APPENDIX J - AMENDMENTS TO THE PRACTICE MANUAL

2006 AMENDMENTS

The following amendments to the 2005 practice manual are effective on November 1, 2006:

1. Section 1.4:

Section 1.4 is amended to state:

> The sentencing court shall use the Sentencing Guidelines Manual in effect on the date of plea or verdict, unless both parties otherwise agree to use the version in effect at the time of sentencing. The 2006 Manual is effective on November 1, 2006. The amendments to the 2005 Manual, which are included in the 2006 Manual, are listed in Appendix J.

2. Section 2.2.1:

The following replaces the first two sentences of Section 2.2.1:

> A prior conviction or adjudication is any adult conviction or juvenile adjudication for which judgment (an adult sentence or a juvenile disposition) was entered before the day of sentencing in the instant case. The order in which the offenses occurred is not controlling.

The following is added to the end of Section 2.2.1:

> Cases that are dismissed before a sentence is imposed are not scored. This includes cases that are disposed of by diversion, deferred sentencing, probation before judgment, the stet docket, or juvenile consent decrees. If the defendant (or juvenile) is not successful in one of these programs and the case proceeds to sentencing, it is then scored.

3. Section 2.2.8:

The following is added to the end of section 2.2.8:

> Convictions and adjudications for an offense that was classified as a felony when the prior offense was committed, but subsequently was reclassified as a misdemeanor should also be scored as a misdemeanor. For example, assault on a police officer was a felony in the District until July 19th,

2006, when part of it was reclassified as a misdemeanor. If an out-of-state conviction matches up to what is now the District's misdemeanor APO statute (for example, the out-of-state conviction is for the offense of simple resisting arrest where the out-of-state statutory elements do not require any weapon nor any injury to the officer), then the out-of-state conviction should be scored as a misdemeanor, regardless of when it was committed. On the other hand, if the out-of-state conviction matches up to what is now the District's felony APO statute, then the conviction should be scored as a felony.

4. Section 3.4:

The following sentence is added to the end of footnote 12:

Thus, in a Youth Act case, a sentence of ISS with probation complies with the Guidelines in any box in which a suspended prison term [ESS] with probation would be a compliant adult sentence.

5. Section 6.1:

The following sentence replaces the first sentence of Section 6.1:

The following sentence must be imposed consecutively: For crimes of violence: multiple victims in multiple events; multiple victims in one event, and one victim in multiple events for offenses sentenced on the same day.

6. Section 7.10:

Section 7.10 is amended to state:

For purposes of determining which offenses count for criminal history scoring purposes, see §2.2.5, and which offenses must be sentenced consecutively/concurrently, see Chapter 6, the phrase "a single event" means offenses that were committed at the same time and place or have the same nucleus of facts. The phrase "multiple events" means offenses that were committed at different times and places or have a different nucleus of facts.

7. Chapter 8:

The following "frequently asked questions" are added to Chapter 8:

1. What should a presentence report writer do if he or she cannot determine whether multiple prior convictions arose out of a single event or multiple events (See § 2.2.5)?

It is sometimes difficult to ascertain whether offenses that were sentenced on the same day arose out of a single or multiple events. The pre-sentence report writer will make this determination based on the criminal history supporting documentation. The report writer should indicate in the report the source of the information upon which s/he relied to make this determination. If the pre-sentence report writer cannot make this determination, either because no supporting documen tation was available or because the available documentation was unclear on the question of single or multiple events, the report writer should apply the rules as if the multiple prior convictions arose out of a single event, score only the most serious offense, and note in the presentence report that s/he has done so because s/he did not have sufficient information to determine whether there was more than one event. Upon request by the prosecution, the defense, or the court, the presentence report writer should either provide a copy of, or make available for copying, the supporting documentation s/he consulted on this question.

2. How do you score an out-of-state offense for possession of implements of crime or possession of a prohibited weapon when the defendant has a prior felony conviction that, if charged here, would raise the offense from a misdemeanor to a felony?

Following the basic elements test articulated in Rule 2.2.6(4), PIC (D.C. Code § 22-2501) and PPW (D.C. Code § 22-3515) should be scored as misdemeanors unless the statute in the other jurisdiction, like ours, makes theoffense a felony if the person previously has been convicted of that offense or of a felony.

3. Do the Guidelines apply to indeterminate sentences? If yes, how does it work?

Yes and no. The Guidelines apply to all pleas and verdicts entered into on or after June 14, 2004. While the Guidelines were designed primarily for the new determinate system, a small number of pleas or verdicts entered after June 14, 2004, are cases in which an indeterminate sentence must be imposed because the offense was committed before August 5, 2000. (The District of Columbia changed from an indeterminate to a determinate system of sentencing on August 5, 2000. See § 24-403.01. Sentencing, supervised release, and good time credit for felonies committed on or after August 5, 2000 [Formerly § 24-203.1]).

If the plea or verdict was entered on or after June 14, 2004, the Guidelines apply regardless of when the offense was committed – ie., whether the offense was committed before or after August 5, 2000. Conversely, if the plea or verdict was entered before June 14, 2004, the Guidelines do not apply even if the offense was committed after August 5, 2000. In such cases, the sentencing judge may nonetheless take the Guideline recommendations into consideration.Questions have arisen regarding how to apply the Guidelines to offenses that were committed before August 5, 2000, where the plea or verdict was entered after June 14, 2004. An example of such a case might be a defendant who was convicted in 1999, the conviction was overturned on appeal, and the defendant was convicted again by plea or verdict on or after June 14, 2004. Another example would be a defendant who committed an offense in 1997, but whose case was not disposed of by plea or verdict before June 14, 2004. In both of these examples, the Guidelines would apply.

To apply the Guidelines to an offense that was committed before August 5, 2000, the court should follow the same procedures as it would for an offense that occurred on or after August 5, 2000, to determine the appropriate box and whether any enhancements or departure principles apply. In designing the Guidelines, the sentencing ranges were determined in part by reference to the minimum term of a hypothetical indeterminate sentence, where the minimum was one-third of the maximum term. Therefore, if a sentence for theft in the old system was 2-6 years, the Commission used 2 years to determine what the sentencing range should be in Group 8; or if a sentence for aggravated assault while armed in the old system was 8 to 24 years, the Commission used 8 years to determine what the sentencing range should be in Group 4.

In applying the Guidelines to an indeterminate sentence, the judge should locate the box on the grid in which the offense/offender falls, and then use any sentence within the prescribed range to set the minimum term of the indeterminate sentence. To set the maximum term, the judge would then multiply the minimum term by three (or more). See D.C. Code § 24-403 ("the court imposing such sentence shall sentence the person for a maximum period not exceeding the maximum fixed by law, and for a minimum period not exceeding one-third of the maximum sentence imposed"). Assuming no enhancements or departure principles, a sentence for first degree burglary while armed in Box 3A could be as low as 90 to 270 months or as high 180 months to life. Prison is the only option. Similarly, a sentence for a second CPWL conviction in Box 8C could be as low as 14 to 42 months or as high as 40 to 120 months. The reason for the latter sentence is that a second conviction for CPWL is an enhancement that doubles the top of the box. This means that the minimum number of an indeterminate sentence could theoretically go as high as 64 months. However, the maximum statutory sentence for a second CPWL conviction is 120 months and the minimum sentence cannot be more than 1/3 of the maximum. So the maximum indeterminate sentence a person can receive for a second CPWL is 40-120 months, even though box 8C would otherwise permit a longer indeterminate sentence for a second conviction of CPWL. A short split sentence would be permissible for a second CPWL conviction in Box 8C as long as the minimum term of the imposed sentence (before the split) was between 14 and 40 months and the maximum term of the imposed sentence was at least three times the minimum.

8. Appendix C and C-I

The offense of enhanced assault, D.C. Official Code §22-404(a)(2) is added to Appendix C and C-I as a Master Group 8 offense.

The offense of false statements in money transmission, D.C. Official Code §26-1023(b) is added to Appendix C and C-I as a Master Group 9 offense.

Accessory after the fact for capital crimes is deleted from Appendix C and C-I.

2005 AMENDMENTS

The following amendments to the 2004 practice manual are effective on June 14, 2005:

1. Amendment: A new Section 1.4, entitled "Use of Sentencing Guidelines Manual in effect on the Date of Sentencing," is added. This new section states: "The sentencing court shall use the Sentencing Guidelines Manual in effect on the date that the defendant is sentenced. The 2005 Manual is effective on June 14, 2005. The amendments to the 2004 Manual, which are included in the 2005 Manual, are listed in Appendix J."

2. Amendment: Section 1.5.1. (now §1.6.1) is amended by inserting the following after the second sentence: "The Commission will also make changes to the Practice Manual to clarify the sentencing guidelines or to create new policy rules where necessary. See Appendix J, which lists new amendments in the June 14, 2005 Practice Manual."

3. Amendment: Section 1.5.1. (now §1.6.1) is amended by deleting the third sentence and inserting the following: "The Commission strongly encourages questions from criminal justice practitioners concerning the applicable sentencing range or options for individual cases under the Sentencing Guidelines. If you have a Guidelines application inquiry, please contact us at (202) 727-8822. The Commission provides information to assist in understanding and applying the Sentencing Guidelines. The information provided is not binding on the court or parties in any case. However, the issues raised by the inquiry may be used to inform subsequent revisions of the Practice Manual."

4. Amendment: Section 2.1 is amended by adding the following sentence after the third sentence: "Appendix C-I is a chart that has all of the felonies that may be prosecuted in the District of Columbia arranged by D.C. Official Code (2001) cite."

5. Amendment: Section 2.1 is amended by adding the following after the fourth paragraph: "Note: For accessory after the fact convictions, the top and bottom of the applicable guideline range for the underlying offense is reduced by one half. See Appendix C and C-I."

6. Amendment: Section 2.2.2. is amended by deleting the first sentence in the second paragraph and replacing it with: "Out-of-state and federal convictions and adjudications should be matched as closely as possible to D.C. Official Code offenses by following the rules in section 2.2.6."

7. Amendment: Section 2.2.2 is amended by inserting the following before the "Note" regarding YRA sentences:

> Note: When scoring prior convictions for accessory after the fact, score as follows when the under lying offense falls into the following boxes:
>
> groups 1-3: 3 points
> groups 4-5: 2 points
> groups 6-9: 1 point

8. Amendment: Section 2.2.3 is amended by deleting the second sentence of the third paragraph and replacing it with: "If any prior felony conviction or any part of its sentence (including incarceration, probation, parole or supervised release) occurred within the ten-year window, then all lapsed felony convictions are revived."

9. Amendment: Section 2.2.3 is amended by deleting the last sentence of the fifth paragraph, which currently states "Only felony convictions within the 10-year window can revive earlier felony convictions." In lieu of this sentence, the following sentence is inserted: "A prior felony conviction can revive an earlier felony conviction only if the more recent conviction or any part of its sentence (including incarceration, probation, parole or supervised release) occurred within the 10-year window. See Section 7.27."

10. Amendment: Section 2.2.6 is amended by deleting the entire section and replacing it with:

Convictions and adjudications for federal and out-of-state offenses are scored like the closest comparable D.C. Official Code offenses. To determine the closest comparable D.C. Official Code offense:

1. Look at the name of the offense;
2. Examine the statutory elements of the offense;
3. Choose the DC offense that most closely matches the out-of-state offense. Score the out-of-state offense for criminal history purposes just as the most closely matched DC offense would be scored (for example, an out-of-state offense that most closely matches ADW is scored as 2 points, just as is a prior DC ADW conviction).
4. If there are more than one possible DC statutes that "closely match" the out-of-state offense, select the least severe DC statute, whether that statute is a misdemeanor or a lesser felony. (In some cases, the least severe DC statute might actually be a felony even if the out-of-state offense is a misdemeanor. What is most important is how DC classifies the statute.) Importantly, do not look to the underlying conduct of the prior offense to select the offense that most closely matches; instead compare the elements of the DC and out-of-state offenses.
5. If no comparable DC statute can be found based on the above rules, then the following default rules apply:

   a. Apply one point for all convictions that are classified as felonies by the other jurisdiction;
   b. Apply ½ point for all juvenile adjudications that are classified as felonies by the other jurisdiction;
   c. Apply ¼ point for all convictions that are classified as misdemeanors by the other jurisdiction.
   d. Exception: If defense counsel can demonstrate to the sentencing Court that the conduct criminalized by the other jurisdiction is not currently classified as criminal conduct in DC, then the Court may delete or remove any criminal history points applied by CSOSA for such an offense.

Note: The same lapse rules apply to out-of state convictions as to D.C. convictions. Thus, a revived out-of-state felony should be scored as ½ point under these default rules, and misdemeanor convictions and juvenile adjudications would not be scored at all

6. If the government determines that the criminal history score for the out-of-state conviction under-represents the severity of the offense, then the government may seek a criminal history departure. This departure principle applies only to out-of-state convictions. If the Court concludes by a preponderance of evidence that the underlying conduct for the out-of state conviction most closely matches a more severe DC offense, then the Court may adjust the criminal history score by applying the same number of criminal history points applicable to the more severe DC offense. In making this determination, the burden of proof is on the government to establish that the conduct for the out-of state conviction more closely matches a more severe DC offense. The Court should apply this departure principle only if it determines that the conduct of conviction, as opposed to alleged conduct or conduct relating to other offenses, more closely matches the more severe DC offense.

While the parties may not normally bargain over the criminal history score, the parties may agree that the Court should apply a higher and specific value of points as the appropriate score for an out-of state conviction. This would help create certainty at the time of a plea and would reduce resources necessary to litigate the appropriate criminal history score when it is contested. If agreed upon by the parties, CSOSA and the Court should accept this score when calculating criminal history. This exception to the general rule prohibiting bargaining over criminal history score applies only to out-of-state convictions and is the ONLY EXCEPTION to the general prohibition.

Note: In rare cases, the sentence the court imposed may assist us in determining the applicable statute of conviction in the foreign jurisdiction. For example, in North Carolina, "breaking and entering" includes both a misdemeanor (simple breaking or entering) and a felony (intent to commit any felony or larceny). If a defendant has a prior conviction for “breaking or entering” in North Carolina, and received a 5-year sentence for that conviction, the prior conviction must be a felony since the maximum penalty for the misdemeanor is 120 days for persons with an extensive criminal history.

Note: Figuring out exactly which D.C. offense most closely resembles an out-of-state offense may not be necessary if the number of criminal history points assigned to it would be the same regardless of whether it comes closer to one offense or another.

Note: Figuring out the exact number of criminal history points is not necessary where a defendant has six or more points (e.g., two prior violent felonies; three prior mid-level felonies; six prior low-level felonies or a combination of these and misdemeanors that add up to six or more points).

The Commission has developed a preliminary list of common Maryland offenses that are comparable to D.C. offenses. This list is available at www.sentencing.dc.gov. In the coming months, the Commission will work on comparing additional Maryland, Virginia and Federal offenses to D.C. offenses. It will then work on comparability for common offenses in other jurisdictions. In the meantime, the Commission strongly urges practitioners and judges to call for assistance regarding comparability of specific offenses. Such a call is likely to be more efficient than trying to decide comparability at the time of sentencing in a given case.

11. Amendment: A new Section 2.2.8 is inserted, which is entitled "Scoring Convictions/Adjudications for Offenses Where Sentencing Severity has Changed Since the Commission of the Prior Offense." This new section states:

Convictions and adjudications for offenses that were classified as misdemeanors when the prior offense occurred but were subsequently reclassified as felonies should be scored as misdemeanors. For example, distribution of marijuana was a misdemeanor until June 8, 2001, when it was reclassified as a felony in some circumstances. Any distribution of marijuana conviction for an offense committed before June 8, 2001, therefore, should be scored as a misdemeanor.

Following this section, a footnote is inserted that states:

> Distribution of marijuana was a misdemeanor under all circumstances before June 8, 2001, when it was reclassified as a felony unless the defendant has not been previously convicted of distributing or possessing with intent to distribute any controlled substances and the amount of marijuana was ½ pound or less. D.C. Official Code § 48-904.01(a)(2)((B). Carrying a pistol without a license was a misdemeanor before August 20, 1994, unless the person had previously been convicted of CPWL or of any felony. Since then, it has also been a felony to carry a pistol outside a person's home or place of business or on land possessed by the person. D.C. Official Code § 22-4504. An attempt to commit a crime of violence was a misdemeanor before August 20, 1994, when it was reclassified as a 5-year felony. D.C. Official Code § 22-1803. Attempt robbery, however, has been classified as a 3-year felony since the Code was enacted in 1901. D.C. Official Code § 22-2802.

12. Amendment: A new Section 2.2.10, entitled "Military and Foreign Convictions," is inserted. This new section states: "Convictions resulting from military offenses are scored if imposed by a general or special court martial. Convictions imposed by a summary court martial or Article 15 proceeding are not scored. Convictions resulting from a foreign conviction are not scored."

13. Amendment: A new Section 2.2.11 is inserted, which is entitled "Convictions for Traffic Offenses." This new section states: "Convictions for traffic offenses are not scored. However, convictions for Negligent (Vehicular) Homicide, D.C. Official Code § 50-2203.01, and Fleeing Law Enforcement, D.C. Official Code 50-2201.05, are criminal offenses and are scored. See Appendix C and C-I."

14. Amendment: Page 4-1 is amended by inserting the following prior to the last paragraph: "The court should apply only one of two or more enhancements. In such a case, the court may, but need not, select the enhancement that raises the top of the range by the greatest percentage.

15. Amendment: Page 4-1 is amended by inserting the following after the last paragraph: "A conviction for accessory after the fact reduces by one-half both the top and the bottom of the prison range available in the box applicable to the underlying offense."

16. Amendment: Page C-3 is amended by adding Attempt Crime of Violence While Armed. The offense severity group for this offense is "Same group as unarmed completed offense."

17. Amendment: Page C-3 is amended by changing the offense severity group for assault with intent to commit any other felony from Master Group 6 to Master Group 8.

18. Amendment: Page C-3 is amended by adding Assault with Intent to Commit Mayhem as Master Group 7.

19. Amendment: Page C-4 is amended by dividing Burglary while armed into first degree burglary while armed (Master Group 3) and second degree burglary while armed (Master Group 6).

20. Amendment: Page C-6 is amended by adding Cruelty to Animals as Master Group 9.

21. Amendment: Page C-8 is amended by adding Fleeing Law Enforcement as Master Group 8.

22. Amendment: Page C-9 is amended by adding Illegal Dumping as Master Group 9.

23. Amendment: Page C-9 is amended by adding Identity Theft as Master Group 8.

24. Amendment: Page C-12 is amended by adding Possession of Unregistered Firearm, Second Offense as Master Group 9.

25. Amendment: Page C-17 is amended by inserting Taxicab Driver enhancement.

DISTRICT OF COLUMBIA
SENTENCING COMMISSION