
Public Comment



Proposed Amendments 2001

VOLUME I



Volume One: Proposed Amendments to the Sentencing Guidelines

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This compilation contains unofficial text of proposed amendments to the sentencing guidelines and is provided only for the convenience of the user in the preparation of public comment. Official text of the proposed amendments was published in the Federal Register, November 7, 2000.

**INDEX TO PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES
PUBLISHED IN THE FEDERAL REGISTER NOVEMBER 7, 2000**

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2	5	Counterfeiting Offenses. —This proposed amendment (A) increases the base offense level in §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) from level 9 to level 10; (B) replaces the minimum offense level of level 15 for manufacturing offenses with a two-level enhancement; and (C) proposes to delete commentary that suggests that the manufacturing adjustment does not apply if the defendant "merely photocopies".
3	7	Tax Privacy. —This amendment proposes to address several offenses relating to unlawful disclosure and/or inspection of tax return information. The amendment proposes to (A) amend the Statutory Index to refer most of those offenses to the guideline covering eavesdropping and interception of communications, §2H3.1; and (B) amend §2H3.1 to add a three-level decrease in the base offense level for the least serious types of offense behavior.
4	10	Circuit Conflict Concerning Stipulations. — This proposed amendment addresses the circuit conflict regarding whether admissions made by the defendant during his guilty plea hearing, without more, can be considered "stipulations" for purposes of §1B1.2(a). The proposed amendment represents a narrow approach to the majority view 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).

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Circuit Conflict Concerning Aggravated Assault.—This proposed 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 in a case in which the weapon that was used was a non-inherently dangerous weapon. This amendment presents two options. Both options address the circuit conflict by clarifying in the aggravated assault guideline that (A) both the base offense level of level 15 and the weapon use enhancement in subsection (b)(2) shall apply to aggravated assaults that involve a dangerous weapon with intent to cause bodily harm; and (B) instruments, such as a car or chair, that ordinarily are not used as weapons may qualify as a dangerous weapon for purposes of subsection (b)(2) when the defendant involves them in the offense with the intent to cause bodily harm.

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Circuit Conflict Concerning Certain Fraudulent Misrepresentations.—This proposed amendment resolves a circuit conflict regarding the scope of the enhancement in subsection (b)(4)(A) of §2F1.1 (Fraud and Deceit) for misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency. The proposed amendment provides for application of the enhancement if (A) the defendant falsely represented that the defendant was an employee of a covered organization or a government agency; or (B) the defendant was an employee of a covered organization or a government agency who represented that the defendant was acting solely for the benefit of the organization or agency when, in fact, the defendant intended to divert all or part of that benefit.

Circuit Conflict Concerning Drug Defendants Mitigating Role.—This amendment proposes to resolve a circuit conflict regarding whether application of §3B1.2 (Mitigating Role) is precluded in the case of a single defendant drug courier if the defendant’s base offense level is determined solely by the quantity personally handled by the defendant and that quantity constitutes all of the defendant’s relevant conduct. The proposed amendment (A) adopts the view that such a defendant, in a single defendant case, is not precluded from receiving a mitigating role adjustment; (B) incorporates commentary from the Introduction to Chapter Three, Part B (Role in the Offense) that there must be more than one participant before application of a mitigating role adjustment may be considered; (C) incorporates the definition of "participant" found in the aggravating role guideline; (D) amends commentary to indicate that the mitigating role adjustment ordinarily is not warranted if the defendant receives a lower offense level than warranted by the actual criminal conduct because; (E) deletes commentary language that the minimal role adjustment is intended to be used infrequently; and (F) makes technical amendments to the guideline.

2001 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

Proposed Amendment: Unauthorized Compensation

1. **Synopsis of Proposed Amendment:** *This proposed amendment addresses the issue of whether, and to what extent, the guideline offense levels should be increased in §2C1.4, the guideline for offenses in 18 U.S.C. § 209 involving the unlawful supplementation of the salary of various federal employees. The proposed amendment (A) adds a cross reference to the bribery and gratuity guidelines, in order to account for aggravating conduct; and (B) consolidates the unauthorized compensation guideline (§2C1.4) with the conflict of interest guideline (§2C1.3) and the guideline covering payments to obtain public office (§2C1.5), to promote ease of application.*

The Commission began to focus on this issue in 1998 when it promulgated an amendment to §2C1.4 to delete outdated, erroneous background commentary. That commentary, first written in 1987, described the offenses covered by the guideline as misdemeanors punishable by imprisonment for not more than one year. In fact, however, the penalties for 18 U.S.C. § 209 offenses were changed in 1989. The applicable penalties, under 18 U.S.C. § 216, became (1) imprisonment for not more than one year; or (2) imprisonment for not more than five years, if the defendant willfully engaged in the conduct constituting the offense.

The increased statutory penalties under 18 U.S.C. § 216 implicate the question of whether guideline penalties under §§2C1.3 and 2C1.4 should be increased correspondingly, particularly if the current guideline penalty structure inadequately takes into account aggravating conduct associated with these offenses.

The guideline covering offenses in 18 U.S.C. § 209, §2C1.4, has a base offense level of level 6 and no additional enhancements that take into account aggravating conduct. From FY91 through FY99, a total of 73 cases were sentenced under §2C1.4. Because of the low offense levels associated with this guideline, all of the defendants sentenced under §2C1.4 received probation.

Moreover, the increased statutory penalty in 18 U.S.C. § 216 (namely, the five-year statutory maximum for willful conduct) applies not only to offenses under 18 U.S.C. § 209 but also to bribery, graft, and conflict of interest offenses under 18 U.S.C. §§ 203, 204, 205, 207, and 208, all of which are covered by the conflict of interest guideline, §2C1.3. That guideline has a base offense level of level 6 and a four-level enhancement if the offense involved actual or planned harm to the government. From FY91 through FY99, a total of 71 cases were sentenced under §2C1.3, and only 10 of those cases received the enhancement for actual or planned harm to the government.

Commission staff review of the cases sentenced under §§2C1.3 and 2C1.4 revealed that many of those cases actually involved a bribe or a gratuity. In other words, many of these defendants likely could have been charged under a bribery or gratuity statute (most likely 18 U.S.C. § 201) and sentenced under the more serious bribery (§2C1.1) or gratuity (§2C1.2) guideline but were convicted under the less serious statutes and sentenced under

the less severe guidelines (i.e., §§2C1.3 and 2C1.4).

The following proposed amendment is intended to address these issues by (A) adding a cross reference from §2C1.4 to the bribery and gratuity guidelines, in order to account for aggravating conduct; and (B) consolidating the unauthorized compensation guideline with the conflict of interest guideline and the guideline covering payments to obtain public office, to promote ease of application. First, in order to more adequately account for aggravating conduct prevalent in these cases (i.e., the presence of a bribe or a gratuity), the proposed amendment provides a cross reference to §2C1.1 (in the case of a bribe) or §2C1.2 (in the case of a gratuity), which will apply on the basis of the underlying conduct; i.e., as a sentencing factor rather than a count of conviction factor.

Second, in order to simplify overall guideline operation, the proposed amendment consolidates §§2C1.3 (Conflict of Interest), 2C1.4 (Payment or Receipt of Unauthorized Compensation), and 2C1.5 (Payments to Obtain Public Office). Although the elements of the offenses of conflict of interest (currently covered by §2C1.3) and unauthorized compensation (currently covered by §2C1.4) differ in some ways, the gravamen of the offenses is similar - unauthorized receipt of a payment in respect to an official act. The base offense levels for both guidelines are identical. However, the few cases in which these guidelines were applied usually involved a conflict of interest offense that was associated with a bribe or gratuity.

The guideline covering payments to obtain public office, §2C1.5, is also consolidated under the proposed amendment. Offenses involving payment to obtain public office generally, but not always, involve the promised use of influence to obtain public appointive office. Also, such offenses need not involve a public official (see, for example, the second paragraph of 18 U.S.C. § 211). The current offense level for all such offenses is level 8. The two statutes to which §2C1.5 applies (18 U.S.C. §§ 210 and 211) are both Class A misdemeanors. Under the proposed consolidation, the base offense level would be level 6, but the higher base offense level of §2C1.5 would be taken into account by a two-level enhancement in subsection (b)(1)(B) covering conduct under 18 U.S.C. § 210 and the first paragraph of 18 U.S.C. § 211. There is one circumstance in which a lower offense level may result and one circumstance in which a higher offense level may result. The offense level for conduct under the second paragraph of 18 U.S.C. § 211 (the prong of § 211 that does not pertain to the promise or use of influence) is reduced from level 8 to level 6. On the other hand, conduct that involves a bribe of a government official will result in an increased offense level (level 10 or greater, compared to level 8) under the proposed cross reference.

§2C1.3. Conflict of Interest; Payment or Receipt of Unauthorized Compensation; Payments to Obtain Public Office

(a) Base Offense Level: 6

(b) Specific Offense Characteristic

~~(1) If the offense involved actual or planned harm to the government, increase by 4 levels:~~

(1) (Apply the greater):

- (A) if the offense involved actual or planned harm to the government, increase by 4 levels; or
- (B) if the offense involved (i) the payment, offer, or promise of any money or thing of value in consideration for the use of, or promise to use, any influence to procure an appointive federal position for any person; or (ii) the solicitation or receipt of any money or thing or value in consideration of the promise of support, or use of influence, in obtaining an appointive federal position for any person, increase by 2 levels.

(c) Cross Reference

- (1) If the offense involved a bribe or gratuity, apply §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) or §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate, if the resulting offense level is greater than determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 203, 205, 207, 208, 209, 210, 211, 1909. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

- 1. Abuse of Position of Trust.—Do not apply the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

~~Background: This section applies to financial and non-financial conflicts of interest by present and former federal officers and employees. The maximum term of imprisonment authorized by statute is two years.~~

~~§2C1.4. Payment or Receipt of Unauthorized Compensation~~

- ~~(a) Base Offense Level: 6~~

Commentary

~~Statutory Provisions: 18 U.S.C. §§ 209, 1909.~~

~~Application Note:~~

- ~~1. Do not apply the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill).~~

~~Background: Violations of 18 U.S.C. § 209 involve the unlawful supplementation of salary of various federal employees. 18 U.S.C. § 1909 prohibits bank examiners from performing any service for compensation for banks or bank officials. Both offenses are misdemeanors for which the maximum term of imprisonment authorized by statute is one year.~~

~~§2C1.5. — Payments to Obtain Public Office~~

~~————— (a) ——— Base Offense Level: — 8~~

~~————— Commentary~~

~~Statutory Provisions: — 18 U.S.C. §§ 210, 211.~~

~~Application Note:~~

~~1. ——— Do not apply the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill).~~

~~Background: — Under 18 U.S.C. § 210, it is unlawful to pay, offer, or promise anything of value to a person, firm, or corporation in consideration of procuring appointive office. Under 18 U.S.C. § 211, it is unlawful to solicit or accept anything of value in consideration of a promise of the use of influence in obtaining appointive federal office. Both offenses are misdemeanors for which the maximum term of imprisonment authorized by statute is one year.~~

Proposed Amendment: Counterfeiting Offenses

2. **Synopsis of Proposed Amendment:** *This proposed amendment (A) increases the base offense level in §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) from level 9 to level 10; (B) replaces the minimum offense level of level 15 for manufacturing offenses with a two-level enhancement; and (C) proposes to delete commentary that suggests that the manufacturing adjustment does not apply if the defendant "merely photocopies".*

First, the amendment increases the base offense level from level 9 to level 10. Setting the base offense level at level 10 for counterfeiting crimes promotes proportionality in sentencing for counterfeiting vis-a-vis other, similar economic crimes. For example, fraud crimes sentenced under §2F1.1 (Fraud and Deceit) receive a base offense level of level 6 and almost invariably (roughly 85% of the time) two additional levels for "more than minimal planning." Thus, before any "loss" enhancement is applied, fraud defendants are routinely at a minimum of level 8. Placing the base offense level for counterfeiting at level 10 recognizes that counterfeiting causes greater harm than fraud in its most basic form in that counterfeiting undermines public confidence in the currency and causes the government to spend great sums of money to build anti-counterfeiting safeguards into the currency.

Second, the amendment replaces the minimum offense level of level 15 for manufacturing offenses with a two-level enhancement. Replacing the minimum offense level of level 15 with a two-level enhancement has a double benefit. First, it eliminates the cliff inherent in setting a sentencing minimum. Specifically, the existing minimum of level 15 for manufacturing activity takes all defendants who engage in manufacturing to level 15 regardless of the economic harm caused. This means that the manufacturer of twenty dollars worth of counterfeit, who many would contend does not deserve to be sentenced at offense level 15, receives the same sentence as the manufacturer of seventy thousand dollars worth of counterfeit. In the context of a system which recognizes the magnitude of economic harm caused as a prime determinant of relative culpability, this disproportionate grouping of all manufacturers at level 15 is neither logical nor desirable.

A second benefit of this change is that, unlike the current guideline, which provides no incremental punishment for manufacturers of more than seventy thousand dollars in counterfeit, the proposed two-level enhancement provides reasonable incremental punishment for all manufacturers. Such a result also fosters the central goal of proportionate sentencing.

Third, the amendment proposes to delete the language in Application Note 4 that suggests, as a minority of courts have interpreted it, that the manufacturing adjustment does not apply if the defendant "merely photocopies". That application note was intended to make the minimum offense level for manufacturing offenses inapplicable to notes that are so obviously counterfeit that they are unlikely to be accepted. Particularly with the advent of digital technology, it cannot be said that photocopying necessarily produces a note so obviously counterfeit as to be impassible.

§2B5.1. Offenses Involving Counterfeit Bearer Obligations of the United States

- (a) Base Offense Level: **910**
- (b) Specific Offense Characteristics
 - (1) If the face value of the counterfeit items exceeded \$2,000, increase by the corresponding number of levels from the table at §2F1.1 (Fraud and Deceit).
 - (2) If the defendant manufactured or produced any counterfeit obligation or security of the United States, or possessed or had custody of or control over a counterfeiting device or materials used for counterfeiting, ~~and the offense level as determined above is less than 15, increase to level 15~~ increase by **2** levels.

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Commentary

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Application Notes:

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- 4. *Subsection (b)(2) does not apply to persons who ~~merely photocopy notes or otherwise~~ produce items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny.*

Issue for Comment:

The Commission invites comment on whether it should amend §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) to include an enhancement (e.g., a two-level enhancement) for counterfeiting offenses that involve "sophisticated means". If so, what conduct should constitute "sophisticated means" in the context of counterfeiting offenses? For example, should the use of technology, such as digital counterfeiting, generally be considered sophisticated? Alternatively, are there particular forms of technology, such as particular forms of digital counterfeiting, that would be considered sophisticated for purposes of an enhancement?

Proposed Amendment: Tax Privacy

3. **Synopsis of Proposed Amendment:** *This amendment proposes to address several offenses relating to unlawful disclosure and/or inspection of tax return information. The amendment proposes to (A) amend the Statutory Index to refer most of those offenses to the guideline covering eavesdropping and interception of communications, §2H3.1; and (B) amend §2H3.1 to add a three-level decrease in the base offense level for the least serious types of offense behavior.*

The pertinent offenses are:

(A) 26 U.S.C. § 7213(a)(1)-(3), and (5), which makes it unlawful for federal and state employees and certain other people willfully to disclose any tax return or tax return information (for a maximum term of imprisonment of five years);

(B) 26 U.S.C. § 7213(d), which makes it unlawful for any person willfully to divulge tax-related computer software (for a maximum term of imprisonment of five years);

(C) 26 U.S.C. § 7213A, which makes it unlawful for federal employees and certain other persons willfully to inspect any tax return or tax return information (for a maximum term of imprisonment of one year); and

(D) 26 U.S.C. § 7216, which makes it unlawful for any person engaged in the business of preparing tax returns knowingly or recklessly to disclose any information furnished to that person in connection with preparation of a return (for a maximum term of imprisonment of one year).

The following proposed amendment refers these offenses to §2H3.1 and provides for a three-level downward adjustment in the base offense level for the least serious types of offense behavior, i.e., the inspection (but not disclosure) of tax return information, and the reckless or knowing disclosure of information collected by a tax preparer in preparation of a tax return. The proposed amendment also (A) adds, in bracketed form, an application note to make clear that an adjustment for abuse of position of trust may apply; and (B) makes a technical change in subsection (b)(1) that is not intended to have substantive effect.

§2H3.1. Interception of Communications or Eavesdropping; Disclosure of Tax Return Information

(a) Base Offense Level:

(1) 9; or

(2) 6, if the offense involved only (A) inspection, but not disclosure, of a tax return or tax return information; or (B) a knowing or reckless disclosure of information furnished to a tax return preparer in connection with the preparation of a tax return.

(b) Specific Offense Characteristic

- (1) If the purpose of the conduct offense was to obtain direct or indirect commercial advantage or economic gain, increase by 3 levels.

(c) Cross Reference

- (1) If the purpose of the conduct was to facilitate another offense, apply the guideline applicable to an attempt to commit that offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 2511; 26 U.S.C. §§ 7213(a)(1)-(a)(3), (a)(5), (d), 7213A, 7216; 47 U.S.C. § 605. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline, "tax return" and "tax return information" have the meaning given the terms "return" and "return information" in 26 U.S.C. § 6013(b)(1) and (2), respectively.
- ±2. Satellite Cable Transmissions.—If the offense involved interception of satellite cable transmissions for purposes of commercial advantage or private financial gain (including avoiding payment of fees), apply §2B5.3 (Criminal Infringement of Copyright) rather than this guideline.
- [3. Abuse of Position of Trust.—A defendant who used a special skill or abused a position of trust in the commission of the offense may be subject to an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill). For example, a federal or state employee who unlawfully disclosed a tax return or tax return information in violation of 26 U.S.C. § 7213(a) or (b) may have occupied a position of public trust, as described in Application Note 1 of §3B1.3, and may have used that position to significantly facilitate the commission of the offense.]

Background: This section refers to conduct proscribed by 47 U.S.C. § 605 and the Electronic Communications Privacy Act of 1986, which amends 18 U.S.C. § 2511 and other sections of Title 18 dealing with unlawful interception and disclosure of communications. These statutes proscribe the interception and divulging of wire, oral, radio, and electronic communications. The Electronic Communications Privacy Act of 1986 provides for a maximum term of imprisonment of five years for violations involving most types of communication.

This section also refers to conduct relating to the disclosure and inspection of tax returns and tax return information, which is proscribed by 26 U.S.C. §§ 7213(a)(1)-(3), (5), (d), 7213A, and 7216. These statutes provide for a maximum term of imprisonment of five years for most types of disclosure of tax return information.

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APPENDIX A - STATUTORY INDEX

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26 U.S.C. § 7212(b)	2B1.1, 2B2.1, 2B3.1
26 U.S.C. § 7213(a)(1)	2H3.1
26 U.S.C. § 7213(a)(2)	2H3.1
26 U.S.C. § 7213(a)(3)	2H3.1
26 U.S.C. § 7213(a)(5)	2H3.1
26 U.S.C. § 7213(d)	2H3.1
26 U.S.C. § 7213A	2H3.1
26 U.S.C. § 7214	2C1.1, 2C1.2, 2F1.1
26 U.S.C. § 7215	2T1.7
26 U.S.C. § 7216	2H3.1

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Proposed Amendment: Circuit Conflict Concerning Stipulations

4. **Synopsis of Proposed Amendment:** *This proposed amendment addresses the circuit conflict regarding whether admissions made by the defendant during his guilty plea hearing, without more, can be considered "stipulations" for purposes of §1B1.2(a). Compare, e.g., United States v. Nathan, 188 F. 3d 190, 201 (3d Cir. 1999) (statements made by defendants during the factual-basis hearing for a plea agreement do not constitute "stipulations" for the purpose of this enhancement; a statement is a stipulation only if it is part of a defendant's written plea agreement or if both the government and the defendant explicitly agree at a factual-basis hearing that the facts being placed on the record are stipulations that might subject the defendant to §1B1.2(a)), with United States v. Loos, 165 F. 3d 504, 508 (7th Cir. 1998) (the objective behind §1B1.2(a) is best answered by interpreting "stipulations" to mean any acknowledgment by the defendant that the defendant committed the acts that justify use of the more serious guideline, not in the formal agreement).*

The proposed amendment represents a narrow approach to the majority view 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). This approach lessens the possibility that the plea agreement will be modified during the course of the plea proceeding without providing the parties, especially the defendant, with notice of the defendant's potential sentencing range.

§1B1.2. Applicable Guidelines

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Commentary

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Application Notes:

1. *This section provides the basic rules for determining the guidelines applicable to the offense conduct under Chapter Two (Offense Conduct). The court is to use the Chapter Two guideline section referenced in the Statutory Index (Appendix A) for the offense of conviction. However, (A) in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the Chapter Two offense guideline section applicable to the stipulated offense is to be used; and (B) for statutory provisions not listed in the Statutory Index, the most analogous guideline, determined pursuant to §2X5.1 (Other Offenses), is to be used.*

* * *

~~*However, there is a limited exception to this general rule. Where a stipulation that is set forth in a written plea agreement or made between the parties on the record during a plea proceeding specifically establishes facts that prove a more serious offense or offenses than the offense or offenses of conviction, the court is to apply the guideline most applicable to the more serious offense or offenses established. As set forth in the first paragraph of this note, an exception to this general rule is that if a plea agreement (written or made orally on the record) contains a stipulation that establishes a more serious offense than the offense of*~~

conviction, the guideline section applicable to the stipulated offense is to be used. A factual statement made by the defendant during the plea proceeding is not a stipulation for purposes of subsection (a) unless such statement was agreed to as part of the plea agreement. The sentence that may be imposed is limited, however, to the maximum authorized by the statute under which the defendant is convicted. *See* Chapter Five, Part G (Implementing the Total Sentence of Imprisonment). For example, if the defendant pleads guilty to theft, but admits the elements of robbery as part of the plea agreement, the robbery guideline is to be applied. The sentence, however, may not exceed the maximum sentence for theft. *See* H. Rep. 98-1017, 98th Cong., 2d Sess. 99 (1984).

The exception to the general rule has a practical basis. In ~~cases where~~ a case in which the elements of an offense more serious than the offense of conviction are established by a plea agreement, it may unduly complicate the sentencing process if the applicable guideline does not reflect the seriousness of the defendant's actual conduct. Without this exception, the court would be forced to use an artificial guideline and then depart from it to the degree the court found necessary based upon the more serious conduct established by the plea agreement. The probation officer would first be required to calculate the guideline for the offense of conviction. However, this guideline might even contain characteristics that are difficult to establish or not very important in the context of the actual offense conduct. As a simple example, §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) contains monetary distinctions which are more significant and more detailed than the monetary distinctions in §2B3.1 (Robbery). Then, the probation officer might need to calculate the robbery guideline to assist the court in determining the appropriate degree of departure in a case in which the defendant pled guilty to theft but admitted committing robbery. This cumbersome, artificial procedure is avoided by using the exception rule in guilty or nolo contendere plea cases where it is applicable.

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Proposed Amendment: Circuit Conflict Concerning Aggravated Assault

5. **Synopsis of Proposed Amendment:** *This proposed 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 in a case in which the weapon that was used was a non-inherently dangerous weapon. Compare e.g., United States v. Williams, 954 F.2d 204, 205-08 (4th Cir. 1992) (applying the dangerous weapon enhancement for defendant's use of a chair did not constitute impermissible double counting even though the use of the chair increased the defendant's offense level twice: first by triggering application of the aggravated assault guideline and second as the basis for the dangerous weapon enhancement), with United States v. Hudson, 972 F.2d 504, 506-07 (2d Cir. 1992) (in a case in which the use of an automobile caused the crime to be classified as an aggravated assault, the court may not enhance the base offense level under §2A2.2(b) for use of the same non-inherently dangerous weapon).*

This amendment presents two options. Both options address the circuit conflict by clarifying in the aggravated assault guideline that (A) both the base offense level of level 15 and the weapon use enhancement in subsection (b)(2) shall apply to aggravated assaults that involve a dangerous weapon with intent to cause bodily harm; and (B) instruments, such as a car or chair, that ordinarily are not used as weapons may qualify as a dangerous weapon for purposes of subsection (b)(2) when the defendant involves them in the offense with the intent to cause bodily harm.

The difference between the options is that, unlike Option One, Option Two proposes other substantive changes in the aggravated assault guideline to address additional problems with the guideline. Specifically, Option Two attempts more explicitly and thoroughly than Option One to address one of the key issues underlying the circuit conflict, i.e., what conduct is incorporated in the base offense level. The aggravated assault guideline covers three types of aggravated assault: felonious assaults that involve any one of the following: (A) serious bodily injury; (B) a dangerous weapon with intent to cause bodily harm; and (C) intent to commit another felony. See Application Note 1 of §2A2.2. Unlike the current guideline, which has one base offense level of level 15 for all types of aggravated assault, Option Two provides for each type of aggravated assault a base offense level that is intended to cover that type of assault in its most basic form, unaccompanied by further aggravated conduct. Accordingly, Option Two provides two alternative base offense levels: (A) level 19, if the offense involved serious bodily injury; and (B) level 15, otherwise (i.e., if the offense involved either an intent to commit another felony or a dangerous weapon with the intent to cause bodily injury).

The base offense level of level 19 for offenses under 18 U.S.C. § 113(a)(6) (assaults resulting in serious bodily injury) achieves the same offense level as should be achieved under the current guideline by application of the base offense level and the serious bodily injury enhancement in subsection (b)(3)(B). However, FY 1999 data show that 16 percent of the 63 cases that involved a conviction under 18 U.S.C. § 113(a)(6) either received no bodily injury enhancement or received an enhancement lower than the four-level enhancement required for serious bodily injury. Therefore, either there may be confusion about what conduct the base offense level incorporates for these types of aggravated assaults or application of the serious bodily injury enhancement is being avoided in cases in which it is

warranted. Incorporating the serious bodily injury enhancement into the base offense level may help to ameliorate these concerns.

OPTION 1:

§2A2.2. Aggravated Assault

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 112, 113(a)(2), (3), (6), 114, 115(a), (b)91), 351(e), 1751(e). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Aggravated assault" means a felonious assault that involved (A) possession of a dangerous weapon with intent to ~~do bodily harm~~ cause bodily injury (i.e., not merely to frighten) with that weapon; (B) serious bodily injury; or (C) an intent to commit another felony.

"Brandished," "bodily injury," "firearm," "otherwise used," "permanent or life-threatening bodily injury," and "serious bodily injury," have the meaning given those terms in §1B1.1, Application Note 1.

"Dangerous weapon" has the meaning given that term in §1B1.1, Application Note 1. For purposes of this guideline, and pursuant to that application note, "dangerous weapon" includes any instrument that is not ordinarily used as a weapon (e.g., a car, a chair, or an ice pick) if such an instrument is involved in the offense with the intent to commit bodily injury.

"More than minimal planning," has the meaning given that term in §1B1.1, Application Note 1.

~~2. Definitions of "more than minimal planning," "firearm," "dangerous weapon," "brandished," "otherwise used," "bodily injury," "serious bodily injury," and "permanent or life-threatening bodily injury," are found in the Commentary to §1B1.1 (Application Instructions).~~

~~3. This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1 (Assault With Intent to Commit Murder). Assault with intent to commit rape is covered by §2A3.1 (Criminal Sexual Abuse).~~

2. Aggravating Factors.—This guideline covers felonious assaults that are more serious than minor assaults because of the presence of certain aggravating factors, i.e., serious bodily injury, the involvement of a dangerous weapon with intent to cause bodily injury, and the intent to commit another felony.

An assault that involves the presence of a dangerous weapon is aggravated in form when the presence of the dangerous weapon is coupled with the intent to cause bodily injury. In such a case, the base offense level and the weapon enhancement in subsection (b)(2) take into account different aspects of the offense. The base offense level takes into account the presence of the dangerous weapon (regardless of the manner in which the weapon was involved) and the fact that the defendant intended to cause bodily injury. Subsection (b)(2), on the other hand, takes into account the manner in which the dangerous weapon was involved in the offense. Accordingly, in a case involving a dangerous weapon with intent to cause bodily injury, the court shall apply both the base offense level and subsection (b)(2).

3. More than Minimal Planning.—For purposes of subsection (b)(1), waiting to commit the offense when no witnesses were present would not alone constitute more than minimal planning. However, luring the victim to a specific location or wearing a ski mask to prevent identification would constitute more than minimal planning.

Background: This section applies to serious (aggravated) assaults. Such offenses occasionally may involve planning or be committed for hire. Consequently, the structure follows §2A2.1. This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1 (Assault with Intent to Commit Murder). Assault with intent to commit rape is covered by §2A3.1 (Criminal Sexual Abuse).

There are a number of federal provisions that address varying degrees of assault and battery. The punishments under these statutes differ considerable, even among provisions directed to substantially similar conduct. For example, if the assault is upon ~~certain~~ a federal officers "while engaged in or on account of: the performance of official duties," the maximum term of imprisonment ~~under~~ pursuant to 18 U.S.C. § 111(a)(2) is three years. If a deadly or dangerous weapon is used in the assault on a federal officer, or if the assault results in bodily injury, the maximum term of imprisonment is ten years. ~~However, if the same~~ If a dangerous weapon is used to assault a person ~~not otherwise specifically protected~~, who is not a federal officer, and the weapon was used with the intent to do bodily harm, without just cause or excuse, the maximum term of imprisonment ~~under~~ pursuant to 18 U.S.C. § 113(c)(a)(3) also is ~~five~~ ten years. If an assault results in serious bodily injury, the maximum term of imprisonment ~~under~~ pursuant to 18 U.S.C. § 113(f)(a)(6) is ten years, unless the injury constitutes maiming by scalding, corrosive, or caustic substances ~~under~~ pursuant to 18 U.S.C. § 114, in which case the maximum term of imprisonment is twenty years.

OPTION 2:

§2A2.2. Aggravated Assault

- (a) Base Offense Level (Apply the greater): **15**
 - (1) **19**, if the offense involved serious bodily injury; or
 - (2) **15**, otherwise.
- (b) Specific Offense Characteristics

* * *

~~(3) If the victim sustained bodily injury, increase the offense level according to the seriousness of the injury:~~

Degree of Bodily Injury	Increase in Level
(A) Bodily Injury	add 2
(B) Serious Bodily Injury	add 4
(C) Permanent or Life-Threatening Bodily Injury	add 6

~~(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.~~

~~Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed 9 levels.~~

- (3) (A) If subsection (a)(1) applies, and the victim sustained (i) permanent or life-threatening bodily injury, increase by 2 levels; or (ii) an injury that is between serious bodily injury and permanent or life-threatening bodily injury, increase by 1 level. However the cumulative enhancements from this subdivision and subsection (b)(2) shall not exceed 5 levels.
- (B) If subsection (a)(2) applies, and the victim sustained (i) bodily injury, increase by 2 levels; or (ii) an injury between bodily injury and serious bodily injury increase by 3 levels.
- (4) If the offense was motivated by a payment or offer of money or other thing of value, increase by 2 levels.
- (5) If the offense involved the violation of a court protection order, increase by 2 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 112, 113(a)(2), (3), (6), 114, 115(a), (b)(9), 351(e), 1751(e). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Aggravated assault" means a felonious assault that involved (A) possession of a dangerous weapon with intent to ~~do bodily harm~~ cause bodily injury (*i.e.*, not merely to frighten) with that weapon;⁷ (B) serious bodily injury;⁷ or (C) an intent to commit another felony.

"Brandished," "bodily injury," "firearm," "otherwise used," "permanent or life-threatening bodily injury," and "serious bodily injury," have the meaning given those terms in §1B1.1, Application Note 1.

"Dangerous weapon" has the meaning given that term in §1B1.1, Application Note 1. For purposes of this guideline, and pursuant to that application note, "dangerous weapon" includes any instrument that is not ordinarily used as a weapon (*e.g.*, a car, a chair, or an ice pick) if such an instrument is involved in the offense with the intent to commit bodily injury.

"More than minimal planning," has the meaning given that term in §1B1.1, Application Note 1.

- ~~2. Definitions of "more than minimal planning," "firearm," "dangerous weapon," "brandished," "otherwise used," "bodily injury," "serious bodily injury," and "permanent or life-threatening bodily injury," are found in the Commentary to §1B1.1 (Application Instructions).~~
- ~~3. This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1 (Assault With Intent to Commit Murder). Assault with intent to commit rape is covered by §2A3.1 (Criminal Sexual Abuse).~~
2. Aggravating Factors.—This guideline covers felonious assaults that are more serious than minor assaults because of the presence of certain aggravating factors, *i.e.*, serious bodily injury, the involvement of a dangerous weapon with intent to cause bodily injury, and/or the intent to commit another felony.

An assault that involves the presence of a dangerous weapon is aggravated in form when the presence of the dangerous weapon is coupled with the intent to cause bodily injury. In such a case, the base offense level and the weapon enhancement in subsection (b)(2) take into account different aspects of the offense. The base offense level takes into account the presence of the dangerous weapon (regardless of the manner in which the weapon was involved) and the fact that the defendant intended to cause bodily injury. Subsection (b)(2), on the other hand, takes into account the manner in which the dangerous weapon was involved in the offense. Accordingly, in a case involving a dangerous weapon with intent to cause bodily injury, the court shall apply both the base offense level and subsection (b)(2).

3. More than Minimal Planning.—For purposes of subsection (b)(1), waiting to commit the offense when no witnesses were present would not alone constitute more than minimal planning. However, luring the victim to a specific location or wearing a ski mask to prevent identification would constitute more than minimal planning.

Background: This section applies to serious (aggravated) assaults. Such offenses occasionally may involve planning or be committed for hire. Consequently, the structure follows §2A2.1. This

guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1 (Assault with Intent to Commit Murder). Assault with intent to commit rape is covered by §2A3.1 (Criminal Sexual Abuse).

There are a number of federal provisions that address varying degrees of assault and battery. The punishments under these statutes differ considerable, even among provisions directed to substantially similar conduct. For example, if the assault is upon certain a federal officers "while engaged in or on account of: the performance of official duties," the maximum term of imprisonment under pursuant to 18 U.S.C. § 111(a)(2) is three years. If a deadly or dangerous weapon is used in the assault on a federal officer, or if the assault results in bodily injury, the maximum term of imprisonment is ten years. However, if the same If a dangerous weapon is used to assault a person not otherwise specifically protected, who is not a federal officer, and the weapon was used with the intent to do bodily harm, without just cause or excuse, the maximum term of imprisonment under pursuant to 18 U.S.C. § 113(e)(a)(3) also is five ten years. If an assault results in serious bodily injury, the maximum term of imprisonment under pursuant to 18 U.S.C. § 113(f)(a)(6) is ten years, unless the injury constitutes maiming by scalding, corrosive, or caustic substances under pursuant to 18 U.S.C. § 114, in which case the maximum term of imprisonment is twenty years.

Proposed Amendment: Circuit Conflict Concerning Certain Fraudulent Misrepresentations

6. **Synopsis of Proposed Amendment:** *This proposed amendment resolves a circuit conflict regarding the scope of the enhancement in subsection (b)(4)(A) of §2F1.1 (Fraud and Deceit) for misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency. Specifically, the conflict concerns whether the misrepresentation applies only in cases in which the defendant does not have any authority to act on behalf of the covered organization or government agency or if it applies more broadly (i.e., to cases in which the defendant, who has a legitimate connection to the covered organization or government agency, misrepresents that the defendant was acting solely on behalf of the organization or agency). Compare e.g., United States v. Marcum 16 F.3d 599 (4th Cir. 1994) (enhancement appropriate even though defendant did not misrepresent his authority to act on behalf of the organization but rather only misrepresented that he was conducting an activity wholly on behalf of the organization), with United States v. Frazier, 53 F.3d 1105 (10th Cir. 1995) (application of the enhancement is limited to cases in which the defendant exploits his victim by claiming to have authority which in fact does not exist).*

The proposed amendment provides for application of the enhancement if (A) the defendant falsely represented that the defendant was an employee of a covered organization or a government agency; or (B) the defendant was an employee of a covered organization or a government agency who represented that the defendant was acting solely for the benefit of the organization or agency when, in fact, the defendant intended to divert all or part of that benefit (for example, for the defendant's personal gain). Under either scenario, it is the representation that enables the defendant to commit the offense. To avoid double counting in the case of an employee described in clause (B) who also holds a position of trust, the proposed amendment provides an application note instructing the court not to apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill) if the same conduct forms the basis both for the enhancement in §2F1.1(b)(4)(A) and the adjustment in §3B1.3.

The proposed amendment also addresses the issue of the embezzler who works for a covered organization or government agency. The proposed amendment provides that embezzlement of funds by an employee of a covered organization or government agency, without more, is not sufficient to trigger application of the enhancement. However, such an employee who also holds a position of trust may be subject to an adjustment pursuant to §3B1.3.

§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

Commentary

* * *

Application Notes:

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5. ~~Subsection (b)(4)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.~~ Misrepresentation.—Subsection (b)(4)(A) applies in any case in which (A) the defendant represented that the defendant was a employee or authorized agent of a charitable, educational, religious, or political organization, or government agency when, in fact, the defendant was not such an employee or agent; or (B) the defendant was a employee or agent of the organization or agency and represented that the defendant was acting solely to obtain a benefit for the organization or agency, when in fact, the defendant intended to divert all or part of that benefit (e.g. for the defendant’s personal gain). Subsection (b)(4)(A) would apply, for example, to the following:

- (A) A defendant who solicits contributions for a non-existent famine relief organization.
- (B) A defendant who solicits donations from church members by falsely claiming to be a fund raiser for a religiously affiliated school.
- (C) A defendant, chief of a local fire department, who conducts a public fund raiser representing that the purpose of the fund raiser is to procure sufficient funds for a new fire engine when, in fact, the defendant diverts some of the funds for the defendant’s personal benefit.

If the conduct that forms the basis for an enhancement under subsection (b)(4)(A) is the only conduct that forms the basis for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) do not apply an adjustment under §3B1.3.

The embezzlement of funds alone is not sufficient to warrant application of subsection (b)(4)(A). The embezzled funds must have been solicited pursuant to a misrepresentation that the defendant was acting to obtain a benefit for the organization or agency. However, if a defendant who embezzles funds holds a position of public or private trust, §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply.

* * *

Proposed Amendment: Circuit Conflict Concerning Certain Drug Defendants and Mitigating Role

7. **Synopsis of Proposed Amendment:** *This amendment proposes to resolve a circuit conflict regarding whether application of §3B1.2 (Mitigating Role) is precluded (i.e., without the necessity of applying the guideline to the facts) in the case of a single defendant drug courier if the defendant's base offense level is determined solely by the quantity personally handled by the defendant and that quantity constitutes all of the defendant's relevant conduct. Compare e.g., United States v. Isaza-Zapata, 148 F.3d 236, 241 (3d. Cir. 1998) (defendant who pleaded guilty to importing heroin was sentenced based on amounts in his personal possession, but if he can meet the requirements of §3B1.2 he is entitled to the reduction upon appropriate proof) with United States v. Isienyi, 207 F.3d 390 (7th Cir. 2000) (defendant pleaded guilty to one count of importing a specified quantity of heroin; held defendant ineligible for a mitigating role adjustment when his offense level consisted only of amounts he personally handled).*

The proposed amendment adopts the view that such a defendant, in a single defendant case, is not precluded from receiving a mitigating role adjustment.

In addition to resolving the circuit conflict, the proposed amendment (A) incorporates commentary from the Introduction to Chapter Three, Part B (Role in the Offense) that there must be more than one participant before application of a mitigating role adjustment may be considered; (B) incorporates the definition of "participant" found in the aggravating role guideline; (C) amends commentary to indicate that the mitigating role adjustment ordinarily is not warranted if the defendant receives a lower offense level than warranted by the actual criminal conduct because, for example, the defendant was convicted of a less serious offense or otherwise was held accountable under a plea for a lesser quantity of drugs than warranted by the defendant's actual conduct; (D) deletes commentary language that the minimal role adjustment is intended to be used infrequently; and (E) makes technical amendments to the guideline (such as the addition of headings for, and the reordering of, application notes in the commentary) that are intended to have no substantive impact on the guideline.

§3B1.2. Mitigating Role

* * *

Commentary

Application Notes:

1. Definition.—For purposes of this guideline, "participant" has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).
2. Requirement of Multiple Participants.—This guideline is not applicable unless more than one participant was involved in the offense. See the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved

other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.

3. Applicability of Adjustment.—

- (A) Substantially Less Culpable than Average Participant.—This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant.

However, a reduction for a mitigating role under this section ordinarily is not warranted in the case of a defendant who has received an offense level lower than the offense level warranted by the defendant's actual criminal conduct (because, for example, the defendant was convicted of a less serious offense or was held accountable for a quantity of drugs less than what the defendant otherwise would have been accountable under §1B1.3(Relevant Conduct)). In such a case, the defendant 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 level 14 under §2D1.1) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under §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.

- (B) Fact-Based Determination.—The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case. As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.

- (C) Applicability to Certain Defendants.—A defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who, based on the defendant's criminal conduct, is accountable under §1B1.3 (Relevant Conduct) only for the quantity of drugs the defendant personally transported or stored is not precluded from receiving an adjustment under this guideline.

- +4. Minimal Participant.—Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant. [It is intended that the downward adjustment for a minimal participant will be used infrequently.]

~~2. It is intended that the downward adjustment for a minimal participant will be used~~

~~infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marijuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs.~~

35. Minor Participant.—~~For purposes of §3B1.2(b), a minor participant means any participant Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants, but whose role could not be described as minimal.~~

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 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 §2D1.1) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of 6 under §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.~~

~~Background. This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant. The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case.~~

Issues for Comment:

1. *With respect to a defendant whose role in a drug offense is limited to transporting or storing drugs, should the Commission, as an alternative to the proposed amendment, preclude such a defendant from receiving any mitigating role adjustment under §3B1.2? Alternatively, should the Commission provide that such a defendant may qualify only for a minor role adjustment, but not a minimal role adjustment?*
2. *Should the example in proposed Application Note 3(C) (i.e., that a defendant whose role in a drug trafficking offense is limited to transporting or storing drugs and who is accountable under §1B1.3 (Relevant Conduct) only for the quantity of drugs the defendant personally transported or stored is not precluded from receiving a mitigating role adjustment) be broadened to make clear that the rule is intended to cover defendants convicted of offenses other than drug trafficking offenses who have a similarly limited role in the offense? Specifically, should the example be expanded to make clear that the rule is intended to apply to a defendant who has a similarly limited role in any offense and who is accountable under §1B1.3 only for that portion of the offense for which the defendant was personally involved?*



Volume Two: Proposed Amendments to the Sentencing Guidelines

January 24, 2001

This compilation contains unofficial text of proposed amendments to the sentencing guidelines and is provided only for the convenience of the user in the preparation of public comment. Official text of the proposed amendments can be found in the Federal Register, January 26, 2001.

**INDEX TO PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES
PUBLISHED IN THE FEDERAL REGISTER JANUARY 26, 2001**

<u>AMDT. NO.</u>	<u>PAGE NO.</u>	<u>ISSUE</u>
PART A: PROPOSED EMERGENCY AMENDMENTS		
1	1	Ecstasy. —In response to the directive in section 3664 of the Ecstasy Anti-Proliferation Act of 2000, Pub. L. 106–310, (A) proposes to increase the marihuana equivalencies for MDMA, MDA, MDEA, and PMA; and (B) presents an issue for comment regarding whether the Commission should base the penalties for Ecstasy on the penalties for other drugs of abuse, such as powder cocaine, methamphetamine mixture, or mescaline.
2	2	Amphetamine. —In response to the directive in section 3664 of the Ecstasy Anti-Proliferation Act of 2000, Pub. L. 106–310, (A) proposes two options to implement the directive; and (B) presents two issues for comment regarding (i) an alternative quantity ratio between amphetamine and methamphetamine; and (ii) whether §2D1.1(b)(4) should be amended to include amphetamine and dextroamphetamine.
3	9	Trafficking in List I Chemicals. —In response to the directive in section 3651 of the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106–310, (A) proposes to increase the penalties for ephedrine, phenylpropanolamine, and pseudoephedrine; (B) proposes to increase the penalties for Benzaldehyde, Hydriodic Acid, Methylamine, Nitroethane, and Norpseudoephedrine; and (B) presents an issue for comment regarding whether the Commission should provide a lower maximum base offense level for ephedrine, phenylpropanolamine, and pseudoephedrine in §2D1.11 than that proposed.

Human Trafficking.—In response to the directive in section 112(b) of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106–386, proposes to (A) reference new offense at 18 U.S.C. § 1591 to §2G1.1; (B) increases the offense levels in and expand the age of the victim enhancement in §§2G1.1(b)(2) and 2G2.1(b)(1) and provide additional increased punishment; (C) provide a special instruction in §§2G1.1 and 2G2.1 regarding attempts; (D) provide an upward departure based on the number of victims in §§2G1.1, 2G2.1 and 2H4.1; (E) reference new offenses at 18 U.S.C. §§ 1589, 1590, and 1592 to §2H4.1; (F) expand the weapon enhancement in §2H4.1 and provide additional increased punishment; and (G) create a new guideline at §2H3.2 for violations of the Migrant and Seasonal Agricultural Worker Protection Act.

PART B: Non-emergency, Permanent Amendments

Sexual Predators.—(A) Proposes four options to implement the "pattern of activity" directive in the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105–314; (B) presents an issue for comment regarding specific language proposed in Option 2 of the proposed "pattern of activity" amendment; (C) proposes two options for resolving circuit conflict regarding who the "victim" is in child pornography cases for purposes of grouping multiple counts; (D) proposes to increase the penalties for offenses the involve violations of chapter 117 of title 18, United States Code, or incest; and (E) presents two issues for comment regarding whether §§2A3.1, 2A3.2, 2A3.3 and 2A3.4 should be amended to provide an enhancement (i) if the offense involved the transportation, persuasion, inducement, enticement or coercion of a child to engage in prohibited sexual conduct; and (ii) to maintain proportionality between these guidelines and §2G2.2.

6	50	Stalking and Domestic Violence. —In response to the directive in the Victims of Trafficking and Violence Act 2000, Pub. L. 106–386, and other statutory amendments, proposes to (A) increase the base offense level in §2A6.2; (B) expand the definition of "stalking" to conform to statutory changes made by the Act; and (C) provide a conforming amendment to §1B1.5.
7	52	Re-promulgation of Emergency Amendment Regarding Enhanced Penalties for Amphetamine and Methamphetamine Laboratory Operators as Permanent Amendment. —Proposes three options for re-promulgating temporary, emergency amendment that implemented "substantial risk" directive in the Methamphetamine and Club Drug Anti-Proliferation Act of 2000, section 102 of Pub. L. 106–310. See 65 FR 80474 (Dec. 21, 2000).
8	66	Mandatory Restitution for Amphetamine and Methamphetamine Offenses. —In response to section 3613 of the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106–310, proposes to amend §5E1.1 to include a reference to 21 U.S.C. § 853(q), which provides mandatory restitution for offenses that involve the manufacture of methamphetamine.
9	66	Safety Valve. —Proposes to (A) delete language in §2D1.1(b)(6) that limits application of the safety valve to defendants with offense level 26 or greater; and (B) delete outdated commentary.
10	69	Anhydrous Ammonia. —In response to section 3653 of the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106–310, (A) proposes to include new offense at section 423 of the Controlled Substances Act (21 U.S.C. § 864) (pertaining to anhydrous ammonia) in §2D1.12; and (B) presents an issue for comment regarding whether the enhancement at §2D1.12(b)(1) is sufficient to account for the seriousness of attempting or intending to manufacture methamphetamine through the use of anhydrous ammonia.

11	71	<p>GHB.—(A) In response to the Hillary J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, Pub. L. 106–172, proposes to (i) increase the penalties for Schedule I and II Depressants and Flunitrazepam in the Drug Quantity Table of §2D1.1; and (ii) include reference to gamma butyrolactone in the Chemical Quantity Table of §2D1.11; and (B) include reference to iodine in the Chemical Quantity Table of §2D1.11.</p>
12	77	<p>Economic Crime Package.—(A) Proposes a consolidation of the theft, property destruction, and fraud guidelines into a new guideline; (B) proposes three options for a new loss table for the proposed consolidated guideline and two options for a new tax loss table; (C) a proposes revised definition of loss; (D) in conjunction with the proposed loss tables, proposes to provide a 1-level increase in several guidelines that refer to the loss tables for cases in which the loss is greater than \$2,000 but less than \$5,000; (E) proposes technical and conforming amendments pertaining to the proposed consolidated guideline; (F) proposes an amendment to address a circuit conflict regarding the methodology that should be used to calculate the tax loss in a case in which the defendant under-reports income on both individual and corporate tax returns; and (G) presents five issues for comment regarding (i) an alternative methodology for calculating the tax loss in such cases; (ii) whether the definition of "tax loss" should include interest and penalties in evasion of payment cases; (iii) whether the "sophisticated concealment" enhancement in §§2T1.1(b)(2) and 2T1.4(b)(2) should be conformed to the "sophisticated means" enhancement in §2F1.1(b)(6)(C); (iv) whether and how the rules on inchoate and partially completed offenses should apply under the proposed consolidated guideline; and (v) whether and to what extent there should be an enhancement for destruction of, or damage to, unique or irreplaceable items of cultural, archeological, or historical significance.</p>

13	157	Aggravating and Mitigating Factors in Fraud and Theft Cases. —(A) Proposes two options to provide for the consideration of a number of aggravating and mitigating factors that may be present in theft and fraud cases; and (B) presents an issue for comment regarding whether any of the factors in the existing specific offense characteristics in §§2F1.1, 2B1.1, and 2B1.3 should be incorporated into the aggravating and mitigating factors found in either of Option One or Two and, accordingly, eliminated as a specific offense characteristic within the relevant guideline.
14	162	Sentencing Table Amendment and Alternative to Sentencing Table Amendment. —(A) Proposes to change the Sentencing Table in Chapter Five by expanding each of Zones B and C by two levels in Criminal History Categories I and II; and (B) proposes, as an alternative to the proposed sentencing table amendment, a new guideline, to be added at the end of Chapter Five immediately following the Sentencing Table, which provides a two-level reduction in offense level for certain less serious economic offenses, in furtherance of the statutory command in 28 U.S.C. § 994(j).
15	166	Firearms Table. —Proposes two options to increase the penalties in §2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms or Ammunition) for offenses involving more than 100 firearms.
16	169	Prohibited Person Definition. —(A) Proposes to modify the definition of "prohibited person" in §§2K1.3 and 2K2.1 to refer to the relevant prohibited persons statutes for explosive and firearm offenses, respectively; and (B) 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.
17	171	Prior Felonies. —Addresses a circuit conflict by proposing to clarify in §§2K1.3 and 2K2.1 that an offense committed after the commission of any part of the offense cannot be counted as a prior felony conviction.

- 18 174 **Immigration.**—(A) Proposes to provide more graduated sentencing enhancements in §2L1.2 based on the seriousness of the prior aggravated felony conviction; and (B) presents two issues for comment regarding (i) whether the 16-level enhancement currently provided by §2L1.2(b)(1) should be graduated on some basis other than period of imprisonment actually served; and (ii) whether aggravated felonies that were committed beyond a certain number of years prior to the instant offense should not count for purposes of triggering §2L1.2(b)(1).
- 19 179 **Nuclear, Biological, and Chemical Weapons.**—(A) In response to the sense of Congress contained in section 1423(a) of the National Defense Authorization Act for Fiscal Year 1997, proposes an increase in the base offense levels in §§2M5.1 and 2M5.2 for offenses that involve the importation, attempted importation, exportation, and attempted exportation of nuclear, chemical, and biological weapons, materials, or technologies; (B) proposes to revise §2M6.1 to incorporate into that guideline two new offenses, 18 U.S.C. § 175, relating to biological weapons, and 18 U.S.C. § 229, relating to chemical weapons; and (C) presents three issues for comment regarding (i) whether the proposed amendment adequately addresses the offenses in 18 U.S.C. §§ 175, relating to biological weapons, and in 18 U.S.C. § 229, relating to chemical weapons; (ii) how the Commission should punish threats to use nuclear, biological, or chemical weapons; and (iii) how the Commission should treat attempts, conspiracies, and solicitations to commit an offense under 18 U.S.C. § 175 or § 229.

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Money Laundering.—(A) Proposes a new consolidated guideline at §2S1.1 for 18 U.S.C. §§ 1956 and 1957 offenses; and (B) presents four issues for comment regarding (i) whether application of proposed §2S1.1(a)(1) should be expanded to include defendants who are otherwise accountable for the underlying offense under §1B1.3(a)(1)(B); (ii) whether proposed §2S1.1 should include enhancements for conduct that constitute elements of the money laundering offense, even if the conduct did not constitute an aggravated form of money laundering offense conduct; (iii) whether application of proposed §2S1.1(b)(2)(A) ("in the business of laundering funds") should be expanded to include defendants (I) whose base offense level is determined under proposed §2S1.1(a)(1) and (II) who launder criminally derived funds generated by offenses which they did not commit and are not otherwise accountable under §1B1.3(a)(1)(A); and (iv) whether violations of 18 U.S.C. § 1960 (Illegal Money Transmitting Businesses) should be referenced to §2S1.3 (Structuring Transactions to Evade Reporting Requirements).

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Miscellaneous New Legislation and Technical Amendments.—Proposes to (A) include references to new statutory provisions in Appendix A and the Commentary of relevant guidelines; (B) modify Application Note 3 of the Commentary to §2J1.6 to improve the transition between the first and second paragraphs; (C) add a reference to 18 U.S.C. § 842(l)-(o) to the Commentary of §2K1.3; and (D) add a reference to 7 U.S.C. § 6810 to the Commentary of §2N2.1.

Proposed Amendments to the Sentencing Guidelines

Part (A): Proposed Temporary, Emergency Amendments and Intent to Make Permanent Each of the Proposed Temporary, Emergency Amendments

The Commission hereby gives notice of, and requests comment on, its intent to promulgate each of the proposed amendments set forth in this Part as a temporary, emergency amendment and after promulgation as an emergency amendment, to promulgate each such amendment as a permanent, non-emergency amendment.

Proposed Amendment: Ecstasy

1. **Synopsis of Proposed Amendment:** *This proposed amendment addresses the directive in the Ecstasy Anti-Proliferation Act of 2000 (the "Act"), section 3664 of Pub. L. 106-310, which instructs the Commission to provide, under emergency amendment authority, increased penalties for the manufacture, importation, exportation, or trafficking of Ecstasy. The directive specifically requires the Commission to increase the base offense level for 3,4-methylenedioxy methamphetamine (MDMA), 3,4-methylenedioxy amphetamine (MDA), 3,4-methylenedioxy-N-ethylamphetamine (MDEA), paramethoxymethamphetamine (PMA), and any other controlled substance that is marketed as Ecstasy and that has either a chemical structure similar to MDMA or an effect on the central nervous system substantially similar to or greater than MDMA.*

The proposed amendment addresses the directive by amending the Drug Equivalency Table in §2D1.1, Application Note 10, to increase the marijuana equivalencies for the specified controlled substances. The increased equivalencies make the penalties for these substances comparable to other drugs of abuse. The increases also satisfy the sense of Congress in the Act that the penalties for these substances, particularly for high-level traffickers, are too low.

An issue for comment regarding whether the Commission should base the penalties of Ecstasy on the penalties for other drugs of abuse, such as powder cocaine, methamphetamine mixture, or mescaline follows the proposed amendment.

Proposed Amendment:

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

* * *

Commentary

Application Notes:

* * *

10. DRUG EQUIVALENCY TABLES

* * *

LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)*

* * *

1 gm of 3,4-Methylenedioxyamphetamine/MDA =	50 gm 1 kg of marihuana
1 gm of 3,4-Methylenedioxymethamphetamine/MDMA =	35 gm 1 kg of marihuana
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA =	30 gm 1 kg of marihuana
1 gm of Paramethoxymethamphetamine/PMA =	1 kg of marihuana
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =	680 gm of marihuana
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg of marihuana

**Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

Issue for Comment: *It has been represented to the Commission that Ecstasy (i.e., MDMA, MDEA, MDA and PMA) is similar in its hallucinogenic effect on the user to mescaline, and also has been described as having an added stimulant component that can elevate heart rate, blood pressure, and body temperature. It has also been suggested that the drug is neither physically nor psychologically addictive. The Commission invites comment on these representations and on the appropriate penalty structure for Ecstasy. The proposed amendment treats Ecstasy as being of comparable seriousness to heroin, providing a marihuana equivalency for Ecstasy that is the same as heroin. Accordingly, for sentencing purposes, 1 gm of Ecstasy will be the equivalent of 1 kg of marihuana. Should the Commission alternatively treat Ecstasy comparably to some other major drug of abuse? For example, should the Commission treat Ecstasy as being of comparable seriousness to powder cocaine (which would result in a marihuana equivalency for Ecstasy of 200 gm) or methamphetamine mixture (which would result in a marihuana equivalency for Ecstasy of 2 kg)? Or should the penalty be comparable to that for mescaline (which would result in a marihuana equivalency for Ecstasy of 10 gm) or some multiple of the penalty for mescaline? Comment also is requested regarding whether the Drug Quantity Table in §2D1.1 should be revised with respect to Ecstasy to provide additional incremental penalties (perhaps with exponential quantity increases) so as to punish more severely those offenders who traffic in larger quantities.*

Proposed Amendment: Amphetamine

2. **Synopsis of Proposed Amendment:** *This proposed amendment implements the directive in the Methamphetamine Anti-Proliferation Act of 2000, section 3611 of Pub. L. 106-310 (the "Act"), which directs the Commission to provide, under emergency amendment authority,*

increased guideline penalties for amphetamine such that those penalties are comparable to the base offense level for methamphetamine.

There are no mandatory minimum sentences for amphetamine offenses. Currently, a quantity of amphetamine is sentenced at the same level as an equal quantity of powder cocaine. That is, with no or minimal criminal history, an offender convicted of trafficking 500 grams of amphetamine would receive a guideline range of 63 to 78 months, based solely on the weight of the drug. A weight of 5,000 grams (5 kilograms), and the lowest criminal history category, would result in a sentencing range of 121 to 151 months. The mathematical relationships between the weight of amphetamine and the current five- and ten-year quantity thresholds for methamphetamine-mix and methamphetamine-actual are 10-to-1 and 100-to-1, respectively.

The proposed amendment provides two options for implementing the directive. Both options propose to treat amphetamine and methamphetamine identically, at a 1:1 ratio (i.e., the same quantities of amphetamine and methamphetamine would result in the same base offense level) because of the similarities of the two substances. Specifically, amphetamine and methamphetamine (A) chemically are similar; (B) are produced by a similar method, and are trafficked in a similar manner; (C) share similar methods of use; (D) affect the same parts of the brain; and (E) have similar intoxicating effects. Both options also distinguish between pure amphetamine (i.e., amphetamine (actual)) and amphetamine mixture in the same manner, and at the same quantities, as pure methamphetamine (i.e., methamphetamine (actual) and methamphetamine mixture).

Although both options ultimately achieve the same penalty increase, the proposed options differ in how they implement the directive. Option One amends the Drug Equivalency Table of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). To determine the offense level under this option, the quantity of amphetamine (actual or mixture) is converted to its marijuana weight equivalency using the Drug Equivalency Tables. Option Two, on the other hand, amends §2D1.1 specifically to include amphetamine in the Drug Quantity Table.

Included in both options is a reference to the controlled substance dextroamphetamine, which is a substance quite similar to amphetamine. Currently, dextroamphetamine has the same marijuana equivalency as amphetamine mixture. The proposed amendment (A) distinguishes between dextroamphetamine mixture and dextroamphetamine (actual); and (B) provides penalties for the dextroamphetamine mixture and dextroamphetamine (actual) that are the same as amphetamine mixture and amphetamine (actual), respectively.

Two issues for comment follows the proposed amendment. The first requests comment regarding whether the Commission should provide an alternative quantity ratio between amphetamine and methamphetamine. The second requests comment regarding whether §2D1.1(b)(4) should be amended to include amphetamine and dextroamphetamine.

Proposed Amendment:

Option 1:

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

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Commentary

Application Notes:

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DRUG EQUIVALENCY TABLES

* * *

Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*

* * *

1 gm of Amphetamine =	200 gm 2 kg of marihuana
1 gm of Amphetamine (Actual) =	20 kg of marihuana
1 gm of Dextroamphetamine =	200 gm 2 kg of marihuana
1 gm of Dextroamphetamine (Actual) =	20 kg of marihuana
1 gm of Methamphetamine =	2 kg of marihuana

* * *

**Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.*

Option 2:

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

* * *

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*

Base Offense Level

(1) * * * **Level 38**

M 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of "Ice";
M 15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual), or 15 KG or more of Dextroamphetamine, or 1.5 KG or more of Dextroamphetamine (actual);

* * *

(2) * * * **Level 36**

M At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice";
M At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual), or at least 5 KG but less than 15 KG of Dextroamphetamine, or at least 500 G but less than 1.5 KG of Dextroamphetamine (actual);

* * *

(3) * * * **Level 34**

M At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice";
M At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual), or at least 1.5 KG but less than 5 KG of Dextroamphetamine, or at least 150 G but less than 500 G of Dextroamphetamine (actual);

* * *

(4) * * * **Level 32**

M At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";
M At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual), or at least 500 G but less than 1.5 KG of Dextroamphetamine, or at least 50 G but less than 150 G of Dextroamphetamine (actual);

* * *

* * *

(5) * * * **Level 30**

M At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice";

M At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual), or at least 350 G but less than 500 G of Dextroamphetamine, or at least 35 G but less than 50 G of Dextroamphetamine (actual);

* * *

(6) * * * **Level 28**

M At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice";

M At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual), or at least 200 G but less than 350 G of Dextroamphetamine, or at least 20 G but less than 35 G of Dextroamphetamine (actual);

* * *

(7) * * * **Level 26**

M At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice";

M At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual), or at least 50 G but less than 200 G of Dextroamphetamine, or at least 5 G but less than 20 G of Dextroamphetamine (actual);

* * *

(8) * * * **Level 24**

M At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice";

M At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual), or at least 40 G but less than 50 G of Dextroamphetamine, or at least 4 G but less than 5 G of Dextroamphetamine (actual);

* * *

(9) * * * **Level 22**
M At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of "Ice";
M At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual), or at least 30 G but less than 40 G of Dextroamphetamine, or at least 3 G but less than 4 G of Dextroamphetamine (actual);

* * * **Level 20**
(10) M At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice";
M At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual), or at least 20 G but less than 30 G of Dextroamphetamine, or at least 2 G but less than 3 G of Dextroamphetamine (actual);

* * * **Level 18**
(11) M At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice";
M At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual), or at least 10 G but less than 20 G of Dextroamphetamine, or at least 1 G but less than 2 G of Dextroamphetamine (actual);

* * * **Level 16**
(12) M At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of "Ice";
M At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual), or at least 5 G but less than 10 G of Dextroamphetamine, or at least 500 MG but less than 1 G of Dextroamphetamine (actual);

* * * **Level 14**
(13) M At least 2.5 G but less than 5 G of Methamphetamine, or at least 250 MG but less than 500 MG of Methamphetamine (actual), or at least 250 MG but less than 500 MG of "Ice";
M At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual), or at least 2.5 G but less than 5 G of , or at least 250 MG but less than 500 MG of Dextroamphetamine (actual);

- (14) * * *
M Less than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual), or less than 250 MG of "Ice";
M Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual), or less than 2.5 G of Dextroamphetamine, or less than 250 MG of Dextroamphetamine (actual);
* * *

*Notes to Drug Quantity Table:

- (B) * * *
The terms "PCP (actual)", "Amphetamine (actual)", "Dextroamphetamine (actual)", and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, dextroamphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), dextroamphetamine (actual), or methamphetamine (actual), whichever is greater.
* * *

Commentary

Application Notes:

9. * * *
Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP, amphetamine, dextroamphetamine, or methamphetamine for which the guideline itself provides for the consideration of purity (see the footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.

10.

* * *

DRUG EQUIVALENCY TABLES

* * *

Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*

* * *

1 gm of Amphetamine = 200-2 kg of marihuana

1 gm of Amphetamine (Actual) =	20 kg of marihuana
1 gm of Dextroamphetamine =	200 gm 2 kg of marihuana
1 gm of Dextroamphetamine (Actual) =	20 kg of marihuana
1 gm of Methamphetamine =	2 kg of marihuana
1 gm of Methamphetamine (Actual) =	20 kg of marihuana
1 gm of "Ice" =	20 kg of marihuana

* * *

**Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.*

Issues for Comment:

1. *In response to the directive in the Methamphetamine Anti-Proliferation Act of 2000 that instructs the Commission to provide, under emergency amendment authority, increased guideline penalties for amphetamine such that those penalties are comparable to the base offense level for methamphetamine, the Commission has proposed two amendment options that use a 1:1 ratio between amphetamine and methamphetamine (i.e., the same quantities of amphetamine and methamphetamine will result in the imposition of the same base offense level from the Drug Quantity Table in §2D1.1). The Commission invites comment on whether some alternative ratio should be used. For example, should the Commission use a 2:1 ratio or a 5:1 ratio between amphetamine and methamphetamine, and if so, why?*
2. *Section 2D1.1(b)(4) currently provides a two-level enhancement if the offense involved the importation of methamphetamine or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully. The Commission invites comment regarding whether this enhancement should be amended to include the importation of amphetamine or the manufacture of amphetamine from listed chemicals that the defendant knew were imported unlawfully. If so, should the Commission also include the importation of dextroamphetamine or the manufacture of dextroamphetamine from listed chemicals that the defendant knew were imported unlawfully, particularly because dextroamphetamine is so similar to amphetamine and would be treated the same as amphetamine under the proposed amendment options?*

Proposed Amendment: Trafficking in List I Chemicals

3. **Synopsis of Proposed Amendment:** *This proposed amendment addresses the three-part directive in the Methamphetamine Anti-Proliferation Act of 2000, section 3651 of Pub. L. 106-310 (the "Act"), regarding enhanced punishment for trafficking in List I chemicals. That section requires the Commission to promulgate an amendment implementing the directive under emergency amendment authority.*

First, the directive instructs the Commission "to provide increased penalties for offenses involving ephedrine, phenylpropanolamine (PPA), or pseudoephedrine (including their

salts, optical isomers, and salts of optical isomers) to correspond to the quantity of controlled substance that reasonably could have been manufactured using the quantity of ephedrine, PPA, and pseudoephedrine possessed or distributed." In response to this directive, the proposed amendment provides a new chemical table specifically for ephedrine, pseudoephedrine, and PPA. The table ties the base offense levels for these chemicals to the base offense levels for methamphetamine (actual) set forth in §2D1.1, assuming a 50 percent yield of the controlled substance from the chemicals. Methamphetamine (actual) is used rather than methamphetamine mixture because ephedrine, PPA, and pseudoephedrine produce methamphetamine (actual).

This new table has a maximum base offense level of level 38 (as opposed to a maximum base offense level of level 30 for all other precursor chemicals). Providing a maximum base offense level of level 38 increases the sentences for ephedrine, pseudoephedrine, and PPA by linking the theoretical yield of these chemicals to methamphetamine (actual) instead of methamphetamine (mixture) as had been done in the past. Additionally, this adjustment will have an impact on the relationship between §§2D1.1 and 2D1.11 by eliminating the six-level distinction that currently exists between offenses that involve possession of these precursor chemicals with intent to manufacture methamphetamine and offenses that involve an attempt to manufacture methamphetamine, at least for offenses involving ephedrine, PPA, and pseudoephedrine.

In order to address cases that involve more than one chemical, the proposed amendment eliminates the ephedrine equivalency table and instead proposes a rule that would require the court to determine the base offense level by using the quantity of the single chemical that results in the greatest base offense level. An upward departure is provided for cases in which the offense level does not adequately address the seriousness of the offense.

However, the proposed amendment provides an exception to this rule for offenses that involve a combination of ephedrine, pseudoephedrine, or phenylpropanolamine because these chemicals often are used in the same manufacturing process. In a case that involves two or more of these chemicals, the base offense level will be determined using the total quantity of the chemicals involved, based on an ephedrine equivalency.

Second, the directive instructs the Commission "to establish, based on scientific, law enforcement, and other data the Commission considers appropriate, a table in which the quantity of controlled substance that could reasonably have been manufactured shall be determined by using a table of manufacturing conversion ratios for ephedrine, PPA, and pseudoephedrine." In response to the directive, the proposed amendment adds to the Drug Equivalency Tables in §2D1.1 a conversion table for ephedrine, PPA, and pseudoephedrine for cases that are cross-referenced out of §2D1.11 because the offense involved the manufacture of methamphetamine. This table, which provides for a 50 percent conversion ratio for ephedrine, PPA, and pseudoephedrine, was developed using data from the Drug Enforcement Agency, Office of Diversion Control, as published on the web site of the Office of National Drug Control Policy (ONDCP). These data indicate that the actual yield of methamphetamine from ephedrine and pseudoephedrine is "typically in the range of 50 to 75 percent".

Third, the directive instructs the Commission "to increase penalties for offenses involving any List I chemical other than ephedrine, PPA, and pseudoephedrine, such that those penalties reflect the dangerous nature of such offenses, the need for aggressive law enforcement action to fight such offenses, and the extreme dangers associated with unlawful activity involving methamphetamine and amphetamine." In response to this directive, the proposed amendment increases the base offense level for Benzaldehyde, Hydriodic Acid, Methylamine, Nitroethane, and Norpseudoephedrine by two levels. These five additional List I chemicals also are associated with methamphetamine and amphetamine production. The maximum base offense level for these five chemicals will increase from level 30 to level 32. All other List I chemicals will remain at their current maximum base offense level of level 30.

An issue for comment follows the proposed amendment regarding whether, as an alternative, the maximum base offense level in the proposed Ephedrine, Pseudoephedrine, Phenylpropanolamine Table in §2D1.11 should be set lower than the maximum base offense level in §2D1.1. This reduction would maintain the existing distinction between offenses involving possession of precursor chemicals with intent to manufacture versus attempt to manufacture for ephedrine, PPA, and pseudoephedrine currently captured by the maximum base offense level of 30 in §2D1.11. The original relationship between controlled substances in §2D1.1 and list I chemicals in §2D1.11 presumed a 50 percent yield of controlled substances from each chemical and then reduced the entire table by eight levels. The eight level distinction later was reduced to six levels in response to a congressional directive.

Proposed Amendment:

§2D1.11. Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy

* * *

Section 2D1.11(d) is amended by striking the Chemical Quantity Table and the Notes that follow the Table in their entirety and inserting the following:

**(d)(1) EPHEDRINE, PSEUDOEPHEDRINE, AND PHENYLPROPANOLAMINE
QUANTITY TABLE*
(Methamphetamine and Amphetamine Precursor Chemicals)**

	Quantity	Base Offense Level
(1)	3 KG or more of Ephedrine; 3 KG or more of Phenylpropanolamine; 3 KG or More of Pseudoephedrine.	Level 38
(2)	At least 1 KG but less than 3 KG of Ephedrine; At least 1 KG but less than 3 KG of Phenylpropanolamine; At least 1 KG but less than 3 KG of Pseudoephedrine.	Level 36
(3)	At least 300 G but less than 1 KG of Ephedrine; At least 300 G but less than 1 KG of Phenylpropanolamine; At least 300 G but less than 1 KG of Pseudoephedrine.	Level 34
(4)	At least 100 G but less than 300 G of Ephedrine; At least 100 G but less than 300 G of Phenylpropanolamine; At least 100 G but less than 300 G of Pseudoephedrine.	Level 32
(5)	At least 70 G but less than 100 G of Ephedrine; At least 70 G but less than 100 G of Phenylpropanolamine; At least 70 G but less than 100 G of Pseudoephedrine.	Level 30
(6)	At least 40 G but less than 70 G of Ephedrine; At least 40 G but less than 70 G of Phenylpropanolamine; At least 40 G but less than 70 G of Pseudoephedrine.	Level 28
(7)	At least 10 G but less than 40 G of Ephedrine; At least 10 G but less than 40 G of Phenylpropanolamine; At least 10 G but less than 40 G of Pseudoephedrine.	Level 26
(8)	At least 8 G but less than 10 G of Ephedrine; At least 8 G but less than 10 G of Phenylpropanolamine; At least 8 G but less than 10 G of Pseudoephedrine.	Level 24

- | | | |
|------|---|-----------------|
| (9) | At least 6 G but less than 8 G of Ephedrine;
At least 6 G but less than 8 G of Phenylpropanolamine;
At least 6 G but less than 8 G of Pseudoephedrine. | Level 22 |
| (10) | At least 4 G but less than 6 G of Ephedrine;
At least 4 G but less than 6 G of Phenylpropanolamine;
At least 4 G but less than 6 G of Pseudoephedrine. | Level 20 |
| (11) | At least 2 G but less than 4 G of Ephedrine;
At least 2 G but less than 4 G of Phenylpropanolamine;
At least 2 G but less than 4 G of Pseudoephedrine. | Level 18 |
| (12) | At least 1 G but less than 2 G of Ephedrine;
At least 1 G but less than 2 G of Phenylpropanolamine;
At least 1 G but less than 2 G of Pseudoephedrine. | Level 16 |
| (13) | At least 500 MG but less than 1 G of Ephedrine;
At least 500 MG but less than 1 G of Phenylpropanolamine;
At least 500 MG but less than 1 G of Pseudoephedrine. | Level 14 |
| (14) | Less than 500 MG of Ephedrine;
Less than 500 MG of Phenylpropanolamine;
Less than 500 MG of Pseudoephedrine. | Level 12 |

(d)(2) CHEMICAL QUANTITY TABLE*
(All Other Precursor Chemicals)

Listed Chemicals and Quantity	Base Offense Level
(1) <u>List I Chemicals</u> 51 KG or more of Benzaldehyde; 132 KG or more of Hydriodic Acid; 12 KG or more of Methylamine; 37.8 KG or more of Nitroethane; 600 KG or more of Norpseudoephedrine.	Level 32
(2) <u>List I Chemicals</u> At least 17 KG but less than 51 KG of Benzaldehyde; 20 KG or more of Benzyl Cyanide; 200 G or more of Ergonovine; 400 G or more of Ergotamine; 20 KG or more of Ethylamine;	Level 30

At least 44 KG but less than 132 KG of Hydriodic Acid;
320 KG or more of Isosafrole;
At least 4 KG but less than 12 KG of Methylamine;
500 KG or more of N-Methylephedrine;
500 KG or more of N-Methylpseudoephedrine;
At least 12.6 KG but less than 37.8 KG of Nitroethane;
At least 200 KG but less than 600 KG of Norpseudoephedrine;
20 KG or more of Phenylacetic Acid;
10 KG or more of Piperidine;
320 KG or more of Piperonal;
1.6 KG or more of Propionic Anhydride;
320 KG or more of Safrole;
400 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone.

(3) List I Chemicals

Level 28

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

List II Chemicals

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

(4) List I Chemicals

Level 26

At least 1.8 KG but less than 5.3 KG of Benzaldehyde;

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

List II Chemicals

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

(5) List I Chemicals

Level 24

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

At least 28 KG but less than 40 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

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

(6) List I Chemicals

Level 22

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

List II Chemicals

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

(7) List I Chemicals

Level 20

At least 178 G but less than 712 G of Benzaldehyde;
At least 200 G but less than 800 G of Benzyl Cyanide;
At least 2 G but less than 8 G of Ergonovine;
At least 4 G but less than 16 G of Ergotamine;

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

List II Chemicals

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

(8) List I Chemicals

Level 18

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

List II Chemicals

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

(9)

List I Chemicals

Level 16

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

List II Chemicals

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

(10)

List I Chemicals

Level 14

At least 2.7 KG but less than 3.6 KG of Anthranilic Acid;
At least 71.2 G but less than 107 G of Benzaldehyde;
At least 80 G but less than 120 G of Benzyl Cyanide;
At least 800 MG but less than 1.2 G of Ergonovine;
At least 1.6 G but less than 2.4 G of Ergotamine;

At least 80 G but less than 120 G of Ethylamine;
At least 176 G but less than 264 G of Hydriodic Acid;
At least 1.44 KG but less than 1.92 KG of Isosafrole;
At least 16 G but less than 24 G of Methylamine;
At least 3.6 KG but less than 4.8 KG of N-Acetylanthranilic Acid;
At least 2.25 KG but less than 3 KG of N-Methylephedrine;
At least 2.25 KG but less than 3 KG of N-Methylpseudoephedrine;
At least 56.25 G but less than 75 G of Nitroethane;
At least 800 G but less than 1.2 KG of Norpseudoephedrine;
At least 80 G but less than 120 G of Phenylacetic Acid;
At least 40 G but less than 60 G of Piperidine;
At least 1.44 KG but less than 1.92 KG of Piperonal;
At least 7.2 G but less than 9.6 G of Propionic Anhydride;
At least 1.44 KG but less than 1.92 KG of Safrole;
At least 1.8 KG but less than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

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

(11) List I Chemicals

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

Level 12

Less than 1.8 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

Less than 66 G of Acetic Anhydride;

Less than 7.05 KG of Acetone;

Less than 120 G of Benzyl Chloride;

Less than 6.45 KG of Ethyl Ether;

Less than 7.2 KG of Methyl Ethyl Ketone;

Less than 60 G of Potassium Permanganate;

Less than 7.8 KG of Toluene.

*Notes:

~~(A) The List I Chemical Equivalency Table provides a method for combining different precursor chemicals to obtain a single offense level. In a case involving two or more list I chemicals used to manufacture different controlled substances or to manufacture one controlled substance by different manufacturing processes, convert each to its ephedrine equivalency from the table below, add the quantities, and use the Chemical Quantity Table to determine the base offense level. In a case involving two or more list I chemicals used together to manufacture a controlled substance in the same manufacturing process, use the quantity of the single list I chemical that results in the greatest base offense level.~~

(A) Except as provided in subdivision (B), to calculate the base offense level in an offense that involves two or more chemicals, use the quantity of the single chemical that results in the greatest offense level, regardless of whether the chemicals are set forth in different tables or in different categories (i.e. list I or list II) under subsection (d) of this guideline.

~~(B) If more than one list II chemical is involved, use the single list II chemical resulting in the greatest offense level.~~

(B) To calculate the base offense level in an offense that involves two or more chemicals set forth in the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, (i) convert each chemical to its ephedrine equivalency using the table below; (ii) add the quantities that result from that equivalency; and (iii) use the Pseudoephedrine and Phenylpropanolamine Quantity Table to determine the base offense level.

PSEUDOEPHEDRINE AND PHENYLPROPANOLAMINE EQUIVALENCY TABLE

1 gm of Pseudoephedrine=

1 gm of Ephedrine

1 gm of Phenylpropanolamine=

1 gm of Ephedrine

~~(C) If both list I and list II chemicals are involved, use the offense level determined under (A) or (B) above, whichever is greater.~~

~~(D)~~(C) In a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of

the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

~~(E) LIST I CHEMICAL EQUIVALENCY TABLE~~

1 gm of Anthranilic Acid*	0.033 gm of Ephedrine
1 gm of Benzaldehyde**	1.124 gm of Ephedrine
1 gm of Benzyl Cyanide	1 gm of Ephedrine
1 gm of Ergonovine	100 gm of Ephedrine
1 gm of Ergotamine	50 gm of Ephedrine
1 gm of Ethylamine**	1 gm of Ephedrine
1 gm of Hydriodic Acid**	0.4545 gm of Ephedrine
1 gm of Isosafrole	0.0625 gm of Ephedrine
1 gm of Methylamine	5 gm of Ephedrine
1 gm of N-Acetylanthranilic Acid*	0.025 gm of Ephedrine
1 gm of N-Methylephedrine**	0.04 gm of Ephedrine
1 gm of N-Methylpseudoephedrine**	0.04 gm of Ephedrine
1 gm of Nitroethane**	1.592 gm of Ephedrine
1 gm of Norpseudoephedrine**	0.1 gm of Ephedrine
1 gm of Phenylacetic Acid	1 gm of Ephedrine
1 gm of Phenylpropanolamine**	0.1 gm of Ephedrine
1 gm of Piperidine	2 gm of Ephedrine
1 gm of Piperonal	0.0625 gm of Ephedrine
1 gm of Propionic Anhydride	12.5 gm of Ephedrine
1 gm of Pseudoephedrine**	1 gm of Ephedrine
1 gm of Safrole	0.0625 gm of Ephedrine
1 gm of 3,4-Methylenedioxyphenyl- 2-propanone**	0.05 gm of Ephedrine

~~* The ephedrine equivalency for anthranilic acid or N-acetylanthranilic acid, or both, shall not exceed 159.99 grams of ephedrine.~~

~~**In cases involving (A) hydriodic acid and one of the following: ephedrine, N-methylephedrine, N-methylpseudoephedrine, norpseudoephedrine, phenylpropanolamine, or pseudoephedrine; or (B) ethylamine and 3,4-methylenedioxyphenyl-2-propanone; or (C) benzaldehyde and nitroethane; calculate the offense level for each separately and use the quantity that results in the greater offense level.~~

Commentary

Application Notes:

* * *

4. ~~When two or more list I chemicals are used together in the same manufacturing process, calculate the offense level for each separately and use the quantity that results in the greatest base offense level. In any other case, the quantities should be added together (using the List~~

~~(Chemical Equivalency Table) for the purpose of calculating the base offense level.~~

- (A) Determining the Base Offense Level for Two or More Chemicals.—Except as provided in subdivision B, if the offense involves two or more chemicals, use the quantity of the single chemical that results in the greatest offense level, regardless of whether the chemicals are set forth in different tables or in different categories (i.e., list I or list II) under subsection (d) of this guideline.

~~Examples:~~ (a) The defendant was in possession of five kilograms of ephedrine and 300 grams of hydriodic acid. Ephedrine and hydriodic acid typically are used together in the same manufacturing process to manufacture methamphetamine. ~~Therefore, the~~ The base offense level for each ~~listed~~ chemical is calculated separately and the ~~list I~~ chemical with the higher base offense level is used. Five kilograms of ephedrine result in a base offense level of ~~26~~level 38; 300 grams of hydriodic acid result in a base offense level of 16. In this case, the base offense level would be ~~26~~level 38.

~~(b) The defendant was in possession of five kilograms of ephedrine and two kilograms of phenylacetic acid. Although both of these chemicals are used to manufacture methamphetamine, they are not used together in the same manufacturing process. Therefore, the quantity of phenylacetic acid should be converted to an ephedrine equivalency using the List I Chemical Equivalency Table and then added to the quantity of ephedrine. In this case, the two kilograms of phenylacetic acid convert to two kilograms of ephedrine (see List I Chemical Equivalency Table), resulting in a total equivalency of seven kilograms of ephedrine.~~

- (B) Determining the Base Offense Level for Offenses Involving Ephedrine, Pseudoephedrine, or Phenylpropanolamine.—If the offense involves two or more chemicals set forth in the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, (i) convert each chemical to its ephedrine equivalency; (ii) add the quantities that result from that equivalency; and (iii) use the Pseudoephedrine and Phenylpropanolamine Quantity Table to determine the base offense level.

Example: The defendant was in possession of 80 grams of ephedrine and 50 grams of phenylpropanolamine. The 50 grams of phenylpropanolamine converts to 50 grams of ephedrine, which when added to the quantity of ephedrine, results in a total of 130 grams of ephedrine. In this case, the base offense level would be level 32.

- (C) Upward Departure.—In a case involving two or more chemicals used to manufacture different controlled substances, or to manufacture one controlled substance by different manufacturing processes, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense.

~~5. Where there are multiple list II chemicals, all quantities of the same list II chemical are added together for purposes of determining the base offense level. However, quantities of different list II chemicals are not aggregated (see Note B to the Chemical Quantity Table). Thus, where~~

~~multiple list II chemicals are involved in the offense, the base offense level is determined by using the base offense level for the single list II chemical resulting in the greatest base offense level. For example, in the case of an offense involving seven kilograms of methyl ethyl ketone and eight kilograms of acetone, the base offense level for the methyl ethyl ketone is 12 and the base offense level for the acetone is 14; therefore, the base offense level is 14.~~

~~6. Where both list I chemicals and list II chemicals are involved, use the greater of the base offense level for the list I chemicals or the list II chemicals (see Note CA to the Chemical Quantity Table).~~

~~7.5. * * *~~

~~8.6. * * *~~

Background: Offenses covered by this guideline involve list I chemicals (including ephedrine, pseudoephedrine, and phenylpropanolamine) and list II chemicals. List I chemicals are important to the manufacture of a controlled substance and usually become part of the final product. For example, ephedrine reacts with other chemicals to form methamphetamine. The amount of ephedrine directly affects the amount of methamphetamine produced. List II chemicals are generally used as solvents, catalysts, and reagents.

* * *

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

* * *

Commentary

Application Notes: * * *

10. * * *

DRUG EQUIVALENCY TABLES

* * *

Schedule V Substances*****

1 unit of a Schedule V Substance = 0.00625 gm of marihuana

******Provided*, that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana.

List I Chemicals (relating to the manufacture of amphetamine or methamphetamine

1 gm of Ephedrine =	10 kg of marihuana
1 gm of Phenylpropanolamine =	10 kg of marihuana
1 gm of Pseudoephedrine =	10 kg of marihuana

******Provided*, that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

* * *

Issues for Comment:

1. *Currently, there is a six level difference between the base offense levels in the Drug Quantity Table of §2D1.1 and the Chemical Quantity Table in §2D1.11. (The original relationship between controlled substances in §2D1.1 and list I chemicals in §2D1.11 presumed a 50 percent yield of controlled substances from each chemical and then reduced the entire table in §2D1.11 by eight levels. The eight level distinction was later reduced to six levels as a result of a congressional directive.) This six level difference effectively creates a distinction between offenses involving possession of precursor chemicals with intent to manufacture a controlled substance and offenses involving an actual attempt to manufacture a controlled substance. However, the proposed amendment essentially will eliminate this distinction for cases involving ephedrine, pseudoephedrine, and phenylpropanolamine by (1) eliminating that six-level difference in offense level from the §2D1.1 offense level that corresponds to the amount of controlled substance that could be manufactured from a given quantity of precursor chemical (assuming a 50% yield); and (2) setting the maximum base offense level at level 38, the maximum base offense level provided for the manufacture of methamphetamine in §2D1.1. The Commission invites comment regarding whether the maximum base offense level for the proposed Ephedrine, Pseudoephedrine, Phenylpropanolamine Table in §2D1.11 should be lower than level 38. A lower maximum base offense level would maintain a distinction between offenses involving possession of precursor chemicals with intent to manufacture methamphetamine and offenses involving an actual attempt to manufacture methamphetamine.*
2. *In response to the congressional directive to increase penalties for offenses involving List I chemicals other than ephedrine, PPA, and pseudoephedrine, the Commission invites comment regarding whether, in addition to or instead of the proposed amendment, the penalty structure in §2D1.11 should be changed to increase penalties for Benzaldehyde, Hydriodic Acid, Methylamine, Nitroethane, and Norpseudoephedrine at each quantity level in the Chemical Quantity Table, and if so, by how much.*

Proposed Amendment: Human Trafficking

4. **Synopsis of Proposed Amendment:** *This amendment implements the directive found at section*