

greater of two calculations: (i) the retail value of the device multiplied by the number of such devices; and (ii) the number of such devices multiplied by the price a person legitimately using the device to access or make use of a copyrighted work would have paid.

All options use the statutory definition of "circumvent a technological measure" found in 17 U.S.C. § 1201(a)(3)(A), which is "to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner."

Second, the proposed amendment adds an application note regarding the determination of the infringement amount in cases under 17 U.S.C. §§ 1201 and 1204 in which the defendant circumvented a technological measure. In such an offense, the "retail value of the infringed item" is the price the user would have paid to access lawfully the copyrighted work, and the "infringed item" is the accessed work.

Two issues for comment follow the proposed amendment. The first issue is regarding whether the Commission should amend §2B5.3 to provide a downward departure for cases in which the infringement amount overstates the seriousness of the offense. The second issue is regarding the interaction between the proposed provisions on circumventing a technological measure and application of §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Proposed Amendment:

§2B5.3. Criminal Infringement of Copyright or Trademark

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
 - (1) If the infringement amount (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
 - (2) If the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution, increase by **2** levels.

Option 1:

- [(3) If the (A) offense involved the manufacture, importation, or uploading of infringing items; or (B) defendant was convicted under 17 U.S.C. §§ 1201(b) and 1204 for trafficking in devices used to circumvent a technological measure, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.]
- (4) If the offense was not committed for commercial advantage or private financial gain, decrease by **2** levels, but the resulting offense level shall be not less than level **8**.

- (5) If the offense involved (A) the conscious or reckless risk of serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

Commentary

Statutory Provisions: 17 U.S.C. § 506(a), 1201, 1204; 18 U.S.C. §§ 2318-2320, 2511. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Circumvent a technological measure" has the meaning given that term in 17 U.S.C. § 1201(a)(3)(A).

"Commercial advantage or private financial gain" means the receipt, or expectation of receipt, of anything of value, including other protected works.

"Infringed item" means the copyrighted or trademarked item with respect to which the crime against intellectual property was committed.

"Infringing item" means the item that violates the copyright or trademark laws.

"Uploading" means making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to (A) download or otherwise copy the infringing item; or (B) have access to the infringing item, including by storing the infringing item as an openly shared file. "Uploading" does not include merely downloading or installing an infringing item on a hard drive on a defendant's personal computer unless the infringing item is an openly shared file.

"Work being prepared for commercial distribution" has the meaning given that term in 17 U.S.C. § 506(a)(3).

2. Determination of Infringement Amount.—This note applies to the determination of the infringement amount for purposes of subsection (b)(1).

(A) Use of Retail Value of Infringed Item.—The infringement amount is the retail value of the infringed item, multiplied by the number of infringing items, in a case involving any of the following:

- (i) The infringing item (I) is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item; or (II) is a digital or electronic reproduction of the infringed item.
- (ii) The retail price of the infringing item is not less than 75% of the retail price of the infringed item.

- (iii) *The retail value of the infringing item is difficult or impossible to determine without unduly complicating or prolonging the sentencing proceeding.*
- (iv) *The offense involves the illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511. (In a case involving such an offense, the "retail value of the infringed item" is the price the user of the transmission would have paid to lawfully receive that transmission, and the "infringed item" is the satellite transmission rather than the intercepting device.)*
- (v) *The retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than does the retail value of the infringing item.*
- (vi) *The offense involves the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution. In a case involving such an offense, the "retail value of the infringed item" is the value of that item upon its initial commercial distribution.*
- (vii) *A case under 18 U.S.C. §§ 2318 or 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the "infringed item" is the identifiable, genuine good or service.*
- (viii) *A case under 17 U.S.C. §§ 1201 and 1204 in which the defendant circumvented a technological measure. In such an offense, the "retail value of the infringed item" is the price the user would have paid to access lawfully the copyrighted work, and the "infringed item" is the accessed work.*

[Option 2:

- (B) *Use of Retail Value of Infringing Item.—The infringement amount is the retail value of the infringing item, multiplied by the number of infringing items, in any case not covered by subdivision (A) of this Application Note, including a case involving the unlawful recording of a musical performance in violation of 18 U.S.C. § 2319A. This note also applies in a case involving the trafficking of devices used to circumvent a technological measure in violation of 17 U.S.C. §§ 1201 and 1204. In such a case the 'infringing item' is the device.]*

[Option 3:

- (C) *Determination of Infringement Amount in Cases Involving Trafficking in Devices Used to Circumvent a Technological Measure.—In a case in which the defendant is convicted under 17 U.S.C. §§ 1201(b) and 1204 for trafficking in a device used to circumvent a technological measure, the infringement amount is the greater of the following:*

- (i) *the number of such devices multiplied by the retail value of the device; or*

(ii) *the number of such devices multiplied by the price a person legitimately using the device to access or make use of a copyrighted work would have paid.]*

~~(C)~~(D) Retail Value Defined.—*For purposes of this Application Note, the "retail value" of an infringed item or an infringing item is the retail price of that item in the market in which it is sold.*

~~(D)~~(E) Determination of Infringement Amount in Cases Involving a Variety of Infringing Items.—*In a case involving a variety of infringing items, the infringement amount is the sum of all calculations made for those items under subdivisions (A) and (B) of this Application Note. For example, if the defendant sold both counterfeit videotapes that are identical in quality to the infringed videotapes and obviously inferior counterfeit handbags, the infringement amount, for purposes of subsection (b)(1), is the sum of the infringement amount calculated with respect to the counterfeit videotapes under subdivision (A)(i) (i.e., the quantity of the infringing videotapes multiplied by the retail value of the infringed videotapes) and the infringement amount calculated with respect to the counterfeit handbags under subdivision (B) (i.e., the quantity of the infringing handbags multiplied by the retail value of the infringing handbags).*

~~(E)~~(F) Indeterminate Number of Infringing Items.—*In a case in which the court cannot determine the number of infringing items, the court need only make a reasonable estimate of the infringement amount using any relevant information, including financial records.*

3. Application of §3B1.3.—*If the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) shall apply.*

4. Upward Departure Considerations.—*If the offense level determined under this guideline substantially understates the seriousness of the offense, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure may be warranted:*

(A) *The offense involved substantial harm to the reputation of the copyright or trademark owner.*

(B) *The offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise.*

Background: *This guideline treats copyright and trademark violations much like theft and fraud. Similar to the sentences for theft and fraud offenses, the sentences for defendants convicted of intellectual property offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, similar to the loss enhancement in the theft and fraud guideline, the infringement amount in subsection (b)(1) serves as a principal factor in determining the offense level for intellectual property offenses.*

Subsection (b)(1) implements section 2(g) of the No Electronic Theft (NET) Act of 1997, Pub. L. 105–147, by using the retail value of the infringed item, multiplied by the number of infringing items, to determine the pecuniary harm for cases in which use of the retail value of the infringed item is a

reasonable estimate of that harm. For cases referred to in Application Note 2(B), the Commission determined that use of the retail value of the infringed item would overstate the pecuniary harm or otherwise be inappropriate. In these types of cases, use of the retail value of the infringing item, multiplied by the number of those items, is a more reasonable estimate of the resulting pecuniary harm.

Section 2511 of title 18, United States Code, as amended by the Electronic Communications Act of 1986, prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.

[Option 1: Subsection (b)(3)(B) and] Application Notes 1(a)(vii) and [Option 2: (viii)] [Option 3: 1(C)] implement the directive in section 1(c) of Public Law 109-181.

Issues for Comment:

- 1. The Commission requests comment regarding whether it should provide a downward departure provision for cases in which the infringement amount overstates the seriousness of the offense.*
- 2. The Commission requests comment regarding the interaction of Application Note 4 pertaining to the application of §3B1.3 (Abuse of Position of Trust or Use of Special Skill). This application note, added in 2000 as part of the Commission's implementation of the No Electronic Theft Act, provides that an adjustment under §3B1.3 shall apply in any case in which the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item. The Commission has received comment that not every de-encryption or circumvention case involves a "special skill" as that term is defined in §3B1.3 ("a skill not possessed by members of the general public and usually requiring substantial education, training or licensing"). Additionally, the proposed amendment specifically addresses cases involving the circumvention of a technological measure, either in the form of trafficking in devices used to circumvent a technological measure or in the determination of infringement amount in cases involving actual circumvention. Should the Commission delete Application Note 4 because the skill, whatever degree, needed to de-encrypt or circumvent a technological measure would be taken into account in §2B5.3? As an alternative, should the Commission modify the note to emphasize that §3B1.3 applies only when the defendant's skill in de-encrypting or otherwise circumventing a technological measure was one not possessed by the general public, as contemplated by §3B1.3?*

6. Terrorism

Synopsis of Proposed Amendment: *This multi-part proposed amendment implements the USA PATRIOT Improvement and Reauthorization Act of 2005 (the "USA PATRIOT Act"), Pub. L. 109-177, and the Department of Homeland Security Appropriations Act, 2007 (the "Homeland Security Act"), Pub. L. 109-295.*

Part I of the proposed amendment addresses section 122 of the PATRIOT Act, which created a new offense in 21 U.S.C. § 960a covering narco-terrorism. This new offense prohibits engaging in conduct that would be covered under 21 U.S.C. § 841(a) if committed under the jurisdiction of the United States, knowing or intending to provide, directly or indirectly, anything of pecuniary value to any person or organization that has engaged or engages in terrorist activity (defined in section 212(a)(3)(B) of the Immigration and Nationality Act) or terrorism (defined in section 140(d)(2) of the Foreign Relations Authorization Act). The penalty is not less than twice the minimum punishment under 21 U.S.C. § 841(b)(1) and not more than life. Section 960a also provides a mandatory term of supervised release of at least 5 years.

The proposed amendment presents two options for addressing this new offense, although under either option the sentence determination is the same. Option 1 would amend §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) to provide a new base offense level of 6 plus the offense level specified in the Drug Quantity Table if the defendant was convicted under 21 U.S.C. § 960a (see proposed §2D1.1(a)(4)). Option 2 would create a new guideline in §2D1.14 (Narco-Terrorism) that would add 6 levels to the offense level determined under §2D1.1. Both options bracket the exclusion of the mitigating role cap in §2D1.1(a)(3) and the safety valve reduction in §2D1.1(b)(9) to highlight this discussion point for the Commission. The proposed amendment also provides a corresponding amendment to Appendix A (Statutory Index).

Part II of the proposed amendment addresses section 551 of the Homeland Security Act, which created a new offense in 18 U.S.C. § 554 regarding the construction of border tunnels and subterranean passages that cross the international boundary between the United States and another country. (The USA PATRIOT Act also amended title 18, United States Code, to provide a new offense in 18 U.S.C. § 554 for smuggling goods from the United States. For purposes of presenting proposed statutory references, the proposed amendments to Appendix A (Statutory Index) for border tunnels is presented in Part II and the proposed amendments to Appendix A (Statutory Index) for smuggling goods from the United States is presented in Part IV.) Section 554(a) prohibits the construction or financing of such tunnels and passages and provides a statutory maximum term of imprisonment of 20 years. Section 554(b) prohibits the knowing or reckless disregard of the construction on land the person owns or controls and provides a statutory maximum term of imprisonment of 10 years. Section 554(c) prohibits the use of the tunnels to smuggle an alien, goods (in violation of 18 U.S.C. § 545), controlled substances, weapons of mass destruction (including biological weapons), or a member of a terrorist organization (defined in 18 U.S.C. § 2339B(g)(6)) and provides a penalty of twice the maximum term of imprisonment that would have otherwise been applicable had the unlawful activity not made use of the tunnel or passage.

Section 551(c) of the Homeland Security Act also directs the Commission, under its regular amendment authority, to promulgate or amend the guidelines to provide for increased penalties for persons convicted of offenses under 18 U.S.C. § 554. In carrying out this directive, the Commission "shall—

(A) ensure that the sentencing guidelines, policy statements, and official commentary

reflect the serious nature of the offenses described in section 554 of title 18, United States Code, and the need for aggressive and appropriate law enforcement action to prevent such offenses;

(B) provide adequate base offense levels for offenses under such section;

(C) account for any aggravating or mitigating circumstances that might justify exceptions, including—

(i) the use of a tunnel or passage described in subsection (a) of such section to facilitate other felonies; and

(ii) the circumstances for which the sentencing guidelines currently provide applicable sentencing enhancements;

(D) ensure reasonable consistency with other relevant directives, other sentencing guidelines, and statutes;

(E) make any necessary and conforming changes to the sentencing guidelines and policy statements; and

(F) ensure that the sentencing guidelines adequately meet the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code.

The proposed amendment provides a new guideline in §2X7.1 (Border Tunnels and Subterranean Passages) for this offense. If the defendant was convicted under 18 U.S.C. § 554(a) or (c), the base offense level would be 4 plus the offense level applicable to the underlying smuggling offense. If the defendant was convicted under 18 U.S.C. § 554(b), the proposed amendment provides a base offense level of 8.

Part III of the proposed amendment addresses other new offenses created by the PATRIOT Act. Based on an assessment of similar offenses already covered by the relevant guidelines, the proposed amendment provides for the following:

- (A) The new offense in 18 U.S.C. § 554, pertaining to smuggling of goods from the United States is referenced to §§2B1.5 (Cultural Heritage), 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), and 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants).
- (B) The new offense in 18 U.S.C. § 2282A, pertaining to mining of US navigable waters, is referenced to §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2B1.1 (Fraud, Theft, and Property Damage), 2K1.4 (Arson; Property Damage by Use of Explosives), and 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)). The proposed amendment also adds vessel, maritime facility, and a vessel's cargo to §2K1.4(a)(1) and (a)(2) to cover conduct described in 18 U.S.C. § 2282A. The definitions provided for vessel, maritime facility, and aids to maritime navigation come from title 33 of the Code of Federal Regulations pertaining to the United States Coast Guard, specifically Navigation and Navigable Waters.

Section 2282B, pertaining to violence against maritime navigational aids, is referenced to §§2B1.1, 2K1.4, and 2X1.1. Section 2K1.4(a) is amended to provide a new base offense level of [16] [if the offense involved the destruction of or tampering with aids to maritime navigation][if the offense of conviction is 18 U.S.C. § 2282B].

- (C) The new offense in 18 U.S.C. § 2283 pertaining to transporting biological and chemical weapons is referenced to §§2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2M5.3

(Providing Material Support or Resources to Designated Foreign Terrorism Organizations of For a Terrorist Purpose), 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction). The new offense in 18 U.S.C. § 2284 pertaining to transporting terrorists is referenced to §§2M5.3, 2X2.1 (Aiding and Abetting), and 2X3.1 (Accessory After the Fact).

Part IV of the proposed amendment addresses two other statutes that were amended by the PATRIOT Act as follows:

- (A) Section 2341 of title 18, United States Code, which provides definitions for offenses involving contraband cigarettes and smokeless tobacco, was amended to reduce the number of contraband cigarettes necessary to violate the substantive offenses set forth in 18 U.S.C. §§ 2342 and 2344 from 60,000 to 10,000. The proposed amendment makes conforming changes to the background commentary of §2E4.1 (Unlawful Conduct Relating to Contraband Cigarettes). The proposed amendment also expands the headings of Chapter Two, Part E, Subpart 4 and §2E4.1 to include smokeless tobacco.*
- (B) The Act increased the statutory maximum term of imprisonment for offenses covered by the International Emergency Economic Powers Act (50 U.S.C. § 1705) from 10 years to 20 years to make penalties for these offenses commensurate with terrorist financing violations. The proposed amendment references 50 U.S.C. § 1705 to §2M5.3 and also modifies the heading of the guideline to include "specially designated global terrorist" because it is another list identifying terrorists and terrorist organizations.*

Part V of the proposed amendment sets forth all of the proposed statutory references in Appendix A (Statutory Index) for the new offenses described in Parts III and IV.

Part VI of the proposed amendment presents two issues for comment. The first requests comment regarding whether current guideline penalties are sufficient for increases in statutory maximum terms of imprisonment to 18 U.S.C. §§ 545 and 549. The second issue for comment addresses a directive contained in the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162, regarding a defendant who is convicted of a Federal offense while wearing or displaying insignia and uniform received in violation of 18 U.S.C. § 716.

Proposed Amendment:

Part I - Narco-Terrorism

Option 1:

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

- (a) Base Offense Level (Apply the greatest):
 - (1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury

resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

- (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (3) [Except if the defendant is convicted under 21 U.S.C. § 960a,] the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels[; or]
- (4) [4][6] plus the offense level specified in the Drug Quantity Table set forth in subsection (c) if the defendant was convicted under 21 U.S.C. § 960a.

(b) Specific Offense Characteristics

- (1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.
- (2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.
- (3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.
- (4) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.
- (5) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.
- (6) If the offense involved the distribution of an anabolic steroid and a

masking agent, increase by 2 levels.

- (7) If the defendant distributed an anabolic steroid to an athlete, increase by 2 levels.
- (8) (Apply the greater):
 - (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.
 - (B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subdivision (C); or (II) the environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.
 - (C) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.
- (9) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), [and the defendant was not convicted under 21 U.S.C. § 960a,] decrease by 2 levels.]

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross References

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.
- (2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

- (1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

Commentary

* * *

Background: *Offenses under 21 U.S.C. §§ 841 and 960 receive identical punishment based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense.*

The base offense levels in §2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking. Levels 32 and 26 in the Drug Quantity Table are the distinctions provided by the Anti-Drug Abuse Act; however, further refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses. To determine these finer distinctions, the Commission consulted numerous experts and practitioners, including authorities at the Drug Enforcement Administration, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Forces, who also advocate the necessity of these distinctions. Where necessary, this scheme has been modified in response to specific congressional directives to the Commission.

The base offense levels at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; e.g., level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months.

[USE WITH OPTION TO ADD 6 LEVELS:

Section 960a of title 21, United States Code, provides that a defendant shall be sentenced to a term of imprisonment of not less than twice the minimum punishment under 21 U.S.C. § 841(b)(1). Adding six levels to the offense level determined under the Drug Quantity Table for convictions under 21 U.S.C. § 960a establishes a guideline range with a lower limit as close to twice the statutory minimum as possible; e.g., offense level 32 plus [6] levels provides a range of 235 to 293 months, corresponding to a statutory minimum of 20 years or 240 months.]

For marihuana plants, the Commission has adopted an equivalency of 100 grams per plant, or the actual weight of the usable marihuana, whichever is greater. The decision to treat each plant as equal to 100 grams is premised on the fact that the average yield from a mature marihuana plant equals 100 grams of marihuana. In controlled substance offenses, an attempt is assigned the same offense level as the object of the attempt. Consequently, the Commission adopted the policy that each plant is to be treated as the equivalent of an attempt to produce 100 grams of marihuana, except where the actual weight of the usable marihuana is greater.

Specific Offense Characteristic (b)(2) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.

Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).

Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.

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

Subsection (b)(8)(A) implements the instruction to the Commission in section 303 of Public Law 103-237.

Subsections (b)(8)(B) and (C) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106-310.

Option 2:

[§2D1.14. Narco-Terrorism

- (a) Base Offense Level: [4][6] plus the offense level from §2D1.1 applicable for the underlying offense[, except that §2D1.1(a)(3) and (b)(9) shall not apply].

Commentary

Statutory Provision: 21 U.S.C. § 960a.

Application Note:

1. In General.—The base offense level is determined using the Drug Quantity Table in §2D1.1(c) and any appropriate specific offense characteristics in §2D1.1(b)(1) through (b)(8).

Background: This guideline implements 21 U.S.C. § 960a, which provides that a defendant shall be sentenced to a term of imprisonment of not less than twice the minimum punishment under 21 U.S.C.

§ 841(b)(1). [Use the following with Option to add six levels under subsection (a): Adding six levels to the offense level determined under §2D1.1 establishes a guideline range with a lower limit as close to twice the statutory minimum as possible; e.g., offense level 32 plus 6 levels provides a range of 235 to 293 months, corresponding to a statutory minimum of 20 years or 240 months.]]

Appendix A (Statutory Index)

21 U.S.C. § 960(d)(7) 2D3.2
21 U.S.C. § 960a [Option 1: 2D1.1][Option 2: 2D1.14]

Part II - Border Tunnels

7. OFFENSES INVOLVING BORDER TUNNELS

§2X7.1. Border Tunnels and Subterranean Passages

(a) Base Offense Level:

- (1) If the defendant was convicted under 18 U.S.C. § 554(c), [4] plus the offense level applicable to the underlying smuggling offense. If the resulting offense level is less than level [16], increase to level [16].
- (2) [16], if the defendant was convicted under 18 U.S.C. § 554(a); or
- (3) [8][9], if the defendant was convicted under 18 U.S.C. § 554(b).

Commentary

Statutory Provision: 18 U.S.C. § 554.

Application Note:

1. Definition.—For purposes of this guideline, "underlying smuggling offense" means the smuggling offense the defendant committed through the use of the tunnel or subterranean passage.

APPENDIX A (Statutory Index)

18 U.S.C. § 553(a)(2) 2B1.1, 2B6.1
18 U.S.C. § 554 2X7.1

Part III - Other New Offenses

(A) 18 U.S.C. § 554 (Smuggling From the US)

§2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources

* * *

Commentary

Statutory Provisions: 16 U.S.C. §§ 470ee, 668(a), 707(b); 18 U.S.C. §§ 541-546, 554, 641, 661-662, 666, 668, 1152-1153, 1163, 1168, 1170, 1361, 1369, 2232, 2314-2315.

* * *

§2M5.2. Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License

(a) Base Offense Level:

- (1) 26, except as provided in subdivision (2) below;
- (2) 14, if the offense involved only non-fully automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed ten.

Commentary

Statutory Provisions: 18 U.S.C. § 554; 22 U.S.C. §§ 2778, 2780.

* * *

§2Q2.1. Offenses Involving Fish, Wildlife, and Plants

* * *

Commentary

Statutory Provisions: 16 U.S.C. §§ 668(a), 707(b), 1174(a), 1338(a), 1375(b), 1540(b), 3373(d); 18 U.S.C. § 545, 554. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

Background: This section applies to violations of the Endangered Species Act, the Bald Eagle Protection Act, the Migratory Bird Treaty, the Marine Mammal Protection Act, the Wild Free-Roaming Horses and Burros Act, the Fur Seal Act, the Lacey Act, and to violations of 18 U.S.C. §§ 545 and 554 whereif the smuggling activity involved fish, wildlife, or plants.

(B) 18 U.S.C. §§ 2282A (Mining US Waters) and 2282B (Violence Against Navigational Aids)

§2K1.4.

Arson; Property Damage by Use of Explosives

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

- (1) **24**, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense, and that risk was created knowingly; or (B) involved the destruction or attempted destruction of a dwelling, an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, ~~a ferry~~, a maritime facility, a vessel, or a vessel's cargo, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use;
- (2) **20**, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than (i) a dwelling, or (ii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, ~~a ferry~~, a maritime facility, a vessel, or a vessel's cargo, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; or (C) endangered (i) a dwelling, (ii) a structure other than a dwelling, or (iii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, ~~a ferry~~, a maritime facility, a vessel, or a vessel's cargo, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; ~~or~~
- (3) **[16.]** [if the offense involved the destruction of or tampering with aids to maritime navigation][if the offense of conviction is 18 U.S.C. § 2282B];
or
- ~~(3)~~(4) **2** plus the offense level from §2B1.1 (Theft, Property Destruction, and Fraud).

(b) Specific Offense Characteristics

- (1) If the offense was committed to conceal another offense, increase by **2** levels.
- (2) If the base offense level is not determined under (a)~~(3)~~(4), and the offense occurred on a national cemetery, increase by **2** levels.

(c) Cross Reference

- (1) If death resulted, or the offense was intended to cause death or serious bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person) if the resulting offense level is

greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(a), (b), 33, 81, 844(f), (h) (only in the case of an offense committed prior to November 18, 1988), (i), 1153, 1855, 1992, 1993(a)(1), (a)(2), (a)(3), (b), 2275, 2282A, 2282B, 2332a, 2332f; 49 U.S.C. § 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Aids to maritime navigation" means any device external to a vessel intended to assist the navigator to determine position or save course, or to warn of dangers or obstructions to navigation.

"Explosives" includes any explosive, explosive material, or destructive device.

"Maritime facility" means any structure or facility of any kind located in, on, under, or adjacent to any waters subject to the jurisdiction of the United States and used, operated, or maintained by a public or private entity, including any contiguous or adjoining property under common ownership or operation.

"National cemetery" means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.

"Mass transportation" has the meaning given that term in 18 U.S.C. § ~~1993(c)(5)~~1992(d)(7).

"State or government facility", "infrastructure facility", "place of public use", and "public transportation system" have the meaning given those terms in 18 U.S.C. § 2332f(e)(3), (5), (6), and (7), respectively.

"Vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

2. Risk of Death or Serious Bodily Injury.—Creating a substantial risk of death or serious bodily injury includes creating that risk to fire fighters and other emergency and law enforcement personnel who respond to or investigate an offense.

3. Upward Departure Provision.—If bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

Background: Subsection (b)(2) implements the directive to the Commission in section 2 of Public Law 105–101.

(C) 18 U.S.C. §§ 2283 (Transporting Biological, Chemical Materials) and 2284 (Transporting Terrorists)

§2K1.3. **Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials**

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 842(a)-(e), (h), (i), (l)-(o), (p)(2), 844(d), (g), 1716. 2283; 26 U.S.C. § 5685.

* * *

§2M5.3. **Providing Material Support or Resources to Designated Foreign Terrorist Organizations or For a Terrorist Purpose**

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 2283, 2284, 2339B, 2339C(a)(1)(B), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. § 2339C(a)(1)(B)).

* * *

§2M6.1. **Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, Transport, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy**

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 175, 175b, 175c, 229, 831, 832, 842(p)(2) (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)), 1993(a)(2), (3), (b), 2283, 2332a (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)), 2332h; 42 U.S.C. §§ 2077(b), 2122, 2131. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2X2.1. **Aiding and Abetting**

The offense level is the same level as that for the underlying offense.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2, 2284, 2339, 2339A, 2339C(a)(1)(A).

* * *

§2X3.1. Accessory After the Fact

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 3, 757, 1071, 1072, 2284, 2339, 2339A, 2339C(c)(2)(A), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. § 2339C(a)(1)(A)).

* * *

Part IV - Increased Penalties and Other Statutory Changes

(A) 18 U.S.C. § 2341 (Smokeless Tobacco and Counterfeit Cigarettes)

4. TRAFFICKING IN CONTRABAND CIGARETTES AND SMOKELESS TOBACCO

§2E4.1. Unlawful Conduct Relating to Contraband Cigarettes and Smokeless Tobacco

- (a) Base Offense Level (Apply the greater):
- (1) 9; or
 - (2) the offense level from the table in §2T4.1 (Tax Table) corresponding to the amount of the tax evaded.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2342(a), 2344(a).

Application Note:

1. "Tax evaded" refers to state excise tax.

Background: The conduct covered by this section generally involves evasion of state excise taxes. At least ~~60,000~~10,000 cigarettes must be involved. Because this offense is basically a tax matter, it is

graded by use of the tax table in §2T4.1.

(B) 50 U.S.C. § 1705 - IEEPA violations

§2M5.3. **Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose**

- (a) Base Offense Level: 26
- (b) Specific Offense Characteristic
 - (1) If the offense involved the provision of (A) dangerous weapons; (B) firearms; (C) explosives; (D) funds with the intent, knowledge, or reason to believe such funds would be used to purchase any of the items described in subdivisions (A) through (C); or (E) funds or other material support or resources with the intent, knowledge, or reason to believe they are to be used to commit or assist in the commission of a violent act, increase by 2 levels.
- (c) Cross References
 - (1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or §2A1.2 (Second Degree Murder) otherwise, if the resulting offense level is greater than that determined above.
 - (2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), if the resulting offense level is greater than that determined above.
 - (3) If the offense involved the provision of (A) a nuclear weapon, nuclear material, or nuclear byproduct material; (B) a chemical weapon; (C) a biological agent, toxin, or delivery system; or (D) a weapon of mass destruction, apply §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2339B, 2339C(a)(1)(B), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. § 2339C(a)(1)(B)); 50 U.S.C. § 1705; 50 U.S.C. App. § 1701.

Application Notes:

1. Definitions.—For purposes of this guideline:

"Biological agent", "chemical weapon", "nuclear byproduct material", "nuclear material", "toxin", and "weapon of mass destruction" have the meaning given those terms in Application Note 1 of the Commentary to §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction).

"Dangerous weapon", "firearm", and "destructive device" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

"Explosives" has the meaning given that term in Application Note 1 of the Commentary to §2K1.4 (Arson; Property Damage by Use of Explosives).

"Foreign terrorist organization" has the meaning given the term "terrorist organization" in 18 U.S.C. § 2339B(g)(6).

"Material support or resources" has the meaning given that term in 18 U.S.C. § 2339B(g)(4).

"Specially designated global terrorist" means any foreign person or person so designated pursuant to Executive Order 13224 of September 23, 2001.

2. Departure Provisions.—

(A) In General.—In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of the funds or other material support or resources involved, the extent of planning or sophistication, and whether there were multiple occurrences. In a case in which such factors are present in an extreme form, a departure from the guidelines may be warranted. See Chapter Five, Part K (Departures).

(B) War or Armed Conflict.—In the case of a violation during time of war or armed conflict, an upward departure may be warranted.

Part V - Statutory Index Amendments

Appendix A (Statutory Index)

18 U.S.C. § 553(a)(2) 2B1.1, 2B6.1
18 U.S.C. § 554 2B1.5, 2M5.2, 2Q2.1

* * *

18 U.S.C. 2281 2A1.1, 2A1.2, 2A1.3,
2A1.4, 2A2.1, 2A2.2,
2A2.3, 2A4.1, 2B1.1,
2B3.1, 2B3.2, 2K1.4,
2X1.1
18 U.S.C. § 2282A 2A1.1, 2A1.2, 2B1.1,
2K1.4, 2X1.1
18 U.S.C. § 2282B 2B1.1, 2K1.4, 2X1.1

18 U.S.C. § 2283	2K1.3, 2M5.3, 2M6.1	
18 U.S.C. § 2284	2M5.3, 2X2.1, 2X3.1	
		* * *
18 U.S.C. § 2339	2M5.3, 2X2.1, 2X3.1	
		* * *
50 U.S.C. § 783(c)	2M3.3	
50 U.S.C. § 1705	2M5.3	
		* * *
50 U.S.C. App. § 1701	2M5.1, 2M5.2, 2M5.3	

Part VI - Issues for Comment:

1. *The USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109–177 increased the statutory maximum terms of imprisonment for 18 U.S.C. § 545 from 5 years to 20 years and for 18 U.S.C. § 549 from 2 years to 10 years. The guidelines currently reference 18 U.S.C. § 545 offenses to §§2B1.5 (Cultural Heritage), 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants), and 2T3.1 (Evading Import Duties; Smuggling). Section 549 offenses are referenced to §§2B1.1 (Theft, Fraud, and Property Damage) and 2T3.1. The Commission requests comment regarding whether the current referenced guidelines provide sufficient penalties for 18 U.S.C. §§ 545 and 549 offenses in light of the increased statutory maximum terms of imprisonment. If not, how should the Commission amend these guidelines to provide adequate punishment?*
2. *Part II of the proposed amendment creates a new guideline, §2X7.1 (Border Tunnels and Subterranean Passages) to implement the new offense in 18 U.S.C. § 554. The Commission requests comment regarding the proposed offense levels, specifically whether the offense levels for any of subsections ought to be higher than proposed, and if so, what would be appropriate offense levels for convictions under 18 U.S.C. § 554(a), (b), and (c), respectively?*
3. *Section 1191(c) of Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162, directs the Commission to amend the guidelines "to assure that the sentence imposed on a defendant who is convicted of a Federal offense while wearing or displaying insignia and uniform received in violation of section 716 of title 18, United States Code, reflects the gravity of this aggravating factor." Section 716, of title 18, United States Code, is a class B misdemeanor to which the guidelines do not apply. Notwithstanding, the Commission requests comment regarding how it should address this directive. For example, should the Commission provide a Chapter Three adjustment applicable in any case in which a uniform or insignia received in violation of 18 U.S.C. § 716 was worn or displayed during the commission of the federal offense? If so, how many levels would be appropriate for such an adjustment? If not, what alternatives should the Commission consider? Alternatively, should the Commission amend Chapter Five, Part K (Departures) to provide a new upward departure provision for such cases? The Commission also requests comment regarding whether, instead of an adjustment or departure, the Commission should provide an application note, perhaps in §1B1.9 (Class B or C Misdemeanors and Infractions), recognizing the directive but explaining that the guidelines do not apply to Class B or C misdemeanors.*

7. Drugs

Synopsis of Proposed Amendment: *This proposed amendment addresses new offenses created by the USA PATRIOT Improvement and Reauthorization Act of 2005 (the "PATRIOT Act"), Pub. L. 109–177, and the Adam Walsh Child Protection and Safety Act of 2006 (the "Adam Walsh Act"), Pub. L. 109–248.*

First, the proposed amendment addresses 21 U.S.C. § 865, which provides a mandatory consecutive sentence of not more than 15 years' imprisonment for any drug offense involving the smuggling of methamphetamine or any listed chemical while using a facilitated entry program for entry into the United States. The proposed amendment provides a new two-level enhancement in §§2D1.1(b)(5) and 2D1.11(b)(5) if the defendant is convicted under 21 U.S.C. § 865. A proposed application note in both guidelines provides instruction as to how the court should impose a sentence in order to comply with the statutory requirement of a consecutive sentence.

Second, the proposed amendment provides three options for addressing the new offense in 21 U.S.C. § 841(g), which was created by the Adam Walsh Act. This offense prohibits the use of the Internet to distribute a date rape drug to any person, "knowing or with reasonable cause to believe that — (A) the drug would be used in the commission of criminal sexual conduct; or (B) the person is not an authorized purchaser." The statute defines "date rape drug" as "(i) gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4-butanediol; (ii) ketamine; (iii) flunitrazepam; or (iv) any substance which the Attorney General designates...to be used in committing rape or sexual assault." The penalty is not more than 20 years' imprisonment.

Option One provides a new [two-][four-]level enhancement in §2D1.1(b)(9) if the defendant was convicted under 21 U.S.C. § 841(g). Option Two focuses on the more serious conduct of distributing the drug knowing or having reason to believe it would be used to commit criminal sexual conduct. This option also requires a conviction under 21 U.S.C. § 841(g) but provides a four-level enhancement if the defendant knew or had reasonable cause to believe the drug would be used in the commission of criminal sexual conduct. Option Three adopts a tiered approach: if the defendant knew the drug was to be used to commit criminal sexual conduct, add six levels with a floor of 29; if the defendant had reasonable cause to believe the drug would be used to commit criminal sexual conduct, add three levels with a floor of 26; in all other cases involving a conviction under this section, that is to say, the defendant sold the drug to an unauthorized purchaser, add two levels. "Criminal sexual conduct" is defined as any offense covered by the criminal sexual abuse guidelines (Chapter 2, Part A, Section 3). (Section 841(g) of title 21, United States Code, does not define this term.)

Third, the proposed amendment addresses the new offense in 21 U.S.C. § 860a, which provides a mandatory consecutive term of imprisonment of not more than 20 years for manufacturing, distributing, or possessing with the intent to manufacture or distribute, methamphetamine on a premises in which a minor is present or resides. Two options are presented. The first option recognizes that currently §2D1.1(b)(8) provides a six-level enhancement and a minimum offense level of 30, if the offense involved the manufacture of methamphetamine or amphetamine and the offense created a substantial risk of harm to the life of a minor or incompetent (the "substantial risk of harm" enhancement). The Commission added this provision in 2000 in response to a very specific congressional directive contained in the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106–310. See USSG App. C (amendments 608 and 620 (effective Dec. 12, 2000, and Nov. 1, 2001, respectively)). To address the overlap of conduct covered by the substantial risk of harm enhancement and the new offense, the proposed amendment would apply in any case in which the defendant is convicted under 21 U.S.C. § 860a and the substantial risk of harm enhancement does not apply. Thus, two levels will be applied in a case in which a minor is

present, but in which the offense did not create a substantial risk of harm to the life of a minor. In any methamphetamine manufacturing case in which the government proves a substantial risk of harm to the life of a minor, the offense level will be increased by six levels and the defendant will be subject to a minimum offense level of 30. The second option, recognizing that manufacturing methamphetamine poses an inherent danger to minors, establishes an enhancement for manufacturing and possession with intent to manufacture that is separate and apart from proving substantial risk of harm to the life of the minor under existing §2D1.1(b)(8). Option Two adds six levels with a floor of 29 if the defendant manufactured or possessed with intent to manufacture methamphetamine on premises where a minor resides or was present. If a defendant distributed or possessed with intent to distribute where a minor resides or was present, add three levels with a floor of 15.

Fourth, the proposed amendment eliminates the offense level cap of 20 for ketamine. Ketamine is a schedule III controlled substance. Currently, the Drug Quantity Table provides a maximum of level 20 for most schedule III substances because such substances are subject to a statutory maximum of 5 years. If a defendant is convicted under 21 U.S.C. § 860a for distributing ketamine, however, the defendant is subject to a statutory maximum of 20 years. Accordingly, the Drug Quantity Table in §2D1.1(c) is modified to allow for sentencing of 21 U.S.C. § 860a offenses involving quantities of ketamine corresponding to offense levels greater than level 20. The proposed amendment also provides a marijuana equivalency in Application Note 10 for ketamine (1 unit of ketamine = 1 gram of marijuana).

Fifth, the proposed amendment adds to Application Note 10 a new drug equivalency table for 1,4-butanediol (BD) and gamma butyrolactone (GBL), both of which are included in the definition of date rape drugs under 21 U.S.C. § 841(g). Neither is a controlled substance. The proposed drug equivalency is 1 ml of BD or GBL equals 8.8 grams of marijuana.

Sixth, the proposed amendment updates Appendix A (Statutory Index) to include references to the new offenses.

Finally, issues for comment request input regarding the proposals addressing 21 U.S.C. §§ 841(g), 860a, and 865.

Proposed Amendment:

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

- (a) Base Offense Level (Apply the greatest):
- (1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
 - (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

(3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.

(4) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by 2 levels.

(5) If the defendant is convicted under 21 U.S.C. § 865, increase by 2 levels.

~~(5)~~(6) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by 2 levels.

~~(6)~~(7) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by 2 levels.

~~(7)~~(8) If the defendant distributed an anabolic steroid to an athlete, increase by 2 levels.

[Option 1 (21 U.S.C. § 841(g)):

(9) If the defendant was convicted under 21 U.S.C. § 841(g), increase by [2][4] levels.]

[Option 2 (21 U.S.C. § 841(g)):

- (9) If the defendant was convicted under 21 U.S.C. § 841(g) of knowing, or having reasonable cause to believe, that the drug would be used in the commission of criminal sexual conduct, increase by [4] levels.]

[Option 3 (21 U.S.C. § 841(g)):

- (9) (A) If the defendant committed the offense under 21 U.S.C. §841(g)(1)(A) and (i) knew that the date rape drug was to be used to commit criminal sexual conduct, add 6 levels; if the offense level is less than 29, increase to 29; or (ii) had reasonable cause to believe that the drug would be used to commit criminal sexual conduct, add 3 levels. If the offense level is less than 26, increase to 26.
- (B) If the defendant committed the offense under 21 U.S.C. § 841(g)(1)(B) and knew or had reasonable cause to believe that the buyer was not an authorized purchaser, increase by 2 levels.]

[Option 1: (21 U.S.C. § 860a):

- (10) If (A) the defendant was convicted under 21 U.S.C. § 860a; and (B) subsection (b)(11)(C) does not apply, increase by 2 levels.

~~(8)~~(11) (Apply the greaterest):

- (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.
- (B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subdivision (C); or (II) the environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.
- (C) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.

- ~~(9)~~(12) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

[Option 2: (21 U.S.C. § 860a):

~~(8)~~(10) (Apply the greaterest):

- (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
- (B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subdivision (C); or (II) the environment, increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.
- (C) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.
- (D) (i) If (I) the defendant was convicted under 21 U.S.C. § 860a; and (II) the offense involved the manufacturing or possession with intent to manufacture methamphetamine on premises in which an individual under the age of 18 years is present or resides, add [**6**] levels. If the resulting offense level is less than [**29**], increase to level [**29**]; or
 - (ii) If (I) the defendant was convicted under 21 U.S.C. § 860a; and (II) the offense involved the distribution or possession with intent to distribute methamphetamine on premises in which an individual under the age of 18 years is present or resides, increase by [**2**][**3**] levels. If the resulting offense level is less than [**15**], increase to [**15**].

~~(9)~~(11) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross References

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

(1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*

Base Offense Level

- (1) ● 30 KG or more of Heroin; **Level 38**
● 150 KG or more of Cocaine;
● 1.5 KG or more of Cocaine Base;
● 30 KG or more of PCP, or 3 KG or more of PCP (actual);
● 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of "Ice";
● 15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual);
● 300 G or more of LSD;
● 12 KG or more of Fentanyl;
● 3 KG or more of a Fentanyl Analogue;
● 30,000 KG or more of Marihuana;
● 6,000 KG or more of Hashish;
● 600 KG or more of Hashish Oil;
● 30,000,000 units or more of Ketamine;
● 30,000,000 units or more of Schedule I or II Depressants;
● 1,875,000 units or more of Flunitrazepam.
- (2) ● At least 10 KG but less than 30 KG of Heroin; **Level 36**
● At least 50 KG but less than 150 KG of Cocaine;
● At least 500 G but less than 1.5 KG of Cocaine Base;
● At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);
● 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";
● 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);
● At least 100 G but less than 300 G of LSD;
● At least 4 KG but less than 12 KG of Fentanyl;
● At least 1 KG but less than 3 KG of a Fentanyl Analogue;
● At least 10,000 KG but less than 30,000 KG of Marihuana;
● At least 2,000 KG but less than 6,000 KG of Hashish;
● At least 200 KG but less than 600 KG of Hashish Oil;
● At least 10,000,000 but less than 30,000,000 units of Ketamine;
● At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
● At least 625,000 but less than 1,875,000 units of Flunitrazepam.
- (3) ● At least 3 KG but less than 10 KG of Heroin; **Level 34**
● At least 15 KG but less than 50 KG of Cocaine;
● At least 150 G but less than 500 G of Cocaine Base;
● At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
● 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";
● 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);
● At least 30 G but less than 100 G of LSD;
● At least 1.2 KG but less than 4 KG of Fentanyl;
● At least 300 G but less than 1 KG of a Fentanyl Analogue;

- At least 3,000 KG but less than 10,000 KG of Marihuana;
- At least 600 KG but less than 2,000 KG of Hashish;
- At least 60 KG but less than 200 KG of Hashish Oil;
- At least 3,000,000 but less than 10,000,000 units of Ketamine;
- At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
- At least 187,500 but less than 625,000 units of Flunitrazepam.

- (4) ● At least 1 KG but less than 3 KG of Heroin; **Level 32**
- At least 5 KG but less than 15 KG of Cocaine;
 - At least 50 G but less than 150 G of Cocaine Base;
 - At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
 - 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";
 - 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);
 - At least 10 G but less than 30 G of LSD;
 - At least 400 G but less than 1.2 KG of Fentanyl;
 - At least 100 G but less than 300 G of a Fentanyl Analogue;
 - At least 1,000 KG but less than 3,000 KG of Marihuana;
 - At least 200 KG but less than 600 KG of Hashish;
 - At least 20 KG but less than 60 KG of Hashish Oil;
 - At least 1,000,000 but less than 3,000,000 units of Ketamine;
 - At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
 - At least 62,500 but less than 187,500 units of Flunitrazepam.

- (5) ● At least 700 G but less than 1 KG of Heroin; **Level 30**
- At least 3.5 KG but less than 5 KG of Cocaine;
 - At least 35 G but less than 50 G of Cocaine Base;
 - At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
 - 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";
 - At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual);
 - At least 7 G but less than 10 G of LSD;
 - At least 280 G but less than 400 G of Fentanyl;
 - At least 70 G but less than 100 G of a Fentanyl Analogue;
 - At least 700 KG but less than 1,000 KG of Marihuana;
 - At least 140 KG but less than 200 KG of Hashish;
 - At least 14 KG but less than 20 KG of Hashish Oil;
 - At least 700,000 but less than 1,000,000 units of Ketamine;
 - At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
 - At least 43,750 but less than 62,500 units of Flunitrazepam.

- (6) ● At least 400 G but less than 700 G of Heroin; **Level 28**
- At least 2 KG but less than 3.5 KG of Cocaine;
 - At least 20 G but less than 35 G of Cocaine Base;
 - At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
 - 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";

- At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
- At least 4 G but less than 7 G of LSD;
- At least 160 G but less than 280 G of Fentanyl;
- At least 40 G but less than 70 G of a Fentanyl Analogue;
- At least 400 KG but less than 700 KG of Marihuana;
- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil;
- At least 400,000 but less than 700,000 units of Ketamine;
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
- At least 25,000 but less than 43,750 units of Flunitrazepam.

- (7) ● At least 100 G but less than 400 G of Heroin; **Level 26**
- At least 500 G but less than 2 KG of Cocaine;
 - At least 5 G but less than 20 G of Cocaine Base;
 - At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
 - 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";
 - At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
 - At least 1 G but less than 4 G of LSD;
 - At least 40 G but less than 160 G of Fentanyl;
 - At least 10 G but less than 40 G of a Fentanyl Analogue;
 - At least 100 KG but less than 400 KG of Marihuana;
 - At least 20 KG but less than 80 KG of Hashish;
 - At least 2 KG but less than 8 KG of Hashish Oil;
 - At least 100,000 but less than 400,000 units of Ketamine;
 - At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
 - At least 6,250 but less than 25,000 units of Flunitrazepam.

- (8) ● At least 80 G but less than 100 G of Heroin; **Level 24**
- At least 400 G but less than 500 G of Cocaine;
 - At least 4 G but less than 5 G of Cocaine Base;
 - At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
 - 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";
 - At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
 - At least 800 MG but less than 1 G of LSD;
 - At least 32 G but less than 40 G of Fentanyl;
 - At least 8 G but less than 10 G of a Fentanyl Analogue;
 - At least 80 KG but less than 100 KG of Marihuana;
 - At least 16 KG but less than 20 KG of Hashish;
 - At least 1.6 KG but less than 2 KG of Hashish Oil;
 - At least 80,000 but less than 100,000 units of Ketamine;
 - At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
 - At least 5,000 but less than 6,250 units of Flunitrazepam.

- (9) ● At least 60 G but less than 80 G of Heroin;
 ● At least 300 G but less than 400 G of Cocaine;
 ● At least 3 G but less than 4 G of Cocaine Base;
 ● At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);
 ● 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";
 ● At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);
 ● At least 600 MG but less than 800 MG of LSD;
 ● At least 24 G but less than 32 G of Fentanyl;
 ● At least 6 G but less than 8 G of a Fentanyl Analogue;
 ● At least 60 KG but less than 80 KG of Marihuana;
 ● At least 12 KG but less than 16 KG of Hashish;
 ● At least 1.2 KG but less than 1.6 KG of Hashish Oil;
 ● At least 60,000 but less than 80,000 units of Ketamine;
 ● At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
 ● At least 3,750 but less than 5,000 units of Flunitrazepam.

Level 22

- (10) ● At least 40 G but less than 60 G of Heroin;
 ● At least 200 G but less than 300 G of Cocaine;
 ● At least 2 G but less than 3 G of Cocaine Base;
 ● At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
 ● 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";
 ● At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
 ● At least 400 MG but less than 600 MG of LSD;
 ● At least 16 G but less than 24 G of Fentanyl;
 ● At least 4 G but less than 6 G of a Fentanyl Analogue;
 ● At least 40 KG but less than 60 KG of Marihuana;
 ● At least 8 KG but less than 12 KG of Hashish;
 ● At least 800 G but less than 1.2 KG of Hashish Oil;
 ● At least 40,000 but less than 60,000 units of Ketamine;
 ● At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
 ● 40,000 or more units of Schedule III substances (except Ketamine);
 ● At least 2,500 but less than 3,750 units of Flunitrazepam.

Level 20

- (11) ● At least 20 G but less than 40 G of Heroin;
 ● At least 100 G but less than 200 G of Cocaine;
 ● At least 1 G but less than 2 G of Cocaine Base;
 ● At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
 ● 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";
 ● At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);
 ● At least 200 MG but less than 400 MG of LSD;
 ● At least 8 G but less than 16 G of Fentanyl;
 ● At least 2 G but less than 4 G of a Fentanyl Analogue;
 ● At least 20 KG but less than 40 KG of Marihuana;

Level 18

- At least 5 KG but less than 8 KG of Hashish;
- At least 500 G but less than 800 G of Hashish Oil;
- At least 20,000 but less than 40,000 units of Ketamine;
- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
- At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine);
- At least 1,250 but less than 2,500 units of Flunitrazepam.

- (12) ● At least 10 G but less than 20 G of Heroin; **Level 16**
- At least 50 G but less than 100 G of Cocaine;
 - At least 500 MG but less than 1 G of Cocaine Base;
 - At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);
 - 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";
 - At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual);
 - At least 100 MG but less than 200 MG of LSD;
 - At least 4 G but less than 8 G of Fentanyl;
 - At least 1 G but less than 2 G of a Fentanyl Analogue;
 - At least 10 KG but less than 20 KG of Marihuana;
 - At least 2 KG but less than 5 KG of Hashish;
 - At least 200 G but less than 500 G of Hashish Oil;
 - At least 10,000 but less than 20,000 units of Ketamine;
 - At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
 - At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine);
 - At least 625 but less than 1,250 units of Flunitrazepam.

- (13) ● At least 5 G but less than 10 G of Heroin; **Level 14**
- At least 25 G but less than 50 G of Cocaine;
 - At least 250 MG but less than 500 MG of Cocaine Base;
 - At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);
 - 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";
 - 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);
 - At least 50 MG but less than 100 MG of LSD;
 - At least 2 G but less than 4 G of Fentanyl;
 - At least 500 MG but less than 1 G of a Fentanyl Analogue;
 - At least 5 KG but less than 10 KG of Marihuana;
 - At least 1 KG but less than 2 KG of Hashish;
 - At least 100 G but less than 200 G of Hashish Oil;
 - At least 5,000 but less than 10,000 units of Ketamine;
 - At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
 - At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine);
 - At least 312 but less than 625 units of Flunitrazepam.

- (14) ● Less than 5 G of Heroin; **Level 12**
- Less than 25 G of Cocaine;
 - Less than 250 MG of Cocaine Base;

- Less than 5 G of PCP, or less than 500 MG of PCP (actual);
- Less than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual), or less than 250 MG of "Ice";
- Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual);
- Less than 50 MG of LSD;
- Less than 2 G of Fentanyl;
- Less than 500 MG of a Fentanyl Analogue;
- At least 2.5 KG but less than 5 KG of Marihuana;
- At least 500 G but less than 1 KG of Hashish;
- At least 50 G but less than 100 G of Hashish Oil;
- At least 2,500 but less than 5,000 units of Ketamine;
- At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
- At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine);
- At least 156 but less than 312 units of Flunitrazepam;
- 40,000 or more units of Schedule IV substances (except Flunitrazepam).

- (15) ● At least 1 KG but less than 2.5 KG of Marihuana; **Level 10**
- At least 200 G but less than 500 G of Hashish;
 - At least 20 G but less than 50 G of Hashish Oil;
 - At least 1,000 units but less than 2,500 units of Ketamine;
 - At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
 - At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine);
 - At least 62 but less than 156 units of Flunitrazepam;
 - At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam).

- (16) ● At least 250 G but less than 1 KG of Marihuana; **Level 8**
- At least 50 G but less than 200 G of Hashish;
 - At least 5 G but less than 20 G of Hashish Oil;
 - At least 250 units but less than 1,000 units of Ketamine;
 - At least 250 but less than 1,000 units of Schedule I or II Depressants;
 - At least 250 but less than 1,000 units of Schedule III substances (except Ketamine);
 - Less than 62 units of Flunitrazepam;
 - At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam);
 - 40,000 or more units of Schedule V substances.

- (17) ● Less than 250 G of Marihuana; **Level 6**
- Less than 50 G of Hashish;
 - Less than 5 G of Hashish Oil;
 - Less than 250 units of Ketamine;
 - Less than 250 units of Schedule I or II Depressants;
 - Less than 250 units of Schedule III substances (except Ketamine);
 - Less than 4,000 units of Schedule IV substances (except Flunitrazepam);
 - Less than 40,000 units of Schedule V substances.

*Notes to Drug Quantity Table:

- (A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of

the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

- (B) The terms "PCP (actual)", "Amphetamine (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, 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), or methamphetamine (actual), whichever is greater.

The term "Oxycodone (actual)" refers to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.

- (C) "Ice," for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.
- (D) "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.
- (E) In the case of an offense involving marijuana plants, treat each plant, regardless of sex, as equivalent to 100 G of marijuana. *Provided*, however, that if the actual weight of the marijuana is greater, use the actual weight of the marijuana.
- (F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one "unit" means 0.5 ml. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (e.g., patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 mg of an anabolic steroid is one "unit".
- (G) In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.
- (H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).
- (I) Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(a), (b)(1)-(3), (7), (g), 860a, 865, 960(a), (b); 49 U.S.C. § 46317(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"Mixture or substance" as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.*

An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.

Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.

2. *The statute and guideline also apply to "counterfeit" substances, which are defined in 21 U.S.C. § 802 to mean controlled substances that are falsely labeled so as to appear to have been legitimately manufactured or distributed.*
3. *Definitions of "firearm" and "dangerous weapon" are found in the Commentary to §1B1.1 (Application Instructions). The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to §2D1.1; see §§2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), 2D1.12(c)(1), and 2D2.1(b)(1).*
4. *Distribution of "a small amount of marihuana for no remuneration", 21 U.S.C. § 841(b)(4), is treated as simple possession, to which §2D2.1 applies.*
5. *Analogues and Controlled Substances Not Referenced in this Guideline.—Any reference to a particular controlled substance in these guidelines includes all salts, isomers, all salts of isomers, and, except as otherwise provided, any analogue of that controlled substance. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed. For purposes of this guideline "analogue" has the meaning given the term "controlled substance analogue" in 21 U.S.C. § 802(32). In determining the appropriate sentence, the court also may consider whether the same quantity of analogue produces a greater effect on the central nervous system than the controlled substance for which it is an analogue.*

In the case of a controlled substance that is not specifically referenced in this guideline, determine the base offense level using the marihuana equivalency of the most closely related controlled substance referenced in this guideline. In determining the most closely related controlled substance, the court shall, to the extent practicable, consider the following:

- (A) *Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.*
- (B) *Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on*

the central nervous system of a controlled substance referenced in this guideline.

(C) *Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.*

6. *Where there are multiple transactions or multiple drug types, the quantities of drugs are to be added. Tables for making the necessary conversions are provided below.*
7. *Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and a lower sentence imposed (including a downward departure), as provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." See §5K1.1 (Substantial Assistance to Authorities). In addition, 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).*
8. *Interaction with §3B1.3.—A defendant who used special skills 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). Certain professionals often occupy essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense. Additionally, an enhancement under §3B1.3 ordinarily would apply in a case in which the defendant used his or her position as a coach to influence an athlete to use an anabolic steroid.*

Note, however, that if an adjustment from subsection (b)(2)(B) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

9. *Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP, amphetamine, methamphetamine, or oxycodone 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. *The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences. The statute, however, provides direction only for the more common controlled substances, i.e., heroin, cocaine, PCP, methamphetamine, fentanyl, LSD and marijuana. In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:*
 - (A) *Use the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marijuana.*
 - (B) *Find the equivalent quantity of marijuana in the Drug Quantity Table.*
 - (C) *Use the offense level that corresponds to the equivalent quantity of marijuana as the base offense level for the controlled substance involved in the offense.*

(See also Application Note 5.) For example, in the Drug Equivalency Tables set forth in this Note, 1 gm of a substance containing oxymorphone, a Schedule I opiate, converts to an equivalent quantity of 5 kg of marihuana. In a case involving 100 gm of oxymorphone, the equivalent quantity of marihuana would be 500 kg, which corresponds to a base offense level of 28 in the Drug Quantity Table.

The Drug Equivalency Tables also provide a means for combining differing controlled substances to obtain a single offense level. In each case, convert each of the drugs to its marihuana equivalent, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level.

For certain types of controlled substances, the marihuana equivalencies in the Drug Equivalency Tables are "capped" at specified amounts (e.g., the combined equivalent weight of all Schedule V controlled substances shall not exceed 999 grams of marihuana). Where there are controlled substances from more than one schedule (e.g., a quantity of a Schedule IV substance and a quantity of a Schedule V substance), determine the marihuana equivalency for each schedule separately (subject to the cap, if any, applicable to that schedule). Then add the marihuana equivalencies to determine the combined marihuana equivalency (subject to the cap, if any, applicable to the combined amounts).

Note: Because of the statutory equivalences, the ratios in the Drug Equivalency Tables do not necessarily reflect dosages based on pharmacological equivalents.

Examples:

- a. *The defendant is convicted of selling 70 grams of a substance containing PCP (Level 22) and 250 milligrams of a substance containing LSD (Level 18). The PCP converts to 70 kilograms of marihuana; the LSD converts to 25 kilograms of marihuana. The total is therefore equivalent to 95 kilograms of marihuana, for which the Drug Quantity Table provides an offense level of 24.*
- b. *The defendant is convicted of selling 500 grams of marihuana (Level 8) and five kilograms of diazepam (Level 8). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 10 in the Drug Quantity Table.*
- c. *The defendant is convicted of selling 80 grams of cocaine (Level 16) and five kilograms of marihuana (Level 14). The cocaine is equivalent to 16 kilograms of marihuana. The total is therefore equivalent to 21 kilograms of marihuana, which has an offense level of 18 in the Drug Quantity Table.*
- d. *The defendant is convicted of selling 56,000 units of a Schedule III substance, 100,000 units of a Schedule IV substance, and 200,000 units of a Schedule V substance. The marihuana equivalency for the Schedule III substance is 56 kilograms of marihuana (below the cap of 59.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule III substances). The marihuana equivalency for the Schedule IV substance is subject to a cap of 4.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule IV substances (without the cap it would have been 6.25 kilograms). The marihuana equivalency for the Schedule V substance is subject to the cap of 999 grams of marihuana set forth as the maximum equivalent weight for Schedule V substances (without the cap it would have been 1.25 kilograms). The combined equivalent weight, determined by adding together the above amounts, is subject to the cap of 59.99 kilograms of marihuana set forth as the maximum combined equivalent weight for Schedule III, IV, and V substances. Without the cap, the combined equivalent weight would have been 61.99 (56 + 4.99 + .999) kilograms.*

DRUG EQUIVALENCY TABLES

Schedule I or II Opiates*

1 gm of Heroin =	1 kg of marihuana
1 gm of Alpha-Methylfentanyl =	10 kg of marihuana
1 gm of Dextromoramide =	670 gm of marihuana
1 gm of Dipipanone =	250 gm of marihuana
1 gm of 3-Methylfentanyl =	10 kg of marihuana
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm of marihuana
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/ PEPAP =	700 gm of marihuana
1 gm of Alphaprodine =	100 gm of marihuana
1 gm of Fentanyl (-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] Propanamide) =	2.5 kg of marihuana
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg of marihuana
1 gm of Levorphanol =	2.5 kg of marihuana
1 gm of Meperidine/Pethidine =	50 gm of marihuana
1 gm of Methadone =	500 gm of marihuana
1 gm of 6-Monoacetylmorphine =	1 kg of marihuana
1 gm of Morphine =	500 gm of marihuana
1 gm of Oxycodone (actual) =	6700 gm of marihuana
1 gm of Oxymorphone =	5 kg of marihuana
1 gm of Racemorphan =	800 gm of marihuana
1 gm of Codeine =	80 gm of marihuana
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm of marihuana
1 gm of Ethylmorphine =	165 gm of marihuana
1 gm of Hydrocodone/Dihydrocodeinone =	500 gm of marihuana
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm of marihuana
1 gm of Opium =	50 gm of marihuana
1 gm of Levo-alpha-acetylmethadol (LAAM)=	3 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.*

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

1 gm of Cocaine =	200 gm of marihuana
1 gm of N-Ethylamphetamine =	80 gm of marihuana
1 gm of Fenethylamine =	40 gm of marihuana
1 gm of Amphetamine =	2 kg of marihuana
1 gm of Amphetamine (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
1 gm of Khat =	.01 gm of marihuana
1 gm of 4-Methylaminorex ("Euphoria")=	100 gm of marihuana
1 gm of Methylphenidate (Ritalin)=	100 gm of marihuana
1 gm of Phenmetrazine =	80 gm of marihuana
1 gm Phenylacetone/P ₂ P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm of marihuana
1 gm Phenylacetone/P ₂ P (in any other case) =	75 gm of marihuana
1 gm of Cocaine Base ("Crack") =	20 kg of marihuana
1 gm of Aminorex =	100 gm of marihuana
1 gm of Methcathinone =	380 gm of marihuana
1 gm of N-N-Dimethylamphetamine =	40 gm 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.

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

1 gm of Bufotenine =	70 gm of marihuana
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =	100 kg of marihuana
1 gm of Diethyltryptamine/DET =	80 gm of marihuana
1 gm of Dimethyltryptamine/DMT =	100 gm of marihuana
1 gm of Mescaline =	10 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) =	1 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) =	0.1 gm of marihuana
1 gm of Peyote (Dry) =	0.5 gm of marihuana

1 gm of Peyote (Wet) =	0.05 gm of marihuana
1 gm of Phencyclidine/PCP =	1 kg of marihuana
1 gm of Phencyclidine (actual) /PCP (actual) =	10 kg of marihuana
1 gm of Psilocin =	500 gm of marihuana
1 gm of Psilocybin =	500 gm of marihuana
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg of marihuana
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg of marihuana
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg of marihuana
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg of marihuana
1 gm of 3,4-Methylenedioxyamphetamine/MDA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxymethamphetamine/MDMA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA=	500 gm of marihuana
1 gm of Paramethoxymethamphetamine/PMA =	500 gm 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.

Schedule I Marihuana

1 gm of Marihuana/Cannabis, granulated, powdered, etc. =	1 gm of marihuana
1 gm of Hashish Oil =	50 gm of marihuana
1 gm of Cannabis Resin or Hashish =	5 gm of marihuana
1 gm of Tetrahydrocannabinol, Organic =	167 gm of marihuana
1 gm of Tetrahydrocannabinol, Synthetic =	167 gm of marihuana

Flunitrazepam **

1 unit of Flunitrazepam =	16 gm of marihuana
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***Provided*, that the minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.

Schedule I or II Depressants (except gamma-hydroxybutyric acid)

1 unit of a Schedule I or II Depressant
(except gamma-hydroxybutyric acid) = 1 gm of marihuana

Gamma-hydroxybutyric Acid

1 ml of gamma-hydroxybutyric acid = 8.8 gm of marihuana

Schedule III Substances (except ketamine)***

1 unit of a Schedule III Substance = 1 gm of marihuana

****Provided*, that the combined equivalent weight of all Schedule III substances, Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 59.99 kilograms of marihuana.

Ketamine

1 unit of ketamine = 1 gm of marihuana

Schedule IV Substances (except flunitrazepam)****

1 unit of a Schedule IV Substance
(except Flunitrazepam)= 0.0625 gm of marihuana

*****Provided*, that the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 4.99 kilograms of marihuana.

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.

Date Rape Drugs (except flunitrazipam, GHB, or ketamine)

1 ml of 1,4-butanediol =	8.8 gm marihuana
1 ml of gamma butyrolactone =	8.8 gm marihuana

To facilitate conversions to drug equivalencies, the following table is provided:

MEASUREMENT CONVERSION TABLE

1 oz = 28.35 gm
1 lb = 453.6 gm
1 lb = 0.4536 kg
1 gal = 3.785 liters
1 qt = 0.946 liters
1 gm = 1 ml (liquid)
1 liter = 1,000 ml
1 kg = 1,000 gm
1 gm = 1,000 mg
1 grain = 64.8 mg.

11. If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance (e.g., 100 doses of Mescaline at 500 mg per dose = 50 gms of mescaline). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information.

TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE

Hallucinogens

MDA	250 mg
MDMA	250 mg
Mescaline	500 mg
PCP*	5 mg
Peyote (dry)	12 gm
Peyote (wet)	120 gm

Psilocin*	10 mg
Psilocybe mushrooms (dry)	5 gm
Psilocybe mushrooms (wet)	50 gm
Psilocybin*	10 mg
2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*	3 mg

Marihuana

1 marihuana cigarette	0.5 gm
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Stimulants

Amphetamine*	10 mg
Methamphetamine*	5 mg
Phenmetrazine (Preludin)*	75 mg

**For controlled substances marked with an asterisk, the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.*

12. *Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. See §1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.*

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

In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance - actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that the defendant did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing.

13. *Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 C.F.R. § 1308.13-15 even though they contain a small amount of a Schedule I or II controlled substance. For example,*

Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 C.F.R. § 1308.13-15 is the appropriate classification.

14. *If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.*

15. *LSD on a blotter paper carrier medium typically is marked so that the number of doses ("hits") per sheet readily can be determined. When this is not the case, it is to be presumed that each 1/4 inch by 1/4 inch section of the blotter paper is equal to one dose.*

In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.

16. *In an extraordinary case, an upward departure above offense level 38 on the basis of drug quantity may be warranted. For example, an upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level 38. Similarly, in the case of a controlled substance for which the maximum offense level is less than level 38, an upward departure may be warranted if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance.*

17. *For purposes of the guidelines, a "plant" is an organism having leaves and a readily observable root formation (e.g., a marijuana cutting having roots, a rootball, or root hairs is a marijuana plant).*

18. *If the offense involved importation of amphetamine or methamphetamine, and an adjustment from subsection (b)(2) applies, do not apply subsection (b)(4).*

19. *Hazardous or Toxic Substances.—Subsection [Option 1 (21 U.S.C. § 860a): (B)(8)(11)(A)] [Option 2 (21 U.S.C. § 860a): (b)(8)(10)(A)] applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b); or 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). In some cases, the enhancement under subsection [Option 1 (21 U.S.C. § 860a): (B)(8)(11)(A)] [Option 2 (21 U.S.C. § 860a): (b)(8)(10)(A)] may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of probation and supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release), respectively, any costs of environmental cleanup and harm to individuals or property shall be considered by the court*

in cases involving the manufacture of amphetamine or methamphetamine and should be considered by the court in cases involving the manufacture of a controlled substance other than amphetamine or methamphetamine. See 21 U.S.C. § 853(q) (mandatory restitution for cleanup costs relating to the manufacture of amphetamine and methamphetamine).

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

(A) Factors to Consider.—*In determining, for purposes of subsection [Option 1 (21 U.S.C. § 860a): (B)(8)(11)(B)] [Option 2 (21 U.S.C. § 860a): (b)(8)(10)(B)] or (C), whether the offense created a substantial risk of harm to human life or the environment, the court shall include consideration of the following factors:*

- (i) *The quantity of any chemicals or hazardous or toxic substances found at the laboratory, and the manner in which the chemicals or substances were stored.*
- (ii) *The manner in which hazardous or toxic substances were disposed, and the likelihood of release into the environment of hazardous or toxic substances.*
- (iii) *The duration of the offense, and the extent of the manufacturing operation.*
- (iv) *The location of the laboratory (e.g., whether the laboratory is located in a residential neighborhood or a remote area), and the number of human lives placed at substantial risk of harm.*

(B) Definitions.—*For purposes of subsection [Option 1 (21 U.S.C. § 860a): (B)(8)(11)(C)] [(Option 2 (21 U.S.C. § 860a): (b)(8)(10)(C))]:*

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

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

21. Applicability of Subsection [Option 1 (21 U.S.C. § 860a): (b)(9)(12)] [Option 2 (21 U.S.C. § 860a): (b)(9)(11)].—*The applicability of subsection [Option 1 (21 U.S.C. § 860a): (b)(9)(12)] [Option 2 (21 U.S.C. § 860a): (b)(9)(11)] shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection [Option 1 (21 U.S.C. § 860a): (b)(9)(12)] [Option 2 (21 U.S.C. § 860a): (b)(9)(11)] applies.*

22. Imposition of Consecutive Sentence for 21 U.S.C. § 860a or § 865.—*Sections 860a and 865 of title 21, United States Code, require the imposition of a mandatory consecutive term of imprisonment of not more than 20 years and 15 years, respectively. In order to comply with the relevant statute, the court should determine the appropriate "total punishment" and divide the sentence on the judgment form between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. § 860a or § 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. § 860a or § 865. [For example, if the applicable adjusted guideline range is 151-188 months and the court determines a "total punishment" of 151 months is appropriate, a sentence of 130 months for*

the underlying offense plus 21 months for the conduct covered by 21 U.S.C. § 860a or § 865 would achieve the "total punishment" in a manner that satisfies the statutory requirement of a consecutive sentence.]

~~22~~23. Application of Subsection (b)(5)(6).—For purposes of subsection (b)(5)(6), "mass-marketing by means of an interactive computer service" means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(5)(6) would apply to a defendant who operated a web site to promote the sale of Gamma-hydroxybutyric Acid (GHB) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. "Interactive computer service", for purposes of subsection (b)(5)(6) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

~~23~~24. Application of Subsection (e)(1).—

(A) Definition.—For purposes of this guideline, "sexual offense" means a "sexual act" or "sexual contact" as those terms are defined in 18 U.S.C. § 2246(2) and (3), respectively.

(B) Upward Departure Provision.—If the defendant committed a sexual offense against more than one individual, an upward departure would be warranted.

~~24~~25. Application of Subsection (b)(6)(7).—For purposes of subsection (b)(6)(7), "masking agent" means a substance that, when taken before, after, or in conjunction with an anabolic steroid, prevents the detection of the anabolic steroid in an individual's body.

~~25~~26. Application of Subsection (b)(7)(8).—For purposes of subsection (b)(7)(8), "athlete" means an individual who participates in an athletic activity conducted by (I) an intercollegiate athletic association or interscholastic athletic association; (ii) a professional athletic association; or (iii) an amateur athletic organization.

[to be used with Option 2 (21 U.S.C. § 841(g)):

27. Application of Subsection (b)(9).—For purposes of this subsection, "criminal sexual conduct" means an offense covered by Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse).]

Background: Offenses under 21 U.S.C. §§ 841 and 960 receive identical punishment based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense.

The base offense levels in §2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking. Levels 32 and 26 in the Drug Quantity Table are the distinctions provided by the Anti-Drug Abuse Act; however, further refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses. To determine these finer distinctions, the Commission consulted numerous experts and practitioners, including authorities at the Drug Enforcement Administration, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Forces, who also advocate the necessity of these distinctions. Where necessary, this scheme has been modified in response to specific congressional directives to the Commission.

The base offense levels at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; e.g., level 32 ranges from 121 to 151 months, where the

statutory minimum is ten years or 120 months.

For marihuana plants, the Commission has adopted an equivalency of 100 grams per plant, or the actual weight of the usable marihuana, whichever is greater. The decision to treat each plant as equal to 100 grams is premised on the fact that the average yield from a mature marihuana plant equals 100 grams of marihuana. In controlled substance offenses, an attempt is assigned the same offense level as the object of the attempt. Consequently, the Commission adopted the policy that each plant is to be treated as the equivalent of an attempt to produce 100 grams of marihuana, except where the actual weight of the usable marihuana is greater.

Specific Offense Characteristic (b)(2) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.

Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).

Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.

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

Subsection [Option 1 (21 U.S.C. § 860a): (B)(8)(11)(A)][Option 2 (21 U.S.C. § 860a): (b)(8)(10)(A)] implements the instruction to the Commission in section 303 of Public Law 103-237.

Subsections [Option 1 (21 U.S.C. § 860a): (b)(8)(11)(B)][Option 2 (21 U.S.C. § 860a): (b)(8)(10)(B)] and (C) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106-310.

* * *

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

Attempt or Conspiracy

- (a) Base Offense Level: The offense level from the Chemical Quantity Table set forth in subsection (d) or (e), as appropriate, except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (e) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels.
- (b) Specific Offense Characteristics
 - (1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.
 - (2) If the defendant is convicted of violating 21 U.S.C. § 841(c)(2) or (f)(1), or § 960(d)(2), (d)(3), or (d)(4), decrease by 3 levels, unless the defendant knew or believed that the listed chemical was to be used to manufacture a controlled substance unlawfully.
 - (3) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.
 - (4) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a listed chemical through mass-marketing by means of an interactive computer service, increase by 2 levels.
 - (5) If the defendant is convicted under 21 U.S.C. § 865, increase by 2 levels.
- (c) Cross Reference
 - (1) If the offense involved unlawfully manufacturing a controlled substance, or attempting to manufacture a controlled substance unlawfully, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, Trafficking) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(c)(1), (2), (f)(1), 865, 960(d)(1), (2), (3), (4).

Application Notes:

1. "Firearm" and "dangerous weapon" are defined in the Commentary to §1B1.1 (Application Instructions). The adjustment in subsection (b)(1) should be applied if the weapon was present, unless it is improbable that the weapon was connected with the offense.
2. "Offense involved unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully," as used in subsection (c)(1), means that the