

**United States Sentencing Commission Public Meeting Minutes**  
**April 10, 2014**

Chair Patti B. Saris called the meeting to order at 2:30 p.m. in the Mecham Conference Center of the Thurgood Marshall Federal Judicial Building, Washington, D.C.

The following Commissioners were present:

- Judge Patti B. Saris, Chair
- Ricardo H. Hinojosa, Vice Chair
- Ketanji B. Jackson, Vice Chair
- Charles R. Breyer, Vice Chair
- Dabney L. Friedrich, Commissioner
- Rachel E. Barkow, Commissioner
- William H. Pryor, Jr., Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following Commissioner was not present:

- Isaac Fulwood, Jr., Commissioner Ex Officio

The following staff participated in the meeting:

- Kenneth Cohen, Staff Director
- Kathleen Grilli, General Counsel
- Tobias Dorsey, Special Counsel

Chair Saris opened the meeting by welcoming the public in attendance. She observed that the Commission had received more than 20,000 letters during its public comment period, a testament to the extraordinary public interest in federal sentencing.

Chair Saris thanked the Members of Congress who submitted letters to the Commission, including Senators Barbara Boxer, Richard Durbin, Dianne Feinstein, Charles Grassley, Patrick Leahy, and Rand Paul, and Representatives Paul Cook, Sam Farr, Bob Goodlatte, Jared Huffman, Douglas Lamborn, Doug LaMalfa, and Mike Thompson.

Chair Saris also thanked the Criminal Law Committee of the Judicial Conference of the United States, the Department of Justice, the Federal Public and Community Defenders, the Commission's advisory groups, and the many advocacy groups, law enforcement organizations, and individuals who submitted their comments. She noted that all of the input was of paramount importance to the Commission.

Judge Saris observed that the issue that received the most attention was the proposed amendment to reduce the guidelines applicable to the drug quantity table by two levels across all drug types. She noted that this was an important question, one which the Commission had grappled with for

several years, and that the issue will be addressed later in the meeting.

Chair Saris called for a motion to adopt the January 9, 2014, public meeting minutes. Vice Chair Hinojosa made a motion to adopt the minutes, with Vice Chair Jackson seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote.

Chair Saris announced that the Commission's Annual National Training Seminar will be held in Philadelphia, PA, on September 17-19, 2014. Information about the seminar is available on the Commission's website.

Chair Saris also announced that a new version of the Commission's Interactive Sourcebook was available on the Commission's webpage. The new version is more user-friendly and has many new features. In addition to other features, the new version will allow users to see sentencing trends across various fiscal years and includes data not published in the Commission's Annual Sourcebook. She added that the 2013 Annual Report and Sourcebook of Federal Sentencing Statistics are also now available from the Commission's webpage. Finally, Chair Saris announced the latest addition to the Commission's "Quick Facts" series, which deals with career offenders.

Chair Saris called on Ms. Grilli to inform the Commission on possible votes to amend the sentencing guidelines.

Ms. Grilli stated that the first proposed amendment, attached hereto as Exhibit A, is a multi-part amendment that responds to the Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4 (March 7, 2013), which provides new and expanded criminal offenses and increased penalties for certain crimes involving assault, sexual abuse, stalking, domestic violence, harassment, and human trafficking.

Part A of the proposed amendment addresses changes to 18 U.S.C. § 113 (Assaults within maritime and territorial jurisdiction). The Act expanded the scope of section 113(a)(1), (2), (3) and (4) and Part A of the proposed amendment amends Appendix A to provide additional statutory references for these sections of 113.

The Act expanded section 113(a)(7) so that it also applies to assault resulting in substantial bodily injury to a spouse, intimate partner, or dating partner. Part A of the proposed amendment amends §2A2.3 (Minor Assault) to revise the two-tiered enhancement for assaults resulting in injury. Specifically, it broadens the scope of the 4-level enhancement so that it applies not only to a case in which the offense resulted in substantial bodily injury to an individual who has not attained the age of 16 years, but also to a case in which the offense resulted in substantial bodily injury to a spouse, intimate partner, or dating partner. It also amends the heading of §2A2.3 by changing "Minor Assault" to "Assault," and makes conforming changes to the commentary to §§2A2.2 (Aggravated Assault) and 2A2.3.

Section 113(a)(8) is a new provision established by the Act. It applies to assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or

suffocate, and provides a statutory maximum term of imprisonment of 10 years. Part A of the proposed amendment makes three changes to address section 113(a)(8). First, it amends Appendix A to reference section 113(a)(8) to §2A2.2. Second, as a conforming change, it amends the Commentary to §2A2.2 to provide that the term “aggravated assault” includes an assault involving strangulation, suffocation, or an attempt to strangle or suffocate. Third, the proposed amendment amends §2A2.2 to provide a 3-level enhancement if the offense involves strangling, suffocating, or attempting to strangle or suffocate a spouse, intimate partner, or dating partner. The cumulative impact of subsections (b)(2), (b)(3), and the new enhancement is limited to 12 levels.

In addition, Part A of the proposed amendment amends §2A6.2 (Stalking or Domestic Violence) to address cases involving strangling, suffocating, or attempting to strangle or suffocate. Specifically, §2A6.2 has a 2-level enhancement that applies if the offense involved an aggravating factor such as bodily injury, and a 4-level enhancement that applies if the offense involved more than one such aggravating factor. The proposed amendment amends §2A6.2 to establish strangling, suffocating, or attempting to strangle or suffocate as a separate new aggravating factor.

Finally, Part A of the proposed amendment amends the Commentary to §5D1.1 (Imposition of a Term of Supervised Release) to provide more guidance on the imposition of supervised release in cases in which the defendant is convicted of an offense involving domestic violence.

Part B of the proposed amendment addresses changes to 18 U.S.C. § 1153 (Offenses committed within Indian country), commonly referred to as the Major Crimes Act. The proposed amendment deletes section 1153 from Appendix A. The proposed amendment also addresses, in a similar manner, a related statutory provision at 18 U.S.C. § 1152, commonly known as the General Crimes Act. The proposed amendment deletes section 1152 from Appendix A.

Part C of the proposed amendment addresses statutory changes to 18 U.S.C. §§ 2261 (Interstate domestic violence), 2261A (Stalking), and 2262 (Interstate violation of protection order) made by Public Law 109–162 in 2006 that were expanded and restated by section 107 of the Act. The proposed amendment amends the Commentary to §2A6.2 to expand the definition of “stalking” in the Commentary to §2A6.2 to conform to the statutory changes to section 2261A.

Part D of the proposed amendment addresses statutory changes made by the Act to 8 U.S.C. § 1375a (Domestic violence information and resources for immigrants and regulation of international marriage brokers). Before enactment of the Act, criminal provisions in section 1375a were set forth in subsection (d)(3)(C) and in subsection (d)(5)(B). The Act revised and reorganized these criminal provisions such that all criminal provisions are set forth in subsection (d)(5)(B). The proposed amendment responds to these changes by revising the Appendix A references for offenses under section 1375a(d). The reference for subsection (d)(3)(C) is deleted as obsolete. Offenses under subsection (d)(5)(B)(i) and (ii) continue to be referenced to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). Offenses under subsection (d)(5)(B)(iii) are referenced to §2B1.1 (Theft, Property Destruction, and Fraud).

Part E of the proposed amendment addresses offenses under 18 U.S.C. § 2423 (Transportation of Minors), which were modified by the Act. Section 2423 contains four offenses, each of which prohibit sexual conduct with minors. Sections 2423(a) and (b) were already referenced in Appendix A to §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor). Part E of the proposed amendment continues to maintain that reference and amends Appendix A to reference section 2423(c) and (d) to §2G1.3.

Part F of the proposed amendment responds to the new Class A misdemeanor at 18 U.S.C. § 1597(a). Part F of the proposed amendment references this offense to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)).

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2014, effective date, and with staff authorized to make technical and conforming changes if needed.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Barkow made a motion to promulgate the proposed amendment, with Commissioner Pryor seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit B, responds to two circuit conflicts involving the effect of a statutory mandatory minimum sentence on the guideline range in resentencing proceedings under 18 U.S.C. § 3582(c)(2) and the Commission's policy statement at §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range). Circuits are split over what to use as the bottom of the range in order to apply §1B1.10(b)(2)(B) in two distinct situations where the amended guideline range as determined on the Sentencing Table is below the applicable mandatory minimum.

First, there are cases in which the defendant's original guideline range was above the statutory mandatory minimum but the defendant received a sentence below the mandatory minimum pursuant to a government motion for substantial assistance and the amended guideline range as determined on the Sentencing Table is below the mandatory minimum. Second, there are cases in which the defendant's original guideline range as determined by the Sentencing Table was, at least in part, below the statutory mandatory minimum, and the defendant received a sentence below the mandatory minimum pursuant to a government motion for substantial assistance.

The proposed amendment generally adopts the approach of the Third Circuit in United States v. Savani, 733 F.3d 56, 66-7 (3d Cir. 2013) and the District of Columbia Circuit in In re Sealed Case, 722 F.3d 361, 369-70 (D.C. Cir. 2013), which have taken the view that the bottom of the amended range would be the bottom of the Sentencing Table guideline range, not the applicable statutory mandatory minimum. It amends §1B1.10 to specify that, if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence

below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of §1B1.10, the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction).

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2014, effective date, and with staff authorized to make technical and conforming changes if needed.

Chair Saris called for a motion as suggested by Ms. Grilli. Vice Chair Hinojosa made a motion to promulgate the proposed amendment, with Vice Chair Breyer seconding. The Chair called for discussion on the vote.

Vice Chair Jackson stated that she did not support the proposed amendment. She noted that she struggled with her decision, especially in light of the potential benefit to some defendants under the Commission's prior amendments that implemented the Fair Sentencing Act of 2010. Vice Chair Jackson recounted that she still supported the Commission's unanimous decision to reduce the guideline penalties for crack offenses and to make that reduction retroactive.

Vice Chair Jackson observed that the proposed amendment was complicated, but generally the amendment would permit a defendant who originally received a substantial assistance departure and got a sentence below the statutory mandatory minimum to be considered for an additional substantial assistance discount as a result of the Commission's determination to revise the guidelines and to make that change retroactive.

Vice Chair Jackson stated that she did not support the proposed amendment for two reasons. First, she believes the amendment is inconsistent with the substantial assistance and retroactivity statutes and guidelines as they current exist. She explained that the amendment required a reinterpretation of §5G1.1(b) in substantial assistance cases, which she believed was not authorized. She recounted that §5G1.1(b) provides that if the statutory mandatory minimum is greater than the otherwise applicable guideline range, then the statutory minimum shall be the guideline sentence.

Vice Chair Jackson asserted that the proposed amendment adds to §5G1.1 the implicit caveat "unless the defendant has provided substantial assistance," in which case the statutory mandatory minimum become irrelevant and the otherwise applicable guideline range becomes the guideline sentence. She stressed that in addition to not being explicitly stated in §5G1.1, the proposed new rule is problematic because the statute that governs the substantial assistance departure says nothing about determining the sentence to be imposed without regard to the statutory minimum.

Vice Chair Jackson believed that 18 U.S.C. § 3553(e) demonstrates Congress' intent that a defendant who would have otherwise been subject to a statutory mandatory minimum, but provided substantial assistance, was authorized to get a break from the mandatory minimum and, therefore, the mandatory minimum would be the starting point below which a court is authorized to sentence. In her view, the proposed amendment ignored that statutory mandate.

Additionally, Vice Chair Jackson believed that the proposed amendment was inconsistent with 18 U.S.C. § 3582(c), which gives the court authority to consider retroactive application of new guideline amendments. She observed that section 3582(c) permits a court to lower a sentence that was previously imposed when the defendant was originally sentenced “based on a sentencing range that has been subsequently lowered by the Sentencing Commission” and when the reduction is consistent with the Commission's policy statements.

Based on Vice Chair Jackson’s analysis of section 3582(c) and the relevant case law, she concluded that a cooperating defendant who originally provided substantial assistance, received a departure, and was sentenced below the statutory mandatory minimum, does not qualify for retroactivity because the original sentence was based on the extent of the cooperation, not the guideline range. Moreover, she believed that the guidelines sentencing range in such cases has not been subsequently lowered by the Commission, but remains the statutory mandatory minimum pursuant to §5G1.1.

Beyond the statutory inconsistencies Vice Chair Jackson identified, she also believed that a rule that authorizes courts to disregard the statutory mandatory minimum in substantial assistance cases in the retroactivity context wreaks havoc on the sentencing guidelines as well.

Vice Chair Jackson observed that an exception already exists in the current §1B1.10 for cooperating defendants which states that, when retroactivity is considered, “a reduction comparably less than the amended guideline range may be appropriate.” She noted that this exception makes sense if, as §5G1.1 states, the amended guideline range is the statutory mandatory minimum. In such cases, a cooperating defendant's comparable reduction is a discount from the statutory mandatory minimum.

But, under the proposed amendment, Vice Chair Jackson asserted, the Commission would be doing something totally different. In her view, the Commission would be deciding that, for one category of defendants, the amended guideline range for reduction purposes is not the statutory mandatory minimum, but what the guidelines otherwise would have called for if there were no statutory minimum.

Vice Chair Jackson observed that the proposed amendment authorizes a court applying the amended §1B1.10 in a substantial assistance case to depart downward from the new guideline range in order to reward cooperation, when the statutory mandatory minimum is, in her view, the obvious starting point for determining the extent of a downward departure.

In Vice Chair Jackson’s opinion, the proposed amendment diverges from the ordinary departure framework because it establishes a departure that does not compare cooperating defendants to non-cooperating defendants. Instead, she continued, the result compares cooperating defendants to an imagined category of non-cooperating defendants in a system without statutory mandatory minimums who, thus, might have received a sentence within the revised guideline range.

Turning to her second reason for not supporting the proposed amendment, Vice Chair Jackson asserted that the amendment creates, rather than resolves, unwarranted disparity. Because the

Commission would give courts the authority to disregard the statutory mandatory minimum for cooperating defendants only in the retroactivity context, she believes that a crack defendant who provided substantial assistance today would be at a significant disadvantage.

Vice Chair Jackson explained that when the defendant's sentence under the guidelines is calculated, the court is required to follow §5G1.1. And as a result, she continued, if a defendant's guideline range is lower than the statutory mandatory minimum, the mandatory minimum would become the guideline sentence and any substantial assistance departure would proceed from there. But, she added, under the proposed amendment, if that same cooperating defendant was sentenced before the Fair Sentencing Act, the defendant would be entitled to his cooperation reduction, but the court would be required to start from the lower revised guideline range rather than the statutory mandatory minimum.

Commissioner Friedrich stated that she did not support the proposed amendment because she also believed it was inconsistent with the statutory and the guidelines schemes that Congress and the Commission have set up with respect to cooperating defendants and resentencings. She also agreed with Vice Chair Jackson that the amendment was likely to increase unwarranted disparity.

Vice Chair Hinojosa stated that he supported the proposed amendment because he believed Congress made clear in 18 U.S.C. § 3553(e) that when a defendant provides substantial assistance, and the government has filed a §5K1.1 (Substantial Assistance to Authorities (Policy Statement)) motion, the statutory mandatory minimum no longer applied. Therefore, he continued, the statutory mandatory minimum is not the guideline range in such cases because the statute itself says the mandatory minimum does not apply.

Vice Chair Hinojosa observed that 18 U.S.C. § 3582(c)(2) grants the Commission authority to determine under what conditions actions of the Commission can be made retroactive. In his view, that is what the Commission is doing if it adopts the proposed amendment to allow defendants to get a further reduction if the sentencing court determines that to be appropriate.

Vice Chair Hinojosa observed that there is a policy reason for treating cooperating defendants differently. He noted that both Congress and the Commission recognize that these defendants place their lives and the lives of their relatives in danger by their cooperation and assistance. Vice Chair Hinojosa also noted that this is especially true in the southwest border districts. Because of this, Vice Chair Hinojosa concluded, these defendants should have the same opportunity as other defendants to have their sentences reduced.

Hearing no further discussion, the Chair called on the Staff Director to perform a roll call vote on the motion to adopt the proposed amendment. The motion was adopted by a 4 to 3 vote with Chair Saris, Vice Chairs Hinojosa and Breyer, and Commissioner Barkow voting in favor of the motion and Vice Chair Jackson and Commissioners Friedrich and Pryor voting against the motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit C, clarifies how principles of relevant conduct apply in cases in which the defendant is convicted of a firearms

offense (e.g., being a felon in possession of a firearm) in two situations: first, when the defendant unlawfully possessed one firearm on one occasion and a different firearm on another occasion (but was not necessarily convicted of the second offense); and second, when the defendant unlawfully possessed a firearm and also used a firearm in connection with another offense, such as robbery or attempted murder (but was not necessarily convicted of the other offense).

One application issue arises when the defendant unlawfully possessed a firearm and used the firearm in connection with another offense, and the court must determine whether the “in connection with” offense under subsections (b)(6)(B) and (c)(1) of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) satisfies the requirements of the relevant conduct guideline. A second application issue arises when the defendant unlawfully possessed one firearm on one occasion and a different firearm on another occasion, and the court must determine whether both firearms fall within the scope of “any firearm” under §§2K2.1(b)(6)(B) and (c)(1).

The proposed amendment clarifies that §2K2.1(b)(6)(B) is not limited to firearms and ammunition cited in the offense of conviction, but amends the cross reference at §2K2.1(c)(1) to limit its application to firearms and ammunition cited in the offense of conviction. The proposed amendment also makes conforming changes to the Commentary, clarifying the relevant conduct analysis that applies and providing examples.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2014, effective date, and with staff authorized to make technical and conforming changes if needed.

Chair Saris called for a motion as suggested by Ms. Grilli. Vice Chair Jackson made a motion to promulgate the proposed amendment, with Commissioner Friedrich seconding. The Chair called for discussion on the vote

Commissioner Barkow stated that while she supported the proposed amendment because it will limit the use of the cross reference to offenses committed with the same firearm or ammunition used in the offense of conviction, instead of any other firearm that a felon-in-possession may use, she believed the amendment did not go far enough.

Commissioner Barkow noted that under the current guidelines, and even after the amendment, if adopted, a defendant’s sentence must be increased on the basis of any crime committed with a firearm named in the indictment that the judge finds the defendant committed by a preponderance of the evidence and this applies whether the defendant was acquitted of that offense or if the crime was never charged or charged but dismissed.

Observing that the problems of using acquitted, uncharged, and dismissed criminal conduct are particularly pronounced with a continuing status offense, such as felon-in-possession, because it is so sweeping and has no limiting principle other than the requirement that the person be a felon and that the weapon used be a firearm, Commissioner Barkow believed that there is a deeper

issue regarding the guideline's use of cross references and its approach to relevant conduct that the Commission should address.

Commissioner Barkow identified the use of acquitted conduct as the issue that concerned her the most. She stated that she knew of no other guideline regime that uses it, and she does not believe the federal system should because of the disrespect it shows the jury's verdict. She also believed the majority of federal judges, when asked, agree.

Commissioner Barkow noted that the use of dismissed and uncharged conduct raises issues as well. In her view, it makes sense for a guideline system to specify how aggravating factors that are not themselves chargeable as crimes should be used to draw distinctions among defendants who commit the same offense. But, she added, it is a different matter when prosecutors seek to increase a defendant's sentence on the basis of conduct that could be charged as a separate criminal offense, but the prosecutor opts instead to get a sentencing increase for that same conduct without going through the constitutional process for finding defendants guilty of offenses.

Commissioner Barkow observed that if prosecutors are allowed to seek to increase sentences on the basis of uncharged, dismissed, and acquitted conduct, then the carefully-crafted protections established by the Constitution's Framers are short-circuited. In her view, any system that does this deserves a closer look to make sure it is not a scheme that replaces the constitutional protections in the name of expedience.

Commissioner Barkow expressed her hope that the Commission will make consideration of acquitted conduct and the use of cross references a priority in the future. She would also like to take a broader look at relevant conduct in general to determine whether it is being used to circumvent the Constitution's protections.

Hearing no further discussion, the Chair called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Ms. Grilli advised the Commission that the just promulgated amendment has the effect of lowering the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses. In light of that, she asked whether there was a motion pursuant to Rule 2.2 of the Commission's Rules of Practice and Procedure to instruct staff to prepare a retroactivity impact analysis of the felon in possession amendment.

Chair Saris called for a motion as suggested by Ms. Grilli. Hearing none, the proposal failed for lack of a motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit D, is a multi-part amendment that addresses differences among the circuits in the calculation of the guideline range of supervised release under §5D1.2 (Term of Supervised Release) in two situations: first, when there is a statutory mandatory minimum term of supervised release, and second, when the instant offense of conviction is the failure to register as a sex offender under 18 U.S.C. § 2250.

First, there appear to be differences among the circuits in how to calculate the guideline range of supervised release when there is a statutory minimum term of supervised release. Part A addresses this circuit conflict by adopting the approach of the Seventh Circuit, which concluded that when there is a statutory minimum term of supervised release, the statutory minimum term becomes the bottom of the guideline range or, if it equals or exceeds the top of the guideline range provided by subsection (a), becomes a guidelines “range” of a single point at the statutory minimum. The proposed amendment provides a new application note explaining that, under subsection (c), a statutorily required minimum term of supervised release operates to restrict the low end of the guidelines term of supervised release. Examples are also provided.

Second, there appear to be differences among the circuits in how to calculate the guideline range of supervised release when the defendant is convicted under 18 U.S.C. § 2250 (i.e., for failing to register as a sex offender). Circuits have reached different conclusions about whether a failure to register offense is a sex offense, for which the guidelines recommend a life term of supervised release. Part B responds to the application issue by amending the commentary to §5D1.2 to clarify that offenses under section 2250 are not “sex offenses.” Accordingly, offenses under section 2250 are not covered by subsection (b) of §5D1.2.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2014, effective date, and with staff authorized to make technical and conforming changes if needed.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Barkow made a motion to promulgate the proposed amendment, with Vice Chair Jackson seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit E, responds to concerns that have been raised about cases in which aliens are transported through dangerous terrain, e.g., along the southern border of the United States.

Section 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) currently has an enhancement at subsection (b)(6) for reckless endangerment, which provides for a 2-level increase and a minimum offense level of 18 if the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person. The application note for subsection (b)(6) explains the wide variety of conduct that triggers that enhancement.

The proposed amendment adds to the existing parenthetical that currently provides examples of the “wide variety of conduct” to which this specific offense characteristic could apply, “or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements.”

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2014, effective date, and with staff authorized to make technical and conforming changes if needed.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Pryor made a motion to promulgate the proposed amendment, with Commissioner Barkow seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit F, is a multi-part amendment that addresses cases in which the defendant is subject to an undischarged term of imprisonment. The proposed amendment is in three parts, each of which amends §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment). The first part addresses cases in which a defendant is subject to an undischarged term of imprisonment that is relevant conduct but does not result in a Chapter Two or Three increase. The second part addresses cases in which the defendant is subject to an anticipated state term of imprisonment. The third part addresses cases in which certain aliens are subject to undischarged terms of imprisonment.

Part A amends §5G1.3(b) to require a court to adjust the sentence and impose concurrent sentences in any case in which the prior offense is relevant conduct under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), whether or not it also formed the basis for a Chapter Two or Chapter Three increase. Conforming changes are made to the application notes.

Part B amends §5G1.3 to address cases in which there is an anticipated, but not yet imposed, state term of imprisonment that is relevant conduct to the instant offense of conviction under the provisions of §1B1.3(a)(1), (a)(2), or (a)(3). The proposed amendment creates a new subsection (c), similar to §5G1.3(b)(2), that directs the court to impose the instant offense to run concurrently with the anticipated period of imprisonment, if subsection (a) does not apply.

Part C addresses certain cases in which the defendant is an alien and is subject to an undischarged term of imprisonment. Specifically, it amends §2L1.2 (Unlawfully Entering or Remaining in the United States) to provide a departure provision for certain cases in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense. In such a case, the time served is not covered by an adjustment under §5G1.3(b) and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). The new departure provision states that, in such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Federal Bureau of Prisons. The provision also sets forth factors for the court to consider in determining whether to provide such a departure.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2014, effective date, and with staff authorized to make technical and conforming changes if needed.

Chair Saris called for a motion as suggested by Ms. Grilli. Vice Chair Breyer made a motion to

promulgate the proposed amendment, with Commissioner Barkow seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Ms. Grilli advised the Commission that the just promulgated amendment has the effect of lowering the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses. In light of that, she asked whether there was a motion pursuant to Rule 2.2 of the Commission's Rules of Practice and Procedure to instruct staff to prepare a retroactivity impact analysis of the felon in possession amendment.

Chair Saris called for a motion as suggested by Ms. Grilli. Hearing none, the proposal failed for lack of a motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit G, responds to concerns about the environmental and other harms caused by marihuana cultivation operations. Offenses involving marihuana cultivation are generally sentenced under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

The proposed amendment amends §2D1.1 to provide a 2-level enhancement that applies if (A) the offense involved the cultivation of marihuana on state or federal land or while trespassing on tribal or private land and (B) the defendant receives an adjustment for aggravating role under §3B1.1 (Aggravating Role).

The proposed amendment also provides a new application note stating that such offenses “interfere with the ability of others to safely access and use the area and also pose or risk a range of other harms, such as harms to the environment.” It clarifies that this new enhancement may be applied cumulatively (added together) with the existing environmental enhancement at subsection (b)(13)(A).

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2014, effective date, and with staff authorized to make technical and conforming changes if needed.

Chair Saris called for a motion as suggested by Ms. Grilli. Vice Chair Breyer made a motion to promulgate the proposed amendment, with Commissioner Friedrich seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Ms. Grilli stated that the last proposed amendment, attached hereto as Exhibit H, revises the guidelines applicable to drug offenses. It changes how the base offense levels in the Drug Quantity Table incorporate the statutory mandatory minimum penalties.

Specifically, the proposed amendment amends the Drug Quantity Table in §2D1.1 so that the quantities that trigger the statutory mandatory minimum penalties trigger base offense levels 24

and 30, rather than 26 and 32. Under the proposed amendment, §2D1.1 continues to reflect the minimum base offense level of 6 and the maximum base offense level of 38 that are incorporated into the Drug Quantity Table across all drug types. It also continues to reflect the minimum base offense levels that are incorporated into the Drug Quantity Table for particular drug types, e.g., the minimum base offense level of 12 that applies if the offense involved any quantity of certain Schedule I or II controlled substances.

Similarly, it continues to reflect the maximum base offense levels and associated drug quantity “caps” that are incorporated into the Drug Quantity Table for particular drug types, e.g., the maximum base offense level of 8 and the combined equivalent weight “cap” of 999 grams of marijuana that apply if the offense involved any quantity of Schedule V substances. In the proposed amendment the various minimum and maximum base offense levels and drug quantity “caps” are associated with new drug quantities, determined by extrapolating upward or downward as appropriate.

The proposed amendment makes parallel changes to the quantity tables in §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), which apply to offenses involving the chemical precursors of controlled substances. Section 2D1.11 is generally structured to provide base offense levels that are tied to, but less severe than, the base offense levels in §2D1.1 for offenses involving the final product.

Finally, the proposed amendment makes certain clerical and conforming changes to reflect the changes to the quantity tables.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2014, effective date, with staff authorized to make technical and conforming changes if needed, and waiving the requirements of Rule 4.1 of the Commission’s Rules of Practice and Procedure, which requires consideration of retroactivity at the time of promulgation of an amendment that has the effect of reducing the term of imprisonment required by the guidelines.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Barkow made a motion to promulgate the proposed amendment, with Vice Chair Jackson seconding. The Chair called for discussion on the vote.

Vice Chair Hinojosa recounted how he was on the Commission in 2007 and 2010 when it reduced the penalties for crack cocaine offenses by two levels. He stated that he thought it was the appropriate thing to do then and that the Commission’s decision had subsequently been proven correct.

Vice Chair Hinojosa also recalled how the Commission responded to the 2010 Fair Sentencing Act on the crack cocaine penalties and how the Commission’s studies have shown that the recidivism rate of those defendants who received sentencing reductions were the same or lower than those defendants who served their full terms. He stated that this result provides a basis for any commissioner to support the proposed amendment because it demonstrates that there is no

increase in recidivism rates in reducing sentences by two levels.

Vice Chair Hinojosa observed that while the proposed amendment is for a reduction to the guideline for drug trafficking offenses, the amended guideline penalties would still remain consistent and within the statutory mandatory minimums established by Congress.

Vice Chair Hinojosa noted that the guidelines will continue to have enhancements for those defendants that have aggravators, whether it be for the possession of a firearm, commission of violence in relationship to a drug trafficking offense, as well as all the other enhancements that are within the guideline system to account for aggravating circumstances in drug trafficking offenses.

Vice Chair Hinojosa thanked everyone who sent thousands of comments on the proposed amendment, noting that they were extremely helpful to the Commission and were an example of how public comment informs the Commission's deliberations.

Vice Chair Hinojosa recalled how, two years ago, the Department of Justice was reluctant to support a two-level reduction, and, in fact, did not support such a reduction. He thanked the Department of Justice for its support of the current proposed reduction, as shown by the personal testimony of the Attorney General before the Commission.

However, Vice Chair Hinojosa expressed his surprise that the Attorney General had taken steps to provide the proposed reduction outside the provisions of the Sentencing Reform Act of 1984. He reminded the audience that, pursuant to the Sentencing Reform Act, the Commission was granted authority to promulgate and amend the sentencing guidelines. Also pursuant to that Act, Congress has the right to reject any amendment the Commission promulgates and any amendment not subsequently rejected by Congress will not go into effect until November 1 of the year when the amendment was promulgated. Thus, the proposed amendment, if adopted, will not become law until November 1, 2014, and unless Congress does not disapprove.

Vice Chair Hinojosa recalled that when Attorney General Holder testified before the Commission in March, he failed to mention that the night before the Department of Justice had instructed prosecutors across the country to either not oppose, or to argue for, the two-level reduction in all drug trafficking cases. He emphasized that the instruction came before the Commission had acted and before Congress had the opportunity to approve or disapprove the Commission's actions.

Vice Chair Hinojosa stated that it would have been informative to have known before the Attorney General's testimony that this action had been taken. Had the Commission known, commissioners could have asked the Attorney General under which of the 18 U.S.C. § 3553(a) factors the Department of Justice based its request. If it was because the Attorney General had spoken in favor of this proposal, Vice Chair Hinojosa cautioned, that would set a dangerous precedent because, while past Attorney Generals have expressed their views on possible amendments to the guidelines, many times for an increase and sometimes for a decrease in penalties, none have ever asked the courts to proceed with increases or decreases because the

Attorney General supported them and before the Commission and Congress had exercised their statutory obligations.

Vice Chair Hinojosa expressed the view that by taking this action, the Attorney General demonstrated disregard of one of the section 3553(a) factors, the need to avoid unwarranted disparity. He noted that some judges, some even in the same courthouse, have decided to grant such requests while others have denied them. Vice Chair Hinojosa reported that judges have contacted him as they were surprised by the Department of Justice's action and were dismayed by it. Because he was not aware of the Attorney General's order before he testified, Vice Chair Hinojosa stated that he was unable to identify on what basis, other than it is in favor of it, the Justice Department was asking the courts to ignore the process set out in the Sentencing Reform Act.

Having expressed his concerns, Vice Chair Hinojosa stated that he would still support the proposed amendment. However, he stressed, it was important to remember that this was a small step that in no way removes the necessity of Congress to address this issue. Vice Chair Hinojosa stated that the Commission has advised Congress that it should consider reducing the current statutory mandatory minimum penalties for drug trafficking and expanding the safety valve provision.

Vice Chair Hinojosa expressed the view that the unilateral actions of any stakeholder should in no way diminish the need for the Commission to act in a bipartisan fashion and certainly the need for Congress to act in a bipartisan fashion on these important issues.

Vice Chair Jackson recalled that in the discussions leading up the vote, the Commission considered many good reasons to support the proposed amendment, including the Commission's statutory obligation to address prison overcrowding in a manner consistent with public safety. She added that this obligation was an important concern that justified the adoption of the proposed amendment, but expressed the desire to make clear that her vote was based on additional concerns. She stated that it was her strong belief that lowering the base offense levels for drug penalties was necessary for the guideline system to work properly.

Vice Chair Jackson explained that the guidelines currently prescribe a base offense level for drug trafficking offenses that is tied to the drug quantity attributable to the defendant being sentenced. Under the guidelines system, she continued, the base offense level is the starting point for the calculation of an offense level that is supposed to account for the seriousness of an offense, including the defendant's culpability in committing that offense.

However, Vice Chair Jackson cautioned, it has been clear for some time that when the base offense level which is based on drug quantity alone is set very high, there is less opportunity for the guidelines' specific offense characteristics, which distinguish serious and dangerous drug trafficking offenders from low-level drug trafficking offenders, to operate. In other words, she continued, it is as if one factor, drug quantity, applicable to both low-level and high-level traffickers alike, drives so much of the guideline penalty analysis that it becomes more difficult for judges to sentence drug offenders proportionately, by taking into account not only how much

of a drug the defendant has but also any significant aggravating or potentially mitigating factors such as violence or the defendant's role in the offense.

Vice Chair Jackson closed by stating that she supported the proposed amendment as a step toward recalibrating the drug guidelines so that they can function better in assisting judges to assign meaningful penalties that account for the entirety of a defendant's culpability and conduct.

Commissioner Friedrich stated that she also supported the proposed amendment because it was a measured one that would alleviate the problem of prison overcrowding and was consistent with the statutory scheme established by Congress. She added that the amendment also had the support of the Criminal Law Committee of the Judicial Conference, the Department of Justice, as well as a number of Members of Congress on both sides of the aisle.

Commissioner Friedrich observed that, pursuant to the proposed amendment, guideline sentences in drug trafficking cases will continue to be linked to the statutory mandatory minimum penalties established by Congress. She recounted that, historically, the initial Commission made a rational decision to set the drug trafficking guideline ranges above the statutory mandatory minimum penalties to provide an incentive for defendants to plead guilty and to cooperate in investigations.

However, Commissioner Friedrich continued, since that time, Congress and the Commission have taken steps to de-emphasize the role of drug quantity in sentencing. She noted that the Commission has added, consistent with congressional directives, more than a dozen specific offender characteristics, the vast majority of which have enhanced offenders' sentences above the base offense levels that the Commission initially set. Congress and the Commission have also added statutory and guideline safety valve relief to §2D1.1.

Additionally, Commissioner Friedrich noted, the Commission's experience with the 2007 crack amendment suggests that lowering drug guideline sentences to be on par with, rather than above, statutory mandatory minimum penalties, will not have a significant effect on the number of trials or the frequency with which offenders cooperate with the government. Indeed, she emphasized, the trial and cooperation rates for crack offenders have remained relatively stable since the Commission reduced crack penalties by two levels in 2007.

Commissioner Friedrich stated that, if the proposed amendment were adopted, the average sentence imposed for a drug trafficking offender would be reduced by 11 months. Noting that some members of Congress and representatives in the law enforcement community had expressed concerns about public safety, she reminded everyone, as Judge Hinojosa had noted, that the amendment would not undermine the application of the career offender guideline, statutory mandatory minimum penalties, or any other aggravating factor under the guidelines, including the use of a weapon, violence, or criminal history.

Commissioner Friedrich stated that the Commission was mindful of the potential risk to public safety and fully intends to track and study the recidivism rates of the offenders who benefit from the amendment, if adopted. Commissioner Friedrich noted that the Commission's recidivism studies provide support for the two-level reduction. Both the Commission's 2010 recidivism

study, which tracked crack offenders for two years, and the Commission's most recent study, which tracked offenders for five years, reflected that the recidivism rates for crack offenders who were released early were comparable to the recidivism rates for offenders who received no sentencing reduction at all.

Commissioner Friedrich stated that she further supported the proposed amendment because it would help alleviate the growing prison population and the economic burden on the Federal Bureau of Prisons. She reported that the Commission has estimated that over the next five years the amendment would reduce the federal prison population by more than 6,500 prisoners, resulting in substantial savings for American taxpayers over time.

Commissioner Friedrich also stated that she agreed with Judge Hinojosa's view regarding the Department of Justice's failure to respect the legal process that Congress and the Commission had established to amend the sentencing guidelines.

While Commissioner Friedrich urged Congress to support the proposed amendment, she also encouraged policymakers to consider legislative reforms that would accomplish more than simply lower federal sentences. She noted that recent Commission research has highlighted that sentencing disparities are increasing at the national, regional, and local levels, and even within courthouses. If the nation aspires to have a criminal justice system that furthers the stated goals of the Sentencing Reform Act and treats similarly-situated defendants similarly, no matter where their crimes are committed and no matter who the prosecutor or judge is, she cautioned, legislative reforms are needed to increase the degree of uniformity and certainty in the federal sentencing system.

Commissioner Friedrich recalled that it has now been nearly a decade since Justice Breyer noted in United States v. Booker that the ball lies in Congress' court. However, she noted, Congress has taken no action to address the ever-growing sentencing disparities in the federal courts, and the answer to this problem is not congressional inaction nor is it disparate charging practices by the Department of Justice.

Commissioner Friedrich closed by stating that, as members of the Commission, Congress, and the Department of Justice consider legislative reforms that lower the severity of federal sentences, she also urged consideration of constitutional legislative reforms that will further the important and laudable goals of the Sentencing Reform Act.

Commissioner Pryor stated that he supported the proposed amendment and noted that the amendment respects the general framework of the guidelines and existing penalties by maintaining its incorporation of all statutory mandatory minimum sentences.

Commissioner Pryor observed that the amended drug quantity table would continue to use the minimum offense level of 12 for certain Schedule I and II controlled substances and the maximum offense level of 38 and the amendment. Also, he noted, it would ensure that the maximum of the sentencing range does not exceed the minimum by more than the greater of 25

percent or six months, and the amendment helps reduce, although it does not eliminate, the likelihood that the federal prison population will exceed the capacity of the prisons.

Commissioner Pryor stated that the proposed amendment would update the drug guideline to reflect two significant changes in law since the adoption of the first Guidelines Manual in 1987. First, he recounted, in contrast with the original manual, which provided a single specific offense characteristic for use of a firearm or other dangerous weapon, §2D1.1 now contains 14 enhancements and three downward adjustments, which enable district courts to distinguish between serious and minor offenders.

Second, Commissioner Pryor continued, since the adoption of the original guidelines, Congress has adopted the safety valve, which allows District Courts to sentence some drug offenders below the statutory mandatory minimum sentences that would otherwise apply to their crimes. He stated that the safety valve has enabled prosecutors to encourage low-level offenders to plead guilty more often than before.

Commissioner Pryor believed that the amended guideline will allow all these provisions to work in tandem with the new base offense levels to ensure that drug offenders receive sentences that are sufficient, but not greater than necessary, to comply with the purposes of sentencing.

Commissioner Pryor noted that while the amended guideline modestly reduces the starting point for calculating a guideline range for drug offenders, it also respects the primary role of Congress in establishing the boundaries for sentencing drug offenders. He added that the amended guidelines should assist the federal judiciary in fulfilling its role of sentencing drug offenders in a fair and rational manner.

Commissioner Pryor thanked the public for the substantial amount of comment the Commission received on the proposed amendment as it aided our deliberations. But, he added, like Vice Chair Hinojosa, he regretted that before the Commission voted on the amendment, the Attorney General instructed the United States Attorneys across the nation not to object to defense requests to apply the proposed amendment in sentencing proceedings going forward.

Commissioner Pryor expressed his view that the Attorney General's unprecedented instruction disrespected the Commission's statutory role as an independent Commission in the Judicial Branch to establish sentencing policies and practices under the Sentencing Reform Act and the role of Congress as the Legislative Branch to decide whether to revise, modify, or disapprove our proposed amendment.

Commissioner Pryor emphasized that the Commission did not discharge its statutory duty until it vote on a proposed amendment, and Congress, by law, had until November 1, 2014, to decide whether our proposed amendment should become effective. He observed that the law provided the Executive Branch no authority to establish national sentencing policies based on speculation about how the Commission and Congress might vote on a proposed amendment. Commissioner Pryor expressed his appreciation for the Attorney General's personal appearance before the Commission in March and his helpful comments in support of this amendment, but also hoped to

avoid in the future the kind of improper instruction that he sent federal prosecutors before the vote on the proposed amendment.

Commissioner Pryor also echoed Commissioner Friedrich's call that Congress address the legal reforms that need to take place statutorily that would make the federal sentencing system more consistent and rational.

Commissioner Barkow supported the proposed amendment. She stated that, while she believes drug quantity should play a role in a defendant's sentence for a trafficking offense and that defendants who deal in larger quantities should get higher sentences, drug quantity is not the only critical factor in a defendant's sentence.

Commissioner Barkow observed that the drug trafficking guidelines include many special offense characteristics that capture other key conduct, including the use or threat of violence or the use of a dangerous weapon. Additionally, she continued, the guidelines direct judges to focus on a defendant's role in a drug trafficking operation, accounting for aggravating and mitigating roles.

Commissioner Barkow noted that, like Judge Jackson suggested, she did not believe that placing such emphasis on drug quantity accurately reflected a defendant's culpability. Quantity overwhelmingly drives a defendant's sentence, she continued, even though it is a poor surrogate for culpability and dangerousness, particularly as compared to special offense characteristics dealing specifically with role and violence.

Commissioner Barkow asserted that drug quantity's disproportionate impact is particularly true in the case of drug conspiracies. Kingpins, couriers, and street peddlers in a conspiracy are held equally responsible for the same quantity amounts because the relevant conduct rules make them all responsible for the reasonably foreseeable quantities distributed by their organizations. But, of course, she added, those individuals are not the same, and their roles are far more important than the quantity in assessing their individual culpability.

As a result, while Commissioner Barkow stated that she supported the proposed amendment because it lets specific offense characteristics play a greater role in a defendant's sentence relative to quantity, she would also like the Commission to continue to pursue the question whether the guidelines are doing their best to accurately reflect a defendant's culpability and achieve a proportionate sentencing structure or whether the guidelines need further adjustment, either in the treatment of quantity, the mitigating and aggravating role adjustments, or the approach to relevant conduct.

Commissioner Barkow remarked that she agreed with those commenters who have urged the Commission to consider whether it should have conforming amendments to lower the mitigating role cap in §2D1.5 (Continuing Criminal Enterprise; Attempt or Conspiracy). She also agreed that the Commission should consider whether the relevant conduct rules need to change with respect to drug quantity in conspiracies and also should consider the possible need to increase some special offense characteristics, such as the ones for violence.

Regarding the proposed amendment, Commissioner Barkow agreed with some commenters who argue that there is no principled reason for not lowering the top category, Level 38, by two. In her view, she saw no reason to carve out these quantities from the two-level reduction. Commissioner Barkow added that she did not think it makes sense to lower the floor of the table from Level 12 because it would treat traffickers on par with those who merely possess drugs in some cases.

Commissioner Barkow stated that she believed the proposed amendment is a significant step in the right direction. The Sentencing Reform Act mandates that the Commission take into account the capacity of available correctional facilities and minimize the likelihood that the federal prison population will exceed its capacity. She stated that the proposed amendment responds to that issue.

Commissioner Barkow echoed Commissioner Friedrich's observation that the proposed amendment will save over 6,500 prison beds in five years. She also noted that the Department of Justice has stated that it is critical to shift some of its budget from prisons to other law enforcement needs, in the name of public safety. Commissioner Barkow remarked that you cannot have an effective public safety system that spends most of its money on prisons but neglects the need for police and prosecutors.

Commissioner Barkow recounted that recidivism studies find that the odds of detection matter more for deterrence than the length of a sentence and that finding is borne out by the Commission's data studying the prior two-level reduction in sentences for crack offenders. She reported that those released earlier did not have higher recidivism rates than similarly-situated defendants who served their full sentences. This indicated, she added, that you can shave off time in these sentences, free up funds for law enforcement needs, and protect the public just as well, if not better.

Commissioner Barkow stated that all government efforts should be subject to scrutiny for effectiveness and for making sure the benefits outweigh the costs, and sentencing should be no different. Because the proposed amendment is consistent with public safety, a concern for the federal prison population, and a step toward making the drug guidelines more keyed to a defendant's culpability, she was happy to support it.

In closing, Commissioner Barkow expressed her pleasure working on all the issues before the Commission this year. She noted that the Chair, her fellow Commissioners, and the staff represent the absolute best in government service, and it was an honor to be part of this team.

Commissioner Wroblewski echoed Commissioner Barkow's statement about how it was an honor to serve with his fellow Commissioners and to work with the staff on these very important issues. He assured the audience that every commissioner takes these issues very seriously, devotes tremendous effort, energy and thought to them, and are fully committed to the American people and to justice.

Turning to some of the commissioners' comments that the Attorney General may have acted outside the legal system or ignored the guideline amendment process, Commissioner Wroblewski asserted that those were very serious charges, and they are something that he felt obligated to address. Commissioner Wroblewski recalled how, after it was announced that the Attorney General sent guidance to federal prosecutors across the country, some commissioners were upset and voiced their concerns to him. Commissioner Wroblewski stated that he took those concerns seriously and when he returned to his office, he researched the applicable laws, including the United States Constitution, the United States Code, the Federal Rules of Criminal Procedure, the sentencing guidelines, and the jurisprudence of the United States Supreme Court and the United States Courts of Appeals.

Commissioner Wroblewski reported that he did not find a requirement for the Attorney General to advocate for a guideline sentence in every case. What he did find was the three-step process to sentencing in place since the *Booker* decision. He noted that two of those steps are very closely tethered to the guidelines and require the district court to calculate the guidelines as they are in the *Sentencing Guidelines Manual* and to consider various grounds for departure.

However, Commissioner Wroblewski continued, there is the third step: To ensure that a sentence is sufficient, but not greater than necessary, to serve the purposes of sentencing as laid out in section 3553(a). Commissioner Wroblewski stated that the guidance the Attorney General issued back in March directed United States Attorneys to first calculate the guidelines as they are currently written, thus respecting the guideline system and process. However, he added, the guidance went further, and it did so because the law goes beyond the first two steps.

Commissioner Wroblewski observed that the guidance asks the prosecutors to make a complete and individualized assessment of the aggravating and mitigating factors in every case and, after making that, if there were a motion made for a variance to reflect the policy embodied in the proposed amendment, not to object to the motion. Why, he asked, did the guidance reflect this? Because, Commissioner Wroblewski answered, it is the prosecutor's obligation, as officers of the court, to make recommendations to the court about sentences that are sufficient but not greater than necessary to meet the purposes of sentencing.

Commissioner Wroblewski recalled that when the Attorney General appeared before the Commission in March, he testified that in many cases the current guidelines call for sentences that are sufficient but greater than necessary to serve the purposes of sentencing. Thus, he explained, when it came time to give guidance to prosecutors as to the third step -- sufficient but not greater than necessary to serve the purposes of sentencing -- prosecutors were directed to give their best assessment, as officers of the court, of what is indeed sufficient but not greater than necessary consistent with Department policy.

Commissioner Wroblewski asserted that this was more than just a theoretical discussion. He noted that, since the Attorney General testified on March 13th until today, approximately 1,500 individuals have been sentenced across the country on drug trafficking charges. Commissioner Wroblewski estimated that, between today and November 1st, when the new guidelines will be in force, approximately 13,000 individuals will be sentenced for drug trafficking offenders. He

stated that each of those people were entitled to a lawful sentence, as that law has been determined by the Supreme Court of the United States, which means they are entitled to a sentence that is sufficient but not greater than necessary to serve the purposes of sentencing.

Commissioner Wroblewski conceded that none of this was easy; what the Commission does is not easy and the obligations of prosecutors and as officers of the court are not easy. He noted that not everyone agrees with the proposed amendment and not everyone agrees with the approach that the Commission has taken.

However, Commissioner Wroblewski stated, he believed that what the Commission was doing today, all of the amendments, including the proposed amendment to the drug trafficking guidelines, was in the finest traditions of the United States Sentencing Commission. And, Commissioner Wroblewski concluded, what the Attorney General did was not only lawful, but it, too, was in the finest tradition of the United States Department of Justice.

Vice Chair Hinojosa expressed his surprise at Commissioner Wroblewski's statement. He noted that he greatly respected Commissioner Wroblewski's work, particularly as he had represented the Department of Justice through two different Administrations and ably presented the viewpoints of different Attorney Generals.

But, as Vice Chair Hinojosa recounted, he had previously expressed to Commissioner Wroblewski his surprise that the Department of Justice's instruction not to oppose a reduction has really turned out in the district courts as a request for the reduction of two levels within the guidelines. He stated that he believed the request was based on the Attorney General's change of viewpoint, because two years ago the Department of Justice testified that they were not ready to proceed with a two-level reduction.

Vice Chair Hinojosa again expressed his opinion that changing policy in this way set a dangerous precedent because the Attorney General himself, through the Department of Justice, had asked for increases within the guidelines. He stated that he did not understand why these requests for increases did not make a sentence not sufficient as in the Attorney General's view the guidelines should be increased. Vice Chair Hinojosa emphasized that a sentence must be sufficient but not greater than necessary; we can't excuse and forget the sufficient part of it.

Vice Chair Hinojosa added that it was surprising to him that statements made by the Attorney General can somehow be read into the section 3553(a) factors any more than statements by the public defenders or defense attorneys. He observed that the prosecutor is one person, representing one side; the defense attorney is another person, representing the other side, and their viewpoints are equal when it comes to the presentations in the courtroom. Vice Chair Hinojosa emphasized that just because the defense attorney is asking for a particular sentence doesn't make it any more correct with regards to the section 3553(a) factors than that of the prosecutor asking for the same thing.

Hearing no further discussion, the Chair called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Ms. Grilli advised the Commission that the just promulgated amendment has the effect of lowering the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses. In light of that, she asked whether there a motion pursuant to Rule 2.2 of the Commission's Rules of Practice and Procedure to instruct staff to prepare a retroactivity impact analysis of the drug amendment.

Chair Saris called for a motion as suggested by Ms. Grilli. Vice Chair Breyer made a motion to promulgate the proposed amendment, with Vice Chair Jackson seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Vice Chair Breyer asked Chair Saris for the opportunity to make a remark and the Chair granted his request. Vice Chair Breyer stated that he agreed with the sentiments expressed by his fellow commissioners, especially Commissioner Barkow's comment about it being a privilege to work with the staff, the Chair, and the other commissioners.

Vice Chair Breyer observed that, in the years that he has been in public service, he has never had the privilege of working with such fine people. He also highlighted that the Commission voted unanimously to reduce guideline drug penalties, a remarkable result considering that the commissioners are from very different perspectives and different experiences.

Vice Chair Breyer also believed that the Commission had a lot of work ahead of it, but that there was also a lot of energy on the Commission. He noted the experience of the commissioners and the dedication of the staff. Vice Chair Breyer noted that this issue was an ongoing process and it was a pleasure to be a part of it.

Ms. Grilli advised the Commission on a possible vote to publish an issue for comment regarding the possible retroactive application of the just promulgated drug amendment. The issue for comment seeks comment on whether the Commission should list the entire amendment, or one or more parts of the amendment, in subsection (c) of §1B1.10 as an amendment that may be applied retroactively to previously sentenced defendants. It also asks whether the Commission should provide further guidance or limitations regarding the circumstances in which and the amount by which sentences may be reduced.

Ms. Grilli advised the commissioners that a motion to publish the issue for comment would be in order with a 60-day comment period and with staff authorized to make technical and conforming changes if needed.

Chair Saris called for a motion as suggested by Ms. Grilli. Vice Chair Hinojosa made a motion to publish the issue for comment, with Commissioner Friedrich seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Chair Saris observed that the vote to amend the Drug Quantity Table was unanimous and she expressed her appreciation of the way the Commission worked in a bipartisan way on this important amendment.

Chair Saris recounted that the Commission first considered whether to reduce the guideline levels in the Drug Quantity Table by two levels across all drug types in 2010, when it adjusted crack sentencing levels in response to the Fair Sentencing Act. The Commission decided not to act on the proposal then, but return to the issue this year as part of its overall focus on finding ways to reduce cost of incarceration and overcapacity of prisons without endangering public safety.

Chair Saris stated that reducing the federal prison population has become urgent, with that population almost three times where it was in 1991. Federal prisons are 32 percent over capacity, and federal prisons spending exceeds \$6 billion a year, making up more than a quarter of the budget of the entire Department of Justice, and reduces resources available for prosecutors and law enforcement, aid to state and local law enforcement, crime victim services, and crime prevention programs, all of which promote public safety.

Chair Saris asserted that the Commission takes the responsibility of considering this issue very seriously and has given significant consideration to the arguments both for and against the drug amendment. Many factors support adoption of this modest amendment, she continued, and many of her colleagues have said that. When the Drug Quantity Tables were set at the current level above the mandatory minimum penalties, drug quantity was the primary driver of drug sentences. Chair Saris noted that, when the levels were set, there was only one other specific offense characteristic in the Drug Guideline. Currently, there are 14 specific offense characteristics, including enhancements for violence, firearms, aggravating role, and a whole host of other factors to help ensure that dangerous offenders receive long sentences. She noted that drug quantity, while still an important proxy for seriousness, no longer needs to be quite as central to the calculation.

Chair Saris observed how, originally, the drug guideline levels were set above the mandatory minimum penalties. This was done so that, even for the lowest-level drug offenders with minimal criminal history, there would still be some room for their sentences to move down before hitting the mandatory minimum. That way, these offenders would have had some incentive to plead and cooperate.

Since then, Chair Saris continued, Congress added the safety valve which provides for sentences below mandatory minimum levels for low-level offenders and gives those offenders substantial incentive to cooperate. It is no longer necessary to set the guidelines above mandatory minimum penalties to encourage low-level offenders to cooperate. That is why it is appropriate that the amended guideline would continue to link guideline ranges to existing mandatory minimum penalties, she added, but would place mandatory minimums within the guideline ranges, rather than below the ranges, for those with a low criminal history level.

Chair Saris stated that the modest reduction in drug penalties was an important step toward reducing the problem of prison overcrowding at the federal level. It reduces the penalties by an average of 11 months, or about 17 percent, for 70 percent of all offenders for all drug types. Within five years, the federal prison population would be reduced by more than 6,500. Over time the effects could be much greater. Offenders sentenced in just the first year after the change would over time serve almost 14,000 fewer years than they would have without the change.

Chair Saris recounted how the Commission has recommended that Congress reduce mandatory minimum penalties for drug offenses, which would have a greater impact on prison cost and populations, and stated that the Commission will continue to work with the bipartisan Members of Congress who have cosponsored legislation to do so. She added that the more modest amendment promulgated today stays within the current statutory framework, but still would be a significant step towards addressing this problem of overcrowding.

Chair Saris recognized the many people and groups who submitted public comment to the Commission, including defense attorneys, civil rights organizations, sentencing reform organizations, faith groups, Right on Crime, the Chairman of the Senate Judiciary Committee, and other bipartisan Senators, and the Department of Justice. Additionally, the Commission has listened very carefully to those who do not support the amendment, including the National District Attorneys Association, the National Association of Assistant United States Attorneys, the Chairman of the House Judiciary Committee, and the Ranking Member of the Senate Judiciary Committee.

Chair Saris emphasized that the Commission and staff have immense respect for the hard work law enforcement officers do to keep the public safe, and the Commission is sensitive to law enforcement concerns that reducing drug sentences will undermine public safety, including threatening the reduction in crime rates the nation has experienced over the last several decades.

Chair Saris recalled the high levels of violence in American cities in the 1980s, the high-profile tragedies like the death of Len Bias, and the great worry about crack babies. She stated that she understood the concern about going back to those days. But, she added, the Department of Justice supported the amendment, and the Attorney General testified that it would not undercut public safety.

Chair Saris noted that recent experience with reducing sentences for federal crack cocaine offenders suggests the same, and it is consistent with the experience of many states. In addition, she noted, existing guideline and statutory enhancements for career offenders and for traffickers who use weapons or violence help to ensure that the most serious offenders receive very substantial sentences.

Chair Saris stated that the Commission crafted the amendment such that there will not be any reduction in sentences for drug traffickers with the highest quantity of drugs. She added that the Commission will continue monitoring drug sentencing, as it has consistently done, to determine whether there are additional modifications that need to be made to ensure that the most harmful conduct results in the appropriate sentences.

Chair Saris observed that there has been a particular concern about recent increases in the use of heroin and the devastating effect of that drug. She recalled that, at the March hearing she made a point of asking the Attorney General about whether the just promulgated drug amendment would undercut the Department of Justice's efforts to address the growing heroin epidemic, and the Attorney General assured the Commission that it would not.

Chair Saris stated that she was convinced that the amendment was a modest, well-thought-out step to appropriately reduce prison costs and overcapacity. She noted that the amendment updated the drug guidelines to account for changes in the law and guidelines over the past several decades, and reflected the Commission's careful consideration of its data, and would not undermine the public's safety, and that is why she supported the amendment.

Chair Saris announced that over the next few months, the Commission will be studying the issue of whether the drug amendment should apply retroactively, which it is statutorily required to consider. She observed that while this was a complex and difficult issue, requiring a different analysis than the decision about reducing drug sentences prospectively, the Commission will again carefully consider the views of the stakeholders, any potential impact on public safety, and the data, all of which are very important.

Chair Saris explained that in undertaking this analysis, the Commission will take into account, as it always does when considering retroactivity, the purposes of the amendment, the magnitude of the change, and the difficulty of applying the change retroactively, among other factors.

Chair Saris emphasized that the Commission will carefully consider this issue and many stakeholders will have strong views. She stated that she did not know how it will come out, but the Commission will carefully review data and the retroactivity impact analysis it directed staff to conduct, as well as public comment, in order to ensure that it will weigh all perspectives. In closing, Chair Saris again thanked the public for attending and all of the Members of Congress, judges, organizations, members of the public, who have submitted comments and contributed so much to the process.

Chair Saris asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Vice Chair Hinojosa made a motion to adjourn, with Vice Chair Jackson seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 4:01 p.m.

## EXHIBIT A

### PROPOSED AMENDMENT: VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT

**Synopsis of Proposed Amendment:** *This proposed amendment responds to the Violence Against Women Reauthorization Act of 2013, Pub. L. 113–4 (March 7, 2013), which, among other things, provided new and expanded criminal offenses and increased penalties for certain crimes involving assault, sexual abuse, stalking, domestic violence, harassment, and human trafficking.*

*This proposed amendment addresses the issues raised by the statutory changes made by the Act in the following manner:*

#### (A) 18 U.S.C. § 113 (Assaults within maritime and territorial jurisdiction)

**Synopsis of Proposed Amendment:** *This part of the proposed amendment addresses changes to 18 U.S.C. § 113 (Assaults within maritime and territorial jurisdiction). Section 113 sets forth a range of penalties for assaults within the special maritime and territorial jurisdiction of the United States. This jurisdiction is defined by statute to include, among other things, maritime areas such as the high seas; land areas such as federal lands and buildings; federal holdings overseas such as diplomatic missions and military bases; and aircraft, vessels, and space vehicles belonging to the federal government, as well as certain other aircraft, vessels, and space vehicles. See 18 U.S.C. § 7. Section 113 also applies to assaults committed by Indians or non-Indians within Indian country. See 18 U.S.C. § 1153 (Offenses committed within Indian country), commonly referred to as the Major Crimes Act, and 18 U.S.C. § 1152, commonly referred to as the General Crimes Act.*

*Before enactment of the Act, section 113(a) contained seven paragraphs, (1) through (7). Each of these paragraphs applies to certain types of assault and provides a statutory maximum term of imprisonment. Most of these paragraphs are referenced in Appendix A (Statutory Index) to specific offense guidelines in Chapter Two, Part A. The Act revised certain paragraphs and added a new paragraph (8).*

##### Sec. 113(a)(1) Assault with Intent to Commit Sexual Abuse (20-Year Maximum)

*Before enactment of the Act, section 113(a)(1) applied to assault with intent to commit murder and provided a statutory maximum term of imprisonment of 20 years. Section 113(a)(1) is referenced in Appendix A to §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder).*

*The Act expanded section 113(a)(1) so that it applies not only to assault with intent to commit murder, but also to assault with intent to commit a violation of section 2241 (Aggravated sexual abuse) or 2242 (Sexual abuse). The proposed amendment amends Appendix A so that section 113(a)(1) is also referenced to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), which is the guideline to which offenses under sections 2241 and 2242 are referenced.*

##### Sec. 113(a)(2) Assault with Intent to Commit Certain Sex Offenses (10-Year Maximum)

*Before enactment of the Act, section 113(a)(2) applied to assault with intent to commit any felony, except murder or a felony under chapter 109A, and provided a statutory maximum term of imprisonment of 10 years. Felonies under chapter 109A include violations of sections 2241, 2242, 2243 (Sexual abuse of a*

minor or ward), and 2244 (Abusive sexual contact). Section 113(a)(2) is referenced in Appendix A to §2A2.2 (Aggravated Assault).

The Act expanded the scope of section 113(a)(2) by narrowing the chapter 109A exception. Section 113(a)(2) now applies to assault with intent to commit any felony, except murder or a violation of section 2241 or 2242. The effect of this change is that an assault with intent to commit a felony violation of section 2243 or 2244 may now be prosecuted under section 113(a)(2). The proposed amendment amends Appendix A so that section 113(a)(2) is referenced not only to §2A2.2 but also to §§2A3.2, 2A3.3, and 2A3.4 (i.e., the guidelines to which offenses under sections 2243 and 2244 are referenced).

Sec. 113(a)(4) Assault by Striking, Beating, or Wounding (1-Year Maximum)

Section 113(a)(4) applies to assault by striking, beating, or wounding. Before the Act it provided a statutory maximum term of imprisonment of 6 months. Section 113(a)(4) is not referenced in Appendix A.

The Act increased the statutory maximum term of imprisonment to 1 year. The proposed amendment amends Appendix A to reference section 113(a)(4) to §2A2.3.

Sec. 113(a)(7) Assault Resulting in Substantial Bodily Injury to Spouse, Intimate Partner, or Dating Partner (5-Year Maximum)

Before enactment of the Act, section 113(a)(7) applied to assault resulting in substantial bodily injury to an individual who has not attained the age of 16 years, and provided a statutory maximum term of imprisonment of 5 years. Section 113(a)(7) is referenced in Appendix A (Statutory Index) to §2A2.3. Among other things, §2A2.3 has a two-tiered enhancement for assaults resulting in injury, with a 2-level enhancement if the victim sustained bodily injury and a 4-level enhancement if the offense resulted in substantial bodily injury to an individual who has not attained the age of 16 years.

The Act expanded section 113(a)(7) so that it also applies to assault resulting in substantial bodily injury to a spouse, intimate partner, or dating partner. The proposed amendment amends §2A2.3 to revise the two-tiered enhancement for assaults resulting in injury. Specifically, it broadens the scope of the 4-level enhancement so that it applies not only to a case in which the offense resulted in substantial bodily injury to an individual who has not attained the age of 16 years, but also to a case in which the offense resulted in substantial bodily injury to a spouse, intimate partner, or dating partner.

Finally, the proposed amendment amends the heading of §2A2.3 by changing "Minor Assault" to "Assault," and makes conforming changes to the commentary to §§2A2.2 and 2A2.3.

Sec. 113(a)(8) Assault of a Spouse, Intimate Partner, or Dating Partner by Strangling or Suffocating (10-Year Maximum)

Section 113(a)(8) is a new provision established by the Act. It applies to assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate, and provides a statutory maximum term of imprisonment of 10 years.

The proposed amendment makes three changes to address section 113(a)(8). First, it amends Appendix A to reference section 113(a)(8) to §2A2.2.

Second, as a conforming change, it amends the Commentary to §2A2.2 to provide that the term "aggravated assault" includes an assault involving strangulation, suffocation, or an attempt to strangle or suffocate.

Third, the proposed amendment amends §2A2.2 to provide a 3-level enhancement if the offense involves strangling, suffocating, or attempting to strangle or suffocate a spouse, intimate partner, or dating partner. The cumulative impact of subsections (b)(2), (b)(3), and this new enhancement is limited to 12 levels.

In addition, the proposed amendment also amends §2A6.2 (Stalking or Domestic Violence) to address cases involving strangling, suffocating, or attempting to strangle or suffocate. Specifically, §2A6.2 has a 2-level enhancement that applies if the offense involved an aggravating factor such as bodily injury, and a 4-level enhancement that applies if the offense involved more than one such aggravating factor. The proposed amendment amends §2A6.2 to establish strangling, suffocating, or attempting to strangle or suffocate as a separate new aggravating factor. Accordingly, a case that involves this factor would receive the 2-level enhancement, and a case that involves both this factor and another factor (such as bodily injury) would receive the 4-level enhancement.

#### Supervised Release

Finally, the proposed amendment amends the Commentary to §5D1.1 (Imposition of a Term of Supervised Release) to provide more guidance on the imposition of supervised release in cases in which the defendant is convicted of an offense involving domestic violence. By statute, if the defendant is convicted for the first time of a domestic violence crime as defined in 18 U.S.C. § 3561(b), a term of supervised release is required. *See* 18 U.S.C. § 3583(a). Such a defendant is also required to attend an approved rehabilitation program, if available within a 50-mile radius of the legal residence of the defendant. *See* 18 U.S.C. § 3583(d); §5D1.3(a)(3). The proposed amendment amends the Commentary to describe these statutory provisions. It then provides that, in any other case involving domestic violence or stalking, it is "highly recommended" that a term of supervised release be imposed.

#### **Proposed Amendment:**

##### **§2A2.2.        Aggravated Assault**

- (a)     Base Offense Level: **14**
- (b)     Specific Offense Characteristics
  - (1)     If the assault involved more than minimal planning, increase by **2** levels.
  - (2)     If (A) a firearm was discharged, increase by **5** levels; (B) a dangerous weapon (including a firearm) was otherwise used, increase by **4** levels; (C) a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by **3** levels.
  - (3)     If the victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

|     | <u>Degree of Bodily Injury</u>  | <u>Increase in Level</u> |
|-----|---|--------------------------|
| (A) | Bodily Injury   | add <b>3</b>             |
| (B) | Serious Bodily Injury   | add <b>5</b>             |
| (C) | Permanent or Life-Threatening<br>Bodily Injury  | add <b>7</b>             |
| (D) | If the degree of injury is between that specified in subdivisions<br>(A) and (B), add <b>4</b> levels; or |                          |
| (E) | If the degree of injury is between that specified<br>in subdivisions (B) and (C), add <b>6</b> levels.    |                          |

However, the cumulative adjustments from application of subdivisions (2) and (3) shall not exceed **10** levels.

(4) If the offense involved strangling, suffocating, or attempting to strangle or suffocate a spouse, intimate partner, or dating partner, increase by **3** levels.

However, the cumulative adjustments from application of subdivisions (2), (3), and (4) shall not exceed **12** levels.

~~(4)~~(5) If the assault was motivated by a payment or offer of money or other thing of value, increase by **2** levels.

~~(5)~~(6) If the offense involved the violation of a court protection order, increase by **2** levels.

~~(6)~~(7) If the defendant was convicted under 18 U.S.C. § 111(b) or § 115, increase by **2** levels.

#### Commentary

\* \* \*

#### Application Notes:

1. Definitions.—For purposes of this guideline:

"Aggravated assault" means a felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (i.e., not merely to frighten) with that weapon; (B) serious bodily injury; ~~or~~ (C) strangling, suffocating, or attempting to strangle or suffocate; or (D) an intent to commit another felony.

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

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

*"Strangling" and "suffocating" have the meaning given those terms in 18 U.S.C. § 113.*

*"Spouse," "intimate partner," and "dating partner" have the meaning given those terms in 18 U.S.C. § 2266.*

2. *Application of Subsection (b)(1).—For purposes of subsection (b)(1), "more than minimal planning" means more planning than is typical for commission of the offense in a simple form. "More than minimal planning" also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which §3C1.1 (Obstructing or Impeding the Administration of Justice) applies. For example, waiting to commit the offense when no witnesses were present would not alone constitute more than minimal planning. By contrast, luring the victim to a specific location or wearing a ski mask to prevent identification would constitute more than minimal planning.*
3. *Application of Subsection (b)(2).—In a case involving a dangerous weapon with intent to cause bodily injury, the court shall apply both the base offense level and subsection (b)(2).*
4. *Application of Official Victim Adjustment.—If subsection (b)(6)(7) applies, §3A1.2 (Official Victim) also shall apply.*

*Background: This guideline covers felonious assaults that are more serious than ~~minor~~ other assaults because of the presence of an aggravating factor, i.e., serious bodily injury; the involvement of a dangerous weapon with intent to cause bodily injury; strangling, suffocating, or attempting to strangle or suffocate; or the intent to commit another felony. Such offenses occasionally may involve planning or be committed for hire. Consequently, the structure follows §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder). This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1. Assault with intent to commit rape is covered by §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).*

*An assault that involves the presence of a dangerous weapon is aggravated in form when the presence of the dangerous weapon is coupled with the intent to cause bodily injury. In such a case, the base offense level and the weapon enhancement in subsection (b)(2) take into account different aspects of the offense, even if application of the base offense level and the weapon enhancement is based on the same conduct.*

*Subsection (b)(6)(7) implements the directive to the Commission in subsection 11008(e) of the 21<sup>st</sup> Century Department of Justice Appropriations Act (the "Act"), Public Law 107–273. The enhancement in subsection (b)(6)(7) is cumulative to the adjustment in §3A1.2 (Official Victim) in order to address adequately the directive in section 11008(e)(2)(D) of the Act, which provides that the Commission shall consider "the extent to which sentencing enhancements within the Federal guidelines and the authority of the court to impose a sentence in excess of the applicable guideline range are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by" 18 U.S.C. §§ 111 and 115.*

**§2A2.3. Minor Assault**

- (a) Base Offense Level:
  - (1) 7, if the offense involved physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened; or
  - (2) 4, otherwise.
- (b) Specific Offense Characteristic
  - (1) If (A) the victim sustained bodily injury, increase by 2 levels; or (B) the offense resulted in substantial bodily injury to a spouse, intimate partner, or dating partner, or an individual under the age of sixteen years, increase by 4 levels.
- (c) Cross Reference
  - (1) If the conduct constituted aggravated assault, apply §2A2.2 (Aggravated Assault).

*Commentary*

\* \* \*

*Application Notes:*

1. *Definitions.*—For purposes of this guideline:

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

~~"Minor assault" means a misdemeanor assault, or a felonious assault not covered by §2A2.2 (Aggravated Assault).~~

"Spouse," "intimate partner," and "dating partner" have the meaning given those terms in 18 U.S.C. § 2266.

"Substantial bodily injury" means "bodily injury which involves (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty." See 18 U.S.C. § 113(b)(1).

*Background:* ~~Minor assault and battery are covered in this section. This section applies to misdemeanor assault and battery and to any felonious assault not covered by §2A2.2 (Aggravated Assault).~~

\* \* \*

**§2A6.2. Stalking or Domestic Violence**

- (a) Base Offense Level: **18**
- (b) Specific Offense Characteristic

(1) If the offense involved one of the following aggravating factors: (A) the violation of a court protection order; (B) bodily injury; (C) strangling, suffocating, or attempting to strangle or suffocate; (D) possession, or threatened use, of a dangerous weapon; or ~~(D)~~(E) a pattern of activity involving stalking, threatening, harassing, or assaulting the same victim, increase by **2** levels. If the offense involved more than one of these aggravating factors subdivisions (A), (B), (C), (D), or (E), increase by **4** levels.

- (c) Cross Reference

(1) If the offense involved the commission of another criminal offense, apply the offense guideline from Chapter Two, Part A (Offenses Against the Person) most applicable to that other criminal offense, if the resulting offense level is greater than that determined above.

Commentary

\* \* \*

Application Notes:

1. For purposes of this guideline:

*"Bodily injury" and "dangerous weapon" are defined in the Commentary to §1B1.1 (Application Instructions).*

*"Pattern of activity involving stalking, threatening, harassing, or assaulting the same victim" means any combination of two or more separate instances of stalking, threatening, harassing, or assaulting the same victim, whether or not such conduct resulted in a conviction. For example, a single instance of stalking accompanied by a separate instance of threatening, harassing, or assaulting the same victim constitutes a pattern of activity for purposes of this guideline.*

*"Stalking" means (A) traveling with the intent to kill, injure, harass, or intimidate another person and, in the course of, or as a result of, such travel, placing the person in reasonable fear of death or serious bodily injury to that person or an immediate family member of that person; or (B) using the mail or any facility of interstate or foreign commerce to engage in a course of conduct that places that person in reasonable fear of the death of, or serious bodily injury to, that person or an immediate family member of that person. See 18 U.S.C. § 2261A. "Immediate family member" (A) has the meaning given that term in 18 U.S.C. § 115(c)(2); and (B) includes a spouse or intimate partner. "Course of conduct" and "spouse or intimate partner" have the meaning given those terms in 18 U.S.C. § 2266(2) and (7), respectively.*

*"Strangling" and "suffocating" have the meaning given those terms in 18 U.S.C. § 113.*

2. *Subsection (b)(1) provides for a two-level or four-level enhancement based on the degree to which the offense involved aggravating factors listed in that subsection. If the offense involved aggravating factors more serious than the factors listed in subsection (b)(1), the cross reference in subsection (c) most likely will apply, if the resulting offense level is greater, because the more serious conduct will be covered by another offense guideline from Chapter Two, Part A. For example, §2A2.2 (Aggravated Assault) most likely would apply pursuant to subsection (c) if the offense involved assaultive conduct in which injury more serious than bodily injury occurred or if a dangerous weapon was used rather than merely possessed.*
3. *In determining whether subsection (b)(1)(~~D~~)(E) applies, the court shall consider, under the totality of the circumstances, any conduct that occurred prior to or during the offense; however, conduct that occurred prior to the offense must be substantially and directly connected to the offense. For example, if a defendant engaged in several acts of stalking the same victim over a period of years (including acts that occurred prior to the offense), then for purposes of determining whether subsection (b)(1)(~~D~~)(E) applies, the court shall look to the totality of the circumstances, considering only those prior acts of stalking the victim that have a substantial and direct connection to the offense.*

*Prior convictions taken into account under subsection (b)(1)(~~D~~)(E) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*

4. *For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving stalking, threatening, or harassing the same victim are grouped together (and with counts of other offenses involving the same victim that are covered by this guideline) under §3D1.2 (Groups of Closely Related Counts). For example, if the defendant is convicted of two counts of stalking the defendant's ex-spouse under 18 U.S.C. § 2261A and one count of interstate domestic violence involving an assault of the ex-spouse under 18 U.S.C. § 2261, the stalking counts would be grouped together with the interstate domestic violence count. This grouping procedure avoids unwarranted "double counting" with the enhancement in subsection (b)(1)(~~D~~)(E) (for multiple acts of stalking, threatening, harassing, or assaulting the same victim) and recognizes that the stalking and interstate domestic violence counts are sufficiently related to warrant grouping.*

\* \* \*

#### **§5D1.1. Imposition of a Term of Supervised Release**

- (a) The court shall order a term of supervised release to follow imprisonment—
  - (1) when required by statute (see 18 U.S.C. § 3583(a)); or
  - (2) except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed.
- (b) The court may order a term of supervised release to follow imprisonment in any other case. See 18 U.S.C. § 3583(a).
- (c) The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.

Commentary

Application Notes:

1. Application of Subsection (a).—Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment when supervised release is required by statute or, except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed. The court may depart from this guideline and not impose a term of supervised release if supervised release is not required by statute and the court determines, after considering the factors set forth in Note 3, that supervised release is not necessary.
2. Application of Subsection (b).—Under subsection (b), the court may impose a term of supervised release to follow a term of imprisonment in any other case, after considering the factors set forth in Note 3.
3. Factors to Be Considered.—
  - (A) Statutory Factors.—In determining whether to impose a term of supervised release, the court is required by statute to consider, among other factors:
    - (i) the nature and circumstances of the offense and the history and characteristics of the defendant;
    - (ii) the need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
    - (iii) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
    - (iv) the need to provide restitution to any victims of the offense.

See 18 U.S.C. § 3583(c).
  - (B) Criminal History.—The court should give particular consideration to the defendant's criminal history (which is one aspect of the "history and characteristics of the defendant" in subparagraph (A)(i), above). In general, the more serious the defendant's criminal history, the greater the need for supervised release.
  - (C) Substance Abuse.—In a case in which a defendant sentenced to imprisonment is an abuser of controlled substances or alcohol, it is highly recommended that a term of supervised release also be imposed. See §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).
  - (D) Domestic Violence.—If the defendant is convicted for the first time of a domestic violence crime as defined in 18 U.S.C. § 3561(b), a term of supervised release is required by statute. See 18 U.S.C. § 3583(a). Such a defendant is also required by statute to attend an approved rehabilitation program, if available within a 50-mile radius of the legal

residence of the defendant. *See* 18 U.S.C. § 3583(d); §5D1.3(a)(3). In any other case involving domestic violence or stalking in which the defendant is sentenced to imprisonment, it is highly recommended that a term of supervised release also be imposed.

4. Community Confinement or Home Detention Following Imprisonment.—A term of supervised release must be imposed if the court wishes to impose a "split sentence" under which the defendant serves a term of imprisonment followed by a period of community confinement or home detention pursuant to subsection (c)(2) or (d)(2) of §5C1.1 (Imposition of a Term of Imprisonment). In such a case, the period of community confinement or home detention is imposed as a condition of supervised release.
5. Application of Subsection (c).—In a case in which the defendant is a deportable alien specified in subsection (c) and supervised release is not required by statute, the court ordinarily should not impose a term of supervised release. Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution. The court should, however, consider imposing a term of supervised release on such a defendant if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case.

\* \* \*

## APPENDIX A - STATUTORY INDEX

\* \* \*

|   |                            |
|---|----------------------------|
| 18 U.S.C. § 113(a)(1)   | 2A2.1, 2A3.1               |
| 18 U.S.C. § 113(a)(2)   | 2A2.2, 2A3.2, 2A3.3, 2A3.4 |
| 18 U.S.C. § 113(a)(3)   | 2A2.2                      |
| 18 U.S.C. § 113(a)(4)   | 2A2.3                      |
| 18 U.S.C. § 113(a)(5)<br>(Class A misdemeanor<br>provisions only) | 2A2.3                      |
| 18 U.S.C. § 113(a)(6)   | 2A2.2                      |
| 18 U.S.C. § 113(a)(7)   | 2A2.3                      |
| 18 U.S.C. § 113(a)(8)   | 2A2.2                      |

### **(B) 18 U.S.C. §§ 1152 and 1153 (Offenses committed within Indian country)**

**Synopsis of Proposed Amendment:** *This part of the proposed amendment addresses changes to 18 U.S.C. § 1153 (Offenses committed within Indian country), commonly referred to as the Major Crimes Act. The Act contains a list of offenses and specifies that any Indian who commits against the person or*

property of another Indian or other person any of the listed offenses shall be subject to the same law and penalties as all other persons committing any of those offenses, within the exclusive jurisdiction of the United States.

Before enactment of the Act, the list of offenses in section 1153 included only four categories of assault: assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, and assault against an individual who has not attained the age of 16 years. The Act expanded the list of assault offenses to include any felony assault under section 113.

Offenses under section 1153 are referenced in Appendix A to 17 guidelines to account for the various listed offenses. These 17 guidelines include references to the three different guidelines (§§2A2.1, 2A2.2, and 2A2.3) to which felony assaults under section 113 are currently referenced. The proposed amendment deletes section 1153 from Appendix A.

The proposed amendment also addresses, in a similar manner, a related statutory provision at 18 U.S.C. § 1152, commonly known as the General Crimes Act. Section 1152 provides that the general laws of the United States that apply to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States shall extend to the Indian country and is currently referenced to a single guideline, §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources). The proposed amendment deletes section 1152 from Appendix A.

**Proposed Amendment:**

**APPENDIX A - STATUTORY INDEX**

\* \* \*

18 U.S.C. § 1152 ——— ~~2B1.5~~

18 U.S.C. § 1153 ——— ~~2A1.1, 2A1.2, 2A1.3,  
2A1.4, 2A2.1, 2A2.2,  
2A2.3, 2A3.1, 2A3.2,  
2A3.3, 2A3.4, 2A4.1,  
2B1.1, 2B1.5, 2B2.1,  
2B3.1, 2K1.4~~

**(C) 18 U.S.C. §§ 2261, 2261A, 2262 (Domestic Violence and Stalking)**

**Synopsis of Proposed Amendment:** This part of the proposed amendment addresses statutory changes to 18 U.S.C. §§ 2261 (Interstate domestic violence), 2261A (Stalking), and 2262 (Interstate violation of protection order). Statutory changes to these provisions were made by Public Law 109–162 in 2006 and were expanded and restated by Section 107 of the Act. The proposed amendment amends the Commentary to §2A6.2 to reflect these statutory changes.

Before these statutory changes, these offenses generally required as a jurisdictional element of the offense that the defendant travel in interstate or foreign commerce or into or out of Indian country or within the special maritime and territorial jurisdiction of the United States or, in the case of a stalking offense under section 2261A(2), that the defendant use the mail or any facility of interstate or foreign commerce. As a result of the statutory changes, the jurisdictional element may instead be met by presence in the special maritime and territorial jurisdiction of the United States or, in the case of a stalking offense under section 2261A(2), by using an interactive computer service, electronic communication service, or electronic communication system. These statutory changes have also expanded and restated the elements of stalking offenses under section 2261A to cover a broader range of conduct. As a result of these statutory changes, section 2261A has been extended to cover placing a person under surveillance with intent to kill, injure, harass, or intimidate; and conduct that causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress. The proposed amendment expands the definition of "stalking" in the Commentary to §2A6.2 to conform to these statutory changes to section 2261A.

**Proposed Amendment:**

**§2A6.2. Stalking or Domestic Violence**

\* \* \*

Commentary

\* \* \*

Application Notes:

1. For purposes of this guideline:

\* \* \*

~~"Stalking" means (A) traveling with the intent to kill, injure, harass, or intimidate another person and, in the course of, or as a result of, such travel, placing the person in reasonable fear of death or serious bodily injury to that person or an immediate family member of that person; or (B) using the mail or any facility of interstate or foreign commerce to engage in a course of conduct that places that person in reasonable fear of the death of, or serious bodily injury to, that person or an immediate family member of that person. See conduct described in 18 U.S.C. § 2261A. "Immediate family member" (A) has the meaning given that term in 18 U.S.C. § 115(e)(2); and (B) includes a spouse or intimate partner. "Course of conduct" and "spouse or intimate partner" have the meaning given those terms in 18 U.S.C. § 2266(2) and (7), respectively.~~

\* \* \*

**(D) 8 U.S.C. § 1375a(d) (Regulation of international marriage brokers)**

**Synopsis of Proposed Amendment:** *This part of the proposed amendment addresses statutory changes made by the Act to 8 U.S.C. § 1375a (Domestic violence information and resources for immigrants and regulation of international marriage brokers).*

*The Act revised and strengthened the regulation of international marriage brokers. Among other things, such marriage brokers are required to collect certain information about the United States client and are restricted from disclosing certain information about children and foreign national clients. A broker who knowingly violates or attempts to violate these provisions is subject to a maximum term of imprisonment*

of five years. *See* section 1375a(d)(5)(B)(i)(II). If the violation is not a knowing violation, the maximum term of imprisonment is one year. *See* section 1375a(d)(5)(B)(i)(I).

The Act also contains two other criminal provisions. First, a person who misuses information obtained by an international marriage broker is subject to a maximum term of imprisonment of one year. *See* section 1375a(d)(5)(B)(ii). Second, a person who knowingly and with intent to defraud another person outside the United States in order to recruit, solicit, entice, or induce that other person into entering a dating or matrimonial relationship, makes false or fraudulent representations regarding the background information required to be provided to an international marriage broker is subject to a maximum term of imprisonment of one year. *See* section 1375a(d)(5)(B)(iii).

Before enactment of the Act, criminal provisions in section 1375a were set forth in subsection (d)(3)(C) and in subsection (d)(5)(B). These criminal provisions are referenced in Appendix A (Statutory Index) to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). The Act revised and reorganized these criminal provisions such that all criminal provisions are set forth in subsection (d)(5)(B), as described above.

The proposed amendment responds to these changes by revising the Appendix A references for offenses under section 1375a(d). The reference for subsection (d)(3)(C) is deleted as obsolete. Offenses under subsection (d)(5)(B)(i) and (ii) continue to be referenced to §2H3.1. Offenses under subsection (d)(5)(B)(iii) are referenced to §2B1.1 (Theft, Property Destruction, and Fraud).

**Proposed Amendment:**

**APPENDIX A - STATUTORY INDEX**

\* \* \*

|                                      |                  |
|--------------------------------------|------------------|
| 8 U.S.C. § 1375a(d)(3)(C), (d)(5)(B) | <del>2H3.1</del> |
| 8 U.S.C. § 1375a(d)(5)(B)(i)         | 2H3.1            |
| 8 U.S.C. § 1375a(d)(5)(B)(ii)        | 2H3.1            |
| 8 U.S.C. § 1375a(d)(5)(B)(iii)       | 2B1.1            |

**(E) 18 U.S.C. § 2423 (Transportation of minors)**

**Synopsis of Proposed Amendment:** *This part of the proposed amendment addresses offenses under 18 U.S.C. § 2423 (Transportation of minors), which were modified by the Act.*

*Section 2423 contains four offenses, each of which prohibit sexual conduct with minors.*

*Subsection (a) prohibits transporting a minor with intent that the minor engage in prostitution or criminal sexual activity. It provides a mandatory minimum term of imprisonment of 10 years and maximum of life. It is referenced in Appendix A (Statutory Index) to §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct*

with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor).

Subsection (b) prohibits traveling in interstate or foreign commerce for the purpose of "illicit sexual conduct," which is defined in subsection (f) to mean a criminal sexual act with a minor. It provides a statutory maximum term of imprisonment of 30 years. It is referenced in Appendix A to §2G1.3.

Subsection (c) prohibits traveling in foreign commerce and engaging in "illicit sexual conduct". The Act expanded this provision to also cover residing in a foreign country and engaging in "illicit sexual conduct". It provides a statutory maximum term of imprisonment of 30 years. It is not referenced in Appendix A. The proposed amendment would amend Appendix A to reference section 2423(c) to §2G1.3.

Subsection (d) prohibits any person from, for the purpose of commercial advantage or private financial gain, arranging, inducing, procuring, or facilitating the travel of a person for "illicit sexual conduct." It provides a statutory maximum term of imprisonment of 30 years. It is not referenced in Appendix A. The proposed amendment amends Appendix A to reference section 2423(d) to §2G1.3.

**Proposed Amendment:**

**APPENDIX A - STATUTORY INDEX**

\* \* \*

18 U.S.C. § 2423(a) ————— 2G1.3

18 U.S.C. § 2423(b) ————— 2G1.3

18 U.S.C. § 2423(a)-(d) 2G1.3

**(F) 18 U.S.C. § 1597 (Unlawful conduct with respect to immigration documents)**

**Synopsis of Proposed Amendment:** *This part of the proposed amendment responds to the new Class A misdemeanor established by the Act in Chapter 77 (Peonage, Slavery, and Trafficking in Persons) of title 18. This new offense, at 18 U.S.C. § 1597(a), makes it unlawful for any person to knowingly destroy, conceal, remove, confiscate, or possess, an actual or purported passport or other immigration document of another individual—*

- (1) *in the course of violating 18 U.S.C. § 1351 (Fraud in foreign labor contracting) or 8 U.S.C. § 1324 (Bringing in and harboring certain aliens);*
- (2) *with intent to violate 18 U.S.C. § 1351 or 8 U.S.C. § 1324; or*
- (3) *in order to, without lawful authority, maintain, prevent, or restrict the labor or services of the individual.*

*In addition, section 1597(c) prohibits knowingly obstructing, attempting to obstruct, or in any way interfering with or preventing the enforcement of this section. Section 1597 provides a statutory maximum term of imprisonment of one year.*

*The proposed amendment references this offense to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)).*

**Proposed Amendment:**

**APPENDIX A - STATUTORY INDEX**

\* \* \*

18 U.S.C. § 1593A      2H4.1

18 U.S.C. § 1597      2X5.2

## EXHIBIT B

### PROPOSED AMENDMENT: 1B1.10

**Synopsis of Proposed Amendment:** *This proposed amendment responds to two circuit conflicts involving the effect of a mandatory minimum sentence on the guideline range in sentence reduction proceedings under 18 U.S.C. § 3582(c)(2) and the Commission's policy statement at §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range).*

*Section 3582(c)(2) authorizes the court to reduce a defendant's term of imprisonment if the defendant's sentence was based on a sentencing range that has subsequently been lowered by the Sentencing Commission and the reduction is consistent with applicable policy statements issued by the Commission. The applicable policy statement is §1B1.10, which provides guidance and limitations for a court in such a proceeding. Effective November 1, 2011, the Commission promulgated Amendment 750, which made a series of changes to the drug guidelines to implement the Fair Sentencing Act of 2010, and Amendment 759, which made two parts of Amendment 750 available for retroactive application. Amendment 759 also revised §1B1.10 to provide that the new sentence may not be lower than the amended guideline range unless the original sentence was below the original guideline range because of a government motion for substantial assistance. In such a case, "a reduction comparably less than the amended guideline range" may be appropriate. See §1B1.10(b)(2)(B). Circuits are now split over how to apply §1B1.10(b)(2)(B) in two situations.*

#### Original Guideline Range Above the Mandatory Minimum

*First, there are cases in which the defendant's original guideline range was above the mandatory minimum but the defendant received a sentence below the mandatory minimum pursuant to a government motion for substantial assistance. For example, consider a case in which the mandatory minimum was 240 months, the original guideline range was 262 to 327 months, and the defendant's original sentence was 160 months, representing a 39 percent reduction for substantial assistance below the bottom of the guideline range. In a sentence reduction proceeding pursuant to Amendment 750, the amended guideline range as determined on the Sentencing Table is 168 to 210 months, but after application of the "trumping" mechanism in §5G1.1 (Sentencing on a Single Count of Conviction), the mandatory minimum sentence of 240 months is the guideline sentence. See §5G1.1(b). Section 1B1.10(b)(2)(B) provides that such a defendant may receive a comparable 39 percent reduction from the bottom of the amended guideline range, but circuits are split over what to use as the bottom of the range.*

*The Eighth Circuit has taken the view that the bottom of the amended guideline range in such a case would be 240 months, i.e., the guideline sentence that results after application of the "trumping" mechanism in §5G1.1. See United States v. Golden, 709 F.3d 1229, 1231-33 (8th Cir. 2013). In contrast, the Seventh Circuit has taken the view that the bottom of the amended guideline range in such a case would be 168 months, i.e., the bottom of the amended range as determined by the Sentencing Table, without application of the "trumping" mechanism in §5G1.1. See United States v. Wren, 706 F.3d 861, 863 (7th Cir. 2013). Each circuit found support for its view in an Eleventh Circuit decision, United States v. Liberse, 688 F.3d 1198 (11th Cir. 2012), which also discussed this issue.*

#### Bottom of Original Guideline Range Below the Mandatory Minimum

*Second, there are cases in which the defendant's original guideline range as determined by the Sentencing Table was, at least in part, below the mandatory minimum, and the defendant received a*

sentence below the mandatory minimum pursuant to a government motion for substantial assistance. In these cases, the "trumping" mechanism in §5G1.1 operated at the original sentence to restrict the guideline range to be no less than the mandatory minimum.

For example, consider a case in which the original Sentencing Table guideline range was 140 to 175 months but the mandatory minimum was 240 months, resulting (after operation of §5G1.1) in a guideline sentence of 240 months. The defendant's original sentence was 96 months, representing a 60 percent reduction for substantial assistance below the statutory and guideline minimum. In a sentence reduction proceeding, the amended Sentencing Table guideline range is 110 to 137 months, resulting (after operation of §5G1.1) in a guideline sentence of 240 months. Section 1B1.10(b)(2)(B) provides that such a defendant may receive a reduction from the bottom of the amended guideline range, but circuits are split over what to use as the bottom of the range.

The Eleventh Circuit, the Sixth Circuit, and the Second Circuit have taken the view that the bottom of the amended range in such a case would remain 240 months, *i.e.*, the guideline sentence that results after application of the "trumping" mechanism in §5G1.1. See United States v. Glover, 686 F.3d 1203, 1208 (11th Cir. 2012); United States v. Joiner, 727 F.3d 601 (6th Cir. 2013); United States v. Johnson, 732 F.3d 109 (2d Cir. 2013). Under these decisions, the defendant in the example would have an original range of 240 months and an amended range of 240 months, and would not be eligible for any reduction because the range has not been lowered.

In contrast, the Third Circuit and the District of Columbia Circuit have taken the view that the bottom of the amended range in such a case would be 110 months, *i.e.*, the bottom of the Sentencing Table guideline range. See United States v. Savani, 733 F.3d 56, 66-7 (3d Cir. 2013); In re Sealed Case, 722 F.3d 361, 369-70 (D.C. Cir. 2013).

The proposed amendment generally adopts the approach of the Third Circuit in Savani and the District of Columbia Circuit in In re Sealed Case. It amends §1B1.10 to specify that, if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of §1B1.10 the amended guideline range shall be determined without regard to the operation of §5G1.1 and §5G1.2.

A new application note with examples is also provided.

#### **Proposed Amendment:**

#### **§1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)**

(a) Authority.—

- (1) In General.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection ~~(c)~~(d) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction

in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) Exclusions.—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—

(A) none of the amendments listed in subsection ~~(e)~~(d) is applicable to the defendant; or

(B) an amendment listed in subsection ~~(e)~~(d) does not have the effect of lowering the defendant's applicable guideline range.

(3) Limitation.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) Determination of Reduction in Term of Imprisonment.—

(1) In General.—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection ~~(e)~~(d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection ~~(e)~~(d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

(2) Limitation and Prohibition on Extent of Reduction.—

(A) Limitation.—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) Exception for Substantial Assistance.—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.

(C) Prohibition.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Cases Involving Mandatory Minimum Sentences and Substantial Assistance.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction).

(e)(d) Covered Amendments.—Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, and 750 (parts A and C only).

#### Commentary

##### Application Notes:

##### 1. Application of Subsection (a).—

(A) Eligibility.—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (e)(d) that lowers the applicable guideline range (*i.e.*, the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance). Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (e)(d) is applicable to the defendant; or (ii) an amendment listed in subsection (e)(d) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (*e.g.*, a statutory mandatory minimum term of imprisonment).

##### (B) Factors for Consideration.—

(i) In General.—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(ii) Public Safety Consideration.—The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) Post-Sentencing Conduct.—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the term of imprisonment in determining: (I) whether a reduction in the defendant’s term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. Application of Subsection (b)(1).—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection ~~(e)~~(d) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.
3. Application of Subsection (b)(2).—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, as provided in subsection (b)(2)(A), if the term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court may reduce the defendant’s term of imprisonment to a term that is no less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the term of imprisonment imposed was 70 months; and (C) the amended guideline range determined under subsection (b)(1) is 51 to 63 months, the court may reduce the defendant’s term of imprisonment, but shall not reduce it to a term less than 51 months.

If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward departure or variance), the court likewise may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities. In such a case, the court may reduce the defendant's term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

The provisions authorizing such a government motion are §5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the

defendant's substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).

In no case, however, shall the term of imprisonment be reduced below time served. *See* subsection (b)(2)(C). Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. *Application of Subsection (c).*—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of §5G1.1 to a range of 120 to 135 months. *See* §5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. *See* §5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (*i.e.*, unrestricted by operation of §5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's

original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.

45. Application to Amendment 750 (Parts A and C Only).—As specified in subsection ~~(e)~~(d), the parts of Amendment 750 that are covered by this policy statement are Parts A and C only. Part A amended the Drug Quantity Table in §2D1.1 for crack cocaine and made related revisions to the Drug Equivalency Tables in the Commentary to §2D1.1 (see §2D1.1, comment. (n.8)). Part C deleted the cross reference in §2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under §2D1.1.

56. Supervised Release.—

(A) Exclusion Relating to Revocation.—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

(B) Modification Relating to Early Termination.—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

67. Use of Policy Statement in Effect on Date of Reduction.—Consistent with subsection (a) of §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of this policy statement that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).

Background: Section 3582(c)(2) of Title 18, United States Code, provides: "[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or

category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." The Supreme Court has concluded that proceedings under section 3582(c)(2) are not governed by *United States v. Booker*, 543 U.S. 220 (2005), and this policy statement remains binding on courts in such proceedings. *See Dillon v. United States*, 130 S. Ct. 2683 (2010).

Among the factors considered by the Commission in selecting the amendments included in subsection ~~(e)~~(d) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection ~~(e)~~(d) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines<sup>\*</sup> or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).

\* So in original. Probably should be "to fall above the amended guidelines".

## EXHIBIT C

### PROPOSED AMENDMENT: FELON IN POSSESSION

**Synopsis of Proposed Amendment:** *This proposed amendment clarifies how principles of relevant conduct apply in cases in which the defendant is convicted of a firearms offense (e.g., being a felon in possession of a firearm) in two situations: first, when the defendant unlawfully possessed one firearm on one occasion and a different firearm on another occasion (but was not necessarily convicted of the second offense); and second, when the defendant unlawfully possessed a firearm and also used a firearm in connection with another offense, such as robbery or attempted murder (but was not necessarily convicted of the other offense).*

*Circuits appear to be following a range of approaches in determining how the relevant conduct guideline, §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), interacts with the firearms guideline, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), in such cases.*

*Consider, for example, a case in which the defendant, a convicted felon, possesses a shotgun (a violation of 18 U.S.C. § 922(g)) on one occasion and possesses a handgun (another violation of section 922(g)) on another occasion. The defendant is convicted of a single count, for the unlawful possession of the shotgun. The court determines that the defendant also used the handgun in connection with a robbery.*

*In such a case, the court must determine, among other things, whether to apply the specific offense characteristic at subsection (b)(6)(B) or the cross reference at subsection (c)(1), or both. Under subsection (b)(6)(B), if a defendant possesses any firearm in connection with another offense, the defendant may receive a 4-level enhancement and a minimum offense level of 18. Similarly, under subsection (c)(1), if the defendant possesses any firearm in connection with another offense, the defendant may be cross referenced to another offense guideline applicable to the defendant's other offense conduct.*

*As with other specific offense characteristics and cross references in the Guidelines Manual, the scope of these provisions is determined based on subsections (a)(1) through (a)(4) of the relevant conduct guideline, §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)):*

- (a)(1) acts and omissions "that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense", see §1B1.3(a)(1);*
- (a)(2) "solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions ... that were part of the same course of conduct or common scheme or plan as the offense of conviction", see §1B1.3(a)(2);*
- (a)(3) "all harm that resulted from the acts and omissions ..., and all harm that was the object of such acts and omissions", see §1B1.3(a)(3); and*
- (a)(4) "any other information specified in the applicable guideline", see §1B1.3(a)(4).*

*When the Defendant Used the Firearm in Connection With Another Offense*

*One application issue arises when the defendant unlawfully possessed a firearm and used the firearm in connection with another offense, and the court must determine whether the "in connection with" offense under subsections (b)(6)(B) and (c)(1) satisfies the requirements of the relevant conduct guideline.*

*In several circuits, when a felon in possession defendant possessed a firearm in connection with another offense, the courts apply a subsection (a)(2) relevant conduct analysis and consider whether the other offense is a "groupable" offense under §3D1.2(d); if the other offense is not a "groupable" offense, the increase under subsection (b)(6)(B) and the cross reference under subsection (c)(1) do not apply. See, e.g., United States v. Horton, 693 F.3d 463, 478-79 (4th Cir. 2012) (felon in possession used a firearm in connection with a murder, but the murder is not relevant conduct under subsection (a)(2) analysis because murder does not group); United States v. Settle, 414 F.3d 6239, 632-33 (6th Cir. 2005) (attempted murder); United States v. Jones, 313 F.3d 1019, 1023 n.3 (7th Cir. 2002) (murder); United States v. Williams, 431 F.3d 767, 772-73 & n.9 (11th Cir. 2005) (aggravated assault). These circuits do not appear to preclude subsection (b)(6)(B) or (c)(1) from applying to the defendant under a subsection (a)(1) relevant conduct analysis. The Third Circuit also applies a subsection (a)(2) relevant conduct analysis in such a case but does not require the other offense to be a "groupable" offense. See United States v. Kulick, 629 F.3d 165, 170 (3rd Cir. 2010) (in felon in possession case, cross reference to extortion guideline may apply under subsection (a)(2) relevant conduct analysis even though extortion does not group). The Fifth Circuit, in contrast, has held that the court does not perform any relevant conduct analysis in determining the scope of subsections (b)(6)(B) and (c)(1). United States v. Gonzales, 996 F.2d 88, 92 n.6 (5th Cir. 1993). See also United States v. Outley, 348 F.3d 476 (5th Cir. 2003) ("section 1B1.3 does not restrict the application of section 2K2.1(c)(1)").*

*When the Defendant Unlawfully Possessed One Firearm on One Occasion and a Different Firearm on Another Occasion*

*A second application issue arises when the defendant unlawfully possessed one firearm on one occasion and a different firearm on another occasion, and the court must determine whether both firearms fall within the scope of "any firearm" under subsections (b)(6)(B) and (c)(1).*

*The circuits appear to agree that the use of the term "any firearm or ammunition" in subsections (b)(6)(B) and (c)(1) indicates that they apply to any firearm "and not merely to a particular firearm upon which the defendant's felon-in-possession conviction is based." United States v. Mann, 315 F.3d 1054, 1055-57 (8th Cir. 2003). See also United States v. Jardine, 364 F.3d 1200, 1207 (10th Cir. 2004); United States v. Williams, 431 F.3d 767, 769-71 (11th Cir. 2005). But there are different approaches among the circuits as to what, if any, limiting principles apply. For example, the Sixth Circuit has indicated that there must be a "clear connection" between the different firearms because of relevant conduct principles under §1B1.3. See United States v. Settle, 414 F.3d 629, 632-33 (6th Cir. 2005), and most other circuits to consider the question have agreed. However, the Fifth Circuit has held that relevant conduct principles do not apply, but the other firearm "must at least be related" to the firearm in the count of conviction because of the "overall context" of §2K2.1. United States v. Gonzales, 996 F.2d 88, 92 n.6 (5th Cir. 1993). See also United States v. Outley, 348 F.3d 476 (5th Cir. 2003) ("section 1B1.3 does not restrict the application of section 2K2.1(c)(1)").*

*The proposed amendment clarifies that subsection (b)(6)(B) is not limited to firearms and ammunition cited in the offense of conviction, but amends subsection (c)(1) to limit its application to firearms and ammunition cited in the offense of conviction. The proposed amendment also makes conforming changes to the Commentary, clarifying the relevant conduct analysis that applies and providing examples.*

**Proposed Amendment:**

**§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition**

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

(6) If the defendant—

(A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

\* \* \*

(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply—

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

\* \* \*

Application Notes:

\* \* \*

14. "In Connection With" Application of Subsections (b)(6)(B) and (c)(1).—

- (A) In General.—Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.
- (B) Application When Other Offense is Burglary or Drug Offense.—Subsections (b)(6)(B) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.
- (C) Definitions.—
- "Another felony offense", for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.
- "Another offense", for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.
- (D) Upward Departure Provision.—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.
- (E) Relationship Between the Instant Offense and the Other Offense.—In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. See §1B1.3(a)(1)–(4) and accompanying commentary.

In determining whether subsection (c)(1) applies, the court must also consider whether the firearm used in the other offense was a firearm cited in the offense of conviction.

For example:

(i) Firearm Cited in the Offense of Conviction. Defendant A's offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant A used the shotgun in connection with a robbery. Ordinarily, under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level.

Ordinarily, the unlawful possession of the shotgun on February 10 will be "part of the same course of conduct or common scheme or plan" as the unlawful possession of the same shotgun on October 15. See §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 9 to §1B1.3). The use of the shotgun "in connection with" the robbery is relevant conduct because it is a factor specified in subsections (b)(6)(B) and (c)(1). See §1B1.3(a)(4) ("any other information specified in the applicable guideline").

(ii) Firearm Not Cited in the Offense of Conviction. Defendant B's offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant B unlawfully possessed a handgun (not cited in the offense of conviction) and used the handgun in connection with a robbery.

Subsection (b)(6)(B). In determining whether subsection (b)(6)(B) applies, the threshold question for the court is whether the two unlawful possession offenses (the shotgun on October 15 and the handgun on February 10) were "part of the same course of conduct or common scheme or plan". See §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 9 to §1B1.3).

If they were, then the handgun possession offense is relevant conduct to the shotgun possession offense, and the use of the handgun "in connection with" the robbery is relevant conduct because it is a factor specified in subsection (b)(6)(B). See §1B1.3(a)(4) ("any other information specified in the applicable guideline"). Accordingly, subsection (b)(6)(B) applies.

On the other hand, if the court determines that the two unlawful possession offenses were not "part of the same course of conduct or common scheme or plan," then the handgun possession offense is not relevant conduct to the shotgun possession offense and subsection (b)(6)(B) does not apply.

Subsection (c)(1). Under these circumstances, the cross reference in subsection (c)(1) does not apply, because the handgun was not cited in the offense of conviction.

## EXHIBIT D

### PROPOSED AMENDMENT: SUPERVISED RELEASE

**Synopsis of Proposed Amendment:** *This proposed amendment addresses differences among the circuits in the calculation of the guideline range of supervised release under §5D1.2 (Term of Supervised Release) in two situations: first, when there is a statutory minimum term of supervised release, and second, when the instant offense of conviction is failure to register as a sex offender under 18 U.S.C. § 2250.*

*Section 5D1.2(a) sets forth general rules for determining the guideline range of supervised release. The guideline range is two to five years, for a Class A or B felony (i.e., a statutory maximum of 25 or more years); one to three years, for a Class C or D felony (i.e., a statutory maximum of five or more years but less than 25 years); and one year, for a Class E felony or a Class A misdemeanor (i.e., a statutory maximum of one or more years but less than five years). See §5D1.2(a)(1)-(3); 18 U.S.C. § 3559 (Sentencing classification of offenses).*

*Section 5D1.2(b) operates for certain offenses to replace the top end of the guideline range calculated under subsection (a) with a life term of supervised release. Those offenses are (1) any offense listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person; and (2) a sex offense (as defined in the Commentary to §5D1.2).*

*Section 5D1.2(c) states: "The term of supervised release imposed shall be not less than any statutorily required term of supervised release."*

#### A. When a Statutory Minimum Term of Supervised Release Applies

*First, there appear to be differences among the circuits in how to calculate the guideline range of supervised release when there is a statutory minimum term of supervised release. These cases involve the meaning of subsection (c) and its interaction with subsection (a).*

*The Seventh Circuit held that when there is a statutory minimum term of supervised release, the statutory minimum term becomes the bottom of the guideline range (replacing the bottom of the range provided by (a)) or, if it equals or exceeds the top of the guideline range provided by subsection (a), becomes a guidelines "range" of a single point at the statutory minimum. United States v. Gibbs, 578 F.3d 694, 695 (7th Cir. 2009). Thus, if subsection (a) provides a range of three to five years, but the statute provides a range of five years to life, the "range" is precisely five years. Gibbs involved a drug offense for which 21 U.S.C. § 841(b) required a supervised release term of five years to life. See also United States v. Goodwin, 717 F.3d 511, 519-20 (7th Cir. 2013) (applying Gibbs to a case involving a failure to register for which 18 U.S.C. § 3583(k) required a supervised release term of five years to life).*

*These cases are in tension with the approach of the Eighth Circuit in United States v. Deans, 590 F.3d 907, 911 (8th Cir. 2010). In Deans, the range calculated under subsection (a) was two to three years of supervised release. However, the relevant statute, 21 U.S.C. § 841(b)(1)(C), provided a range three years to life. Under the Seventh Circuit's approach in Gibbs, the guidelines "range" would appear to be precisely three years. Without reference to Gibbs, the Eighth Circuit in Deans indicated that the statutory requirement "trumps" subsection (a), and the guideline range becomes the statutory range — three years to life. 590 F.3d at 911. Thus, the district court's imposition of five years of supervised release "was neither an upward departure nor procedural error." Id.*

Part A adopts the approach of the Seventh Circuit in Gibbs and Goodwin. It provides a new application note explaining that, under subsection (c), a statutorily required minimum term of supervised release operates to restrict the low end of the guidelines term of supervised release. Examples are also provided.

**B. When the Defendant is Convicted of Failure to Register as a Sex Offender**

Second, there appear to be differences among the circuits in how to calculate the guideline range of supervised release when the defendant is convicted under 18 U.S.C. § 2250 (*i.e.*, for failing to register as a sex offender). When a defendant is convicted of such an offense, the court is required by statute to impose a term of supervised release of at least five years and up to life. See 18 U.S.C. § 3583(k).

There appears to be an application issue about when, if at all, such an offense is a "sex offense" for purposes of subsection (b) of §5D1.2. If a failure to register is a sex offense, then subsection (b) specifically provides for a term of supervised release of anywhere from the minimum provided by subsection (a) to the maximum provided by statute (*i.e.*, life), and a policy statement contained within subsection (b) recommends that the maximum be imposed. See §5D1.2(b), p.s. Another effect of the determination is that, if a failure to register is a "sex offense," the guidelines recommend that special conditions of supervised release also be imposed, such as participating in a sex offender monitoring program and submitting to warrantless searches. See §5D1.3(d)(7).

Application Note 1 defines "sex offense" to mean, among other things, "an offense, perpetrated against a minor, under" chapter 109B of title 18 (the only section of which is section 2250). Circuits have reached different conclusions about the effect of this definition.

The Seventh Circuit has held that a failure to register can never be a "sex offense" within the meaning of Note 1. United States v. Goodwin, 717 F.3d 511, 518-20 (7th Cir. 2013). The court in Goodwin reasoned that there is no specific victim of a failure to register, and therefore a failure to register is never "perpetrated against a minor" and can never be a "sex offense" — rendering the definition's inclusion of offenses under chapter 109B "surplusage". 717 F.3d at 518. In an unpublished opinion, the Second Circuit has determined that a failure to register was not a "sex offense". See United States v. Herbert, 428 Fed. App'x 37 (2d Cir. 2011). In both cases, the government argued for these outcomes, confessing error below.

There are unpublished decisions in other circuits that have reached different results, without discussion. In those cases, the defendant had a prior sex offense against a minor, and the circuit court determined that the failure to register was a "sex offense". See United States v. Zeiders, 440 Fed. App'x 699, 701 (11th Cir. 2011); United States v. Nelson, 400 Fed. App'x 781 (4th Cir. 2010).

Part B responds to the application issue by amending the commentary to §5D1.2 to clarify that offenses under section 2250 are not "sex offenses". Accordingly, offenses under section 2250 are not covered by subsection (b) of §5D1.2.

**Proposed Amendment:**

**(A) When a Statutory Minimum Term of Supervised Release Applies**

**§5D1.2. Term of Supervised Release**

- (a) Except as provided in subsections (b) and (c), if a term of supervised release is ordered, the length of the term shall be:
  - (1) At least two years but not more than five years for a defendant convicted of a Class A or B felony. See 18 U.S.C. § 3583(b)(1).
  - (2) At least one year but not more than three years for a defendant convicted of a Class C or D felony. See 18 U.S.C. § 3583(b)(2).
  - (3) One year for a defendant convicted of a Class E felony or a Class A misdemeanor. See 18 U.S.C. § 3583(b)(3).
- (b) Notwithstanding subdivisions (a)(1) through (3), the length of the term of supervised release shall be not less than the minimum term of years specified for the offense under subdivisions (a)(1) through (3) and may be up to life, if the offense is—
  - (1) any offense listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person; or
  - (2) a sex offense.

(Policy Statement) If the instant offense of conviction is a sex offense, however, the statutory maximum term of supervised release is recommended.
- (c) The term of supervised release imposed shall be not less than any statutorily required term of supervised release.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

*"Sex offense" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 109B of such title; (iii) chapter 110 of such title, not including a recordkeeping offense; (iv) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (v) an offense under 18 U.S.C. § 1201; or (vi) an offense under 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (vi) of this note.*

\* \* \*

5. Early Termination and Extension.—*The court has authority to terminate or extend a term of supervised release. See 18 U.S.C. § 3583(e)(1), (2). The court is encouraged to exercise this authority in appropriate cases. The prospect of exercising this authority is a factor the court may wish to consider in determining the length of a term of supervised release. For example, the court may wish to consider early termination of supervised release if the defendant is an abuser of narcotics, other controlled substances, or alcohol who, while on supervised release,*

successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant.

6. Application of Subsection (c).—Subsection (c) specifies how a statutorily required minimum term of supervised release may affect the minimum term of supervised release provided by the guidelines.

For example, if subsection (a) provides a range of two years to five years, but the relevant statute requires a minimum term of supervised release of three years and a maximum term of life, the term of supervised release provided by the guidelines is restricted by subsection (c) to three years to five years. Similarly, if subsection (a) provides a range of two years to five years, but the relevant statute requires a minimum term of supervised release of five years and a maximum term of life, the term of supervised release provided by the guidelines is five years.

The following example illustrates the interaction of subsections (a) and (c) when subsection (b) is also involved. In this example, subsection (a) provides a range of two years to five years; the relevant statute requires a minimum term of supervised release of five years and a maximum term of life; and the offense is a sex offense under subsection (b). The effect of subsection (b) is to raise the maximum term of supervised release from five years (as provided by subsection (a)) to life, yielding a range of two years to life. The term of supervised release provided by the guidelines is then restricted by subsection (c) to five years to life. In this example, a term of supervised release of more than five years would be a guideline sentence. In addition, subsection (b) contains a policy statement recommending that the maximum — a life term of supervised release — be imposed.

Background: This section specifies the length of a term of supervised release that is to be imposed. Subsection (c) applies to statutes, such as the Anti-Drug Abuse Act of 1986, that require imposition of a specific minimum term of supervised release.

## **(B) When the Defendant Is Convicted of Failure to Register as a Sex Offender**

### **§5D1.2. Term of Supervised Release**

\* \* \*

#### Commentary

##### Application Notes:

1. Definitions.—For purposes of this guideline:

"Sex offense" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; ~~(ii) chapter 109B of such title;~~ ~~(iii)~~ ~~(ii)~~ chapter 110 of such title, not including a recordkeeping offense; ~~(iv)~~ ~~(iii)~~ chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; ~~(v)~~ ~~(iv)~~ an offense under 18 U.S.C. § 1201; or ~~(vi)~~ ~~(v)~~ an offense under 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through ~~(vi)~~ ~~(v)~~ of this note. Such term does not include an offense under 18 U.S.C. § 2250 (Failure to register).

\* \* \*

## EXHIBIT E

### PROPOSED AMENDMENT: ALIEN SMUGGLING

**Synopsis of Proposed Amendment:** *This amendment responds to concerns that have been raised about cases in which aliens are transported through a dangerous or remote geographic area, e.g., along the southern border of the United States. Specifically, aliens transported through such an area may face the risk of starvation, dehydration, or exposure.*

*Section 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) currently has an enhancement at subsection (b)(6) for reckless endangerment, which provides for a 2-level increase and a minimum offense level of 18 if the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person. The application note for subsection (b)(6) explains that reckless conduct to which subsection (b)(6) applies includes a wide variety of conduct, and provides as examples "transporting persons in the trunk or engine compartment of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in a crowded, dangerous, or inhumane condition".*

*One case that illustrates these concerns is United States v. Mateo Garza, 541 F.3d 2008 (5th Cir. 2008), in which the Fifth Circuit held that the reckless endangerment enhancement at §2L1.1(b)(6) does not per se apply to transporting aliens through the South Texas brush country, and must instead be applied based on the specific facts presented to the court. The Fifth Circuit emphasized that it is not enough to say, as the district court had, that traversing an entire geographical region is inherently dangerous, but that it must be dangerous on the facts presented to and used by the district court. The Fifth Circuit identified such pertinent facts from its prior case law as the length of the journey, the temperature, whether the aliens were provided food and water and allowed rest periods, and whether such aliens suffered injuries and death. See, e.g., United States v. Garcia-Guerrero, 313 F.3d 892 (5th Cir. 2002). Additional facts that have supported the enhancement include: whether the aliens were abandoned en route, the time of year during which the journey took place, the distance traveled, and whether the aliens were adequately clothed for the journey. See e.g., United States v. Chapa, 362 Fed. App'x 411 (5th Cir. 2010); United States v. De Jesus-Ojeda, 515 F.3d 434 (5th Cir. 2008); United States v. Hernandez-Pena, 267 Fed. App'x 367 (5th Cir. 2008); United States v. Rodriguez-Cruz, 255 F.3d 1054 (9th Cir. 2001).*

*The proposed amendment adds to the existing parenthetical that currently provides examples of the "wide variety of conduct" to which this specific offense characteristic could apply, "or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements".*

#### **Proposed Amendment:**

#### **§2L1.1. Smuggling, Transporting, or Harboring an Unlawful Alien**

- (a) Base Offense Level:
  - (1) **25**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who was inadmissible under 8 U.S.C. § 1182(a)(3);

(2) **23**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony; or

(3) **12**, otherwise.

(b) Specific Offense Characteristics

(1) If (A) the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), and (B) the base offense level is determined under subsection (a)(3), decrease by **3** levels.

(2) If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

|     | <u>Number of Unlawful Aliens<br/>Smuggled, Transported, or<br/>Harbored</u> | <u>Increase in Level</u> |
|-----|---|--------------------------|
| (A) | 6-24  | add <b>3</b>             |
| (B) | 25-99   | add <b>6</b>             |
| (C) | 100 or more   | add <b>9</b> .           |

(3) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by **2** levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by **4** levels.

(4) If the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent or grandparent, increase by **2** levels.

(5) (Apply the Greatest):

(A) If a firearm was discharged, increase by **6** levels, but if the resulting offense level is less than level **22**, increase to level **22**.

(B) If a dangerous weapon (including a firearm) was brandished or otherwise used, increase by **4** levels, but if the resulting offense level is less than level **20**, increase to level **20**.

(C) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.

(6) If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.

- (7) If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury:

|     | <u>Death or Degree of Injury</u>               | <u>Increase in Level</u> |
|-----|--|--------------------------|
| (A) | Bodily Injury                                  | add <b>2</b> levels      |
| (B) | Serious Bodily Injury                          | add <b>4</b> levels      |
| (C) | Permanent or Life-Threatening<br>Bodily Injury | add <b>6</b><br>levels   |
| (D) | Death  | add <b>10</b><br>levels. |

- (8) (Apply the greater):

- (A) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (i) after the alien was smuggled into the United States; or (ii) while the alien was transported or harbored in the United States, increase by **2** levels. If the resulting offense level is less than level **18**, increase to level **18**.
- (B) If (i) the defendant was convicted of alien harboring, (ii) the alien harboring was for the purpose of prostitution, and (iii) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by **2** levels, but if the alien engaging in the prostitution had not attained the age of 18 years, increase by **6** levels.

- (9) If the defendant was convicted under 8 U.S.C. § 1324(a)(4), increase by **2** levels.

(c) Cross Reference

- (1) If death resulted, apply the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined under this guideline.

Commentary

\* \* \*

Application Notes:

\* \* \*

5. *Application of Subsection (b)(6).*—Reckless conduct to which the adjustment from subsection (b)(6) applies includes a wide variety of conduct (e.g., transporting persons in the trunk or engine compartment of a motor vehicle, carrying substantially more passengers than the rated capacity of

*a motor vehicle or vessel, ~~or~~ harboring persons in a crowded, dangerous, or inhumane condition, or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements).*

*If subsection (b)(6) applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2 (Reckless Endangerment During Flight). Additionally, do not apply the adjustment in subsection (b)(6) if the only reckless conduct that created a substantial risk of death or serious bodily injury is conduct for which the defendant received an enhancement under subsection (b)(5).*

6. *Inapplicability of §3A1.3.—If an enhancement under subsection (b)(8)(A) applies, do not apply §3A1.3 (Restraint of Victim).*

*Background: This section includes the most serious immigration offenses covered under the Immigration Reform and Control Act of 1986.*

## EXHIBIT F

### PROPOSED AMENDMENT: OTHER TERMS OF IMPRISONMENT

**Synopsis of Proposed Amendment:** *This proposed amendment addresses certain cases in which the defendant is subject to another term of imprisonment, such as an undischarged term of imprisonment or an anticipated term of imprisonment. The guideline generally applicable to undischarged terms of imprisonment is §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment), which provides:*

- (a) *If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.*
- (b) *If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:*
  - (1) *the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and*
  - (2) *the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.*
- (c) *(Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.*

*The proposed amendment is in three parts. The first part addresses cases in which a defendant is subject to an undischarged term of imprisonment that is relevant conduct but does not result in a Chapter Two or Three increase. The second part addresses cases in which the defendant is subject to an anticipated state term of imprisonment. The third part addresses cases in which certain aliens are subject to undischarged terms of imprisonment.*

#### **(A) Accounting for Undischarged Terms of Imprisonment that Are Relevant Conduct But Do Not Result in Chapter Two or Chapter Three Increases**

**Synopsis of Proposed Amendment:** *Part A amends §5G1.3(b) to require a court to adjust the sentence and impose concurrent sentences in any case in which the prior offense is relevant conduct under the provisions of §1B1.3(a)(1), (a)(2), or (a)(3), whether or not it also formed the basis for a Chapter Two or Chapter Three increase. Conforming changes are made to the application notes.*

**Proposed Amendment:**

**§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment**

- (a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
- (b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) ~~and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments)~~, the sentence for the instant offense shall be imposed as follows:
- (1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
  - (2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.
- (c) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

Commentary

Application Notes:

1. Consecutive Sentence - Subsection (a) Cases. Under subsection (a), the court shall impose a consecutive sentence when the instant offense was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.
2. Application of Subsection (b).—
  - (A) In General.—Subsection (b) applies in cases in which all of the prior offense (i) is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct); ~~and (ii) has resulted in an increase in the Chapter Two or Three offense level for the instant offense.~~ Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (c).

- (B) *Inapplicability of Subsection (b).*—Subsection (b) does not apply in cases in which the prior offense ~~increased the Chapter Two or Three offense level for the instant offense but~~ was not relevant conduct to the instant offense under §1B1.3(a)(1), (a)(2), or (a)(3) (e.g., the prior offense is an aggravated felony for which the defendant received an increase under §2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the defendant received an increased base offense level under §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).
- (C) *Imposition of Sentence.*—If subsection (b) applies, and the court adjusts the sentence for a period of time already served, the court should note on the Judgment in a Criminal Case Order (i) the applicable subsection (e.g., §5G1.3(b)); (ii) the amount of time by which the sentence is being adjusted; (iii) the undischarged term of imprisonment for which the adjustment is being given; and (iv) that the sentence imposed is a sentence reduction pursuant to §5G1.3(b) for a period of imprisonment that will not be credited by the Bureau of Prisons.
- (D) *Example.*—The following is an example in which subsection (b) applies and an adjustment to the sentence is appropriate:

The defendant is convicted of a federal offense charging the sale of ~~40-55~~ grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 12-18 months (Chapter Two offense level of level 16 for sale of ~~55-70~~ grams of cocaine; 3 level reduction for acceptance of responsibility; final offense level of level 13; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.

3. *Application of Subsection (c).*—

- (A) *In General.*—Under subsection (c), the court may impose a sentence concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following:
- (i) the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a));
  - (ii) the type (e.g., determinate, indeterminate/parolable) and length of the prior undischarged sentence;
  - (iii) the time served on the undischarged sentence and the time likely to be served before release;

- (iv) *the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and*
  - (v) *any other circumstance relevant to the determination of an appropriate sentence for the instant offense.*
- (B) *Partially Concurrent Sentence.*—*In some cases under subsection (c), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the prior undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.*
- (C) *Undischarged Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release.*—*Subsection (c) applies in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and has had such probation, parole, or supervised release revoked. Consistent with the policy set forth in Application Note 4 and subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.*
- (D) *Complex Situations.*—*Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (c) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.*
- (E) *Downward Departure.*—*Unlike subsection (b), subsection (c) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (c), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.*

*To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any downward departure under this application note be*

clearly stated on the Judgment in a Criminal Case Order as a downward departure pursuant to §5G1.3(c), rather than as a credit for time served.

4. Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. See §5K2.23 (Discharged Terms of Imprisonment).

*Background:* Federal courts generally "have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings." See Setser v. United States, 132 S. Ct. 1463, 1468 (2012); 18 U.S.C. § 3584(a). Federal courts also generally have discretion to order that the sentences they impose will run concurrently with or consecutively to other state sentences that are anticipated but not yet imposed. See Setser, 132 S. Ct. at 1468. Exercise of that discretion, however, is predicated on the court's consideration of the factors listed in 18 U.S.C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission.

\* \* \*

**(B) Cases in Which The Defendant is Subject to An Anticipated State Term of Imprisonment**

**Synopsis of Proposed Amendment:** Part B amends §5G1.3 to address cases in which there is an anticipated, but not yet imposed, state term of imprisonment that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct). The proposed amendment creates a new subsection (c), similar to §5G1.3(b)(2), that directs the court to impose the instant offense to run concurrently with the anticipated period of imprisonment, if subsection (a) does not apply.

**Proposed Amendment:**

**§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment**

- (a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
- (b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:
  - (1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines

that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

(c) If subsection (a) does not apply, and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

~~(e)~~(d) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

#### Commentary

#### Application Notes:

\* \* \*

3. Application of Subsection (c).—Subsection (c) applies to cases in which the federal court anticipates that, after the federal sentence is imposed, the defendant will be sentenced in state court and serve a state sentence before being transferred to federal custody for federal imprisonment. In such a case, where the other offense is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

34. Application of Subsection ~~(e)~~(d).—

(A) In General.—Under subsection ~~(e)~~(d), the court may impose a sentence concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following:

\* \* \*

(B) Partially Concurrent Sentence.—In some cases under subsection ~~(e)~~(d), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the prior undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.

- (C) Undischarged Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release.—Subsection ~~(e)~~(d) applies in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and has had such probation, parole, or supervised release revoked. Consistent with the policy set forth in Application Note 4 and subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.
- (D) Complex Situations.—Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection ~~(e)~~(d) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.
- (E) Downward Departure.—Unlike subsection (b), subsection ~~(e)~~(d) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection ~~(e)~~(d), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any downward departure under this application note be clearly stated on the Judgment in a Criminal Case Order as a downward departure pursuant to §5G1.3 ~~(e)~~(d), rather than as a credit for time served.

45. Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. See §5K2.23 (Discharged Terms of Imprisonment).

\* \* \*

### (C) Sentencing of Certain Aliens With Undischarged Terms of Imprisonment

**Synopsis of Proposed Amendment:** Part C addresses certain cases in which the defendant is an alien and is subject to an undischarged term of imprisonment. Specifically, it amends §2L1.2 (Unlawfully Entering or Remaining in the United States) to provide a departure provision for certain cases in which

*the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense. In such a case, the time served is not covered by an adjustment under §5G1.3(b) and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). The new departure provision states that, in such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. The provision also sets forth factors for the court to consider in determining whether to provide such a departure.*

**Proposed Amendment:**

**§2L1.2. Unlawfully Entering or Remaining in the United States**

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristic
  - (1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

- (A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by **16** levels if the conviction receives criminal history points under Chapter Four or by **12** levels if the conviction does not receive criminal history points;
- (B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by **12** levels if the conviction receives criminal history points under Chapter Four or by **8** levels if the conviction does not receive criminal history points;
- (C) a conviction for an aggravated felony, increase by **8** levels;
- (D) a conviction for any other felony, increase by **4** levels; or
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **4** levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

\* \* \*

7. Departure Based on Seriousness of a Prior Conviction.—There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction. In such a case, a departure may be warranted. Examples: (A) In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted. (B) In a case in which the 12-level enhancement under subsection (b)(1)(A) or the 8-level enhancement in subsection (b)(1)(B) applies but that enhancement does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction, an upward departure may be warranted. (C) In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted.

8. Departure Based on Time Served in State Custody.—In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, the time served is not covered by an adjustment under §5G1.3(b) and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). In such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

Such a departure should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant. In determining whether such a departure is appropriate, the court should consider, among other things, (A) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (B) the seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant's other criminal history.

89. Departure Based on Cultural Assimilation.—There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the

*duration of the defendant's continued residence in the United States, (4) the duration of the defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.*

**EXHIBIT G**

**PROPOSED AMENDMENT: MARIJUANA CULTIVATION OPERATIONS**

**Synopsis of Proposed Amendment:** *This proposed amendment responds to concerns about the environmental and other harms caused by marihuana cultivation operations. Offenses involving marihuana cultivation are generally sentenced under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).*

*The proposed amendment amends §2D1.1 to provide a 2-level enhancement that applies if (A) the offense involved the cultivation of marihuana on state or federal land or while trespassing on tribal or private land and (B) the defendant receives an adjustment for aggravating role under §3B1.1 (Aggravating Role).*

*The proposed amendment also provides a new application note stating that such offenses "interfere with the ability of others to safely access and use the area and also pose or risk a range of other harms, such as harms to the environment." It clarifies that this new enhancement may be applied cumulatively (added together) with the existing environmental enhancement at subsection (b)(13)(A).*

**Proposed Amendment:**

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

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

- (12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by **2** levels.
- (13) (Apply the greatest):
  - (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 defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
  - (C) If—

- (i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or
- (ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

- (D) 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**.

(14) If (A) the offense involved the cultivation of marijuana on state or federal land or while trespassing on tribal or private land; and (B) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by **2** levels.

- (15) If the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:

- (A) (i) the defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise;
- (B) the defendant, knowing that an individual was (i) less than 18 years of age, (ii) 65 or more years of age, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or otherwise particularly susceptible to the criminal conduct, distributed a controlled substance to that individual or involved that individual in the offense;
- (C) the defendant was directly involved in the importation of a controlled substance;
- (D) the defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense;

(E) the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood,

increase by **2** levels.

~~(4516)~~ If the defendant receives the **4**-level ("minimal participant") reduction in §3B1.2(a) and the offense involved all of the following factors:

- (A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;
- (B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and
- (C) the defendant had minimal knowledge of the scope and structure of the enterprise,

decrease by **2** levels.

~~(4617)~~ 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.

\* \* \*

#### 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:

\* \* \*

17. Application of Subsection (b)(12).—Subsection (b)(12) applies to a defendant who knowingly maintains a premises (*i.e.*, a building, room, or enclosure) for the purpose of manufacturing or distributing a controlled substance, including storage of a controlled substance for the purpose of distribution.

*Among the factors the court should consider in determining whether the defendant "maintained" the premises are (A) whether the defendant held a possessory interest in (e.g., owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises.*

*Manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses for the premises. In making this determination, the court should consider how frequently the premises was used by the*

defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.

18. Application of Subsection (b)(13).—

- (A) Hazardous or Toxic Substances (Subsection (b)(13)(A)).—Subsection (b)(13)(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 (b)(13)(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).
- (B) Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine (Subsection (b)(13)(C)–(D)).—
- (i) Factors to Consider.—In determining, for purposes of subsection (b)(13)(C)(ii) or (D), 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.
- (ii) Definitions.—For purposes of subsection (b)(13)(D):

*"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).*

**Insert the following (and renumber succeeding Application Notes accordingly):**

19. *Application of Subsection (b)(14).—Subsection (b)(14) applies to offenses that involve the cultivation of marijuana on state or federal land or while trespassing on tribal or private land. Such offenses interfere with the ability of others to safely access and use the area and also pose or risk a range of other harms, such as harms to the environment.*

*The enhancements in subsection (b)(13)(A) and (b)(14) may be applied cumulatively (added together), as is generally the case when two or more specific offense characteristics each apply. See §1B1.1 (Application Instructions), Application Note 4(A).*

19. *Application of Subsection (b)(14).—*

(A) *Distributing to a Specified Individual or Involving Such an Individual in the Offense (Subsection (b)(14)(B)).—If the defendant distributes a controlled substance to an individual or involves an individual in the offense, as specified in subsection (b)(14)(B), the individual is not a "vulnerable victim" for purposes of §3A1.1(b).*

(B) *Directly Involved in the Importation of a Controlled Substance (Subsection (b)(14)(C)).—Subsection (b)(14)(C) applies if the defendant is accountable for the importation of a controlled substance under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), i.e., the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the importation of a controlled substance.*

*If subsection (b)(3) or (b)(5) applies, do not apply subsection (b)(14)(C).*

(C) *Pattern of Criminal Conduct Engaged in as a Livelihood (Subsection (b)(14)(E)).—For purposes of subsection (b)(14)(E), "pattern of criminal conduct" and "engaged in as a livelihood" have the meaning given such terms in §4B1.3 (Criminal Livelihood).*

\* \* \*

## EXHIBIT H

### PROPOSED AMENDMENT: DRUGS

**Synopsis of Proposed Amendment:** *This proposed amendment revises the guidelines applicable to drug offenses. It changes how the base offense levels in the Drug Quantity Table incorporate the statutory mandatory minimum penalties.*

*Specifically, the proposed amendment amends the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) so that the quantities that trigger the statutory mandatory minimum penalties trigger base offense levels 24 and 30, rather than 26 and 32. As described more fully below, setting base offense levels at levels 24 and 30 establishes guideline ranges with a lower limit below, and an upper limit above, the statutory minimum; e.g., level 30 corresponds (at Criminal History Category I) to a guideline range of 97 to 121 months, where the statutory minimum term is ten years or 120 months.*

*The proposed amendment makes parallel changes to the quantity tables in §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), which apply to offenses involving the chemical precursors of controlled substances.*

#### Background

Penalty Structure of Federal Drug Laws. *The penalty structure of the Drug Quantity Table is based on the penalty structure of federal drug laws for most major drug types. That penalty structure generally establishes several tiers of penalties for manufacturing and trafficking in controlled substances, each based on the amount of controlled substances involved. See generally 21 U.S.C. §§ 841(b)(1)(A), (B), (C), 960(b)(1), (2), (3).*

*Generally, for smaller quantities of drugs, the statutory maximum term of imprisonment is 20 years. See 21 U.S.C. § 841(b)(1)(C). For quantities of marijuana less than 50 kilograms, the statutory maximum term of imprisonment is 5 years. See 21 U.S.C. § 841(b)(1)(D). If certain aggravating factors are present (e.g., if the defendant had a prior conviction for a felony drug offense, see 21 U.S.C. § 841(b)(1)(C), (D), or if death or serious bodily injury results from the use of the substance, see 21 U.S.C. § 841(b)(1)(C)), higher statutory penalties apply.*

*If the amount of the controlled substance reaches a statutorily specified quantity, the statutory maximum term increases to 40 years, and a statutory minimum term of 5 years applies. See 21 U.S.C. § 841(b)(1)(B). If the amount of the controlled substance reaches ten times that specified quantity, the statutory maximum term is life, and a statutory minimum term of 10 years applies. See 21 U.S.C. § 841(b)(1)(A). If certain aggravating factors are present (e.g., if the defendant had one or more prior convictions for a felony drug offense, or if death or serious bodily injury results from the use of the substance), higher statutory penalties apply. See 21 U.S.C. § 841(b)(1)(A), (B).*

Framework of the Federal Sentencing Guidelines. *The Sentencing Reform Act of 1984 established the Commission's organic statute and provided that the Commission, "consistent with all pertinent provisions of any Federal statute," shall promulgate guidelines and policy statements. See 28 U.S.C. § 994(a). It also provided that the Commission shall establish a sentencing range "for each category of offense involving each category of defendant". See 28 U.S.C. § 994(b)(1). Each sentencing range must be "consistent with all pertinent provisions of title 18, United States Code". See 28 U.S.C. § 994(b)(1).*

Where the guidelines call for imprisonment, the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months. See 28 U.S.C. § 994(b)(2).

In addition, the Commission's organic statute contains a variety of directives to the Commission in promulgating the sentencing guidelines. Among other things, the Commission must ensure that the sentencing guidelines are "formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." See 28 U.S.C. § 994(g).

Incorporation of Statutory Penalties into Drug Quantity Table. The Commission has incorporated into the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) the penalty structure of federal drug laws and the relevant statutory mandatory minimum sentences and has extrapolated upward and downward to set guideline sentencing ranges for all drug quantities. See §2D1.1, comment. (backg'd.) ("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."). By extrapolating upward and downward, the guidelines avoid sharp differentials or "sentencing cliffs" based upon small differences in drug quantities.

The drug quantity thresholds in the Drug Quantity Table have generally been set so that the drug quantity that triggers a statutory mandatory minimum penalty also triggers a base offense level that corresponds (at Criminal History Category I) to a guideline range slightly above the statutory mandatory minimum penalty. Thus, the quantity that triggers a statutory 5-year mandatory minimum term of imprisonment also triggers a base offense level of 26 (corresponding to a guideline range of 63 to 78 months), and the quantity that triggers a statutory 10-year mandatory minimum term of imprisonment also triggers a base offense level of 32 (corresponding to a guideline range of 121 to 151 months). See §2D1.1, comment. (backg'd.) ("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."). The Commission has stated that "[t]he base offense levels are set at guideline ranges slightly higher than the mandatory minimum levels to permit some downward adjustment for defendants who plead guilty or otherwise cooperate with authorities." See United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy (February 1995) at 148.

A minimum base offense level of 6 and a maximum base offense level of 38 are incorporated into the Drug Quantity Table across most drug types. In addition, certain higher minimum base offense levels are incorporated into the Drug Quantity Table for particular drug types, e.g., a minimum base offense level of 12 applies if the offense involved any quantity of certain Schedule I or II controlled substances. See, e.g., §2D1.1(c)(14); §2D1.1, comment. (n.8(D)) ("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."). Similarly, certain maximum base offense levels and associated drug quantity "caps" are incorporated into the Drug Quantity Table for particular drug types, e.g., a maximum base offense level of 8 and a combined equivalent weight "cap" of 999 grams of marihuana apply if the offense involved any quantity of Schedule V substances. See, e.g., §2D1.1(c)(16) (applying a base offense level of 8 if the offense involved 40,000 or more units of Schedule V substances); §2D1.1, comment. (n.8(D)) ("Provided, that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana.").

Guideline Developments. Since the initial selection of offense levels 26 and 32, the guidelines have been amended many times -- often in response to congressional directives -- to provide greater emphasis on

*the defendant's conduct and role in the offense rather than drug quantity. The version of §2D1.1 in the original 1987 Guidelines Manual contained a single specific offense characteristic: a 2-level enhancement if a firearm or other dangerous weapon was possessed. The version of §2D1.1 now in effect contains fourteen enhancements and three downward adjustments (including the "mitigating role cap" provided in subsection (a)(5)), with four enhancements and one downward adjustment added effective November 1, 2010, in response to the emergency directive in the Fair Sentencing Act of 2010, Pub. L. 111-220.*

*The "Safety Valve". Also since the initial selection of offense levels 26 and 32, Congress has enacted the "safety valve," which applies to certain non-violent drug defendants and allows the court, without any government motion, to impose a sentence below a statutory mandatory minimum penalty if the court finds, among other things, that the defendant "has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan". See 18 U.S.C. § 3553(f). This statutory provision was established by Congress in 1994 and is incorporated into the guidelines at USSG §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases). In addition, §2D1.1(b)(16) provides a 2-level reduction in the defendant's offense level if the defendant meets the "safety valve" criteria, regardless of whether a mandatory minimum penalty applies in the case. In the case of a defendant for whom the statutorily required minimum sentence is at least five years, the guidelines provide an offense level of not less than 17. See §5G1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).*

*Because the "safety valve" was established after the initial selection of levels 26 and 32, its effect on plea rates and cooperation could not have been foreseen at that time. Commission data indicate that defendants charged with a mandatory minimum penalty are more likely to plead guilty if they qualify for the "safety valve" than if they do not. Specifically, in fiscal year 2012, drug trafficking defendants charged with a mandatory minimum penalty had a plea rate of 99.6 percent if they qualified for the "safety valve" and a plea rate of 93.9 percent if they did not.*

*Crack Cocaine Cases After the 2007 Amendment. In 2007, the Commission amended the Drug Quantity Table for cocaine base ("crack" cocaine) so that the quantities that trigger mandatory minimum penalties also trigger base offense levels 24 and 30, rather than 26 and 32. See USSG App. C, Amendment 706 (effective November 1, 2007). At base offense level 24, the guideline range for a defendant in Criminal History Category I is 51 to 63 months, which includes the corresponding mandatory minimum penalty of 5 years (60 months); at base offense level 30, the guideline range for such a defendant is 97 to 121 months, which includes the corresponding mandatory minimum penalty of 10 years (120 months). In 2010, in implementing the emergency directive in section 8 of the Fair Sentencing Act of 2010, the Commission moved crack cocaine offenses back to a guideline penalty structure based on levels 26 and 32.*

*During the period when crack cocaine offenses had a guideline penalty structure based on levels 24 and 30, the overall rates at which crack cocaine defendants pled guilty remained stable. Specifically, in the fiscal year before the 2007 amendment took effect, the plea rate for crack cocaine defendants was 93.1 percent. In the two fiscal years after the 2007 amendment took effect, the plea rates for such defendants were 95.2 percent and 94.0 percent, respectively.*

*For those same fiscal years, the overall rates at which crack cocaine defendants received substantial assistance departures under §5K1.1 (Substantial Assistance to Authorities) were 27.8 percent in the fiscal*

year before the 2007 amendment took effect and 25.3 percent and 25.6 percent in the two fiscal years after the 2007 amendment took effect.

#### Amendment to the Drug Quantity Table

As stated above, this proposed amendment changes how the base offense levels in the Drug Quantity Table incorporate the statutory mandatory minimum penalties. Specifically, it amends the table so that the quantities that trigger the statutory mandatory minimum penalties trigger base offense levels 24 and 30, rather than 26 and 32. Setting base offense levels at levels 24 and 30 establishes guideline ranges with a lower limit below, and an upper limit above, the statutory minimum; *e.g.*, level 30 corresponds (at Criminal History Category I) to a guideline range of 97 to 121 months, where the statutory minimum term is ten years or 120 months.

Under the proposed amendment, §2D1.1 continues to reflect the minimum base offense level of 6 and the maximum base offense level of 38 that are incorporated into the Drug Quantity Table across all drug types. It also continues to reflect the minimum base offense levels that are incorporated into the Drug Quantity Table for particular drug types, *e.g.*, the minimum base offense level of 12 that applies if the offense involved any quantity of certain Schedule I or II controlled substances. *See, e.g.*, §2D1.1(c)(14); §2D1.1, comment. (n.8(D)) ("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."). Similarly, it continues to reflect the maximum base offense levels and associated drug quantity "caps" that are incorporated into the Drug Quantity Table for particular drug types, *e.g.*, the maximum base offense level of 8 and the combined equivalent weight "cap" of 999 grams of marijuana that apply if the offense involved any quantity of Schedule V substances. *See, e.g.*, §2D1.1(c)(16) (applying a base offense level of 8 if the offense involved 40,000 or more units of Schedule V substances); §2D1.1, comment. (n.8(D)) ("Provided, that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marijuana.").

In the proposed amendment the various minimum and maximum base offense levels and drug quantity "caps" are associated with new drug quantities, determined by extrapolating upward or downward as appropriate.

The proposed amendment makes parallel changes to the quantity tables in §2D1.11, which apply to offenses involving the chemical precursors of controlled substances. Section 2D1.11 is generally structured to provide base offense levels that are tied to, but less severe than, the base offense levels in §2D1.1 for offenses involving the final product.

Finally, the proposed amendment makes certain clerical and conforming changes to reflect the changes to the quantity tables.

#### **Proposed Amendment:**

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

\* \* \*

### **(c) DRUG QUANTITY TABLE**

## Controlled Substances and Quantity\*

## Base Offense Level

(1)

- 90 KG or more of Heroin;

### Level 38

- 450 KG or more of Cocaine;
- 25.2 KG or more of Cocaine Base;
- 90 KG or more of PCP, or 9 KG or more of PCP (actual);
- 45 KG or more of Methamphetamine, or 4.5 KG or more of Methamphetamine (actual), or 4.5 KG or more of "Ice";
- 45 KG or more of Amphetamine, or 4.5 KG or more of Amphetamine (actual);
- 900 G or more of LSD;
- 36 KG or more of Fentanyl;
- 9 KG or more of a Fentanyl Analogue;
- 90,000 KG or more of Marihuana;
- 18,000 KG or more of Hashish;
- 1,800 KG or more of Hashish Oil;
- 90,000,000 units or more of Ketamine;
- 90,000,000 units or more of Schedule I or II Depressants;
- 5,625,000 units or more of Flunitrazepam.

(+)(2)

- At least 30 KG ~~or more~~ but less than 90 KG of Heroin;

### Level 3836

- At least 150 KG ~~or more~~ but less than 450 KG of Cocaine;
- At least 8.4 KG ~~or more~~ but less than 25.2 KG of Cocaine Base;
- At least 30 KG ~~or more~~ but less than 90 KG of PCP, or at least 3 KG ~~or more~~ but less than 9 KG of PCP (actual);
- At least 15 KG ~~or more~~ but less than 45 KG of Methamphetamine, or at least 1.5 KG ~~or more~~ but less than 4.5 KG of Methamphetamine (actual), or at least 1.5 KG ~~or more~~ but less than 4.5 KG of "Ice";
- At least 15 KG ~~or more~~ but less than 45 KG of Amphetamine, or at least 1.5 KG ~~or more~~ but less than 4.5 KG of Amphetamine (actual);
- At least 300 G ~~or more~~ but less than 900 G of LSD;
- At least 12 KG ~~or more~~ but less than 36 KG of Fentanyl;
- At least 3 KG ~~or more~~ but less than 9 KG of a Fentanyl Analogue;
- At least 30,000 KG ~~or more~~ but less than 90,000 KG of Marihuana;
- At least 6,000 KG ~~or more~~ but less than 18,000 KG of Hashish;

- At least 600 KG ~~or more~~ but less than 1,800 KG of Hashish Oil;
- At least 30,000,000 units ~~or more~~ but less than 90,000,000 units of Ketamine;
- At least 30,000,000 units ~~or more~~ but less than 90,000,000 units of Schedule I or II Depressants;
- At least 1,875,000 units ~~or more~~ but less than 5,625,000 units of Flunitrazepam.

(2)(3)

- At least 10 KG but less than 30 KG of Heroin;

### **Level 3634**

- At least 50 KG but less than 150 KG of Cocaine;
- At least 2.8 KG but less than 8.4 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)(4)

- At least 3 KG but less than 10 KG of Heroin;
- At least 15 KG but less than 50 KG of Cocaine;
- At least 840 G but less than 2.8 KG 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;

### **Level 3432**

- 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)(5) **Level 3230**
- At least 1 KG but less than 3 KG of Heroin;
  - At least 5 KG but less than 15 KG of Cocaine;
  - At least 280 G but less than 840 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;
  - 1,000,000 units or more of Schedule III Hydrocodone;
  - At least 62,500 but less than 187,500 units of Flunitrazepam.

- (5)(6) **Level 3028**
- At least 700 G but less than 1 KG of Heroin;
  - At least 3.5 KG but less than 5 KG of Cocaine;
  - At least 196 G but less than 280 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 700,000 ~~or more~~ but less than 1,000,000 units of Schedule III Hydrocodone;
  - At least 43,750 but less than 62,500 units of Flunitrazepam.

- (6)(7) **Level 2826**
- At least 400 G but less than 700 G of Heroin;
  - At least 2 KG but less than 3.5 KG of Cocaine;
  - At least 112 G but less than 196 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 400,000 but less than 700,000 units of Schedule III Hydrocodone;
- At least 25,000 but less than 43,750 units of Flunitrazepam.

~~(7)~~(8)

- At least 100 G but less than 400 G of Heroin;
- At least 500 G but less than 2 KG of Cocaine;
- At least 28 G but less than 112 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 100,000 but less than 400,000 units of Schedule III Hydrocodone;
- At least 6,250 but less than 25,000 units of Flunitrazepam.

**Level 2624**

~~(8)~~(9)

- At least 80 G but less than 100 G of Heroin;
- At least 400 G but less than 500 G of Cocaine;
- At least 22.4 G but less than 28 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

**Level 2422**

- 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 80,000 but less than 100,000 units of Schedule III Hydrocodone;
- At least 5,000 but less than 6,250 units of Flunitrazepam.

- (9)(10) • At least 60 G but less than 80 G of Heroin;
- At least 300 G but less than 400 G of Cocaine;
  - At least 16.8 G but less than 22.4 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 60,000 but less than 80,000 units of Schedule III Hydrocodone;
  - 60,000 units or more of Schedule III substances (except Ketamine or Hydrocodone);
  - At least 3,750 but less than 5,000 units of Flunitrazepam.

## Level 2220

- (1011) • At least 40 G but less than 60 G of Heroin;
- At least 200 G but less than 300 G of Cocaine;
  - At least 11.2 G but less than 16.8 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;

## Level 2018

- 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;
- At least 40,000 but less than 60,000 units of Schedule III Hydrocodone;
- At least 40,000 ~~or more~~ but less than 60,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 2,500 but less than 3,750 units of Flunitrazepam.

(~~11~~12)

**Level 1816**

- At least 20 G but less than 40 G of Heroin;
- At least 100 G but less than 200 G of Cocaine;
- At least 5.6 G but less than 11.2 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;
- 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 Hydrocodone;
- At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 1,250 but less than 2,500 units of Flunitrazepam.

(~~12~~13)

**Level 1614**

- At least 10 G but less than 20 G of Heroin;
- At least 50 G but less than 100 G of Cocaine;
- At least 2.8 G but less than 5.6 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 Hydrocodone;
- At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 625 but less than 1,250 units of Flunitrazepam.

(1314)

- ~~At least 5 G but less~~ Less than 10 G of Heroin;
- ~~At least 25 G but less~~ Less than 50 G of Cocaine;
- ~~At least 1.4 G but less~~ Less than 2.8 G of Cocaine Base;
- ~~At least 5 G but less~~ 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~~ 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~~ 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~~ Less than 100 MG of LSD;
- ~~At least 2 G but less~~ Less than 4 G of Fentanyl;
- ~~At least 500 MG but less~~ 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 Hydrocodone;
- At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 312 but less than 625 units of Flunitrazepam;
- 80,000 units or more of Schedule IV substances (except Flunitrazepam).

**Level 1412**

(1415)

- ~~Less than 5 G of Heroin;~~
- ~~Less than 25 G of Cocaine;~~
- ~~Less than 1.4 G 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;

**Level 1210**

- 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 Hydrocodone;
- At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 156 but less than 312 units of Flunitrazepam;
- At least 40,000 or more but less than 80,000 units of Schedule IV substances (except Flunitrazepam).

(1516) • At least 1 KG but less than 2.5 KG of Marihuana; **Level 108**

- 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 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 Hydrocodone;
- At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine or Hydrocodone);
- 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);
- 160,000 units or more of Schedule V substances.

(1617) • At least 250 G but less than 1 KG of Marihuana; **Level 86**

- 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 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 Hydrocodone;
- At least 250 but less than 1,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- 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 Less than 160,000 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 Hydrocodone;
- Less than 250 units of Schedule III substances (except Ketamine or Hydrocodone);
- Less than 4,000 units of Schedule IV substances (except Flunitrazepam);
- Less than 40,000 units of Schedule V substances.

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

8. Use of Drug Equivalency Tables.—

(A) Controlled Substances Not Referenced in Drug Quantity Table.—*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 marihuana. In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:*

- (i) *Use the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana.*
- (ii) *Find the equivalent quantity of marihuana in the Drug Quantity Table.*
- (iii) *Use the offense level that corresponds to the equivalent quantity of marihuana as the base offense level for the controlled substance involved in the offense.*

*(See also Application Note 6.) 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 ~~2826~~ in the Drug Quantity Table.*

(B) Combining Differing Controlled Substances.—*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~~ 2.49 kilograms 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.*

(C) Examples for Combining Differing Controlled Substances.—

- (i) *The defendant is convicted of selling 70 grams of a substance containing PCP (Level ~~2220~~) and 250 milligrams of a substance containing LSD (Level ~~1816~~). 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 ~~2422~~.*
- (ii) *The defendant is convicted of selling 500 grams of marihuana (Level ~~86~~) and five kilograms of diazepam (Level ~~86~~). 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 ~~108~~ in the Drug Quantity Table.*
- (iii) *The defendant is convicted of selling 80 grams of cocaine (Level ~~1614~~) and 2 grams of cocaine base (Level ~~1412~~). The cocaine is equivalent to 16 kilograms of marihuana, and the cocaine base is equivalent to 7.142 kilograms of marihuana. The total is therefore equivalent to 23.142 kilograms of marihuana, which has an offense level of ~~1816~~ in the Drug Quantity Table.*
- (iv) *The defendant is convicted of selling ~~56,000~~76,000 units of a Schedule III substance, ~~100,000~~200,000 units of a Schedule IV substance, and ~~200,000~~600,000 units of a Schedule V substance. The marihuana equivalency for the Schedule III substance is 5676 kilograms of marihuana (below the cap of ~~59.99~~79.99 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 ~~4.999~~.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule IV substances (without the cap it would have been ~~6.25~~12.5 kilograms). The marihuana equivalency for the Schedule V substance is subject to the cap of ~~999 grams~~2.49 kilograms of marihuana set forth as the maximum equivalent weight for Schedule V substances (without the cap it would have been ~~1.25~~3.75 kilograms). The combined equivalent weight, determined by adding together the above amounts, is subject to the cap of ~~59.99~~79.99 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~~88.48 (5676 + ~~4.999~~.99 + ~~.999~~2.49) kilograms.*

(D) 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 (N-phenyl-N-1-(2-phenylethyl)-4-piperidinyl] Propanamide) = | 2.5 kg of marihuana  |
| 1 gm of Hydromorphone/Dihydromorphanone =                                    | 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 <sub>2</sub> P (when possessed for the purpose of manufacturing methamphetamine) = | 416 gm of marihuana   |
| 1 gm Phenylacetone/P <sub>2</sub> P (in any other case) =   | 75 gm of marihuana    |
| 1 gm Cocaine Base ("Crack") =   | 3,571 gm 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    |
| 1 gm of N-Benzylpiperazine =  | 100 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 |
|---------------------------|--------------------|

*\*\*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 and hydrocodone)\*\*\*

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

*\*\*\*Provided*, that the combined equivalent weight of all Schedule III substances (except ketamine and hydrocodone), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed ~~59.99~~ 79.99 kilograms of marihuana.

#### Schedule III Hydrocodone\*\*\*\*

|                                      |                   |
|--------------------------------------|-------------------|
| 1 unit of Schedule III hydrocodone = | 1 gm of marihuana |
|--------------------------------------|-------------------|

\*\*\*\*Provided, that the combined equivalent weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed ~~999.99~~ 2,999.99 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 ~~4.999.99~~ 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~~ 2.49 kilograms of marihuana.

\* \* \*

*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~~ 30 and 24 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.~~ at levels 24 and 30 establish guideline ranges such that the statutory minimum falls within the range; e.g., level 30 ranges from 97 to 121 months, where the statutory minimum term is ten years or 120 months.*

\* \* \*

**§2D1.2. Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy**

\* \* \*

Commentary

\* \* \*

Application Note:

1. *This guideline applies only in a case in which the defendant is convicted of a statutory violation of drug trafficking in a protected location or involving an underage or pregnant individual (including an attempt or conspiracy to commit such a violation) or in a case in which the defendant stipulated to such a statutory violation. See §1B1.2(a). In a case involving such a conviction but in which only part of the relevant offense conduct directly involved a protected location or an underage or pregnant individual, subsections (a)(1) and (a)(2) may result in different offense levels. For example, if the defendant, as part of the same course of conduct or common scheme or plan, sold 5 grams of heroin near a protected location and 10 grams of heroin elsewhere, the offense level from subsection (a)(1) would be level ~~16~~14 (2 plus the offense level for the sale of 5 grams of heroin, the amount sold near the protected location); the offense level from subsection (a)(2) would be level ~~17~~15 (1 plus the offense level for the sale of 15 grams of heroin, the total amount of heroin involved in the offense).*

\* \* \*

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

\* \* \*

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

**Quantity**

|  | <b>Base Offense Level</b>   |
|--|---|
| (1) Ephedrine;<br>9 KG or more of Phenylpropanolamine;<br>9 KG or more of Pseudoephedrine.   | 9 KG or more of<br><b>Level 38</b>  |
| (±) Ephedrine;   | <del>At least 3 KG or more</del> but less than 9 KG of<br><b>Level 38</b> |
| (2) At least 3 KG <del>or more</del> but less than 9 KG of Phenylpropanolamine;<br>At least 3 KG <del>or more</del> but less than 9 KG of Pseudoephedrine. | <b>Level 36</b>   |

|   |  |
|---|--|
| <p><del>(2)</del><br/>Ephedrine;</p> <p>(3) At least 1 KG but less than 3 KG of Phenylpropanolamine;<br/>At least 1 KG but less than 3 KG of Pseudoephedrine.</p>                                     | <p>At least 1 KG but less than 3 KG of<br/><b>Level 3634</b></p>   |
| <p><del>(3)</del><br/>Ephedrine;</p> <p>(4) At least 300 G but less than 1 KG of Phenylpropanolamine;<br/>At least 300 G but less than 1 KG of Pseudoephedrine.</p>                                   | <p>At least 300 G but less than 1 KG of<br/><b>Level 3432</b></p>  |
| <p><del>(4)</del><br/>Ephedrine;</p> <p>(5) At least 100 G but less than 300 G of Phenylpropanolamine;<br/>At least 100 G but less than 300 G of Pseudoephedrine.</p>                                 | <p>At least 100 G but less than 300 G of<br/><b>Level 3230</b></p> |
| <p><del>(5)</del><br/>(6) At least 70 G but less than 100 G of Ephedrine;<br/>At least 70 G but less than 100 G of Phenylpropanolamine;<br/>At least 70 G but less than 100 G of Pseudoephedrine.</p> | <p><b>Level 3028</b></p>   |
| <p><del>(6)</del><br/>(7) At least 40 G but less than 70 G of Ephedrine;<br/>At least 40 G but less than 70 G of Phenylpropanolamine;<br/>At least 40 G but less than 70 G of Pseudoephedrine.</p>    | <p><b>Level 2826</b></p>   |
| <p><del>(7)</del><br/>(8) At least 10 G but less than 40 G of Ephedrine;<br/>At least 10 G but less than 40 G of Phenylpropanolamine;<br/>At least 10 G but less than 40 G of Pseudoephedrine.</p>    | <p><b>Level 2624</b></p>   |
| <p><del>(8)</del><br/>(9) At least 8 G but less than 10 G of Ephedrine;<br/>At least 8 G but less than 10 G of Phenylpropanolamine;<br/>At least 8 G but less than 10 G of Pseudoephedrine.</p>       | <p><b>Level 2422</b></p>   |
| <p><del>(9)</del><br/>(10) At least 6 G but less than 8 G of Ephedrine;<br/>At least 6 G but less than 8 G of Phenylpropanolamine;<br/>At least 6 G but less than 8 G of Pseudoephedrine.</p>         | <p><b>Level 2220</b></p>   |
| <p><del>(10)</del><br/>(11) At least 4 G but less than 6 G of Ephedrine;<br/>At least 4 G but less than 6 G of Phenylpropanolamine;<br/>At least 4 G but less than 6 G of Pseudoephedrine.</p>        | <p><b>Level 2018</b></p>   |
| <p><del>(11)</del><br/>(12) At least 2 G but less than 4 G of Ephedrine;<br/>At least 2 G but less than 4 G of Phenylpropanolamine;<br/>At least 2 G but less than 4 G of Pseudoephedrine.</p>        | <p><b>Level 1816</b></p>   |
| <p><del>(12)</del><br/>(13) At least 1 G but less than 2 G of Ephedrine;<br/>At least 1 G but less than 2 G of Phenylpropanolamine;<br/>At least 1 G but less than 2 G of Pseudoephedrine.</p>        | <p><b>Level 1614</b></p>   |

- (13) ~~At least 500 MG but less~~ Less than 1 G of Ephedrine; **Level 1412**
- (14) ~~At least 500 MG but less~~ Less than 1 G of Phenylpropanolamine;  
~~At least 500 MG but less~~ Less than 1 G of Pseudoephedrine.
- (14) ~~Less than 500 MG of Ephedrine;~~ **Level 12**  
~~Less than 500 MG of Phenylpropanolamine;~~  
~~Less than 500 MG of Pseudoephedrine.~~

**(e) CHEMICAL QUANTITY TABLE\***  
**(All Other Precursor Chemicals)**

| <b>Listed Chemicals and Quantity</b>   | <b>Base Offense Level</b> |
|--|---------------------------|
| (1) <u>List I Chemicals</u>  | <b>Level 30</b>           |
| 2.7 KG or more of Benzaldehyde;  |                           |
| 60 KG or more of Benzyl Cyanide;   |                           |
| 600 G or more of Ergonovine;   |                           |
| 1.2 KG or more of Ergotamine;  |                           |
| 60 KG or more of Ethylamine;   |                           |
| 6.6 KG or more of Hydriodic Acid;  |                           |
| 3.9 KG or more of Iodine;  |                           |
| 960 KG or more of Isosafrole;  |                           |
| 600 G or more of Methylamine;  |                           |
| 1500 KG or more of N-Methylephedrine;  |                           |
| 1500 KG or more of N-Methylpseudoephedrine;  |                           |
| 1.9 KG or more of Nitroethane;   |                           |
| 30 KG or more of Norpseudoephedrine;   |                           |
| 60 KG or more of Phenylacetic Acid;  |                           |
| 30 KG or more of Piperidine;   |                           |
| 960 KG or more of Piperonal;   |                           |
| 4.8 KG or more of Propionic Anhydride;   |                           |
| 960 KG or more of Safrole;   |                           |
| 1200 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;                            |                           |
| 3406.5 L or more of Gamma-butyrolactone;   |                           |
| 2.1 KG or more of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid.         |                           |
| (4) <u>List I Chemicals</u>  | <b>Level 3028</b>         |
| (2) <del>At least 890 G or more but less than 2.7 KG</del> of Benzaldehyde;          |                           |
| <del>At least 20 KG or more but less than 60 KG</del> of Benzyl Cyanide;             |                           |
| <del>At least 200 G or more but less than 600 G</del> of Ergonovine;                 |                           |
| <del>At least 400 G or more but less than 1.2 KG</del> of Ergotamine;                |                           |
| <del>At least 20 KG or more but less than 60 KG</del> of Ethylamine;                 |                           |
| <del>At least 2.2 KG or more but less than 6.6 KG</del> of Hydriodic Acid;           |                           |
| <del>At least 1.3 KG or more but less than 3.9 KG</del> of Iodine;                   |                           |
| <del>At least 320 KG or more but less than 960 KG</del> of Isosafrole;               |                           |
| <del>At least 200 G or more but less than 600 G</del> of Methylamine;                |                           |
| <del>At least 500 KG or more but less than 1500 KG</del> of N-Methylephedrine;       |                           |
| <del>At least 500 KG or more but less than 1500 KG</del> of N-Methylpseudoephedrine; |                           |
| <del>At least 625 G or more but less than 1.9 KG</del> of Nitroethane;               |                           |

At least 10 KG ~~or more~~ but less than 30 KG of Norpseudoephedrine;  
At least 20 KG ~~or more~~ but less than 60 KG of Phenylacetic Acid;  
At least 10 KG ~~or more~~ but less than 30 KG of Piperidine;  
At least 320 KG ~~or more~~ but less than 960 KG of Piperonal;  
At least 1.6 KG ~~or more~~ but less than 4.8 KG of Propionic Anhydride;  
At least 320 KG ~~or more~~ but less than 960 KG of Safrole;  
At least 400 KG ~~or more~~ but less than 1200 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
At least 1135.5 L ~~or more~~ but less than 3406.5 L of Gamma-butyrolactone;  
At least 714 G ~~or more~~ but less than 2.1 KG of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid.

#### List II Chemicals

33 KG or more of Acetic Anhydride;  
3525 KG or more of Acetone;  
60 KG or more of Benzyl Chloride;  
3225 KG or more of Ethyl Ether;  
3600 KG or more of Methyl Ethyl Ketone;  
30 KG or more of Potassium Permanganate;  
3900 KG or more of Toluene.

#### (2) List I Chemicals

**Level 2826**

- (3) At least 267 G but less than 890 G of Benzaldehyde;  
At least 6 KG but less than 20 KG of Benzyl Cyanide;  
At least 60 G but less than 200 G of Ergonovine;  
At least 120 G but less than 400 G of Ergotamine;  
At least 6 KG but less than 20 KG of Ethylamine;  
At least 660 G but less than 2.2 KG of Hydriodic Acid;  
At least 376.2 G but less than 1.3 KG of Iodine;  
At least 96 KG but less than 320 KG of Isosafrole;  
At least 60 G but less than 200 G of Methylamine;  
At least 150 KG but less than 500 KG of N-Methylephedrine;  
At least 150 KG but less than 500 KG of N-Methylpseudoephedrine;  
At least 187.5 G but less than 625 G of Nitroethane;  
At least 3 KG but less than 10 KG of Norpseudoephedrine;  
At least 6 KG but less than 20 KG of Phenylacetic Acid;  
At least 3 KG but less than 10 KG of Piperidine;  
At least 96 KG but less than 320 KG of Piperonal;  
At least 480 G but less than 1.6 KG of Propionic Anhydride;  
At least 96 KG but less than 320 KG of Safrole;  
At least 120 KG but less than 400 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
At least 340.7 L but less than 1135.5 L of Gamma-butyrolactone;  
At least 214 G but less than 714 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

#### List II Chemicals

At least 11 KG ~~or more~~ but less than 33 KG of Acetic Anhydride;  
At least 1175 KG ~~or more~~ but less than 3525 KG of Acetone;  
At least 20 KG ~~or more~~ but less than 60 KG of Benzyl Chloride;  
At least 1075 KG ~~or more~~ but less than 3225 KG of Ethyl Ether;

At least 1200 KG ~~or more~~ but less than 3600 KG of Methyl Ethyl Ketone;  
At least 10 KG ~~or more~~ but less than 30 KG of Potassium Permanganate;  
At least 1300 KG ~~or more~~ but less than 3900 KG of Toluene.

(3)

List I Chemicals

**Level 2624**

(4)

At least 89 G but less than 267 G of Benzaldehyde;  
At least 2 KG but less than 6 KG of Benzyl Cyanide;  
At least 20 G but less than 60 G of Ergonovine;  
At least 40 G but less than 120 G of Ergotamine;  
At least 2 KG but less than 6 KG of Ethylamine;  
At least 220 G but less than 660 G of Hydriodic Acid;  
At least 125.4 G but less than 376.2 G of Iodine;  
At least 32 KG but less than 96 KG of Isosafrole;  
At least 20 G but less than 60 G of Methylamine;  
At least 50 KG but less than 150 KG of N-Methylephedrine;  
At least 50 KG but less than 150 KG of N-Methylpseudoephedrine;  
At least 62.5 G but less than 187.5 G of Nitroethane;  
At least 1 KG but less than 3 KG of Norpseudoephedrine;  
At least 2 KG but less than 6 KG of Phenylacetic Acid;  
At least 1 KG but less than 3 KG of Piperidine;  
At least 32 KG but less than 96 KG of Piperonal;  
At least 160 G but less than 480 G of Propionic Anhydride;  
At least 32 KG but less than 96 KG of Safrole;  
At least 40 KG but less than 120 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
At least 113.6 L but less than 340.7 L of Gamma-butyrolactone;  
At least 71 G but less than 214 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

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

(4)

Chemicals

List I

**Level 2422**

(5)

At least 62.3 G but less than 89 G of Benzaldehyde;  
At least 1.4 KG but less than 2 KG of Benzyl Cyanide;  
At least 14 G but less than 20 G of Ergonovine;  
At least 28 G but less than 40 G of Ergotamine;  
At least 1.4 KG but less than 2 KG of Ethylamine;  
At least 154 G but less than 220 G of Hydriodic Acid;  
At least 87.8 G but less than 125.4 G of Iodine;  
At least 22.4 KG but less than 32 KG of Isosafrole;  
At least 14 G but less than 20 G of Methylamine;

At least 35 KG but less than 50 KG of N-Methylephedrine;  
At least 35 KG but less than 50 KG of N-Methylpseudoephedrine;  
At least 43.8 G but less than 62.5 G of Nitroethane;  
At least 700 G but less than 1 KG of Norpseudoephedrine;  
At least 1.4 KG but less than 2 KG of Phenylacetic Acid;  
At least 700 G but less than 1 KG of Piperidine;  
At least 22.4 KG but less than 32 KG of Piperonal;  
At least 112 G but less than 160 G of Propionic Anhydride;  
At least 22.4 KG but less than 32 KG of Safrole;  
At least 28 KG but less than 40 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
At least 79.5 L but less than 113.6 L of Gamma-butyrolactone;  
At least 50 G but less than 71 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

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

(5)

List I Chemicals

**Level 2220**

(6)

At least 35.6 G but less than 62.3 G of Benzaldehyde;  
At least 800 G but less than 1.4 KG of Benzyl Cyanide;  
At least 8 G but less than 14 G of Ergonovine;  
At least 16 G but less than 28 G of Ergotamine;  
At least 800 G but less than 1.4 KG of Ethylamine;  
At least 88 G but less than 154 G of Hydriodic Acid;  
At least 50.2 G but less than 87.8 G of Iodine;  
At least 12.8 KG but less than 22.4 KG of Isosafrole;  
At least 8 G but less than 14 G of Methylamine;  
At least 20 KG but less than 35 KG of N-Methylephedrine;  
At least 20 KG but less than 35 KG of N-Methylpseudoephedrine;  
At least 25 G but less than 43.8 G of Nitroethane;  
At least 400 G but less than 700 G of Norpseudoephedrine;  
At least 800 G but less than 1.4 KG of Phenylacetic Acid;  
At least 400 G but less than 700 G of Piperidine;  
At least 12.8 KG but less than 22.4 KG of Piperonal;  
At least 64 G but less than 112 G of Propionic Anhydride;  
At least 12.8 KG but less than 22.4 KG of Safrole;  
At least 16 KG but less than 28 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
At least 45.4 L but less than 79.5 L of Gamma-butyrolactone;  
At least 29 G but less than 50 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

At least 726 G but less than 1.1 KG of Acetic Anhydride;  
At least 82.25 KG but less than 117.5 KG of Acetone;

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

(6)

Chemicals

(7)

At least 8.9 G but less than 35.6 G of Benzaldehyde;  
At least 200 G but less than 800 G of Benzyl Cyanide;  
At least 2 G but less than 8 G of Ergonovine;  
At least 4 G but less than 16 G of Ergotamine;  
At least 200 G but less than 800 G of Ethylamine;  
At least 22 G but less than 88 G of Hydriodic Acid;  
At least 12.5 G but less than 50.2 G of Iodine;  
At least 3.2 KG but less than 12.8 KG of Isosafrole;  
At least 2 G but less than 8 G of Methylamine;  
At least 5 KG but less than 20 KG of N-Methylephedrine;  
At least 5 KG but less than 20 KG of N-Methylpseudoephedrine;  
At least 6.3 G but less than 25 G of Nitroethane;  
At least 100 G but less than 400 of Norpseudoephedrine;  
At least 200 G but less than 800 G of Phenylacetic Acid;  
At least 100 G but less than 400 G of Piperidine;  
At least 3.2 KG but less than 12.8 KG of Piperonal;  
At least 16 G but less than 64 G of Propionic Anhydride;  
At least 3.2 KG but less than 12.8 KG of Safrole;  
At least 4 KG but less than 16 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
At least 11.4 L but less than 45.4 L of Gamma-butyrolactone;  
At least 7 G but less than 29 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

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

(7)

List I Chemicals

(8)

At least 7.1 G but less than 8.9 G of Benzaldehyde;  
At least 160 G but less than 200 G of Benzyl Cyanide;  
At least 1.6 G but less than 2 G of Ergonovine;  
At least 3.2 G but less than 4 G of Ergotamine;  
At least 160 G but less than 200 G of Ethylamine;  
At least 17.6 G but less than 22 G of Hydriodic Acid;

List I

**Level 2018**

**Level 1816**

At least 10 G but less than 12.5 G of Iodine;  
At least 2.56 KG but less than 3.2 KG of Isosafrole;  
At least 1.6 G but less than 2 G of Methylamine;  
At least 4 KG but less than 5 KG of N-Methylephedrine;  
At least 4 KG but less than 5 KG of N-Methylpseudoephedrine;  
At least 5 G but less than 6.3 G of Nitroethane;  
At least 80 G but less than 100 G of Norpseudoephedrine;  
At least 160 G but less than 200 G of Phenylacetic Acid;  
At least 80 G but less than 100 G of Piperidine;  
At least 2.56 KG but less than 3.2 KG of Piperonal;  
At least 12.8 G but less than 16 G of Propionic Anhydride;  
At least 2.56 KG but less than 3.2 KG of Safrole;  
At least 3.2 KG but less than 4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
At least 9.1 L but less than 11.4 L of Gamma-butyrolactone;  
At least 6 G but less than 7 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

#### List II Chemicals

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

~~(8)~~  
(9)

#### List I Chemicals

3.6 KG or more of Anthranilic Acid;  
At least 5.3 G but less than 7.1 G of Benzaldehyde;  
At least 120 G but less than 160 G of Benzyl Cyanide;  
At least 1.2 G but less than 1.6 G of Ergonovine;  
At least 2.4 G but less than 3.2 G of Ergotamine;  
At least 120 G but less than 160 G of Ethylamine;  
At least 13.2 G but less than 17.6 G of Hydriodic Acid;  
At least 7.5 G but less than 10 G of Iodine;  
At least 1.92 KG but less than 2.56 KG of Isosafrole;  
At least 1.2 G but less than 1.6 G of Methylamine;  
4.8 KG or more of N-Acetylanthranilic Acid;  
At least 3 KG but less than 4 KG of N-Methylephedrine;  
At least 3 KG but less than 4 KG of N-Methylpseudoephedrine;  
At least 3.8 G but less than 5 G of Nitroethane;  
At least 60 G but less than 80 G of Norpseudoephedrine;  
At least 120 G but less than 160 G of Phenylacetic Acid;  
At least 60 G but less than 80 G of Piperidine;  
At least 1.92 KG but less than 2.56 KG of Piperonal;  
At least 9.6 G but less than 12.8 G of Propionic Anhydride;  
At least 1.92 KG but less than 2.56 KG of Safrole;  
At least 2.4 KG but less than 3.2 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
At least 6.8 L but less than 9.1 L of Gamma-butyrolactone;  
At least 4 G but less than 6 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

**Level 1614**

List II Chemicals

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

(9) List I Chemicals

**Level 1412**

(10) ~~At least 2.7 KG but less~~ Less than 3.6 KG of Anthranilic Acid;  
~~At least 3.6 G but less~~ Less than 5.3 G of Benzaldehyde;  
~~At least 80 G but less~~ Less than 120 G of Benzyl Cyanide;  
~~At least 800 MG but less~~ Less than 1.2 G of Ergonovine;  
~~At least 1.6 G but less~~ Less than 2.4 G of Ergotamine;  
~~At least 80 G but less~~ Less than 120 G of Ethylamine;  
~~At least 8.8 G but less~~ Less than 13.2 G of Hydriodic Acid;  
~~At least 5 G but less~~ Less than 7.5 G of Iodine;  
~~At least 1.44 KG but less~~ Less than 1.92 KG of Isosafrole;  
~~At least 800 MG but less~~ Less than 1.2 G of Methylamine;  
~~At least 3.6 KG but less~~ Less than 4.8 KG of N-Acetylanthranilic Acid;  
~~At least 2.25 KG but less~~ Less than 3 KG of N-Methylephedrine;  
~~At least 2.25 KG but less~~ Less than 3 KG of N-Methylpseudoephedrine;  
~~At least 2.5 G but less~~ Less than 3.8 G of Nitroethane;  
~~At least 40 G but less~~ Less than 60 G of Norpseudoephedrine;  
~~At least 80 G but less~~ Less than 120 G of Phenylacetic Acid;  
~~At least 40 G but less~~ Less than 60 G of Piperidine;  
~~At least 1.44 KG but less~~ Less than 1.92 KG of Piperonal;  
~~At least 7.2 G but less~~ Less than 9.6 G of Propionic Anhydride;  
~~At least 1.44 KG but less~~ Less than 1.92 KG of Safrole;  
~~At least 1.8 KG but less~~ Less than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
~~At least 4.5 L but less~~ Less than 6.8 L of Gamma-butyrolactone;  
~~At least 3 G but less~~ Less than 4 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

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

(10) List I Chemicals

**Level 12**

~~Less than 2.7 KG of Anthranilic Acid;~~  
~~Less than 3.6 G of Benzaldehyde;~~

Less than 80 G of Benzyl Cyanide;  
Less than 800 MG of Ergonovine;  
Less than 1.6 G of Ergotamine;  
Less than 80 G of Ethylamine;  
Less than 8.8 G of Hydriodic Acid;  
Less than 5 G of Iodine;  
Less than 1.44 KG of Isosafrole;  
Less than 800 MG of Methylamine;  
Less than 3.6 KG of N Acetylanthranilic Acid;  
Less than 2.25 KG of N Methylphedrine;  
Less than 2.25 KG of N Methylpseudoephedrine;  
Less than 2.5 G of Nitroethane;  
Less than 40 G of Norpseudoephedrine;  
Less than 80 G of Phenylacetic Acid;  
Less than 40 G of Piperidine;  
Less than 1.44 KG of Piperonal;  
Less than 7.2 G of Propionic Anhydride;  
Less than 1.44 KG of Safrole;  
Less than 1.8 KG of 3, 4 Methyleneoxyphenyl 2-propanone;  
Less than 4.5 L of Gamma-butyrolactone;  
Less than 3 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

Less than 66 G of Acetic Anhydride;  
Less than 7.05 KG of Acetone;  
Less than 120 G of Benzyl Chloride;  
Less than 6.45 KG of Ethyl Ether;  
Less than 7.2 KG of Methyl Ethyl Ketone;  
Less than 60 G of Potassium Permanganate;  
Less than 7.8 KG of Toluene.

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\* \* \*

Commentary

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

Application Notes:

1. Cases Involving Multiple Chemicals.—

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

Example: The defendant was in possession of five kilograms of ephedrine and 300 grams of hydriodic acid. Ephedrine and hydriodic acid typically are used together in the same

manufacturing process to manufacture methamphetamine. The base offense level for each chemical is calculated separately and the chemical with the higher base offense level is used. Five kilograms of ephedrine result in a base offense level of level ~~38~~36; 300 grams of hydriodic acid result in a base offense level of level ~~26~~24. In this case, the base offense level would be level ~~38~~36.

- (B) Determining the Base Offense Level for Offenses involving Ephedrine, Pseudoephedrine, or Phenylpropanolamine.—If the offense involves two or more chemicals each of which is set forth in the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, (i) aggregate the quantities of all such chemicals, and (ii) determine the base offense level corresponding to the aggregate quantity.

Example: The defendant was in possession of 80 grams of ephedrine and 50 grams of phenylpropanolamine, an aggregate quantity of 130 grams of such chemicals. The base offense level corresponding to that aggregate quantity is level ~~32~~30.

\* \* \*

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