

PROPOSED AMENDMENT: RE-PROMULGATION OF EMERGENCY AMENDMENT REGARDING ENHANCED PENALTIES FOR AMPHETAMINE OR METHAMPHETAMINE LABORATORY OPERATORS AS PERMANENT AMENDMENT

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 to promulgate 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.

Two options are presented.

Option 1.—Option 1 proposes to re-promulgate the emergency amendment without any changes. The pertinent parts of Option 1 are as follows:

(1) Guidelines Amended.—The 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) that also apply in the case of an attempt or a conspiracy to manufacture amphetamine or methamphetamine. The 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 in Appendix (A) (Statutory Index) 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 amendment to §§2D1.1 and 2D1.10 tracks the structure of the directive. Accordingly, in §2D1.1, the amendment provides a three-level increase and a minimum offense level of level 27 if the offense (A) involved the manufacture of amphetamine or methamphetamine; and (B) created a substantial risk of either harm to human life or the environment. For offenses that created a substantial risk of harm to the life of a minor or an incompetent, the amendment provides a six-level increase and a minimum offense level of 30.

However, the structure of the amendment in §2D1.10 differs from that in §2D1.1 with respect to the first prong of the enhancement (regarding substantial risk of harm to human life or to the environment). Specifically, the amendment provides a three-level increase and a minimum offense level of level 27 if the offense involved the manufacture of amphetamine or methamphetamine without making application of the enhancement dependent upon whether the offense also involved a substantial risk of either harm to human life or the environment. Consideration of whether the offense involved a substantial risk of harm to human life is unnecessary because §2D1.10 applies only to convictions under 21 U.S.C. § 858, and the creation of a substantial risk of harm to human life is an element of a § 858 offense. Therefore, the base offense level already takes into account the substantial risk of harm to human life. Consideration of whether the offense involved a substantial risk of harm to the environment is unnecessary because the directive predicated application of the enhancement on substantial risk of harm either to human life or to the environment, and the creation of a substantial risk of harm to human life is necessarily present because it is an element of the offense.

(3) Determining "Substantial Risk of Harm".—Neither the directive nor any statutory provision defines "substantial risk of harm". Based on an analysis of relevant case law that interpreted "substantial risk of harm", the amendment provides commentary setting

forth factors that may be relevant in determining whether a particular offense created a substantial risk of harm.

(4) Definitions.—The definition of "incompetent" is modeled after several state statutes, which proved useful for purposes of this amendment.

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

Option 2.—Option 2 proposes to expand the emergency amendment, as set forth in Option 1, to apply to the manufacture of all controlled substances rather than just amphetamine or methamphetamine. Although the directive specifically instructs the Commission to provide increased penalties for the manufacture of amphetamine and methamphetamine, the Commission may, under its general promulgation authority, expand the scope of an emergency amendment when it re-promulgates the amendment as a permanent amendment. The reason for the proposed expansion is that if the manufacture of any controlled substance creates a substantial risk of harm to human life or the environment, there is a strong argument that the increased penalties should apply regardless of the type of controlled substances involved in the offense. The pertinent parts of Option 2 are as follows:

(1) §2D1.1.—The enhancement in subsection (b)(6) is proposed to apply to the manufacture of any controlled substance, not just to the manufacture of amphetamine or methamphetamine. The expansion to all controlled substances in §2D1.1 is rather straightforward. Conforming changes are made to the Commentary, but the amendment to §2D1.1 otherwise remains the same as the emergency amendment.

(2) §2D1.10.—Option 2's proposed expansion to all controlled substances in §2D1.10 requires a restructuring of the guideline (as it was amended by the emergency amendment).

First, Option 2 proposes to increase the alternative base offense level in subsection (a)(1) from "3 plus" to "6 plus the offense level from the Drug Quantity Table in §2D1.1." This proposed increase corresponds to the proposed deletion of subsection (b)(1)(A) of the emergency amendment. As explained above in the description of Option 1 under "Structure," subsection (b)(1)(A) provides a three-level increase if "if the offense involved the manufacture of amphetamine or methamphetamine," without making application of the enhancement dependent upon whether the offense also involved a substantial risk of either harm to human life or the environment. However, if the emergency amendment is to be expanded to apply to the manufacture of all controlled substances, this enhancement no longer is appropriate. In order not to lose the three-level increase that was provided by this enhancement, the three levels from this enhancement are built into the alternative base offense level in subsection (a)(1).

Second, Option 2 proposes two alternatives for addressing the minimum offense level of level 27 that also was provided by the enhancement in subsection (b)(1)(A). Option 2(a)

increases the current alternative base offense level in subsection (a)(2) from level 20 to level 27. Although this option is consistent with expanding the entire emergency amendment to all controlled substances, the impact of this change is likely to be significant for lower level drug offenders. Option 2(b) proposes to add an additional alternative base offense level of level 27 if the offense involved the manufacture of amphetamine or methamphetamine, but maintains the alternative base offense level 20 for all other controlled substances. Although this option has less of an impact on lower level drug offenders than Option 2(a), it is not consistent with the approach otherwise taken in Option 2 of expanding the emergency amendment to cover all controlled substances.

Finally, Option 2 makes the enhancement that applies if the offense created a substantial risk of harm to the life of a minor or an incompetent applicable to all controlled substances. Conforming amendments are made to the Commentary.

Proposed Amendment:

Option 1: Re-promulgating Emergency Amendment Without Any Changes

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

* * *

[Redesignate subsection (b)(6) as subsection (b)(7) and insert the following:]

(b) Specific Offense Characteristics
* * *

(6) (Apply the greater):

- (A) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subsection (b)(6)(B); or (II) the environment, increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.
- (B) 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**.

Commentary

* * *

Application Notes:

* * *

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.—

(A) Factors to Consider.—In determining, for purposes of subsection (b)(6), whether the offense created a substantial risk of harm to human life or the environment, the court may consider factors such as the following:

(i) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, or the manner in which the chemicals or substances were stored.

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

(iii) The duration of the offense, or the extent of the manufacturing operation.

(iv) The location of the amphetamine or methamphetamine laboratory (e.g., in a residential neighborhood or a remote area) and the number of human lives placed at substantial risk of harm.

(B) Definitions.—For purposes of subsection (b)(6)(B):

"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).

Background:

* * *

The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense

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

Subsection (b)(5) implements the instruction to the Commission in section 303 of Public Law 103-237.

Subsection (b)(6) implements the instruction to the Commission in section 102 of Public Law 106-878.

Option 2: Expanding Emergency Amendment to All Controlled Substances:

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

* * *

(b) Specific Offense Characteristics

* * *

(6) (Apply the greater):

(A) If the offense (i) involved the manufacture of ~~amphetamine or methamphetamine~~ a controlled substance; and (ii) created a substantial risk of harm to (I) human life other than a life described in (b)(6)(B); or (II) the environment, increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

(B) If the offense (i) involved the manufacture of ~~amphetamine or methamphetamine~~ a controlled substance; 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**.

* * *

Commentary

* * *

Application Notes:

* * *

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 individuals 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 Controlled Substances.—

(A) Factors to Consider.—In determining, for purposes of subsection (b)(6), whether the offense created a substantial risk of harm to the environment or human life, the court may consider factors such as the following:

- (i) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, or the manner in which the chemicals or substances were stored.
- (ii) The manner in which hazardous or toxic substances were disposed, or the likelihood of release into the environment of hazardous or toxic substances.
- (iii) The duration of the offense or extent of the manufacturing operation.
- (iv) The location of the amphetamine or methamphetamine laboratory (e.g., in a residential neighborhood or a remote area) and the number of individuals placed at risk of bodily injury.

(B) Definitions.—For purposes of subsection (b)(6):

"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).

Background:

* * *

Subsections (b)(5)(A) and (B) implement the instruction to the Commission in section 303 of Public Law 103–237.

Subsections (b)(5)(C) and (b)(6) implement 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) ~~36~~ plus the offense level from the Drug Quantity Table in §2D1.1; or

[option 2(a): (2) ~~20~~27.]

[option 2(b): (2) ~~27~~, if the offense involved the manufacture of amphetamine or methamphetamine; or

~~(2)~~(3) ~~20~~, otherwise.]

(b) Specific Offense Characteristic

(1) ~~(Apply the greater):~~

~~(A) If the offense involved the manufacture of amphetamine or methamphetamine, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.~~

~~(B) 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.~~

Commentary

Statutory Provision: 21 U.S.C. § 858.

Application Note:

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

(A) Factors to Consider.—In determining, for purposes of subsections (b)(1), whether the offense created a substantial risk of harm to the life of a minor or an incompetent, the court may consider factors such as the following:

(i) *The quantity of any chemicals or hazardous or toxic substances found at the laboratory, or the manner in which the chemicals or substances were stored.*

- (ii) *The manner in which hazardous or toxic substances were disposed, or the likelihood of release into the environment of hazardous or toxic substances.*
- (iii) *The duration of the offense or extent of the manufacturing operation.*
- (iv) *The location of the amphetamine or methamphetamine laboratory (e.g., in a residential neighborhood or a remote area) and the number of individuals placed at risk of bodily injury.*

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

"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).

Background: Subsections (a)(2) and (b)(1) implements the instruction to the Commission in section 102 of Public Law 106–878.