laundering), increase by 5 levels; if the resulting offense level is less than level 17, increase to level 17; or

(B) Exceeding $10,000 in any year from any other criminal activity, increase by 2 levels; if".

Section 2T1.3(b)(1) is amended by deleting "income exceeding $10,000 in any year from criminal activity, increase by 2 levels. If" and inserting in lieu thereof:

"income:

(A) From criminal activity involving or related to the manufacture, importation, or distribution of controlled substances (including money laundering), increase by 5 levels; if the resulting offense level is less than level 17, increase to level 17; or

(B) Exceeding $10,000 in any year from any other criminal activity, increase by 2 levels; if".

Section 2T1.4(b)(1) is amended by inserting the following additional subdivision:

"(4) If the defendant aided, assisted, procured, counseled, or advised the filing of a return which failed to report or to correctly identify the source of income:

(A) From criminal activity involving or related to the manufacture, importation, or distribution of controlled substances (including money laundering), increase by 5 levels; if the resulting offense level is less than level 17, increase to level 17; or

(B) Exceeding $10,000 in any year from any other criminal activity, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.".

Reason for Amendment: This amendment provides an enhancement, including a minimum base offense level of 17, for tax violations that involve or are related to violations of the controlled substance laws. This amendment would treat such offenses in a manner similar to money laundering offenses. Under the proposed amendment to section 2T1.4, persons who procure or counsel tax fraud that involves unlawful controlled substance offenses or other criminal activity would be treated the same as those who commit such offenses directly.

Chapter Three—Adjustments, Part A—Victim-Related Adjustments

15. Proposed Amendment: Chapter 3, part A is amended by inserting the following additional guideline and accompanying commentary:

"Section 3A1.4. Commission of Terrorist Crimes

If the defendant committed a felony that involved, or was intended to promote international terrorism, whether committed within or outside the United States, increase by 3 levels.

Commentary

Application Note:

1. If the offense constituted a severe threat to national security, or caused death or bodily injury not taken into account in the offense guideline, an upward departure may be warranted.".

Reason for Amendment: This section would provide an enhancement for terrorist actions involving offenses such as explosives, kidnapping, weapons offenses, passport violations, murder, robbery, and other felony offenses that are committed to promote international terrorism.

Chapter Three, Part B—Role in the Offense

Chapter Two, Part D—Offenses Involving Drugs

16(A). Proposed Amendment: The Introductory Commentary to chapter Three, part B is amended by deleting the third sentence of the first paragraph.

The commentary to section 3B1.2 is amended by inserting the following additional note:

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

Reason for Amendment: This amendment clarifies a situation in which a defendant is not ordinarily eligible for a reduction under section 3B1.2 (Mitigating Role), and moves existing language from the Introductory Commentary of chapter Three, part B, to the Commentary in section 3B1.2.

(B). Proposed Amendment. The Commentary to section 3B1.1 is amended by inserting the following additional note:

"4. When a defendant, who otherwise would merit a mitigating role reduction under section 3B1.2 (Mitigating Role), exercised limited supervision over a limited number of participants with equal or lesser roles, do not apply an adjustment from this section. For example, an increase in offense level under this section would not be appropriate for a defendant whose only function was to offload a single large shipment of marijuana, and who supervised other offloaders of that shipment. Instead, consider such circumstances in determining the appropriate reduction under section 3B1.2 (Mitigating Role). See also Application Note 4 of the Commentary to section 3B1.2 (Mitigating Role).".

The Commentary to section 3B1.2 is amended by inserting the following additional note:

"4. When a defendant who otherwise would merit a mitigating role reduction under section 3B1.2 (Mitigating Role), supervises a number of participants with equal or lesser roles, a lesser reduction than otherwise appropriate ordinarily is warranted. For example, in the case of a defendant who would have qualified for a minimal role adjustment but for his supervision of other participants, an adjustment for minor role, rather the minimal role, would be appropriate.".

Reason for Amendment: This amendment clarifies that a defendant who otherwise merits a mitigating role, and who supervises a limited number of participants of equal or lesser roles, is not subject to an aggravating role enhancement. Instead, such circumstances may be considered in determining whether a mitigating role reduction is appropriate under section 3B1.2.

17(A). Proposed Amendment: The Introductory Commentary to chapter three, part B is amended by deleting the first sentence of the second paragraph and inserting in lieu thereof:

"In the case of a criminal activity involving more than one participant, section 3B1.1 or section 3B1.2 may apply. When a criminal activity involves only one participant, or only participants of roughly equivalent culpability, neither section 3B1.1 nor section 3B1.2 will apply.'.

Section 3B1.1 is amended by deleting "follows:" and inserting in lieu thereof "follows (Apply the greatest):".

Section 3B1.1(a) is amended by deleting "five or more participants, or was otherwise extensive" and by inserting in lieu thereof "at least four other participants".

Section 3B1.1(b) is amended by deleting "(but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive" and inserting in lieu thereof "of at least four other participants in a criminal activity".

Section 3B1.1(c) is amended by deleting "other than described in (a) or (b)" and inserting in lieu thereof "that involved at least one other participant".

The Commentary to section 3B1.1 captioned "Application Notes" is amended in Note 1 by deleting the second sentence and inserting in lieu thereof the following additional paragraphs:

"In addition, for the purposes of this guideline, a participant ordinarily includes any person who plays the role of a participant, even if such person is not actually criminally responsible for the offense (e.g., if two persons were recruited to assist in transporting marihuana, they would be deemed participants even if they were undercover law enforcement agents and, thus, not criminally responsible for the offense). However, if an undercover agent were recruited to assist in transporting marihuana and that agent recruited three other undercover agents, only the first undercover agent would be counted as a participant.

Furthermore, for purposes of this guideline, a participant includes any person recruited to play a [[significant]] role in the offense, even though their lack of awareness that an offense was being committed is a bar to their criminal liability (e.g., a person recruited to drive the getaway car from a robbery who is unaware that a robbery is to be committed; or a person expressly hired to collect money for charitable purposes, who is unaware that a fraud is being perpetrated). Persons such as postal employees, messengers, or taxi drivers who are performing their normal duties, and are not otherwise criminally responsible for their conduct, are not included under this paragraph.".

The Commentary to section 3B1.1 captioned "Application Notes" is amended by deleting Note 2.

Section 3B1.4 is deleted in its entirety.

Reason for Amendment: This amendment clarifies the definition of participant to inlcude the defendant and other persons who are criminally responsible. "Participant" also includes, in most cases, law enforcement officers, and those who are not criminally responsible for their conduct in the offense but who play a role in furthering the offense, even if unwitting. The amendment also deletes section 3B1.4, which is untitled, and is inconsistent with the remainder of the guideline format. The substance of the Commentary to section 3B1.4 is more appropriately placed in the Introductory Commentary to this part.

Illustration of Chapter Three, Part B, as amended by Proposed Amendment 17(A)

Part B—Role in the Offense

Introductory Commentary

* * * * *

[When an offense is committed by more than one participant, section 3B1.1 or section 3B1.2 (or neither) may apply.] *In the case of a criminal activity involving more than one participant, section 3B1.1 or section 3B1.2 may apply. When a criminal activity involves only one participant, or only participants of roughly equivalent culpability, neither section 3B1.1 or section 3B1.2 will apply.* Section 3B1.3 may apply to offenses committed by any number of participants.

Section 3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as [follows:] *follows (Apply the greatest):*

(a) If the defendant was an organizer or leader of a criminal activity that involved [five or more participants or was otherwise extensive] *at least four other participants*, increase by 4 levels.

(b) If the defendant was a manager or supervisor [(but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive] *of at least four other participants in a criminal activity*, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal [other than described in (a) or (b)] *that involved at least one other participant*, increase by 2 levels.

Commentary

Application Notes:

1. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. [A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.]

In addition, for the purposes of this guideline, a participant ordinarily includes any person who plays the role of a participant, even if such person is not actually criminally responsible for the offense (e.g., if two persons were recruited to assist in transporting marihuana, they would be deemed participants even if they were undercover law enforcement agents and, thus, not criminally responsible for the offense). However, if an undercover agent were recruited to assist in transporting marihuana and that agent recruited three other undercover agents, only the first undercover agent would be counted as a participant.

Furthermore, for purposes of this guideline, a participant includes any person recruited to play a [[significant]] role in the offense, even though their lack of awareness that an offense was being committed is a bar to their criminal liability (e.g., a person recruited to drive the getaway car from a robbery who is unaware that a robbery is to be committed; or a person expressly hired to collect money for charitable purposes, who is unaware that a fraud is being perpetrated). Persons such as postal employees, messengers, or taxi drivers who are performing their normal duties, and are not otherwise criminally responsible for their conduct, are not included under this paragraph.

[2. In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.]

* * * * *

[Section 3B1.4. In any other case, no adjustment is made for role in the offense.

Commentary

Many offenses are committed by a single individual or by individuals of roughly equal culpability so that none of them will receive an adjustment under this part. In addition, some participants in a criminal organization may receive increases under section 3B1.1 (Aggravating Role) while others receive decreases under section 3B1.2 (Mitigating Role) and still other participants receive no adjustment.]

(B). Proposed Amendment to section 3B1.1 (Aggravating Role): The Commentary to section 3B1.1, captioned "Application Notes," is amended in Note 1 by inserting the following additional sentence as the first sentence:

"This adjustment applies only when the offense is committed by more than one participant.".

Reason for Amendment: This amendment clarifies that this adjustment is restricted to cases in which the defendant participates in the commission of the offense with at least one other person who is also criminally responsible for the commission of the offense.

18(A). Proposed Amendment: Section 3B1.2 is amended by deleting "In cases falling between (a) and (b), decrease by 3 levels.".

The Commentary to section 3B1.2 is deleted in its entirety and the following notes are inserted in lieu thereof:

"1. This section applies only in the case of criminal activity involving more than one participant. "Participant" is defined in Note 1 of the Commentary to section 3B1.1.

[[2. No mitigating role adjustment under this section shall be applied to a defendant who, in connection with the offense, threatened the use of force, possessed a dangerous weapon, or caused another person to threaten the use of force or possess a dangerous weapon.]]

3. Subsection (a) (Minimal Role) applies to a defendant who is [[plainly among the least culpable of the participants in the criminal activity]] [[plainly among the least culpable when compared to all other participants who typically participate in the particular type of criminal activity]]. [[It is intended that the downward adjustment for a minimal participant be restricted to a narrow group of defendants whose function in the criminal activity and whose culpability for the offense, relative to that of other participants, indicates that such defendants are plainly among the least culpable.]]

To receive a reduction under subsection (a) (Minimal Role), the defendant [[ordinarily]] shall have:

(a) Only performed unskilled or unsophisticated tasks;

(b) No proprietary interest in the criminal activity, and received no benefit from the criminal activity, other than a [[fixed-fee]] payment that is a small amount both absolutely and in comparison to the expected profit of those who have employed the defendant.

(c) No [[significant]] decision-making authority in the criminal activity;

[[(d) Participated in the criminal activity [[on no more than one occasion]] [[for no more than a short period of time]]; and

[[(e) No more than limited knowledge of the scope and structure of the criminal activity and of the criminal conduct of the more culpable participants.]]

[[Frequently, such defendants will have little or no knowledge of the scope and structure of the criminal activity or of the activities of the more culpable participants.]]

4. In a controlled substance trafficking offense (any offense for which the offense level is determined under section 2D1.1)—

(a) "No proprietary interest" excludes (1) any defendant who owned any portion of the controlled substance; and (2) any defendant who financed any aspect of the importation, manufacture, cultivation, transportation, or distribution of the controlled substance;

(b) "No [[significant]] decision-making authority" excludes (1) any defendant who sold, negotiated the sale of, or determined the terms of a sale of the controlled substance, (2) any defendant who exercised [[significant]] decision-making authority with respect to the importation, manufacture, cultivation, transportation, or distribution of the controlled substance, and (3) and defendant who exercised control of the controlled substance for a significant period of time, such that the defendant [[had the ability to control]] [[was essential to]] the success of the criminal activity. In contrast, "no [[significant]] decision-making authority in the criminal activity" includes any defendant who did not exercise control over the controlled substance for any significant period of time, such that the defendant [[had the ability to control]] [[was essential to]] the success of the criminal activity. For example, a defendant who merely offloaded one ship, or permitted use of a residence in furtherance of the criminal activity did not exercise control over the controlled substance for any significant period of time.

5. Subsection (b) (Minor Role) applies to a defendant who is [[significantly less culpable than a defendant who carried out the same criminal activity without assistance]] [[substantially less culpable when compared to all other participants who typically participate in the particular type of criminal activity]], but who is more culpable than a minimal role participant. This subsection may apply to a defendant who meets some but not all of the criteria for a minimal role reduction. [[For example, an adjustment for minor role, rathter than minimal role, may be appropriate for a defendant who otherwise qualifies for a minimal role adjustment, but exercised sufficient control over controlled substances being transported so as not to merit a minimal role adjustment.]] Furthermore, subsection (b) may apply to a defendant who otherwise meets the criteria for a minimal role adjustment but for the exercise of limited supervision over a limited number of participants who also had minimal roles in the offense.

6. Consistent with the structure of the guidelines, the defendant bears the burden of persuasion in establishing a mitigating role reduction. In determining whether a defendant merits a mitigating role adjustment, the court should base its determination of role on the totality of the circumstances. Among the factors to be considered are the apparent sophistication or lack of sophistication of the defendant or the conduct, evidence concerning the existence of similar criminal conduct by the defendant, evidence of wealth derived from unknown or illegal sources, and the quantity of controlled substances with which the defendant was personally involved.

[[7. In a controlled substance trafficking offense (any offense covered under section 2D1.1), the criminal activity to be considered is the trafficking in the controlled substance, not merely the transportation of the controlled substance from one place to another. For example, in the case of a person hired to drive a truck containing marihuana from one city to another, the defendant's role is to be considered in relation to the criminal activity of drug trafficking. Therefore, a transporter may, if otherwise qualified, receive a reduction for a mitigating role.]]".

Reason for Amendment: This amendment more clearly specifies the factors that the court should consider when determining whether a defendant receives a mitigating role adjustment. This amendment also clarifies that couriers and mules by virtue of the function they play in a criminal activity are either presumed to be eligible nor ineligible for a mitigating role reduction. Such defendants must otherwise meet the criteria for a mitigating role reduction before they are eligible for such adjustment.

Additional Issues for Comment: The Commission requests comment on the following questions:

(1) Whether mitigating role adjustments should apply in cases in which the defendant is substantially less culpable than other defendants in the same case, or whether the adjustments should apply only when the defendant is substantially less culpable than individuals, whether or not defendants, who typically participate in similar criminal conduct?

(2) Whether defendants who perform certain functions in a drug activity may be eligible for a mitigating role adjustment under section 3B1.2 solely by virtue of the function performed? For example, it might be suggested in commentary to section 3B1.2 that defendants who perform the functions of offloader, driver, transporter, or lookout, are automatically eligible for a minor or minimal role adjustment, or are eligible for such an adjustment if certain other

factors are present. The Commission requests comment on how it should identify such participants and how to treat a defendant who performs more than one function in the offense.

(3) Conversely, whether defendants who perform certain functions in a drug activity are, by virtue of the importance of the function, disqualified from receiving a mitigating role adjustment, notwithstanding the fact that the defendant may have received a substantially smaller amount of money for his participation than other participants and may have exercised little decison-making authority in the criminal activity? For example, some argue that because one who transports controlled substances performs a crucial function for the drug trafficking ring, that person should not receive a mitigating role adjustment, no matter how little compensation the individual received, for an offense level based only on the quantity of controlled substances transported.

(4) What factors should be considered in determining whether to give a mitigating role reduction; and whether the list of factors provided in proposed application note 1 is adequate or overinclusive?

(5) Whether a defendant who otherwise merits a mitigating role adjustment under section 3B1.2 should be prevented from receiving that adjustment where the defendant has not been held responsible for a greater quantity of controlled substances than the defendant actually trafficked or aided in the trafficking? The Commission also requests comment on whether such a restriction should apply only to defendants whose sole function is that of a courier or mule.

(6) Conversely, whether a defendant who otherwise does not merit a mitigating role reduction under section 3B1.2 solely because he sold small quantities of certain controlled substances should be permitted to receive that mitigating role adjustment where the defendant has been held responsible for a greater quantity of controlled substances than the defendant actually trafficked or aided in trafficking?

(B). Proposed Amendment to section 3B1.2 (Mitigating Role): The Commentary to Section 3B1.2 captioned "Application Notes" is amended by inserting the following additional note:

"4. In addition to a downward adjustment for a minimal participant, a downward departure may be warranted on the ground that minimal participation exists to a degree not contemplated by the guidelines. For example, a downward departure, in addition to a downward adjustment for a minimal participant, may be warranted in a case where the offense level as applied to a defendant has been extraordinarily magnified by a circumstance that bears little relation to the defendant's role in the offense.".

Reason for Amendment: This amendment provides expressly that a court may depart below the applicable guideline range when it determines that a defendant's minimal participation exists to a degree not taken into consideration by the Sentencing Commission.

19. Proposed Amendment: Section 2D1.1(b) is amended by inserting the following additional subdivisions:

[[Option 1:

"(3) If the defendant was a minimal participant, decrease by 4 levels, but if the offense involved—

(A) Only marijuana, hashish, hashish oil, a Schedule I or II Depressant, or a Schedule III, IV, or V substance, in no event shall the offense level be greater than level [[16–28]]; or

(B) Any other controlled substance, in no event shall the offense level be greater than level [[20–32]].

(4) If the defendant was a minor participant, decrease by 2 levels, but if the offense involved—

(A) Only marijuana, hashish, hashish oil, a Schedule I or II Depressant, or a Schedule III, IV, or V substance, in no event shall the offense level be greater than level [[22–28]]; or

(B) Any other controlled substance, in no event shall the offense level be greater than level [[26–34]].".]]

[[Option 2:

"(3) If the defendant was a minimal participant, decrease by 4 levels, but in no event shall the offense level be greater than level [[16–32]].

(4) If the defendant was a minor participant, decrease by 2 levels, but in no event shall the offense level be greater than level [[22–34]]."]]

[[Option 3:

"(3) If the defendant was a minimal participant, decrease by 4 levels, but in no event shall the offense level be greater than level [[16–32]]."]]

[[Options 1 and 2:

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

"15. Do not apply an adjustment from section 3B1.2 (Mitigating Role) if the offense level is adjusted under subsection (b)(3) or (b)(4).".]]

[[Option 3:

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

"15. Do not apply an adjustment from section 3B1.2 (Mitigating Role) is the offense level is adjusted under subsection (b)(3).".]]

Reason for Amendment: This amendment limits the offense level to which a minor or minimal participant in drug cases is exposed. Some argue that, with regard to extremely large quantities of drugs, using the weight of the substance to determine the offense level of a minor or minimal participant overstates the culpability of that participant. Some also argue that the current 4-level reduction may be inadequate to counter the impact of a quantity-driven offense level.

Additional Issues for Comment: The Commission requests comment on this amendment and on possible variations of the amendment, as suggested by the following questions:

(1)(a) Should the same offense level cap apply to minor and minimal role offenders?

(b) Should the same offense level cap apply to marijuana (and similar substances) as applies to other controlled substances (such as heroin, cocaine, and crack cocaine)? On what criteria should the Commission make a distinction between types of substances for purposes of determining an appropriate offense level cap?

(2) Should the offense level cap limit the sentence imposed (e.g., no greater than [[120]] months) or limit the guideline offense level to be applied (e.g., no greater than level [[32]])?

(3) With regard to mitigating role participants, should one offense level cap be selected for a particular substance (e.g., a level 32 for cocaine offenses) or should two offense level caps be available, with the cap to be determined based on the mandatory minimum penalty to which the defendant is subject as a result of the quantity of drugs with which the defendant is involved? For example, with two offense level caps, a defendant involved with a quantity of less than 5 kilograms of cocaine could be subject to an offense level cap of 26 (or a sentencing cap of 60 months) and a defendant involved with a quantity of 5 or more kilograms of cocaine could be subject to an offense level cap of 32 (or a sentencing cap of 120 months)? Would the use of two such caps create an undesirable "cliff" effect? For example, a defendant involved with 4.9 kilograms of cocaine might be subject to a 5-year sentencing cap, whereas a defendant involved with 5 kilograms of cocaine would be subject to a 10-year cap: a 5-year difference in sentence may be based on a difference in quantity of 100 grams of cocaine.

(4) To what extent do mandatory minimum sentencing statutes, on which the Commission has set its base offense levels for drug offenses, further influence the Commission's consideration of these possible amendments? Some argue that congressional intent is clearer

concerning the determination of the amount of drugs that triggers a mandatory sentence for substantive offenses than it is with regard to this same determination in the context of conspiratorial offenses. Accordingly, should there be different offense level caps, depending on whether the defendant's accountability for a quantity of drugs is based on conspiratorial or substantive conduct? How could such a distinction be articulated?

(5) Should an amendment capping the offense level of mitigating role offenders be available only to defendants with a Criminal History Category of I? Category I or II? Or, should it be available only to Category I or II defendants who have no prior drug trafficking conviction?

(6) Should an alternative to an offense level cap be considered such that at high base offense levels the reduction for minimal role is greater than 4 levels, and for minor role, greater than 2 levels?

(7) Should this amendment modify section 2D1.1 (Manufacturing, Importing, Exporting, or Trafficking) or section 3B1.2 (Mitigating Role)?

20. Proposed Amendment: [[Option 1: Section 2D1.8 is deleted in its entirety. The Commentary to section 2D1.1 captioned "Statutory Provisions" is amended by inserting "856," before "960(a),".]]

[[Option 2: Section 2D1.8(a) is deleted and the following section inserted in lieu thereof:

"(a) Base Offense Level

(1) The offense level from the table in section 2D1.1 applicable to the underlying controlled substance offense, except as provided below.

(2) If the defendant had no role in the underlying controlled substance offense other than renting or allowing use of a premises, the offense level shall be 4 levels less than the offense from section 2D1.1 applicable to the underlying controlled substance offense, but not greater than level [[16]].".

The Commentary to section 2D1.8 captioned "Application Note" is amended by deleting Note 1 and inserting the following note in lieu thereof:

"1. Do not apply an additional adjustment under section 3B1.2 (Mitigating Role) if the offense level is determined under subsection (a)(2).".]]

[[Option 3: Section 2D1.8(a) is deleted and the following section inserted in lieu thereof:

"(a) Base Offense Level (Apply the greatest):

(1) The offense level from the table in section 2D1.1 applicable to the underlying controlled substance offense;

(2) [[16]] .".]]

Reason for Amendment: Currently, this guideline, which provides for a base offense level of 16 without regard to the quantity of drugs involved in the offense, can produce what appear to be anomalous results. A defendant who allows less than 250 grams of marijuana to be sold from his apartment is assigned a base offense level of 16 if convicted under 21 U.S.C. 856; if he had been convicted of actual distribution, he would have been assigned a base offense level of 6. In contrast, a defendant who allowed the use of a premises to sell 300 kilograms of heroin would also be assigned an offense level of 16 under the current guideline. Each option determines the offense level by reference to section 2D1.1. Option 1 provides no maximum or minimum offense level. Option 2 provides a maximum offense level 16 where the defendant has no role other than to rent or allow the use of a premises. Option 3 provides a minimum offense level 16 for every case.

Section 3C1.2. Reckless Endangerment During Flight

21. Issue for Comment: The sentencing Commission requests comment on whether section 3C1.2 adequately accounts for and punishes the full range of behavior to which it is applicable. More specifically, should the guideline incorporate a floor offense level for creating a substantial risk of death or serious bodily injury (e.g., a level from 12 to 15), with additional enhancements (e.g., 2 levels each) for physical injury, serious physical injury, or if death results? Or, should a cross reference to another guideline be used in lieu of, or in conjunction with, the above?

Chapter Three, Part D—Multiple Counts

22. Issue for Comment: The Commission seeks comment regarding amendment of the multiple count rules. In certain situations, multiple counts of conviction do not result in an increase in guideline range; for example, when one count embodies conduct treated as a specific offense characteristic, or adjustment to, the guideline applicable to the other count, or when there is a difference of nine or more levels between the counts. The Commission seeks comment as to the current structure and the court's ability to choose a point in the guideline range is adequate in these cases, or where section 3D1.2 should be modified and, if so, in what manner.

For example, section 3D1.4 instructs the user to disregard any group of closely related counts that is nine or more levels less serious than the group with the highest offense level. Thus, when counts of conviction include serious offenses and significantly less serious ones, the lesser ones do not contribute toward the determination of the guideline range. For example, a drug count with a high offense level and a theft count relating to a relatively small theft would result in a guideline range no different from the range that would result from the drug count alone if the two offenses were nine or more levels apart.

Another example concerns the tax evasion guideline, section 2T1.1(b)(1). This guideline includes a specific offense characteristic that provides that, if the defendant failed to report or to correctly identify the source of income exceeding $10,000 from criminal activity, a two-level increase results. Assuming there were also a count of conviction for a drug offense, the grouping rule cited above operate to group the tax evasion and drug count. The offense level for the count of conviction relating to the drug offenses is likely to exceed the offense for the tax evasion count. Therefore, the offense level for the group of closely related counts would be that for the drug offense.

Chapter Three, Part E—Acceptance of Responsibility

23. Proposed Amendment: [[Option 1: Section 3E1.1(a) is amended by deleting "his criminal conduct" and inserting in lieu thereof "the offense of conviction and relevant conduct".

The Commentary to section 3E1.1 captioned "Application Notes" is amended in Note 1(c) by deleting "related" and inserting in lieu thereof "relevant".

The Commentary to section 3E1.1 captioned "Application Notes" is amended in Note 3 by deleting "and related conduct" and inserting in lieu thereof "of conviction and relevant conduct".

The Background to section 3E1.1 is amended by deleting "and related conduct" and inserting in lieu thereof "of conviction and relevant conduct".]]

[[Option 2: Section 3E1.1(a) is amended by inserting the following immediately before the period at the end of the sentence "if the offense level determined above is level 29 or less; and 3 levels if the offense level determined above is level 30 or greater".]]

[[Option 3: Subsections (a), (b), and (c) of section 3E1.1 are deleted and the following is inserted in lieu thereof:

"(a) If the defendant—

(1) Is convicted upon a plea of guilty or nolo contendere entered prior to the opening of the government's case at trial, or

(2) Truthfully admits his involvement in the offense of conviction prior to adjudication of guilt, while exercising his constitutional right to a trial to assert and preserve issues not related to factual guilt,

reduce the offense level by 2 levels.

(b) If the defendant—

[[(1) Truthfully admits involvement in the offense of conviction and relevant conduct and,]]

(2) Demonstrates full acceptance of responsibility by taking timely affirmative steps such as:

[[(a) Truthful admission of involvement in the offense of conviction and relevant conduct]]

(a) Voluntary payment of restitution prior to adjudication of guilt;

(b) Voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

(c) Voluntary and full cooperation with authorities in the prosecution and sentencing of the offense;

(d) Voluntary resignation from the office or position held during the commission of the offense; or

(e) Voluntary surrender to authorities promptly after the commission of offense;

reduce the offense level by one level.

(c) If section 3E1.1(a) and (b) apply, reduce the offense level by 3 levels.".

The Commentary to section 3E1.1 captioned "Application Notes" is amended by deleting Notes 1, 2, and 3 and inserting in lieu thereof:

"1. Section 3E1.1 provides for a 1, 2, or 3 level reduction. The 3-level reduction is intended for the defendant who enters a plea in a timely fashion, admits his involvement in the offense, and demonstrates additional affirmative acts of acceptance of responsibility.

2. Section 3E1.1(a)(2) is intended to apply in the rare situation where the defendant admits his involvement in the offense of conviction prior to adjudication of guilty, but exercises his constitutional right to trial for reasons unrelated of contesting factual guilt (e.g., [[to challenge admissibility of evidence necessary to prove guilt,]] to challenge the constitutionality of a statute or challenge the applicability of a statute to his conduct, to assert conduct which would demonstrate that the defendant should not be held responsible for the offense (self-defense motive) to demonstrate the absence of the intent to commit the offense or the absence of knowledge that the conduct would constitute the offense at the time that the offense was committed).

3. The 2- or 3-level reduction is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt. However, such a defendant could qualify for the 1-level reduction as set forth in section 3E1.1(b).".

The Commentary to section 3E1.1 captioned "Application Notes" is amended in the second sentence of Note 4 by inserting "(b) (1) and (2)" immediately following "3E1.1".

The Commentary to section 3E1.1 captioned "Application Notes" is amended by renumbering Note 5 as 6, and by inserting the following as Note 5:

"5. In determining whether a defendant demonstrates 'voluntary and full cooperation,' as used in section (b)(2)(c), appropriate considerations include: (a) the defendant's cooperation with the government that is insufficient to merit a motion by the government for a substantial assistance departure, and (b) the defendant's cooperation with the court and with the pre-trial and probation officers in the execution of their duties.".]]

[[Option 4: Subsections (a), (b), and (c) of section 3E1.1 are deleted and the following is inserted in lieu thereof:

"(a) If more than one of the following applies, use the greatest:

(1) If the defendant clearly demonstrates a recognition and affirmative acceptance of responsibility for his offense in a timely manner, decrease the offense level by 3 levels; or

(2) If the defendant is convicted upon a plea of guilty or nolo contendere entered prior to the opening of the government's case at trial, decrease the offense level by 2 levels[[; or

(3) If the defendant is convicted upon the plea of guilty or nolo contendere after the opening of the government's case at trial, decrease the offense levely by 1 level]].

(b) A defendant may be given consideration under subsection (a)(1) without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury, or the practical certainty of conviction at trial. Entry of a plea of guilty prior to the opening of the government's case at trial is not in itself sufficient to warrant a reduction under subsection (a)(1).".

The Commentary to section 3E1.1 captioned "Application Notes" is amended in Note 1 by deleting "this provision" and inserting in lieu thereof "an adjustment under section 3E1.1(a)(1)", and by deleting "related" and inserting in lieu thereof "relevant".

The Commentary to section 3E1.1 captioned "Application Notes" is amended in Note 2 by deleting "This adjustment" and inserting in lieu thereof "section 3E1.1(a) (1)".

The Commentary to section 3E1.1 captioned "Application Notes" is amended in Note 3 by deleting "related" and inserting in lieu thereof "relevant", and by deleting "this section" and inserting in lieu thereof "section 3E1.1(a)(1)".

The Commentary to section 3E1.1 captioned "Application Notes" is amended in Note 4 by inserting immediately before the period at the end of the first sentence "under subsection (a)(1)", and in the second sentence by deleting "3E1.1" and inserting in lieu thereof "3E1.1(a)(1)".

The Commentary to section 3E1.1 captioned "Application Notes" is amended by renumbering Note 5 as Note 6 and by inserting the following additional note as Note 5:

"5. Subsection (a)(2) applies to a defendant who is convicted upon a plea of guilty or nolo contendere entered prior to the opening of the government's case at trial (including a conditional plea under Rule 11(a)(2) of the Rules of Criminal Procedure), but does not qualify for a reduction under subsection (a)(1). Such defendants have ensured the certainty of their just punishment in a timely manner and, therefore, are appropriately provided a 2-level reduction.

[[Subsection (a)(3) applies to a defendant who is convicted upon a plea of guilty or nolo contendere, but does not qualify for a reduction under either subsection (a) (1) or (2). Such defendants have ensured the certainty of their just punishment and, therefore, appropriately are provided a 1-level reduction.".]]

The Commentary to section 3E1.1 captioned "Background" is amended by deleting "related" and inserting in lieu thereof "relevant", by inserting "under subsection (a)(1)" immediately following "lower offense level" and by inserting the following additional sentence at the end:

"Lesser reductions are provided under subsection (a)(2) [[or (3)]] to a defendant who, although not qualifying for a reduction under subsection (a)(1), nevertheless has ensured the certainty of his just punishment by entering a plea of guilty or nolo contendere.".

Conforming Amendment: Section 6B1.2(a) is amended by deleting "statutory purposes of sentencing" and inserting in lieu thereof "sentencing guidelines".

The Commentary to section 6B1.2 is amended in the first paragraph by deleting: "This section makes clear that a court may accept a plea agreement provided that the judge complies with the obligations imposed by Rule 11(e), Fed. R. Crim. P. A judge" and inserting in lieu thereof "The court", and by inserting, immediately before "This requirement", the following:

"A defendant who enters a plea of guilty or nolo contendere prior to the opening of the government's case at trial ensures a reduction in offense level by 2 levels under section 3E1.1 (Acceptance of Responsibility). Further reductions in sentences due to plea agreements will tend to undermine the system of sentencing guidelines and should be avoided.".]]

Reason for Amendment: Option 1 provides expressly that a defendant be required to accept responsibility for the offense of conviction and all relevant conduct. With respect to Option 1, the Commission solicits comment on whether "the offense of conviction and all relevant conduct" is the appropriate scope of consideration for acceptance of responsibility; whether the scope should be broader, i.e., the offense of conviction and all related conduct (all conduct connected with the conduct constituting the offense of conviction whether or not it is within the parameters of relevant conduct); or whether the scope should be narrower, i.e., restricted to the offense of conviction.

Option 2 provides a greater reduction for acceptance of responsibility for cases with offense levels of 30 or greater. The Commission solicits comments on the appropriateness of providing a greater reduction at higher offense levels, and if so, whether the three level reduction should begin at offense level 30 or at a lower or higher offense level.

Option 3 provides a broader range of adjustments for acceptance of responsibility. Under this option, a defendant receives a two-level reduction under subsection (a) if he is convicted upon a plea of guilty or nolo contendere entered prior to the opening of the government's case at trial, or truthfully admits his involvement in the offense of conviction prior to adjudication of guilt, while exercising his constitutional right to a trial to assert and preserve issues not related to factual guilt. A separate, additional, one-level reduction is provided under subsection (b) to a defendant who takes additional steps demonstrative of full acceptance of responsibility. Because the decrease under subsection (b) is separate, a defendant who denies his guilt and is convicted by trial could nevertheless achieve a one-level reduction under subsection (b) of this option by subsequently demonstrating affirmative acceptance of responsibility.

Option 4 is similar to Option 3, but has certain differences. As in Option 3, a defendant who is convicted upon a plea of guilty or nolo contendere entered prior to the government's case at trial receives at least a two-level reduction. Similarly, if such defendant takes additional steps to accept responsibility, a three-level reduction is provided. Under Option 4, a defendant who goes to trial may be eligible for the full reduction under very exceptional circumstances (e.g., a defendant who admits and accepts responsibility for his conduct, but goes to trial to challenge the applicability of the statute to his conduct). Unlike Option 3, however, a defendant who goes to trial is convicted, and later admits his guilt at sentencing would not be eligible for a partial reduction under Option 4. Bracketed language within Option 4 is included to solicit comment on whether if this option is adopted it should include a partial (one-level) reduction for a defendant who changes his plea after the opening of the government's case at trial.

Section 4A1.1. Criminal History Category

24. Proposed Amendment: Section 4A1.1(f) is deleted as follows:

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

and the following is inserted in lieu thereof:

"(f) Add 1 point for each of the following:

"(i) Each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was considered related to another sentence resulting from a conviction of a crime of violence. Provided, that (1) this subparagraph does not apply where the sentences are considered related because the offenses occurred on the same occasion; and (2) not more than 3 points may be added under this subparagraph; and

(ii) Each prior sentence, or each set of consolidated prior sentences, counted under (a) for which the defendant actually served at least [[five]] years of imprisonment prior to initial release.".

Reason for Amendment: This amendment further distinguishes the weight given to serious prior offenses by adding an additional point for sentences on which the defendant actually served five or more years of imprisonment.

Section 4A1.2. Definitions and Instructions for Computing Criminal History

25(A). Proposed Amendment: [[Option 1: Section 4A1.2(f) is amended by deleting ", except" and inserting in lieu thereof ". Provided,"; and by deleting "from juvenile court" and inserting in lieu thereof "for an offense committed prior to the defendant's eighteenth birthday".

Section 4A1.2(j) is deleted as follows:

"(j) Expunged Convictions

Sentences for expunged convictions are not counted, but may be considered under section 4A1.3 (Adequacy of Criminal History Category).",

and the following inserted in lieu thereof:

"(j) Reversed, Vacated, Annulled, Set Aside, Pardoned, or Expunged Convictions

(1) A sentence resulting from a conviction that has been reversed is not counted. A sentence resulting from a conviction that has been vacated, set aside, annulled, or expunged or for which the defendant has been pardoned, is not counted if such action was based on a determination that the conviction was legally defective or on evidence pertaining to the defendant's innocence.

(2) A number of jurisdictions have various procedures pursuant to which a defendant's conviction may be vacated, 'set aside,' annulled, or ordered expunged, or a defendant may be pardoned, for reasons unrelated to innocence or legal defect (e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction). A sentence for such a conviction is counted.

(3) Provided, that any sentence resulting from a conviction or adjudication for an offense committed prior to a defendant's eighteenth birthday that has been vacated, set aside, annulled, or ordered expunged, or for which the defendant has been pardoned is not counted [[unless the defendant commenced the instant offense prior to such action]] .".

The Commentary to section 4A1.2 captioned "Application Notes" is amended by deleting Note 10 and renumbering the remaining notes accordingly.]]

[[Option 2: Section 4A1.2(f) is amended by deleting "is counted as a sentence under section 4A1.1(c) even if a conviction is not formally entered, except that diversion from juvenile court is not counted" and inserting in lieu thereof:

"(e.g., a probationary disposition without entry of a conviction) [[is counted as a sentence under section 4A1.1(c) only if the defendant commenced the instant offense prior to satisfaction of the express conditions, if any, of such diversionary disposition]] [[is not counted]].

Section 4A1.2(j) is deleted as follows:

"(j) Expunged Convictions

Sentences for expunged convictions are not counted, but may be considered under section 4A1.3 (Adequacy of Criminal History Category).",

and the following is inserted in lieu thereof:

"(j) Reversed, Vacated, Annulled, Set Aside, Pardoned, or Expunged Convictions

(1) A sentence resulting from a conviction that has been reversed, vacated, set aside, annulled, or expunged, or for which the defendant has been pardoned, is not counted if such action was based upon a determination that the conviction was legally defective or on evidence pertaining to the defendant's innocence.

(2) A number of jurisdictions have various procedures pursuant to which a defendant's conviction may be vacated, set aside,

annulled, or expunged, or a defendant may be pardoned, for reasons unrelated to legal defect or innocence (e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction). A sentence resulting from such a conviction for an offense committed at age eighteen or older—

(A) is counted if the sentence contained a term of imprisonment of [[sixty days or more]] [[more than one year and one month]] [[, or if the defendant commenced the instant offense before such action was taken]] ; and

(B) is not counted in any other case.

(3) A sentence resulting from a conviction or adjudication for an offense committed prior to age eighteen that has been vacated, set aside, annulled, expunged, or for which the defendant has been pardoned is not counted [[unless the defendant commenced the instant offense before such action was taken]] "]]

Reason for Amendment. This amendment provides more consistency in respect to the counting of convictions that have been reversed, vacated, annulled, set aside, expunged, or pardoned. Currently, whether such sentences are counted depends upon the terminology used by the various jurisdictions. E.g., sentences resulting from convictions that have been annulled or set aside are counted; sentences resulting from convictions that have been expunged are not. Option 1 would count all sentences resulting from offenses committed at age eighteen or older unless reversed, vacated, annulled, set aside, expunged, or pardoned on the basis of a finding of legal defect or information pertaining to the defendant's innocence. Option 2 would count executed (non suspended) sentences of imprisonment of more than a certain amount, unless the action vacating, annulling, setting aside, expunging, or pardoning such sentence was based upon a finding of legal defect or information pertaining to the defendant's innocence. Lesser sentences for which the convictions had been vacated, annulled, set aside, expunged, or pardoned would not be counted.

(B). Proposed Amendment: [[Option 1: Section 4A1.2(e)(1) is amended by inserting the following additional sentences as the first two sentences:

"To establish the applicable time period for counting sentences under § 4A1.1(a), count back fifteen years from the date of the defendant's commencement of the instant offense, without credit for any period of [[one]] [[two]] [[three]] [[four]] [[five]] years or more that the defendant continuously was in imprisonment. For example, if the defendant was continuously imprisoned for eight years, and any part of this imprisonment fell within the fifteen-year period, the applicable time period would be 23 (15 + 8) years."

By deleting "within fifteen years of the defendant's commencement of the instant offense" and inserting in lieu thereof "on or after the beginning of the applicable time period";

And by deleting "such fifteen-year" and inserting in lieu thereof "the applicable time".]]

[[Option 2: Section 4A1.2(e)(1) is amended by inserting the following additional sentences as the first two sentences:

"To establish the applicable time period, count back twelve years from the date of the defendant's commencement of the instant offense, without credit for any period of [[one]] [[two]] [[three]] [[four]] [[five]] years or more that the defendant continuously was in imprisonment. For example, if the defendant was continuously imprisoned for eight years, and any part of this imprisonment fell within the twelve-year period, the applicable time period would be 20 (12 + 8) years.".

By deleting "of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense" and inserting in lieu thereof "that was imposed on or after the beginning of the applicable time period".

And by deleting "such fifteen-year" and inserting in lieu thereof "the applicable time".

Section 4A1.2(e) is amended by deleting subdivision (2) and by renumbering the remaining subdivisions accordingly.]]

Reason for Amendment: Both options of this amendment extend the applicable time period for counting prior convictions (for purposes of determining number of criminal history points and determining career offender status) to take into account substantial periods of incarceration. Option 1 retains the current guideline structure of 10- and 15-year "applicable time periods." Option 2 modifies the current guideline structure to provide for a uniform 12-year applicable time period.

Illustration of Section 4A1.2 as Amended by Option 1

[[Option 1: (1) *To establish the applicable time period for counting sentences under § 4A1.1(a), count back fifteen years from the date of the defendant's commencement of the instant offense, without credit for any period of [[one]] [[two]] [[three]] [[four]] [[five]] years or more that the defendant continuously was in imprisonment. For example, if the defendant was continuously imprisoned for eight years, and any part of this imprisonment fell within the fifteen-year period, the applicable time period would be 23 (15 + 8) years.* Any prior sentence of imprisonment exceeding one year and one month that was imposed [within fifteen years of the defendant's commencement of the instant offense] *on or after the beginning of the applicable time period* is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of [such fifteen-year] *the applicable time* period.]]

Illustration of Section 4A1.2 as Amended by Option 2

[[Option 2: (1) *To establish the applicable time period, count back twelve years from the date of the defendant's commencement of the instant offense, without credit for any period of [[one]] [[two]] [[three]] [[four]] [[five]] years or more that the defendant continuously was in imprisonment. For example, if the defendant was continuously imprisoned for eight years, and any part of this imprisonment fell within the twelve year period, the applicable time period would be 20 (12 + 8) years.* Any prior sentence [of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense] *that was imposed on or after the beginning of the applicable time period* is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of [such fifteen-year] *the applicable time* period.

[(2) Any other prior sentence that was imposed within ten years of the defendant's commencement of the instant offense is counted.]

([3] *2*) Any prior sentence not within the time periods specified above is not counted.

([4] *3*) The applicable time period for certain sentences resulting from offenses committed prior to age eighteen is governed by section 4A1.2(d)(2).]]

Section 4A1.3. Adequacy of Criminal History Category (Policy Statement)

26(A). Proposed Amendment: [[Option 1: Section 4A1.3 is amended by deleting the fourth sentence in the last paragraph and inserting in lieu thereof:

"In such a case, a sentence above the guideline range for a defendant with a Category VI criminal history may be warranted, but the court shall determine the extent of the departure by extrapolating a new guideline range from the existing guideline ranges in the Sentencing Table. For example, a defendant with a total offense level 10 who has 16 criminal history points and a guideline range of 24–30 months, would have a hypothetical Category VII criminal history, and a hypothetical guideline range of 27–33 months. In the case of unusually serious criminal history, or unusually high numbers of criminal history points, the extent of the departure may be greater than that suggested by extrapolation."]]

[[Option 2: Section 4A1.3 is amended in the fourth (last) paragraph by beginning a new (fifth) paragraph with the fifth sentence, and by inserting the following at the end of the fourth paragraph.

"In determining whether such a departure is warranted, the court should consider that, in the case of a defendant who has established a prior criminal record sufficient to warrant consideration of an upward departure from criminal history category VI, the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of that criminal record. For example, a defendant with nine prior 60-day jail sentences for offenses such as petty larceny, prostitution, or possession of gambling slips (a total of 18 points) has a higher number of criminal history points than the typical criminal history category VI defendant, but not necessarily a more serious criminal history overall. Where the court finds that the quantity and quality of the defendant's criminal history points are sufficient to warrant an upward departure, the court should use an incremental approach, moving down the sentencing table in one-level increments until it finds a guideline range appropriate to the case. Because qualitative judgment is important to this determination, it is not possible to specify the appropriate increments with precision; however, a one, two, or three-level increment should be sufficient to address all but the most egregious cases.".]]

Reason for Amendment: Options 1 and 2 both provide for a structured departure in the case of an offender with high criminal history point totals. The current guideline invites departures on the basis of high criminal history point totals, but suggests no structure for the extent of the departure. Option 1 requires an extrapolation of the Sentencing Table based on three-point increments, with greater departures permitted where criminal history is particularly serious or where criminal history point totals are unusually large. Option 2 accounts for the possibility that a defendant with a high criminal history point total may have accrued a large number of such points after committing numerous less serious offenses for which short prison sentences were imposed—in contrast with the more serious offender who has been incarcerated for long periods of time and has had less opportunity to accumulate large point totals.

(B). Proposed Amendment: Section 4A1.3 is amended in the first paragraph by inserting "(a) Degree of Risk." immediately before "If reliable"; by deleting "the seriousness of the defendant's past criminal conduct or"; by renumbering "(a)", "(b)", "(c)", and "(d)" as "(1)", "(2)", "(3)", and "(4)" respectively; and by deleting "; (e) prior similar adult criminal conduct not resulting in a criminal conviction".

Section 4A1.3 is amended in the second paragraph by deleting "the seriousness of the defendant's criminal history or"; by deleting "serious assaults" and inserting in lieu thereof "criminal acts"; by deleting "had a similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding, (4)"; by deleting "serious" immediately following "another"; by renumbering "(5)" as "(4)"; and by deleting "serious" immediately following "significantly more" and inserting in lieu thereof "extensive".

Section 4A1.3 is amended in the third paragraph by deleting "the seriousness of the defendant's criminal history or"; by deleting "minor misdemeanor"; and by deleting "serious" and inserting in lieu thereof "extensive".

Section 4A1.3 is amended by inserting the following additional subsection after the third paragraph:

"(b) Type of Risk. If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning the nature of the criminal conduct underlying a defendant's prior convictions, and prior similar adult criminal conduct not resulting in a criminal conviction, that establishes a pattern of particularly harmful or very minor criminal behavior.

An upward departure under this provision may be warranted when the criminal history category significantly underrepresents the seriousness of the defendant's criminal history. Examples might include offenders with a history of repetitive assaultive behavior, of repetitive sophisticated criminal behavior (e.g., a series of sophisticated frauds or a similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding), and those with unusually extensive and serious prior records.

A downward departure under this provision may be warranted when the criminal history category significantly overrepresents the seriousness of the defendant's criminal history. Examples might include offenders whose points result from unusually harsh sentencing for misdemeanors or from a string of convictions for relatively minor, victimless crimes such as prostitution.".

Section 4A1.3 is amended in the last paragraph by inserting "(c)" immediately before "In considering"; and by deleting "of the defendant's criminal history, and that the seriousness of" and inserting in lieu thereof "or extensiveness of the defendant's criminal history, and that".

Reason for Amendment: This amendment clarifies that departures under this section may be warranted when the criminal history category does not adequately address either the likelihood of new offenses being committed by the defendant, or the type of risk posed by the defendant.

(C). Proposed Amendment: Section 4A1.3 is amended by inserting the following at the end of the third paragraph:

"A downward departure on the basis of the adequacy of a defendant's criminal history category is not warranted when the guidelines in this chapter specify a particular criminal history category in lieu of the category that would result from calculation of the criminal history points under section 4A1.1. Such guidelines include sections 4B1.1 and 4B1.4.".

Reason for Amendment: This amendment expressly prohibits downward departures for defendants sentenced under the career criminal and armed career criminal sections of those guidelines when such departures are based on the court's conclusion that the criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood the defendant will commit further crimes. Some have argued that such departures are in direct conflict with the statutory directive in 28 U.S.C. 994(h) that career offenders be sentenced at or near the statutory maximum for the offense of conviction and the Commission's interpretation of this directive by placing all such defendants in Criminal History Category VI.

Section 4B1.1. Career Offender

Section 4B1.2. Definitions of Terms Used in Section 4B1.1

27(A). Proposed Amendment: The Commentary to section 4B1.1 captioned "Application Notes" is amended in Note 2 by deleting the first sentence and inserting in lieu thereof:

[[Option 1: "'Offense Statutory Maximum' refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, before the maximum term has been increased by a sentencing enhancement statute applied because the defendant has one or more prior convictions. See e.g., sentencing enhancement statutes in [[18 U.S.C. 924(e);]] 21 U.S.C. 841(a)(1)(B); 21 U.S.C. 841(a)(1)(C); 21 U.S.C. 844(a). For example, where the defendant's statutory maximum of twenty years has been enhanced under 21 U.S.C. 841(a)(1)(C) to a thirty-year maximum because the defendant has one or more qualifying prior drug convictions, the 'Offense Statutory Maximum' is twenty years and not thirty years.".]]

[[Option 2: "'Offense Statutory Maximum' refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, after the maximum term has been increased by a sentencing enhancement statute applied because the defendant has one or more prior convictions. See e.g., sentencing enhancement statutes in [[18 U.S.C. 924(e):]] 21 U.S.C. 841(a)(1)(B): 21 U.S.C. 841(a)(1)(C): 21 U.S.C. 844(a). For example, where the defendant's statutory maximum of twenty years has been enhanced under 21 U.S.C. 841(a)(1)(C) to a thirty-year maximum because the defendant has one or more qualifying prior drug convictions, the 'Offense Statutory Maximum' is thirty years and not twenty years."]]

Reason for Amendment: This amendment clarifies the meaning of the term "offense statutory maximum," as used in this section. Under Option 1, an enhancement of the statutory maximum sentence that itself was based upon the defendant's prior criminal record would not be used in determining the offense level under this guideline. Under Option 2, such enhancement would be used.

(B). Proposed Amendment: The Commentary to section 4B1.2 captioned "Application Notes" is amended in Note 3 by deleting "one year" and inserting in lieu thereof 'two years".

Reason for Amendment: This amendment prevents the counting of relatively less serious crimes of violence by requiring that the statutory maximum for the offense be greater than two years. Comment is requested as to whether the proposed amendment appropriately excludes only such "less serious" offenses.

(C). Proposed Amendment: Section 4B1.2(3) is amended by deleting the last sentence therein, and inserting in lieu thereof "The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.".

Reason for Amendment: This amendment conforms the section 4B1.1 definition of "sustaining a conviction" for an offense with the section 4A1.2 definition of "convicted of an offense."

(D). Issue for Comment: Comment is requested as to whether the Commission should identify (generically or specifically) certain categories of crimes of violence (now counted under section 4B1.2(1)) that would be considered "lesser" crimes of violence and not counted under this section. Such categories of offenses, or offenses might include non-aggravated assault, threatening communications, and similar offenses, or offenses with low statutory maxima. The use of any of these categories as qualifying crimes of violence under section 4B1.2(1) might be excluded, or such use might be limited to providing no more than one of the qualifying crimes of violence, or such use might result in a lesser career offender sentence—perhaps one that was "near the statutory maximum" but not "at the statutory maximum."

(E). Issue for Comment: Comment is requested as to whether the Commission should modify the requirement concerning the prior offenses counted for career offender purposes to provide that where the two prior offenses are not related (e.g., not consolidated for trial or sentence), they will be still counted as only one prior conviction if they could have been properly consolidated for trial as joinable offenses under Fed. R. Crim. P. 8(a).

(F). Issue for Comment: Comment is requested as to whether the Commission should modify the requisite sequence requirement in section 4B1.2(3) to require that the prior and instant offenses occur in a strictly consecutive sequence. The current rule requires only that the instant offense be committed subsequent to the date the judgment of conviction is entered for the two qualifying prior convictions. A strictly consecutive rule would require that the defendant commit the first "prior" offense, and be arrested, convicted, and sentenced for the offense, before the defendant commits the second "prior" offense, and is arrested, convicted, and sentenced for the offense. Finally, the instant offense would have to be committed subsequent to the second prior conviction. Departures might be encouraged in the case of numerous armed robberies, rapes, and other serious violent crimes not otherwise counted under the proposed rule. This rule would ensure that the career offender guideline is a more truly recidivist provision by requiring three separate encounters with the criminal justice system. Similarly, this rule would also reduce the possibility that a defendant who engages in a single short-lived crime spree will be classified as a career offender.

A report of the Commission's study of the Career Offender provisions is available for inspection at the Commission's offices.

Chapter Five, Part A—Sentencing Table

28(A). Issue for Comment: The Commission seeks comment on whether to establish a new Category 0 criminal history for offenders for whom Category I criminal history may be an inaccurate measure of likelihood of recidivism. A review of sentencing data suggests that offenders in Category I may exhibit certain different characteristics that could justify distinguishing their crimial history category. The Commission also seeks comment on how such a division would be drawn. One such proposed division would separate offenders with zero criminal history points and with no known criminal history of any kind into a Category 0, and other offenders with 0 or 1 point who had some known criminal history (including prior arrests or convictions) into a Category I. Finally, the Commission seeks comment on the various methods by which Category 0 offenders might be eligible for reduced sentences. Proposals might include establishment of a new Sentencing Table with a new Category 0, a Chapter Four reduction of a Category 0 offender's offense level, or the exposure of a Category 0 offender to a broader selection of alternatives to imprisonment.

A report of the Commission's study of Criminal History Category 0 is available for inspection at the Commission's offices.

(B). Issue for Comment: Defendants with more than 13 criminal history points are presently assigned to Category VI. This open-ended characteristic of the category has led some to question whether the criminal history categories of the Sentencing Table adequately take into account the criminal background of offenders with high numbers of criminal history points. Accordingly, the Commission solicits comment on the following issues:

(1) Whether a new Category VII should be added to the Sentencing Table, or whether offenders with large numbers of criminal history points should be sentenced solely pursuant to a departure;

(2) If a new Category VII is established, what should be the point spread of Category VI and the new Category VII; and should the new Category VII be capped, or should it be open-ended as the current Category VI is open-ended;

(3) When the defendant with large numbers of criminal history points is subject to a departure, under what circumstances would a departure be justified (e.g., a general sense of inadequacy of criminal history, or the existence of a particular number of points; and how would the extent of the departure be structured (e.g., by some principle of reasonableness, or by 10–15% extrapolation of the guideline range).

The following options provide alternative definitions of the offender population to which Category VII might apply:

[[Option 1—Category VI with a 3-point spread. Category VI would include defendants with 13–15 points, and a new Category VII would include cases with 16 or more points.]]

[[Option 2—Category VI with a 7-point spread. Category VI would include defendants with 13–19 points, and a new Category VII would include cases with 20 or more points.]]

[[Option 3—Category VI and Category VII each with 3-point spreads. Category VI would include defendants with 13–15 points, and a new Category VII would include defendants with 16–18 points.]]

If a new Category VII is promulgated, defendants sentenced pursuant to section 4B1.1 (Career Offender) and section 4B1.4 (Armed Career Criminal) would continue to be sentenced at Category VI, except for those defendants who, on the basis of their criminal history point total, would otherwise be sentenced at a higher criminal history category.

A report of the Commission's study of Criminal History Category VII is available for inspection at the Commission's offices.

Chapter Five, Part A—Sentencing Table

Chapter Five, Part B—Probation

Chapter Five, Part C—Imprisonment

29. Proposed Amendment: [[Option 1: Section 5C1.1(c) is amended by deleting "one half of the minimum term, but in no event less than one month," and inserting in lieu thereof "one month.".

Section 5C1.1(d) is amended by deleting "one half of the minimum term" and inserting in lieu thereof "one month".

The Commentary to section 5C1.1, captioned "Application Notes," is amended in Note 3 by deleting "one half of the minimum term specified in the guideline range from the Sentencing Table, but in no event less than one month," and inserting in lieu thereof "one month", by deleting "of two months" and inserting in lieu thereof "of one month", and by deleting "requiring two months" and inserting in lieu thereof "requiring three months".

The Commentary to section 5C1.1, captioned "Application Notes," is amended in Note 4 in the third paragraph by deleting "one half of the minimum term specified in the guideline range" and inserting in lieu thereof "one month", by deleting "of four months" and inserting in lieu thereof "of one month of", and by deleting "requiring four months" and inserting in lieu thereof "requiring seven months".]]

[[Option 2: Section 5B1.1(a)(2) is amended by deleting "six" and inserting in lieu thereof "ten".

The Commentary to section 5B1.1, captioned "Application Notes," is amended in Note 1(b) by deleting "six" and inserting in lieu thereof "ten".

The Commentary to section 5B1.1, captioned "Application Notes," is amended in Note 2 by deleting "six" and inserting in lieu thereof "ten".

Section 5C1.1(c) is amended by deleting "six" and inserting in lieu thereof "ten".

Section 5C1.1(c) is amended by deleting "one half of the minimum term, but in no event less than one month," and inserting in lieu thereof "one month".

Section 5C1.1(d) is deleted in its entirety.

The Commentary to section 5C1.1, captioned "Application Notes," is amended in Note 3 in the first sentence by deleting "six" and inserting in lieu thereof "ten".

The Commentary to section 5C1.1, captioned "Application Notes," is amended in Note 3 in the fourth paragraph by deleting "one half of the minimum term specified in the guideline range from the Sentencing Table, but in no event less than one month," and inserting in lieu thereof "one month", by deleting "of two months" and inserting in lieu thereof "of one month", and by deleting "requiring two months" and inserting in lieu thereof "requiring three months."

The Commentary to section 5C1.1, captioned "Application Notes," is amended by deleting Note 4 in its entirety and by renumbering Notes 5, 6, 7, and 8 accordingly.]]

[[Option 3: Chapter 5, Part A—Sentencing Table, is amended at Criminal History Category I and Offense Level 7 by deleting "1–7" and inserting in lieu thereof "0–6", and at Criminal History Category I and Offense Level 8 by deleting "2–8" and inserting in lieu thereof "0–6".]]

[[Option 4: Chapter 5, Part A—Sentencing Table, is amended at Criminal History Category I and Offense Level 7 by deleting "1–7" and inserting in lieu thereof "0–6", at Criminal History Category II and Offense Level 6 by deleting "1–7" and inserting in lieu thereof "0–6", and at Criminal History Category III and Offense Level 5 by deleting "1–7" and inserting in lieu thereof "0–6".]]

[[Option 5: Section 5C1.1(d) is amended by deleting "ten" and inserting in lieu thereof "twelve".

The Commentary to section 5C1.1, captioned Application Notes, is amended in Note 4 by deleting "ten" and inserting in lieu thereof "twelve".]]

[[Option 6: Chapter 5, Part A—Sentencing Table, is amended at Criminal History Category I and Offense Level 7 by deleting "1–7" and inserting in lieu thereof "0–6", at Criminal History Category II and Offense Level 6 by deleting "1–7" and inserting in lieu thereof "0–6", and at Criminal History Category III and Offense Level 5 by deleting "1–7" and inserting in lieu thereof "0–6".

Section 5C1.1(c) is amended by deleting "one half of the minimum term, but in no event less than one month," and inserting in lieu thereof "one month.".

Section 5C1.1(d) is amended by deleting "one half of the minimum term" and inserting in lieu thereof "one month".

The Commentary to section 5C1.1, captioned "Application Notes," is amended in Note 3 by deleting "one half of the minimum term specified in the guideline range from the Sentencing Table, but in no event less than one month," and inserting in lieu thereof "one month", by deleting "of two months" and inserting in lieu thereof "of one month", and by deleting "requiring two months" and inserting in lieu thereof "requiring three months".

The Commentary to section 5C1.1, captioned "Application Notes," is amended in Note 4 in the third paragraph by deleting "one half of the minimum term specified in the guideline range" and inserting in lieu thereof "one month", by deleting "of four months" and inserting in lieu thereof "of one month of", and by deleting "requiring four months" and inserting in lieu thereof "requiring seven months".

Section 5C1.1(d) is amended by deleting "ten" and inserting in lieu thereof "twelve".

The Commentary to section 5C1.1, captioned "Application Notes," is amended in Note 4 by deleting "ten" and inserting in lieu thereof "twelve".]]

Reason for Amendment: These amendments, individually and in combination, redefine the "split sentence" and enlarge the number of defendants eligible for alternatives to imprisonment. The Commission seeks comment on whether these options are appropriate or whether they compromise the structure of the guidelines as originally drafted. The Commission further seeks comment on whether these alternatives should apply to all defendants at the offense levels specified or whether an offense-by-offense approach (e.g., excluding white-collar offenders) should be adopted. To assist in comment in respect to this amendment, a working group report on alternatives to imprisonment is available for inspection at the Commission's offices.

Option 1 redefines the "split sentence" to require service of at least one month of incarceration rather than the current requirement of at least one-half of the minimum term, but not less than one month.

Option 2 expands the alternative of probation with confinement conditions to include those defendants who were previously eligible only for a "split sentence". It also incorporates Option 1's redefinition of the "split sentence".

Option 3 amends the guideline ranges in the Sentencing Table for Criminal History Category I at Offense Levels 7 and 8 by substituting a guideline range of 0–6 months for guideline ranges of 2–8 and 4–10 months respectively.

Option 4 amends the guideline ranges in the Sentencing Table for Criminal History Category I at Offense Level 7, Criminal History Category II at Offense Level 6, and Criminal History Category III at Offense Level 5. In each case a range of 0 to 6 months is substituted for the current range of 1 to 7 months.

Option 5 expands the availability of split sentences to guideline ranges with a minimum of twelve months or less. Currently "split sentences" are authorized only if minimum of the guideline range is ten months or less.

Option 6 incorporates Options 1, 4, and 5.

Additional Issue for Comment: The Commission requests comment on whether the menu of options available to the judge at sentencing should be expanded to include additional alternative programs such as intensive supervision, public service, shock incarceration (boot camps), day reporting centers, or other programs. Specifically, the Commission solicits comments on the adaptability of these or other programs to the current structure of the sentencing guidelines. To aid in focusing comment on this issue, a report titled "The Federal Offenders: A Program of Intermediate Punishments" is available for inspection at the Commission's offices.

Illustration of 5C1.1 as Amended by Option 1:

Section 5C1.1. Imposition of a Term of Imprisonment

* * * * *

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

(d) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than six months but not more than ten months, the minimum term may be satisfied by (1) a sentence of imprisonment; or (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e), provided that at least [one-half of the minimum term] *one month* is satisfied by imprisonment.

* * * * *

Commentary

Application Notes:

* * * * *

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

* * * * *

Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least [one-half of the minimum term specified in the guideline range from the Sentencing Table, but in no event less than one month.] *one month* must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 4–10 months, a sentence of imprisonment [of two months] *of one month* followed by a term of supervised release with a condition [requiring two months] *requiring three months* of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

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

It may impose a sentence of imprisonment.

Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least [one-half of the minimum term specified in the guideline range] *one month* must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 8–14 months, a sentence [of four months] *of one month of* imprisonment followed by a term of supervised release with a condition [requiring four months] *requiring seven months* community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.

* * * * *

Illustration of Section 5B1.1 and Section 5C1.1 as amended by Option 2

Section 5B1.1. Imposition of a Term of Probation

(a) Subject to the statutory restrictions in subsection (b) below, sentence of probation is authorized:

* * * * *

(2) if the minimum term of imprisonment specified by the Sentencing Table is at least one but not more than [six] *ten* months, provided that the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in § 5C1.1(c)(2) (Imposition of a Term of Imprisonment).

* * * * *

Commentary

Application Notes:

* * * * *

(b) Where the minimum term of imprisonment specified in the guideline range from the Sentencing Table is at least one but not more than [six] *ten* months.

* * * * *

2. Where the minimum term of imprisonment specified in the guideline range from the Sentencing Table is more than [six] *ten* months, the guidelines do not authorize a sentence of probation. See section 5C1.1 (Imposition of a Term of Imprisonment).

* * * * *

Section 5C1.1. Imposition of a Term of Imprisonment

* * * * *

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

[(d) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than six months but nor more than ten months, the minimum term may be satisfied by (1) a sentence of imprisonment; or (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment.]

* * * * *

Commentary

Application Notes:

* * * * *

3. Subsection 5C1.1(c) provides that where the minimum term of imprisonment specified in the guideline range from the Sentencing Table is at least one but not more than [six] *ten* months, the court has three options:

It may impose a sentence of imprisonment.

* * * * *

Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least [one-half of the minimum term specified in the guideline range from the Sentencing Table, but in no event less than one month,] *one month* must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 4–10 months, a sentence of imprisonment [of two months] *of one month* followed by a term of supervised release with a condition [requiring two months] *requiring three months* of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

* * * * *

[4. Subsection 5C1.1(d) provides that where the minimum term specified in the guideline range from the Sentencing Table is more than six but not more than ten months, the court has two options:

It may impose a sentence of imprisonment.

Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 8–14 months, a sentence of four months imprisonment followed by a term of supervised release with a condition requiring four months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.

The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 8–14 months, both a sentence of four months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under § 5C1.1(d)), and a sentence of five months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under section 5C1.1(d)) would be within the guideline range.]

Illustration of Section 5C1.1 as Amended by Option 5

Section 5C1.1. Imposition of a Term of Imprisonment

* * * * *

(d) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than six months but not more than [ten] *twelve* months, the minimum term may be satisfied by (1) a sentence of imprisonment; or (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in section 5C1.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment.

* * * * *

Commentary

Application Notes:

* * * * *

4. Subsection 5C1.1(d) provides that where the minimum term specified in the guideline range from the Sentencing Table is more than six but not more than [ten] *twelve* months, the court has two options:

* * * * *

Section 5E1.2. Fines for Individual Defendants

30. Proposed Amendment: Section 5E1.2(b) is amended by deleting "the fine imposed shall be within the range" and inserting in lieu thereof "the applicable guideline fine range is that".

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

"Except as specified in (4) below, the maximum of the fine range is the amount shown in column B of the table below.",

and inserting in lieu thereof:

"The maximum of the fine range is the amount from column B or C of the table below. Column C shall be used when the statute setting forth the offense of conviction authorizes (i) a fine of more than $250,000 on a single count of conviction, or (ii) a fine for each day of violation. Column B shall be used in all other cases.".

Section 5E1.2(c)(3) is amended by inserting the following additional column:

"C

Maximum-Specified Offenses

$5,000
$7,500
$10,000
$20,000
$40,000
$90,000
$160,000
$250,000
$360,000
$550,000
$1,000,000
$1,500,000
$2,250,000
$3,000,000
$5,000,000
$8,000,000".

Section 5E1.2(c)(4) is deleted as follows:

"(4) Subsection (c)(2), limiting the maximum fine, does not apply if the defendant is convicted under a statute authorizing (A) a maximum fine greater than $250,000, or (B) a fine for each day of violation. In such cases, the court may impose a fine up to the maximum authorized by the statute.".

The Commentary to section 5E1.2 captioned "Application Notes" is amended in Note 5 by deleting the first sentence as follows:

"Subsection (c)(4) applies to statutes that contain special provisions permitting larger fines; the guidelines do not limit maximum fines in such cases.",

and inserting in lieu thereof:

"Column C of the fine table in subsection (c)(3) applies to statutes that contain special provisions authorizing higher fines.".

Reason for Amendment: This amendment provides a new column (C) to the fine table at section 5E1.2(c)(3). The purpose is to provide an upper limit to the guideline fine range that varies with the seriousness of the offense for defendants convicted under a statute authorizing a maximum fine greater than $250,000, or a fine for each day of violation. The current guidelines provide very limited guidance for such cases. For example, the current guideline fine range for sale of 1 gram of cocaine (a level 12 offense) is $3,000 to $2,000,000.

31. Proposed Amendment: Section 5E1.2(b) is amended by deleting "subsections (f) and (i)" and inserting in lieu thereof "subsection (f)".

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

"(7) the costs to the government of any imprisonment, probation, or supervised release ordered; and".

Section 5E1.2 is amended by deleting subsection (i) as follows:

"(i) Notwithstanding of the provisions of subsection (c) of this section, but subject to the provisions of subsection (f) herein, the court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered.".

The Commentary to section 5E1.2 captioned "Application Notes" is amended in Note 7 by deleting the first sentence as follows:

"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).".

and inserting in lieu thereof:

"Subsection (d)(7) provides for consideration of the costs to the government of any imprisonment, probation, or supervised release order.".

Reason for Amendment: This amendment converts this factor into one of several factors to be considered in setting the fine within the otherwise applicable guideline range. This amendment is designed to simplify operation of the guidelines while, at the same time, allowing the court to consider the costs to the government of any sentence of imprisonment, probation, or supervised release imposed in determining the total amount of the fine.

Section 5F1.4 Order of Notice to Victims

32. Proposed Amendment: Section 5F1.4 is amended by deleting:

"The court may order the defendant to pay the cost of giving notice to victims pursuant to 18 U.S.C. 3555. This cost may be set off against any fine imposed if the court determines that the imposition of both sanctions would be excessive.".

and inserting in lieu thereof:

"(a) In the case of a defendant convicted of an offense involving fraud or other intentionally deceptive practices, the court shall order the defendant to give reasonable notice to victims, as provided in 18 U.S.C. 3555, if the offense appears to have affected unidentified and uncompensated victims who could reasonably be identified in this manner, unless the court finds that the cost of giving notice would be disproportionate to the loss caused by the offense.

(b) If the court determines that the cost of giving such notice, taken together with the fine imposed upon the defendant, would be excessive, it shall set off the cost of giving such notice against any fine imposed to the extent necessary to provide an appropriate total sanction.".

The Commentary to section 5F1.4 captioned "Background" is amended in the first paragraph by deleting "the defendant to 'give" and inserting in lieu thereof "that the defendant give", by deleting "approve' to the victims of the offense.", and inserting in lieu thereof "approve, to the victims of the offense.", and by deleting "generally applicable sentencing factors listed in 18 U.S.C. 3553(a) and the cost involved in giving the notice as it relates to the loss caused by the crime" and inserting in lieu thereof "factors listed in 18 U.S.C. 3553(a), to the extent that they are applicable, and the cost involved in giving the notice as it relates to the loss caused by the offense".

The Commentary to section 5F1.4 captioned "Background" is amended by inserting the following additional sentence at the end of the first paragraph:

"This guideline provides that the court order the defendant to give reasonable notice to victims in the circumstances described.".

Reason for Amendment: This amendment provides more specific guidance as to circumstances under which an order of notice to victims is to be imposed.

Chapter Five, Part H—Specific Offender Characteristics

Chapter Five, Part A—Departures

33(A). Proposed Amendment: The Introductory Commentary to chapter Five, part H is amended by inserting the following additional paragraph as the third paragraph:

"Offender characteristics that are not ordinarily relevant to determining whether a sentence should be outside the guidelines, or where within the guidelines a sentence should fall, may be relevant to a departure from the guidelines if such factors, alone or in combination, are present to an unusual degree and are important to the sentencing purposes in the particular case.".

Reason for Amendment: This amendment provides expressly that departures may be appropriate when offender characteristics that are ordinarily not relevant to a guideline departure are present to an unusual degree, either alone or in combination, and are important to the sentencing purposes in the particular case.

(B). Proposed amendment: Section 5H1.1 is amended in the first paragraph by deleting "when the defendant is elderly and infirm" and inserting in lieu thereof "if combined with another factor (e.g., young and naive or elderly and infirm)".

Reason for Amendment: This amendment provides expressly that a departure may be appropriate where age is combined with other factors.

(C). Issue for Comment: The Commission requests comment on whether it should amend its policy statements to provide expressly whether or not a court may consider a defendant's lack of youthful guidance, history of family violence, or a similar factor as a ground for a departure from the applicable guideline range?

(D). Issue for Comment: The Commission requests comment on whether chapter Five, parts H and K, should be amended to authorize a downward departure where a court finds that the defendant's advanced age (e.g., age 60 or older) has reduced the defendant's risk of recidivism, provided that the defendant (1) serves a substantial portion of his sentence, (2) is not a major drug trafficker, and (3) has no current or past history of violent offenses. Comment is also requested on how such a departure, if authorized, might be structured to provide for consistency in application.

Section 5K1.1. Substantial Assistance to Authorities (Policy Statement)

34. Proposed Amendment: Section 5K1.1 is amended by deleting "Upon motion of the government stating" and inserting in lieu thereof "Upon a finding".

Section 5K1.1 is amended by inserting the following additional subsections:

"(b) Substantial weight should be given to the government's evaluation of the extent and value of the defendant's assistance, particularly when the extent and value of the assistance are difficult to ascertain.

(c) A departure below a statutorily required minimum sentence may be made only upon the motion of the government. 18 U.S.C. 3553(e).".

Commentary to section 5K1.1 captioned "Application Notes" is amended by deleting Notes 1 and 3 in their entirely, and by inserting the following as Note 1:

"1. Because of the nature of this factor, it is expected that the consideration of a downward departure will generally be based upon the motion of the government. As provided in subsection (b), substantial weight should be given to the government's evaluation of the extent and value of the defendant's assistance, particularly when the extent and value of such assistance are difficult to ascertain.".

Reason for Amendment: This amendment eliminates the requirement of a government motion and moves into the policy statement the admonition presently in the Commentary concerning the substantial weight that should be given the government's evaluation of a defendant's assistance.

Chapter Six—Sentencing Procedures and Plea Agreements

35(A). Proposed Amendment: The Commentary to section 6B1.2 is amended by inserting the following additional paragraph at the end:

"The Commission encourages the government [[in plea discussions]] [[prior to the Rule 11 colloquy]] to disclose to the defendant facts and circumstances of the offense and offender characteristics, known to the government, that are relevant to application of the sentencing guildelines."

Reason for Amendment: This amendment adds commentary recommending that the government disclose to the defendant information known to the government relevent to application of the guidelines to encourage plea negotiations that realistically reflect probable outcomes under the sentencing guidelines.

(B). Issue for Comment: The Commission requests comment on whether it should amend its guidelines to provide that conduct that is described in a count dismissed pursuant to a plea agreement and that does not fall within the scope of section 1B1.3 (Relevant Conduct) may nevertheless be considered by the court in determining whether or not to depart from the applicable guideline range? For example, if a defendant pleads guilty to one robbery and another robbery count is dismissed, the conduct underlying the second count is not relevant conduct to the offense of conviction. The Commission solicits comment on whether the conduct underlying such a count should or should not be considered as a grounds for an upward departure.

(C). Issue for Comment: The Commission seeks comment on whether it should provide expressly that conduct of which a defendant is acquitted, but which the court at sentencing nevertheless determines to have been established by a preponderance of the evidence, may be used for the following purposes: (1) Determining the offense level, (2) selecting a sentence within the guideline range, and (3) as a basis for imposing a sentence above the guideline range (upward departure).

Miscellaneous Substantive, Clarifying, Conforming, and Technical Amendments

36(A). Proposed Amendment to section 1B1.1 (Application Instructions): The Commentary to section 1B1.1 captioned "Application Notes" is amended in Note 1 by inserting the following at the end:

"(m) 'Reckless' refers to a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation.

(n) 'Criminally negligent' refers to conduct that involves a gross deviation from the standard of care that a reasonable person would exercise under the circumstances, but which is not reckless.".

The Commentary to section 2A1.4 captioned "Application Notes" is amended in Note 1 by deleting:

" 'Reckless' refers to a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation. The term thus",

and inserting in lieu thereof:

" 'Reckless' and 'criminally negligent' are defined in the Commentary to § 1B1.1 (Application Instructions). This definition of reckless conduct";

and by inserting the following additional sentence at the end:

"Offenses under this guideline involving criminally negligent conduct generally will be encountered as assimilative crimes.".

The Commentary to section 2A1.4 captioned "Application Notes" is amended by deleting Note 2; and in the caption by deleting "Notes" and inserting in lieu thereof "Note".

The Commentary to section 2A5.2 is amended by inserting the following immediately before "Background":

"Application Note:

1. 'Reckless' is defined in the Commentary to § 1B1.1 (Application Instructions).".

The Commentary to section 2F1.1 captioned "Application Notes" is amended in Note 2 by deleting "is" and inserting in lieu thereof "and 'reckless' (subsection (b)(4)) are".

The Commentary to section 2N2.1 captioned "Application Notes" is amended in Note 1 by inserting the following additional sentence at the end:

" 'Reckless' and 'criminally negligent' are defined in the Commentary to § 1B1.1 (Application Instructions).".

The Commentary to section 3C1.2 captioned "Application Notes" is amended in Note 2 by deleting "section 2A1.4 (Involuntary Manslaughter)" and inserting in lieu thereof "section 1B1.1 (Application Instructions)".

Reason for Amendment: The terms "reckless" and "criminally negligent" are used in a number of guidelines. For consistency and clarity, this amendment transfers the definitions of these terms to section 1B1.1 (Application Instructions), the guideline section containing definitions of general applicability. References to these definitions are added and conformed accordingly.

(B). Proposed Amendment to § 1B1.1 (Application Instructions) and various chapter Two offense guidelines: The Commentary to section 1B1.1 captioned "Application Notes" is amended in Note 1 by inserting the following additional subdivision at the end:

"(m) 'Defendant' refers to the defendant individually, and not to other participants. Therefore, when used in connection with roles, status, knowledge, or motive, it restricts consideration to the role, status, knowledge or motive of the defendant. Examples include section 2C1.2(b)(2) ('If the defendant was a parent, relative, or legal guardian'), section 2H1.1(b)(1) ('If the defendant was a public official'), section 2L1.1 ('If the defendant committed the offense other than for profit'), section 2S1.1(b)(1) ('If the defendant knew or believed'), section 2T1.4 ('If the defendant committed the offense as part of a pattern or scheme from which he derived a substantial portion of his income'), section 3A1.1 ('If the defendant knew or should have known') section 3B1.1 and section 3B1.2 ('Based on the defendant's role'), and section 3B1.3 ('If the defendant violated a position of public or private trust or used a special skill').

When used in connection with conduct (acts and omissions), the use of the term 'defendant' restricts consideration to the acts and omissions that the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused. Examples include section 3C1.1 ('If the defendant willfully obstructed or impeded') and section 3C1.2 ('If the defendant recklessly created a substantial risk').".

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

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

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

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

Section 2S1.3(a)(1) is amended by deleting "defendant" and inserting in lieu thereof "offense involved"; by deleting "structured" and inserting in lieu thereof "structuring"; and by deleting "filed, or caused" and inserting in lieu thereof "filing, or causing".

Reason for Amendment: This amendment clarifies that the term 'defendant' has different meanings in different contexts. When used in respect to status, position, knowledge, or motive, it refers to the defendant only (e.g., 'If the defendant knew or should have known,' 'If the defendant was a parent, guardian'). When used in respect to conduct, it refers to the personal conduct of the defendant (i.e., acts or omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant). In certain guidelines (sections 2A5.2(a) (1) and (2), 2A6.1(b) (1) and (2), and 2S1.3(a)(1)), the Commission has used the term 'defendant' although the broader term 'offense involved' seems more consistent with the remainder of the guidelines. This amendment, in these instances, substitutes the term 'offense involved."

(C). Proposed Amendment to section 1B1.2 (Applicable Guidelines): Section 1B1.2(a) is amended by deleting "conviction by a plea of guilty or nolo contendere" and inserting in lieu thereof "a plea agreement (written or made orally on the record)".

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

Reason for Amendment: This amendment revises the guideline at section 1B1.2 to clarify the meaning of "stipulation" as used in this guideline, consistent with the amendment of the Commentary to this guideline effective November 1, 1991 (Appendix C, amendment 434).

(D). Proposed Amendment to section 1B1.10 (Retroactivity of Amended Guideline Range (Policy Statement)): Section 1B1.10(d) is amended by inserting "347," immediately after "341,".

Reason for Amendment: This amendment provides for retroactive application of amendment 347, which was effective November 1, 1990. Among the factors the Commission considers in deciding whether an amendment should apply retroactively are: (1) the amendment's purpose; (2) the magnitude of the change in guideline range the amendment makes; and (3) the difficulty in applying the amendment retroactively. In the case of amendment 347, these factors suggest the appropriateness of retroactive application. First, the amendment's purpose was to clarify section 3C1.1's application. It has been suggested that the misapplication of section 3C1.1 before the amendment might have been more widespread than the Commission first believed. Second, the interaction between sections 3C1.1 and 3E1.1 means that pre-amendment decisions to apply section 3C1.1 might have had a four-level rather than a two-level effect. Third, the presentence investigation report in the vast majority of cases will contain all information necessary to determine whether section 3C1.1 was appropriately applied in the first instance. Thus, retroactive application of section 3C1.1's amended commentary should be possible with little additional fact finding or hearings.

(E). Proposed Amendment to chapter One, part B (General Application Principles): Chapter One, part B, is amended by inserting an additional guideline at the end, titled "Section 1B1.11. Definitions", containing: (1) The text of Application Note 1 of section 1B1.1 as subsection (a); (2) the text of the first paragraph of Application Note 2 of section 1B1.1 as subsection (b); and (3) the following commentary:

"Commentary

Application Note:

1. The term 'e.g.' (for example) is used to set forth examples. It is not a term of limitation.

The term 'i.e.' (that is) is used to define an item or concept further and, therefore, is a term of limitation.

The term 'includes' is used to set forth items contained in a particular category. It does not, however, necessarily provide an exhaustive listing of the items in that category.".

The Commentary to section 1B1.1 captioned "Application Notes" is amended by deleting Notes 1 and 2; and by renumbering Notes 3, 4, and 5 as 1, 2, and 3, respectively.

The Commentary to section 1B1.1 captioned "Application Notes" is amended in Notes 1 (formerly Note 3) by deleting:

"does not necessarily include every statute covered by that guideline. In addition, some statutes may be",

and inserting in lieu thereof:

"provides examples of the statutes covered by that guideline. Some guidelines apply to more than one statute, and some statutes are";

and by inserting the following additional paragraph at the end:

"In the case of an offense that is not listed in the Guideline Manual (either in the Statutory Provisions or Statutory Index), the list of offenses set forth in the Statutory Provisions to the various offense guidelines may be helpful in making the determination required under section 2x5.1 (Other Offenses) as to whether there is a sufficiently analogous guideline.".

Reason for Amendment: This amendment moves definitions of general applicability, currently contained in the Commentary to section 1B1.1, to a separate guideline section for ease of reference, and elevates these definitions from commentary to guidelines to reflect their importance.

(F). Proposed Amendment to Chapter Two, Offense Conduct: Section 2A2.1(b)(1) is amended by inserting "or" immediately before "(B)", and by deleting:

";or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels";

Section 2A2.2(b)(3) is amended by deleting:

"(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels; or

(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels".

Section 2A3.1(b)(4) is amended by inserting "or" immediately before "(B)", and by deleting"; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels".

Section 2A4.1(b)(2) is amended by inserting "or" immediately before "(B)", and by deleting "; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels".

Section 2B3.1(b)(3) is amended by deleting:

"(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels; or

(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels".

Section 2B3.2(b)(4) is amended by deleting:

"(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels; or

(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels; or

Section 2E2.1(b)(2) is amended by deleting:

"(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels; or

(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels".

Reason for Amendment: This amendment deletes intermediate offense level adjustments that are not subject to adequate definition and that are unnecessary to the operation of the guidelines since a court may accomplish the result achieved through selecting an intermediate offense level by instead selecting the higher or lower enhancement and adjusting the sentence within the applicable range.

(G). Proposed Amendment to Chapter Two, Offense Conduct: Section 2A2.4(c)(1) is amended by deleting "defendant is convicted under 18 U.S.C. 111 and the" immediately before "conduct".

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

Section 2K1.5(b)(1) is amended by deleting "defendant is convicted under 49 U.S.C. 1472(1)(2) (i.e., the defendant acted" and inserting in lieu thereof "offense was committed", and by deleting "life)" and inserting in lieu thereof "life".

Reason for Amendment: This amendment, consistent with the overall structure of the guidelines, provides for the application of these adjustments on the basis of the underlying conduct rather than upon a requirement of a conviction under a specific statute.

(H). Proposed Amendment to Section 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft): The Commentary to § 2B1.1 captioned "Application Notes" is amended in the first paragraph of Note 2 by inserting the following additional sentences immediately after the second sentence:

"Market value is to be determined in relation to the victim of the offense. For example, in the case of merchandise taken from a retailer, the market value is the retail market value; in the case of merchandise taken from a wholesaler, the market value is the wholesale market value.".

Reason for Amendment: This amendment adds language to the Commentary of Section 2B1.1 to provide expressly that market value is to be determined in relation to the particular victim, an approach that is consistent with the other portions of this definition. Although the determination of loss is not subject to precise definition in all circumstances, a victim-oriented approach should generally make the determination more straightforward. For example, in the case of 20 television sets stolen from a wholesaler, it should generally be easier to determine the wholesale market value than the eventual retail value (which may differ widely among the various stores serviced by the wholesaler).

(I). Proposed Amendment to Section 2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States): The Commentary to Section 2B5.1 captioned "Application Notes"is amended in Note 3 by deleting "merely photocopy notes or otherwise", and by inserting "(e.g., a mere photocopy of a note)" immediately following "so obviously counterfeit".

The Commentary to Section 2B5.1 captioned "Application Notes" is amended by inserting the following additional Note:

"4. For the purpose of subsection (b)(1), do not count items that clearly were not intended for circulation (e.g., discarded, defective items).".

Reason for Amendment: This amendment clarifies the operation of this guideline.

(J). Proposed Amendment to Section 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking): The Commentary to Section 2D1.1 captioned "Application Notes" is amended in Note 10 in the subdivision of the "Drug Equivalency Tables" in the table captioned "Cocaine and Other Schedule I and II Stimulants" by inserting at the end:

"N-N-Dimethylamphetamine = 40 gm of marihuana",

and in the table captioned "LSD, PCP, and Other Schedule I and II Hallucinogens" by inserting at the end:

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

Reason for Amendment: This amendment inserts equivalencies for two additional controlled substances to make the Drug Equivalency Table more comprehensive.

(K). Proposed Amendment to section 2D1.4 (Attempts and Conspiracies) and various Chapter Two offense guidelines: Sections 2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2 2D3.1, 2D3.2, 2D3.3, 2D3.4, and 2D3.5 are amended in their titles by inserting at the end thereof in each instance "; Attempt or Conspiracy".

Section 2D1.4 is deleted in its entirety.

The Commentary to section 2D1.1 captioned "Application Notes" is amended in Note 12 by deleting the second, third, and fourth sentences and inserting in lieu thereof:

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

The Commentary to section 2D1.1 captioned "Application Notes" is amended in Note 12 by inserting the following additional paragraphs at the end:

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

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

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

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

"Section 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy); section 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy); section 2D1.5 (Continuing Criminal Enterprise; Attempt or Conspiracy); section 2D1.6 (Use of Communication Facility in Committing Drug Offense; Attempt or Conspiracy); section 2D1.7 (Unlawful Sale or Transportation of Drug Paraphernalia; Attempt or Conspiracy); section 2D1.8 (Renting or Managing a Drug Establishment; Attempt or Conspiracy); section 2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy); section 2D1.10 (Endangering Human Life While Illegally Manufacturing a Controlled Substance; Attempt or Conspiracy); section 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy); section 2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment; Attempt or Conspiracy); section 2D1.13 (Structuring Chemical Transactions or Creating a Chemical Mixture to Evade Reporting or Recordkeeping Requirements; Presenting False or Fraudulent Identification to Obtain a Listed Chemical; Attempt or Conspiracy); section 2D2.1 (Unlawful Possession; Attempt or Conspiracy); section 2D2.2 (Acquiring a Controlled Substance by Forgery, Fraud, Deception, or Subterfuge; Attempt or Conspiracy); section 2D3.1 (Illegal Use of Registration Number to Manufacture, Distribute, Acquire, or Dispense a Controlled Substance; Attempt or Conspiracy); section 2D3.2 (Manufacture of Controlled Substance in Excess of or Unauthorized by Registration Quota; Attempt or Conspiracy); section 2D3.3 (Illegal Use of Registration Number to Distribute or Dispense a Controlled Substance to Another Registrant or Authorized Person; Attempt or Conspiracy); section 2D3.4 (Illegal Transfer or Transshipment of a Controlled Substance; Attempt or Conspiracy); and section 2D3.5 (Violation of Recordkeeping or Reporting Requirements for Listed Chemicals and Certain Machines; Attempt or Conspiracy)".

Appendix A (Statutory Index) is amended in the line beginning 21 U.S.C. 846 by deleting "2D1.4" and inserting in lieu thereof: "2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2, 2D3.1, 2D3.2, 2D3.3, 2D3.4, and 2D3.5"; and in the line beginning 21 U.S.C. § 963 by deleting "2D1.4" and inserting in lieu thereof: "2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2, 2D3.1, 2D3.2, 2D3.3, 2D3.4, and 2D3.5".

Reason for Amendment: This amendment clarifies and simplifies the guideline provisions dealing with attempts and conspiracies in drug cases and conforms the structure of these provisions to that of other offense guidelines that specifically address attempts and conspiracies (i.e., attempts and conspiracies described in section 2X1.1(c)).

(L). Proposed Amendment to section 2E1.4 (Use of Interstate Commerce Facilities in the Commission of Murder-For-Hire): Section 2E1.4(a)(2) is amended by inserting at the end "from sections 2A1.2 (First Degree Murder), 2A1.5 (Conspiracy or Solicitation to Commit Murder), or 2A2.1 (Assault With Intent to Commit Murder), as applicable".

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

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

and inserting in lieu thereof:

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

Reason for Amendment: This amendment makes the wording of subsection (a)(2) and the Background Commentary more precise. The reference in the current Background Commentary to a maximum term of five years is obsolete; this sentence is deleted as unnecessary.

(M). Proposed Amendment to section 2J1.6 (Failure to Appear by Defendant): Section 2J1.6(b)(1) is amended by deleting "away from the facility" and inserting in lieu thereof "in failure to appear status".

The Commentary to section 2J1.6 captioned "Application Notes" is amended by inserting the following additional notes:

"5. 'Voluntarily surrendering' includes voluntarily reporting to the court or to the correctional facility (in the case of a failure to report for service of sentence), or turning one's self in to a law enforcement authority as a person in failure to appear status. It does not, however, include notifying authorities of one's failure to appear status after being arrested on another charge.

6. 'While in failure to appear status' means at any time between the time the defendant was scheduled to report and the time the defendant was returned to federal custody."

Reason for Amendment: The amendment clarifies the operation of this guideline.

(N). Proposed Amendment to chapter Two, part L, subpart 2: The title of section 2L2.1 is amended by inserting at the end "; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law".

The Commentary to section 2L2.1 captioned "Statutory Provisions" is amended by inserting "8 U.S.C. 1325(b);" immediately before "18 U.S.C.", and by inserting "1015," immediately after "Sections".

The title of section 2L2.2 is amended by inserting at the end: "; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law".

The Commentary to section 2L2.2 captioned "Statutory Provisions" is amended by deleting "18 U.S.C." and inserting in lieu thereof "8 U.S.C. 1325(b); 18 U.S.C. 911, 1015,".

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

"8 U.S.C. 1325(b) * * * 2L2.1, 2L2.2".

Reason for Amendment: This amendment expands the titles of sections 2L2.1 and 2L2.2 to include additional statutes appropriately covered by these provisions. Conforming revisions are made in the Statutory Provisions and Appendix A (Statutory Index).

(O). Proposed Amendment to section 2P1.1 (Escape, Instigating or Assisting Escape): Section 2P1.1(b)(3) is amended by deleting "the non-secure custody of a community corrections center, community treatment center, 'halfway house,' or similar facility" and inserting in lieu thereof "non-secure custody" and by inserting "(A) the offense involved a failure to return from a furlough from secure custody; or (B)" immediately following "apply if".

The Commentary to section 2P1.1 captioned "Application Notes" is amended in Note 2 by deleting "(not in connection with an arrest or other charges)" and inserting in lieu thereof "; it does not include notifying authorities of one's status as an escapee after being arrested on another charge".

Reason for Amendment: This amendment clarifies (1) that a failure to return from a furlough from secure custody is excluded from subsection (b)(3); and (2) that an institution with no security perimeter (a minimum security camp) is included under subsection (b)(3) (U.S. v. Agudelo, 768 F.Supp. 339 (N.D. Fla. 1991)). In addition, it makes an editorial improvement to the commentary.

(P). Proposed Amendment to chapter two, part T, subpart 3, Customs Taxes: The Introductory Commentary to Chapter two, part T, subpart 3, is amended by deleting ". These guidelines are primarily aimed at" and inserting in lieu thereof "and is designed to address violations involving"; by deleting "They are" and inserting in lieu thereof "It is"; by deleting "legislation generally applies" and inserting in lieu thereof "criminal statutes apply"; by inserting "if applicable," immediately following "guideline,"; and by deleting "these guidelines" and inserting in lieu thereof "the guideline in this part".

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

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

"(c) Cross Reference

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

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

Section 2T3.2, including accompanying commentary, is deleted in its entirety.

Appendix A (Statutory Index) is amended in the lines beginning "18 U.S.C. 545", "18 U.S.C. 547", "18 U.S.C. 549", and "19 U.S.C. 1464" by deleting in each instance ", 2T3.2".

Reason for Amendment: This amendment inserts a cross reference in section 2T3.1 to provide the legal authority to implement the policy set forth in the introductory commentary; consolidates sections 2T3.1 and 2T3.2 which contain identical characteristics; and makes conforming changes in commentary.

(Q). Proposed Amendment to section 2X1.1 (Attempt, Solicitation, or Conspiracy): Section 2X1.1(b)(3) is amended by deleting "(A)"; and by deleting:

"(B) If the statute treats solicitation of the offense identically with the object offense, do not apply subdivision (A) above; i.e., the offense level is the same as that for the object offense.".

The Commentary to Section 2X1.1 captioned "Application Notes" is amended in the last paragraph of Note 1 by inserting "Section 2B4.1 Bribery in Procurement of Bank Loan and Other Commercial Bribery; Solicitation of Bribe);" immediately before "Section 2C1.1"; by inserting "Section 2C1.5 (Payments to Obtain Public Office; Solicitation of Payment); Section 2C1.6 (Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper; Solicitation of Loan or Gratuity);" immediately before "Section 2E5.1"; and by inserting "; Section 2E5.6 (Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations; Solicitation of Prohibited Payment or Loan); Section 2J1.8 (Bribery of Witness; Solicitation of Bribe); Section 2J1.9 (Payment to Witness; Solicitation of Payment)" immediately before the period at the end of the sentence.

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

Conforming Amendments: Section 2B4.1 is amended in the title by inserting at the end "; Solicitation of Bribe".

Section 2C1.5 is amended in the title by inserting at the end "; Solicitation of Payment".

Section 2C1.6 is amended in the title by inserting at the end "; Solicitation of Loan or Gratuity".

Section 2E5.6 is amended in the title by inserting at the end "; Solicitation of Prohibited Payment or Loan".

Section 2J1.8 is amended in the title by inserting at the end "; Solicitation of Bribe".

Section 2J1.9 is amended in the title by inserting at the end "; Solicitation of Payment".

Reason for Amendment: This amendment simplifies the structure of this guideline by deleting subsection (b)(3)(B) and addressing the offenses currently covered by this subsection by including a specific reference to solicitation in the titles of the appropriate offense guideline, as is done in the case of conspiracy and attempt.

(R). Proposed Amendment to Sections 2X3.1 (Accessory After the Fact) and 2X4.1 (Misprision of Felony): Section 2X3.1 is amended by deleting "4" and inserting in lieu therof "level 1", and by inserting "level" immediately before "30".

Section 2X4.1 is amended by deleting "4" and inserting in lieu thereof "level 1", and by inserting "level" immediately before "19".

Reason for Amendment: This amendment corrects an anomaly. For example, under the current guidelines, in the case of a level 6 or 7 theft or fraud (or any other offense with an offense level of 6 or 7), a conviction for the substantive offense with a 4-level reduction for minimal role will result in an offense level of 2 or 3, respectively. A conviction for accessory after the fact or misprision (lesser offenses) will result in a higher final offense (level 4) because of the alternative minimum offense level. This anomaly is removed by the revision of the minimum offense level under Sections 2X3.1 and 2X4.1.

(S). Proposed Amendment to Section 3A1.2 (Official Victim): Section 3A1.2(a) is amended by deleting "a law enforcement or corrections officer; a former law enforcement or corrections officer; an officer or employee included in 18 U.S.C. 1114; a former officer or employee included in 18 U.S.C. 1114;" and inserting in lieu thereof "a government officer or employee; a former government officer or employee;".

The Commentary to section 3A1.2 captioned "Application Notes" is amended in Note 2 by deleting "are not expressly covered by this section. The court should make an upward departure of at least three levels in those unusual cases in which such persons are victims." and inserting in lieu thereof "although covered by this section, do not represent the heartland of the conduct covered. An upward departure to reflect the potential disruption of the governmental function in such cases typically would be warranted.".

The Commentary to section 3A1.2 captioned "Application Notes" is amended in Note 4 by deleting "law enforcement or corrections officer or other person covered under 18 U.S.C. 1114" and inserting in lieu thereof "government officer or employee"; and by inserting at the end "This adjustment also would not apply in the case of a robbery of a postal employee because the offense guideline for robbery contains an enhancement (section 2B3.1(a)) that takes such conduct into account.".

Reason for Amendment: Section 3A1.2 (entitled "Official Victim") currently covers some but not all government officers or employees victimized on account of their official position. Primarily, it covers law enforcement and correctional officers and employees, prosecutors and judges; but because of the reference to 18 U.S.C. 1114, it also covers postal warkers and members of the Coast Guard. To add to the complexity, an application note instructs that in the case of certain high level officials, an upward departure of at least 3 levels should be made. Unstated is whether a 3-level upward departure should be made in the case of a governmental officer or employee who is not covered by this section but who nonetheless is targeted as a victim because of his official status. This amendment adopts a more generic approach. Under this amendment, this section would apply to all government officers or employees targeted on account of their official position or in retaliation for their official conduct.

(T). Proposed Amendment to section 3B1.3 (Abuse of Position of Trust or Use of Special Skill): Section 3B1.3 is amended in the title by inserting "Special" immediately before "Trust".

Section 3B1.3 is amended by inserting "special" immediately before "trust" wherever the latter term appears.

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

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

and inserting in lieu thereof:

"1. 'Special trust' refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Such positions ordinarily are subject to significantly less monitoring than the typical employee. For this enhancement to apply, the position of trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult). This adjustment, for example, would apply in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a fraudulent loan scheme by a bank president, the theft of merchandise by a police officer who finds the door unlocked during a routine patrol, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment would not apply in the case of an embezzlement or theft by an ordinary bank teller or postal employee because such positions are not characterized by the factors described above."

Reason for Amendment: Numerous questions have arisen in the application of this section in respect to the intended scope of this adjustment. This amendment reformulates the definition of an abuse of position of trust to provide an operationally more workable definition that appropriately distinguishes cases warranting this enhancement.

(U). Proposed Amendment to chapter Five, part E (Restitution, Fines, Assessments, Forfeitures): Chapter Five, part E, is amended by inserting the following additional policy statement:

"Section 5E1.5. Costs of Prosecution (Policy Statement)

Costs of prosecution shall be imposed on a defendant as required by statute.

Commentary

Background: Various statutes require the court to impose the costs of prosecution: 7 U.S.C. 13 (larceny or embezzlement in connection with commodity exchanges); 21 U.S.C. 844 (simple possession of controlled substances) (unless the court finds that the defendant lacks the ability to pay); 26 U.S.C. 7201 (attempt to defeat or evade income tax); 26 U.S.C. 7202 (willful failure to collect or pay tax); 26 U.S.C. 7203 (willful failure to file income tax return, supply information or pay tax); 26 U.S.C. 7206 (fraud and false statements); 26 U.S.C. 7210 (failure to obey summons); 26 U.S.C. 7213 (unauthorized disclosure of information); 26 U.S.C. 7215 (offenses with respect to collected taxes); 26 U.S.C. 7216 (disclosure or use of information by preparers of returns); 26 U.S.C. 7232 (failure to register or false statement by gasoline manufacturer or producer); 42 U.S.C. 1302c–9 (improper FOIA disclosure); 43 U.S.C. 942–6 (rights of way for Alaskan wagon roads).".

Reason for Amendment: A number of statutes mandate imposition of the costs of prosecution. The proposed policy statement would make the Guidelines Manual more comprehensive by including notice to users of these statutory sentencing requirements.

(V). Proposed amendment to chapter Five, part K (Departures): Chapter Five, part K, is amended by inserting the following additional policy statement:

"Section 5K2.17. Extraordinary Physical Impairment (Policy Statement)

If a defendant suffers from an extraordinary physical impairment, a sentence below the applicable guidline range may be warranted; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.".

Reason for Amendment: For purposes of clarity and comprehensiveness, this amendment takes an existing ground for departure discussed in section 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse) and creates a new section in chapter Five, part K (Departures) that specifically deals with this ground for departure.

(W). Proposed Amendment to section 6B1.2 (Standards for Acceptance of Plea Agreements): Section 6B1.2(a) is amended by deleting "statutory purposes of sentencing" and inserting in lieu thereof "sentencing guidelines".

The Commentary to section 6B1.2 is amended by deleting "This section makes clear that a court may accept a plea agreement provided that the judge complies with the obligations imposed by Rule 11(e), Fed. R. Crim. P. A judge" and inserting in lieu thereof "The court", and by inserting the following additional sentences immediately before "This requirement";

"A defendant who enters a plea of guilty in a timely manner will enhance the likelihood of his receiving a reduction in offense level by 2 levels under § 3E1.1 (Acceptance of Responsibility). Further reduction in offense level (or sentence) due to a plea agreement will tend to undermine the sentencing guidelines.".

The Commentary to section 6B1.2 is amended in the first sentence of the second paragraph by deleting "will" and inserting in lieu thereof "may".

Reason for Amendment: This amendment expresses the Commission's position on the appropriate interaction between section 3E1.1 and section 6B1.2, and makes several editorial improvements.

(X). Proposed Amendment to section 6B1.2 (Standards for Acceptance of Plea Agreements): Section 6B1.2(a) is amended by deleting "statutory purposes of sentencing" and inserting in lieu thereof "sentencing guidelines".

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

"Provided, that the acceptance of a plea agreement that includes the dismissal of a charge or a plea agreement not to pursue a potential charge shall not exclude the conduct underlying such charge from consideration under section 1B1.3 (Relevant Conduct) in respect to the offense of which the defendant is convicted.".

The Commentary to section 6B1.2 is amended by inserting the following additional paragraph as the second paragraph:

"Compliance with subsection (a) of this policy statement will reduce the likelihood that a plea agreement will undermine the sentencing guidelines, intentionally or unintentionally. It is to be noted, however, that the acceptance of a plea agreement that includes the dismissal of a charge, or a plea agreement not to pursue a potential charge will, in no event, exclude the conduct underlying such charge from consideration under the provisions of section 1B1.3 (Relevant Conduct) that are applicable to the offense of which the defendant is convicted.".

The Commentary to section 6B1.2 is amended in the third (formerly second) paragraph by deleting "will" and inserting in lieu thereof "should"; by deleting "the contemplated sentence is" and inserting in lieu thereof "such sentence is an appropriate sentence"; and by deleting "recommended sentence or agreement" and inserting in lieu thereof "sentence".

Reason for Amendment: This amendment clarifies that a plea agreement to dismiss a charge or not to pursue a potential charge does not insulate the conduct underlying such charge from the operation of section 1B1.3 (Relevant Conduct).

(Y). Proposed Amendment to section 5D1.1 (Imposition of a Term of Supervised Release): Section 5D1.1(a) is amended by inserting "(other than a sentence of life imprisonment)" immediately before "is imposed".

The Commentary to section 5D1.1 captioned "Application Notes" is amended in the first sentence of Note 1 by inserting "(other than a sentence of life imprisonment)" immediately following "year".

Reason for Amendment: Currently, this guideline requires imposition of a term of supervised release whenever a term of imprisonment exceeding one year is imposed. This amendment provides an exception to this requirement in the case of a sentence of life imprisonment.

[FR Doc. 91–31238 Filed 12–31–91; 8:45 am]
BILLING CODE 2210–40–M

federal register

Thursday
January 2, 1992

Part IV

Office of Personnel Management

5 CFR Parts 831, et al.

Court Orders Affecting Retirement Benefits; Proposed Rule

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 831, 838, 841, 842, and 843

RIN 3206-AE14

Court Orders Affecting Retirement Benefits

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing proposed regulations to improve processing of court orders affecting retirement benefits under the Civil Service Retirement System (CSRS) and the Federal Employees Retirement System (FERS). The proposed regulations would establish rules of interpretation and procedures for processing court orders that divide retirement benefits or award survivor annuities, provide model paragraphs for use in preparing court orders, and create a single uniform set of procedures for processing court orders under FERS and CSRS. The regulations are needed to streamline OPM's procedures to allow disputes over the interpretation of State court orders to be brought to closure more easily and quickly, minimizing hardship to the former spouse.

DATES: Comments must be received on or before March 3, 1992.

ADDRESSES: Send comments to Andrea Minniear Farran, Assistant Director for Retirement and Insurance Policy, Retirement and Insurance Group, Office of Personnel Management, P.O. Box 57, Washington, DC 20044; or deliver to OPM, room 4351, 1900 E Street NW., Washington, DC.

Comments on the information collection requirements contained in this regulation also should be filed with the Office of Management and Budget. (See below under Paperwork Reduction Act.)

FOR FURTHER INFORMATION CONTACT: Harold L. Siegelman, (202) 606-0299.

SUPPLEMENTARY INFORMATION: These regulations would replace the existing separate sets of interim regulations under the Civil Service Retirement System (CSRS) and the Federal Employees Retirement System (FERS).

On May 13, 1985, we published (at 50 FR 20064) interim regulations which, in part, revised our procedures for processing court orders affecting benefits under CSRS. Those interim rules were necessary to implement the Civil Service Retirement Spouse Equity Act of 1984 (CSRSEA) (Pub. L. 98-615).

On September 8, 1986, we published (at 51 FR 31927) interim regulations amending the interim regulations published May 13, 1985. The September 8th interim regulations implemented several changes to CSRSEA made by the Federal Employees Benefits Improvement Act of 1986 (Pub. L. 99-251). The September 8th interim regulations also included changes based on comments received in response to the interim regulations published May 13, 1985.

On February 3, 1987, we published (at 52 FR 3209) interim regulations amending the interim regulations for processing court orders under CSRS to implement the Federal Employees' Retirement System Technical Corrections Act of 1986 (Pub. L. 99-556).

On March 12, 1990, we published (at 55 FR 9093) amendments to the interim regulations implementing CSRSEA. The amendments included revised guidelines explaining how we interpret certain language used in court orders affecting CSRS benefits.

The interim regulations published May 13, 1985, as amended, remain in effect for court orders affecting CSRS benefits.

On December 30, 1986, we published (at 51 FR 47021) proposed regulations for revising our procedures for processing court orders under CSRS to expedite payments to the former spouses.

On December 31, 1986, we published (at 51 FR 47190) interim regulations for processing court orders affecting FERS basic benefits. Those interim regulations implemented for FERS the procedures that we had proposed the day before for CSRS. The interim regulations published December 31, 1986, remain in effect for court orders affecting FERS benefits.

1. Reasons to Change Processing Procedures

The proposed regulations will make it easier for the parties in a divorce to ensure that OPM will divide CSRS or FERS benefits, or provide a survivor benefit, in accordance with their wishes. In enacting the provisions allowing OPM to honor the decisions of State courts respecting a former spouse's interest in an employee's retirement benefits, the intent of Congress was that the Federal Government not insert itself into marital property disputes. The proposed regulations assure that the dispute-resolution role rests in the hands of the State courts as was originally intended by the Congress.

Under the current regulations for court orders, a process has evolved that, rather than truly protecting the rights of all parties, often simply resulted in delays in payments to former spouses and hardships to them. Under existing regulations, when we receive a court order that awards a benefit to a former spouse of a CSRS or FERS retiree, the retiree can protest OPM's decision through frequently lengthy administrative procedures. This may create financial hardship because, under CSRS procedures, no money is paid while the administrative proceedings are pending. Since the aftermath of many divorces is often an emotionally charged situation, some retirees deliberately use the process to delay payments for as long as possible.

The proposed regulations synthesize our experience in processing court orders since 1978, and contain two important changes that we believe will improve our service to people affected by these orders. First, the regulations will make it easier for people to submit orders that will be acceptable to OPM. The regulations are very detailed as to what constitutes a court order that is acceptable for processing, and as to the exact meaning of court order terminology. The definitions in these regulations are designed to give the most commonly-used meaning to words most often encountered in court orders. This will allow OPM to accept as many court orders as possible rather than rejecting orders, which would require the parties to return to State court. To further facilitate preparation of acceptable orders, appendices to the regulations contain model paragraphs that attorneys can use to ensure that, in drafting orders, the language they select will both produce the intended result and meet OPM's processing requirements.

Second, because the regulations prescribe in detail what is and is not acceptable for processing, OPM can now assume the appropriate role for itself, which is a ministerial role, rather than a mediator in marital property disputes. This role belongs to the State courts. If a court order is so flawed that it is not sufficiently clear to satisfy our requirements, the appropriate action is for the parties to return to the State court to correct the problem. Likewise, if the retiree contends that the court intended its order to have a different meaning than the clear meaning it has under these regulations, the proper forum for the retiree's complaint is the State court. OPM will require the employees and former spouses to settle the disputes in the State courts where they belong, not in Federal proceedings. The courts issuing the orders are in the best position to determine the meaning of their own orders. This will result in faster resolution of disputes and eliminate the delay in payments to former spouses with court orders that comply with the requirements of the regulations.

2. Changes Having Broad Application

The proposed regulations would consolidate the CSRS and FERS regulations concerning court orders affecting retirement benefits into a single set of regulations applicable to both retirement systems.

We have made several changes to make the regulations easier to use by both the legal community in drafting and submitting court orders and by OPM staff in applying the regulations to court orders. The proposed regulations distinguish clearly among regulations that affect employee annuities, refunds of employee contributions, and former spouse survivor annuities. Under the current regulation, some sections contain regulations pertaining to more than one of these different benefits. This resulted in a lack of clarity about which regulatory provisions apply to which types of benefit. The proposed regulations also divide rules into separate subparts covering procedures, requirements, and terminology. These changes make it easier for the legal community to focus on the provisions that effect benefits involved in the case with which they are concerned. A side effect of clearly dividing the regulations by the type of benefits the order seeks to affect is repetition of provisions that apply to more than one type of benefit. The repetition has added greatly to the length of these regulations; however, separate provisions about the effect of court orders on different types of benefits will simplify this very difficult subject and enhance the usability of the regulations.

These proposed regulations change several terms that have caused confusion or misunderstandings under the current regulations. We hope that the new terms will make the regulations easier to understand.

The term, "employee retirement benefits," that is used in the current regulations has been replaced by its two component parts, "Employee annuities" and "Refunds of employee contributions." The failure to distinguish between these two distinct types of benefits in the current regulations makes the regulations more complex and difficult to understand. Although most of the rules relating to "employee retirement benefits" apply to both annuities and refunds, some of the rules affecting "employee retirement benefits" make sense only for annuities, and others, only for refunds. Treating annuities and refunds separately makes the regulations longer; however, we believe that it also makes them simpler for attorneys and others to use.

The term, "former spouse annuity," which is used in the current regulations, has been replaced by "former spouse survivor annuity." Comments on prior regulations demonstrated that most commenters did not understand that "former spouse annuity" in the current regulations is only used when we are referring to the survivor benefit payable to a former spouse. The term has never included payments to a former spouse during a retiree's lifetime.

The term, "qualifying court order," which is used in the current regulations, has been replaced by "court order acceptable for processing." The principal reason for this change is to eliminate any similarity in terminology between court orders affecting CSRS and FERS benefits and "qualified domestic relations orders," QDRO's, under the Employees Retirement Income Security Act (ERISA), 29 U.S.C. 1001 *et seq.* In addition, the new term is more consistent with our role under the proposed regulations as the ministerial processor of court orders.

3. Preparing a Court Order

A court order may affect any of three types of retirement benefits paid by OPM. The regulations treat each of the three—employee annuities, refunds of employee contributions, and survivor annuities—independently. In preparing a court order, attorneys should keep in mind that we consider each of the three types of awards separate and independent of the other two, and should exercise great care in each type of benefit they intend to affect. Our requirement that the award of each type of benefits be independent does not mean that the court award of one type of benefit cannot affect another. For example, awarding a former spouse survivor annuity requires a reduction in the employee annuity. If the former spouse has been awarded a portion of the gross or net employee annuity, the former spouse's portion of the employee annuity will be affected.

A complete court order requires three separate provisions—one addressing each type of benefit that the court can affect. However, frequently, courts intend to award only a portion of the employee annuity or a survivor annuity, rather than a complete retirement package. The regulatory structure is designed to maintain a clear separation between court orders affecting different types of benefits. This permits a court that intends only to divide an employee annuity to consider only subparts A, B, C, and F of these regulations. Similarly, if the court intends to award only a survivor annuity, only subparts A, G, H, and I of these regulations apply. More detail on the regulatory structure is available in the analysis of § 838.102.

4. Section Analysis

Section 838.101(a) states the purpose of the regulations. The regulations cover both CSRS and FERS. Our role under the proposed regulations changes from one of an active adjudicator of disputes concerning the interpretation of court orders to one of performing only the ministerial function of executing clear, specific, and unambiguous instructions. As we explained in the section of this supplementary information entitled "Reasons to Change Processing Procedures," the proper place to resolve disputes concerning division of retirement benefits upon termination of marriage is the State courts.

OPM's comments on the legislation that in 1978 enacted section 8345(j) of title 5, United States Code, favored placing the responsibility for deciding the issue of divisions of CSRS employee annuities and refunds of employee contributions as marital property in the State courts. On May 7, 1979, the supplementary information for the original proposed regulations (published at 44 FR 26885) recognized the traditional role of State courts in domestic relations matters. Despite the legislative intent to have all property issues resolved in the State court, we, in interpreting ambiguous orders, have been drawn into marital disputes. Section 838.101(a) states our intent to separate ourselves from these marital disputes. The approach of these regulations is to require the State courts to resolve all disputes, requiring us to perform only the ministerial function of following the State courts' instructions.

Section 838.101(b) states what is covered by these court order regulations. Four principal areas are covered. The first area is the requirements that a court order must meet to enable us to process the court order without any adjudicatory role for OPM, that is, making OPM's function merely a ministerial act. The second area is the procedures that the former spouse must follow to apply for benefits based on a court order. The third area is the procedures that OPM will follow in executing court orders and in making payments based on court orders. The procedures cover how we handle applications based on court orders and the limitations that we must apply in executing court orders. The final area is the meanings assigned to words and phrases commonly used in court orders to provide notice of the effect that these terms will have if used in a court order. With this notice, we must assume that courts use these terms with a full understanding of their regulatory definition, making terms that could otherwise be ambiguous, completely clear and precise, thereby allowing us to process the court order as a ministerial act.

Section 838.101(c) provides the rule for determining whether we will process a court order under the new regulations. We must retain the old CSRS regulations for court orders filed before the new regulations begin to apply to preserve the legitimate expectations of people who filed court orders that were drafted in reliance on the current regulations. We have thousands of court orders on file that, under the current regulation, we are holding without decision until benefits become payable. The acceptability of these court orders must be judged under the regulatory standards in effect at the time that they were filed. Applying the new, more stringent standards of these regulations to them would be unfair to the employees and former spouses who obtained the court orders in good faith.

The delay before the new regulations become effective is necessary to give the public, especially the legal community, notice of the new requirements and standards that apply to court orders affecting CSRS or FERS benefits and to provide an adjustment period before those requirements and standards apply. We must assume that State courts and attorneys involved with divorces of Federal employees and retirees will become thoroughly familiar with the requirements and terminology in the regulations. We do not wish to require the parties to return to court unnecessarily. The delayed effective date provides time for the effective dissemination of this information.

Section 838.102 provides a guide to finding regulations that relate to court orders. Paragraph (a) outlines the structure of part 838. Subpart A contains definitions and other material of significance to all types of court orders affecting CSRS and FERS. The rest of the part is divided into three major units depending on whether the court order applies to employee annuities, refunds of employee contributions, or former spouse survivor annuities. For each unit, separate subparts cover procedures for processing, requirements that court orders must satisfy, and definitions of terms frequently used in court orders. (The terminology section for employee annuities and refunds of employee contributions are combined to avoid excessive duplication.)

The subparts (B, D and G) regulating procedures contain rules relating to former spouse filing requirements and to our actions upon receipt of court orders. In addition, they contain rules and limitations that the State court cannot change such as when benefits are paid. The subparts (C, E, and H) regulating requirements that court orders must satisfy contain rules pertaining to the requirements that a court order must meet to be acceptable for processing. The subparts (F and I) defining terms explains our understanding of the meaning of terms commonly used in court orders. By choosing the correct term, the State court can tell us exactly what to do. We assume that State courts are familiar with our assigned meanings of these terms and have used them in the way that they are defined in these subparts.

Paragraphs (b) through (i) of § 838.102 contain cross references to other regulations concerning court orders or former spouse benefits. This information may assist people doing research.

Section 838.103 contains definitions of terms. These definitions apply to subparts A through I. Subpart J (for orders filed before the new requirements and procedures become applicable) contains its own definitions. Most of the definitions are the same as used in the current CSRS regulations. As explained in the section of the Supplementary Information entitled "Changes Having Broad Application," the term "court order acceptable for processing" replaces "qualifying court order," and "employee annuity" and "refund of employee contributions" replace "employee retirement benefits."

The definition of "net annuity" is changed to exclude from "net annuity" amounts withheld for State income taxes under section 8345(k) or section 8469 of title 5, United States Code to the same extent that current regulations exclude amounts withheld for Federal income tax. "Net annuity" has two applications. First, "net annuity" is the maximum amount of employee annuity that a State court can award to a former spouse. "Net annuity" is also one of the three types of annuity that may be used to satisfy the requirements of § 838.306 for identifying the type of annuity to which a formula, percentage, or fraction applies. The other two types, "gross annuity" and "self-only annuity" are also defined in section 838.103. Those definitions are essentially the same as under the current regulations.

Section 838.111 states the general statutory exemption from legal process under section 8346(a) or section 8470 of title 5, United States Code. Neither CSRS or FERS benefits are subject to State court orders except when expressly authorized by Federal statute. These regulations (part 838) contain the regulations for the exceptions that permit State court orders under section 8345(j), section 8341(h), section 8467, or section 8445 of title 5, United States Code. Part 581 of title 5, Code of Federal Regulations, regulates the exception for garnishments for alimony and child support under sections 659, 661, and 662 of title 42, United States Code.

Sections 838.121 through 838.124 state the responsibilities of everyone affected by the process. OPM's role is limited to the ministerial function of complying with court orders that meet the statutory and regulatory requirements. The State court is the proper forum for resolving all disputes over the validity or the effect of court orders. The court is also responsible for issuing orders that conform to the statutory and regulatory requirements. The former spouse must comply with the application requirements of these regulations. The person who worked under CSRS or FERS and the former spouse must submit all their disputes concerning entitlement to benefits to the appropriate State court for resolution.

Section 838.131 contains rules for computing the timeliness throughout part 838. Paragraph (a) provides that the normal CSRS and FERS rules for computing timeframes apply under part 838. Paragraph (b) provides rules for determining the date when OPM receives a court order. The date of receipt may be important for determining whether the order is controlled by subparts A through I or subpart J, the timeliness of filing, or the commencing date of benefits. The methodology for determining the date of receipt is similar to the methodology applicable to determining the date of service of process for garnishments under subpart B of part 581 of title 5, Code of Federal Regulations.

Section 838.132 states the statutory payment schedule for CSRS and FERS annuity benefits under sections 8345(a) and 8463 of title 5, United States Code, respectively. We are required by statute to pay CSRS and FERS annuity benefits on the first business day of the month after the month in which the benefits accrue. State courts have no authority to alter this payment schedule.

Section 838.133 continues the rule under section 831.1713(b) of title 5, Code of Federal Regulations, and Guidelines I.G of appendix A and III.F of appendix B to subpart Q of part 831 of title 5, Code of Federal Regulations, that provides that the minimum monthly amount payable under a court order is one dollar. This section discontinues the provision in the current regulation that requires that the former spouse's share of employee annuity be rounded to the nearest whole dollar. Although the gross amount of an employee annuity is always in whole dollars, the amount paid to the employee after deductions usually is not. Rounding the former spouse benefit to the nearest dollar appears to serve no useful purpose.

Section 838.134 states the order of precedence for honoring court orders when we receive more than one court order affecting one employee or retiree. This section does not change the current rules. Except for court orders that make prohibited modifications of survivor annuity provisions (i.e., modifications that are ineffective under sections 8341(h)(4) and 8445(d) of title 5, United States Code), the last court order concerning any former spouse supersedes all earlier court orders affecting that former spouse. For cases involving more than one former spouse, the court order issued first has priority. Section 838.134(c) provides the rules that we will follow if the employee or retiree and the former spouse obtain conflicting court orders. The rules for determining which court order we must follow provide that we will honor the determination by courts of the employee's domicile (as shown by our records) in preference to the courts of any other jurisdiction and we will honor a later determination in preference to an earlier one. The former is appropriate because the courts of the employee's or retiree's domicile have the best claim to jurisdiction over his or her property, including the employee annuity. The latter is appropriate because the latest court order is presumably issued with knowledge of all earlier court orders and is intended to supersede them.

Section 838.135 eliminates the former spouse's option under § 831.1718 of title 5, Code of Federal Regulations, to have us honor an agreement between an employee or retiree and the former spouse that gives the former spouse a smaller portion of the employee's or retiree's benefits than the former spouse would receive under the court order. The current regulation should be changed because it is inconsistent with OPM's role of merely following the court instructions. If the employee or retiree and the former spouse agree on an amount other than the one that we determine must be paid in accordance with these regulations based on the terms of the court order, they must obtain an amended court order acceptable for processing to change the amount.

Subpart B regulates the procedures that apply to former spouse's applications and our processing of court orders directed at employee annuities. The distinctions among procedures, requirements and terminology are discussed in connection with § 838.102. Section 838.201 lists the topics covered by subpart B and contains cross references to related regulations.

Section 838.211 regulates when a former spouse's share of employee annuity becomes available for payment and the maximum amount payable to a former spouse. These rules are unchanged from the current regulations, §§ 831.1706 and 841.905 of title 5, Code of Federal Regulations.

Section 838.211(c) regulates when a court order prevents a retiree from waiving his or her annuity under section 8345(d) or 8465(a) of title 5, United States Code. Our rule has always been that waiver is permitted until the court order has affected the annuity. Under CSRS, the court order affects an annuity only after expiration of the 30-day notice period during which the retiree can file an objection to give reasons that OPM should not honor the court order. Accordingly, § 831.1706(b) of title 5, Code of Federal Regulations, ends the right to waive at the end of the 30-day notice period. Under FERS and the proposed regulations, the court order affects the annuity when we receive the court order. Accordingly, § 841.905(b) of title 5, Code of Federal Regulations, and § 838.221(c) terminate the right to waive the employee annuity at that time.

Section 838.221 states the application requirements that a former spouse must meet. The requirements are the same as the current FERS requirements under § 841.905 of title 5, Code of Federal Regulations. The only difference from the CSRS requirements under § 831.1705 of title 5, Code of Federal Regulations, is that the former spouse must provide the employee's mailing address if the court order affects the benefits of someone who is still an employee. Under the CSRS regulations, we do not process court orders until benefits become payable. Under the current FERS regulations and the proposed regulations, we need the employee's mailing address because we process the court order upon receipt. In processing a court order, we send information to the employee.

Sections 838.222 and 838.223 provide procedures for our processing of court orders. The procedures eliminate the delays in payments to the former spouse and streamline our handling of court orders. The regulations state the information that OPM will provide to the employee or retiree and the former spouse affected by a court order. Section 838.222(d) provides that payments to the former spouse and withholding from the employee annuity will begin on time, even if the information is not provided to the retiree before the annuity withholding begins.

Section 838.224 provides procedures that the employee or retiree must follow to dispute the validity of the court order. The burden is on the employee or retiree to obtain a court order invalidating the court order submitted by the former spouse. The proper forum for deciding issues relating to the validity of court orders is the courts, not Federal administrative proceedings. Paragraphs 838.224 (a) and (b) require the retiree to submit all challenges to the validity of a court order to the court for adjudication.

Section 838.225 regulates processing amended court orders. Amended court orders are processed as new court orders. Paragraph (b) clarifies the rule for collection of amounts past due or correcting excessive payments under § 831.1711(a)(2) or § 841.910(b)(1) of title 5, Code of Federal Regulations. To have OPM collect an arrearage or correct for excessive payments the court order must expressly tell us to take that action, tell us the total amount of the adjustment, and tell us how much of the adjustment should be made each month.

Section 838.231 regulates the commencing date of payments to the former spouse. Section 838.231(a) provides that the former spouse's share of an employee annuity begins to accrue on the first day of the second month after we receive a court order acceptable for processing. The statute does not provide a commencing date. This commencing date corresponds to the earliest commencing date permitted by statute for a survivor annuity based on a court order under sections 8341(h)(3)(A) and 8445(c)(1) of title 5, United States Code. This commencing date is the same as is used in the current FERS regulations under § 841.910(b)(2) of title 5, Code of Federal Regulations.

Section 838.231(b) regulates the commencing dates of accrual and payment of the former spouse's share of an employee annuity when the former spouse submits an incomplete application. Former spouses frequently submit copies of court orders that do not bear original court certifications, and therefore, do not satisfy the requirements of § 838.221. We also receive applications lacking other documents required by that section for proving validity of the court order.

Section 838.231(b) provides that the only document necessary to begin accrual of the former spouse's share of the employee annuity is a copy of the court order, even if that copy is not an original court certified copy. However, we cannot pay accrued benefits to the former spouse until we have received all the required documentation. If necessary, we will make a retroactive payment to the former spouse covering annuity that accrued after we receive a copy of the court order but prior to our receipt of all necessary documentation.

Section 838.232(a) restates the requirement under § 831.1713(d) or § 841.912(b) of title 5, Code of Federal Regulations, that we must suspend a former spouse's share of an employee annuity if the employee annuity is stopped. Section 838.232(b) provides an exception to the suspension requirement to curb abuses by retirees.

Section 838.233 regulates the termination of the former spouse's share of an employee annuity. It does not change current practice. Paragraph (a) provides for termination in accordance with the terms of the court order. Paragraph (b) provides for termination as soon as possible after we receive a court order invalidating the court order submitted by the former spouse. If we receive the court order at least 20 days before the end of the month we generally can stop the next check (which is for annuity accruing during the month in which we received the court order). If we receive the court order when there are fewer than 20 days left in the month, we will not stop the check for the month in which we receive the court order, but the former spouse's share of the employee annuity will cease accruing at the end of that month. Paragraph (c) provides that a court order becomes ineffective when an amended court order that supersedes it becomes effective. Paragraph (d) provides that if the retiree dies, the former spouse's share stops when annuity to the retiree stops, effective at the end of the month before death. No Federal statute gives State courts any authority over accrued, unpaid annuity that would have been due the retiree for the part of the month in which the retiree dies. We must pay it in accordance with the order of precedence in section 8342 or section 8424 of title 5, United States Code. For cases in which the former spouse predeceases the retiree, paragraph (e) provides that unless the court order expressly provides otherwise, accrual of the former spouse's share ceases at the end of the month before the former spouse dies.

Section 838.234 provides the special requirements applicable to a court order that directs us to collect an arrearage. The special requirement is discussed in connection with § 838.225.

Section 838.235 states how we will pay lump-sum awards from employee annuity. If the court specifies the monthly rate of payment, we will use that rate. Otherwise, we will withhold at the rate of 50 percent of the gross annuity at the time that payments start. Payments will continue at the same rate until the lump sum has been paid.

No Federal statute authorizes State courts to delay or stop annuity payments. We are required by sections 8345(a) and 8463 of title 5, United States Code, to pay employee annuity monthly. Sections 8345(j) and 8467 of title 5, United States Code, authorize State courts in certain situations to direct payment to someone other than the retiree but not to stop payments. Section 838.236 states this statutory prohibition against court orders seeking to stop payments that we are required to make.

Section 838.237 changes the procedures that we will follow upon the death of the former spouse. Currently, § 831.1712 of title 5, Code of Federal Regulations, requires us to contact the State court when the former spouse dies. At that time, we request the State court to provide additional instructions for the disposition of the former spouse portion of the employee annuity. Only a court order issued after the death of the former spouse meets the requirements of the current regulation. Section 838.237 changes our approach to eliminate our involvement in the process. We will no longer solicit additional instructions from the court or require an after-death court order to resolve entitlement. Unless that court order includes express instructions telling us what to do with the former spouse's share of the employee annuity when the former spouse dies, the former spouse's share reverts to the employee upon the death of the former spouse. The limitations on whom we will pay after the death of the former spouse that currently exist under § 831.1712 of title 5, Code of Federal Regulations, would continue under § 838.237.

Section 838.241 states that we add cost-of-living adjustments to annuities in accordance with section 8340 or section 8462 of title 5, United States Code. If the court wants us to apply a different rate or add them at a different time, the court order must include specific instructions.

Section 838.242 states the current rules that we use to calculate lengths of service in evaluating formulas used in a court order. The current rule is in guidelines I.A and I.C of appendix A to subpart Q of part 831 of title 5, Code of Federal Regulations. Our policy not to compute lengths of time smaller than months is based on section 8332 of title 5, United States Code, that allows credit for service for years or twelfth parts thereof. We will not honor requests that we calculate smaller units of time.

Section 838.243 duplicates the minimum amount of a former spouse's share of employee annuity requirement established in § 838.133 of these regulations.

Subpart C states the requirements that a court order directed at employee annuity must satisfy to qualify as a court order acceptable for processing. Each section is structured to exclude court orders that do not satisfy the requirements of that section. This structure is designed to allow us to point to specific regulatory language that expressly states that a court order that does not contain a necessary provision is not acceptable for processing. Unless a specific regulation declares a court order not acceptable, the court order is acceptable for processing.

Section 838.302 clarifies that court orders that contain language that make it impossible for us to process the court order while maintaining our ministerial role are not acceptable for processing. Section 838.302(a) defines as unprocessable all court orders labeled "qualified domestic relations order" or issued on ERISA forms. Such a court order demonstrates on its face that the court does not understand that CSRS and FERS are not covered by ERISA. More importantly, the court order itself proves that our necessary presumption that the court is familiar with these regulations and that the court used the terms defined by these regulations intending those terms to have the meaning assigned by these regulations is incorrect. Accordingly, we cannot process such a court order.

Section 838.302(b) also defines as unprocessable court orders that attempt to award a former spouse a portion of an employee annuity that continues after the death of the employee. Our system provides only two types of benefits, employee annuities that are payable to the employee and terminate at the employee's death and survivor annuities that are payable to the employee's survivors after the employee's death. Sections 8345(j) and 8467 of title 5, United States Code, permit a State court to redirect payments that would otherwise be made to a former employee to a former spouse, but our system does not allow the State court to partition the employee annuity to create a separate annuity that can continue independent of the employee's continued entitlement to the employee annuity. Only a survivor annuity can continue after the death of the employee.

Our current guidelines provide that unless the court order clearly and specifically provides that it is awarding an annuity that begins after the death of the employee or retiree, rather than a continuation of the former spouse's share of the employee annuity—a continuation not authorized by statute—the court order is not acceptable. How that distinction affects the use of these regulations is discussed in the section of this supplementary information concerning preparing a court order. This approach is justified for a number of reasons. Continuing the spouse's portion of an employee annuity after the death of the employee is a product of ERISA which permits a permanent partition of an employee annuity. As previously discussed, CSRS and FERS are exempt from ERISA and do not permit partition of an employee annuity. Our statutes only permit payment that would otherwise be made to a former employee to be redirected to the former spouse. We must also be assured that the court understood that the award of a survivor benefit results in a reduction of the employee's annuity. A court order that implies that partition of an employee annuity is permitted demonstrates that the court is not familiar with the requirements of these regulations. Thus, we must be able to rely on familiarity to make our function of executing court orders in accordance with these regulations ministerial.

We have, in the past, interpreted language that attempted to award the former spouse a portion of the employee annuity that would continue after the death of the employee as providing a portion of the employee annuity that terminates at the employee's death. However, such an interpretation would not be consistent with our limited ministerial role under these regulations. The number of court orders affected by this provision should be negligible.

Section 838.303 requires that the court order identify the retirement system and state that the former spouse is entitled to a portion of the employee annuity. This requirement is derived from current regulations, §§ 831 1704(a) and 841.903(b) of title 5, Code of Federal Regulations.

Section 838.304 changes the current rule on the degree of specificity required for a court order to direct us to pay the former spouse s share of an employee annuity directly to the former spouse. Under current CSRS regulations (§ 831.1704(b) of title 5, Code of Federal Regulations), we will pay the former spouse if the court order directs us to pay, or if the court order is neutral concerning the source of payment, or if the court order directs the retiree to pay and the retiree does not object to our paying directly. Under the current FERS regulation (§ 841.903(b) of title 5, Code of Federal Regulations), we will pay the former spouse unless the court order expressly directs us not to pay the former spouse directly. Under both of these approaches, we acted in an adjudicatory role. Considering that most of the court orders that we currently accept are neutral concerning the source of payments and we do not wish to needlessly require former spouses to return to court to correct technical deficiencies in court orders, we will continue to accept court orders that are neutral concerning who is to make the payments. Nevertheless, we strongly recommend that court orders expressly direct OPM to pay the former spouse directly. Court orders that direct the retiree to pay the former spouse are not acceptable for processing.

Section 838.305 states the requirements for specifying how much of the employee annuity is payable to the former spouse. The section continues the current requirements of §§ 831.1704(b) and 841.903(b) of title 5, and guidelines I.C and VI of appendix A to subpart Q of part 831 of title 5, Code of Federal Regulations, with one exception. The current guidelines (guideline VI.A.2 of appendix A to subpart Q of part 831 of title 5, Code of Federal Regulations) provide one exception to the general rule that we "will not research, interpret, or apply State laws regarding community or marital property rights or divisions." The exception in current guidelines requires us to apply State law to determine whether disability retirement benefits are subject to division as marital property upon divorce. Section 838.305 abolishes that exception and applies the general rule to all court orders. Unless the court order expressly directs us not to apply it to an employee annuity based on disability, we will apply the court order to any employee annuity payable. If State law does not permit division of disability retirement benefits until the retiree reaches age 62, and the court wants OPM to follow the State rule, the court order must state that it does not apply to disability retirement benefits until the retiree reaches age 62 and provide sufficient instruction for dividing the employee annuity after age 62.

Section 838.305 (b)(2) and (e) contain new material concerning the information that courts can expect us to locate in evaluating a formula. Both of these provisions arise from our concern about the types of salary rate information that will be available under the Federal Employees Pay Comparability Act of 1990, section 529 of Public Law 101-509, enacted November 5, 1990, especially, information about locality pay differentials under section 5305 of title 5, United States Code. Section 838.622(b)(2) contains a list of items that courts should feel comfortable in expecting us to evaluate. Courts should be wary about expecting us to evaluate variables that require us to find information not on the list. Section 838.622(e) provides that a court order is not acceptable for processing if it directs us to adjust the salary component of an annuity computation by an amount other than one of the four factors listed in the paragraph.

Section 838.306 provides that a court order that awards the former spouse a percentage or fraction of the employee annuity or gives us a formula for computing the amount of the former spouse's share of the employee annuity must use as a base for our computation the self-only, gross, or net annuity and must provide us with a way to tell which of these three types of annuity to use.

Subpart D regulates the procedures applicable to court orders directed at refunds of employee contributions. Its structure is similar to subpart B, which contains the corresponding rules for employee annuity. Sections 838.401, 838.411, 838.421, 838.423 through 838.425, and 838.441 correspond to §§ 838.201, 838.211, 838.221, 838.222 through 838.224, and 838.242, respectively.

Unlike annuities that are paid each month, refunds of employee contributions are paid only once and they extinguish any entitlement to a deferred annuity benefit. After the refund is paid, no funds are left to satisfy a court order.

Section 838.422 regulates the time limits for a former spouse to file an application for a court order to affect a refund of employee contributions. The time limits are the same as currently apply under § 831.2009 of title 5, Code of Federal Regulations. We must generally receive the court order no later than the last day of the second month before we pay the refund; however, if the former spouse indicates on the form for spousal notification of a refund application that he or she is submitting a court order, the court order is timely filed if we receive it no later than 20 days after we receive the form for spousal notification of a refund application.

Section 838.431 provides a remedy for former spouses who are harmed by not receiving notice of an application for a refund of employee contributions. This section continues the current rule under § 831.2009(f) of title 5, Code of Federal Regulations.

Section 838.432 states the statutory requirement under sections 8342(j) and 8424(b) of title 5, United States Code, that a State court may prevent the payment of a refund of employee contributions only if a court order entitles the former spouse to a portion of the employee annuity or to a former spouse survivor annuity. The current regulation implementing that statute is § 831.2009(g) of title 5, Code of Federal Regulations.

As subpart C states the requirements that a court order directed at employee annuity must satisfy to qualify as a court order acceptable for processing, subpart E contains similar rules for court orders directed at refunds of employee contributions. Its structure is similar to subpart C. Sections 838.501, and 838.502 through 838.504 correspond to §§ 838.301, and 838.303 through 838.305, respectively.

Section 838.505 implements the statutory requirements for barring payment of a refund of employee contributions that are stated in section 8342(j) or section 8424(b) of title 5, United States Code. A court order can prohibit payment of a refund of employee contributions only if it awards a former spouse a portion of employee annuity, or a former spouse survivor annuity, that would be extinguished by payment of the refund of employee contributions.

Subpart F explains our understanding of terms frequently used in court orders directed at employee annuities or refunds of employee contributions and states whether use of the term will satisfy specific requirements of subpart C or subpart E. When we process court orders, we must assume that courts are familiar with the meanings assigned to the terms defined in this subpart and have used the terms in the way assigned by subpart F.

Section 838.611 contains information about provisions that attempt to identify the retirement system to satisfy the requirements of § 838.303 or § 838.502 of these regulations. Section 838.611 continues the current rules under guideline V of appendix A to subpart Q of part 831 of title 5, Code of Federal Regulations. The court order must clearly provide that it affects CSRS or FERS benefits. Court orders that award benefits paid by agencies other than OPM, most commonly military retired pay paid by the Department of Defense, are not acceptable even if the other benefit terminates to allow credit toward the benefit paid by OPM. This is necessary for two reasons. A practical reason is that we would not be able to compute benefits based on a retirement system administered by another agency. The legal reason is that no court order authorizes OPM to pay a portion of the retiree annuity to the former spouse.

Section 838.612 contains information about provisions used to identify employee annuities or refunds of employee contributions to satisfy the requirements of § 838.303 or § 838.502 of these regulations. Section 838.612 continues the current rules under guideline IV of appendix A to subpart Q of part 831 of title 5, Code of Federal Regulations. Paragraph (a) lists terms that are usually used to identify any type of retirement benefit actually paid. Although the literal meaning of some of the terms listed in paragraph (a), such as "pensions" or "annuities," would not include lump-sum distributions, such as refund of employee contributions, our experience has shown that these terms are broadly used to identify all retirement benefits payable. Accordingly, we will continue to accept these terms as affecting both employee annuities and refunds of employee contributions. Paragraph (b) lists terms used to describe lump-sum awards, that is, awards either of a specified amount that are usually based on the amount of the employee contributions (rather than on the amount of an employee annuity) or payable only from refunds of employee contributions.

Section 838.621 establishes a new term, "prorata share," for the most common type of formula used to divide retirement benefits. Court orders that use this term are instructing us to divide the benefits in accordance with the formula provided in paragraph (a). The section also identifies other terms that award a "prorata share."

Section 838.622 contains information about cost-of-living and salary adjustments that can be altered by provisions in court orders. It continues the current rules under guidelines I.A and I.B of appendix A to subpart Q of part 831 of title 5, Code of Federal Regulations.

Section 838.623 contains information about terms used in court orders that attempt to describe periods of service or tell us how to compute lengths of service for use in formulas. It continues the current rules under guidelines I.D, I.F, and III of appendix A to subpart Q of part 831 of title 5, Code of Federal Regulations, except that the definition of "military service" has been changed to include periods of civilian employment with military agencies.

Under the current guidelines, "military service" excludes such periods of civilian employment "except where the exclusion of such civilian service would be manifestly contrary to the intent of the court order." This change is necessary because exercising judgment to determine whether "the exclusion of such civilian service would be manifestly contrary to the intent of the court order," would be inconsistent with limiting our role in executing court orders to perform the ministerial function of carrying out the court's instructions. Our experience has shown that the court usually intends to include this civilian service in each element of the computation; therefore, we drafted the regulation to implement what has been the court's most likely intent. Again, we must assume that, unless the court provides its own definition, the court will use the term as we have defined it here.

Section 838.624 contains information about how we will treat court orders that contain inconsistent instructions for determining the amount of former spouse's share. It continues the current rules under guidelines I.E. and I.C.2 of appendix A to subpart Q of part 831 of title 5, Code of Federal Regulations.

Section 838.625 contains lists of terms that are synonymous with the types of annuity defined in § 838.103. The terms may be used to satisfy the requirements of § 838.306 of these regulations. Section 838.625 continues the current rules under guideline II of appendix A to subpart Q of part 831 of title 5, Code of Federal Regulations.

Subpart G regulates the procedures applicable to court orders awarding former spouse survivor annuities. Its structure is similar to subpart B that contains the corresponding rules for court orders awarding a portion of an employee annuity. Sections 838.701, 838.721 through 838.724, and 838.735 correspond to §§ 838.201, 838.221 through 838.224, and 838.241, respectively.

Section 838.711 states the statutory maximum amount that we may pay as a former spouse survivor annuity. The total of all monthly survivor annuities payable to the widow or widower and all former spouses (except for the former spouse survivor annuities authorized by section 4(b) of CSRSEA) may never exceed 55 percent of the employee annuity under CSRS or 50 percent of the employee annuity under FERS. The definition of former spouse survivor annuity in § 838.103 includes the basic employee death benefit as defined in § 843.102 of title 5, Code of Federal Regulations.

Section 838.725 states the statutory provision in section 8341(h)(4) or section 8445(d) of title 5, United States Code, declaring ineffective court orders that, after the employee retires or dies, modify any provision in a court order concerning a former spouse survivor annuity. This subject is covered in more detail by § 838.806.

Section 838.726 establishes as a regulation for the first time our existing policy for handling employee and retiree election rights in cases in which a former spouse is entitled to a former spouse survivor annuity. It provides that court orders affect our authority to pay benefits based on employee elections but do not affect the employee or retiree's rights to make survivor annuity elections. For example, a married employee who at the time of retirement has a former spouse who is entitled to the maximum former spouse survivor annuity by court order must elect (under § 831.604 or § 842.604 of title 5, Code of Federal Regulations) a reduced annuity to provide a current spouse survivor annuity to the spouse at the time of retirement unless that spouse consents to a different election. The employee annuity is reduced based on the court order that awards the former spouse survivor annuity. No additional reduction is necessary based on the election for the spouse at retirement because that spouse will not receive a benefit as long as the former spouse's entitlement under the court order continues. The benefit for the current spouse is discussed under § 838.733.

Sections 838.731 and 838.732 implement statutory requirements under section 8341(h)(3) or section 8445(c) of title 5, United States Code, for commencing and terminating former spouse survivor annuities.

Section 838.733 establishes as a regulation for the first time our existing policy for determining the rights of a current spouse as defined in §§ 831.603 or 842.602 of title 5, Code of Federal Regulations, for whom the retiree elected a reduced annuity to provide a survivor annuity, or a former spouse with a court order that cannot be honored because of a higher priority court order when a former spouse with entitlement to a former spouse survivor annuity by court order loses that entitlement. If the former spouse loses entitlement while the retiree is living, the annuity reduction would automatically continue to provide a survivor annuity to the current spouse or other former spouse. If the former spouse loses entitlement after the death of the retiree, the spouse at retirement (if he or she qualifies as a widow or widower) or other former spouse would begin to receive a survivor annuity after the former spouse loses entitlement.

Section 838.734 states the rule that OPM will not honor court orders that award lump-sum payments (other than the FERS basic employee death benefit) to a former spouse upon the death of an employee or retiree.

Subpart H regulates the requirements applicable to court orders awarding former spouse survivor annuities. Its structure is similar to subpart C, which contains the corresponding rules for court orders awarding a portion of an employee annuity. Sections 838.801, 838.803, and 838.805 correspond to §§ 838.301, 838.302, and 838.305, respectively.

Section 838.802 states the statutory requirements under CSRS that a court order may award a former spouse survivor annuity only if the marriage terminated on or after May 7, 1985, and, if the retiree retired before May 7, 1985, the former spouse was the beneficiary of a reduced annuity to provide a current spouse survivor annuity on May 7, 1985. These requirements result from section 4(a)(1) of CSRSEA, which controls the effective date of section 8341(h) of title 5, United States Code, the statutory authority for State court orders that award former spouse survivor annuities.

Section 838.804 states the requirement that a court order must expressly award a former spouse survivor annuity or expressly direct an employee or retiree to elect to provide a former spouse survivor annuity. This continues the current requirement of § 831.1704(d) of title 5 and guideline II of appendix B to subpart Q of part 831 of title 5, Code of Federal Regulations. Sections 838.303 and 838.304 are the corresponding sections applicable to employee annuity.

Section 838.806 contains the special requirements applicable to an amended court order. Sections 8341(h)(4) and 8445(d) of title 5, United States Code, do not allow us to accept court orders that contain modified provisions affecting survivor annuities if the modification is issued after the retirement or death of the employee. We explained these statutory provisions in detail (at 53 FR 29057, August 2, 1988, and 53 FR 46895, December 5, 1988) when we issued §§ 831.1704(e) and 841.903(d) of title 5, Code of Federal Regulations. Section 838.806 continues to treat as prohibited modifications the same amended court orders that were prohibited under §§ 831.1704(e) and 841.903(d). In addition, § 838.806 establishes standards for determining whether orders that vacate or set aside divorces are pretexts for evading the statutory prohibition against modification.

Section 838.807 states the current requirement under guideline III.C of appendix B to subpart Q of part 831 of title 5, Code of Federal Regulations, that the cost of providing the survivor annuity must be taken from the employee annuity or the former spouse's share of the employee annuity. If the court order directs us to take the cost from the former spouse's share of the employee annuity and the former spouse's share of the employee annuity is sufficient to pay the entire cost, we will take the cost from the former spouse's share of the employee annuity. Otherwise, the entire cost to provide the former spouse survivor annuity must be taken from the employee annuity in accordance with section 8339(j) or section 8417(a) of title 5, United States Code.

Subpart I explains our understanding of terms frequently used in court orders awarding former spouse survivor annuities and states whether use of the terms will satisfy specific requirements of subpart H. When we process a court order, we must assume that the court is familiar with the meanings assigned the terms defined in this subpart and have used the terms in the way assigned by this subpart.

Section 838.911 is similar to § 838.611 in most respects. It sets a similar standard for provisions in court orders that attempt to identify the retirement system to satisfy the requirements of § 838.804 of these regulations. The only noteworthy difference is the effect that we accord the term "maintain." We treat a provision in a court order that requires a retiree to "maintain" the survivor annuity coverage that the former spouse had prior to the divorce as sufficient to identify our benefits if the former spouse would have been entitled to a survivor annuity as the widow or widower except for the divorce. For example, in the case of a post-retirement divorce, the retiree must have elected to provide a survivor annuity for the spouse. Section 838.911 continues the current rules under guidelines II and III.A of appendix B to subpart Q of part 831 of title 5, Code of Federal Regulations. The court order must clearly provide that it awards survivor annuity benefits paid by OPM. Court orders that award survivor annuity benefits paid by other agencies, most commonly military retired pay paid by the Department of Defense, are not acceptable even if the other benefit terminates to allow credit from the other benefit to be counted toward the benefit paid by OPM.

Section 838.912 corresponds to § 838.612 in the sense that it contains information about provisions used to identify former spouse survivor annuities to satisfy the requirements of § 838.804 of these regulations, just as § 838.612 contains information about provisions concerning employee annuities or refunds of employee contributions to satisfy the requirements of § 838.303 or § 838.502 of these regulations. However, as under current rules, the standards for identifying survivor annuities are stricter than the standards for identifying employee annuities or refunds of employee contributions. Section 838.912 continues the current rules under guidelines I and III.B of appendix B to subpart Q of part 831 of title 5, Code of Federal Regulations. Also, if the court order awards the former spouse a survivor annuity under the statute authorizing survivor annuities to a person with an insurable interest in certain retirees, applicable statutes do not authorize us to comply with the court order. As in § 838.611, the term, "maintain" is accorded special significance if the former spouse is covered prior to the divorce.

Section 838.921 contains information about terminology used to describe the amount of a former spouse survivor annuity. Paragraph (a) continues the current rule under guideline III.E of appendix B to subpart Q of part 831 of title 5, Code of Federal Regulations, that court orders that award a former spouse survivor annuity, but do not contain express instructions for determining the amount of the former spouse survivor annuity, award the maximum amount available. Paragraph (b) continues the current rule under guideline III.D of appendix B to subpart Q of part 831 of title 5, Code of Federal Regulations. The rule is that a court order that provides that the former spouse will keep or that the retiree will maintain the survivor annuity to which the former spouse was entitled before divorce awards a former spouse survivor annuity in the same amount as the former spouse had at the time of divorce. Paragraph (c) restates the rule under guideline III.F of appendix B to subpart Q of part 831 of title 5, Code of Federal Regulations, that the minimum former spouse survivor annuity is $1 per month and that cost of living increases must be added to survivor annuities. Paragraph (d) continues the current rule under guideline III.G of appendix B to subpart Q of part 831 of title 5, Code of Federal Regulations, that a court order may authorize a reduction in the amount of a former spouse survivor annuity based on a retiree's election to provide a survivor annuity for a new spouse because the election is an event that will be documented in normal OPM files, but a court order may not authorize a reduction in the amount of a former spouse survivor annuity based on an employee's or retiree's remarriage because the remarriage is not an event that will be documented in normal OPM files. As under the current guideline, only the reduction opportunity is nullified; we treat the court order as awarding a former spouse survivor annuity because that is the probable intent of the court.

Section 838.922 establishes the new term, "prorata share," for the most common type of formula used to divide survivor annuity benefits, as § 838.621 did for court orders dividing employee annuities. Court orders that use this term instruct us to divide the benefits in accordance with the formula provided in paragraph (a). The section also identifies other terms that award a "prorata share."

Section 838.931 continues our current practice, which has not previously been included in the regulations, concerning a divorce decree that provisionally awards a former spouse survivor annuity until further order of the court can be acceptable. Such a court order provides a survivor annuity until the court issues a court order acceptable for processing that changes it. However, if the new court order is issued after the employee retires or dies, it cannot effectively change or terminate the provisional award. If the divorce occurs after the employee retires, section 8341(h) or section 8445 of title 5, United States Code, does not permit us to accept a court order changing or terminating the provisional award. Effectively, that makes the provisional award permanent.

Section 838.932 changes the rule under guideline III.G of appendix B to subpart Q of part 831 of title 5, Code of Federal Regulations, that court orders cannot authorize former spouses to exercise a right to elect a former spouse survivor annuity. The current guideline, under which the election right is nullified and the court order is treated as unequivocally awarding a former spouse survivor annuity, deviates farther than necessary from the instructions of the court. Under § 838.932, a court order providing for such an election awards a former spouse survivor annuity until the former spouse notifies OPM otherwise in a form prescribed by OPM. If the former spouse elects no survivor annuity, the election is irrevocable. A former spouse's election of no survivor annuity under this provision is effective and the employee annuity will be restored to the unreduced rate (unless a reduction is still required as a result of another court order or the retiree's election) effective on the first day of the month after OPM receives the election.

Section 838.933 contains information about terminology used to describe the source of payment of the cost of a former spouse survivor annuity. It continues the current rule under guideline III.C of appendix B to subpart Q of part 831 of title 5, Code of Federal Regulations, that court orders that unequivocally award former spouse survivor annuities and direct the former spouse to pay the costs are acceptable to award a former spouse survivor annuity but the cost must be paid in accordance with § 838.807 of these regulations. On the other hand, court orders that award a former spouse survivor annuity conditioned upon the former spouse paying the cost are not acceptable unless the former spouse is also entitled to a sufficient portion of the employee annuity to cover the cost.

Subpart J contains the current CSRS regulations that will continue to apply to court orders that are currently on file and that we receive prior to January 1, 1993.

Paperwork Reduction Act

The information collection requirements contained in §§ 838.221, 838.421, and 838.721 have been submitted to the Office of Management and Budget for approval in accordance with the requirements of the Paperwork Reduction Act. It is estimated that there will be approximately 7000 responses annually, with an estimated average burden of 6 minutes per response, for a total annual burden of 700 hours. Comments regarding these proposed collections of information through the letters of application should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, Attention: Joseph Lackey, Desk Officer for the Office of Personnel Management. Comments should be received on or before March 3, 1992. All other comments should be sent to OPM as instructed above under "ADDRESSES."

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation will only affect Federal agencies and retirement payments to retired Government employees, spouses, and former spouses.

List of Subjects

5 CFR Parts 831, 841, 842, and 843

Administrative practice and procedure, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Law enforcement officers, Pensions, Retirement.

5 CFR Part 838

Administrative practice and procedure, Claims, Disability benefits, Government employees, Income taxes, Pensions, Retirement, Courts.

U.S. Office of Personnel Management.

Constance Berry Newman,

Director.

Accordingly, OPM proposes to amend title 5, Code of Federal Regulations, as follows:

PART 838—COURT ORDERS AFFECTING RETIREMENT BENEFITS

1. Part 838 is added to read as follows:

PART 838—COURT ORDERS AFFECTING RETIREMENT BENEFITS

Authority: 5 U.S.C. 8347(a) and 8461(g). Subparts B, C, D, E, and J also issued under 5 U.S.C. 8345(j)(2) and 8467(b). Sections 838.221, 838.422, and 838.721 also issued under 5 U.S.C. 8347(b).

Subpart A—Court Orders Generally

Organization and Structure of Regulations on Court Orders

§ 838.101 Purpose and scope.

(a)(1) This part regulates the Office of Personnel Management's handling of court orders affecting the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS), both of which are administered by the Office of Personnel Management (OPM). Generally, OPM must comply with court orders, decrees, or court-approved property settlement agreements in connection with divorces, annulments of marriage, or legal separations of employees, Members, or retirees that award a portion of the former employee's or Member's retirement benefits or a survivor annuity to a former spouse.

(2) In executing court orders under this part, OPM must honor the clear instructions of the court. Instructions must be specific and unambiguous. OPM will not supply missing provisions, interpret ambiguous language, or clarify the court's intent by researching individual State laws. In carrying out the court's instructions, OPM performs purely ministerial actions in accordance with these regulations. Disagreement between the parties concerning the validity or the provisions of any court order must be resolved by the court.

(b) This part prescribes—

(1) The requirements that a court order must meet to be acceptable for processing under this part;

(2) The procedures that a former spouse must follow when applying for benefits based on a court order under sections 8341(h), 8345(j), 8445 or 8467 of title 5, United States Code;

(3) The procedures that OPM will follow in honoring court orders and in making payments to the former spouse; and

(4) The effect of certain words and phrases commonly used in court orders affecting retirement benefits.

(c) (1) Subparts A through I of this part apply only to court orders received by OPM on or after July 1, 1992.

(2) Subpart J of this part applies only to court orders received by OPM before July 1, 1992.

§ 838.102 Regulatory structure.

(a) This part is organized as follows:

(1) Subpart A contains information and rules of general application to all court orders directed at CSRS or FERS retirement benefits.

(2) Subparts B and C of this part contain information about court orders directed at ongoing employee annuity payments.

(3) Subparts D and E of this part contain information about court orders directed at refunds of employee contributions.

(4) Subpart F of this part contains information about the effect of words and phrases commonly used in court orders affecting ongoing employee annuity payments and refunds of employee contributions.

(5) Subparts G, H, and I of this part contain information about court orders awarding former spouse survivor annuities.

(6) Subpart J of this part contains the rules applicable to court orders filed under procedures in effect prior to the implementation of this part. These rules continue to apply to court orders received by OPM before July 1, 1992.

(b) Part 890 of this chapter contains information about coverage under the Federal Employees Health Benefits Program.

(c) Part 581 of this chapter contains information about garnishment of Government payments including salary and CSRS and FERS retirement benefits.

(d) Parts 294 and 297 of this chapter and §§ 831.106 and 841.108 contain information about disclosure of information from OPM records.

(e) Subpart V of part 831 of this chapter and subpart C of part 842 of this chapter contain information about how court orders affect eligibility to make an alternative form of annuity election.

(f) Part 1600 of this title contains information about court orders affecting the Federal Employees Thrift Savings Plan.

(g) Subpart F of part 831 of this chapter, subpart F of part 841 of this chapter, and part 843 of this chapter contain information about entitlement to survivor annuities.

(h) Subpart T of part 831 of this chapter and subpart B of part 843 of this chapter contain information about refunds of employee contributions and lump-sum death benefits.

(i) Parts 870, 871, 872, and 873 of this chapter contain information about the Federal Employees Group Life Insurance Program.

§ 838.103 Definitions.

In this part (except subpart J)—

Civil Service Retirement System or *CSRS* means the retirement system for Federal employees described in subchapter III of chapter 83 of title 5, United States Code.

Court order means any judgment or property settlement issued by or approved by any court of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, The Northern Mariana Islands, or the Virgin Islands, or any Indian court in connection with, or incident to, the divorce, annulment of marriage, or legal separation of a Federal employee or retiree.

Court order acceptable for processing means a court order as defined in this section that meets the requirements of subpart C of this part to affect an employee annuity, subpart E of this part to affect a refund of employee contributions, or subpart H of this part to award a former spouse survivor annuity.

Employee means an employee or Member covered by CSRS or FERS.

Employee annuity means the recurring payments under CSRS or FERS made to a retiree. "Employee annuity" does not include payments of accrued and unpaid annuity after the death of a retiree under section 8342(g) or 8424(h) of title 5, United States Code.

Federal Employees Retirement System or "FERS" means the retirement system for Federal employees described in chapter 84 of title 5, United States Code.

Former spouse means (1) in connection with a court order affecting an employee annuity or a refund of employee contributions, a living person whose marriage to an employee has been subject to a divorce, annulment of marriage, or legal separation resulting in a court order, or (2) in connection with a court order awarding a former spouse survivor annuity, a living person who was married for at least 9 months to an employee or retiree who performed at least 18 months of civilian service covered by CSRS or who performed at least 18 months of civilian service creditable under FERS, and whose marriage to the employee or retiree was terminated prior to the death of the employee or retiree.

Former spouse survivor annuity means a recurring benefit under CSRS or FERS, or the basic employee death benefit under FERS as described in part 843 of this chapter, that is payable to a former spouse after the employee's or retiree's death.

Gross annuity means the amount of monthly annuity payable after reducing the self-only annuity to provide survivor annuity benefits, if any, but before any other deduction. Unless the court order expressly provides otherwise, *gross annuity* also includes any lump-sum payments made to the retiree under section 8343a or 8420a of title 5, United States Code.

Member means a Member of Congress covered by CSRS or FERS.

Net annuity means the amount of monthly annuity payable after deducting from the gross annuity any amounts that are (1) owed by the retiree to the United States, (2) deducted for health benefits premiums under section 8906 of title 5, United States Code, and §§ 891.401 and 891.402 of this chapter, (3) deducted for life insurance premiums under section 8714a(d) of title 5, United States Code, (4) deducted for Medicare premiums, (5) properly withheld for Federal income tax purposes, if the amounts withheld are not greater than they would be if the retiree claimed all dependents to which he or she was entitled, or (6) properly withheld for State income tax purposes, if the amounts withheld are not greater than they would be if the retiree claimed all dependents to which he or she was entitled. Unless the court order expressly provides otherwise, "net annuity" also includes any lump-sum payments made to the retiree under section 8343a or 8420a of title 5, United States Code.

Reduction to provide survivor benefits means the reduction required by section 8339(j)(4) or section 8419(a) of title 5, United States Code.

Refund of employee contributions means a payment of the lump-sum credit to a separated employee under section 8342(a) or section 8424(a) of title 5, United States Code. *Refund of employee contributions* does not include lump-sum payments made under section 8342 (c) through (f) or section 8424 (d) through (g) of title 5, United States Code.

Retiree means a former employee or Member who is receiving recurring payments under CSRS or FERS based on his or her service as an employee. *Retiree* does not include a person receiving an annuity only as a current spouse, former spouse, child, or person with an insurable interest.

Self-only annuity means the recurring payments to a retiree who has elected not to provide a survivor annuity to anyone. Unless the court order expressly provides otherwise, *self-only annuity* also includes any lump-sum payments made to the retiree under section 8343a or 8420a of title 5, United States Code.

Separated employee means a former employee or Member who has separated from a position in the Federal Government covered by CSRS and FERS under subpart B of part 831 of this chapter or subpart A of part 842 of this chapter, respectively, and is not currently employed in such a position, and who is not a retiree.

Statutory Limit on Court's Authority

§ 838.111 Exemption from legal process except as authorized by Federal law.

(a) Employees, retirees, and State courts may not assign CSRS and FERS benefits except as provided in this part.

(b) CSRS and FERS benefits are not subject to execution, levy, attachment, garnishment or other legal process except as expressly provided by Federal law.

Division of Responsibilities

§ 838.121 OPM's responsibilities.

OPM is responsible for authorizing payments in accordance with clear, specific and express provisions of court orders acceptable for processing.

§ 838.122 State courts' responsibilities.

State courts are responsible for—

(a) Providing due process to the employee or retiree;

(b) Issuing clear, specific, and express instructions consistent with the statutory provisions authorizing OPM to provide benefits to former spouses and the requirements of this part for awarding such benefits;

(c) Using the terminology defined in this part only when it intends to use the meaning given to that terminology by this part;

(d) Determining when court orders are invalid; and

(e) Settling all disputes between the employee or retiree and the former spouse.

§ 838.123 Claimants' responsibilities.

Claimants are responsible for—

(a) Filing a certified copy of court orders and all other required supporting information with OPM;

(b) Keeping OPM advised of their current mailing addresses;

(c) Notifying OPM of any changes in circumstances that could affect their entitlement to benefits; and

(d) Submitting all disputes with employees or retirees to the appropriate State court for resolution.

§ 838.124 Employees' and retirees' responsibilities.

Employees and retirees are responsible for—

(a) Raising any objections to the validity of a court order in the appropriate State court; and

(b) Submitting all disputes with former spouses to the appropriate State court for resolution.

Procedures Applicable to All Court Orders

§ 838.131 Computation of time.

(a) The rules applicable for computation of time under §§ 831.107 and 841.109 of this chapter apply to this part.

(b)(1) Appendix A of this subpart lists the proper addresses for submitting court orders affecting CSRS and FERS benefits.

(2) A former spouse should submit the documentation required by this part to the address provided in appendix A of this subpart. The component of OPM responsible for processing court orders will note the date of receipt on court orders that it receives.

(3) If a court order is delivered to OPM at an address other than the address in appendix A of this subpart, the recipient will forward the court order to the component of OPM responsible for processing court orders. However, OPM is not considered to have received the court order until the court order is received in the component of OPM responsible for processing court orders.

§ 838.132 Payment schedules.

(a) Under CSRS and FERS, employee annuities and survivor annuities are payable on the first business day of the month following the month in which the benefit accrues.

(b) In honoring and complying with a court order, OPM will not disrupt the payment schedule described in paragraph (a) of this section, despite any provision in the court order directing a different schedule of accrual or payment of amounts due the former spouse.

§ 838.133 Minimum awards.

Payments under this part will not be less than one dollar per month. Any court order that awards a former spouse a portion of an employee annuity or a former spouse survivor annuity in an amount of less than one dollar per month will be treated as an award of an annuity equal to one dollar per month.

§ 838.134 Receipt of multiple court orders.

(a) Except as provided in paragraph (c) of this section, for court orders affecting employee annuities or awarding former spouse survivor annuities, in the event that OPM receives two or more court orders acceptable for processing—

(1) When the court orders affect two or more former spouses, the court orders will be honored in the order in which they were issued to the maximum extent possible under § 838.211 or § 838.711.

(2) When two or more court orders relate to the same former spouse or separated spouse, the one issued last will be honored.

(b)(1) Except as provided in paragraph (c) of this section, for court orders affecting refunds of employee contributions, in the event that OPM receives two or more court orders acceptable for processing—

(i) When the court orders affect two or more former spouses—

(A) The refund will not be paid if either court order prohibits payment of the refund of contributions; otherwise,

(B) The court orders will be honored in the order in which they were issued until the contributions have been exhausted.

(ii) When two or more court orders relate to the same former spouse, the one issued last will be honored first.

(2) In no event will the amount paid out exceed the amount of the refund of employee contributions.

(c) With respect to issues relating to the validity of a court order or to the amount of payment—

(1) If the employee, separated employee, retiree, or other person adversely affected by the court order and former spouse submit conflicting court orders from the same jurisdiction, OPM will consider only the latest court order; or

(2) If the employee, separated employee, retiree, or other person adversely affected by the court order and former spouse submit conflicting court orders from different jurisdictions—

(i) If one of the court orders is from the jurisdiction shown as the employee's, separated employee's, or retiree's address in OPM's records, OPM will consider only the court order issued by that jurisdiction; or

(ii) If none of the court orders is from the jurisdiction shown as the employee's, separated employee's, or retiree's address in OPM's records, OPM will consider only the latest court order.

§ 838.135 Settlements.

(a) OPM must comply with the terms of a properly filed court order acceptable for processing even if the retiree and the former spouse agree that they want OPM to pay an amount different from the amount specified in the court order. Information about OPM's processing of amended court orders is contained in §§ 838.225 and 838.725.

(b)(1) OPM will not honor a request from the former spouse that an amount less than the amount provided in the court order be withheld from an employee annuity or a refund of employee contributions.

(2) OPM will not honor a request from the retiree that an amount greater than the amount provided in the court order be withheld from an employee annuity or a refund of employee contributions.

Address for Filing Court Orders with OPM

Appendix A to Subpart A of Part 838—Addresses for Serving Court Orders Affecting CSRS or FERS Benefits

(a) The mailing address for delivery of court orders affecting CSRS or FERS benefits by the United States Postal Service is—Office of Personnel Management, Retirement and Insurance Group, P.O. Box 17, Washington, DC 20044.

(b) The address for delivery of court orders affecting CSRS or FERS benefits by process servers, express carriers, or other forms of handcarried delivery is—Court-ordered Benefits Section, Allotments Branch, Retirement and Insurance Group, Office of Personnel Management, 1900 E Street, NW., Washington, DC.

Subpart B—Procedures for Processing Court Orders Affecting Employee Annuities

Regulatory Structure

§ 838.201 Purpose and scope.

(a) This subpart regulates the procedures that the Office of Personnel Management will follow upon the receipt of claims arising out of State court orders directed at employee annuities under CSRS or FERS. OPM must comply with qualifying court orders, decrees, or court-approved property settlements in connection with divorces, annulments of marriages, or legal separations of employees or retirees that award a portion of an employee annuity to a former spouse.

(b) This subpart prescribes—

(1) The circumstances that must occur before employee annuities are available to satisfy a court order acceptable for processing; and

(2) The procedures that a former spouse must follow when applying for a portion of an employee annuity based on a court order under section 8345(j) or section 8467 of title 5, United States Code.

(c)(1) Subpart C of this part contains the rules that a court order must satisfy to be a court order acceptable for processing to affect an employee annuity.

(2) Subpart F of this part contains definitions that OPM uses to determine the effect of a court order acceptable for processing on employee annuities.

Availability of Funds

§ 838.211 Amounts subject to court orders.

(a)(1) Employee annuities are subject to court orders acceptable for processing only if all of the conditions necessary for payment of the employee annuity to the former employee have been met, including, but not limited to—

(i) Separation from a position in the Federal service covered by CSRS or FERS under subpart B of part 831 of this chapter or subpart A of part 842 of this chapter, respectively;

(ii) Application for payment of the employee annuity by the former employee; and

(iii) The former employee's immediate entitlement to an employee annuity.

(2) Money held by an employing agency or OPM that may be payable at some future date is not available for payment under court orders directed at employee annuities.

(3) OPM cannot pay a former spouse a portion of an employee annuity before the employee annuity begins to accrue.

(b) Payment to a former spouse under a court order may not exceed the net annuity.

(c) Waivers of employee annuity payments under the terms of section 8345(d) or section 8465(a) of title 5, United States Code, exclude the waived portion of the annuity from availability for payment under a court order if such waivers are postmarked or received before the date that OPM receives a court order acceptable for processing.

Application and Processing Procedures

§ 838.221 Application requirements.

(a) A former spouse (personally or through a representative) must apply in writing to be eligible for a court-awarded portion of an employee annuity. No special form is required.

(b) The application letter must be accompanied by—

(1) A certified copy of the court order acceptable for processing that is directed at employee annuity;

(2) A certification from the former spouse or the former spouse's representative that the court order is currently in force and has not been amended, superseded, or set aside;

(3) Information sufficient for OPM to identify the employee or retiree, such as his or her full name, CSRS or FERS claim number, date of birth, and social security number;

(4) The current mailing address of the former spouse; and

(5) If the employee has not retired under CSRS or FERS or died, the mailing address of the employee.

(c)(1) When court-ordered payments are subject to termination (under the terms of the court order) if the former spouse remarries, no payment will be made until the former spouse submits to OPM a statement in the form prescribed by OPM certifying—

(i) That a remarriage has not occurred;

(ii) That the former spouse will notify OPM within 15 calendar days of the occurrence of any remarriage; and

(iii) That the former spouse will be personally liable for any overpayment to him or her resulting from a remarriage.

(2) OPM may subsequently require periodic recertification of the statements required under paragraph (c)(1) of this section.

§ 838.222 OPM action on receipt of a court order acceptable for processing.

(a) If OPM receives a court order acceptable for processing that is directed at an employee annuity that is in pay status, OPM will inform—

(1) The former spouse—

(i) That the court order is acceptable for processing;

(ii) Of the date on which OPM received the court order, the date on which the former spouse's benefit begins to accrue, and if known, the date on which OPM commences payment under the order;

(iii) Of the amount of the former spouse's monthly benefit and the formula OPM use to compute the monthly benefit; and

(iv) That, if he or she disagrees with the amount of the monthly benefits, he or she must obtain, and submit to OPM, an amended court order clarifying the amount; and

(2) The retiree—

(i) That the former spouse has applied for benefits under this subpart;

(ii) That the court order is acceptable for processing and that OPM must comply with the court order;

(iii) Of the date on which OPM received the court order, the date on which the former spouse's benefit begins to accrue, and if known, the date on which OPM commences payment under the court order;

(iv) Of the amount of the former spouse's monthly benefit and the formula OPM used to compute the monthly benefit;

(v) That, if he or she contests the validity of the court order, he or she must obtain, and submit to OPM, a court order invalidating the court order submitted by the former spouse; and

(vi) That, if he or she disagrees with the amount of the former spouse's monthly benefits, he or she must obtain, and submit to OPM, an amended court order clarifying the amount.

(b) If OPM receives a court order acceptable for processing that is directed at an employee annuity but the employee has died, or if a retiree dies after payments from an employee to a former spouse have begun, OPM will inform the former spouse that the employee or retiree has died and that OPM can only honor court orders dividing employee annuities during the lifetime of the retiree.

(c) If OPM receives a court order acceptable for processing that is directed at an employee annuity that is not in pay status, OPM will inform—

(1) The former spouse—

(i) That the court order is acceptable for processing;

(ii) That benefits cannot begin to accrue until the employee retires;

(iii) To the extent possible, the formula that OPM will use to compute the former spouse's monthly benefit; and

(iv) That, if he or she disagrees with the formula, he or she must obtain, and submit to OPM, an amended court order clarifying the amount; and

(2) The employee, separated employee, or retiree—

(i) That the former spouse has applied for benefits under this subpart;

(ii) That the court order is acceptable for processing and that OPM must comply with the court order;

(iii) To the extent possible, the formula that OPM will use to compute the former spouse's monthly benefit;

(iv) That, if he or she contests the validity of the court order, he or she must obtain, and submit to OPM, a court order invalidating the court order submitted by the former spouse; and

(v) That, if he or she disagrees with the amount of the former spouse's monthly benefits, he or she must obtain, and submit to OPM, an amended court order clarifying the amount.

(d) The failure of OPM to provide, or of the employee, separated employee, or retiree or the former spouse to receive, the information specified in this section prior to the commencing date of a reduction or accrual does not affect—

(1) The validity of payment under the court order; or

(2) The commencing date of the reduction in the employee annuity or the commencing date of the accrual of former spouse benefits as determined under § 838.231.

§ 838.223 OPM action on receipt of a court order not acceptable for processing.

If OPM receives an application from a former spouse not based on a court order acceptable for processing, OPM will inform the former spouse that OPM cannot approve the application and provide the specific reason(s) for disapproving the application. Examples of reasons for disapproving an application include that the court order does not meet the definition of court order in § 838.103 or does not meet one or more of the requirements of subpart C of this part.

§ 838.224 Contesting the validity of court orders.

(a) An employee, separated employee, or retiree who alleges that a court order is invalid must prove the invalidity of the court order by submitting a court order that—

(1) Declares the court order submitted by the former spouse is invalid; or

(2) Sets aside the court order submitted by the former spouse.

(b) OPM must honor a court order acceptable for processing that appears to be valid and that the former spouse has certified is currently in force and has not been amended, superseded, or set aside, until OPM receives a court order described in paragraph (a) of this section or a court order amending or superseding the court order submitted by the former spouse.

§ 838.225 Processing amended court orders.

(a) If the employee, separated employee, retiree, or former spouse submits an amended court order pertaining to payment of a portion of the employee annuity, OPM will process the amended court order prospectively only, effective against employee annuity accruing beginning the first day of the second month after OPM receives the amended court order.

(b) A court order is not effective to adjust payments prior to the first day of the second month after OPM receives the court order unless—

(1) The court order—

(i) Expressly directs OPM to adjust for payment made under the prior court order; and

(ii) Determines the total amount of the adjustment or the length of time over which OPM will make the adjustment; and

(iii) Provides a specific monthly amount of the adjustment or a formula to compute the amount of the monthly adjustment; and

(2) Annuity continues to be available from which to make the adjustment.

Payment Procedures

§ 838.231 Commencing date of payments.

(a) A court order acceptable for processing is effective against employee annuity accruing beginning the first day of the second month after OPM receives the court order.

(b)(1) OPM will not begin payments to the former spouse until OPM receives all the documentation required by § 838.221 (b) and (c).

(2) If payments are delayed under paragraph (b)(1) of this section, after OPM receives all required documentation, it will authorize payment of the annuity that has accrued since the date determined under paragraph (a) of this section but the payment of which was delayed under paragraph (b)(1) of this section.

§ 838.232 Suspension of payments.

(a) Payments from employee annuities under this part will be discontinued whenever the employee annuity payments are suspended or terminated. If employee annuity payments to the retiree are restored, payments to the former spouse will also resume subject to the terms of any court order acceptable for processing in effect at that time.

(b) Paragraph (a) of this section will not be applied to permit a retiree to deprive a former spouse of payment by causing suspension of payment of employee annuity.

§ 838.233 Termination of payments.

A former spouse portion of an employee annuity stops accruing at the earliest of—

(a) The date on which the terms of the court order require termination;

(b)(1) The last day of the first month before OPM receives a court order invalidating, vacating, or setting aside the court order submitted by the former spouse if OPM receives the latest court order no later than 20 days before the end of the month; or

(2) The last day of the month in which OPM receives a court order invalidating, vacating, or setting aside the court order submitted by the former spouse if OPM receives the latest court order later than 20 days before the end of the month; or

(c) The last day of the first month after OPM receives an amended court order;

(d) The last day of the first month before the death of the retiree; or

(e) Except as provided in § 838.237, the date on which the former spouse dies.

§ 838.234 Collection of arrearages.

Specific instructions are required before OPM may pay any arrearage. Except as provided in § 838.225(b), OPM will not increase a former spouse's share of employee annuity to satisfy an arrearage due the former spouse. However, under § 838.225, OPM will prospectively honor the terms of an amended court order that either increases or decreases the former spouse's entitlement.

§ 838.235 Payment of lump-sum awards.

If a court order acceptable for processing awards a former spouse a lump-sum amount from the employee annuity and does not state the monthly rate at which OPM should pay the lump-sum, OPM will pay the former spouse equal monthly installments at 50 percent of the gross annuity (subject to the limitations under § 838.211) at the time of retirement or the date of the order, whichever comes later, until the lump-sum amount is paid.

§ 838.236 Court orders barring payment of annuities.

(a) State courts lack authority to prevent OPM from paying employee annuities as required by section 8345(a) or section 8463 of title 5, United States Code. OPM will not honor court orders directing that OPM delay or otherwise not pay employee annuities at the time or in the amount required by statute.

(b) Except as otherwise provided in this subpart, OPM will honor court orders acceptable for processing that direct OPM to pay the employee annuity to the court, an officer of the court acting as a fiduciary, or a State or local government agency during the pendency of a divorce or legal separation proceeding.

§ 838.237 Death of the former spouse.

(a) Unless the court order acceptable for processing expressly provides otherwise, the former spouse's share of an employee annuity terminates on the last day of the month before the death of the former spouse, and the former spouse's share of employee annuity reverts to the retiree.

(b) Except as otherwise provided in this subpart, OPM will honor a court order acceptable for processing or an amended court order acceptable for processing that directs OPM to pay, after the death of the former spouse, the former spouse's share of the employee annuity to—

(1) The court;

(2) An officer of the court acting as a fiduciary;

(3) The estate of the former spouse; or

(4) One or more of the retiree's children as defined in section 8341(a)(4) or section 8441(4) of title 5, United States Code.

Procedures for Computing the Amount Payable

§ 838.241

Cost-of living adjustments.

Unless otherwise provided in the court order, when the terms of the court order or § 838.621 provide for cost-of-living adjustments on the former spouse's payment from employee annuity, the cost-of-living adjustment will be effected at the same time and at the same percentage rate as the cost-of-living adjustment in the employee annuity.

§ 838.242 Computing lengths of service.

(a) (1) The smallest unit of time that OPM will calculate in computing a formula in a court order is a month, even where the court order directs OPM to make a more precise calculation.

(2) If the court order states a formula using a specified simple or decimal fraction other than twelfth parts of a year, OPM will use the specified number to perform simple mathematical computations.

(b) Unused sick leave is counted as "creditable service" on the date of separation for an immediate CSRS annuity; it is not apportioned over the time when earned. Unused sick leave is not countable as "creditable service" in a FERS annuity (except in a CSRS component for an employee who transferred to FERS) or in a deferred CSRS annuity.

§ 838.243 Minimum amount of awards.

OPM will treat any court order that awards a former spouse a portion of an employee annuity equal to less than $12 per year as awarding the former spouse $1 per month.

Subpart C—Requirements for Court Order Affecting Employee Annuities

§ 838.301 Purpose and scope.

This subpart regulates the requirements that a court order directed at employee annuity must meet to be a court order acceptable for processing.

§ 838.302 Language not acceptable for processing.

(a) Any court order labeled as a "qualified domestic relations order" or issued on a form for ERISA qualified domestic relations orders is not a court order acceptable for processing.

(b) Any court order directed at employee annuity that expressly provides that the former spouse's portion of the employee annuity may continue after the death of the employee or retiree, such as a court order providing that the former spouse's portion of the employee annuity will continue for the lifetime of the former spouse, is not a court order acceptable for processing.

§ 838.303 Expressly dividing employee annuity.

(a) A court order directed at employee annuity is not a court order acceptable for processing unless it expressly divides the employee annuity as provided in paragraph (b) of this section.

(b) To expressly divide employee annuity as required by paragraph (a) of this section the court order must—

(1) Identify the retirement system using terms that are sufficient to identify the retirement system as explained in § 838.611; and

(2) Expressly state that the former spouse is entitled to a portion of the employee annuity using terms that are sufficient to identify the employee annuity as explained in § 838.612.

§ 838.304 Providing for payment to the former spouse.

(a) A court order directed at employee annuity is not a court order acceptable for processing unless it provides for OPM to pay the former spouse a portion of an employee annuity as provided in paragraph (b) of this section.

(b) To provide for OPM to pay the former spouse a portion of an employee annuity as required by paragraph (a) of this section the court order must—

(1) Expressly direct OPM to pay the former spouse directly;

(2) Direct the retiree to arrange or to execute forms for OPM to pay the former spouse directly; or

(3) Be silent concerning who is to pay the portion of the employee annuity awarded to the former spouse.

(c) Except when the court order directed at employee annuity contains a provision described in paragraph (b)(2) of this section, a court order directed at employee annuity that instructs the retiree to pay a portion of the employee annuity to the former spouse is not a court order acceptable for processing.

(d) Although paragraphs (b)(2) and (b)(3) of this section provide acceptable methods for satisfying the requirement that a court directed at employee annuity provide for OPM to pay the former spouse, OPM strongly recommends that any court order directed at employee annuity expressly direct OPM to pay the former spouse directly.

§ 838.305 OPM computation of formulas.

(a) A court order directed at employee annuity is not a court order acceptable for processing unless the court order provides sufficient instructions and information that OPM can compute the amount of the former spouses's monthly benefit using only the express language of the court order, subparts A, B, and F of this part, and information from normal OPM files.

(b) (1) To provide sufficient instructions and information for OPM to compute the amount of the former spouse's share of the employee annuity as required by paragraph (a) of this section the court order must state the former spouse's share as—

(i) A fixed amount;

(ii) A percentage or a fraction of the employee annuity; or

(iii) A formula that does not contain any variables whose values are not readily ascertainable from the face of the court order directed at employee annuity or normal OPM files.

(2) Normal OPM files include information about—

(i) The dates of employment for all periods of creditable civilian and military service;

(ii) The rate of basic pay for all periods of creditable civilian service;

(iii) The annual rates of basic pay for each grade and step under the General Schedule since 1920;

(iv) The amount of premiums for basic and optional life insurance under the Federal Employees Group Life Insurance Program;

(v) The amount of the Government and the employee shares of premiums for any health insurance plan under the Federal Employees Health Benefits Program;

(vi) The standard Federal income tax withholding tables;

(vii) The amount of cost-of-living adjustments under section 8340 or section 8462 of title 5, United States Code, and the amount of the percentage change in the national index on which the adjustment is based;

(viii) The amount of pay adjustments to the General Schedule under section 5303 (or section 5305 prior to November 5, 1990) of title 5, United States Code, and the amount of the percentage change in the national index on which the adjustment is based;

(ix) The provision of law under which a retiree has retired; and

(x) Whether a retiree has elected to provide survivor benefits for a current spouse, former spouse, or a person with an insurable interest.

(c)(1) A court order directed at employee annuity is not a court order acceptable for processing if OPM would have to examine a State statute or court decision (on a different case) to understand, establish, or evaluate the formula for computing the former spouse's share of the employee annuity.

(2) A court order directed at employee annuity is not a court order acceptable for processing if it awards the former spouse a "community property" fraction, share, or percentage of the employee annuity and does not provide a formula by which OPM can compute the amount of the former spouse's share of the employee annuity from the face of the court order or from normal OPM files.

(d) A court order directed at employee annuity is not a court order acceptable for processing if the court order awards a portion of the "present value" of an annuity unless the amount of the "present value" is stated in the court order.

(e) A court order directed at employee annuity is not a court order acceptable for processing if the court order directs OPM to determine a rate of employee annuity that would require OPM to determine a salary or average salary, other than a salary or average salary actually used in computing the employee annuity, as of a date prior to the date of the employee's separation and to adjust that salary for use in computing the former spouse share unless the adjustment is by—

(1) A fixed amount or fixed annual amounts that are stated in the order;

(2) The rate of cost-of-living or salary adjustments as those terms are described in § 838.622;

(3) The percentage change in pay that the employee actually received excluding changes in grade and/or step; or

(4) The percentage change in either of the national indices used to compute cost-of-living or salary adjustments as those terms are described in § 838.622.

§ 838.306 Specifying type of annuity for application of formula, percentage or fraction.

(a) A court order directed at employee annuity that states the former spouse's share of employee annuity as a formula, percentage, or fraction is not a court order acceptable for processing unless OPM can determine the type of annuity on which to apply the formula, percentage, or fraction.

(b) The standard types of annuity to which OPM can apply the formula, percentage, or fraction are net annuity, gross annuity, or self-only annuity, which are defined in § 838.103. Unless the court order otherwise directs, OPM will apply the formula, percentage, or fraction to gross annuity. Section 838.625 contains information on other methods of describing these types of annuity.

Subpart D—Procedures for Processing Court Orders Affecting Refunds of Employee Contributions

Regulatory Structure

§ 838.401 Purpose and scope.

(a) This subpart regulates the procedures that the Office of Personnel Management will follow upon the receipt of claims arising out of State court orders that affect refunds of employee contributions under CSRS or FERS. OPM must comply with court orders, decrees, or court-approved property settlements in connection with divorces, annulments of marriages, or legal separations of employees or retirees that—

(1) Award a portion of a refund of employee contributions to a former spouse; or

(2) If the requirements of §§ 838.431 and 838.505 are met, bar payment of a refund of employee contributions.

(b) This subpart prescribes—

(1) The circumstances that must occur before refunds of employee contributions are available to satisfy a court order acceptable for processing; and

(2) The procedures that a former spouse must follow when applying for a portion of a refund of employee contributions based on a court order under section 8345(j) or section 8467 of title 5, United States Code.

(c)(1) Subpart E of this part contains the rules that a court order directed at a refund of employee contributions must satisfy to be a court order acceptable for processing.

(2) Subpart F of this part contains definitions that OPM uses to determine the effect on a refund of employee contributions of a court order acceptable for processing.

Availability of Funds

§ 838.411 Amounts subject to court orders.

(a)(1) Refunds of employee contributions are subject to court orders acceptable for processing only if all of the conditions necessary for payment of the refund of employee contributions to the separated employee have been met, including, but not limited to—

(i) Separation from a covered position in the Federal service;

(ii) Application for payment of the refund of employee contributions by the separated employee; and

(iii) Immediate entitlement to a refund of employee contributions.

(2) Money held by an employing agency or OPM that may be payable at some future date is not available for payment under court orders directed at refunds of employee contributions.

(b) Payment under a court order may not exceed the amount of the refund of employee contributions.

Application and Processing Procedures

§ 838.421 Application requirements.

(a) A former spouse (personally or through a representative) must apply in writing to be eligible for a court-awarded portion of a refund of employee contributions. No special form is required.

(b) The application letter must be accompanied by—

(1) A certified copy of the court order acceptable for processing that is directed at a refund of employee contributions.

(2) A certification from the former spouse or the former spouse's representative that the court order is currently in force and has not been amended, superseded, or set aside;

(3) Information sufficient for OPM to identify the employee or separated employee, such as his or her full name, CSRS or FERS claim number, date of birth, and social security number;

(4) The current mailing address of the former spouse; and

(5) If the employee or separated employee has not applied for a refund of employee contributions, the current mailing address of the employee or separated employee.

§ 838.422 Timeliness of application.

(a) Except as provided in § 838.431 and paragraph (b) of this section, a court order acceptable for processing that is directed at a refund of employee contributions is not effective unless OPM receives the documentation required by § 838.421 not later than—

(1) The last day of the second month before payment of the refund; or

(2) Twenty days after OPM receives the Statement required by § 831.2007(c) or § 843.208(b) of this chapter if the former spouse has indicated on that Statement that such a court order exists.

(b) If OPM receives a copy of a court order acceptable for processing that is directed at a refund of employee contributions but not all of the documentation required by § 838.421, OPM will notify the former spouse that OPM must receive the missing items within 15 days after the date of the notice or OPM cannot comply with the court order.

§ 838.423 OPM action on receipt of a court order acceptable for processing.

(a) If OPM receives a court order acceptable for processing that is directed at a refund of employee contributions, OPM will inform—

(1) The former spouse—

(i) That the court order is acceptable for processing;

(ii) Of the date on which OPM received the court order;

(iii) Whether OPM has a record of unrefunded employee contributions on the employee;

(iv) That the former spouse's share of the refund of employee contributions cannot be paid unless the employee separates from the Federal service and applies for a refund of employee contributions;

(v) To the extent possible, the formula that OPM will use to compute the former spouse's share of a refund of employee contributions; and

(vi) That, if the former spouse disagrees with the formula, the former spouse must obtain, and submit to OPM, an amended court order clarifying the amount; and

(2) The employee or separated employee—

(i) That the former spouse has applied for benefits under this subpart;

(ii) That the court order is acceptable for processing and that OPM must comply with the court order;

(iii) Of the date on which OPM received the court order;

(iv) That the former spouse's share of the refund of employee contributions cannot be paid unless the employee separates from the Federal service and applies for a refund of employee contributions;

(v) To the extent possible, the formula that OPM will use to compute the former spouse's share of the refund of employee contributions; and

(vi) That, if he or she contests the validity of the court order, he or she must obtain, and submit to OPM, a court order invalidating the court order submitted by the former spouse; and

(vii) That, if he or she disagrees with the formula, he or she must obtain, and submit to OPM, an amended court order clarifying the amount.

(b) The failure of OPM to provide, or of the employee or separated employee or the former spouse to receive, the information specified in this section does not affect the validity of payment under the court order.

§ 838.424 OPM action on receipt of a court order not acceptable for processing.

If OPM receives an application from a former spouse not based on a court order acceptable for processing, OPM will inform the former spouse that OPM cannot approve the application and provide the specific reason(s) for disapproving the application. Examples of reasons for disapproving an application include that the order does not meet the definition of court order in § 838.103 or does not meet one or more of the requirements of subpart E of this part.

§ 838.425 Contesting the validity of court orders.

(a) An employee or separated employee who alleges that a court order is invalid must prove the invalidity of the court order by submitting a court order that—

(1) Declares invalid the court order submitted by the former spouse; or

(2) Sets aside the court order submitted by the former spouse.

(b) OPM must honor a court order acceptable for processing that appears to be valid and that the former spouse has certified is currently in force and has not been amended, superseded, or set aside, until the employee or separated employee submits a court order described in paragraph (a) of this section or a court order amending or superseding the court order submitted by the former spouse.

Payment Procedures

§ 838.431 Correcting failures to provide required spousal notification.

The interests of a former spouse with a court order acceptable for processing that is directed at a refund of employee contributions who does not receive notice of an application for refund of employee contributions because the employee or separated employee submits fraudulent proof of notification or fraudulent proof that the former spouse's whereabouts are unknown are protected if, and only if—

(a) The former spouse files a court order acceptable for processing that affects or bars the refund of employee contributions with OPM no later than the last day of the second month before the payment of the refund; or

(b) The former spouse submits proof that—

(1) The evidence submitted by the employee was fraudulent; and

(2) Absent the fraud, the former spouse would have been able to submit the necessary documentation required by § 838.421 within the time limit prescribed in § 838.422.

§ 838.432 Court orders barring payment of refunds.

A court order, notice, summons, or other document that attempts to restrain OPM from paying a refund of employee contributions is not effective unless it meets all the requirements of § 838.505 or part 581 of this chapter.

Procedures for Computing the Amount Payable

§ 838.441 Computing lengths of service.

(a) The smallest unit of time that OPM will calculate in computing a formula in a court order is a month, even where the court order directs OPM to make a more precise calculation.

(b) If the court order states a formula using a specified simple or decimal fraction other than twelfth parts of a year, OPM will use the specified number to perform simple mathematical computations.

Subpart E—Requirements for Court Orders Affecting Refunds of Employee Contributions

§ 838.501 Purpose and scope.

This subpart regulates the requirements that a court order directed at or barring a refund of employee contributions must meet to be a court order acceptable for processing.

(a) A court order is directed at a refund of employee contributions if it awards a former spouse a portion of a refund of employee contributions.

(b) A court order bars a refund of employee contributions if it prohibits payment of a refund of employee contributions to preserve a former spouse's court-awarded entitlement to a portion of an employee annuity or to a former spouse survivor annuity.

§ 838.502 Expressly dividing a refund of employee contributions.

(a) A court order directed at a refund of employee contributions is not a court order acceptable for processing unless it expressly awards a former spouse a portion of a refund of employee contributions as provided in paragraph (b) of this section.

(b) To expressly award a former spouse a portion of a refund of employee contributions as required by paragraph (a) of this section, the court order must—

(1) Identify the retirement system using terms that are sufficient to identify the retirement system as explained in § 838.611; and

(2) Expressly state that the former spouse is entitled to a portion of a refund of employee contributions using terms that are sufficient to identify the refund of employee contributions as explained in § 838.612.

§ 838.503 Providing for payment to the former spouse.

(a) A court order directed at a refund of employee contributions is not a court order acceptable for processing unless it provides for OPM to pay a portion of a refund of employee contributions to the former spouse as provided in paragraph (b) of this section.

(b) To provide for OPM to pay a portion of a refund of employee contributions to the former spouse as required by paragraph (a) of this section, the court order must—

(1) Expressly direct OPM to pay the former spouse directly;

(2) Direct the employee or separated employee to arrange or to execute forms for OPM to pay the former spouse directly; or

(3) Be silent concerning who is to pay the portion of the refund of employee contributions awarded to the former spouse.

(c) Although paragraphs (b)(2) and (b)(3) of this section provide acceptable methods for satisfying the requirement that the court order provide for OPM to pay the former spouse, OPM strongly recommends that the court order expressly direct OPM to pay the former spouse directly.

§ 838.504 OPM computation of formulas.

(a) A court order directed at a refund of employee contributions is not a court order acceptable for processing unless the court order provides sufficient instructions and information so that OPM can compute the amount of the former spouse's share of the refund of employee contributions using only the express language of the court order, subparts A, D, and F of this part, and information from normal OPM files.

(b) To provide sufficient instructions and information that OPM can compute the amount of the former spouse's share of the refund of employee contributions as required by paragraph (a) of this section requires that the court order state the former spouse's share as—

(1) A fixed amount;

(2) A percentage or a fraction of the refund of employee contributions; or

(3) A formula that does not contain any variables whose values are not readily ascertainable from the face of the court order or normal OPM files.

(c) A court order directed at a refund of employee contributions is not a court order acceptable for processing if OPM would have to examine a State statute or court decision (on a different case) to understand, establish, or evaluate the formula for computing the former spouse's share of the refund of employee contributions.

§ 838.505 Barring payment of refunds.

A court order barring payment of a refund of employee contributions is not a court order acceptable for processing unless—

(a) It expressly directs OPM not to pay a refund of employee contributions;

(b) It awards, or a prior court order acceptable for processing has awarded, the former spouse a former spouse survivor annuity or a portion of the employee annuity; and

(c) Payment of the refund of employee contributions would prevent payment to the former spouse under the court order described in paragraph (b) of this section.

Subpart F—Terminology Used in Court Orders Affecting Employee Annuities or Refunds of Employee Contributions

Regulatory Structure

§ 838.601 Purpose and scope.

(a) This subpart regulates the meaning of terms necessary to award benefits in a court order directed at an employee annuity or a refund of employee contributions. OPM applies the meanings to determine whether a court order directed at an employee annuity or a refund of employee contributions is a court order acceptable for processing and to establish the amount of the former spouse's share of an employee annuity or a refund of employee contributions.

(b)(1) This subpart establishes a uniform meaning to be used for terms and phrases frequently used in awarding a former spouse a portion of an employee annuity or a refund of employee contributions.

(2) This subpart informs the legal community about the definitions to apply terms used in drafting court orders so that the resulting court orders contain the proper language to accomplish the aims of the court.

(c) (1) To assist attorneys and courts in preparing court orders that OPM can honor in the manner that the court intends, Appendix A of this subpart contains model language to accomplish many of the more common objectives associated with the award of a former spouse's share of an employee annuity or a refund of employee contributions.

(2) By using the language in Appendix A of this subpart, the court, attorneys, and parties will know that the court order will be acceptable for processing and that OPM will treat the terminology used in the court order in the manner stated in the Appendix.

Identification of Benefits

§ 838.611 Identifying the retirement system.

(a) To satisfy the requirements of § 838.303(b)(1) or § 838.502(b)(1), a court order must contain language identifying the retirement system to be affected. For example, "CSRS," "FERS," "OPM," or "Federal Government" benefits, or benefits payable "based on service with the U.S. Department of Agriculture," etc., are sufficient identification of the retirement system.

(b) Except as provided in paragraphs (b)(1) and (b)(2) of this section, language referring to benefits under another retirement system, such as military retired pay, Foreign Service retirement benefits or Central Intelligence Agency retirement benefits, does not satisfy the requirements of § 838.303(b)(1) or § 838.502(b)(1).

(1) A court order that mistakenly labels CSRS benefits as FERS benefits and vice versa satisfies the requirements of § 838.303(b)(1) and § 838.502(b)(1).

(2) Unless the court order expressly provides otherwise, for employees transferring to FERS, court orders directed at CSRS benefits apply to the entire FERS basic benefit, including the CSRS component, if any. Such a court order satisfies the requirements of § 838.303(b)(1) and § 838.502(b)(1).

(c) A court order affecting military retired pay, even when military retired pay has been waived for inclusion in CSRS annuities, does not award a former spouse a portion of an employee annuity or a refund of employee contributions under CSRS or FERS. Such a court order does not satisfy the requirements of § 838.303(b)(1) or § 838.502(b)(1).

§ 838.612 Distinguishing between annuities and contributions.

(a) A court order using "annuities," "pensions," "retirement benefits," or similar terms satisfies the requirements of § 838.303(b)(2) and § 838.502(b)(2) and may be used to divide an employee annuity and a refund of employee contributions.

(b) (1) A court order using "contributions," "deductions," "deposits," "retirement accounts," "retirement fund," or similar terms satisfies the requirements of § 838.502(b)(2) and may be used only to divide the amount of contributions that the employee has paid into the Civil Service Retirement and Disability Fund.

(2) Unless the court order specifically states otherwise, when an employee annuity is payable, a court order using the terms specified in paragraph (b)(1) of this section satisfies the requirements of § 838.303(b)(2) and awards the former spouse a benefit to be paid in equal monthly installments at 50 percent of the gross annuity at the time of retirement or the date of the court order, whichever comes later, until the specific dollar amount is reached.

Computation of Benefits

§ 838.621 Prorata share.

(2) *Prorata share* means one-half of the fraction whose numerator is the number of months of Federal civilian and military service that the employee performed during the marriage and whose denominator is the total number of months of Federal civilian and military service performed by the employee.

(b) A court order that awards a former spouse a prorata share of an employee annuity or a refund of employee contributions by using the term *prorata share* and identifying the date when the marriage began satisfies the requirements of § 838.305 and § 838.504 awards the former spouse a prorata share as defined in paragraph (a) of this section.

(c) A court order that awards a portion of an employee annuity as of a specified date before the employee's retirement awards the former spouse a prorata share as defined in paragraph (a) of this section.

(d) A court order that awards a portion of the "value" of an annuity as of a specific date before retirement, without specifying what "value" is, awards the former spouse a prorata share as defined in paragraph (a) of this section.

§ 838.622 Cost-of-living and salary adjustments.

(a)(1) A court order that awards adjustments to a former spouse's portion of an employee annuity stated in terms such as "cost-of-living adjustments" or "COLA's" occurring after the date of the decree but before the date of retirement provides increases equal to the adjustments described in or effected under section 8340 or section 8462 of title 5, United States Code.

(2) A court order that awards adjustments to a former spouse's portion of an employee annuity stated in terms such as "salary adjustments" or "pay adjustments" occurring after the date of the decree provides increases equal to the adjustments described in or effected under section 5303 of title 5, United States Code until the date of retirement.

(b)(1) Unless the court order directly and unequivocally orders otherwise, a court order that awards a former spouse a portion of an employee annuity either on a percentage basis or by use of a fraction or formula provides that the former spouse's share of the employee annuity will be adjusted to maintain the same percentage or fraction whenever the employee annuity changes as a result of—

(i) Salary adjustments occurring after the date of the decree and before the employee retires; and

(ii) Cost-of-living adjustments occurring after the date of the decree and after the date of the employee's retirement.

(2) A court order that awards a former spouse a specific dollar amount from the employee annuity prevents the former spouse from benefiting from salary and cost-of-living adjustments after the date of the decree, unless the court expressly orders their inclusion.

(c)(1)(i) Except as provided in paragraph (b) of this section, a court order that contains a general instruction to calculate the former spouse's share effective at the time of divorce or separation entitles the former spouse to the benefit of salary adjustments occurring after the specified date to the same extent as the employee.

(ii) To prevent the application of salary adjustments after the date of the divorce or separation, the court order must either state the exact dollar amount of the award to the former spouse or specifically instruct OPM not to apply salary adjustments after the specified date in computing the former spouse's share of the employee annuity.

(2)(i) Except as provided in paragraph (b) of this section, a court order that requires OPM to compute a benefit as of a specified date before the employee's retirement, and specifically instructs OPM not to apply salary adjustments after the specified date in computing the former spouse's share of an employee annuity provides that the former spouse is entitled to the application of COLA's after the date of the employee's retirement in the manner described in § 838.241.

(ii) To award COLA's between a specified date and the employee's retirement, the court order must specifically instruct OPM to adjust the former spouse's share of the employee annuity by any COLA's occurring between the specified date and the date of the employee's retirement.

(iii) To prevent the application of COLA's that occur after the employee annuity begins to accrue to the former spouse's share of the employee annuity, the decree must either state the exact dollar amount of the award to the former spouse or specifically instruct OPM not to apply COLA's occurring after the date of the employee's retirement.

§ 838.623 Computing lengths of service.

(a) Sections 838.242 and 838.441 contain information on how OPM calculates lengths of service.

(b) Unless the court order otherwise expressly directs—

(1) For the purpose of describing a period of time to be excluded from any element of a computation, the term *military service* means military service as defined in section 8331(13) of title 5, United States Code, and does not include civilian service with the Department of Defense or the Coast Guard; and

(2) For the purpose of describing a period of time to be included in any element of a computation, the term *military service* means all periods of military and civilian service performed with the Department of Defense or the Coast Guard.

(c)(1) When a court order contains a formula for dividing employee annuity that requires a computation of service worked as of a date prior to separation and using terms such as "years of service," "total service," "service performed," or similar terms, the time attributable to unused sick leave will not be included.

(2) When a court order contains a formula for dividing employee annuity that requires a computation of "creditable service" (or some other phrase using "credit" or its equivalent) as of a date prior to retirement, unused sick leave will be included in the computation as follows:

(i) If the amount of unused sick leave is specified, the court order awards a portion of the employee annuity equal to the monthly employee annuity at retirement times a fraction, the numerator of which is the number of months of "creditable service" as of the date specified plus the number of months of unused sick leave specified (which sum is rounded to eliminate partial months) and whose denominator is the months of "creditable service" used in the retirement computation.

(ii) If the amount of unused sick leave is not specified, the court order awards a portion of the employee annuity equal to the monthly rate at the time of retirement times a fraction, the numerator of which is the number of months of "creditable service" as of the date specified (no sick leave included) and whose denominator is the number of months of "creditable service" used in the retirement computation (sick leave included).

(d)(1) General language such as "benefits earned as an employee with the U.S. Postal Service * * *." provides only that CSRS retirement benefits are subject to division and does not limit the period of service included in the computation (i.e., service performed with other Government agencies will be included).

(2) To limit the computation of benefits to a particular period of employment, the court order must—

(i) Use language expressly limiting the period of service to be included in the computation (e.g., "only U.S. Postal Service" or "exclusive of any service other than U.S. Postal Service employment"); or

(ii) Specify the number of months to be included in the computation; or

(iii) Describe specifically the period of service to be included in the computation (e.g., "only service performed during the period Petitioner and Defendant were married" or "benefits based on service performed through the date of divorce").

§ 838.624 Distinguishing between formulas and fixed amounts.

(a) A court order that contains both a formula or percentage instruction and a dollar amount is deemed to include the dollar amount only as the court's estimate of the initial amount of payment. The formula or percentage instruction controls.

(b) A court order that awards a portion of the "present value" of an employee annuity and specifically states the amount of either the "present value" of the employee annuity or of the award is deemed to give the former spouse "a specific dollar amount" that is payable from a monthly employee annuity and will be paid as a lump-sum award in accordance with § 838.235.

§ 838.625 Types of annuity.

(a) Terms that are synonymous with net annuity are—

(1) Disposable annuity; and

(2) Retirement check.

(b) Terms that are synonymous with self-only annuity are—

(1) Life rate annuity;

(2) Unreduced annuity; and

(3) Annuity without survivor benefit.

(c) All court orders that do not specify net annuity or self-only annuity apply to gross annuity.

Model Paragraphs

Appendix A to Subpart F of Part 838—Recommended Language for Court Orders Dividing Employee Annuities

This appendix provides recommended language for use in court orders attempting to divide employee annuity. A court order directed at employee annuity should include five elements:

• Identification of the benefits;

• Instructions that OPM pay for the former spouse;

• A method for computing the amount of the former spouse's benefit;

• Identification of the type of annuity to which to apply a fraction, percentage or formula; and

• Instructions on what OPM should do if the employee leaves Federal service before retirement and applies for a refund of employee contributions. The court order may also include instructions for disposition of the former spouse's share if the former spouse dies before the employee. By using the model language, courts will know that the court order will have the effect described in this appendix.

The model language in this appendix does not award a benefit that is payable after the death of the employee. A separate, distinct award of a former spouse survivor annuity is necessary to award a former spouse a benefit that is payable after the death of the employee. Appendix A to subpart I of this part contains model language for awarding survivor annuities and contains some examples that award both a portion of an employee annuity and a survivor annuity.

The model language uses the terms "(former spouse)" to identify the spouse who is receiving a former spouse's portion of an employee annuity and "(employee)" to identify the Federal employee whose employment was covered by the Civil Service Retirement System or the Federal Employees Retirement System. Obviously, in drafting an actual court order the appropriate terms, such as "Petitioner" and "Respondent," or the names of the parties should replace "(former spouse)" and "(employee)."

Similarly, the models are drafted for employees covered by the Civil Service Retirement System. The name of the retirement system should be changed for employees covered by the Federal Employees Retirement System.

Table of Contents

100 Series—Identification of the Benefits and Instructions That OPM Pay the Former Spouse

¶ 101 Identifying retirement benefits and directing OPM to pay the former spouse.

Using the following paragraph will expressly divide employee annuity to satisfy the requirements of § 838.303 and direct OPM to pay the former spouse a share of an employee annuity to satisfy the requirements of § 838.304.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Insert language for computing the former spouse's share from 200 series of this appendix.] The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

¶ 102–110 [Reserved].

¶ 111 Protecting a former spouse entitled to military retired pay.

Using the following paragraph will protect the former spouse interest in military retired pay in the event that the employee waives the military retired pay to allow crediting the military service under CSRS or FERS. The paragraph should be used only if the former spouse is awarded a portion of the military retired pay.

"If [Employee] waives military retired pay to credit military service under the Civil Service Retirement System, [insert language for computing the former spouse's share from 200 series of this appendix.]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

200 Series—Computing the Amount of the Former Spouse's Benefit.

Paragraphs 201 through 204 contain model language for the most common types of awards that court orders make to former spouses. Subsequent paragraphs in the 200 series contain model language for less common, more complex awards.

Awards other than fixed amounts require that the court order specify the type of annuity ("gross," "net," or self-only) on which the award is computed. The types of annuity are defined in § 838.103. Variations on type of annuity are covered by the 300 series of this appendix.

¶ 201 Award of a fixed monthly amount.

Using the following paragraph will award the former spouse a fixed monthly amount. OPM will not apply COLA's to a fixed monthly amount unless the court order expressly directs that OPM add COLA's using the language in ¶ 231 of this appendix or similar language.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to $[insert a number] per month from [employee]'s civil service retirement benefits. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

¶ 202 Award of a percentage.

Using the following paragraph will award the former spouse a stated percentage of the employee annuity. Unless the court order expressly directs that OPM not add COLA's to the former spouse's share of the employee annuity, OPM will add COLA's to keep the former spouse's share at the stated percentage. Paragraph 232 of this appendix provides language for excluding COLA's.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to [insert a number] percent of [employee]'s [insert "gross," "net," or "self-only"] monthly annuity under the Civil Service Retirement System. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

¶ 203 Award of a fraction.

Using the following paragraph will award the former spouse a stated fraction of the employee annuity. Unless the court order expressly directs that OPM not add COLA's to the former spouse's share of the employee annuity, OPM will add COLA's to keep the former spouse's share at the stated percentage. Paragraph 232 of this appendix provides language for excluding COLA's.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to [insert fraction]ths of [employee]'s [insert "gross," "net," or "self-only"] monthly annuity under the Civil Service Retirement System. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

¶ 204 Award of a prorata share.

Using the following paragraph will award the former spouse a prorata share of the employee annuity. Prorata share is defined in § 838.621. To award a prorata share the court order must state the date of the marriage. Unless the court order specifies a different ending date, the marriage ends for computation purposes on the date that the court order is filed with the court clerk. Unless the court order expressly directs that OPM not add COLA's to the former spouse's share of the employee annuity, OPM will add COLA's to keep the former spouse's share at the stated percentage. Paragraph 232 of this appendix provides language for excluding COLA's.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to a prorata share of [employee]'s [insert "gross," "net," or self-only] monthly annuity under the Civil Service Retirement System. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

¶ 205–210 [Reserved].

¶ 211 Award based on a stated formula.

Using the following paragraphs will award the former spouse a share of the employee annuity based on a formula stated in the court order. The formula must be stated in the court order (including a court-approved property settlement agreement). The formula may not be incorporated by reference to a statutory provision or a court decision in another case. If the court order uses a formula, the court order must include any data that is necessary for OPM to apply the formula unless the necessary data is contained in normal OPM files.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to a share of [employee]'s [insert "gross," "net," or self-only] monthly annuity under the Civil Service Retirement System to be computed as follows:

"[Insert formula for computing the former spouse's share.]

"The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

¶ 212–230 [Reserved].

¶ 231 Awarding COLA's on fixed monthly amounts.

Using the following paragraph will award COLA's in addition to a fixed monthly amount to the former spouse. The model awards COLA's at the same rate applied to the employee annuity.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to $[insert a number] per month from [employee]'s civil service retirement benefits. When COLA's are applied to [employee]'s retirement benefits, the same COLA applies to [former spouse]'s share. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

¶ 232 Excluding COLA's on awards other than fixed monthly amounts.

Using the following paragraph will prevent application of COLA's to a former spouse's share of an employee annuity in cases where the former spouse has been awarded a percentage, fraction or prorata share of the employee annuity, rather than a fixed dollar amount.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Insert language for computing the former spouse's share from ¶202, ¶203, ¶204, or ¶211 of this appendix.] The United States Office of Personnel Management is directed to determine the amount of [former spouse]'s share on the date [insert "when [employee] retires" if the employee has not retired, or "of this order" if the employee is already retired] and not to apply COLA's to that amount. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

300 Series—Types of Annuity

Awards of employee annuity to a former spouse (other than awards of fixed dollar amounts) must specify whether OPM will use the "gross," "net," or self-only annuity as defined in § 838.103 in determining the amount of the former spouse's entitlement. The court order may contain a formula that has the effect of creating other types of annuity, but the court order may only do this by providing a formula that starts from "gross," "net," or self-only annuity as defined in § 838.103.

¶ 301 Awards based on benefits actually paid.

The court order may include a formula that effectively uses the court's definition of net annuity rather than the one provided by § 838.103. For example, using the following paragraph will award the former spouse a prorata share of the employee annuity reduced only by the amount deducted as premiums for basic life insurance under the Federal Employee Group Life Insurance Program.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to a prorata share of [employee]'s monthly annuity under the Civil Service Retirement System, where monthly annuity means the self-only annuity less the amount deducted as premiums for basic life insurance under the Federal Employee Group Life Insurance Program. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

¶302–310 [Reserved].

¶311 Awards of earned annuity in cases where the actual annuity is based on disability.

Using the following paragraph will award a former spouse a prorata share of what the employee annuity would have been based on only the employee's actual service in cases where the actual employee annuity is based on disability. The paragraph also allows the court order to provide for the former spouse's share to begin when the employee reaches a stated age, using age 62 as an example. As with all other formulas the court order must specify whether the computation applies to "gross," "net," or self-only annuity. OPM will apply COLA's that occurred after the date of the disability retirement to the former spouse's share. The following paragraph should be used only for disability retirees under CSRS. Under FERS, section 8452 of title 5, United States Code, provides a formula for recomputation of disability annuities at age 62 to approximate an earned annuity. Therefore to award a portion of the "earned" benefit under FERS add the introductory phrase, "Starting when [employee] reaches age 62," to the paragraph describing how to compute the amount.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United State's Government. Starting when [employee] reaches age 62, [former spouse] is entitled to a prorata share of [employee]'s [insert "gross," "net," or self-only] monthly annuity under the Civil Service Retirement System, where monthly annuity means the amount of [employee]'s monthly annuity computed as though [employee] had retired on an immediate, nondisability annuity on the commencing date of [employee]'s annuity based on disability. In computing the amount of the immediate annuity, the United States Office of Personnel Management will deem [employee] to have been age 62 at the time that [employee] retired on disability. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

400 Series—Refunds of Employee Contributions

Court orders that award a former spouse a portion of a future employee annuity of an employee who is not then eligible to retire should include an additional paragraph containing instructions that tell OPM what to do if the employee separates before becoming eligible to retire and requests a refund of employee contributions. The court order may award the former spouse a portion of the refund of employee contributions or bar payment of the refund of employee contributions.

¶401 Barring payment of a refund of employee contributions.

Using the following paragraph will bar payment of the refund of employee contributions if payment of the refund of employee contributions would extinguish the former spouse's entitlement to a portion of the employee annuity.

"The United States Office of Personnel Management is directed not to pay [employee] a refund of employee contributions."

¶402 Dividing a refund of employee contributions.

Using the following paragraph will allow the refund of employee contributions to be paid but will award a prorata share of the refund of employee contributions to the former spouse. The sentence on the beginning date of the marriage is unnecessary if the beginning is stated elsewhere in the order. The award of a prorata share is used only as an example; the court order could provide another fraction, percentage, or formula, or a fixed amount. Note that a refund of employee contributions voids the employee's rights to an employee annuity and the former spouse's right to any portion of that annuity.

"If [employee] becomes eligible and applies for a refund of employee contributions, [former spouse] is entitled to a prorata share of the refund of employee contributions. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

500 Series—Death of the former spouse.

¶501 Full annuity restored to the retiree.

No special provision is necessary to restore the entire annuity to the retiree upon the death of the former spouse. Unless the court order expressly provides otherwise, OPM will pay the former spouse's share to the retiree after the death of the former spouse.

¶502 Former spouse share paid to children.

Using the following paragraph will award the former spouse's share of an employee annuity to the children, including any adopted children, of the employee and former spouse.

"If [former spouse] dies before [employee], the United States Office of Personnel Management is directed to pay [former spouse]'s share of [employee]'s civil service retirement benefits to surviving children of the marriage including any adopted children, in equal shares. Upon the death of any child, that child's share will be distributed among the other surviving children."

The language may be modified to terminate the payments to the children when they reach a stated age. A court order that includes such a provision for termination must include sufficient information (such as the children's dates of birth) to permit OPM to determine when the children's interest terminate. OPM will not consider evidence outside the court order (and normal OPM files) to establish the children's dates of birth.

¶503 Former spouse share paid to the court.

Using the following paragraph will provide for payment of the former spouse's share of an employee annuity to the court after the death of the former spouse. This would allow a court officer to administer the funds.

"If [former spouse] dies before [employee], the United States Office of Personnel Management is directed to pay [former spouse]'s share of [employee]'s civil service retirement benefits to this court at the following address:

"[Insert address and where checks should be sent. The address may be up to six lines and should include sufficient information for court officials to credit the correct account.]"

Subpart G—Procedures for Processing Court Orders Awarding Former Spouse Survivor Annuities

Regulatory Structure

§ 838.701 Purpose and scope.

(a) This subpart regulates the procedures that the Office of Personnel Management will follow upon the receipt of claims arising out of State court orders awarding former spouse survivor annuities and under CSRS or FERS (including the FERS basic employee death benefit as defined in § 843.602 of this chapter). OPM must comply with qualifying court orders, decrees, or court-approved property settlements in connection with divorces, annulments of marriages, or legal separations of employees or retirees that award former spouse survivor annuities.

(b) This subpart prescribes—

(1) The commencing and terminating dates of former spouse survivor annuities based on court orders acceptable for processing; and

(2) The procedures that a former spouse must follow when applying for a former spouse survivor annuity based on a court order under section 8341(h) or section 8445 of title 5, United States Code.

(c) (1) Subpart H of this part contains the rules that a court order must satisfy to be court order acceptable for processing to award a former spouse survivor annuity.

(2) Subpart I of this part contains definitions that OPM uses to determine the effect of a court order in connection with a former spouse survivor annuity.

Limitations of Survivor Annuities

§ 838.711 Maximum former spouse survivor annuity.

(a) Under CSRS, payment under a court order may not exceed the amount provided in § 831.614 of this chapter.

(b) Under FERS, payments under a court order may not exceed amount provided in § 842.613 of this chapter plus the basic employee death benefit as defined in § 843.102 of this chapter.

Application and Processing Procedures

§ 838.721 Application requirements.

(a) (1) A former spouse (personally or through a representative) must apply in writing to be eligible for a former spouse survivor annuity based on a court order acceptable for processing. No special form is required to give OPM notice of the court order.

(2) OPM may require an additional application after the death of the employee, separated employee, or retiree. This additional application will be on a form prescribed by OPM.

(b)(1) The application letter under paragraph (a)(1) of this section must be accompanied by—

(i) A certified copy of the court order;

(ii) A certification from the former spouse or the former spouse's representative that the court order is currently in force and has not been amended, superseded, or set aside;

(iii) Information sufficient for OPM to identify the employee or retiree, such as his or her full name, CSRS or FERS claim number, date of birth, and social security number;

(iv) The current mailing address of the former spouse;

(v) If the employee has not retired or died, the mailing address of the employee; and

(vi) A statement in the form prescribed by OPM certifying—

(A) That the former spouse has not remarried before age 55;

(B) That the former spouse will notify OPM within 15 calendar days of the occurrence of any remarriage before age 55; and

(C) That the former spouse will be personally liable for any overpayment to him or her resulting from a remarriage before age 55.

(2) OPM may subsequently require recertification of the statements required by this paragraph.

§ 838.722 OPM action on receipt of a court order acceptable for processing.

(a) If OPM receives a court order acceptable for processing that awards a former spouses survivor annuity based on the service of a living retiree, OPM will inform—

(1) The former spouse—

(i) That the court order is acceptable for processing;

(ii) Of the date on which OPM received the court order; and

(iii) Of the present amount of the monthly former spouse survivor annuity if the retiree were to die immediately and the formula OPM used to compute the monthly benefit; and

(2) The retiree—

(i) That the former spouse has applied for benefits under this subpart;

(ii) That the court order is acceptable for processing and that OPM must comply with the court order;

(iii) Of the date on which OPM received the court order;

(iv) Of the amount and commencing date of the reduction in the retiree's annuity;

(v) Of the present amount of the monthly former spouse survivor annuity if the retiree were to die immediately and the formula OPM used to compute the amount of the former spouse survivor annuity; and

(vi) That, if he or she contests the validity of the court order, he or she must obtain, and submit to OPM, a court order invalidating the court order submitted by the former spouse.

(b) If OPM receives a court order acceptable for processing that awards a former spouse survivor annuity, but the employee, separated employee, or retiree has died OPM will inform—

(1) The former spouse—

(i) That the court order is acceptable for processing;

(ii) Of the date on which OPM received the court order, the date on which the former spouse's benefit will begin to accrue, and if known the date on which OPM will commence payment under the court order; and

(iii) Of the amount on the monthly former spouse survivor annuity and the formula OPM used to compute the former spouse survivor annuity.

(2) Anyone whom OPM knows will be adversely affected by the court order—

(i) That the former spouse has applied for benefits under this subpart;

(ii) That the court order is acceptable for processing and that OPM must comply with the court order;

(iii) Of the date on which OPM received the court order;

(iv) How the court order may adversely affect him or her; and

(v) That, if he or she contests the validity of the court order, he or she must obtain, and submit to OPM, a court order invalidating the court order submitted by the former spouse.

(c) If OPM receives a court order acceptable for processing that awards a former spouse survivor annuity and the employee or separated employee has not retired or died, OPM will attempt to inform—

(1) The former spouse—

(i) That the court order is acceptable for processing;

(ii) To the extent possible, the formula that OPM will use to compute the former spouse survivor annuity (including the FERS basic employee death benefit as defined in § 843.602 of this chapter, if applicable); and

(iii) That, if he or she disagrees with the formula, he or she must obtain, and submit to OPM, an amended court order clarifying the amount before the employee or separated employee retires or dies; and

(2) The employee or separated employee—

(i) That the former spouse has applied for benefits under this subpart;

(ii) That the court order is acceptable for processing and that OPM must comply with the court order;

(iii) To the extent possible, the formula that OPM will use to compute the former spouse survivor annuity (including the FERS basic employee death benefit as defined in § 843.602 of this chapter, if applicable); and

(iv) That, if he or she—

(A) Contests the validity of the court order, he or she must obtain, and submit to OPM, a court order invalidating the court order submitted by the former spouse; or

(B) Disagrees with the formula, he or she must obtain, and submit to OPM, an amended court order clarifying the amount before he or she retires or dies.

(d) The failure of OPM to provide, or of the employee, separated employee, or retiree, the former spouse, or anyone else to receive, the information specified in this section does not affect—

(1) The validity of payment under the court order; or

(2) The commencing date of the reduction in employees annuity or the commencing date of the former spouse entitlement as determined under § 838.731.

§ 838.723 OPM action on receipt of a court order not acceptable for processing.

If OPM receives an application from a former spouse not based on a court order acceptable for processing, OPM will inform the former spouse that OPM cannot approve the application and provide the specific reason(s) for disapproving the application. Examples of reasons for disapproving an application include that the order does not meet the definition of court order in § 838.103 or does not meet one or more of the requirements of subpart H of this part.

§ 838.724 Contesting the validity of court orders.

(a) An employee, retiree or person adversely affected by a court order who alleges that a court order is invalid must prove the invalidity of the court order by submitting to OPM a court order that—

(1) Declares invalid the court order submitted by the former spouse; or

(2) Sets aside the court order submitted by the former spouse.

(b) OPM must honor a court order acceptable for processing that appears to be valid and that the former spouse has certified is currently in force and has not been amended, superseded, or set aside, until the employee, separated employee, retiree, or person adversely affected by the court order submits to OPM a court order described in paragraph (a) of this section or, if issued before the retirement or death of the employee or separated employee, a court order acceptable for processing amending or superseding the court order submitted by the former spouse.

§ 838.725 Amended court orders.

OPM will not honor an amended court order that awards, increases, reduces, or eliminates a former spouse survivor annuity unless the amended court order is issued by the court on a day before the date of retirement or the date of death of the employee or separated employee.

§ 838.726 Effect on employee and retiree election rights.

(a) A court order acceptable for processing that awards a former spouse survivor annuity does not affect a retiring employee's or retiree's rights and obligations to make survivor elections under subpart F of part 831 of this chapter or subpart F of part 842 of this chapter.

(b) A court order acceptable for processing that awards a former spouse survivor annuity requires OPM to pay a former spouse survivor annuity and prevents OPM from paying an elected survivor benefit to a widow or widower or another former spouse if the election is inconsistent with the court order.

Payment Procedures

§ 838.731 Commencing date of payments.

(a) A former spouse survivor annuity based on a court order acceptable for processing begins to accrue in accordance with the terms of the court order but no earlier than the later of—

(1) The first day after the date of death of the employee, separated employee, or retiree; or

(2) The first day of the second month after OPM receives a copy of the court order acceptable for processing.

(b) OPM will not authorize payment of the former spouse survivor annuity until it receives an application and support documentation required under § 838.721.

§ 838.732 Termination of entitlement.

(a) A former spouse survivor annuity (other than the FERS basic employee death benefit as defined in § 843.602 of this chapter) or the right to a future former spouse survivor annuity based on a court order acceptable for processing terminates in accordance with the terms of the court order but no later than the last day of the month before the former spouse remarries before age 55 or dies.

(b) If the employee dies before the former spouse remarries before age 55 or dies, the former spouse's entitlement to the FERS basic employee death benefit as defined in § 843.602 of this chapter based on a court order acceptable for processing terminates in accordance with the terms of the court order.

§ 838.733 Rights of current and other former spouses after termination of a former spouse's entitlement.

(a) If a former spouse of a retiree loses entitlement to a former spouse survivor annuity based on a court order acceptable for processing while the retiree is living and—

(1) If court orders acceptable for processing award former spouse survivor annuities to other former spouses, OPM will continue the reduction to comply with court orders in the order specified in § 838.135;

(2) If paragraph (a)(1) of this section does not obligate the entire entitlement lost by the former spouse, OPM will continue the reduction to provide a current spouse survivor annuity or a former spouse survivor annuity based on a timely-filed election under § 831.604, § 831.605, § 831.612, § 831.613, § 842.603, § 842.604, § 842.611, or § 842.612, of this chapter; or

(3) If paragraphs (a)(1) and (a)(2) of this section do not obligate the entire entitlement lost by the former spouse, the retiree (except a retiree under CSRS who retired before May 7, 1985 and who remarried before February 27, 1986) may elect within 2 years after the former spouse loses entitlement to continue the reduction to provide a survivor annuity for a spouse acquired after retirement.

(b)(1) If a former spouse of an employee or retiree loses entitlement to a former spouse survivor annuity based on a court order acceptable for processing after the death of the employee or retiree and—

(i) If court orders acceptable for processing award former spouse survivor annuities to other former spouses, OPM will pay the next entitled former spouse in the order specified in § 838.135; or

(ii) If paragraph (b)(1) of this section does not obligate the entire entitlement lost by the former spouse, OPM will pay the balance to a current spouse of the deceased—

(A) Retiree who had elected a reduced annuity to provide a current spouse annuity (as defined in § 831.603 or § 842.602); or

(B) Employee.

(2) Except as provided in § 838.734—

(i) The former spouse survivor annuity based on paragraph (b)(1)(i) of this section begins to accrue in accordance with the terms of the court order but no earlier than the later of—

(A) The first day of the month in which the former spouse with the earlier-issued court order loses entitlement; or

(B) The first day of the second month after OPM receives a copy of the court order acceptable for processing; or

(ii) The current spouse annuity under paragraph (b)(1)(ii) of this section begins to accrue on the first day of the month in which the former spouse loses entitlement.

(c) OPM will not authorize payment of the former spouse survivor annuity until it receives an application and supporting documentation required under § 838.721.

§ 838.734 Payment of lump-sum awards by survivor annuity.

OPM will not honor court orders awarding lump-sum payments (other than the FERS basic employee death benefit as defined in § 843.602 of this chapter) to a former spouse upon the death of an employee or retiree.

§ 838.735 Cost-of-living adjustments.

(a) OPM applies cost-of-living adjustments to all former spouse survivor annuities in pay status at the time of the adjustment and in the amount provided by Federal statute.

(b) OPM will not honor provisions of a court order that alters the time or amount of cost-of-living adjustment or that attempts to prevent OPM from applying cost-of-living adjustments to a former spouse survivor annuity in pay status.

Subpart H—Requirements for Court Orders Awarding Former Spouse Survivor Annuities

§ 838.801 Purpose and scope.

This subpart regulates the requirements that a court order awarding a former spouse survivor annuity must meet to be a court order acceptable for processing.

§ 838.802 CSRS limitations.

(a) A court order awarding a former spouse survivor annuity under CSRS is not a court order acceptable for processing unless the marriage terminated on or after May 7, 1985.

(b) In the case of a retiree who retired under CSRS before May 7, 1985, a court order awarding a former spouse survivor annuity under CSRS is not a court order acceptable for processing unless the retiree was receiving a reduced annuity to provide a survivor annuity to benefit that spouse on May 7, 1985.

§ 838.803 Language not acceptable for processing.

(a) Any court order labeled as a "qualified domestic relations order" or issued on a form for ERISA qualified domestic relations orders is not a court order acceptable for processing.

(b) Any court order that provides that the former spouse's portion of the employee annuity shall continue after the death of the employee or retiree, by using language such as "will continue to receive benefits after the death of" the employee, that the former spouse "will continue to receive benefits for his (or her) lifetime," or "that benefits will continue after the death of" the employee, but does not use terms such as "survivor annuity," "death benefits," "former spouse annuity," or similar terms is not a court order acceptable for processing.

§ 838.804 Court orders must expressly award a former spouse survivor annuity or expressly direct an employee or retiree to elect to provide a former spouse survivor annuity.

(a) A court order awarding a former spouse survivor annuity is not a court order acceptable for processing unless it expressly awards a former spouse survivor annuity or expressly directs an employee or retiree to elect to provide a former spouse survivor annuity as described in paragraph (b) of this section.

(b) To expressly award a former spouse survivor annuity or expressly direct an employee or retiree to elect to provide a former spouse survivor annuity as required by paragraph (a) of this section the court order must—

(1) Identify the retirement system using terms that are sufficient to identify the retirement system as explained in § 838.802; and

(2)(i) Expressly state that the former spouse is entitled to a former spouse survivor annuity using terms that are sufficient to identify the survivor annuity as explained in § 838.912; or

(ii) Expressly direct the retiree to elect to provide a former spouse survivor annuity using terms that are sufficient to identify the survivor annuity as explained in § 838.912.

§ 838.805 OPM computation of formulas in computing the designated base.

(a) A court order awarding a former spouse survivor annuity is not a court order acceptable for processing unless the court order provides sufficient instructions and information so that OPM can determine the amount of the former spouse's monthly benefit using only the express language of the court order, subparts A, G and I of this part, and information from normal OPM files.

(b) To provide sufficient instructions and information for OPM to compute the amount of a former spouse survivor annuity as required by paragraph (a) of this section, if the court order uses a formula to determine the former spouse survivor annuity, it must not use any variables whose values are not readily ascertainable from the face of the court order or normal OPM files.

(c) A court order awarding a former spouse survivor annuity is not a court order acceptable for processing if OPM would have to examine a State statute or court decision (on a different case) to understand, establish, or evaluate the formula for computing the former spouse survivor annuity.

§ 838.806 Amended court orders.

(a) A court order awarding a former spouse survivor annuity is not a court order acceptable for processing if it is issued after the date of retirement or death of the employee and modifies or replaces the first order terminating the marital relationship between the employee or retiree and the former spouse.

(b) For purposes of awarding, increasing, reducing, or eliminating a former spouse survivor annuity, or explaining, interpreting, or clarifying a court order that awards, increases, reduces or eliminates a former spouse survivor annuity, the court order must be—

(1) Issued on a day prior to the date of retirement or date of death of the employee; or

(2) The first order terminating the marital relationship between the retiree and the former spouse.

(c) A court order that awards a former spouse survivor annuity and that is issued after the first order terminating the marital relationship between the retiree and the former spouse has been vacated, set aside, or otherwise declared invalid is not a court order acceptable for processing if—

(1) It is issued after the date of retirement or death of the retiree;

(2) It changes any provision concerning a former spouse survivor annuity in the court order that was vacated, set aside or otherwise declared invalid; and

(3)(i) The court order is effective prior to the date when it is issued; or

(ii) The retiree and former spouse do not compensate the Civil Service Retirement and Disability Fund for any uncollected annuity reduction due as a result of the court order vacating, setting aside, or otherwise invalidating the first order terminating the marital relationship between the retiree and the former spouse.

(d) In this section, *date of retirement* means the later of—

(1) The date that the employee files an application for retirement; or

(2) The effective commencing date for the employee's annuity.

(e) In this section, *issued* means actually filed with the clerk of the court, and does not mean the effective date of a retroactive court order that is effective prior to the date when actually filed with the clerk of the court (e.g., a court order issued *nunc pro tunc*).

(f) In this section, the *first order terminating the marital relationship between the retiree and the former spouse* means the original written order that first ends (or first documents an oral order ending) the marriage, and does not include—

(1) Any court order that amends, explains, clarifies, or interprets the original written order regardless of the effective date of the court order making the amendment, explanation, clarification, or interpretation; or

(2) Any court order issued under reserved jurisdiction or any other court orders issued subsequent to the original written order terminating the marriage that divide marital property (even if no division of marital property was made in the court order terminating the marriage) regardless of the effective date of the court order.

§ 838.807 Cost must be paid by annuity reduction.

(a) A court order awarding a former spouse survivor annuity is not a court order acceptable for processing unless it permits OPM to collect the annuity reduction required by section 8339(j)(4) or section 8419 of title 5, United States Code, from annuity paid by OPM. OPM will not honor a court order that provides for the retiree or former spouse to pay OPM the amount of the annuity reduction by any other means.

(b) The amount of the annuity reduction required by section 8339(j)(4) or section 8419 of title 5, United States Code, may be paid—

(1) By reduction of the former spouse's entitlement under a court order acceptable for processing that is directed at employee annuity; or

(2) By reduction of the employee annuity.

(c) Unless the court order otherwise directs, OPM will collect the annuity reduction required by section 8339(j)(4) or section 8419 of title 5, United States Code, from the employee annuity.

Subpart I—Terminology Used in Court Orders Awarding Former Spouse Survivor Annuities

Regulatory Structure

§ 838.901 Purpose and scope.

(a) This subpart regulates the meaning of terms necessary to award a former spouse survivor annuity in a court order, and for OPM to determine whether a court order awarding a former spouse survivor annuity is a court order acceptable for processing and the amount of the former spouse survivor annuity.

(b)(1) This subpart establishes a uniform meaning to be used for terms and phrases frequently used in awarding a former spouse survivor annuity.

(2) This subpart informs the legal community about the definition to be applied to terms used in court orders, to permit the resulting orders to be more carefully drafted, using the proper language to accomplish the aims of the court.

(c)(1) To assist attorneys and courts in preparing court orders that OPM can honor in the manner that the court intends, Appendix A of this subpart contains model language to accomplish many of the more common objectives associated with the award of a former spouse survivor annuity.

(2) By using the language in appendix A of this subpart, the court, attorneys, and parties will know that the court order will be acceptable for processing and that OPM will treat the terminology used in the court order in the manner stated in the Appendix.

Identification of Benefits

§ 838.911 Identifying the retirement system.

(a) To satisfy the requirements of § 838.804(b)(1), a court order must contain language identifying the retirement system affected. For example, "CSRS," "FERS," "OPM," or "Federal Government" survivor benefits, or "survivor benefits payable based on service with the U.S. Department of Agriculture," etc., are sufficient identification of the retirement system.

(b) Except as provided in paragraphs (b)(1) and (b)(2) of this section, language referring to benefits under another retirement system, such as military retired pay, Foreign Service retirement benefits and Central Intelligence Agency retirement benefits, does not satisfy the requirements of § 838.804(b)(1).

(1) A court order that mistakenly labels CSRS benefits as FERS benefits and vice versa satisfies the requirements of § 838.804(b)(1).

(2) Unless the court order expressly provides otherwise, for employees transferring to FERS, court orders directed at CSRS benefits apply to the entire FERS basic benefit, including the CSRS component, if any. Such a court order satisfies the requirements of § 838.804(b)(1).

(c) A court order affecting military retired pay, even when military retired pay has been waived for inclusion in CSRS annuities, does not award a former spouse survivor annuity under CSRS or FERS. Such a court order does not satisfy the requirements of § 838.804(b)(1).

(d) A court order that requires an employee or retiree to maintain survivor benefits covering the former spouse satisfies the requirements of § 838.804(b)(1), if the former spouse was covered by a CSRS or FERS survivor annuity or the FERS basic employee death benefit as defined in § 843.602 of this chapter at the time of the divorce.

§ 838.912 Specifying an award of a former spouse survivor annuity.

(a) To satisfy the requirements of § 838.804(b)(2), a court order must specify that it is awarding a former spouse survivor annuity. The court order must contain language such as "survivor annuity," "death benefits," "former spouse survivor annuity under 5 U.S.C. 8341(h)(1)," etc.

(b)(1) A court order that provides that the former spouse is to "continue as" or "be named as" the beneficiary of CSRS survivor benefits or similar language satisfies the requirements of § 838.804(b)(2).

(2) A court order that requires an employee or retiree to maintain survivor benefits covering the former spouse satisfies the requirements of § 838.804(b)(2), if the former spouse was covered by a CSRS or FERS survivor annuity or the FERS basic employee death benefit as defined in § 843.602 of this chapter at the time of the divorce.

(c) Two types of potential survivor annuities may be provided by retiring employees to cover former spouses. Under CSRS, section 8341(h) of title 5, United States Code, provides for "former spouse survivor annuities" and section 8339(k) of title 5, United States Code, provides for "insurable interest annuities." These are distinct benefits, each with its own advantages. The corresponding FERS provisions are sections 8445 and 8444, respectively.

(1) OPM will enforce court orders to provide section 8341(h) or section 8445 annuities. These annuities are less expensive and have fewer restrictions than insurable interest annuities but the former spouse's interest will automatically terminate upon remarriage before age 55. To provide a section 8341(h) or section 8445 annuity, the court order must use terms such as "former spouse survivor annuity," "section 8341(h) annuity," or "survivor annuity."

(2) OPM cannot enforce court orders to provide "insurable interest annuities" under section 8339(k) or section 8444. These annuities may only be elected at the time of retirement by a retiring employee who is not retiring under the disability provision of the law and who is in good health. The retiree may also elect to cancel the insurable interest annuity to provide a survivor annuity for a spouse acquired after retirement. The parties might seek to provide this type of annuity interest if the nonemployee spouse expects to remarry before age 55, if the employee expect to remarry a younger second spouse before retirement, or if another former spouse has already been awarded a section 8341(h) annuity. However, the court will have to provide its own remedy if the employee is not eligible for or does not make the election. OPM cannot enforce the court order. Language including the words "insurable interest" or referring to section 8339(k) or section 8444 does not satisfy the requirements of § 838.804(b)(2).

(3) In court orders which contain internal contradictions about the type of annuity, such as "insurable interest annuity under section 8341(h)," the section reference will control.

Computation of Benefit

§ 838.921 Determining the amount of a former spouse survivor annuity.

(a) A court order that contains no provision stating the amount of the former spouse survivor annuity provides the maximum former spouse survivor annuity permitted under § 831.614 or § 842.613 of this chapter and satisfies the requirements of § 838.805.

(b)(1) A court order that provides that "a former spouse will keep" or "an employee or retiree will maintain" the survivor annuity to which he or she was entitled at the time of the divorce satisfies the requirements of § 838.805 and provides a former spouse survivor annuity in the same proportion to the maximum survivor annuity under § 831.614 or § 842.613 of this chapter as the former spouse had at the time of divorce. For example, a former spouse of an employee would be entitled to the maximum survivor benefit; a former spouse of a retiree (who was married to the retiree at retirement and continuously until the divorce resulting in the court order) would be entitled to the survivor benefit elected at retirement.

(2) If, at the time of divorce, the employee covered by FERS had at least 18 months of civilian service creditable under CSRS but less than 10 years of service creditable under FERS, a former spouse with a court order described in paragraph (b)(1) or paragraph (b)(2) of this section may be entitled to the basic employee death benefit as defined in § 843.602 of this chapter, but is not entitled to any other former spouse survivor annuity based on the court order.

(c)(1) A court order that awards a former spouse survivor annuity of less than $12 per year satisfies the requirements of § 838.805 and provides an initial rate of $1 per month plus all cost-of-living increases occurring after the later of—

(i) The date of the court order; or

(ii) The date when the employee retires.

(2) The reduction in the employee annuity will be computed as though the court order provided a former spouse survivor annuity of $1 per month.

(d)(1) A court order that awards a former spouse survivor annuity while authorizing the employee or retiree to elect a lesser former spouse survivor annuity upon the employee's or retiree's remarriage satisfies the requirements of § 838.805, and provides the former spouse survivor annuity at the rate initially provided in the court order but does not allow the employee or retiree to elect a lesser benefit for the former spouse.

(2) To provide full survivor annuity benefits to a former spouse while authorizing the employee or retiree to elect a lesser former spouse survivor annuity benefit in order to provide survivor annuity benefits for a subsequent spouse, the court order must provide for a reduction in the former spouse survivor annuity upon the employee's or retiree's election of survivor annuity benefits for a subsequent spouse.

(3) A reduction in the amount of survivor benefits provided to the former spouse does not satisfy the requirements of § 838.805 if it is contingent upon the employee's or annuitant's remarriage rather than his or her election of survivor annuity benefits for a subsequent spouse.

§ 838.922 Prorata share defined.

(a) *Prorata share* means the fraction of the maximum survivor annuity allowable under § 831.614 or § 842.613 of this chapter whose numerator is the number of months of Federal civilian and military service that the employee performed during the marriage and whose denominator is the total number of months of Federal civilian and military service performed by the employee.

(b) A court order that awards a former spouse a "prorata share" of a survivor annuity by using that term and identifying the date when the marriage began satisfies the requirements of § 838.805 and awards the former spouse a former spouse survivor annuity equal to the prorata share as defined in paragraph (a) of this section.

(c) A court order that awards a portion of a survivor annuity, as of a specified date before the employee's retirement, awards the former spouse a former spouse survivor annuity equal to the prorata share as defined in paragraph (a) of this section.

(d) A court order that awards a portion of the "value" of a survivor annuity as of a specific date before retirement, without specifying what "value" is, awards the former spouse a former spouse survivor annuity equal to a prorata share as defined in paragraph (a) of this section.

Miscellaneous Provisions

§ 838.931 Court orders that provide temporary awards of former spouse survivor annuities.

A provision in a court order that temporarily awards a former spouse survivor annuity satisfies the requirements of § 581.804(b)(2), but the temporary award becomes permanent on the date on which OPM is barred from honoring a modification of the court order (the date of retirement or death, or, in the case of a post-retirement divorce, the date of the initial court order), as provided in sections 8341(h)(4) and 8445(d) of title 5, United States Code.

§ 838.932 Court orders that permit the former spouse to elect to receive a former spouse survivor annuity.

(a) Except as provided in paragraph (b) of this section, a court order that gives the former spouse the right to elect a former spouse survivor annuity satisfies the requirements of § 838.804(b)(2) and provides a former spouse survivor annuity in the amount otherwise provided by the court order.

(b) A former spouse who has been awarded a former spouse survivor annuity by a court order that gives the former spouse the right to elect a former spouse survivor annuity may irrevocably elect not to be eligible for a former spouse survivor annuity based on the court order.

(c) The former spouse may make the election under paragraph (b) of this section at any time after the issuance of the court order. An election under paragraph (b) of this section—

(1) Must be in writing and in the form prescribed by OPM;

(2) Is effective on the first day of the month following the month in which OPM receives the election; and

(3) Is irrevocable once it has become effective.

(d) The reduction in an employee annuity based on a court order that gives the former spouse the right to elect a former spouse survivor annuity terminates on the last day of the month in which OPM receives the former spouse's election under paragraph (b) of this section.

§ 838.933 Payment of the cost of a former spouse survivor annuity.

(a) A court order that unequivocally awards a former spouse survivor annuity and directs the former spouse to pay for that benefit satisfies the requirements of § 838.805, and—

(1) If the former spouse has also been awarded a portion of the employee annuity then the cost of the survivor benefit will be deducted from the former spouse's share of the employee annuity (if sufficient to cover the total cost—there will be no partial withholding); otherwise,

(2) The reduction will be taken from the employee annuity and collection from the former spouse will be a private matter between the parties.

(b) A court order that conditions the award of a former spouse survivor annuity on the former spouse's payment of the cost of the benefit satisfies the requirements of § 838.805 only if a court order acceptable for processing also awards the former spouse a portion of the employee annuity sufficient to cover the cost.

Model Paragraphs

Appendix A to Subpart I of Part 838—Recommended Language for Court Orders Awarding Former Spouse Survivor Annuities

This appendix provides recommended language for use in court orders awarding former spouse survivor annuities. A former spouse survivor annuity is not a continuation of a former spouse's share of an employee annuity after the death of the employee. A former spouse's entitlement to a portion of an employee annuity cannot continue after the death of the employee. A court order that attempts to extend the former spouse's entitlement to a portion of an employee annuity past the death of the employee is not effective. The model language in this appendix does not award benefits payable to the former spouse during the lifetime of the employee. A separate, distinct award of a portion of the employee annuity is necessary to award a former spouse a benefit during the lifetime of the employee. Appendix A to subpart F of this part contains model language for a portion of an employee annuity.

Attorneys should exercise great care in preparing provisions concerning former spouse survivor annuities because sections 8341(h)(4) and 8445(d) of title 5, United States Code, prohibit OPM from accepting modifications after the retirement or death of the employee. (See § 838.806 concerning unacceptable modifications.) A court order awarding a former spouse survivor annuity should include four elements:

• Identification of the retirement system;

• Explicit award of the former spouse survivor annuity;

• Method for computing the amount of the former spouse's benefit; and

• Instructions on what OPM should do if the employee leaves Federal service before retirement and applies for a refund of employee contributions.

By using the model language, courts will know that the court order will have the effect described in this appendix.

The model language uses the terms "[former spouse]" to identify the spouse who is receiving a former spouse survivor annuity and "[employee]" to identify the Federal employee whose employment was covered by the Civil Service Retirement System or the Federal Employees Retirement System. Obviously, in drafting an actual court order the appropriate terms, such as "Petitioner" and "Respondent," or the names of the parties should replace "[former spouse]" and "[employee]."

Similarly, except when the provision applies only to the basic employee death benefit (defined in § 843.103 of this chapter) that is available only under the Federal

Employees Retirement System, the models are drafted for employees covered by the Civil Service Retirement System (5 U.S.C. 8331 *et seq.*). The name of the retirement system should be changed for employees covered by the Federal Employees Retirement System (5 U.S.C. chapter 84.).

Statutory references used in the models are to CSRS provisions (such as section 8341(h) of title 5, United States Code). When appropriate, the corresponding FERS provision (such as section 8445 of title 5, United States Code) should be used.

Table of Contents

700 Series—Computing the Amount of the Former Spouse's Benefit

Paragraphs 701 through 704 contain model language for awards of former spouse survivor annuities in amounts that do not require specification of the base on which the former spouse's share will be computed. Situations in which the computational base need not be specified include amounts defined by law or regulation. For example, the maximum former spouse survivor annuity is fixed by statute generally at 55 percent of the employee annuity under CSRS and 50 percent of the employee annuity under FERS.

Paragraphs 711 and 712 contain model language for awards of former spouse survivor annuities that use the employee annuity as the base on which the portion awarded will be computed (that is, on which percentage, fraction or formula will be applied). Paragraphs 721 and 722 contain model language for awards of former spouse survivor annuities that use the maximum possible survivor annuity as the base on which the portion awarded will be computed (that is, on which percentage, fraction or formula will be applied). Using the maximum possible survivor annuity as the base will generally award 55 percent under CSRS and 50 percent under FERS of the amount that using the employee annuity as the base would produce.

Paragraphs 750 and higher contain model language to implement the most common other types of awards.

Each model paragraph includes a reference to the statutory provision under CSRS that authorizes OPM to honor court orders awarding former spouse survivor annuities. The FERS statutory provision that corresponds to section 8341(h) (mentioned in the first sentence of each example) is section 8445.

¶701 Award of the maximum survivor annuity.

Using the following paragraph will award the maximum possible former spouse survivor annuity. Under CSRS, the maximum possible survivor annuity is 55 percent of the employee annuity unless the surviving spouse or former spouse was married to the retiree at retirement and agreed to a lesser amount at that time. Under FERS, the maximum possible survivor annuity is 50 percent of the employee annuity unless the surviving spouse or former spouse was married to the retiree at retirement and agreed to agreed to a lesser amount at that time.

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded the maximum possible former spouse survivor annuity under the Civil Service Retirement System."

¶ 702 Award that continues the pre-divorce survivor annuity benefits.

Using the following paragraph will award a former spouse survivor annuity equal to the amount that the former spouse would have received if the marriage were never terminated by divorce.

"Under section 8341(h)(1) of title 5, United States Code, [Former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System in the same amount to which [former spouse] would have been entitled if the divorce had not occurred."

¶ 703 Award of a prorata share.

Using the following paragraph will award the former spouse a prorata share of the maximum possible survivor annuity. Prorata share is defined in § 838.922. To award a prorata share the court order must state the data of the marriage. Unless the court order specifies a different ending date, the marriage ends for computation purposes on the date that the court order is filed with the court clerk.

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to a prorata share. The marriage began on [insert date]."

¶704 Award of a fixed monthly amount.

Using the following paragraph will award a former spouse survivor annuity that will start at the amount stated in the order when the employee or retiree dies, unless the stated amount exceeds the maximum possible former spouse survivor annuity. If the amount stated in the order exceed the maximum possible former spouse survivor annuity, the court order will be treated as awarding the maximum. After payment of the former spouse survivor annuity has begun, COLA's will be applied in accordance with section 838.735.

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to $[insert a number] per month."

¶705–710 [Reserved].

¶711 Award of a percentage or fraction of the employee annuity.

Using the following paragraph will award a former spouse survivor annuity equal to the stated percentage or fraction of the employee annuity. The stated percentage or fraction may not exceed 55 percent under CSRS or 50 percent under FERS.

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to [insert a percentage or fraction] percent of the [employee]'s annuity."

¶712 Award based on a stated formula as a share of employee annuity.

Using the following paragraphs will award a former spouse survivor annuity in an amount to be determined by applying a stated formula to employee annuity. The amount of the former spouse survivor annuity may not exceed 55 percent of the employee annuity under CSRS or 50 percent under FERS. The formula must be stated in the court order (including a court-approved property settlement agreement). The formula may not be incorporated by reference to a statutory provision or a court decision in another case. If the court order uses a formula, the court order must include any data that is necessary for OPM to evaluate the formula unless the necessary data is contained in normal OPM files.

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be the portion of the [employee]'s employee annuity computed as follows:

"[Insert formula.]"

¶713–720 [Reserved.]

¶721 Award of a percentage or fraction of the maximum survivor annuity.

Using the following paragraph will award a former spouse survivor annuity equal to the stated percentage or fraction of the maximum possible survivor annuity. The stated percentage or fraction may not exceed 100 percent.

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to [insert a percentage of fraction] of the maximum possible survivor annuity.

¶722 Award based on a stated formula as a share of maximum survivor annuity.

Using the following paragraphs will award a former spouse survivor annuity based on a stated formula to be applied to the maximum possible survivor annuity. The formula must be stated in the court order (including a court-approved property settlement agreement). The formula may not be incorporated by reference to a statutory provision or a court decision in another case. If the court order uses a formula, the court order must include any data that is necessary for OPM to evaluate the formula unless the necessary data is contained in normal OPM files.

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be the portion of the maximum possible survivor annuity computed as follows:

"[Insert formula.]"

¶723–750 [Reserved.]

¶751 Changing amount of former spouse survivor based on remarriage before retirement.

Using the following paragraph will award the maximum possible former spouse survivor annuity unless the employee remarries before retirement. Upon the employee's remarriage before retirement the amount of the former spouse survivor annuity changes to a prorata share. The maximum possible and prorata share are used as examples only; other amounts may be substituted. Similar language is not acceptable for remarriages after retirement.

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded the maximum possible former spouse survivor annuity under the Civil Service Retirement System unless [employee] remarries before retirement. If [employee] remarries before retirement, under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to a prorata share. The marriage to [former spouse] began on [insert date]."

¶752 Changing amount of former spouse survivor annuity based on remarriage after retirement.

Using the following paragraph will award the maximum possible former spouse survivor annuity unless the employee remarries after retirement and elects to provide a survivor annuity for the spouse acquired after retirement. Upon the employee's remarriage after retirement and election to provide a survivor annuity for the spouse acquired after retirement, the amount of the former spouse survivor annuity changes to a prorata share. The maximum possible and prorata share are used as examples only; other amounts may be substituted. The change in the amount of the former spouse survivor annuity must be triggered by the election, which is a part of normal OPM files, rather than the remarriage, which is not documented in normal OPM files.

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded the maximum possible former spouse survivor annuity under the Civil Service Retirement System unless [employee] elects to provide a survivor annuity for a new spouse acquired after retirement. If [employee] elects to provide a survivor annuity to a new spouse acquired after retirement, under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to a prorata share. The marriage to [former spouse] began on [insert date]."

800 Series—Paying the Cost of a Former Spouse Survivor Annuity

A court order awarding a former spouse survivor annuity requires that the employee annuity be reduced. The reduction lowers the gross employee annuity. The costs associated with providing the former spouse survivor annuity must be paid by annuity reduction. Under section 838.807, if the former spouse is awarded a portion of the employee annuity sufficient to pay the cost associated with providing the survivor annuity, the former spouse's share may be reduced to pay the cost.

¶801 Costs to be paid from the employee annuity.

No special provision on payment of the costs associated with providing the former spouse survivor annuity is necessary if the court intends the cost to be taken from the employee annuity.

802 Costs to be paid from former spouse's share of the employee annuity.

Using the following paragraph will award the former spouse a prorata share of the employee annuity and a prorata share of the maximum possible survivor annuity and provide that the cost associated with the survivor annuity be deducted from the former spouse's share of the employee annuity. Prorata share and self-only annuity are used as examples only; another amount or type of annuity may be substituted.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to a prorata share of [employee]'s self-only monthly annuity under the Civil Service Retirement System. [Former spouse]'s share of [employee]'s employee annuity will be reduced by the amount of the costs associated with providing the former spouse survivor annuity awarded in the next paragraph. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to a prorata share.

900 Series—Refunds of Employee Contributions

Court orders that award a former spouse survivor annuity based on the service of an employee who is not then eligible to retire should include an additional paragraph containing instructions that tell OPM what to do if the employee requests a refund of employee contributions before becoming eligible to retire. The court order may award the former spouse a portion of the refund of employee contributions or bar payment of the refund of employee contributions.

¶901 Barring Payment of a refund of employee contributions

Using the following paragraph will bar payment of the refund of employee contributions if payment of the refund of employee contributions would extinguish the former spouse's entitlement to a former spouse survivor annuity.

"The United States Office of Personnel Management is directed not to pay [employee] a refund of employee contributions."

¶902 Dividing a refund of employee contributions.

Using the following paragraph will allow the refund of employee contributions to be paid but will award a prorata share of the refund of employee contributions to the former spouse. The award of a prorata share is used only as an example; the court order could provide another fraction, percentage, or formula, or a fixed amount. A refund of employee contributions voids the employee's rights to an employee annuity unless the employee is reemployed under the retirement system. Payment of the refund of employee contributions will also extinguish the former spouse' right to a court-ordered portion of an employee annuity or a former spouse survivor annuity unless the employee is reemployed and reestablishes title to annuity benefits.

"If [employee] becomes eligible and applies for a refund of employee contributions, [former spouse] is entitled to a prorata share of the refund of employee contributions. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

2. Subpart Q of part 831 consisting of §§ 831.1701 through 831.1718 and appendices A and B are redesignated as subpart J of part 838, §§ 838.1001 through 838.1018 and appendices A and B of subpart J, respectively.

3. Newly redesignated § 838.1001 is removed and reserved; newly redesignated § 838.1010 is removed; and § 831.2009 is redesignated as § 838.1010.

4. In newly redesignated § 838.1002, paragraphs (c) and (d) are revised to read as follows:

§ 838.1002 Relation to other regulations.

* * * * *

(c) Subpart F of part 831 of this chapter, subpart F of part 842 of this chapter, and subpart C of part 843 of this chapter contain information about entitlement to survivor annuities.

(d) Subpart T of part 831 of this chapter and subpart B of part 843 of this chapter contain information about entitlement to lump-sum death benefits.

* * * * *

5. Newly redesignated § 838.1012 is revised to read as follows:

§ 838.1012 Death of the former spouse.

(a) Unless the qualifying court order expressly provides otherwise, the former spouse's share of employee retirement benefits terminates on the last day of the month before the death of the former spouse, and the former spouse's share of employee retirement benefits reverts to the retiree.

(b) Except as otherwise provided in this subpart, OPM will honor a qualifying court order or an amended qualifying court order that directs OPM to pay, after the death of the former spouse, the former spouse's share of the employee annuity to—

(1) The court;

(2) An officer of the court acting as a fiduciary;

(3) The estate of the former spouse; or

(4) One or more of the retiree's children as defined in section 8341(a)(4) or section 8441(4) of title 5, United States Code.

§§ 838.1003, 838.1004, 838.1006, 838.1007, 838.1009, 838.1010, 838.1011, 838.1016 Appendix A to Subpart J, Appendix B to Subpart J [Amended]

6. In the list below, for each section and paragraph indicated in the left two columns, remove the section reference indicated in the third column where it appears in the paragraph, and add the reference indicated in the fourth column:

Section	Paragraph	Remove	Add
838.1003	"Qualifying court order"	831.1704	838.1004.
838.1004	(c)(1)(i)	831.1709	838.1009.
838.1004	(c)(1)(ii)	831.1708	8381008.
838.1006	(b)	831.1708	8381008.
838.1006	(d)(2)	831.1705	838.1005.
838.1007	(a)(1)	831.1705	838.1005.
838.1007	(a)(1)	831.1706	838.1006.
838.1007	(a)(2)	831.1705	838.1005.
838.1007	(a)(2)	831.1704	838.1004.
838.1007	(a)(3)	831.1705	838.1005.
838.1007	(a)(3)	831.1706	838.1006.
838.1007	(a)(3)	831.1704	838.1004.
838.1007	(b)	831.1708	838.1008.
838.1009	(a)(1)	831.1708	838.1008.
838.1009	(b)	831.1706	838.1006.
838.1010	(e)	831.1705	838.1005.
838.1010	(f)(2)(ii)	831.1705	838.1005.
838.1011	(a)(3)	831.1705	838.1005.
838.1011	(b)(2)(ii)	831.1705	838.1005.
838.1016	(a)	831.1706	838.1006.
Appendix A to subpart J	I.A.2.	5305	5303.
Appendix A to subpart J	I.C.1.	831.1704(b)	838.1004(b).
Appendix A to subpart J	I.F.	Subpart Q of part 831	Subpart J of part 838.
Appendix A to subpart J	II.C.	831.1703	838.1003.
Appendix A to subpart J	II.E.	831.1703	838.1003.
Appendix A to subpart J	V.D.	831.1704(b)	838.1004(b).
Appendix A to subpart J	VI.B.	831.1704(b)	838.1004(b).
Appendix A to subpart J	III.G.	831.1704(b)	838.1004(b).

§§ 838.1002, 838.1003, 838.1006, 838.1007, 838.1009, 838.1010, 838.1016 [Amended]

7. In the list below, for each section and paragraph indicated in the left two columns, add the words "of this chapter" after the section reference indicated in the third column where it appears in the paragraph:

Section	Paragraph	Section reference
838.1002	(b)	831.106.
838.1002	(g)	831.109.
838.1003	"Former spouse annuity".	831.603.
838.1006	(c)(3)	831.614.
838.1006	(d)(3)	831.607.
838.1007	(c)	831.109.
838.1009	(a)(2)	831.109.
838.1010	(e)(2)	831.2007(c).
838.1010	(g)(1)	831.603.

Section	Paragraph	Section reference
838.1016	(a)	831.614.

PART 831—RETIREMENT

Subpart F—Survivor Benefits

8. The authority citation for part 831 continues to read as follows:

Authority: 5 U.S.C. 8347; § 831.102 also issued under 5 U.S.C. 8334; § 831.106 also issued under 5 U.S.C. 552a; § 831.108 also issued under 5 U.S.C. 8336(d)(2); § 831.204 also issued under sec. 7202(m)(2) of the Omnibus Budget Reconciliation Act of 1990, Public Law 101–508; § 831.303 also issued under sec. 7001(b) of the Omnibus Budget Reconciliation Act of 1990, Public Law 101–508; § 831.502 also issued under 5 U.S.C. 8337; § 831.502 also issued under sec. 1(3), E.O. 11228, 3 CFR 1964–1965 Comp.; § 831.621 also issued under sec. 201(d) of the Federal Employees Benefits Improvement Act of 1986, Public Law 99–251; subpart S also issued under 5 U.S.C. 8345(k); subpart V also issued under 5 U.S.C. 8343a and sec. 6001, Public Law 100–203; § 831.2203 also issued under sec. 7001(a)(4) of the Omnibus Budget Reconciliation Act of 1990, Public Law 101–508.

9. In section 831.603, the definition of "qualifying court order" is revised to read as follows:

§ 831.603 Definitions.

* * * * *

Qualifying court order means a court order that awards a former spouse annuity and that satisfies the requirements of section 8341(h) of title 5, United States Code, for awarding a former spouse annuity.

* * * * *

Subpart Q—[Removed and reserved]

10. The heading for subpart Q "Court Orders Affecting Retirement Benefits" of part 831 is removed and the subpart is reserved.

Subpart V—Alternative Forms of Annuity

11. In § 831.2203, paragraph (b) is revised to read as follows:

§ 831.2203 Eligibility.

* * * * *

(b) An employee or Member who, at the time of retirement has a former spouse who is entitled to a portion of the employee's or Member's retirement benefits or a former spouse annuity under a court order acceptable for processing as defined by § 838.103 of this chapter may not elect an alternative form of annuity.

* * * * *

PART 841—FEDERAL EMPLOYEES RETIREMENT SYSTEM—GENERAL ADMINISTRATION

12. The authority citation for part 841 continues to read as follows:

Authority: 5 U.S.C. 8461; Section 841.108 also issued under 5 U.S.C. 552a; Subpart D also issued under 5 U.S.C. 8423; Section 841.504 also issued under 5 U.S.C. 8422; Section 841.507 also issued under section 505 of Pub. L. 99-335; Subpart J also issued under 5 U.S.C. 8469.

Subpart H—Waiver of Benefits

13. In § 841.802, the definition of "qualifying court order" is revised to read as follows:

§ 841.802 Definitions.

* * * * *

Qualifying court order means a court order acceptable for processing as defined in section 838.103 of this chapter.

* * * * *

Subpart I—Court Orders Affecting Retirement Benefits

14. Subpart I of part 841 is removed and reserved.

PART 842—FEDERAL EMPLOYEES RETIREMENT SYSTEM—BASIC ANNUITY

15. The authority citation for part 842 continues to read as follows:

Authority: 5 U.S.C. 8461(g); Sections 842.104 and 842.106 also issued under 5 U.S.C. 8461(n); Section 842.105 also issued under 5 U.S.C. 8402(c)(1); Section 842.106 also issued under section 7202(m)(2) of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508; Sections 842.604 and 842.611 also issued under 5 U.S.C. 8417; Section 842.607 also issued under 5 U.S.C. 8416 and 8417; section 842.614 also issued under 5 U.S.C. 8419; section 842.615 also issued under 5 U.S.C. 8418; section 842.707 also issued under section 6001 of the Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203; section 842.708 also issued under section 4005 of the Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239 and section 7001 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508; Subpart H also issued under 5 U.S.C. 1104.

Subpart F—Survivor Elections

16. In § 842.602, the definition of "qualifying court order" is revised to read as follows:

§ 842.602 Definitions.

* * * * *

Qualifying court order means a court order that awards a former spouse annuity and that satisfies the requirements of section 8445 of title 5, United States Code, for awarding a former spouse annuity.

* * * * *

Subpart G—Alternative Forms of Annuity

17. In § 842.703, paragraph (b) is revised to read as follows:

§ 842.703 Eligibility.

* * * * *

(b) An employee or Member who, at the time of retirement has a former spouse who is entitled to a portion of the employee's or Member's retirement benefits or a former spouse annuity under a court order acceptable for processing as defined by § 838.103 of this chapter may not elect an alternative form of annuity.

* * * * *

PART 843—FEDERAL EMPLOYEES RETIREMENT SYSTEM—DEATH BENEFITS AND EMPLOYEE REFUNDS

18. The authority citation for part 843 continues to read as follows:

Authority: 5 U.S.C. 8461; Sections 843.205, 843.208, and 843.209 also issued under 5 U.S.C. 8424; Section 843.309 also issued under 5 U.S.C. 8442; Section 843.406 also issued under 5 U.S.C. 8441.

19. In § 843.102, the definition of "qualifying court order" is revised to read as follows:

§ 843.102 Definitions.

* * * * *

Qualifying court order means a court order that awards a former spouse annuity and that satisfies the requirements of section 8445 of title 5, United States Code, for awarding a former spouse annuity.

* * * * *

[FR Doc. 91-31161 Filed 12-31-91; 8:45 am]

BILLING CODE 6325-01-M