PROPOSED AMENDMENT: RE-PROMULGATION OF EMERGENCY AMENDMENT REGARDING ENHANCED PENALTIES FOR AMPHETAMINE OR METHAMPHETAMINE LABORATORY OPERATORS AS PERMANENT AMENDMENT
(Proposed Amendment 7 of User Friendly, Volume Two)

Synopsis of Proposed Amendment: *This proposed amendment provides two options to address the re-promulgation of the emergency amendment regarding the "substantial risk" directive in the Methamphetamine and Club Drug Anti-Proliferation Act of 2000 (the "Act"), section 102 of Pub. L. 106–310.*

The Act requires the Commission to promulgate amendments under emergency amendment authority. Although the Act generally provides that the Commission shall promulgate various amendments "as soon as practicable," the substantial risk directive specifically requires that the amendment implementing the directive shall apply "to any offense occurring on or after the date that is 60 days after the date of the enactment" of the Act. Because of ex post facto concerns raised by this 60-day clause, the Commission promulgated an amendment in November 2000 that implemented the substantial risk directive. The amendment became effective December 16, 2000.

The directive instructs the Commission to amend the federal sentencing guidelines with respect to any offense relating to the manufacture, attempt to manufacture, or conspiracy to manufacture amphetamine or methamphetamine in (A) the Controlled Substances Act (21 U.S.C. § 801 et seq.);(B) the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.); or (C) the Maritime Drug Law Enforcement Act (46 U.S.C. App. § 1901 et seq.).

In carrying out this directive, the Act requires the Commission to provide the following enhancements—

> *(A) if the offense created a substantial risk of harm to human life (other than a life described in subparagraph (B)) or the environment, increase the base offense level for the offense—*
>
> > *(i) by not less than 3 offense levels above the applicable level in effect on the date of the enactment of this Act; or*
> >
> > *(ii) if the resulting base offense level after an increase under clause (i) would be less than level 27, to not less than level 27; or*
>
> *(B) if the offense created a substantial risk of harm to the life of a minor or incompetent, increase the base offense level for the offense—*

(i) by not less than 6 offense levels above the applicable level in effect on the date of the enactment of this Act; or

(ii) if the resulting base offense level after an increase under clause (i) would be less than level 30, to not less than level 30.

Option 1 of the revised proposed amendment proposes to re-promulgate, with only one minor technical change, the emergency amendment as a permanent amendment. Although some consideration has been given to expanding the emergency amendment, as promulgated by the Commission on December 16, 2000 (See Option 1 on pink pages), to apply to the manufacture of all controlled substances rather than only amphetamine or methamphetamine, this proposal was rejected because the directive specifically instructs the Commission to provide increased penalties for the manufacture of amphetamine and methamphetamine.

Opton 2 addresses the "substantial risk" directive in a manner similar to Option 3 of the published options.

The proposal differs from Option 1 in several respects:

1) In §2D1.1, this option treats existing specific offense characteristics (b)(5), relating to a two-level enhancement for environmental violations occurring in the course of a drug trafficking offense, as an alternative to the new three-level enhancement for substantial risk of harm to human life or the environment. Option 1 makes the enhancements additive.

(2) In both §2D1.1 and 2D1.10, this option makes minor changes in the language setting forth a list of factors indicating "substantial risk." Because the factors relate to an enhancement within the guidelines rather than a departure, it seems more appropriate to present the factors in a less discretionary manner.

2) This option makes several conforming changes in §2D1.1, application note 20, and in the background commentary.

This option embodies two important underlying policy issues for the Commission regarding implementation of Congressional directives in the 2000 Act and an earlier law, the 1996 Comprehensive Methamphetamine Control Act, Pub. L. 104-237. Before presenting those two issues, it is important to briefly explain how the Commission responded to the general directives in sections 301 and 303 of the 1996 Act. The Commission did so in the following three ways:

(1) by adding an enhancement for importation of listed chemicals used to

manufacture methamphetamine (current §2D1.1(b)(4));

(2) by increasing the penalties for methamphetamine mixture trafficking offenses (but not for "actual" methamphetamine or "ice") through the Drug Quantity Table; and

(3) by adding an environmental hazard enhancement (current §2D1.1(b)(5)), which was made applicable to any controlled substance offense that involved environmental violations.

Although these directives and the Commission's implementation of them were designed to forestall increases in the statutory mandatory minimum penalties, this strategy was effective only temporarily. In 1998, Congress enacted the very same increases in the mandatory minimum penalties for methamphetamine that had been considered and rejected in the 1996 legislation. The Commission responded last year by conforming the methamphetamine guideline penalties to the increased mandatory minimums Congress had legislated. Now, in the most recent statement of Congressional policy on the matter, i.e., the 2000 Act, Congress has specifically directed the Commission to add a 3-level enhancement, with a "floor" offense level of 27, for methamphetamine/amphetamine manufacturing offenses that present a "substantial risk of harm to human life or the environment."

One issue surrounding implementation of this latest directive is how to square it with the earlier environmental hazard directive in section 303 of the 1996 Act. Commission staff have designed an amendment that makes the new, specifically-directed guideline provision additive with the pre-existing enhancement. Because most meth labs both present a substantial risk of environmental harm and involve actual environmental violations, this will mean that essentially every meth lab case will warrant a 5-level enhancement because of the environmental hazards. Option 2, on the other hand, would not make the enhancements cumulative and is premised on a view that the 2000 Act essentially supersedes the earlier, more general directive in the 1996 Act, insofar as meth lab hazards are concerned.

A second issue involves interpretation and implementation of the 2000 Act's directive in the context of guideline 2D1.10, applicable to the offense of creating a substantial risk of harm to human life while manufacturing a controlled substance offense (21 U.S.C. § 858). This guideline already has a structure similar in part to that which Congress directed because the base offense level is 3 levels greater than the base offense level for an ordinary trafficking offense of the same magnitude. However, the "floor" offense level must be raised from the current level of 20 to level 27 to comply with the directives.

Option 1 for this guideline follows literally the 2000 Act's directive to "increase the base offense level for the offense ... by not less than 3 offense levels above the applicable level in effect on the date of enactment." The result of this literal adherence unfortunately creates an

undesirable inequality in the guidelines that appears to contravene a fundamental Sentencing Reform Act directive that the Commission should treat similar offenses similarly. Here, however, strict compliance with the 2000 Act's directive produces a result in which a meth lab that presents a substantial risk of harm to human life will receive a guideline punishment 3 levels (nearly 40%) more severe if the defendant is convicted under 21 U.S.C. § 858 than if convicted under 21 U.S.C. § 841.

Option 2's approach to guideline 2D1.10 is premised on assumptions that Congress did not intend to require the unequal result described above and that, in view of the competing general and specific directives from Congress, the Commission has some latitude to vary from literal compliance with the problematic part of the 2000 Act's directive. This option would, however, fulfill that part of the directive calling for a floor offense level of 27.

Proposed Amendment:

Option 1: Re-promulgating Emergency Amendment With the Following Change: Strike "878" wherever it appears and insert "310".

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

[Redesignate subsection (b)(6) as subsection (b)(7) and insert the following:]

(b) Specific Offense Characteristics

* * *

(6) (Apply the greater):

(A) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subsection (b)(6)(B); or (II) the environment, increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

(B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

Commentary

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Application Notes:

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20. *Hazardous or Toxic Substances.—Subsection (b)(5) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b). In some cases, the enhancement under subsection (b)(5) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).*

21. *Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine.—*

(A) *Factors to Consider.—In determining, for purposes of subsection (b)(6), whether the offense created a substantial risk of harm to human life or the environment, the court may consider factors such as the following:*

(i) *The quantity of any chemicals or hazardous or toxic substances found at the laboratory, or the manner in which the chemicals or substances were stored.*

(ii) *The manner in which hazardous or toxic substances were disposed, or the likelihood of release into the environment of hazardous or toxic substances.*

(iii) *The duration of the offense, or the extent of the manufacturing operation.*

(iv) *The location of the amphetamine or methamphetamine laboratory (e.g., in a residential neighborhood or a remote area) and the number of human lives placed at substantial risk of harm.*

(B) *Definitions.—For purposes of subsection (b)(6)(B):*

"Incompetent" means an individual who is incapable of taking care of the individual's self or property because of a mental or physical illness or disability, mental retardation, or senility.

"Minor" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).

Background:

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The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in Chapman v. United States, 111 S.Ct. 1919 (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the applicability of "mixture or substance" for the purpose of applying any mandatory minimum sentence (see Chapman; §5G1.1(b)).

Subsection (b)(5) implements the instruction to the Commission in section 303 of Public Law 103–237.

Subsection (b)(6) implements the instruction to the Commission in section 102 of Public Law 106–310.

§2D1.10. Endangering Human Life While Illegally Manufacturing a Controlled Substance; Attempt or Conspiracy

(a) Base Offense Level (Apply the greater):

* * *

(b) Specific Offense Characteristic

(1) (Apply the greater):

(A) If the offense involved the manufacture of amphetamine or methamphetamine, increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

(B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

Commentary

Statutory Provision: 21 U.S.C. § 858.

Application Note:

1. Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine.—

(A) Factors to Consider.— In determining, for purposes of subsection (b)(1)(B), whether the offense created a substantial risk of harm to the life of a minor or an incompetent, the court may consider factors such as the following:

(i) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, or the manner in which the chemicals or substances were stored.

(ii) The manner in which hazardous or toxic substances were disposed, or the likelihood of release into the environment of hazardous or toxic substances.

(iii) The duration of the offense, or the extent of the manufacturing operation.

(iv) The location of the amphetamine or methamphetamine laboratory (e.g., in a residential neighborhood or a remote area) and the number of human lives placed at substantial risk of harm.

(B) Definitions.—For purposes of subsection (b)(1)(B):

"Incompetent" means an individual who is incapable of taking care of the individual's self or property because of a mental or physical illness or disability, mental retardation, or senility.

"Minor" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).

Background: Subsection (b)(1) implements the instruction to the Commission in section 102 of Public Law 106–310.

Option 2:

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

(b) Specific Offense Characteristics

* * *

~~(5) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (B) the~~

~~unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.~~

(~~6~~5) (Apply the greater):

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

(~~A~~B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in ~~subsection (b)(6)(B)~~ subdivision (C); or (II) the environment, increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

(~~B~~C) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

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Commentary

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Application Notes:

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20. *Hazardous or Toxic Substances.—Subsection (b)(5)(A) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b). In some cases, the enhancement under subsection (b)(5)(A) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of probation and supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release), respectively, any costs of environmental cleanup and harm to individuals or property shall be considered by the court in cases involving the manufacture of amphetamine or methamphetamine and should be considered by the court in cases involving the*

manufacture of a controlled substance other than amphetamine or methamphetamine. See 21 U.S.C. 853(q) (mandatory restitution for cleanup costs relating to the manufacture of amphetamine and methamphetamine). ~~*Additionally, any costs of environmental cleanup and harm to individuals or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).*~~

21. Substantial Risk of Harm Associated with the Manufacture of ~~*Amphetamine and Methamphetamine*~~ *Controlled Substances.—*

(A) Factors to Consider.—In determining, for purposes of subsection (b)(~~*6*~~*5)(B), whether the offense created a substantial risk of harm to the environment or human life, the court* ~~*may*~~*shall* ~~*consider factors such as the following*~~*include consideration of the following factors:*

(i) The quantity of any chemicals or hazardous or toxic substances found at the illicit laboratory, ~~*or*~~*and the manner in which the chemicals or substances were stored.*

(ii) The manner in which hazardous or toxic substances were disposed, ~~*or*~~*and the likelihood of release into the environment of hazardous or toxic substances.*

(iii) The duration of the offense ~~*or*~~*and extent of the manufacturing operation.*

(iv) The location of the ~~*amphetamine or methamphetamine*~~*illicit laboratory (e.g., whether the laboratory is located in a residential neighborhood or a remote area) and the number of human lives placed at substantial risk of harm.*

(B) Definitions.—For purposes of subsection (b)(~~*6*~~*5)(C):*

"Incompetent" means an individual who is incapable of taking care of the individual's self or property because of a mental or physical illness or disability, mental retardation, or senility.

"Minor" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).

Background:

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Subsection (b)(5)(A) implements the instruction to the Commission in section 303 of Public Law 103–237.

Subsections (b)(~~*6*~~*5)(B) and (C)) implement*~~*s*~~*, in a broader form, the instruction to the Commission in section 102 of Public Law 106–*~~*878*~~*310.*

§2D1.10. **Endangering Human Life While Illegally Manufacturing a Controlled Substance; Attempt or Conspiracy**

(a) Base Offense Level (Apply the greater):

(1) **3** plus the offense level from the Drug Quantity Table in §2D1.1; or

(2) ~~**20**~~**27**.

(b) Specific Offense Characteristic

(1) ~~(Apply the greater):~~

~~(A) If the offense involved the manufacture of amphetamine or methamphetamine, increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.~~

~~(B)~~ If the offense ~~(i) involved the manufacture of amphetamine or methamphetamine; and (ii)~~ created a substantial risk of harm to the life of a minor or an incompetent, increase by ~~**6**~~**3** levels. If the resulting offense level is less than level **30**, increase to level **30**.

Commentary

Statutory Provision: 21 U.S.C. § 858.

Application Note:

1. Substantial Risk of Harm ~~Associated with the Manufacture of Amphetamine and Methamphetamine~~.~~—~~

(A) Factors to Consider.—In determining, for purposes of subsections (b)(1), whether the offense created a substantial risk of harm to the life of a minor or an incompetent, the court ~~may~~shall ~~consider factors such as the following~~ include consideration of the following factors:

(i) The quantity of any chemicals or hazardous or toxic substances found at the illicit laboratory, ~~or~~and the manner in which the chemicals or substances were stored.

(ii) The manner in which hazardous or toxic substances were disposed, ~~or~~and the likelihood of release into the environment of hazardous or toxic substances.

(iii) The duration of the offense ~~or~~and the extent of the manufacturing operation.

(iv) The location of the ~~amphetamine or methamphetamine~~ illicit laboratory ~~(e.g., in a residential neighborhood or a remote area) and the number of human lives placed at substantial risk of harm~~in proximity to any minors or incompetents.

(B) Definitions.—For purposes of subsection (b)(1):

"Incompetent" means an individual who is incapable of taking care of the individual's self or property because of a mental or physical illness or disability, mental retardation, or senility.

"Minor" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).

Background: Subsections (a)(2) and (b)(1) implement~~s~~, in a broader form, the instruction to the Commission in section 102 of Public Law 106~~–878~~310.