

United States Sentencing Commission Public Meeting Minutes
August 17, 2017

Acting Chair William H. Pryor called the meeting to order at 11:00 a.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- William H. Pryor, Jr., Acting Chair
- Danny C. Reeves, Commissioner
- Rachel E. Barkow, Commissioner
- Zachary Bolitho, Commissioner Ex Officio

The following Commissioner was present via telephone:

- Charles R. Breyer, Vice Chair

The following Commissioner was not present:

- J. Patricia Wilson Smoot, Commissioner Ex Officio

The following staff participated in the meeting:

- Kathleen Grilli, General Counsel

Acting Chair Pryor thanked the public for attending the Commission's meeting and expressed the commissioners' appreciation to those attending in person as well as those watching the livestream broadcast on the Commission's website. He welcomed and encouraged the significant public interest in federal sentencing issues and the work of the Commission.

Acting Chair Pryor introduced the commissioners. Judge Charles Breyer, who was present via telephone, is a Senior District Judge for the Northern District of California and has served as a United States District Judge since 1998.

Commissioner Rachel Barkow is the Segal Family Professor of Regulatory Law and Policy at the New York University School of Law, and serves as the faculty director of the Center on the Administration of Criminal Law at the law school.

Judge Danny Reeves was appointed to the Commission this year. Judge Reeves is a District Court Judge for the Eastern District of Kentucky, and has served in that position since 2001.

Acting Chair Pryor welcomed Zachary Bolitho to the Commission as the new ex officio Commissioner from the Department of Justice. Commissioner Bolitho serves as Counsel to the Deputy Attorney General of the United States. Previously, he was an Assistant Professor at Campbell University School of Law in Raleigh, North Carolina, from 2013 to 2017. Prior to his

work as a law professor, he was an Assistant United States Attorney in the Eastern District of Tennessee from 2009 to 2013 where he served in both the Appellate and the General Crimes Sections.

Acting Chair Pryor called for a motion to adopt the December 9, 2016, public meeting minutes. Commissioner Barkow made a motion to adopt the minutes, with Vice Chair Breyer seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote with Commissioner Reeves abstaining as he was not present at the December meeting.

Acting Chair Pryor provided an update on the Commission's recent work. He reported that the Commission published several reports and publications this year, all of which can be found on its website, including the 2016 Annual Report and Source Book of Federal Sentencing Statistics. The Commission received approximately 315,000 documents for nearly 68,000 federal offenders sentenced in fiscal year 2016. The Annual Source Book provides policy makers and the public with critical federal sentencing data.

Most recently, the Acting Chair continued, the Commission published its 2017 Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System. The 2017 overview analyzes the most recently available federal sentencing data to supplement the data presented in the 2011 Mandatory Minimum Report.

Acting Chair Pryor explained that the 2017 overview found that mandatory minimum penalties continue to result in long sentences in the federal system. These penalties have a significant impact on the size and composition of the federal prison population. The overview also found significant demographic shifts in the data relating to the application of mandatory minimum penalties from 2010 to 2016. This publication is part of a series of publications about mandatory minimum penalties.

Acting Chair Pryor announced that the Commission will release more reports this year including an analysis of President Obama's Clemency Initiative that began in 2014, as well as an analysis of alternative to incarceration programs in the federal courts.

Acting Chair Pryor stated that along with the aforementioned research, the Commission continues to collect and report on sentencing data related to the retroactive application of the 2014 drug guidelines amendment, often referred to as "Drugs Minus Two." As of July, federal courts have considered 47,100 motions for retroactive application of the Drugs Minus Two amendment. The courts have approved 30,730 (65.2%) of these applications.

Before addressing the day's business and the announcement of the final priorities, Acting Chair Pryor thanked on behalf of the Commission the numerous individuals and groups who submitted thoughtful comments and recommendations during its most recent public comment period. He noted that the Commission received a record number of public comments, over 81,000 letters and emails, illustrating the continued public interest in the Commission's work.

Acting Chair Pryor called on the General Counsel, Kathleen Grilli, to advise the Commission

regarding a vote on the final policy priorities for the 2017-2018 amendment cycle.

Ms. Grilli stated that in June of this year the Commission published a Notice of Proposed Policy Priorities for the amendment cycle which would end on May 1, 2018. After reviewing public comment, the Commission finalized a Notice of Final Priorities for this amendment cycle, attached hereto as Exhibit A. She stated that a motion to adopt the Notice of Final Priorities and publish in the Federal Register would be in order.

Acting Chair Pryor called for a motion as suggested by Ms. Grilli. Commissioner Reeves made a motion to publish the Notice of Final Priorities, with Commissioner Barkow seconding. The Acting Chair called for discussion on the motion.

Acting Chair Pryor noted that the Commission's policy priorities fall into the three major categories. First, there are several broad priorities that require close collaboration among all three branches of government, chief among them the Commission's ongoing efforts to make the federal sentencing guidelines stronger and more effective. To that end, the Commission will continue its ongoing multi-year examination of the overall structure of the guidelines post-Booker, possibly including recommendations to Congress on any statutory changes and development of any guideline amendments.

As part of that examination, he continued, the Commission will study possible approaches to simplify the operation of the guidelines, promote proportionality and certainty, and reduce sentencing disparities, including demographic, geographic, and inter-judge disparities. This effort is important to ensure that the federal sentencing guidelines provide clear and effective guidance for federal courts across the country. This work will take time, he noted, and presents the Commission with a significant opportunity to collaborate with Congress, the courts, the Department of Justice, and other stakeholders.

Acting Chair Pryor stated that as part of that ongoing collaboration, the Commission will continue to study mandatory minimum penalties and will release a series of publications analyzing the impact of mandatory minimum penalties on offenders convicted of specific offense types.

The Commission will also continue its work stemming from its 2016 Report to the Congress: Career Offender Enhancements in which the Commission recommended that Congress revise the directive in title 28, United States Code, section 994(h), pertaining to career offenders to focus on offenders who commit violent offenses in either their instant federal offense or in their criminal history. The Commission's report also urged Congress to establish one definition of "crime of violence" for all criminal law purposes, and proposed that it adopt the Commission's definition of "crime of violence" as the single, uniform definition.

Acting Chair Pryor noted that the Commission's second major category is an emerging area and an urgent issue of public concern—synthetic drugs. He emphasized that the Commission is acutely aware of the increasing prevalence of synthetic drugs, including fentanyl. Within weeks of having the Commission's quorum reconstituted, it held a public hearing on synthetic drugs on

April 18, 2017 and published an issue for comment on MDMA (Ecstasy) and methyone in July. The Acting Chair observed that the Commission has already received very helpful comment about these drugs and that later during this meeting the Commission will vote to publish two issues for public comment that will focus specifically on issues related to synthetic cathinones and synthetic cannabinoids.

Acting Chair Pryor announced that the Commission is already planning a second public hearing on synthetic cathinones this fall, and another hearing soon after on synthetic cannabinoids. He added that the Commission will continue to seek input from Congress, the Department of Justice, expert scientists, law enforcement, concerned citizens, and other stakeholders as it studies this important topic – one which the Commission fully intends to tackle this amendment cycle.

Lastly, the Acting Chair stated, there are several priorities that the Commission was not able to fully consider last amendment cycle because it lost its quorum for three critical months. Implementation of federal legislation is always a top priority for the Commission. As one example, he continued, the Commission will complete its work to implement the statutory changes made by the Bipartisan Budget Act. These changes relate to fraudulent claims under certain social security programs and the Commission will discuss a proposed amendment to address this issue later in this meeting.

The Commission will also consider proposals for providing adjustments in the guidelines for first-time offenders, as well as further consideration of the availability of alternatives to incarceration for certain federal offenders.

Acting Chair Pryor stated that the Commission continues to act on the recommendations from the Tribal Issues Advisory Group. In May, the Commission released its own report detailing its review and research related to youthful offenders in the federal system. Informed by that work, the Commission will consider how juvenile sentences are treated under the criminal history guidelines. Also informed by the recommendations of the Tribal Issues Advisory Group, the Commission will consider whether to provide a uniform definition of “court protection order” that would apply throughout the guidelines.

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

Ms. Grilli stated that the next item was the first of a series of possible votes to publish proposed amendments in the Federal Register for public comment. The first proposed amendment, attached hereto as Exhibit B, responds to the Bipartisan Budget Act of 2015, Pub. L. No. 114–74 (Nov. 2, 2015), which added new subdivisions prohibiting conspiracy to commit fraud for substantive offenses that were already contained in title 42, United States Code, sections 408, 1011, and 1383(a).

The three amended statutes were already referenced in Appendix A (Statutory Index) to §2B1.1 (Fraud). The proposed amendment would also reference them to §2X1.1 (Conspiracies, Attempts, Solicitations).

The Bipartisan Budget Act also amended those statutes to add increased penalties of ten years imprisonment for certain persons who commit fraud offenses under relevant social security programs. The new increased penalties apply to all of the fraudulent conduct in subsection (a) of the three statutes.

The proposed amendment would amend §2B1.1 to address those types of cases in which a defendant was specifically convicted under the statute and the statutory maximum term of ten years applies. It provides an enhancement of either [2] or [4] levels and a minimum offense level of [12] or [14] for such cases.

The proposed amendment also adds commentary specifying whether an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) applies by bracketing two possibilities. If the new enhancement were to apply, then §3B1.3 would not, or if the enhancement applies, the adjustment is not precluded from applying. Issues for comment are also included.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on October 10, 2017, and a reply comment period closing on November 6, 2017, and granting staff technical and conforming amendment authority, would be in order.

Acting Chair Pryor called for a motion as suggested by Ms. Grilli. Commissioner Barkow made a motion to publish the proposed amendment, with Commissioner Reeves seconding. The Chair called for discussion on the motion. Hearing no discussion, the Acting Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit C, arises from the recommendations contained in the ad hoc Tribal Issues Advisory Group report that was submitted to the Commission in summer 2016. The proposed amendment contains two parts, neither of which are mutually exclusive. Part A would amend the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to set forth a non-exhaustive list of factors for the court to consider when determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate.

Part B of the proposed amendment would amend the commentary to §1B1.1 (Application Instructions) to provide a definition of court protection order derived from 18 U.S.C. § 2266(5), with a provision that it must be consistent with 18 U.S.C. § 2265(b). Each part includes issues for comment.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on October 10, 2017, and a reply comment period closing on November 6, 2017, and granting staff technical and conforming amendment authority, would be in order.

Acting Chair Pryor called for a motion as suggested by Ms. Grilli. Commissioner Reeves made a motion to publish the proposed amendment, with Commissioner Barkow seconding. The Chair called for discussion on the motion. Hearing no discussion, the Acting Chair called for a vote.

The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit D, concerned first offenders and alternatives to incarceration. This proposed amendment contained two parts, Parts A and B, either of which may be promulgated as they were not mutually exclusive.

Part A sets forth a new Chapter Four guideline, at §4C1.1 (First Offenders), that would provide lower guideline ranges for “first offenders” generally and increase the availability of alternatives to incarceration for such offenders at the lower levels of the Sentencing Table. Part A of the proposed amendment also includes two options for defining a first offender who would be eligible for a decrease under the new guideline.

Part B of the proposed amendment expands Zone B by consolidating Zones B and C. Part B also amends the Commentary to §5F1.2 (Home Detention) to remove the language that required electronic monitoring. Each part includes issues for comment.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on October 10, 2017, and a reply comment period closing on November 6, 2017, and granting staff technical and conforming amendment authority, would be in order.

Acting Chair Pryor called for a motion as suggested by Ms. Grilli. Vice Chair Breyer made a motion to publish the proposed amendment, with Commissioner Barkow seconding. The Chair called for discussion on the motion. Hearing no discussion, the Acting Chair called for a vote. The Acting Chair, Vice Chair Breyer, and Commissioner Barkow voted in favor of the motion, and Commissioner Reeves abstained. The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit E, concerns §3E1.1 (Acceptance of Responsibility). The proposed amendment responds to concerns that the commentary to §3E1.1 encourages courts to deny a reduction in sentence when a defendant pleads guilty, accepts responsibility for the offense of conviction, but unsuccessfully challenges the presentence report’s assessment of relevant conduct.

The proposed amendment amends the Commentary to §3E1.1 to revise how the defendant’s challenge of relevant conduct should be considered in determining whether the defendant has accepted responsibility for purposes of the guideline. An issue for comment is also included.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on October 10, 2017, and a reply comment period closing on November 6, 2017, and granting staff technical and conforming amendment authority, would be in order.

Acting Chair Pryor called for a motion as suggested by Ms. Grilli. Commissioner Barkow made a motion to publish the proposed amendment, with Vice Chair Breyer seconding. The Chair called for discussion on the motion. Hearing no discussion, the Acting Chair called for a vote.

The Acting Chair, Vice Chair Breyer, and Commission Barkow voted in favor of the motion, and Commissioner Reeves voted against the motion. The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit F, responds to recently enacted legislation and miscellaneous guideline issues. Part A responds to the Transnational Drug Trafficking Act of 2015, Pub. L. No. 114–154 (May 16, 2016), by amending §2B5.3 (Criminal Infringement of Copyright or Trademark).

Part B responds to the International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act, Pub. L. No. 114–119 (Feb. 8, 2016), by amending §2A3.5 (Failure to Register as a Sex Offender), §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender), and Appendix A (Statutory Index). Issues for comment are also included.

Part C responds to the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114–182 (June 22, 2016), by amending Appendix A (Statutory Index).

Part D amends §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) to clarify how the use of a computer enhancement at subsection (b)(3) interacts with its correlating commentary.

And Part E responds to the Justice for All Reauthorization Act of 2016 by amending §5D1.3 (Conditions of Supervised Release) regarding conditions of supervised release.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on October 10, 2017, and a reply comment period closing on November 6, 2017, and granting staff technical and conforming amendment authority, would be in order.

Acting Chair Pryor called for a motion as suggested by Ms. Grilli. Commissioner Reeves made a motion to publish the proposed amendment, with Commissioner Barkow seconding. The Chair called for discussion on the motion. Hearing no discussion, the Acting Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit G, makes technical changes to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) by amending §2D1.1 to replace “marihuana equivalency” in the Drug Equivalency Tables. It replaces that term throughout the guideline with the term “converted drug weight.” It also changes the title of the “Drug Equivalency Tables” to “Drug Conversion Tables.” The proposed amendment is not intended as a substantive change in policy.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on October 10, 2017, and a reply comment period closing on November 6, 2017, and granting staff technical and conforming amendment authority, would be in order.

Acting Chair Pryor called for a motion as suggested by Ms. Grilli. Commissioner Barkow made a motion to publish the proposed amendment, with Commissioner Reeves seconding. The Chair called for discussion on the motion. Hearing no discussion, the Acting Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit H, makes various technical changes to the Guidelines Manual. Part A makes certain clarifying changes to Chapter One, Part A, Subpart 1(4)(b) (Departures) and Application Note 2(A) to §2B1.1 (Theft, Property Destruction, and Fraud).

Part B makes technical changes in §§2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification), 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), 4A1.2 (Definitions and Instructions for Computing Criminal History), and 4B1.4 (Armed Career Criminal), to correct title references to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Part C of the proposed amendment makes clerical changes to correct typographical errors, and correct or add Appendix A references.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on October 10, 2017, and a reply comment period closing on November 6, 2017, and granting staff technical and conforming amendment authority, would be in order.

Acting Chair Pryor called for a motion as suggested by Ms. Grilli. Commissioner Reeves made a motion to publish the proposed amendment, with Commissioner Barkow seconding. The Chair called for discussion on the motion. Hearing no discussion, the Acting Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Acting Chair Pryor stated that the final item on the agenda was a vote on the Commission's issues for public comment.

Ms. Grilli stated that the proposed issue for comment, attached hereto as Exhibit I, relates to the Commission's priority concerning the study of synthetic cathinones and synthetic cannabinoids. In August, the Commission indicated that one its priorities will be the study of offenses involving synthetic cathinones, cannabinoids, tetrahydrocannabinol (THC), fentanyl, and fentanyl analogs.

The proposed issue for comment contains two parts, Part A and Part B. Part A focuses on issues related to synthetic cathinones. Part B focuses on issues relating to THC and synthetic

cannabinoids.

The proposed issue for comment seeks comment on factors relating to these controlled substances, including the chemical structure, the pharmacological effects, the potential for addiction and abuse, the pattern of abuse and harms associated with abuse, the patterns of trafficking and harms associated with trafficking, and additionally seeks information about whether the Commission should adopt a broad, class-based approach to synthetic drugs for sentencing purposes.

Ms. Grilli advised that a motion to publish the proposed issue for comment with a public comment period closing October 27, 2017, and granting staff technical and conforming amendment authority, would be in order.

Acting Chair Pryor called for a motion as suggested by Ms. Grilli. Commissioner Barkow made a motion to publish the proposed amendment, with Commissioner Reeves seconding. The Chair called for discussion on the motion. Hearing no discussion, the Acting Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Acting Chair Pryor reminded the public that the Commission's National Seminar on the Federal Sentencing Guidelines in Denver, Colorado will be held in September. This seminar will provide training to probation officers, prosecutors, and defense attorneys on the guidelines. The Acting Chair stated that the Commission looked forward to another big crowd in Denver where it expected over 500 attendees.

Acting Chair Pryor stated that all of the Commission's policy priorities and proposed amendments will be on the Commission website soon. He added that the Commission looked forward to working with all interested parties as we move forward to another productive year and thanked the public for joining the Commission today.

Acting Chair Pryor asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Commissioner Barkow made a motion to adjourn, with Commissioner Reeves seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 11:30 a.m.

Exhibit A

BAC2210-40

UNITED STATES SENTENCING COMMISSION

Final Priorities for Amendment Cycle

AGENCY: United States Sentencing Commission.

ACTION: Notice of final priorities.

SUMMARY: In June 2017, the Commission published a notice of proposed policy priorities for the amendment cycle ending May 1, 2018. See 82 FR 28381 (June 21, 2017). After reviewing public comment received pursuant to the notice of proposed priorities, the Commission has identified its policy priorities for the upcoming amendment cycle and hereby gives notice of these policy priorities.

FOR FURTHER INFORMATION CONTACT: Christine Leonard, Director, Office of Legislative and Public Affairs, (202) 502-4500, pubaffairs@ussc.gov.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an

independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and submits guideline amendments to Congress not later than the first day of May each year pursuant to 28 U.S.C. § 994(p).

As part of its statutory authority and responsibility to analyze sentencing issues, including operation of the federal sentencing guidelines, the Commission has identified its policy priorities for the amendment cycle ending May 1, 2018. Other factors, such as legislation requiring Commission action, may affect the Commission's ability to complete work on any or all identified priorities by May 1, 2018. Accordingly, the Commission may continue work on any or all identified priorities after that date or may decide not to pursue one or more identified priorities.

Pursuant to 28 U.S.C. § 994(g), the Commission intends to consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority.

The Commission has identified the following priorities:

(1) Continuation of its multiyear examination of the structure of the guidelines post-Booker and consideration of legislative recommendations or guideline amendments to simplify

the guidelines, while promoting proportionality and reducing sentencing disparities, and to account appropriately for the defendant’s role, culpability, and relevant conduct.

(2) Continuation of its multiyear study of offenses involving synthetic cathinones (such as methylone, MDPV, and mephedrone) and synthetic cannabinoids (such as JWH-018 and AM-2201), as well as tetrahydrocannabinol (THC), fentanyl, and fentanyl analogues, and consideration of appropriate guideline amendments, including simplifying the determination of the most closely related substance under Application Note 6 of the Commentary to §2D1.1.

(3) Continuation of its work with Congress and others to implement the recommendations of the Commission’s 2016 report to Congress, Career Offender Sentencing Enhancements, including its recommendations to revise the career offender directive at 28 U.S.C. § 994(h) to focus on offenders who have committed at least one “crime of violence” and to adopt a uniform definition of “crime of violence” applicable to the guidelines and other recidivist statutory provisions.

(4) Continuation of its work with Congress and others to implement the recommendations of the Commission’s 2011 report to Congress, Mandatory Minimum Penalties in the Federal Criminal Justice System—including its recommendations regarding the severity and scope of mandatory minimum penalties, consideration of expanding the “safety valve” at 18 U.S.C. § 3553(f), and elimination of the mandatory “stacking” of penalties under 18 U.S.C. § 924(c)—and preparation of a series of publications updating the data in the report.

(5) Continuation of its comprehensive, multiyear study of recidivism, including the circumstances that correlate with increased or reduced recidivism; consideration of developing recommendations to reduce incarceration costs and prison overcapacity, and to promote effective reentry programs; and consideration of appropriate guideline amendments, including revising Chapter Four and Chapter Five (A) to lower guideline ranges for “first offenders” and (B) to increase the availability of alternatives to incarceration for such offenders at the lower levels of the Sentencing Table.

(6) Implementation of the Bipartisan Budget Act of 2015, Pub. L. 114–74, and other legislation warranting Commission action.

(7) Continuation of its study of the May 2016 Report of the Commission’s Tribal Issues Advisory Group and consideration of appropriate guideline amendments, including (A) revising how tribal court convictions are addressed in Chapter Four and (B) providing a definition of “court protection order” that would apply throughout the guidelines.

(8) Continuation of its examination of Chapter Four, Part A (Criminal History) and consideration of amendments to revise how the guidelines (A) treat convictions for offenses committed prior to age eighteen; (B) treat revocations under §4A1.2(k) when the original sentence would not otherwise receive criminal history points because it is outside the time periods in §4A1.2(d)(2) and (e); and (C) account in §4A1.3 for instances in which the time

actually served was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score.

(9) Continuation of its study of alternatives to incarceration, preparation of a publication on the development of alternative-to-incarceration programs in federal district courts, and consideration of appropriate guideline amendments, including consolidating Zones B and C of the Sentencing Table in Chapter 5, Part A.

(10) Resolution of circuit conflicts as warranted, pursuant to the Commission's authority under 28 U.S.C. § 991(b)(1)(B) and Braxton v. United States, 500 U.S. 344 (1991).

(11) Consideration of other miscellaneous guideline application issues, including whether a defendant's denial of relevant conduct should be considered in determining whether the defendant has accepted responsibility for purposes of §3E1.1.

AUTHORITY: 28 U.S.C. § 994(a), (o); USSC Rules of Practice and Procedure 5.2.

William H. Pryor, Jr.

Acting Chair

Exhibit B

PROPOSED AMENDMENT: BIPARTISAN BUDGET ACT

Synopsis of Proposed Amendment: This proposed amendment responds to the Bipartisan Budget Act of 2015, Pub. L. 114–74 (Nov. 2, 2015), which, among other things, amended three existing criminal statutes concerned with fraudulent claims under certain Social Security programs.

The three criminal statutes amended by the Bipartisan Budget Act of 2015 are sections 208 (Penalties [for fraud involving the Federal Old-Age and Survivors Insurance Trust Fund]), 811 (Penalties for fraud [involving special benefits for certain World War II veterans]), and 1632 (Penalties for fraud [involving supplemental security income for the aged, blind, and disabled]) of the Social Security Act (42 U.S.C. §§ 408, 1011, and 1383a, respectively).

(A) Conspiracy to Commit Social Security Fraud

The Bipartisan Budget Act of 2015 added new subdivisions prohibiting conspiracy to commit fraud for substantive offenses already contained in the three statutes (42 U.S.C. §§ 408, 1011, and 1383a). For each of the three statutes, the new subdivision provides that whoever “conspires to commit any offense described in any of [the] paragraphs” enumerated shall be imprisoned for not more than five years, the same statutory maximum penalty applicable to the substantive offense.

The three amended statutes are currently referenced in Appendix A (Statutory Index) to §2B1.1 (Theft, Property Destruction, and Fraud). The proposed amendment would amend Appendix A so that sections 408, 1011, and 1383a of Title 42 are referenced not only to §2B1.1 but also to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)).

An issue for comment is provided.

(B) Increased Penalties for Certain Individuals Violating Positions of Trust

The Bipartisan Budget Act of 2015 also amended sections 408, 1011, and 1383a of Title 42 to add increased penalties for certain persons who commit fraud offenses under the relevant Social Security programs. The Act included a provision in all three statutes identifying such a person as:

a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination

A person who meets this requirement and is convicted of a fraud offense under one of the three amended statutes may be imprisoned for not more than ten years, double the otherwise applicable five-year penalty for other offenders. The new increased penalties apply to all of the fraudulent conduct in subsection (a) of the three statutes.

The proposed amendment would amend §2B1.1 to address cases in which the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies. It provides an enhancement of [4][2] levels and a minimum offense level of [14][12] for such cases. It also adds Commentary specifying whether an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) applies — bracketing two possibilities: if the enhancement applies, the adjustment does not apply; and if the enhancement applies, the adjustment is not precluded from applying.

Issues for comment are also provided.

Proposed Amendment:

(A) Conspiracy to Commit Social Security Fraud

APPENDIX A

STATUTORY INDEX

* * *

42 U.S.C. § 408	2B1.1, 2X1.1
42 U.S.C. § 1011	2B1.1, 2X1.1
42 U.S.C. § 1307(a)	2B1.1
42 U.S.C. § 1307(b)	2B1.1
42 U.S.C. § 1320a-7b	2B1.1, 2B4.1
42 U.S.C. § 1320a-8b	2X5.1, 2X5.2
42 U.S.C. § 1383(d)(2)	2B1.1
42 U.S.C. § 1383a(a)	2B1.1, 2X1.1

* * *

Issue for Comment:

1. Part A of the proposed amendment would reference the new conspiracy offenses under 42 U.S.C. §§ 408, 1011, and 1383a to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)). The Commission invites comment on whether the guidelines covered by the proposed amendment adequately account for these offenses. If not, what revisions to the guidelines would be appropriate to account for these offenses? Should the Commission reference these new offenses to other guidelines instead of, or in addition to, the guidelines covered by the proposed amendment?

(B) Increased Penalties for Certain Individuals Violating Positions of Trust

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

- (a) Base Offense Level:
 - (1) **7**, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or
 - (2) **6**, otherwise.
- (b) Specific Offense Characteristics
 - (1) If the loss exceeded \$6,500, increase the offense level as follows:

	LOSS (APPLY THE GREATEST)	INCREASE IN LEVEL
(A)	\$6,500 or less	no increase
(B)	More than \$6,500	add 2
(C)	More than \$15,000	add 4
(D)	More than \$40,000	add 6
(E)	More than \$95,000	add 8
(F)	More than \$150,000	add 10
(G)	More than \$250,000	add 12
(H)	More than \$550,000	add 14
(I)	More than \$1,500,000	add 16
(J)	More than \$3,500,000	add 18
(K)	More than \$9,500,000	add 20
(L)	More than \$25,000,000	add 22
(M)	More than \$65,000,000	add 24

(N) More than \$150,000,000	add 26
(O) More than \$250,000,000	add 28
(P) More than \$550,000,000	add 30 .

- (2) (Apply the greatest) If the offense—
- (A) (i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by **2** levels;
 - (B) resulted in substantial financial hardship to five or more victims, increase by **4** levels; or
 - (C) resulted in substantial financial hardship to 25 or more victims, increase by **6** levels.
- (3) If the offense involved a theft from the person of another, increase by **2** levels.
- (4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.
- (5) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by **2** levels.
- (6) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by **2** levels.
- (7) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than \$1,000,000, increase by **2** levels; (ii) more than \$7,000,000, increase by **3** levels; or (iii) more than \$20,000,000, increase by **4** levels.
- (8) (Apply the greater) If—
- (A) the offense involved conduct described in 18 U.S.C. § 670, increase by **2** levels; or
 - (B) the offense involved conduct described in 18 U.S.C. § 670, and the defendant was employed by, or was an agent of, an organization

in the supply chain for the pre-retail medical product, increase by 4 levels.

- (9) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.
- (10) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.
- (11) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.
- (12) If the offense involved conduct described in 18 U.S.C. § 1040, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

[Insert the following as (13) and renumber other provisions accordingly:]

- (13) If the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies, increase by [4][2] levels. If the resulting offense level is less than [14][12], increase to level [14][12].
- (13) (Apply the greater) If the offense involved misappropriation of a trade secret and the defendant knew or intended—

- (A) that the trade secret would be transported or transmitted out of the United States, increase by **2** levels; or
- (B) that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by **4** levels.

If subparagraph (B) applies and the resulting offense level is less than level **14**, increase to level **14**.

- (14) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
- (15) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
- (16) (Apply the greater) If—
 - (A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or
 - (B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; or (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees, increase by **4** levels.
 - (C) The cumulative adjustments from application of both subsections (b)(2) and (b)(16)(B) shall not exceed **8** levels, except as provided in subdivision (D).
 - (D) If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.
- (17) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by **2** levels.

(18) (A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by **2** levels.

(ii) 18 U.S.C. § 1030(a)(5)(A), increase by **4** levels.

(iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by **6** levels.

(B) If subdivision (A)(iii) applies, and the offense level is less than level **24**, increase to level **24**.

(19) If the offense involved—

(A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator,

increase by **4** levels.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or

Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

- (2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.
- (3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (*e.g.*, 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.
- (4) If the offense involved a cultural heritage resource or a paleontological resource, apply §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), if the resulting offense level is greater than that determined above.

Commentary

* * *

Application Notes:

* * *

[Insert the following note and renumber other notes accordingly:]

11. **Interaction of Subsection (b)(13) and §3B1.3.**—[If subsection (b)(13) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).][Application of subsection (b)(13) does not preclude a defendant from consideration for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).]

* * *

Issues for Comment:

1. The Bipartisan Budget Act of 2015 amended sections 408, 1011, and 1383a of Title 42 to include a provision in all three statutes increasing the statutory maximum term of imprisonment from five years to ten years for certain persons who commit fraud offenses under subsection (a) of the three statutes. The Act identifies such a person as:

a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or

causes the submission of, medical or other evidence in connection with any such determination

The Commission seeks comment on how, if at all, the guidelines should be amended to address cases in which the offense of conviction is 42 U.S.C. § 408, § 1011, or § 1383a, and the statutory maximum term of ten years' imprisonment applies because the defendant was a person described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a). Are these cases adequately addressed by existing provisions in the guidelines, such as the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill)? If so, as an alternative to the proposed amendment, should the Commission amend §2B1.1 only to provide an application note that expressly provides that, for a defendant subject to the ten years' statutory maximum in such cases, an adjustment under §3B1.3 ordinarily would apply? If not, how should the Commission amend the guidelines to address these cases?

2. The proposed amendment would amend §2B1.1 to provide an enhancement and a minimum offense level for cases in which the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies because the defendant was a person described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a). However, there may be cases in which a defendant, who meets the criteria set forth for the new statutory maximum term of ten years' imprisonment, is convicted under a general fraud statute (*e.g.*, 18 U.S.C. § 1341) for an offense involving conduct described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a).

The Commission seeks comment on whether the Commission should instead amend §2B1.1 to provide a general specific offense characteristic for such cases. For example, should the Commission provide an enhancement for cases in which the offense involved conduct described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the defendant is a person “who receives a fee or other income for services performed in connection with any determination with respect to benefits [covered by those statutory provisions] (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination”? If so, how many levels would be appropriate for such an enhancement? How should such an enhancement interact with the existing enhancements at §2B1.1 and the Chapter Three adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill)?

Exhibit C

PROPOSED AMENDMENT: TRIBAL ISSUES

Synopsis of Proposed Amendment: This proposed amendment is the result of the Commission's study of the May 2016 Report of the Commission's Tribal Issues Advisory Group, and consideration of any amendments to the *Guidelines Manual* that may be appropriate. See Report of the Tribal Issues Advisory Group (May 16, 2016), at <http://www.ussc.gov/research/research-publications/report-tribal-issues-advisory-group>.

In 2015, the Commission established the Tribal Issues Advisory Group (TIAG) as an ad hoc advisory group to the Commission. Among other things, the Commission tasked the TIAG with studying the following issues—

- (A) the operation of the federal sentencing guidelines as they relate to American Indian defendants and victims and to offenses committed in Indian Country, and any viable methods for revising the guidelines to (i) improve their operation or (ii) address particular concerns of tribal communities and courts;
- (B) whether there are disparities in the application of the federal sentencing guidelines to American Indian defendants, and, if so, how to address them;
- (C) the impact of the federal sentencing guidelines on offenses committed in Indian Country in comparison with analogous offenses prosecuted in state courts and tribal courts;
- (D) the use of tribal court convictions in the computation of criminal history scores, risk assessment, and for other purposes;
- (E) how the federal sentencing guidelines should account for protection orders issued by tribal courts; and
- (F) any other issues relating to American Indian defendants and victims, or to offenses committed in Indian Country, that the TIAG considers appropriate. See Tribal Issues Advisory Group Charter § 1(b)(3).

The Commission also directed the TIAG to present a final report with its findings and recommendations, including any recommendations that the TIAG considered appropriate on potential amendments to the guidelines and policy statements. See *id.* § 6(a). On May 16, 2016, the TIAG presented to the Commission its final report. Among the recommendations suggested in the Report, the TIAG recommends revisions to the *Guidelines Manual* relating to the use of tribal court convictions in the computation of criminal history points and how the guidelines should account for protection orders issued by tribal courts.

The proposed amendment contains two parts. The Commission is considering whether to promulgate one or both of these parts, as they are not mutually exclusive.

(A) Tribal Court Convictions

Pursuant to Chapter Four, Part A (Criminal History), sentences resulting from tribal court convictions are not counted for purposes of calculating criminal history points, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). *See* USSG §4A1.2(i). The policy statement at §4A1.3 allows for upward departures if reliable information indicates that the defendant’s criminal history category substantially underrepresents the seriousness of the defendant’s criminal history. Among the grounds for departure, the policy statement includes “[p]rior sentences not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses).” USSG §4A1.3(a)(2)(A).

As noted in the TIAG’s report, in recent years there have been important changes in tribal criminal jurisdiction. In 2010, Congress enacted the Tribal Law and Order Act of 2010 (TLOA), Pub. L. 111–211, to address high rates of violent crime in Indian Country by improving criminal justice funding and infrastructure in tribal government, and expanding the sentencing authority of tribal court systems. In 2013, the Violence Against Women Reauthorization Act of 2013 (VAWA Reauthorization), Pub. L. 113–4, was enacted to expand the criminal jurisdiction of tribes to prosecute, sentence, and convict Indians and non-Indians who assault Indian spouses or dating partners or violate a protection order in Indian Country. It also established new assault offenses and enhanced existing assault offenses. Both statutes increased criminal jurisdiction for tribal courts, but also required more robust court procedures and provided more procedural protections for defendants.

The TIAG notes in its report that “[w]hile some tribes have exercised expanded jurisdiction under TLOA and the VAWA Reauthorization, most have not done so. Given the lack of tribal resources, and the absence of significant additional funding under TLOA and the VAWA Reauthorization to date, it is not certain that more tribes will be able to do so any time soon.” TIAG Report, at 10–11. Members of the TIAG describe their experience with tribal courts as “widely varied,” expressing among their findings certain concerns about funding, perceptions of judicial bias or political influence, due process protections, and access to tribal court records. *Id.* at 11–12.

The TIAG report highlights that “[t]ribal courts occupy a unique and valuable place in the criminal justice system,” while also recognizing that “[t]ribal courts range in style”. *Id.* at 13. According to the TIAG, the differences in style and the concerns expressed above “make it often difficult for a federal court to determine how to weigh tribal court convictions in rendering a sentencing decision.” *Id.* at 11. It also asserts that “taking a single approach to the consideration of tribal court convictions would be very difficult and could potentially lead to a disparate result among Indian defendants in federal courts.” *Id.* at 12. Thus, the TIAG concludes that tribal convictions should not be counted for purposes of determining criminal history points pursuant to Chapter Four, Part A, and that “the current use of USSG §4A1.3 to depart upward in individual cases continues to allow the best formulation of ‘sufficient but not greater than necessary’ sentences for defendants, while not increasing sentencing disparities or introducing due process concerns.” *Id.* Nevertheless, the TIAG recommends that the Commission amend §4A1.3 to provide guidance and a more structured analytical framework for courts to consider when determining whether a departure is appropriate based on a defendant’s record of tribal court convictions. The guidance

recommended by the TIAG “collectively . . . reflect[s] important considerations for courts to balance the rights of defendants, the unique and important status of tribal courts, the need to avoid disparate sentences in light of disparate tribal court practices and circumstances, and the goal of accurately assessing the severity of any individual defendant’s criminal history.” *Id.* at 13.

The proposed amendment would amend the Commentary to §4A1.3 to set forth a non-exhaustive list of factors for the court to consider in determining whether, and to what extent, an upward departure based on a tribal court conviction is appropriate.

Issues for comment are also provided.

(B) Court Protection Orders

Under the *Guidelines Manual*, the violation of a court protection order is a specific offense characteristic in three Chapter Two offense guidelines. *See* USSG §§2A2.2 (Aggravated Assault), 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), and 2A6.2 (Stalking or Domestic Violence). The Commission has heard concerns that the term “court protection order” has not been defined in the guidelines and should be clarified.

The TIAG notes in its report the importance of defining “court protection order” in the guidelines, because—

[a] clear definition of that term will ensure that orders used for sentencing enhancements are the result of court proceedings assuring appropriate due process protections, that there is consistent identification and treatment of such orders, and that such orders issued by tribal courts receive treatment consistent with that of other issuing jurisdictions. TIAG Report, at 14.

The TIAG recommends that the Commission adopt a definition of “court protection order” that incorporates the statutory provisions at 18 U.S.C. §§ 2265 and 2266. Section 2266(5) provides that the term “protection order” includes:

(A) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and

(B) any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking. 18 U.S.C. § 2266(5).

Section 2265(b) provides that

A protection order issued by a State, tribal, or territorial court is consistent with this subsection if—

(1) such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and

(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights. 18 U.S.C. § 2265(b).

The proposed amendment would amend the Commentary to §1B1.1 (Application Instructions) to provide a definition of court protection order derived from 18 U.S.C. § 2266(5), with a provision that it must be consistent with 18 U.S.C. § 2265(b).

An issue for comment is also provided.

Proposed Amendment:

(A) Tribal Court Convictions

§4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)

(a) UPWARD DEPARTURES.—

(1) STANDARD FOR UPWARD DEPARTURE.—If reliable information indicates that the defendant's criminal history category substantially underrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

(2) TYPES OF INFORMATION FORMING THE BASIS FOR UPWARD DEPARTURE.—The information described in subsection (a)(1) may include information concerning the following:

(A) Prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses convictions).

- (B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.
 - (C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.
 - (D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.
 - (E) Prior similar adult criminal conduct not resulting in a criminal conviction.
- (3) PROHIBITION.—A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.
- (4) DETERMINATION OF EXTENT OF UPWARD DEPARTURE.—
- (A) IN GENERAL.—Except as provided in subdivision (B), the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's.
 - (B) UPWARD DEPARTURES FROM CATEGORY VI.—In a case in which the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.
- (b) DOWNWARD DEPARTURES.—
- (1) STANDARD FOR DOWNWARD DEPARTURE.—If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.
 - (2) PROHIBITIONS.—
 - (A) CRIMINAL HISTORY CATEGORY I.—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.

- (B) **ARMED CAREER CRIMINAL AND REPEAT AND DANGEROUS SEX OFFENDER.**—A downward departure under this subsection is prohibited for (i) an armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and (ii) a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).
- (3) **LIMITATIONS.**—
- (A) **LIMITATION ON EXTENT OF DOWNWARD DEPARTURE FOR CAREER OFFENDER.**—The extent of a downward departure under this subsection for a career offender within the meaning of §4B1.1 (Career Offender) may not exceed one criminal history category.
 - (B) **LIMITATION ON APPLICABILITY OF §5C1.2 IN EVENT OF DOWNWARD DEPARTURE TO CATEGORY I.**—A defendant whose criminal history category is Category I after receipt of a downward departure under this subsection does not meet the criterion of subsection (a)(1) of §5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if, before receipt of the downward departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category).
- (c) **WRITTEN SPECIFICATION OF BASIS FOR DEPARTURE.**—In departing from the otherwise applicable criminal history category under this policy statement, the court shall specify in writing the following:
- (1) In the case of an upward departure, the specific reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.
 - (2) In the case of a downward departure, the specific reasons why the applicable criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.

Commentary

Application Notes:

1. **Definitions.**—For purposes of this policy statement, the terms “*depart*”, “*departure*”, “*downward departure*”, and “*upward departure*” have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).
2. **Upward Departures.**—

(A) **Examples.**—An upward departure from the defendant’s criminal history category may be warranted based on any of the following circumstances:

- (i) A previous foreign sentence for a serious offense.
- (ii) Receipt of a prior consolidated sentence of ten years for a series of serious assaults.
- (iii) A similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding.
- (iv) Commission of the instant offense while on bail or pretrial release for another serious offense.

(B) **Upward Departures from Criminal History Category VI.**—In the case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant’s criminal history, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant’s criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses.

(C) **Upward Departures Based on Tribal Court Convictions.**—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following:

- (i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.
- (ii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Pub. L. 111–211 (July 29, 2010), and the Violence Against Women Reauthorization Act of 2013, Pub. L. 113–4 (March 7, 2013).
- (iii) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter.
- (iv) The conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).
- [(v) At the time the defendant was sentenced, the tribal government had formally expressed a desire that convictions from its courts should be counted for purposes of computing criminal history pursuant to the Guidelines Manual.]

3. **Downward Departures.**—A downward departure from the defendant’s criminal history category may be warranted if, for example, the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. A departure below the lower limit of the applicable guideline

range for Criminal History Category I is prohibited under subsection (b)(2)(B), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism.

Background: This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant's criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (*e.g.*, defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.

* * *

Issues for Comment:

1. Part A of the proposed amendment would provide a list of relevant factors that courts may consider, in addition to the factors set forth in §4A1.3(a), in determining whether an upward departure based on a tribal court conviction may be warranted. The Commission seeks comment on whether the factors provided in the proposed amendment are appropriate. Should any factors be deleted or changed? Should the Commission provide additional or different guidance? If so, what guidance should the Commission provide?

In particular, the Commission seeks comment on how these factors should interact with each other and with the factors already contained in §4A1.3(a). Should the Commission provide greater emphasis on one or more factors set forth in the proposed amendment? For example, how much weight should be given to factors that address due process concerns (subdivisions (i) and (ii)) in relation to the other factors provided in the proposed amendment, such as those factors relevant to preventing unwarranted double counting (subdivisions (iii) and (iv))? Should the Commission provide that in order to consider whether an upward departure based on a tribal court conviction is appropriate, and before taking into account any other factor, the court must first determine as a threshold factor that the defendant received due process protections consistent with those provided to criminal defendants under the United States Constitution?

Finally, Part A of the proposed amendment brackets the possibility of including as a factor that courts may consider in deciding whether to depart based on a tribal court conviction if, "at the time the defendant was sentenced, the tribal government had formally expressed a desire that convictions from its courts should be counted for purposes of computing criminal history pursuant to the Guidelines Manual." The Commission invites broad comment on this factor and its interaction with the other factors set forth in the proposed amendment. Is this factor relevant to the court's determination of whether to depart? What are the advantages and disadvantages of

including such a factor? How much weight should be given to this factor in relation to the other factors provided in the proposed amendment? What criteria should be used in determining when a tribal government has “formally expressed a desire” that convictions from its courts should count? How would tribal governments notify and make available such statements?

2. Pursuant to subsection (i) of §4A1.2 (Definitions and Instructions for Computing Criminal History), sentences resulting from tribal court convictions are not counted for purposes of calculating criminal history points, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). As stated above, the policy statement at §4A1.3 allows for upward departures if reliable information indicates that the defendant’s criminal history category substantially underrepresents the seriousness of the defendant’s criminal history.

The Commission invites comment on whether the Commission should consider changing how the guidelines account for sentences resulting from tribal court convictions for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History). Should the Commission consider amending §4A1.2(i) and, if so, how? For example, should the guidelines treat sentences resulting from tribal court convictions same as other sentences imposed for federal, state, and local offenses that may be used to compute criminal history points? Should the guidelines treat sentences resulting from tribal court convictions more akin to military sentences and distinguish between certain types of tribal courts? Is there a different approach the Commission should follow in addressing the use of tribal court convictions in the computation of criminal history scores?

(B) Court Protection Orders

§1B1.1. Application Instructions

* * *

Commentary

Application Notes:

1. The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):

* * *

(D) “*court protection order*” means “protection order” as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b).

(DE) “*Dangerous weapon*” means

[Part B of the proposed amendment would also redesignate succeeding paragraphs accordingly]

* * *

Issue for Comment:

1. Part B of the proposed amendment would include in the Commentary to §1B1.1 (Application Instructions) a definition of court protection order derived from 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b). Is this definition appropriate? If not, what definition, if any, should the Commission provide?

Exhibit D

PROPOSED AMENDMENT: FIRST OFFENDERS / ALTERNATIVES TO INCARCERATION

Synopsis of Proposed Amendment: This proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive.

(A) First Offenders

Part A of the proposed amendment is primarily informed by the Commission's multi-year study of recidivism, including the circumstances that correlate with increased or reduced recidivism. It is also informed by the Commission's continued study of alternatives to incarceration.

Under the *Guidelines Manual*, offenders with minimal or no criminal history are classified into Criminal History Category I. "First offenders," offenders with no criminal history, are addressed in the guidelines only by reference to Criminal History Category I. However, Criminal History Category I includes not only "first" offenders but also offenders with varying criminal histories, such as offenders with no criminal history points and those with one criminal history point. Accordingly, the following offenders are classified in the same category: (1) first time offenders with no prior convictions; (2) offenders who have prior convictions that are not counted because they were not within the time limits set forth in §4A1.2(d) and (e); (3) offenders who have prior convictions that are not used in computing the criminal history category for reasons other than their "staleness" (e.g., sentences resulting from foreign or tribal court convictions, minor misdemeanor convictions or infractions); and (4) offenders with a prior conviction that received only one criminal history point.

Part A sets forth a new Chapter Four guideline, at §4C1.1 (First Offenders), that would provide lower guideline ranges for "first offenders" generally and increase the availability of alternatives to incarceration for such offenders at the lower levels of the Sentencing Table (compared to otherwise similar offenders in Criminal History Category I). Recidivism data analyzed by the Commission indicate that "first offenders" generally pose the lowest risk of recidivism. See, e.g., U.S. Sent. Comm'n, "Recidivism Among Federal Offenders: A Comprehensive Overview," at 18 (2016), available at <http://www.ussc.gov/research/research-publications/recidivism-among-federal-offenders-comprehensive-overview>. In addition, 28 U.S.C. § 994(j) directs that alternatives to incarceration are generally appropriate for first offenders not convicted of a violent or otherwise serious offense. The new Chapter Four Guideline, in conjunction with the revision to §5C1.1 (Imposition of a Term of Imprisonment) described below, would further implement the congressional directive at section 994(j).

Part A of the proposed amendment provides two options for defining a "first offender" who would be eligible for a decrease in offense level under the new guideline. **Option 1** defines a

defendant as a “first offender” if the defendant did not receive any criminal history points from Chapter Four, Part A. **Option 2** defines a defendant as a “first offender” if the defendant has no prior convictions of any kind.

Part A also provides two options for the decrease in offense level that would apply to a first offender. **Option 1** provides a decrease of [1] level from the offense level determined under Chapters Two and Three. **Option 2** provides a decrease of [2] levels if the final offense level determined under Chapters Two and Three is less than level [16], or a decrease of [1] level if the offense level determined under Chapters Two and Three is level [16] or greater.

Part A also amends §5C1.1 (Imposition of a Term of Imprisonment) to add a new subsection (g) that provides that if (1) the defendant is determined to be a first offender under §4C1.1 (First Offender), (2) [the instant offense of conviction is not a crime of violence][the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense], and (3) the guideline range applicable to that defendant is in Zone A or Zone B of the Sentencing Table, the court ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options.

Finally, Part A of the proposed amendment also provides issues for comment.

(B) Consolidation of Zones B and C in the Sentencing Table

Part B of the proposed amendment is a result of the Commission’s continued study of alternatives to incarceration.

The *Guidelines Manual* defines and allocates sentencing options in Chapter Five (Determining the Sentence). This chapter sets forth “zones” in the Sentencing Table based on the minimum months of imprisonment in each cell. The Sentencing Table sorts all sentencing ranges into four zones, labeled A through D. Each zone allows for different sentencing options, as follows:

Zone A.—All sentence ranges within Zone A, regardless of the underlying offense level or criminal history category, are zero to six months. A sentencing court has the discretion to impose a sentence that is a fine-only, probation-only, probation with a confinement condition (home detention, community confinement, or intermittent confinement), a split sentence (term of imprisonment with term of supervised release with condition of confinement), or imprisonment. Zone A allows for probation without any conditions of confinement.

Zone B.—Sentence ranges in Zone B are from one to 15 months of imprisonment. Zone B allows for a probation term to be substituted for imprisonment, contingent upon the probation term including conditions of confinement. Zone B allows for non-prison sentences, which technically result in sentencing ranges larger than six months, because the minimum term of imprisonment is one month and the maximum terms begin at seven months. To avoid sentencing ranges exceeding six months, the guidelines require that probationary sentences in Zone B include conditions of confinement. Zone B also allows for a term of imprisonment (of at least

one month) followed by a term of supervised release with a condition of confinement (*i.e.*, a “split sentence”) or a term of imprisonment only.

Zone C.—Sentences in Zone C range from 10 to 18 months of imprisonment. Zone C allows for split sentences, which must include a term of imprisonment equivalent to at least half of the minimum of the applicable guideline range. The remaining half of the term requires supervised release with a condition of community confinement or home detention. Alternatively, the court has the option of imposing a term of imprisonment only.

Zone D.—The final zone, Zone D, allows for imprisonment only, ranging from 15 months to life.

Part B of the proposed amendment expands Zone B by consolidating Zones B and C. The expanded Zone B would include sentence ranges from one to 18 months and allow for the sentencing options described above. Although the proposed amendment would in fact delete Zone C by its consolidation with Zone B, Zone D would not be redesignated. Finally, Part B makes conforming changes to §§5B1.1 (Imposition of a Term of Probation) and 5C1.1 (Imposition of a Term of Imprisonment).

Part B also amends the Commentary to §5F1.2 (Home Detention) to remove the language instructing that (1) electronic monitoring “ordinarily should be used in connection with” home detention; (2) alternative means of surveillance may be used “so long as they are effective as electronic monitoring;” and (3) “surveillance necessary for effective use of home detention ordinarily requires” electronic monitoring.

Issues for comment are also provided.

Proposed Amendment:

(A) First Offenders

CHAPTER FOUR

CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD

* * *

PART C – FIRST OFFENDER

§4C1.1. First Offender

[Definition of “First Offender”

[Option 1:

- (a) A defendant is a first offender if the defendant did not receive any criminal history points from Chapter Four, Part A.]

[Option 2:

- (a) A defendant is a first offender if the defendant has no prior convictions of any kind.]]

[Decrease in Offense Level for First Offenders

[Option 1:

- (b) If the defendant is determined to be a first offender under subsection (a), decrease the offense level determined under Chapters Two and Three by [1] level.]

[Option 2:

- (b) If the defendant is determined to be a first offender under subsection (a), decrease the offense level as follows:
 - (1) if the offense level determined under Chapters Two and Three is less than level [16], decrease by [2] levels; or
 - (2) if the offense level determined under Chapters Two and Three is level [16] or greater, decrease by [1] level.]]

Commentary

Application Note:

1. **Cases Involving Mandatory Minimum Penalties.**—If the case involves a statutorily required minimum sentence of at least five years and the defendant meets the criteria set forth in subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), the offense level determined under this section shall be not less than level 17. See §5C1.2(b).

* * *

§5C1.1. Imposition of a Term of Imprisonment

- (a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.
- (b) If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.
- (c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by—
 - (1) a sentence of imprisonment; or
 - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or
 - (3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e).
- (d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by—
 - (1) a sentence of imprisonment; or
 - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.
- (e) Schedule of Substitute Punishments:

- (1) One day of intermittent confinement in prison or jail for one day of imprisonment (each 24 hours of confinement is credited as one day of intermittent confinement, provided, however, that one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours);
 - (2) One day of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one day of imprisonment;
 - (3) One day of home detention for one day of imprisonment.
- (f) If the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment.
- (g) In cases in which (1) the defendant is determined to be a first offender under §4C1.1 (First Offender), (2) [the instant offense of conviction is not a crime of violence][the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense], and (3) the guideline range applicable to that defendant is in Zone A or B of the Sentencing Table, the court ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options set forth in this guideline.

Commentary

Application Notes:

1. Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range specified in the Sentencing Table in Part A of this Chapter. For example, if the defendant has an Offense Level of 20 and a Criminal History Category of I, the applicable guideline range is 33–41 months of imprisonment. Therefore, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.
2. Subsection (b) provides that where the applicable guideline range is in Zone A of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is zero months), the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. Where imprisonment is not required, the court, for example, may impose a sentence of probation. In some cases, a fine appropriately may be imposed as the sole sanction.
3. Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than nine months), the court has three options:
 - (A) It may impose a sentence of imprisonment.
 - (B) It may impose a sentence of probation provided that it includes a condition of probation requiring a period of intermittent confinement, community confinement, or home detention,

or combination of intermittent confinement, community confinement, and home detention, sufficient to satisfy the minimum period of imprisonment specified in the guideline range. For example, where the guideline range is 4–10 months, a sentence of probation with a condition requiring at least four months of intermittent confinement, community confinement, or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

- (C) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 4–10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

The preceding examples illustrate sentences that satisfy the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the applicable guideline range. For example, where the guideline range is 4–10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.

- 4. Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (*i.e.*, the minimum term specified in the applicable guideline range is ten or twelve months), the court has two options:

- (A) It may impose a sentence of imprisonment.

- (B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 10–16 months, a sentence of five months imprisonment followed by a term of supervised release with a condition requiring five months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.

The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 10–16 months, both a sentence of five months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of ten months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.

- 5. Subsection (e) sets forth a schedule of imprisonment substitutes.

- 6. There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by

imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant’s criminality is related to the treatment problem to be addressed.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.

Examples: The following examples both assume the applicable guideline range is 12–18 months and the court departs in accordance with this application note. Under Zone C rules, the defendant must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug offender in Criminal History Category I and probation is not prohibited by statute. The court departs downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B felony, so probation is prohibited by statute (*see* §5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.

7. The use of substitutes for imprisonment as provided in subsections (c) and (d) is not recommended for most defendants with a criminal history category of III or above.
8. In a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the residential treatment program.
9. Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is 15 months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).

10. Application of Subsection (g).—

(A) Sentence of Probation Prohibited.—The court may not impose a sentence of probation pursuant to this provision if prohibited by statute. *See* §5B1.1 (Imposition of a Term of Probation).

(B) Definition of “Crime of Violence”.—For purposes of subsection (g), “*crime of violence*” has the meaning given that term in §4B1.2 (Definitions of Terms Used in Section 4B1.1).

(C) Sentence of Imprisonment for First Offenders.—A sentence of imprisonment may be appropriate in cases in which the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon in connection with the offense].

* * *

Issues for Comment:

1. Part A of the proposed amendment provides two options for how to define “first offender” for purposes of applying the new §4C1.1 (First Offender). Option 1 defines a defendant as a “first offender” if the defendant did not receive any criminal history points from Chapter Four, Part A. Option 2 defines a defendant as a “first offender” if the defendant has no prior convictions of any kind. The Commission seeks comment on the proposed definition. Should the Commission adopt a broader definition than either Option 1 or Option 2? Should the Commission adopt a narrower definition than either option? Should the Commission adopt a definition that is narrower than Option 1 but broader than Option 2? For example, should the Commission define “first offender” as a defendant who did not receive any criminal history points from Chapter Four, Part A and has no prior felony convictions? Should the Commission instead define “first offender” as a defendant who either has no prior convictions of any kind or has only prior convictions that are not counted under §4A1.2 for a reason other than being too remote in time? Should the Commission provide additional or different guidance for determining whether a defendant is, or is not, a first offender?
2. Part A of the proposed amendment provides two options for the decrease in offense level that would apply to a first offender. One of the options, Option 1, would provide that if the defendant is determined to be a first offender (as defined in the new guideline) a decrease of [1] level from the offense level determined under Chapters Two and Three would apply. Should the Commission limit the applicability of the adjustment to defendants with an offense level determined under Chapters Two and Three that is less than a certain number of levels? For example, should the Commission provide that if the offense level determined under Chapters Two and Three is less than level [16], the offense level shall be decreased by [1] level? What other limitations or requirements, if any, should the Commission provide for such an adjustment?
3. Part A of the proposed amendment would amend §5C1.1 (Imposition of a Term of Imprisonment) to provide that if the defendant is determined to be a first offender under the new §4C1.1 (First Offender), [the defendant’s instant offense of conviction is not a crime of violence][the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense], and the guideline range applicable to that defendant is in Zone A or Zone B of the Sentencing Table, the court ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options. Should the Commission further limit the application of such a rebuttable “presumption” and exclude certain categories of non-violent offenses? If so, what offenses should be excluded from the presumption of a non-incarceration sentence? For example, should the Commission exclude public corruption, tax, and other white-collar offenses?
4. If the Commission were to promulgate Part A of the proposed amendment, what conforming changes, if any, should the Commission make to other provisions of the *Guidelines Manual*?

(B) Consolidation of Zones B and C in the Sentencing Table

PART A – SENTENCING TABLE

The Sentencing Table used to determine the guideline range follows:

SENTENCING TABLE (in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6
	3	0-6	0-6	0-6	0-6	2-8
	4	0-6	0-6	0-6	2-8	4-10
	5	0-6	0-6	1-7	4-10	6-12
	6	0-6	1-7	2-8	6-12	9-15
	7	0-6	2-8	4-10	8-14	12-18
	8	0-6	4-10	6-12	10-16	15-21
Zone B	9	4-10	6-12	8-14	12-18	18-24
	10	6-12	8-14	10-16	15-21	21-27
	11	8-14	10-16	12-18	18-24	24-30
Zone C Deleted	12	10-16	12-18	15-21	21-27	27-33
13	12-18	15-21	18-24	24-30	30-37	33-41
Zone D	14	15-21	18-24	21-27	27-33	33-41
	15	18-24	21-27	24-30	30-37	37-46
	16	21-27	24-30	27-33	33-41	41-51
	17	24-30	27-33	30-37	37-46	46-57
	18	27-33	30-37	33-41	41-51	51-63
	19	30-37	33-41	37-46	46-57	57-71
	20	33-41	37-46	41-51	51-63	63-78
	21	37-46	41-51	46-57	57-71	70-87
	22	41-51	46-57	51-63	63-78	77-96
	23	46-57	51-63	57-71	70-87	84-105
	24	51-63	57-71	63-78	77-96	92-115
	25	57-71	63-78	70-87	84-105	100-125
	26	63-78	70-87	78-97	92-115	110-137
	27	70-87	78-97	87-108	100-125	120-150
	28	78-97	87-108	97-121	110-137	130-162
	29	87-108	97-121	108-135	121-151	140-175
	30	97-121	108-135	121-151	135-168	151-188
	31	108-135	121-151	135-168	151-188	168-210
	32	121-151	135-168	151-188	168-210	188-235
	33	135-168	151-188	168-210	188-235	210-262
	34	151-188	168-210	188-235	210-262	235-293
	35	168-210	188-235	210-262	235-293	262-327
	36	188-235	210-262	235-293	262-327	292-365
	37	210-262	235-293	262-327	292-365	324-405
	38	235-293	262-327	292-365	324-405	360-life
	39	262-327	292-365	324-405	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life

Commentary to Sentencing Table

Application Notes:

1. The Offense Level (1–43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I–VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. “*Life*” means life imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24–30 months of imprisonment.
2. In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.
3. The Criminal History Category is determined by the total criminal history points from Chapter Four, Part A, except as provided in §§4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal). The total criminal history points associated with each Criminal History Category are shown under each Criminal History Category in the Sentencing Table.

Background: The Sentencing Table previously provided four “zones,” labeled A through D, based on the minimum months of imprisonment in each cell. The Commission expanded Zone B by consolidating former Zones B and C. Zone B in the Sentencing Table now contains all guideline ranges having a minimum term of imprisonment of at least one but not more than twelve months. Although Zone C was deleted by its consolidation with Zone B, the Commission decided not to redesignate Zone D as Zone C, to avoid unnecessary confusion that may result from different meanings of “Zone C” and “Zone D” through different editions of the Guidelines Manual.

* * *

§5B1.1. Imposition of a Term of Probation

- (a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is authorized if:
 - (1) the applicable guideline range is in Zone A of the Sentencing Table;
or
 - (2) the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment).
- (b) A sentence of probation may not be imposed in the event:
 - (1) the offense of conviction is a Class A or B felony, 18 U.S.C. § 3561(a)(1);

- (2) the offense of conviction expressly precludes probation as a sentence, 18 U.S.C. § 3561(a)(2);
- (3) the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense, 18 U.S.C. § 3561(a)(3).

Commentary

Application Notes:

1. Except where prohibited by statute or by the guideline applicable to the offense in Chapter Two, the guidelines authorize, but do not require, a sentence of probation in the following circumstances:
 - (A) **Where the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months).** In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.
 - (B) **Where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than ~~nine~~twelve months).** In such cases, the court may impose probation only if it imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, where the offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2–8 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least two months of community confinement, home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months.
2. Where the applicable guideline range is in Zone ~~C or D~~ of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is ~~ten~~fifteen months or more), the guidelines do not authorize a sentence of probation. See §5C1.1 (Imposition of a Term of Imprisonment).

Background: This section provides for the imposition of a sentence of probation. The court may sentence a defendant to a term of probation in any case unless (1) prohibited by statute, or (2) where a term of imprisonment is required under §5C1.1 (Imposition of a Term of Imprisonment). Under 18 U.S.C. § 3561(a)(3), the imposition of a sentence of probation is prohibited where the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense. Although this provision has effectively abolished the use of “split sentences” imposable pursuant to the former 18 U.S.C. § 3651, the drafters of the Sentencing Reform Act noted that the functional equivalent of the split sentence could be “achieved by a more direct and logically consistent route” by providing that a defendant serve a term of imprisonment followed by a period of supervised release. (S. Rep. No. 225, 98th Cong., 1st Sess. 89 (1983)). Section 5B1.1(a)(2) provides a transition between the circumstances under which a “straight” probationary term is authorized and those where probation is prohibited.

* * *

§5C1.1. Imposition of a Term of Imprisonment

- (a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.
- (b) If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.
- (c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by—
 - (1) a sentence of imprisonment; or
 - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection ~~(e)~~(d), provided that at least one month is satisfied by imprisonment; or
 - (3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection ~~(e)~~(d).
- ~~(d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by—
 - ~~(1) a sentence of imprisonment; or~~
 - ~~(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one half of the minimum term is satisfied by imprisonment.~~~~
- (ed)** Schedule of Substitute Punishments:
 - (1) One day of intermittent confinement in prison or jail for one day of imprisonment (each 24 hours of confinement is credited as one day of intermittent confinement, provided, however, that one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours);
 - (2) One day of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one day of imprisonment;

(3) One day of home detention for one day of imprisonment.

(f) If the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment.

Commentary

Application Notes:

1. Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range specified in the Sentencing Table in Part A of this Chapter. For example, if the defendant has an Offense Level of 20 and a Criminal History Category of I, the applicable guideline range is 33–41 months of imprisonment. Therefore, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.
2. Subsection (b) provides that where the applicable guideline range is in Zone A of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is zero months), the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. Where imprisonment is not required, the court, for example, may impose a sentence of probation. In some cases, a fine appropriately may be imposed as the sole sanction.
3. Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than ~~nine~~ twelve months), the court has three options:
 - (A) It may impose a sentence of imprisonment.
 - (B) It may impose a sentence of probation provided that it includes a condition of probation requiring a period of intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community confinement, and home detention, sufficient to satisfy the minimum period of imprisonment specified in the guideline range. For example, where the guideline range is 4–10 months, a sentence of probation with a condition requiring at least four months of intermittent confinement, community confinement, or home detention would satisfy the minimum term of imprisonment specified in the guideline range.
 - (C) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 4–10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

The preceding examples illustrate sentences that satisfy the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the applicable guideline range. For example, where the guideline range is 4–10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed

by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.

~~4. Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (i.e., the minimum term specified in the applicable guideline range is ten or twelve months), the court has two options:~~

~~(A) It may impose a sentence of imprisonment.~~

~~(B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 10–16 months, a sentence of five months imprisonment followed by a term of supervised release with a condition requiring five months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.~~

~~The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 10–16 months, both a sentence of five months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of ten months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.~~

~~5~~**4.** Subsection ~~(e)~~**(d)** sets forth a schedule of imprisonment substitutes.

~~6. There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed.~~

~~In determining whether such a departure is appropriate, the court should consider, among other things, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.~~

Examples: ~~The following examples both assume the applicable guideline range is 12–18 months and the court departs in accordance with this application note. Under Zone C rules, the defendant must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug offender in Criminal History Category I and probation is not prohibited by statute. The court departs downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B~~

~~felony, so probation is prohibited by statute (see §5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.~~

75. The use of substitutes for imprisonment as provided in subsections (c) ~~and (d)~~ is not recommended for most defendants with a criminal history category of III or above.
86. In a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the residential treatment program.
97. Subsection ~~(f)~~(e) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is 15 months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection ~~(e)~~(d).

* * *

§5F1.2. Home Detention

Home detention may be imposed as a condition of probation or supervised release, but only as a substitute for imprisonment.

Commentary

Application Notes:

1. “**Home detention**” means a program of confinement and supervision that restricts the defendant to his place of residence continuously, except for authorized absences, enforced by appropriate means of surveillance by the probation office. When an order of home detention is imposed, the defendant is required to be in his place of residence at all times except for approved absences for gainful employment, community service, religious services, medical care, educational or training programs, and such other times as may be specifically authorized. Electronic monitoring is an appropriate means of surveillance ~~and ordinarily should be used in connection with~~ **for** home detention. However, alternative means of surveillance may be used ~~so long as they are as effective as electronic monitoring~~ **if appropriate**.
2. The court may impose other conditions of probation or supervised release appropriate to effectuate home detention. If the court concludes that the amenities available in the residence of a defendant would cause home detention not to be sufficiently punitive, the court may limit the amenities available.
3. The defendant’s place of residence, for purposes of home detention, need not be the place where the defendant previously resided. It may be any place of residence, so long as the owner of the residence (and any other person(s) from whom consent is necessary) agrees to any conditions that may be imposed by the court, *e.g.*, conditions that a monitoring system be installed, that there will be no “call forwarding” or “call waiting” services, or that there will be no cordless telephones or answering machines.

Background: The Commission has concluded that ~~the surveillance necessary for effective use of home detention ordinarily requires~~ **is an appropriate means of surveillance for home detention**. However, in some cases home detention may effectively be enforced without electronic

monitoring, *e.g.*, when the defendant is physically incapacitated, or where some other effective means of surveillance is available. Accordingly, the Commission has not required that electronic monitoring be a necessary condition for home detention. Nevertheless, before ordering home detention without electronic monitoring, the court should be confident that an alternative form of surveillance ~~will be equally effective~~ is appropriate considering the facts and circumstances of the defendant's case.

In the usual case, the Commission assumes that a condition requiring that the defendant seek and maintain gainful employment will be imposed when home detention is ordered.

* * *

Issues for Comment:

1. The Commission requests comment on whether the zone changes contemplated by Part B of the proposed amendment should apply to all offenses, or only to certain categories of offenses. The zone changes would increase the number of offenders who are eligible under the guidelines to receive a non-incarceration sentence. Should the Commission provide a mechanism to exempt certain offenses from these zone changes? For example, should the Commission provide a mechanism to exempt public corruption, tax, and other white-collar offenses from these zone changes (*e.g.*, to reflect a view that it would not be appropriate to increase the number of public corruption, tax, and other white-collar offenders who are eligible to receive a non-incarceration sentence)? If so, what mechanism should the Commission provide, and what offenses should be covered by it?
2. The proposed amendment would consolidate Zones B and C to create an expanded Zone B. Such an adjustment would provide probation with conditions of confinement as a sentencing option for current Zone C defendants, an option that was not available to such defendants before. The Commission seeks comment on whether the Commission should provide additional guidance to address these new Zone B defendants. If so, what guidance should the Commission provide?

Exhibit E

PROPOSED AMENDMENT: ACCEPTANCE OF RESPONSIBILITY

Synopsis of Proposed Amendment: This proposed amendment is the result of the Commission’s consideration of miscellaneous guideline application issues, including whether a defendant’s denial of relevant conduct should be considered in determining whether the defendant has accepted responsibility for purposes of §3E1.1.

Section 3E1.1 (Acceptance of Responsibility) provides for a 2-level reduction for a defendant who clearly demonstrates acceptance of responsibility. Application Note 1(A) of §3E1.1 provides as one of the appropriate considerations in determining whether a defendant “clearly demonstrate[d] acceptance of responsibility” the following:

truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility;

In addition, Application Note 3 provides further guidance on evidence that might demonstrate acceptance of responsibility, as follows:

Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (*see* Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

The Commission has heard concerns that the Commentary to §3E1.1 (particularly the provisions cited above) encourages courts to deny a reduction in sentence when a defendant pleads guilty and accepts responsibility for the offense of conviction, but unsuccessfully challenges the presentence report’s assessments of relevant conduct. These commenters suggest this has a chilling effect because defendants are concerned such objections may jeopardize their eligibility for a reduction for acceptance of responsibility.

The proposed amendment amends the Commentary to §3E1.1 to revise how a defendant's challenge to relevant conduct should be considered in determining whether the defendant has accepted responsibility for purposes of the guideline. Specifically, the proposed amendment would revise Application Note 1(A) by substituting a new sentence for the sentence that states "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." The proposed amendment includes two options for the substitute:

Option 1 would provide that "a defendant may make a non-frivolous challenge to relevant conduct without affecting his ability to obtain a reduction."

Option 2 would provide that "a defendant may make a challenge to relevant conduct without affecting his ability to obtain a reduction, unless the challenge lacks an arguable basis either in law or in fact."

An issue for comment is also provided.

Proposed Amendment:

§3E1.1. Acceptance of Responsibility

- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.
- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by **1** additional level.

Commentary

Application Notes:

1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:

[Option 1:

- (A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to

relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. ~~However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.~~ In addition, a defendant may make a non-frivolous challenge to relevant conduct without affecting his ability to obtain a reduction.;

[Option 2:

- (A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. ~~However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.~~ In addition, a defendant may make a challenge to relevant conduct without affecting his ability to obtain a reduction, unless the challenge lacks an arguable basis either in law or in fact.;
 - (B) voluntary termination or withdrawal from criminal conduct or associations;
 - (C) voluntary payment of restitution prior to adjudication of guilt;
 - (D) voluntary surrender to authorities promptly after commission of the offense;
 - (E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
 - (F) voluntary resignation from the office or position held during the commission of the offense;
 - (G) post-offense rehabilitative efforts (*e.g.*, counseling or drug treatment); and
 - (H) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.
2. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.
3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (*see* Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

4. Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.
5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.
6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. For example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.

Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. *See* section 401(g)(2)(B) of Public Law 108–21. The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.

If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion.

Background: The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense by taking, in a timely fashion, the actions listed above (or some equivalent action) is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.

Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps specified in subsection (b). Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range.

Section 401(g) of Public Law 108–21 directly amended subsection (b), Application Note 6 (including adding the first sentence of the second paragraph of that application note), and the Background Commentary, effective April 30, 2003.

* * *

Issue for Comment:

1. The Commission seeks comment on whether the Commission should amend the Commentary to §3E1.1 (Acceptance of Responsibility) to change or clarify how a defendant’s challenge to relevant conduct should be considered in determining whether a defendant has accepted responsibility for purposes of §3E1.1. If so, what changes should the Commission make to §3E1.1?

One of the options included in the proposed amendment, Option 1, would provide that “a defendant may make a non-frivolous challenge to relevant conduct without affecting his ability to obtain a reduction” under §3E1.1(a). If the Commission were to adopt Option 1, what additional guidance, if any, should the Commission provide on the meaning of “non-frivolous”? The second option included in the proposed amendment, Option 2, would provide that “a defendant may make a challenge to relevant conduct without affecting his ability to obtain a reduction, unless the challenge lacks an arguable basis either in law or in fact.” If the Commission were to adopt Option 2, should the Commission provide additional guidance on when a challenge “lacks an arguable basis either in law or in fact”? For example, should the Commission state explicitly that the fact that a challenge is unsuccessful does not by itself establish that the challenge lacked an arguable basis either in law or in fact? If the Commission were to adopt either Option 1 or Option 2, should the challenges covered by the amendment include informal challenges to relevant conduct during the sentencing process, whether or not the issues challenged are determinative to the applicable guideline range? Should the Commission broaden the proposed provision to address other sentencing considerations, such as departures or variances? Should the Commission, instead of adopting either option in the proposed amendment, remove from §3E1.1 all references to relevant conduct for which the defendant is accountable under §1B1.3, and reference only the elements of the offense of conviction?

Exhibit F

PROPOSED AMENDMENT: MISCELLANEOUS

Synopsis of Proposed Amendment: This proposed amendment responds to recently enacted legislation and miscellaneous guideline issues.

The proposed amendment contains five parts (Parts A through E). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive. They are as follows—

Part A responds to the Transnational Drug Trafficking Act of 2015, Pub. L. 114–154 (May 16, 2016), by amending §2B5.3 (Criminal Infringement of Copyright or Trademark).

Part B responds to the International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act, Pub. L. 114–119 (Feb. 8, 2016), by amending §2A3.5 (Failure to Register as a Sex Offender), §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender), and Appendix A (Statutory Index).

Part C responds to the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. 114–182 (June 22, 2016), by amending Appendix A (Statutory Index).

Part D amends §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) to clarify how the use of a computer enhancement at subsection (b)(3) interacts with its correlating commentary.

Part E responds to the Justice for All Reauthorization Act of 2016, Pub. L. 114–324 (Dec. 16, 2016), by amending §5D1.3 (Conditions of Supervised Release).

(A) Transnational Drug Trafficking Act of 2015

Synopsis of Proposed Amendment: Part A of the proposed amendment responds to the Transnational Drug Trafficking Act of 2015, Pub. L. 114–154 (May 16, 2016). The primary purpose of the Act is to enable the Department of Justice to target extraterritorial drug trafficking activity. Among other things, the Act clarified the *mens rea* requirement for offenses related to trafficking in counterfeit drugs, without changing the statutory penalties associated with such offenses. The Act amended 18 U.S.C. § 2230 (Trafficking in Counterfeit Goods or Services), which prohibits trafficking in a range of goods and services, including counterfeit drugs. The amended statute is currently referenced in Appendix A (Statutory Index) of the *Guidelines Manual* to §2B5.3 (Criminal Infringement of Copyright or Trademark).

In particular, the Act made changes relating to counterfeit drugs. First, the Act amended the penalty provision at section 2320, replacing the term “counterfeit drug” with the phrase “drug that uses a counterfeit mark on or in connection with the drug.” Second, the Act revised section 2320(f)(6) to define only the term “drug” instead of “counterfeit drug.” The amended provision defines “drug” as “a drug, as defined in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321).” The Act did not amend the definition of “counterfeit mark” contained in section 2230(f)(1), which provides that—

the term “counterfeit mark” means—

(A) a spurious mark—

- (i) that is used in connection with trafficking in any goods, services, labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature;
- (ii) that is identical with, or substantially indistinguishable from, a mark registered on the principal register in the United States Patent and Trademark Office and in use, whether or not the defendant knew such mark was so registered;
- (iii) that is applied to or used in connection with the goods or services for which the mark is registered with the United States Patent and Trademark Office, or is applied to or consists of a label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature that is designed, marketed, or otherwise intended to be used on or in connection with the goods or services for which the mark is registered in the United States Patent and Trademark Office; and
- (iv) the use of which is likely to cause confusion, to cause mistake, or to deceive; or

(B) a spurious designation that is identical with, or substantially indistinguishable from, a designation as to which the remedies of the Lanham Act are made available by reason of section 220506 of title 36

Part A of the proposed amendment amends §2B5.3(b)(5) to replace the term “counterfeit drug” with “drug that uses a counterfeit mark on or in connection with the drug.” The proposed amendment would also amend the Commentary to §2B5.3 to delete the

“counterfeit drug” definition and provide that “drug” and “counterfeit mark” have the meaning given those terms in 18 U.S.C. § 2320(f).

Proposed Amendment:

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

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
 - (1) If the infringement amount (A) exceeded \$2,500 but did not exceed \$6,500, increase by **1** level; or (B) exceeded \$6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
 - (2) If the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution, increase by **2** levels.
 - (3) If the (A) offense involved the manufacture, importation, or uploading of infringing items; or (B) defendant was convicted under 17 U.S.C. §§ 1201 and 1204 for trafficking in circumvention devices, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
 - (4) If the offense was not committed for commercial advantage or private financial gain, decrease by **2** levels, but the resulting offense level shall be not less than level **8**.
 - (5) If the offense involved a counterfeit drug drug that uses a counterfeit mark on or in connection with the drug, increase by **2** levels.
 - (6) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
 - (7) If the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause (A) the disclosure of classified information; (B) impairment of combat operations; or (C) other significant harm to (i) a combat operation, (ii) a member of the Armed Forces, or (iii) national security, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

Commentary

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

Application Notes:

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

* * *

~~“**Counterfeit drug**” has the meaning given that term in 18 U.S.C. § 2320(f)(6).~~

“**Counterfeit military good or service**” has the meaning given that term in 18 U.S.C. § 2320(f)(4).

“**Drug**” and “**counterfeit mark**” have the meaning given those terms in 18 U.S.C. § 2320(f).

* * *

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

* * *

Subsection (b)(5) implements the directive to the Commission in section 717 of Public Law 112–144.

* * *

(B) International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders

Synopsis of Proposed Amendment: Part B of the proposed amendment responds to the International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act (“International Megan’s Law”), Pub. L. 114–119 (Feb. 8, 2016). The Act added a new notification requirement to 42 U.S.C. § 16914 (Information required in [sex offender] registration). Section 16914 states that sex offenders who are required to register under the Sex Offender Registration and Notification Act (SORNA) must provide certain information for inclusion in the sex offender registry. Those provisions include the offender’s name, Social Security number, address of all residences, name and address where the offender is an employee, the name and address where the offender is a student, license plate number and description of any vehicle. The International Megan’s Law added as an additional requirement that the sex offender must provide “information relating to intended travel of the sex offender outside of the United States, including any anticipated dates and places of departure, arrival or return, carrier and flight numbers for air travel, destination country and address or other contact information therein, means and purpose of travel, and any other itinerary or other travel-related information required by the Attorney General.”

The International Megan’s Law also added a new criminal offense at 18 U.S.C. § 2250(b) (Failure to register). The new subsection (b) provides that whoever is required to register under SORNA who knowingly fails to provide the above described information required by SORNA relating to intended travel in foreign commerce and who engages or attempts to engage in the intended travel, is subject to a 10 year statutory maximum penalty. Section 2250 offenses are referenced in Appendix A (Statutory Index) to §2A3.5 (Failure to Register as a Sex Offender).

Part B of the proposed amendment amends Appendix A (Statutory Index) so the new offenses at 18 U.S.C. § 2250(b) are referenced to §2A3.5. The proposed amendment also brackets the possibility of adding a new application note to the Commentary to §2A3.5 providing that for purposes of §2A3.5(b), a defendant shall be deemed to be in a “failure to register status” during the period in which the defendant engaged in conduct described in 18 U.S.C. § 2250(a) or (b).

Finally, Part B makes clerical changes to §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender) to reflect the redesignation of 18 U.S.C. § 2250(c) by the International Megan’s Law.

Proposed Amendment:

§2A3.5. Failure to Register as a Sex Offender

- (a) Base Offense Level (Apply the greatest):
 - (1) **16**, if the defendant was required to register as a Tier III offender;

- (2) 14, if the defendant was required to register as a Tier II offender; or
- (3) 12, if the defendant was required to register as a Tier I offender.

(b) Specific Offense Characteristics

- (1) (Apply the greatest):

If, while in a failure to register status, the defendant committed—

- (A) a sex offense against someone other than a minor, increase by 6 levels;
- (B) a felony offense against a minor not otherwise covered by subdivision (C), increase by 6 levels; or
- (C) a sex offense against a minor, increase by 8 levels.

- (2) If the defendant voluntarily (A) corrected the failure to register; or (B) attempted to register but was prevented from registering by uncontrollable circumstances and the defendant did not contribute to the creation of those circumstances, decrease by 3 levels.

Commentary

Statutory Provision: 18 U.S.C. § 2250(a), (b).

Application Notes:

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

“*Minor*” means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

“*Sex offense*” has the meaning given that term in 42 U.S.C. § 16911(5).

“*Tier I offender*”, “*Tier II offender*”, and “*Tier III offender*” have the meaning given the terms “tier I sex offender”, “tier II sex offender”, and “tier III sex offender”, respectively, in 42 U.S.C. § 16911.

- 2. **Application of Subsection (b)(1).**—For purposes of subsection (b)(1), a defendant shall be deemed to be in a “failure to register status” during the period in which the defendant engaged in conduct described in 18 U.S.C. § 2250(a) or (b).]

- 3. **Application of Subsection (b)(2).**—

- (A) **In General.**—In order for subsection (b)(2) to apply, the defendant’s voluntary attempt to register or to correct the failure to register must have occurred prior to the time the defendant knew or reasonably should have known a jurisdiction had detected the failure to register.
- (B) **Interaction with Subsection (b)(1).**—Do not apply subsection (b)(2) if subsection (b)(1) also applies.

* * *

§2A3.6. Aggravated Offenses Relating to Registration as a Sex Offender

If the defendant was convicted under—

- (a) 18 U.S.C. § 2250(e)(d), the guideline sentence is the minimum term of imprisonment required by statute; or
- (b) 18 U.S.C. § 2260A, the guideline sentence is the term of imprisonment required by statute.

Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to any count of conviction covered by this guideline.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2250(e)(d), 2260A.

Application Notes:

1. **In General.**—Section 2250(e)(d) of title 18, United States Code, provides a mandatory minimum term of five years’ imprisonment and a statutory maximum term of 30 years’ imprisonment. The statute also requires a sentence to be imposed consecutively to any sentence imposed for a conviction under 18 U.S.C. § 2250(a) or (b). Section 2260A of title 18, United States Code, provides a term of imprisonment of 10 years that is required to be imposed consecutively to any sentence imposed for an offense enumerated under that section.
2. **Inapplicability of Chapters Three and Four.**—Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. *See* §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction).
3. **Inapplicability of Chapter Two Enhancement.**—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic that is based on the same conduct as the conduct comprising the conviction under 18 U.S.C. § 2250(e)(d) or § 2260A.
4. **Upward Departure.**—In a case in which the guideline sentence is determined under subsection (a), a sentence above the minimum term required by 18 U.S.C. § 2250(e)(d) is an upward departure from the guideline sentence. A departure may be warranted, for example, in

a case involving a sex offense committed against a minor or if the offense resulted in serious bodily injury to a minor.

* * *

APPENDIX A

STATUTORY INDEX

* * *

18 U.S.C. § 2250(a), (b) 2A3.5

18 U.S.C. § 2250(e)(d) 2A3.6

* * *

(C) Frank R. Lautenberg Chemical Safety for the 21st Century Act

Synopsis of Proposed Amendment: Part C of the proposed amendment responds to the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. 114–182 (June 22, 2016). The Act, among other things, amended section 16 of the Toxic Substances Control Act (15 U.S.C. § 2615) to add a new subsection that provides that any person who knowingly and willfully violates certain provisions of the Toxic Substances Control Act and who knows at the time of the violation that the violation places an individual in imminent danger of death or bodily injury shall be subject to a fine up to \$250,000, imprisonment of up to 15 years, or both.

Part C of the proposed amendment amends Appendix A (Statutory Index) so that the new provision, 15 U.S.C. § 2615(b)(2) is referenced to §2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants), while maintaining the reference to §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) for 15 U.S.C. § 2615(b)(1).

Proposed Amendment:

APPENDIX A

STATUTORY INDEX

		* * *
15 U.S.C. § 2615(b)(1)	2Q1.2	
15 U.S.C. § 2615(b)(2)	2Q1.1	
15 U.S.C. § 6821	2B1.1	
		* * *

(D) Use of a Computer Enhancement in §2G1.3

Synopsis of Proposed Amendment: Part D of the proposed amendment clarifies how the use of a computer enhancement at §2G1.3(b)(3) interacts with its corresponding commentary at Application Note 4. Section 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) applies to several offenses involving the transportation of a minor for illegal sexual activity. Subsection (b)(3) of §2G1.3 provides a 2-level enhancement if—

the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor.

Application Note 4 to §2G1.3 sets forth guidance on this enhancement providing as follows:

Subsection (b)(3) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

An application issue has arisen as to whether Application Note 4, by failing to distinguish between the two prongs of subsection (b)(3), prohibits application of the enhancement where a computer was used to solicit a third party to engage in prohibited sexual conduct with a minor.

Most courts to have addressed this issue have concluded that Application Note 4 is inconsistent with the language of §2G1.3(b)(3), and have permitted the application of the enhancement for use of a computer in third party solicitation cases. *See, e.g., United States v. Cramer*, 777 F.3d 597, 606 (2d Cir. 2015) (“We conclude that Application Note 4 is plainly inconsistent with subsection (b)(3)(B) The plain language of subsection (b)(3)(B) is clear, and there is no indication that the drafters of the Guidelines intended to limit this plain language through Application Note 4.”); *United States v. McMillian*, 777 F.3d 444, 449–50 (7th Cir. 2015) (“[The defendant] points out that Application Note 4 states that ‘Subsection (b)(3) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor.[.] But the note is wrong. The guideline section provides a 2-level enhancement whenever the defendant uses a computer to ‘entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor When an application note clashes with the guideline, the guideline prevails.’”); *United States v. Hill*, 783 F.3d 842, 846 (11th Cir. 2015) (“Because the application note is inconsistent with the plain language of U.S.S.G. § 2G1.3(b)(3)(B), the plain language of the guideline controls.”); *United States v. Pringler*, 765 F.3d 455 (5th Cir.

2014) (“[W]e hold that the commentary in application note 4 is ‘inconsistent with’ Guideline § 2G1.3(b)(3)(B), and we therefore follow the plain language of the Guideline alone.”).

Part D of the proposed amendment would amend the Commentary to §2G1.3 to clarify that the guidance contained in Application Note 4 refers only to subsection (b)(3)(A) and does not control the application of the enhancement for use of a computer in third party solicitation cases (as provided in subsection (b)(3)(B)).

Proposed Amendment:

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

(a) Base Offense Level:

- (1) **34**, if the defendant was convicted under 18 U.S.C. § 1591(b)(1);
- (2) **30**, if the defendant was convicted under 18 U.S.C. § 1591(b)(2);
- (3) **28**, if the defendant was convicted under 18 U.S.C. § 2422(b) or § 2423(a); or
- (4) **24**, otherwise.

(b) Specific Offense Characteristics

- (1) If (A) the defendant was a parent, relative, or legal guardian of the minor; or (B) the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by **2** levels.
- (2) If (A) the offense involved the knowing misrepresentation of a participant’s identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct; or (B) a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct, increase by **2** levels.
- (3) If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, increase by **2** levels.

- (4) If (A) the offense involved the commission of a sex act or sexual contact; or (B) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by **2** levels.
- (5) If (A) subsection (a)(3) or (a)(4) applies; and (B) the offense involved a minor who had not attained the age of 12 years, increase by **8** levels.

(c) Cross References

- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.
- (2) If a minor was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.
- (3) If the offense involved conduct described in 18 U.S.C. § 2241 or § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), if the resulting offense level is greater than that determined above. If the offense involved interstate travel with intent to engage in a sexual act with a minor who had not attained the age of 12 years, or knowingly engaging in a sexual act with a minor who had not attained the age of 12 years, §2A3.1 shall apply, regardless of the “consent” of the minor.

(d) Special Instruction

- (1) If the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction.

Commentary

* * *

Application Notes:

* * *

4. **Application of Subsection (b)(3)(A).**—Subsection (b)(3)(A) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3)(A) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline’s Internet site.

* * *

(E) Justice for All Reauthorization Act of 2016

Synopsis of Proposed Amendment: Part E of the proposed amendment responds to the Justice for All Reauthorization Act of 2016, Pub. L. 114–324 (Dec. 16, 2016). The Act made statutory changes to protect the rights of crime victims and to address the use of DNA and other forensic evidence. Among other things, the Act amended 18 U.S.C. § 3583, the statute addressing supervised release. Section 3583(d) requires a court, when imposing a sentence of supervised release, to impose certain specified conditions of supervised release. The Act amended section 3583(d) to require the court to include, as one of those conditions, “that the defendant make restitution in accordance with sections 3663 and 3663A [of Title 18, United States Code], or any other statute authorizing a sentence of restitution.”

Part E of the proposed amendment amends the “mandatory” condition of supervised release set forth in subsection (a)(6)(A) of §5D1.3 (Conditions of Supervised Release). It conforms §5D1.3(a)(6)(A) to section 3583(d) as amended by the Justice for All Reauthorization Act.

Proposed Amendment:

§5D1.3. Conditions of Supervised Release

(a) MANDATORY CONDITIONS

- (1) The defendant shall not commit another federal, state or local offense (*see* 18 U.S.C. § 3583(d)).
- (2) The defendant shall not unlawfully possess a controlled substance (*see* 18 U.S.C. § 3583(d)).
- (3) The defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. § 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (*see* 18 U.S.C. § 3583(d)).
- (4) The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant’s presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (*see* 18 U.S.C. § 3583(d)).

- (5) If a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (*see* 18 U.S.C. § 3624(e)).
- (6) The defendant shall (A) make restitution in accordance with ~~18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664~~ 18 U.S.C. §§ 3663 and 3663A, or any other statute authorizing a sentence of restitution; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (*see* 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule.
- (7) If the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act (*see* 18 U.S.C. § 3583(d)).
- (8) The defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

* * *

Exhibit G

PROPOSED AMENDMENT: MARIHUANA EQUIVALENCY

Synopsis of Proposed Amendment: This proposed amendment makes technical changes to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to replace the term “marihuana equivalency” which is used in the Drug Equivalency Tables when determining penalties for certain controlled substances.

The Commentary to §2D1.1 sets forth a series of Drug Equivalency Tables. These tables provide a conversion factor termed “marihuana equivalency” for certain controlled substances that is used to determine the offense level for cases in which the controlled substance involved in the offense is not specifically listed in the Drug Quantity Table, or where there is more than one controlled substance involved in the offense (whether or not listed in the Drug Quantity Table). *See* §2D1.1, comment. (n.8). The Drug Equivalency Tables are separated by drug type and schedule.

In a case involving a controlled substance that is not specifically referenced in the Drug Quantity Table, the base offense level is determined by using the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its marihuana equivalency, then finding the offense level in the Drug Quantity Table that corresponds to that quantity of marihuana. In a case involving more than one controlled substance, each of the drugs is converted into its marihuana equivalency, the converted quantities are added, and the aggregate quantity is used to find the offense level in the Drug Quantity Table.

The Commission received comment expressing concern that the term “marihuana equivalency” is misleading and results in confusion for individuals not fully versed in the guidelines. In particular, commenters suggested that the Commission should replace “marihuana equivalency” with another term.

The proposed amendment would amend §2D1.1 to replace “marihuana equivalency” as the conversion factor for determining penalties for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances, with a new value termed “converted drug weight.” Specifically, the proposed amendment would add the new conversion factor to all provisions of the Drug Quantity Table at §2D1.1(c). In addition, the proposed amendment would change the title of the “Drug Equivalency Tables” to “Drug Conversion Tables,” and revise the commentary to §2D1.1 to change all references to marihuana as a conversion factor and replace it with the new value.

All changes set forth in the proposed amendment are not intended as a substantive change in policy for §2D1.1.

Proposed Amendment:

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

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

- (1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
- (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (3) **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
- (4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels. If the resulting offense level is greater than level **32** and the defendant receives the 4-level (“minimal participant”) reduction in §3B1.2(a), decrease to level **32**.

(b) Specific Offense Characteristics

- (1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.
- (2) If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by **2** levels.

- (3) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.
- (4) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.
- (5) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.
- (6) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.
- (7) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.
- (8) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by **2** levels.
- (9) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.
- (10) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by **2** levels.
- (11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by **2** levels.
- (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 marihuana 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.

- (16) 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.

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

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

(d) Cross References

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within

the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

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

(e) Special Instruction

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

(c) DRUG QUANTITY TABLE

CONTROLLED SUBSTANCES AND QUANTITY*	BASE OFFENSE LEVEL
<p>(1) ● 90 KG or more of Heroin; ● 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; ● 90,000 KG or more of Converted Drug Weight.</p>	Level 38
<p>(2) ● At least 30 KG but less than 90 KG of Heroin; ● At least 150 KG but less than 450 KG of Cocaine; ● At least 8.4 KG but less than 25.2 KG of Cocaine Base; ● At least 30 KG but less than 90 KG of PCP, or</p>	Level 36

- at least 3 KG but less than 9 KG of PCP (actual);
- At least 15 KG but less than 45 KG of Methamphetamine, or at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or at least 1.5 KG but less than 4.5 KG of “Ice”;
- At least 15 KG but less than 45 KG of Amphetamine, or at least 1.5 KG but less than 4.5 KG of Amphetamine (actual);
- At least 300 G but less than 900 G of LSD;
- At least 12 KG but less than 36 KG of Fentanyl;
- At least 3 KG but less than 9 KG of a Fentanyl Analogue;
- At least 30,000 KG but less than 90,000 KG of Marihuana;
- At least 6,000 KG but less than 18,000 KG of Hashish;
- At least 600 KG but less than 1,800 KG of Hashish Oil;
- At least 30,000,000 units but less than 90,000,000 units of Ketamine;
- At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants;
- At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam;
- At least 30,000 KG but less than 90,000 KG of **Converted Drug Weight**.

- (3) **Level 34**
- At least 10 KG but less than 30 KG of Heroin;
 - 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;
 - At least 10,000 KG but less than 30,000 KG of **Converted Drug Weight**.

- (4) **Level 32**
- 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;
- 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;
- At least 3,000 KG but less than 10,000 KG of **Converted Drug Weight**.

- (5) **Level 30**
- 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;
 - At least 62,500 but less than 187,500 units of Flunitrazepam;
 - At least 1,000 KG but less than 3,000 KG of **Converted Drug Weight**.

- (6) **Level 28**
- 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 43,750 but less than 62,500 units of Flunitrazepam;
 - At least 700 KG but less than 1,000 KG of **Converted Drug Weight**.

- (7) **Level 26**
- 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 25,000 but less than 43,750 units of Flunitrazepam;
- At least 400 KG but less than 700 KG of **Converted Drug Weight**.

- (8) **Level 24**
- 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 6,250 but less than 25,000 units of Flunitrazepam;
 - At least 100 KG but less than 400 KG of **Converted Drug Weight**.

- (9) **Level 22**
- 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 at least 4 G but less than 5 G of Amphetamine (actual);
 - At least 800 MG but less than 1 G of LSD;
 - At least 32 G but less than 40 G of Fentanyl;
 - At least 8 G but less than 10 G of a Fentanyl Analogue;
 - At least 80 KG but less than 100 KG of Marihuana;
 - At least 16 KG but less than 20 KG of Hashish;

- At least 1.6 KG but less than 2 KG of Hashish Oil;
- At least 80,000 but less than 100,000 units of Ketamine;
- At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
- At least 5,000 but less than 6,250 units of Flunitrazepam;
- At least 80 KG but less than 100 KG of **Converted Drug Weight**.

- (10) **Level 20**
- 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;
 - 60,000 units or more of Schedule III substances (except Ketamine);
 - At least 3,750 but less than 5,000 units of Flunitrazepam;
 - At least 60 KG but less than 80 KG of **Converted Drug Weight**.

- (11) **Level 18**
- 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;
 - 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 substances (except Ketamine);
 - At least 2,500 but less than 3,750 units of Flunitrazepam;
 - At least 40 KG but less than 60 KG of **Converted Drug Weight**.

- (12) **Level 16**
- 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 substances (except
Ketamine);
- At least 1,250 but less than 2,500 units of Flunitrazepam;
- At least 20 KG but less than 40 KG of **Converted Drug Weight**.

- (13) **Level 14**
- 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 substances (except
Ketamine);
 - At least 625 but less than 1,250 units of Flunitrazepam;
 - At least 10 KG but less than 20 KG of **Converted Drug Weight**.

- (14) **Level 12**
- Less than 10 G of Heroin;
 - Less than 50 G of Cocaine;
 - Less than 2.8 G of Cocaine Base;
 - Less than 10 G of PCP, or
less than 1 G of PCP (actual);
 - Less than 5 G of Methamphetamine, or
less than 500 MG of Methamphetamine (actual), or
less than 500 MG of “Ice”;
 - Less than 5 G of Amphetamine, or

less than 500 MG of Amphetamine (actual);

- Less than 100 MG of LSD;
- Less than 4 G of Fentanyl;
- Less than 1 G of a Fentanyl Analogue;
- At least 5 KG but less than 10 KG of Marihuana;
- At least 1 KG but less than 2 KG of Hashish;
- At least 100 G but less than 200 G of Hashish Oil;
- At least 5,000 but less than 10,000 units of Ketamine;
- At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
- At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine);
- At least 312 but less than 625 units of Flunitrazepam;
- 80,000 units or more of Schedule IV substances (except Flunitrazepam);
- At least 5 KG but less than 10 KG of **Converted Drug Weight**.

- (15) ● At least 2.5 KG but less than 5 KG of Marihuana; **Level 10**
- At least 500 G but less than 1 KG of Hashish;
 - At least 50 G but less than 100 G of Hashish Oil;
 - At least 2,500 but less than 5,000 units of Ketamine;
 - At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
 - At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine);
 - At least 156 but less than 312 units of Flunitrazepam;
 - At least 40,000 but less than 80,000 units of Schedule IV substances (except Flunitrazepam);
 - At least 2.5 KG but less than 5 KG of **Converted Drug Weight**.

- (16) ● At least 1 KG but less than 2.5 KG of Marihuana; **Level 8**
- 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 substances (except Ketamine);
 - 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;
 - At least 1 KG but less than 2.5 KG of **Converted Drug Weight**.

- (17) ● Less than 1 KG of Marihuana; **Level 6**
- Less than 200 G of Hashish;
 - Less than 20 G of Hashish Oil;
 - Less than 1,000 units of Ketamine;
 - Less than 1,000 units of Schedule I or II Depressants;
 - Less than 1,000 units of Schedule III substances (except Ketamine);
 - Less than 16,000 units of Schedule IV substances (except Flunitrazepam);
 - Less than 160,000 units of Schedule V substances;
 - Less than 1 KG of **Converted Drug Weight**.
-

***Notes to Drug Quantity Table:**

- (A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.
- (B) The terms “**PCP (actual)**”, “**Amphetamine (actual)**”, and “**Methamphetamine (actual)**” refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

The terms “**Hydrocodone (actual)**” and “**Oxycodone (actual)**” refer to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.

- (C) “**Ice**,” for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.
- (D) “**Cocaine base**,” for the purposes of this guideline, means “crack.” “**Crack**” is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.
- (E) In the case of an offense involving marijuana plants, treat each plant, regardless of sex, as equivalent to 100 grams of marijuana. *Provided*, however, that if the actual weight of the marijuana is greater, use the actual weight of the marijuana.
- (F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one “**unit**” means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one “**unit**” means 0.5 milliliters. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (*e.g.*, patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 milligrams of an anabolic steroid is one “unit”.
- (G) In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 milligrams of LSD for the purposes of the Drug Quantity Table.

- (H) **Hashish**, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(31)), (ii) at least two of the following: cannabiniol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).
- (I) **Hashish oil**, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(31)), (ii) at least two of the following: cannabiniol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.
- (J) The term “**Converted Drug Weight**,” for purposes of this guideline, refers to a nominal reference designation that is to be used as a conversion factor in the Drug Conversion Tables set forth in the Commentary below, to determine the offense level for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances.

Commentary

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

Application Notes:

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

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

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

2. **“Plant”**.—For purposes of the guidelines, a **“plant”** is an organism having leaves and a readily observable root formation (e.g., a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).
3. **Classification of Controlled Substances**.—Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement

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

4. **Applicability to “Counterfeit” Substances.**—The statute and guideline also apply to “*counterfeit*” substances, which are defined in 21 U.S.C. § 802 to mean controlled substances that are falsely labeled so as to appear to have been legitimately manufactured or distributed.
5. **Determining Drug Types and Drug Quantities.**—Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. *See* §1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

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

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

6. **Analogues and Controlled Substances Not Referenced in this Guideline.**—Any reference to a particular controlled substance in these guidelines includes all salts, isomers, all salts of isomers, and, except as otherwise provided, any analogue of that controlled substance. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed. For purposes of this guideline “*analogue*” has the meaning given the term “controlled substance analogue” in 21 U.S.C. § 802(32). In determining the appropriate sentence, the court also may consider whether the same quantity of analogue produces a greater effect on the central nervous system than the controlled substance for which it is an analogue.

In the case of a controlled substance that is not specifically referenced in this guideline, determine the base offense level using the ~~marihuana equivalency~~ converted drug weight of the most closely related controlled substance referenced in this guideline. *See Application Note 8.* In determining the most closely related controlled substance, the court shall, to the extent practicable, consider the following:

- (A) Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.
- (B) Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.
- (C) Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.
7. **Multiple Transactions or Multiple Drug Types.**—Where there are multiple transactions or multiple drug types, the quantities of drugs are to be added. Tables for making the necessary conversions are provided below.
8. **Use of Drug Equivalency Conversion 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 marijuana. In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:
- (i) Use the Drug Equivalency Conversion Tables to ~~convert the quantity~~ find the converted drug weight of the controlled substance involved in the offense to its equivalent quantity of marijuana.
 - (ii) Find the equivalent quantity of marijuana corresponding converted drug weight in the Drug Quantity Table.
 - (iii) Use the offense level that corresponds to the equivalent quantity of marijuana converted drug weight determined above as the base offense level for the controlled substance involved in the offense.
- (See also Application Note 6.) For example, in the Drug Equivalency Conversion Tables set forth in this Note, 1 gram of a substance containing oxycodone, a Schedule I opiate, converts to an equivalent quantity of 5 kilograms of marijuana converted drug weight. In a case involving 100 grams of oxycodone, the equivalent quantity of marijuana converted drug weight would be 500 kilograms, which corresponds to a base offense level of 26 in the Drug Quantity Table.
- (B) **Combining Differing Controlled Substances.**—The Drug Equivalency Conversion 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 marijuana equivalent converted drug weight, 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 marijuana equivalency converted drug weights assigned in the Drug Equivalency Conversion Tables are “capped” at specified amounts (*e.g.*, the combined equivalent converted weight of all Schedule V controlled

substances shall not exceed 2.49 kilograms of ~~marihuana~~ converted drug weight). 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~~ converted drug weight for each schedule separately (subject to the cap, if any, applicable to that schedule). Then add the ~~marihuana equivalencies~~ converted drug weights to determine the combined ~~marihuana equivalency~~ converted drug weight (subject to the cap, if any, applicable to the combined amounts).

Note: Because of the statutory equivalences, the ratios in the Drug ~~Equivalency Conversion~~ 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 20) and 250 milligrams of a substance containing LSD (Level 16). The PCP converts to 70 kilograms of ~~marihuana~~ converted drug weight; the LSD converts to 25 kilograms of ~~marihuana~~ converted drug weight. The total is therefore ~~equivalent~~ converts to 95 kilograms of ~~marihuana~~ converted drug weight, for which the Drug Quantity Table provides an offense level of 22.
- (ii) The defendant is convicted of selling 500 grams of marihuana (Level 6) and 10,000 units of diazepam (Level 6). The amount of marihuana converts to 500 grams of converted drug weight. The diazepam, a Schedule IV drug, is ~~equivalent~~ converts to 625 grams of ~~marihuana~~ converted drug weight. The total, 1.125 kilograms of ~~marihuana~~ converted drug weight, has an offense level of 8 in the Drug Quantity Table.
- (iii) The defendant is convicted of selling 80 grams of cocaine (Level 14) and 2 grams of cocaine base (Level 12). The cocaine is ~~equivalent~~ converts to 16 kilograms of ~~marihuana~~ converted drug weight, and the cocaine base is ~~equivalent~~ converts to 7.142 kilograms of ~~marihuana~~ converted drug weight. The total is therefore ~~equivalent~~ converts to 23.142 kilograms of ~~marihuana~~ converted drug weight, which has an offense level of 16 in the Drug Quantity Table.
- (iv) The defendant is convicted of selling 76,000 units of a Schedule III substance, 200,000 units of a Schedule IV substance, and 600,000 units of a Schedule V substance. The ~~marihuana equivalency~~ converted drug weight for the Schedule III substance is 76 kilograms of ~~marihuana~~ (below the cap of 79.99 kilograms of ~~marihuana~~ converted drug weight set forth as the maximum ~~equivalent~~ converted weight for Schedule III substances). The ~~marihuana equivalency~~ converted drug weight for the Schedule IV substance is subject to a cap of 9.99 kilograms of ~~marihuana~~ set forth as the maximum ~~equivalent~~ converted weight for Schedule IV substances (without the cap it would have been 12.5 kilograms). The ~~marihuana equivalency~~ converted drug weight for the Schedule V substance is subject to the cap of 2.49 kilograms of ~~marihuana~~ set forth as the maximum ~~equivalent~~ converted weight for Schedule V substances (without the cap it would have been 3.75 kilograms). The combined ~~equivalent~~ converted weight, determined by adding together the above amounts, is subject to the cap of 79.99 kilograms of ~~marihuana~~ converted drug weight set forth as the maximum combined ~~equivalent~~ converted weight for Schedule III, IV, and V substances. Without the cap, the combined ~~equivalent~~ converted weight would have been 88.48 (76 + 9.99 + 2.49) kilograms.

(D) **Drug Equivalency Conversion Tables.—**

SCHEDULE I OR II OPIATES*	CONVERTED DRUG WEIGHT
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/Dihydromorphinone =	2.5 kg-of marihuana
1 gm of Levorphanol =	2.5 kg-of marihuana
1 gm of Meperidine/Pethidine =	50 gm-of marihuana
1 gm of Methadone =	500 gm-of marihuana
1 gm of 6-Monoacetylmorphine =	1 kg-of marihuana
1 gm of Morphine =	500 gm-of marihuana
1 gm of Oxycodone (actual) =	6700 gm-of marihuana
1 gm of Oxymorphone =	5 kg-of marihuana
1 gm of Racemorphan =	800 gm-of marihuana
1 gm of Codeine =	80 gm-of marihuana
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm-of marihuana
1 gm of Ethylmorphine =	165 gm-of marihuana
1 gm of Hydrocodone (actual) =	6700 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)*	CONVERTED DRUG WEIGHT
1 gm of Cocaine =	200 gm-of marihuana
1 gm of N-Ethylamphetamine =	80 gm-of marihuana
1 gm of Fenethylamine =	40 gm-of marihuana
1 gm of Amphetamine =	2 kg-of marihuana
1 gm of Amphetamine (Actual) =	20 kg-of marihuana
1 gm of Methamphetamine =	2 kg-of marihuana
1 gm of Methamphetamine (Actual) =	20 kg-of marihuana
1 gm of "Ice" =	20 kg-of marihuana
1 gm of Khat =	.01 gm-of marihuana
1 gm of 4-Methylaminorex ("Euphoria") =	100 gm-of marihuana
1 gm of Methylphenidate (Ritalin) =	100 gm-of marihuana
1 gm of Phenmetrazine =	80 gm-of marihuana
1 gm Phenylacetone/P ₂ P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm-of marihuana
1 gm Phenylacetone/P ₂ P (in any other case) =	75 gm-of marihuana
1 gm 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)*	CONVERTED DRUG WEIGHT
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/DM =	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-Methylenedioxyamphetamine/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	CONVERTED DRUG WEIGHT
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 **	CONVERTED DRUG WEIGHT
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)	CONVERTED DRUG WEIGHT
1 unit of a Schedule I or II Depressant (except gamma-hydroxybutyric acid) =	1 gm-of marihuana

GAMMA-HYDROXYBUTYRIC ACID	CONVERTED DRUG WEIGHT
1 ml of gamma-hydroxybutyric acid =	8.8 gm-of marihuana

SCHEDULE III SUBSTANCES (EXCEPT KETAMINE)***	CONVERTED DRUG WEIGHT
1 unit of a Schedule III Substance =	1 gm-of marijuana
*** <i>Provided</i> , that the combined equivalent converted weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 79.99 kilograms of marijuana converted drug weight.	

KETAMINE	CONVERTED DRUG WEIGHT
1 unit of ketamine =	1 gm-of marijuana

SCHEDULE IV SUBSTANCES (EXCEPT FLUNITRAZEPAM)****	CONVERTED DRUG WEIGHT
1 unit of a Schedule IV Substance (except Flunitrazepam) =	0.0625 gm-of marijuana
**** <i>Provided</i> , that the combined equivalent converted weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 9.99 kilograms of marijuana converted drug weight.	

SCHEDULE V SUBSTANCES*****	CONVERTED DRUG WEIGHT
1 unit of a Schedule V Substance =	0.00625 gm-of marijuana
***** <i>Provided</i> , that the combined equivalent converted weight of Schedule V substances shall not exceed 2.49 kilograms of marijuana converted drug weight.	

LIST I CHEMICALS (RELATING TO THE MANUFACTURE OF AMPHETAMINE OR METHAMPHETAMINE)*****	CONVERTED DRUG WEIGHT
1 gm of Ephedrine =	10 kg-of marijuana
1 gm of Phenylpropanolamine =	10 kg-of marijuana
1 gm of Pseudoephedrine =	10 kg-of marijuana
***** <i>Provided</i> , that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.	

DATE RAPE DRUGS (EXCEPT FLUNITRAZEPAM, GHB, OR KETAMINE)	CONVERTED DRUG WEIGHT
1 ml of 1,4-butanediol =	8.8 gm marijuana
1 ml of gamma butyrolactone =	8.8 gm marijuana

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

MEASUREMENT CONVERSION TABLE	
	1 oz = 28.35 gm
	1 lb = 453.6 gm
	1 lb = 0.4536 kg
	1 gal = 3.785 liters
	1 qt = 0.946 liters
	1 gm = 1 ml (liquid)
	1 liter = 1,000 ml
	1 kg = 1,000 gm
	1 gm = 1,000 mg

1 grain = 64.8 mg.

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

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

HALLUCINOGENS	
MDA	250 mg
MDMA	250 mg
Mescaline	500 mg
PCP*	5 mg
Peyote (dry)	12 gm
Peyote (wet)	120 gm
Psilocin*	10 mg
Psilocybe mushrooms (dry)	5 gm
Psilocybe mushrooms (wet)	50 gm
Psilocybin*	10 mg
2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*	3 mg
MARIHUANA	
1 marihuana cigarette	0.5 gm
STIMULANTS	
Amphetamine*	10 mg
Methamphetamine*	5 mg
Phenmetrazine (Preludin)*	75 mg

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

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

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

11. **Application of Subsections (b)(1) and (b)(2).**—

(A) **Application of Subsection (b)(1).**—Definitions of “*firearm*” and “*dangerous weapon*” are found in the Commentary to §1B1.1 (Application Instructions). The enhancement for weapon possession in subsection (b)(1) reflects the increased danger of violence when drug

traffickers possess weapons. The enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at the defendant's residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to §2D1.1; see §§2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), and 2D1.12(c)(1).

- (B) **Interaction of Subsections (b)(1) and (b)(2).**—The enhancements in subsections (b)(1) and (b)(2) 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). However, in a case in which the defendant merely possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence, subsection (b)(2) would not apply.
12. **Application of Subsection (b)(5).**—If the offense involved importation of amphetamine or methamphetamine, and an adjustment from subsection (b)(3) applies, do not apply subsection (b)(5).
13. **Application of Subsection (b)(7).**—For purposes of subsection (b)(7), “*mass-marketing by means of an interactive computer service*” means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(7) would apply to a defendant who operated a web site to promote the sale of Gamma-hydroxybutyric Acid (GHB) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. “*Interactive computer service*”, for purposes of subsection (b)(7) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).
14. **Application of Subsection (b)(8).**—For purposes of subsection (b)(8), “*masking agent*” means a substance that, when taken before, after, or in conjunction with an anabolic steroid, prevents the detection of the anabolic steroid in an individual's body.
15. **Application of Subsection (b)(9).**—For purposes of subsection (b)(9), “*athlete*” means an individual who participates in an athletic activity conducted by (A) an intercollegiate athletic association or interscholastic athletic association; (B) a professional athletic association; or (C) an amateur athletic organization.
16. **Application of Subsection (b)(11).**—Subsection (b)(11) does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant. Such conduct is covered by §3C1.1 (Obstructing or Impeding the Administration of Justice) and, if applicable, §2D1.1(b)(15)(D).
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).

19. **Application of Subsection (b)(14).**—Subsection (b)(14) applies to offenses that involve the cultivation of marihuana 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).

20. **Application of Subsection (b)(15).**—

(A) **Distributing to a Specified Individual or Involving Such an Individual in the Offense (Subsection (b)(15)(B)).**—If the defendant distributes a controlled substance to an individual or involves an individual in the offense, as specified in subsection (b)(15)(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)(15)(C)).**—Subsection (b)(15)(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)(15)(C).

(C) **Pattern of Criminal Conduct Engaged in as a Livelihood (Subsection (b)(15)(E)).**—For purposes of subsection (b)(15)(E), “*pattern of criminal conduct*” and “*engaged in as a livelihood*” have the meaning given such terms in §4B1.3 (Criminal Livelihood).

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

22. **Application of Subsection (e)(1).**—

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

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

23. **Interaction with §3B1.3.**—A defendant who used special skills in the commission of the offense may be subject to an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill). Certain professionals often occupy essential positions in drug trafficking schemes. These

professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense. Additionally, an enhancement under §3B1.3 ordinarily would apply in a case in which the defendant used his or her position as a coach to influence an athlete to use an anabolic steroid. Likewise, an adjustment under §3B1.3 ordinarily would apply in a case in which the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility. *See* 21 U.S.C. § 822(g).

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

24. **Cases Involving Mandatory Minimum Penalties.**—Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be “waived” and a lower sentence imposed (including a downward departure), as provided in 28 U.S.C. § 994(n), by reason of a defendant’s “substantial assistance in the investigation or prosecution of another person who has committed an offense.” *See* §5K1.1 (Substantial Assistance to Authorities). In addition, 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. *See* §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).
25. **Imposition of Consecutive Sentence for 21 U.S.C. § 860a or § 865.**—Sections 860a and 865 of title 21, United States Code, require the imposition of a mandatory consecutive term of imprisonment of not more than 20 years and 15 years, respectively. In order to comply with the relevant statute, the court should determine the appropriate “total punishment” and divide the sentence on the judgment form between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. § 860a or § 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. § 860a or § 865. For example, if the applicable adjusted guideline range is 151–188 months and the court determines a “total punishment” of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. § 860a or § 865 would achieve the “total punishment” in a manner that satisfies the statutory requirement of a consecutive sentence.
26. **Cases Involving “Small Amount of Marihuana for No Remuneration.”**—Distribution of “a small amount of marihuana for no remuneration”, 21 U.S.C. § 841(b)(4), is treated as simple possession, to which §2D2.1 applies.
27. **Departure Considerations.**—
 - (A) **Downward Departure Based on Drug Quantity in Certain Reverse Sting Operations.**—If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant’s purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.
 - (B) **Upward Departure Based on Drug Quantity.**—In an extraordinary case, an upward departure above offense level 38 on the basis of drug quantity may be warranted. For example, an upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level 38. Similarly, in the case of a controlled substance for which the maximum offense level is less than level 38, an upward departure may be

warranted if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance.

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

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 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 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.

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

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

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

medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in *Chapman v. United States*, 500 U.S. 453 (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)).

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

The last sentence of subsection (a)(5) implements the directive to the Commission in section 7(1) of Public Law 111–220.

Subsection (b)(2) implements the directive to the Commission in section 5 of Public Law 111–220.

Subsection (b)(3) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.

Subsection (b)(11) implements the directive to the Commission in section 6(1) of Public Law 111–220.

Subsection (b)(12) implements the directive to the Commission in section 6(2) of Public Law 111–220.

Subsection (b)(13)(A) implements the instruction to the Commission in section 303 of Public Law 103–237.

Subsections (b)(13)(C)(ii) and (D) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106–310.

Subsection (b)(15) implements the directive to the Commission in section 6(3) of Public Law 111–220.

Subsection (b)(16) implements the directive to the Commission in section 7(2) of Public Law 111–220.

* * *

Exhibit H

PROPOSED AMENDMENT: TECHNICAL

Synopsis of Amendment: This proposed amendment makes various technical changes to the *Guidelines Manual*.

Part A of the proposed amendment makes certain clarifying changes to two guidelines. First, the proposed amendment amends Chapter One, Part A, Subpart 1(4)(b) (Departures) to provide an explanatory note addressing the fact that §5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. Second, the proposed amendment makes minor clarifying changes to Application Note 2(A) to §2B1.1 (Theft, Property Destruction, and Fraud), to make clear that, for purposes of subsection (a)(1)(A), an offense is “referenced to this guideline” if §2B1.1 is the applicable Chapter Two guideline specifically referenced in Appendix A (Statutory Index) for the offense of conviction.

Part B of the proposed amendment makes technical changes in §§2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification), 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), 4A1.2 (Definitions and Instructions for Computing Criminal History), and 4B1.4 (Armed Career Criminal), to correct title references to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Part C of the proposed amendment makes clerical changes to—

- (1) the Commentary to §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)), to correct a typographical error by inserting a missing word in Application Note 4;
- (2) subsection (d)(6) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), to correct a typographical error in the line referencing Pseudoephedrine;
- (3) subsection (e)(2) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), to correct a punctuation mark under the heading relating to List I Chemicals;
- (4) the Commentary to §2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities) captioned “Statutory Provisions,” to add a missing section symbol and a reference to Appendix A (Statutory Index);
- (5) the Commentary to §2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants) captioned “Statutory Provisions,” to add a missing reference to 42 U.S.C. § 7413(c)(5) and a reference to Appendix A (Statutory Index);

- (6) the Commentary to §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) captioned “Statutory Provisions,” to add a specific reference to 42 U.S.C. § 7413(c)(1)–(4);
- (7) the Commentary to §2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification) captioned “Statutory Provisions,” to add a specific reference to 42 U.S.C. § 7413(c)(1)–(4);
- (8) subsection (a)(4) to §5D1.3. (Conditions of Supervised Release), to change an inaccurate reference to “probation” to “supervised release”; and
- (9) the lines referencing “18 U.S.C. § 371” and “18 U.S.C. § 1591” in Appendix A (Statutory Index), to rearrange the order of certain Chapter Two guidelines references to place them in proper numerical order.

Proposed Amendment:

(A) Clarifying Changes

CHAPTER ONE

**INTRODUCTION, AUTHORITY,
AND GENERAL APPLICATION PRINCIPLES**

PART A – INTRODUCTION AND AUTHORITY

* * *

1. ORIGINAL INTRODUCTION TO THE GUIDELINES MANUAL

* * *

4. The Guidelines’ Resolution of Major Issues (Policy Statement)

* * *

(b) Departures.

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a “heartland,” a set of typical cases embodying the conduct

that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), the last sentence of §5K2.12 (Coercion and Duress), and §5K2.19 (Post-Sentencing Rehabilitative Efforts)* list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

*Note: Section 5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. (See USSG App. C, amendment 768.)

* * *

(d) Probation and Split Sentences.

The statute provides that the guidelines are to “reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . .” 28 U.S.C. § 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission’s view are “serious.”

The Commission’s solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through eight, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels nine and ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one-half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.*

*Note: Although the Commission had not addressed “single acts of aberrant behavior” at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (See Supplement to Appendix C USSG App. C, amendment 603.)

* * *

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level:

- (1) **7**, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or
- (2) **6**, otherwise.

* * *

Commentary

* * *

Application Notes:

2. Application of Subsection (a)(1).—

- (A) **“Referenced to this Guideline”**.—For purposes of subsection (a)(1), an offense is **“referenced to this guideline”** if (i) this guideline is the applicable Chapter Two guideline specifically referenced in Appendix A (Statutory Index) for the offense of conviction, as determined under the provisions of §1B1.2 (Applicable Guidelines) ~~for the offense of conviction~~; or (ii) in the case of a conviction for conspiracy, solicitation, or attempt to which §2X1.1 (Attempt, Solicitation, or Conspiracy) applies, this guideline is the appropriate guideline for the offense the defendant was convicted of conspiring, soliciting, or attempting to commit.
- (B) **Definition of “Statutory Maximum Term of Imprisonment”**.—For purposes of this guideline, **“statutory maximum term of imprisonment”** means the maximum term of imprisonment authorized for the offense of conviction, including any increase in that maximum term under a statutory enhancement provision.
- (C) **Base Offense Level Determination for Cases Involving Multiple Counts**.—In a case involving multiple counts sentenced under this guideline, the applicable base offense level is determined by the count of conviction that provides the highest statutory maximum term of imprisonment.

* * *

(B) Title References to §4A1.3

§2Q1.3. Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

* * *

Commentary

* * *

Application Notes:

* * *

8. Where a defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. *See* §4A1.3 (~~Adequacy of Criminal History Category~~ **Departures Based on Inadequacy of Criminal History Category (Policy Statement)**).

* * *

§2R1.1. Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors

* * *

Commentary

* * *

Application Notes:

* * *

7. In the case of a defendant with previous antitrust convictions, a sentence at the maximum of the applicable guideline range, or an upward departure, may be warranted. *See* §4A1.3 (~~Adequacy of Criminal History Category~~ **Departures Based on Inadequacy of Criminal History Category (Policy Statement)**).

* * *

§4A1.2. Definitions and Instructions for Computing Criminal History

* * *

(h) FOREIGN SENTENCES

Sentences resulting from foreign convictions are not counted, but may be considered under §4A1.3 (~~Adequacy of Criminal History Category~~ **Departures Based on Inadequacy of Criminal History Category (Policy Statement)**).

(i) TRIBAL COURT SENTENCES

Sentences resulting from tribal court convictions are not counted, but may be considered under §4A1.3 (~~Adequacy of Criminal History Category~~Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

(j) EXPUNGED CONVICTIONS

Sentences for expunged convictions are not counted, but may be considered under §4A1.3 (~~Adequacy of Criminal History Category~~Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

* * *

Commentary

Application Notes:

* * *

- 6. **Reversed, Vacated, or Invalidated Convictions.**—Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted. With respect to the current sentencing proceeding, this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (e.g., 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions).

Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 (~~Adequacy of Criminal History Category~~Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

* * *

- 8. **Applicable Time Period.**—Section 4A1.2(d)(2) and (e) establishes the time period within which prior sentences are counted. As used in §4A1.2(d)(2) and (e), the term “*commencement of the instant offense*” includes any relevant conduct. See §1B1.3 (Relevant Conduct). If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (~~Adequacy of Criminal History Category~~Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

* * *

§4B1.4. Armed Career Criminal

* * *

Commentary

* * *

Background: This section implements 18 U.S.C. § 924(e), which requires a minimum sentence of imprisonment of fifteen years for a defendant who violates 18 U.S.C. § 922(g) and has three previous convictions for a violent felony or a serious drug offense. If the offense level determined under this section is greater than the offense level otherwise applicable, the offense level determined under this section shall be applied. A minimum criminal history category (Category IV) is provided, reflecting that each defendant to whom this section applies will have at least three prior convictions for serious offenses. In some cases, the criminal history category may not adequately reflect the defendant's criminal history; see §4A1.3 (Adequacy of Criminal History Category Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

* * *

(C) Clerical Changes

§1B1.13. Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)

* * *

Commentary

Application Notes:

4. **Motion by the Director of the Bureau of Prisons.**—A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A). The Commission encourages the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1. The court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction), after considering the factors set forth in 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement, such as the defendant’s medical condition, the defendant’s family circumstances, and whether the defendant is a danger to the safety of any other person or to the community.

This policy statement shall not be construed to confer upon the defendant any right not otherwise recognized in law.

* * *

§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	BASE OFFENSE LEVEL
----------	--------------------

* * *

- | | |
|---|----------|
| (6) At least 70 G but less than 100 G of Ephedrine;
At least 70 G but less than 100 G of Phenylpropanolamine;
At least 70 G but less than 100 G of Pseudoephedrine Pseudoephedrine. | Level 28 |
|---|----------|

* * *

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

* * *

(2) **List I Chemicals**

Level 28

At least 890 G but less than 2.7 KG of Benzaldehyde;
At least 20 KG but less than 60 KG of Benzyl Cyanide;
At least 200 G but less than 600 G of Ergonovine;
At least 400 G but less than 1.2 KG of Ergotamine;
At least 20 KG but less than 60 KG of Ethylamine;
At least 2.2 KG but less than 6.6 KG of Hydriodic Acid;
At least 1.3 KG but less than 3.9 KG of Iodine;
At least 320 KG but less than 960 KG of Isosafrole;
At least 200 G but less than 600 G of Methylamine;
At least 500 KG but less than 1500 KG of N-Methylephedrine;
At least 500 KG but less than 1500 KG of N-Methylpseudoephedrine;
At least 625 G but less than 1.9 KG of Nitroethane;
At least 10 KG but less than 30 KG of Norpseudoephedrine;
At least 20 KG but less than 60 KG of Phenylacetic Acid;
At least 10 KG but less than 30 KG of Piperidine;
At least 320 KG but less than 960 KG of Piperonal;
At least 1.6 KG but less than 4.8 KG of Propionic Anhydride;
At least 320 KG but less than 960 KG of Safrole;
At least 400 KG but less than 1200 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 1135.5 L but less than 3406.5 L of Gamma-butyrolactone;
At least 714 G 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.

* * *

§2M2.1. Destruction of, or Production of Defective, War Material, Premises, or Utilities

(a) Base Offense Level: **32**

Commentary

Statutory Provisions: 18 U.S.C. §§ 2153, 2154; 42 U.S.C. § 2284; 49 U.S.C. § 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2Q1.1. Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants

(a) Base Offense Level: **24**

Commentary

Statutory Provisions: 18 U.S.C. § 1992(b)(3); 33 U.S.C. § 1319(c)(3); 42 U.S.C. §§ 6928(e), 7413(c)(5). For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

§2Q1.2. Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce

* * *

Commentary

Statutory Provisions: 7 U.S.C. §§ 136j–136l; 15 U.S.C. §§ 2614 and 2615; 33 U.S.C. §§ 1319(c)(1), (2), 1321(b)(5), 1517(b); 42 U.S.C. §§ 300h-2, 6928(d), 7413(c)(1)–(4), 9603(b), (c), (d); 43 U.S.C. §§ 1350, 1816(a), 1822(b); 49 U.S.C. §§ 5124, 46312. For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

§2Q1.3. Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

* * *

Commentary

Statutory Provisions: 33 U.S.C. §§ 403, 406, 407, 411, 1319(c)(1), (c)(2), 1415(b), 1907, 1908; 42 U.S.C. § 7413(c)(1)–(4). For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

§5D1.3. Conditions of Supervised Release

(a) MANDATORY CONDITIONS

* * *

- (4) The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation **supervised release** and at least two periodic drug tests

thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (*see* 18 U.S.C. § 3583(d)).

* * *

APPENDIX A

STATUTORY INDEX

* * *

18 U.S.C. § 371 2A1.5, 2C1.1 (if conspiracy to defraud by interference with governmental functions), ~~2T1.9~~, 2K2.1 (if a conspiracy to violate 18 U.S.C. § 924(c)), **2T1.9**, 2X1.1

* * *

18 U.S.C. § 1591 2G1.1, ~~2G2.1~~, 2G1.3, **2G2.1**

* * *

Exhibit I

REQUEST FOR PUBLIC COMMENT: DRUGS

In August 2016, the Commission indicated that one of its priorities would be the “[s]tudy of offenses involving MDMA/Ecstasy, synthetic cannabinoids (such as JWH-018 and AM-2201), and synthetic cathinones (such as Methylone, MDPV, and Mephedrone), and consideration of any amendments to the *Guidelines Manual* that may be appropriate in light of the information obtained from such study.” See U.S. Sentencing Comm’n, “Notice of Final Priorities,” 81 FR 58004 (Aug. 24, 2016). On August 17, 2017, the Commission revised the priority to study offenses of offenses involving synthetic cathinones (such as methylone, MDPV, and mephedrone) and synthetic cannabinoids (such as JWH-018 and AM-2201), as well as tetrahydrocannabinol (THC), fentanyl, and fentanyl analogues. The Commission also stated that, as part of the study, the Commission will consider possible approaches to simplify the determination of the most closely related substance under Application Note 6 of the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). The Commission expects to solicit comment several times during the study period from experts and other members of the public.

On December 19, 2016, the Commission published a notice inviting general comment on synthetic cathinones (MDPV, methylone, and mephedrone) and synthetic cannabinoids (JWH-018 and AM-2201), as well as about the application of the factors the Commission traditionally considers when determining the marijuana equivalencies for specific controlled substances to the substances under study. See U.S. Sentencing Comm’n, “Request for Public Comment,” 81 FR 92021 (Dec. 19, 2016).

On April 18, 2017, the Commission held a public hearing relating to this priority. The Commission received testimony from experts on the synthetic drugs related to the study, including testimony about their chemical structure, pharmacological effects, trafficking patterns, and community impact.

On June 21, 2017, the Commission published a second notice requesting public comment on issues specifically related to MDMA/ecstasy and methylone, one of the synthetic cathinones included in the Commission’s study. See U.S. Sentencing Comm’n, “Request for Public Comment,” 82 FR 28382 (June 21, 2017).

As part of its continuing work on this priority, the Commission is publishing this third request for public comment. The request for public comment contains two parts (Part A and Part B). Part A focuses on issues related to synthetic cathinones. Part B focuses on issues related to tetrahydrocannabinol (THC) and synthetic cannabinoids.

In addition to the substance-specific topics discussed below, the Commission anticipates that its work will continue to be guided by the factors the Commission traditionally considers when determining the marijuana equivalencies for specific controlled substances, including their chemical structure, pharmacological effects, legislative and scheduling

history, potential for addiction and abuse, the patterns of abuse and harms associated with their abuse, and the patterns of trafficking and harms associated with their trafficking.

The Commission will also consider possible approaches to simplify the determination of the most closely related substance under Application Note 6 of the Commentary to §2D1.1. The Commission has received comment from the public suggesting that questions regarding “the most closely related controlled substance” arise frequently in cases involving the substances included in the study, and that the Application Note 6 process requires courts to hold extensive hearings to receive expert testimony on behalf of the government and the defendant.

The synthetic cannabinoids and synthetic cathinones included in the study are not specifically listed in either the Drug Quantity Table or the Drug Equivalency Tables in §2D1.1. For this reason, in cases involving these substances, courts are required by Application Note 6 of the Commentary to §2D1.1 to “determine the base offense level using the marijuana equivalency of the most closely related controlled substance referenced in [§2D1.1].” Section 2D1.1 provides a three-step process for making this determination. *See* USSG §2D1.1, comment. (n.6, 8). First, a court determines the most closely related controlled substance by considering, to the extent practicable, the factors set forth in Application Note 6. Next, the court determines the appropriate quantity of marijuana equivalent of the most closely related controlled substance, using the Drug Equivalency Tables at Application Note 8(D). Finally, the court uses the Drug Quantity Table in §2D1.1(c) to determine the base offense level that corresponds to that amount of marijuana.

(A) SYNTHETIC CATHINONES

Synthetic Cathinones.— According to the National Institute on Drug Abuse, synthetic cathinones, also known as “bath salts,” are human-made drugs chemically related to cathinone, a stimulant found in the khat plant. *See* National Institute on Drug Abuse, DrugFacts: Synthetic Cathinones (“Bath Salts”) (January 2016) available at <https://www.drugabuse.gov/publications/drugfacts/synthetic-cathinones-bath-salts>. Khat is a shrub grown in East Africa and southern Arabia. Around 1975, scientists identified cathinone as the active chemical in the khat plant and, once its molecular structure was discovered, synthetic cathinones began to be produced.

According to the Drug Enforcement Administration and other sources, synthetic cathinones are typically purchased in powder or crystal form over the Internet from suppliers in China and are delivered to the United States by common carriers. *See, e.g.*, European Monitoring Centre for Drugs and Drug Addiction, Synthetic Cathinones Drug Profile (2017) available at <http://www.emcdda.europa.eu/publications/drug-profiles/synthetic-cathinones>.

The scientific literature and other sources suggest that the effects produced by a synthetic cathinone can vary compared to both natural cathinones and other synthetic cathinones. For example, the synthetic cathinones methylone (3,4-methylenedioxy-N-methylcathinone) and mephedrone (4-Methylmethcathinone) have been reported to have hallucinogenic effects broadly similar to MDMA (3,4-Methylenedioxy-methamphetamine), also known as

“ecstasy.” In contrast, studies have reported that MDPV (3,4-Methylenedioxypropylone) may produce a stimulant effect similar to, but more potent than, cocaine.

Public comment on the Commission’s priority, testimony at the April 2017 hearing, and other sources indicate that (1) there are many different synthetic cathinones, and (2) new synthetic cathinones are regularly developed, displacing the existing ones that are trafficked illegally. Given this information, it would likely be difficult, if not impossible, for the Commission to provide individual marijuana equivalencies for each synthetic cathinone in the *Guidelines Manual*.

Issues for Comment.—

1. The Commission invites general comment on synthetic cathinones, particularly on their chemical structures, their pharmacological effects, potential for addiction and abuse, the patterns of abuse and harms associated with their abuse, and the patterns of trafficking and harms associated with their trafficking. How are synthetic cathinones manufactured, distributed, possessed, and used? What are the characteristics of the offenders involved in these various activities? What harms are posed by these activities? How do these harms differ from those associated with other controlled substances such as marijuana, cocaine, heroin, methamphetamine, or MDMA/Ecstasy?
2. The Commission invites general comment on whether and, if so, how the guidelines should be amended to account for synthetic cathinones. For example, should the Commission establish marijuana equivalencies for specific synthetic cathinones such as methylone, MDPV, and mephedrone? If so, what equivalencies should the Commission provide for methylone, MDPV, and mephedrone, and why? What factors should the Commission consider when deciding whether to account for these synthetic cathinones?
3. As stated above, the Commission has received comment indicating that a large number of synthetic cathinones are currently available, and that new synthetic cathinones are regularly developed for illegal trafficking. Instead of providing marijuana equivalencies for individual synthetic cathinones, should the Commission consider establishing a single marijuana equivalency applicable to all synthetic cathinones? Are synthetic cathinones sufficiently similar to one another in chemical structure, pharmacological effects, potential for addiction and abuse, patterns of trafficking and abuse, and associated harms, to support the adoption of a broad class-based approach for sentencing purposes? If so, what marijuana equivalency should the Commission provide for synthetic cathinones as a class and why? What factors should the Commission account for if it considers adopting a broad class-based approach for synthetic cathinones? Should the Commission define “synthetic cathinones” for purposes of this broad class-based approach? If so, how? Are there any synthetic cathinones that should not be included as part of a broad class-based approach and for which the Commission should provide a marijuana equivalency separate from other synthetic cathinones? If so, what equivalency should the Commission provide for each such synthetic cathinone, and why?

What are the advantages and disadvantages of a broad class-based approach for synthetic cathinones? If the Commission were to provide a different approach to account for synthetic cathinones in the guidelines, what should that different approach be?

(B) TETRAHYDROCANNABINOL (THC) AND SYNTHETIC CANNABINOIDS

Tetrahydrocannabinol or THC.— Tetrahydrocannabinol, or THC, is the primary psychotropic substance in marihuana, the most commonly used controlled substance. Although marihuana is the most common method by which THC is consumed, THC can also be extracted from marihuana in concentrated resins, such as hash oil. Synthetic cannabinoids mimic the effects of THC.

The Drug Equivalency Tables in the Commentary to §2D1.1 set forth the marihuana equivalency for two types of THC—organic THC and synthetic THC. The marihuana equivalencies for both types of THC have the same ratio: 1 gram of THC = 167 grams of marihuana. The marihuana equivalencies for both types of THC have remained unchanged since they were established in the first edition of the *Guidelines Manual* in 1987.

Synthetic Cannabinoids.— According to the National Institute of Drug Abuse, synthetic cannabinoids are man-made mind-altering chemicals that are related to tetrahydrocannabinol (THC), the psychoactive chemical found in the marihuana plant. However, the available scientific literature on this subject strongly suggests that synthetic cannabinoids are substantially different than marihuana or organic THC. See National Institute of Drug Abuse, DrugFacts: Synthetic Cannabinoids (Revised November 2015) available at <https://www.drugabuse.gov/publications/drugfacts/synthetic-cannabinoids>. The Commission has received comment suggesting that these substances are manufactured as a dry powder or crystal, mixed with a solvent, such as acetone, then sprayed on shredded plant material. After the solvent evaporates, the resulting dry mixture is packaged and sold as a “legal” alternative to marihuana. JWH-018 and AM-2201 are two examples of synthetic cannabinoids.

Public comment on the Commission’s priority and testimony at the April 2017 hearing indicated that (1) there are many different synthetic cannabinoids, and (2) new synthetic cannabinoids are regularly developed, displacing the existing ones that are trafficked illegally. Given this information, it would likely be difficult, if not impossible, for the Commission to provide individual marihuana equivalencies for each synthetic cannabinoid in the *Guidelines Manual*. Commission data indicates that the courts have typically identified THC as the most closely related controlled substance referenced in the guidelines in cases involving synthetic cannabinoids.

Public comment on the Commission’s priority and testimony at the April 2017 hearing suggested that applying the marihuana equivalency for THC to a synthetic cannabinoid, such as JWH-018 or AM-2201, is inappropriate because the equivalency for THC itself lacks any empirical support and is too severe. Some commenters also suggested that the current marihuana equivalency for THC may be too severe in cases involving a synthetic cannabinoid as a part of a mixture (*i.e.*, mixed with a solvent or sprayed on a quantity of

plant material) when compared to cases involving a synthetic cannabinoid in pure form (*i.e.*, dry powder or crystals).

Issues for Comment.—

1. The Commission invites general comment on organic and synthetic tetrahydrocannabinol (THC), particularly on its chemical structure, its pharmacological effects, potential for addiction and abuse, the patterns of abuse and harms associated with its abuse, and the patterns of trafficking and harms associated with its trafficking. How is THC manufactured, distributed, possessed, and used? What are the characteristics of the offenders involved in these various activities? What harms are posed by these activities? How do these harms differ from those associated with other controlled substances such as marihuana, cocaine, heroin, or methamphetamine?

The Commission further seeks comment on whether, and if so how, the Commission should change how the guidelines account for THC. As stated above, the marihuana equivalencies of both types of THC, organic and synthetic, have the same ratio—1 gm of THC = 167 gm of marihuana. Is the 1:167 ratio in marihuana equivalency for both types of THC appropriate? Should the Commission establish a different ratio for both types of THC? If so, what ratio should the Commission establish and why? Should THC (organic) and THC (synthetic) have the same ratio in marihuana equivalency? Should the Commission instead establish one ratio for THC (organic) and a different ratio for THC (synthetic)? If so, what ratio should the Commission establish for each substance and why?

2. The Commission invites general comment on synthetic cannabinoids, particularly on their chemical structures, their pharmacological effects, potential for addiction and abuse, the patterns of abuse and harms associated with their abuse, and the patterns of trafficking and harms associated with their trafficking. How are synthetic cannabinoids manufactured, distributed, possessed, and used? What are the characteristics of the offenders involved in these various activities? What harms are posed by these activities? How do these harms differ from those associated with other controlled substances such as marihuana, cocaine, heroin, or methamphetamine?
3. As noted above, courts frequently identify tetrahydrocannabinol (THC) as the most closely related controlled substance referenced in the guidelines in cases involving synthetic cannabinoids. Under the current guidelines, including Application Note 6 to §2D1.1, is this determination appropriate? Is organic and synthetic THC the most closely related controlled substance to (1) JWH-018, (2) AM-2201, and (3) synthetic cannabinoids in general? If not, is there any controlled substance referenced in §2D1.1 that is most closely related to synthetic cannabinoids? If so, what substance?

The Commission further seeks comment on whether and, if so, how the guidelines should be amended to account for synthetic cannabinoids. For example, should the Commission establish marihuana equivalencies for specific synthetic cannabinoids such as JWH-018 and AM-2201? If so, what equivalencies should the Commission

provide for JWH-018 and AM-2201, and why? What factors should the Commission consider when deciding whether to account for these synthetic cannabinoids?

4. As stated above, the Commission has received comment indicating that a large number of synthetic cannabinoids are currently available, and that new synthetic cannabinoids are regularly developed for illegal trafficking. Instead of providing marijuana equivalencies for individual synthetic cannabinoids, should the Commission consider establishing a single marijuana equivalency applicable to all synthetic cannabinoids? Are synthetic cannabinoids sufficiently similar to one another in chemical structure, pharmacological effects, potential for addiction and abuse, patterns of trafficking and abuse, and associated harms, to support the adoption of a broad class-based approach for sentencing purposes? If so, what marijuana equivalency should the Commission provide for synthetic cannabinoids as a class and why? What factors should the Commission account for if it considers adopting a broad class-based approach for synthetic cannabinoids? Should the Commission define “synthetic cannabinoids” for purposes of this broad class-based approach? If so, how? Are there any synthetic cannabinoids that should not be included as part of a broad class-based approach and for which the Commission should provide a marijuana equivalency separate from other synthetic cannabinoids? If so, what equivalency should the Commission provide for each such synthetic cannabinoid, and why?

What are the advantages and disadvantages of a broad class-based approach for synthetic cannabinoids? If the Commission were to provide a different approach to account for synthetic cannabinoids in the guidelines, what should that different approach be?

5. If the Commission was to establish a single marijuana equivalency applicable to all synthetic cannabinoids as a class, should this class-based equivalency also apply to synthetic tetrahydrocannabinol (THC)? Is THC (synthetic) sufficiently similar to other synthetic cannabinoids in chemical structure, pharmacological effects, potential for addiction and abuse, patterns of trafficking and abuse, and associated harms, to be included as part of a broad class-based approach for synthetic cannabinoids? Should the Commission instead continue to provide a marijuana equivalency for THC (synthetic) separate from other synthetic cannabinoids?