

PROPOSED AMENDMENT: IMPLEMENTATION OF EMERGENCY AMENDMENT REGARDING ENHANCED PENALTIES FOR AMPHETAMINE OR METHAMPHETAMINE LABORATORY OPERATORS

Synopsis of Proposed Amendment: *This proposed amendment addresses the directive in section 102 (the "substantial risk directive") of the Methamphetamine and Club Drug Anti-Proliferation Act of 2000 (the "Act"), Pub. L. 106–878.*

The Act requires the Commission to promulgate amendments under emergency amendment authority. Although the Act generally provides that the Commission shall promulgate various amendments "as soon as practicable," the substantial risk directive specifically requires that the amendment implementing the directive shall apply "to any offense occurring on or after the date that is 60 days after the date of the enactment" of the Act. Because of ex post facto concerns raised by this 60 day clause, the Commission may wish consider promulgating an amendment that implements the substantial risk directive not later than December 16, 2000.

The directive instructs the Commission to amend the federal sentencing guidelines with respect to any offense relating to the manufacture, attempt to manufacture, or conspiracy to manufacture amphetamine or methamphetamine in—

- (A) the Controlled Substances Act (21 U.S.C. § 801 et seq.);*
- (B) the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.); or*
- (C) the Maritime Drug Law Enforcement Act (46 U.S.C. App. § 1901 et seq.).*

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

(A) if the offense created a substantial risk of harm to human life (other than a life described in subparagraph (B)) or the environment, increase the base offense level for the offense—

(i) by not less than 3 offense levels above the applicable level in effect on the date of the enactment of this Act; or

(ii) if the resulting base offense level after an increase under clause (i) would be less than level 27, to not less than level 27; or

(B) if the offense created a substantial risk of harm to the life of a minor or incompetent, increase the base offense level for the offense—

(i) by not less than 6 offense levels above the applicable level in effect on the date

of the enactment of this Act; or

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

It is important to note at the outset that the directive is very specific and does not provide the Commission with general authority either to ensure that the guidelines and policy statements promulgated or amended pursuant to the Act are reasonably consistent with other relevant statutory directives and with other guidelines, or to take any other action the Commission considers necessary to carry out the directive. The absence of such provisions in the substantial risk directive is particularly important because giving full effect to the directive creates a few anomalies and structural problems that cannot be addressed in the context of the emergency amendment. Although an argument may be raised that despite the directive, the Commission's organic statute gives the Commission the authority to make any other amendments it considers necessary to maintain consistent guideline application, the Commission generally has narrowly construed its emergency amendment authority and has been mindful of the scope of the amendments made pursuant to such authority. The proposed amendment therefore is premised on a narrow interpretation of the Commission's authority under the substantial risk directive. However, the Commission can address the anomalies and structural problems under its general amendment authority when it re-promulgates the emergency amendment as a permanent amendment. (Following the description of the proposed amendment, the synopsis briefly identifies these anomalies and problems and also provides some preliminary ideas for resolving those problems.)

The pertinent aspects of the proposed amendment are as follows:

(1) Guidelines Amended.—The proposed amendment provides new enhancements in §§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) and 2D1.10 (Endangering Human Life While Illegally Manufacturing a Controlled Substance). The proposed amendment does not amend §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical) or §2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation or Prohibited Flask or Equipment). Although offenses that involve the manufacture of amphetamine or methamphetamine also are referenced to §§2D1.11 and 2D1.12, the cross reference in these guidelines, which applies if the offense involved the manufacture of a controlled substance, will result in application of §2D1.1 and accordingly, the new enhancements.

(2) Structure.—The basic structure of the proposed amendment to §§2D1.1 and 2D1.10 closely tracks the structure of the directive. Accordingly, the proposed amendment provides, in both guidelines, a three-level increase and a minimum offense level of level 27 if the offense involved the manufacture of amphetamine or methamphetamine and the offense created either a

substantial risk of harm to the environment or a substantial risk of bodily injury or death to any person (other than a minor or incompetent) (see paragraph (3) below regarding use of this language instead of "substantial risk to human life"). For offenses that create a substantial risk of bodily injury or death to a minor or incompetent, the proposed amendment provides a six-level increase and a minimum offense level of 30.

The proposed amendment also provides bracketed language in §2D1.1 concerning application of the environmental damage enhancement in subsection (b)(5). Specifically, the bracketed language specifies that subsection (b)(5) applies if the new enhancement for substantial risk of harm does not. This language is proposed because the interaction of subsection (b)(5) and the substantial risk enhancement raises a possible double counting issue. It is bracketed because whether to permit that double counting is a policy decision for the Commission to make. Additionally, the bracketed language highlights the question of whether Congress intended the substantial risk enhancement to be applied in addition to the current environmental damage enhancement, notwithstanding the possible double counting issue.

*Subsection (b)(5) was added to §2D1.1 in response to a specific directive contained in the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104–237. It provides a two-level enhancement if the offense involved either a release of a hazardous or toxic substance into the environment or the unlawful transportation or storage of a hazardous waste, regardless of the type of controlled substance involved in the offense. Notwithstanding that the substantial risk directive specifically targets the manufacture of amphetamine and methamphetamine, this directive and the enhancement in §2D1.1(b)(5) (and the corresponding legislation) address substantially the same harms. Both address the risk to the environment and public health or safety caused by a release of hazardous or toxic substances used in or produced by the manufacturing of controlled substances. The House Report for the substantial risk directive and Application Note 20 of §2D1.1, the note that corresponds to §2D1.1(b)(5), support this conclusion.¹ *See, e.g., H.R. Rep. No. 106–878 at 27 (2000) ("The committee notes the grave danger amphetamine and methamphetamine manufacturing poses to human life and the environment."); §2D1.1, Comment. (n. 20) (encouraging an upward departure in cases in which the enhancement does not adequately account for the seriousness of the environmental harm or other threat to public health or safety).**

Additionally, the language of the substantial risk directive (and therefore any enhancement that implements the directive) arguably subsumes the current environmental enhancement because of the strong likelihood that a release of a hazardous or toxic substance or the transportation of a

¹The harms are substantially similar (but not the same) because the substantial risk directive also addresses the risk of harm associated with the volatility of amphetamine and methamphetamine laboratories and the possibility of explosion.

hazardous waste also will create a substantial risk of harm to the environment or to human life.

As stated above, the bracketed language will prevent double counting (as for example, in a methamphetamine manufacturing offense in which there is a release of a toxic substance). It also will ensure that offenses that involve the manufacture of amphetamine or methamphetamine will be subject to the increased penalties intended by the Act. However, including the bracketed language may not give full effect to the directive's instruction to provide additional increases "above the appropriate level in effect on the date of the enactment of [the] Act" if Congress intended for the substantial risk enhancement to be applied in addition to the environmental damage enhancement in §2D1.1(b)(5), notwithstanding the double counting issue.

(3) Particular Language Used.—The language of the proposed enhancement is largely identical to the language of the directive except with respect to harm to human life. Instead of “substantial risk of harm to a human life”, the proposed amendment uses “substantial risk of bodily injury or death to a person”. This construct is consistent with general guideline language and in particular, is consistent with similar enhancements in the environmental guidelines. See, e.g., §§2Q1.2(b)(2), 2Q1.3(b)(2).

(4) Degree of Harm.—A legal analysis of environmental and methamphetamine manufacturing case law suggests that “bodily injury” is the appropriate minimal degree of injury to punish in the enhancement. A higher degree of injury (e.g., serious bodily injury) may eliminate application of the enhancement in certain cases, for example, cases in which fumes from the manufacture of methamphetamine are released in a residential neighborhood. The risk of harm in such a case is much less than a risk of extreme physical pain or an injury that would require medical intervention such as surgery, which is what would be factually required if the enhancement were based on a risk of serious bodily injury.

(5) Determining "Substantial Risk of Harm".—Neither the directive nor any statutory provision defines "substantial risk of harm". Because of the lack of a definition, the Team analyzed the relevant case law to determine how the courts have interpreted this term. See Vanessa Locke's memorandum, dated November ??, 2000, following proposed amendment. [INCLUDE CORRECT DATE] Based on this analysis, the Team culled a set of factors that may be relevant in determining whether a particular offense created a substantial risk of harm. These factors are presented in brackets to raise for the Commission's consideration whether it prefers to provide this guidance or leave the question of what constitutes substantial risk of harm solely to the court.

(6) Definitions.—The definition of "incompetent" is modeled after several state statutes. Although the Team looked at the federal interpretation of "incompetent", the state definitions proved more useful.

The definitions of "bodily injury" and "minor" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions), and Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse), respectively.

Please note the following: With respect to anomalies and structural problems, the proposed amendment to §2D1.1 creates an anomaly regarding relative offense level increases between the current environmental enhancement in subsection (b)(5) and the proposed substantial risk enhancement. Specifically, an offense that involved an actual release of a hazardous substance into the environment will receive a lesser offense level increase (two levels) than an offense that only created a substantial risk of harm to the environment or a substantial risk of bodily injury or death. This is an issue that can be addressed when the Commission considers re-promulgating the amendment as a permanent amendment. Although the issues and policy questions need to be more fully developed, one example of a change that the Commission may wish to make in the permanent amendment is to eliminate the requirement that the offense involve the manufacture of amphetamine or methamphetamine and restructure §2D1.1 to provide one environmental enhancement for any controlled substance offense that (A) involves the release of hazardous or toxic substances; (B) involve the transportation of hazardous wastes; or (C) otherwise creates a substantial risk of harm to the environment. This enhancement could provide a three-level increase and a minimum offense level of 27 to satisfy the substantial risk directive. This structure also would maintain compliance with the directive that resulted in the promulgation of the current environmental enhancement in §2D1.1(b)(5). The remainder of the emergency amendment could stay the same.

With respect to §2D1.10, the proposed amendment raises a double counting concern with respect to conduct that is already taken into account by the base offense level. Section 2D1.10 is the guideline for violations of 21 U.S.C. § 858 (creating a substantial risk of harm to human life while manufacturing a controlled substance). The guideline provides alternative base offense levels of 3 levels plus the level from the drug quantity table in §2D1.1 that corresponds to the quantity of the controlled substance or level 20 (whichever is greater). Both provisions provide increased penalties based on the fact that the manufacturing offense created a substantial risk of harm to human life. The proposed amendment, as required by the directive, then provides an additional three levels and a minimum offense level of level 27 for the same conduct.

This problem can be addressed when the Commission considers re-promulgating the amendment as a permanent amendment. Although the issues and policy questions have to be more fully developed, examples of changes that the Commission may wish to make to the permanent amendment include: (A) increasing the base offense level of level 20 to level 27, or providing an additional alternative base offense level of level 27 if the offense involved the manufacture of amphetamine or methamphetamine; (B) adding the three levels for substantial risk of harm to human life from the directive into the base offense level, resulting in a base offense level of six

levels plus the offense level from the drug quantity table; (C) maintaining the three-level increase for substantial risk of harm to the environment without the minimum offense level of level 27 (provided the minimum is included as an alternative base offense level); and (D) maintaining the six-level increase and minimum offense level of 30 for offenses that involve a substantial risk of harm to a minor or incompetent.

Proposed Amendment:

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

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(b) Specific Offense Characteristics

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(5) If [subsection (b)(6) does not apply and] the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.

(6) (Apply the greater):

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

(B) If the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of bodily injury or death to a person who is a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

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Commentary

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Application Notes:

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20. Hazardous or Toxic Substances.—Subsection (b)(5) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b). In some cases, the enhancement under subsection (b)(5) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).
21. Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine.—Subsection (b)(6) addresses certain risks of harm associated with the manufacture of amphetamine or methamphetamine. The enhancement in subsection (b)(6)(A) applies if the offense created a substantial risk of harm to the environment or to public health or safety. The enhancement in subsection (b)(6)(B) applies if the offense created a substantial risk of harm to the health and safety of a person who likely was unaware of the harm created by the manufacture of amphetamine or methamphetamine because of the person's age or incompetency. [In determining whether the offense created a substantial risk of (A) harm to the environment; or (B) bodily injury or death, the court may consider factors such as the following:
- (A) The quantity or volatile nature of any precursor chemicals found at the laboratory, or the volatile nature of manufacturing amphetamine or methamphetamine.
 - (B) The quantity of hazardous or toxic substances found at the laboratory.
 - (C) The manner in which hazardous or toxic substances were disposed or the likelihood of release into the environment of hazardous or toxic substances.
 - (D) The duration of the offense or size of the manufacturing operation.
 - (E) The location of the amphetamine or methamphetamine laboratory (e.g., in a residential neighborhood or a remote area) and the number of persons placed at risk of bodily injury or death.]
22. Definitions.—For purposes of subsection (b)(6):

"Bodily injury" has the meaning given that term in Application Note 1 of the Commentary to

§1B1.1 (Application Instructions).

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

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

Background:

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

The enhancements in subsection (b)(6) implements the instruction to the Commission in section 102 of Public Law 106–878.

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

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

- (1) **3** plus the offense level from the Drug Quantity Table in §2D1.1; or
- (2) **20**.

(b) Specific Offense Characteristic

(1) (Apply the greater):

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

(B) If the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of bodily injury or death to a person who is a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

Commentary

Statutory Provision: 21 U.S.C. § 858.

Application Notes:

1. Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine.—Subsection (b)(1) addresses certain risks of harm associated with the manufacture of amphetamine or methamphetamine. The enhancement in subsection (b)(1)(A) applies if the offense created a substantial risk of harm to the environment or to public health or safety. The enhancement in subsection (b)(1)(B) applies if the offense created a substantial risk of harm to the health and safety of a person who likely was unaware of the harm created by the manufacture of amphetamine or methamphetamine because of the person's age or incompetency. [In determining whether the offense created a substantial risk of (A) harm to the environment; or (B) bodily injury or death, the court may consider factors such as the following:

(A) The quantity or volatile nature of any precursor chemicals found at the laboratory, or the volatile nature of manufacturing amphetamine or methamphetamine.

(B) The quantity of hazardous or toxic substances found at the laboratory.

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

(D) The duration of the offense or size of the manufacturing operation.

(E) The location of the amphetamine or methamphetamine laboratory (e.g., in a residential neighborhood or a remote area) and the number of persons placed at risk of bodily injury or death.]

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

"Bodily injury" has the meaning given that term in Application Note 1 of the Commentary to §1B1.1 (Application Instructions), .

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

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

Background: Subsection (b)(1) implements the instruction to the Commission in section 102 of Public Law 106–878.

