Amendments to the Federal Sentencing Guidelines

(Effective November 1, 2001 unless modified or rejected by Congress)

Highlights of Key Points

Prepared by the Office of Education & Sentencing Practice

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SENTENCING GUIDELINES
AMENDMENT HIGHLIGHTS - 2001

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I. **ECONOMIC CRIME PACKAGE -** The "Economic Crime Package" is the outcome of Commission review of economic crime issues over a number of years. The amendment is divided into six major provisions: (1) the consolidation of the theft, property destruction, and fraud guidelines; (2) a revised loss table for the consolidated guideline and a similar table for tax offenses; (3) a revised definition of loss for the consolidated guideline; (4) revisions to the guidelines that refer to the loss table in the consolidated guideline; (5) technical and conforming amendments; and (6) conforming the "sophisticated concealment" enhancement in §§2T1.1 and 2T4.1 to the "sophisticated means" enhancement in the consolidated guideline. In addition, the amendment addresses several circuit conflicts including tax loss in §2T1.1.

Consolidation - The amendment consolidates the guidelines for theft (§2B1.1) property destruction (§2B1.3) and fraud (§2F1.1) into one guideline, §2B1.1. The amendment also deletes the two-level enhancement for more than minimal planning previously contained in §§2B1.1 and 2F1.1. The directive contained in the College Scholarship Fraud Prevention Act of 2000 was implemented in this amendment by providing an additional alternative enhancement if the offense involves a misrepresentation to a consumer in connection with financial assistance for an institution of higher education.

Loss Tables - The primary feature of the revised table for the consolidated guideline is the expansion of the one-level increments into two-level increments. The change increases the range of losses corresponding to each increment, compresses the table and reduces fact-finding. The loss table revision provides substantial increases in penalties for moderate and higher loss amounts. With respect to the revised loss table in §2T4.1 (Tax Table), the new table significantly increases penalties for offenses involving moderate and high tax loss. The new table is designed to reflect the seriousness of tax offenses.

Definition of Loss - The revised definition makes clarifying and substantive changes to the definitions of loss previously contained in the commentary to §§2B1.1 and 2F1.1. The revised definition of loss retains the rule that loss is the greater of actual and intended loss. The amendment defines "actual loss" as the "reasonably foreseeable pecuniary harm" that resulted from the offense. "Reasonably foreseeable pecuniary harm" is defined to include pecuniary harms the defendant knew, or, under the circumstances, reasonably should have known, was a potential result of the offense.

The amendment also resolves the circuit conflict regarding how tax loss is computed for cases that involve a defendant's under-reporting of income on both individual and corporate tax returns. The amendment provides that the amount of the tax loss is the sum of the federal income tax due from the corporation and the amount of federal income tax due from the individual.

II. **MONEY LAUNDERING -** The primary feature of the money laundering amendment is the consolidation of two money laundering guidelines, §§2S1.1 and 2S1.2, into one guideline, §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity). The amendment ties offense levels for money laundering more closely to the underlying conduct that was the source of the criminally derived funds. The consolidated guideline separates money laundering defendants into two categories (direct and third party money launderers) for purposes of determining the base offense level. Direct money launderers are those who commit or would be accountable under relevant conduct (§1B1.3(a)(1)(A)) for the underlying offense which generated the criminal proceeds. Third party money launderers are those who launder the proceeds generated from underlying offense(s) the defendant did not commit or would not be accountable for under relevant conduct (§1B1.3(a)(1)(A)).

In addition, the amendment provides an enhancement designed to reflect the differing seriousness of the underlying conduct that was the source of the criminally derived funds. The consolidated guideline also provides three alternative enhancements which are designed to (1) ensure that all direct money launderers receive additional punishment for committing both the money laundering offense and the underlying offense, and (2) reflect the differing seriousness of money laundering conduct depending on the nature and sophistication of the offense.

The amendment also resolves a circuit conflict regarding the grouping of money laundering counts with counts of conviction for the underlying offense that generated the laundered funds through an application note in the commentary to the consolidated guideline.

III. **IMMIGRATION -** The amendment responds to concerns voiced by judges, probation officers, and defense attorneys regarding disproportionate penalties based on the 16-level enhancement under §2L1.2 (Unlawfully Entering or Remaining in the United States) for a prior conviction for an aggravated felony. The amendment modifies §2L1.2 to provide a more graduated sentencing enhancement of between 8 levels and 16 levels, depending on the seriousness of the prior felony and the dangerousness of the defendant.

The amendment also deletes an application note which provided for a downward departure based on the seriousness of the prior aggravated felony. The graduated sentencing enhancement based on the seriousness of the prior conviction negates the need for the departure provision and thereby renders moot a circuit conflict.

IV. **SEXUAL PREDATORS -** The three-part amendment is promulgated primarily in response to directives to the Commission in the Protection of Children from Sexual Predators Act of 1998. In addition, the Commission initiated a comprehensive examination of the guidelines under which most sex crimes are sentenced. The first part of the amendment addresses the directive to increase penalties in cases in which the defendant engaged in a pattern of activity of sexual abuse or sexual exploitation of a minor. The amendment provides a new Chapter Four guideline, §4B1.5 (Repeat and Dangerous Sex

Offender Against a Minor) focusing on repeat child sex offenders. The new guideline creates a tiered approach to punishing defendants convicted of certain sex crimes and who present a continuing danger to the public. The first tier is aimed at repeat child sex offenders who have an instant offense of conviction of sexual abuse of a minor and a prior felony conviction for sexual abuse of a minor. The second tier provides a five-level increase and a minimum offense level for defendants who do not meet the criteria of the first tier but who have engaged in a pattern of activity involving prohibited sexual conduct with minors.

The amendment also makes several modifications to §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen (Statutory Rape)) in response to a directive to provide an enhancement for offenses under chapter 117 of title 18, United States Code, involving the transportation of minors for prostitution or prohibited sexual conduct. In addition, conforming changes are made to several of the sexual abuse guidelines.

The amendment resolves a circuit conflict regarding whether multiple counts of possession, receipt, or transportation of images containing child pornography should be grouped together pursuant to subsection (a) or (b) of §3D1.2. The conflict was resolved by directing the grouping of multiple counts of child pornography distribution, receipt, and possession pursuant to §3D1.2(d).

V. **SAFETY VALVE** - The amendment expands the eligibility for the two-level reduction in subsection (b)(6) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) to include defendants with an offense level less than level 26. Additionally, the amendment establishes a minimum offense level of 17 in §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) for a defendant who meets the requirements set forth in §5C1.2 and for whom the statutorily authorized minimum sentence is at least five years. The addition of the minimum offense level provides more strict compliance with the directive to the Commission of the Violent Crime Control and Law Enforcement Act of 1994.

VI. **ENHANCED PENALTIES FOR AMPHETAMINE AND METHAMPHETAMINE LABORATORY OPERATORS** - Repromulgates, with change, the emergency amendment of December 16, 2000, regarding methamphetamine laboratories. The amendment responds to the directive contained in the Methamphetamine Anti-Proliferation Act of 2000. The emergency amendment went into effect December 16, 2000; however, the permanent amendment modifies the emergency amendment regarding the substantial risk directive. The permanent amendment treats the existing specific offense characteristic in §2D1.1(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 three-level enhancement for substantial risk of harm to human life or the environment. The amendment also removes a departure provision contained in an application note.

The permanent amendment also makes mandatory the consideration of factors provided in

the commentary to §§2D1.1 and 2D1.10 (Endangering Human Life While Illegally Manufacturing a Controlled Substance) which assist in defining the meaning of "substantial risk of harm." Finally, the permanent amendment adds commentary regarding the (1) determination of restitution under §5E1.1 in cases involving the manufacture of amphetamine or methamphetamine and (2) the formulation of appropriate conditions of probation and supervised release under §5B1.3 and §5D1.3.

VII. **ANHYDROUS AMMONIA** - The amendment addresses the new offense in section 423 of the Controlled Substances Act, 21 U.S.C. § 864, of stealing or transporting across state lines anhydrous ammonia knowing, intending, or having reasonable cause to believe that such anhydrous ammonia will be used to manufacture a controlled substance. The new offense is part of the Methamphetamine Anti-Proliferation Act of 2000. The amendment refers the new offense to §2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask or Equipment, Chemical, Product, or Material) and expands the commentary in the guideline to apply to cases involving the transportation and exportation of prohibited chemicals, products, or material.

VIII. **ECSTASY** - The amendment repromulgates, without change, the emergency amendment of May 1, 2001, to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) previously promulgated in response to the directive contained in the Ecstasy Anti-Proliferation Act of 2000. The directive instructed the Commission to provide increased penalties for the manufacture, importation, exportation, or trafficking of Ecstasy, and specifically, MDMA, MDA, MDEA, and PMA. The amendment substantially increases the marijuana equivalencies for the specified controlled substances which has the effect of substantially increasing the penalties for offenses involving Ecstasy. The amendment sets the marijuana equivalency for one gram of Ecstasy at 500 grams.

IX. **AMPHETAMINE** - The amendment repromulgates, with change, the emergency amendment previously promulgated effective May 1, 2001, to implement the directive contained in the Methamphetamine Anti-Proliferation Act of 2000. The directive instructed the Commission to provide increased penalties for amphetamine offenses that are comparable to the base offense level for methamphetamine offenses. The amendment revises §2D1.1 to include amphetamine in the Drug Quantity Table and treats amphetamine and methamphetamine identically at a 1:1 ratio. The amendment also distinguishes between pure amphetamine (amphetamine actual) and amphetamine mixture.

The permanent amendment differs from the emergency amendment in that it amends §2D1.1(b)(4) to include offenses involving amphetamine importation along with offenses involving methamphetamine importation. Additionally, conforming technical changes were made in the permanent amendment.

X. **GHB** - The amendment implements the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000 which provided emergency scheduling of GHB as a Schedule I controlled substance under Controlled Substances Act when the drug is used illegally.

The amendment eliminates the maximum base offense level of 20 in the Drug Quantity Table of §2D1.1 for Schedule I and II depressants, including GHB and flunitrazepam. Similarly, the amendment makes corresponding changes to the Drug Equivalency Tables in §2D1.1 by eliminating the maximum marijuana equivalency when offenses involving flunitrazepam and Schedule I or II depressants also involve offenses for controlled substances in Schedules III, IV or V.

XI. **LIST I CHEMICALS** - The amendment repromulgates, with additional changes, the emergency amendment of May 1, 2001, promulgated in response to the three-part directive contained in the Methamphetamine Anti-Proliferation Act of 2000. The amendment amends §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical) by providing a new chemical quantity table specifically for ephedrine, pseudoephedrine and phenylpropanolamine which increases penalties for these chemicals. The amendment also provides an upward departure provision for cases in which the offense level does not adequately address the seriousness of the offense. The amendment also amends §2D1.1 by adding to the Drug Equivalency Table a conversion table for ephedrine, pseudoephedrine and phenylpropanolamine. The amendment increases the base offense level at §2D1.11 for Benzaldehyde, Hydriodic Acid, Methylamine, Nitroethane, and Norpseudophedrine.

The permanent amendment adds to the emergency amendment in two ways. The Chemical Quantity Table in §2D1.11 is amended to include gamma-butyrolactone (GBL), a precursor for GHB, as a List I chemical. Also, iodine is added to the Chemical Quantity Table in §2D1.11 in response to a recent classification of iodine as a List II chemical.

XII. **MANDATORY RESTITUTION** - The amendment responds to the Methamphetamine Anti-Proliferation Act of 2000. The Act amended 21 U.S.C. § 853(q) to provide mandatory restitution for offenses involving the manufacture of methamphetamine. Accordingly, the amendment amends §5E1.1 to include a reference to the statute in the guideline provisions regarding mandatory restitution.

XIII. **STALKING AND DOMESTIC VIOLENCE -** The amendment is in response to the directive contained in the Victims of Trafficking and Violence Act of 2000. The amendment increases the base offense level in §2A6.2 (Stalking or Domestic Violence) due to concern for proportionality in sentencing these offenses relative to other crimes, such as threatening or harassing communications. The amendment also conforms the definition of "stalking" contained within §2A6.2 to the statutory changes made by the Act.

XIV. **HUMAN TRAFFICKING** - The amendment repromulgates the emergency amendment of May 1, 2001, on human trafficking (i.e., peonage, involuntary servitude and forced labor). The amendment implements the congressional directive contained in the Victims of Trafficking and Violence Protection Act of 2000. The amendment refers three new offenses to §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade) and amends the guideline to provide alternative base offense levels. The amendment expands §2H4.1(b)(2) to provide additional increased punishment.

Also, a new offense at 18 U.S.C. § 1591 is referenced to §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) and §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production). The amendment also creates a new guideline, §2H4.2 (Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act). Finally, the amendment amends §5E1.1 to include a reference to 18 U.S.C. § 1593 in the guideline provisions regarding mandatory restitution.

XV. **PROHIBITED PERSON DEFINITION and PRIOR FELONIES -** The amendment makes two revisions regarding the definition of "prohibited person" in §§2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials) and 2K2.1 (Unlawful, Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). First, the amendment adopts the definitions of prohibited person found in specific statutes for explosive and firearm offenses. Second, the amendment clarifies that the relevant time to determine whether a person qualifies as a "prohibited person" is as of the time the defendant committed the instant offense.

Similarly, a circuit conflict regarding the issue of whether a crime committed after the commission of the instant offense and before sentencing for the instant offense is counted as a prior felony conviction for purposes of determining the defendant's base offense level was clarified. The amendment clarifies §§2K1.3 and 2K2.1 by adopting the view that an offense committed after the commission of any part of the instant offense cannot be counted as a prior felony conviction.

XVI. **FIREARMS TABLE -** The amendment modifies the firearms table in §2K2.1 in response to a recommendation from the Bureau of Alcohol, Tobacco, and Firearms to increase penalties for offenses involving more than 100 firearms. The amendment modifies the table to provide enhancements in two-level increments. The increases are provided to ensure adequate and proportionate punishment in cases that involve large numbers of firearms.

XVII. **NUCLEAR, BIOLOGICAL AND CHEMICAL WEAPONS -** The amendment responds to the sense of Congress contained in Section 1423(a) of the National Defense Authorization Act for Fiscal Year 1997. The amendment increases the base offense levels in §§2M5.1 (Evasion of Export Controls) and 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License) for offenses that involve the importation, attempted importation, exportation and attempted exportation of nuclear, chemical, and biological weapons, materials or technologies. Also, Appendix A (Statutory Index) is amended to refer 50 U.S.C. §1701 to §§2M5.1 and 2M5.2.

The amendment also substantially revises §2M6.1 (Unlawful Production, Development,

Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction) to incorporate two new offenses; 18 U.S.C. § 175, relating to biological weapons, and 18 U.S.C. § 229, relating to chemical weapons. The amendment creates three alternative base offense levels. Additionally, three specific offense characteristics are added to address the following: (1) injury or death; (2) substantial disruption of public, governmental, or business functions or services; or (3) substantial expenditure of funds for clean up and decontamination efforts.

XVIII. **COUNTERFEITING** - The amendment increases penalties for counterfeiting activity in §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) in response to concerns raised by the Department of the Treasury and the United States Secret Service. The amendment adds a two-level enhancement for manufacturing in addition to the minimum offense level of 15. Also, the amendment adds a two-level enhancement (which would apply alternatively to the manufacturing enhancement) if the offense involved possessing or controlling (1) paper that is similar to a distinctive paper used by the United States for its currency, obligations, or securities; or (2) a feature or device that is essentially identical to a distinctive counterfeit deterrent used by the United States for its currency, obligations, or securities. Finally, the amendment deletes language in the commentary of §2B5.1 that suggests that the manufacturing adjustment does not apply if the defendant "merely photocopies."

XIX. **TAX PRIVACY** - The amendment responds to the Internal Revenue Service Restructuring and Reform Act of 1998, pertaining to the unlawful disclosure of tax-related information contained on computer software and to unlawful requests for tax audits, and the Taxpayer Browsing Protection Act of 1997, pertaining to unlawful inspection of tax information. The two-part amendment updates Appendix A (Statutory Index) by referring most of the newly created tax offenses to §2H3.1(Interception of Communications; Eavesdropping; Disclosure of Tax Return Information). In addition, the amendment adds a three-level decrease in the base offense level under §2H3.1 for the least serious types of offense behavior, in which there was not intent to harm or obtain pecuniary gain.

XX. **UNAUTHORIZED COMPENSATION** - The amendment consolidates §§2C1.3 (Conflict of Interest) and 2C1.4 (Payment or Receipt of Unauthorized Compensation) under §2C1.3 (Conflict of Interest; Payment or Receipt of Unauthorized Compensation) to simplify guideline application. A cross reference is added to the consolidated guideline to refer to §§2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) and 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity) to account for aggravating conduct in offenses involving the unlawful supplementation of the salary of various federal officials and employees committed in violation of 18 U.S.C. § 209.

XXI. **CIRCUIT CONFLICTS** - In addition to the circuit conflicts resolved by other 2001 amendments, the following conflicts were also addressed:

A. **STIPULATIONS -** The amendment addresses the circuit conflict regarding whether admissions made by a defendant during a guilty plea hearing can be considered stipulations for purposes of subsection (a) of §1B1.2 (Applicable Guidelines). The amendment clarifies that a factual statement made by the defendant during the plea colloquy must be made as part of the plea agreement in order to be considered a stipulation for purposes of §1B1.2(a).

B. **AGGRAVATED ASSAULT -** The amendment addresses the circuit conflict regarding whether the four-level enhancement in subsection (b)(2)(B) of §2A2.2 (Aggravated Assault) for use of a dangerous weapon during an aggravated assault is impermissible double counting. The amendment provides that (1) both the base offense level of 15 and the weapon enhancement in subsection (b)(2) shall apply to aggravated assaults that involve a dangerous weapon with intent to cause harm and (2) an instrument not ordinarily used as a weapon may qualify as a dangerous weapon for purposes of the use of the aggravated assault guideline and the application of subsection (b)(2) when the defendant involves it in the intent to cause bodily harm.

C. **FRAUDULENT MISREPRESENTATION -** The amendment contained in the Economic Crime Package resolves the circuit conflict regarding the scope of the enhancement for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency. The amendment provides for the application of the enhancement at (b)(7) of §2B1.1 (Theft, Property Destruction, and Fraud) if the defendant falsely represented that the defendant was acting to obtain a benefit for a covered organization or agency regardless of whether the defendant actually was associated with the organization or government agency.

D. **MITIGATING ROLE -** The amendment resolves a circuit conflict regarding whether a defendant who is accountable under §1B1.3 (Relevant Conduct) only for conduct in which the defendant personally was involved, and who personally performs a limited function in concerted criminal activity, is precluded from consideration for an adjustment under §3B1.2 (Mitigating Role). The amendment clarifies that such a defendant is not automatically precluded from being considered for a mitigating role adjustment. The court must measure the defendant's role against relevant conduct for which the defendant is held accountable at sentencing, whether or not other defendants are charged. The amendment also makes a number of technical adjustments to the commentary that are intended to have no substantive impact.