



Amendments to the Sentencing Guidelines (Preliminary)

April 10, 2014

This document collects the amendments to the sentencing guidelines, policy statements, and commentary, in the unofficial, "reader-friendly" form in which they were made available at the Commission's public meeting on April 10, 2014. As with all amendments on which a vote to promulgate has been made but not yet officially submitted to Congress and the Federal Register, authority to make technical and conforming changes may be exercised and motions to reconsider may be made. Once submitted to Congress and the Federal Register, official text of the amendments will be posted on the Commission's website at www.ussc.gov and will be available in a forthcoming edition of the Federal Register, and an updated "reader-friendly" version of the amendments will be posted on the Commission's website at www.ussc.gov.

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The Commission specified an effective date of **November 1, 2014**, for the amendments listed above.

PROPOSED AMENDMENT: 1B1.10

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

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

Original Guideline Range Above the Mandatory Minimum

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

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

Bottom of Original Guideline Range Below the Mandatory Minimum

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

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

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

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

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

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

A new application note with examples is also provided.

Proposed Amendment:

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

(a) Authority.—

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

§ 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

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

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

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

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

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

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

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

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

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

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

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

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

Commentary

Application Notes:

1. Application of Subsection (a).—

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

(B) Factors for Consideration.—

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

(ii) Public Safety Consideration.—The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether

such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

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

2. *Application of Subsection (b)(1).—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection ~~(c)~~(d) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.*

3. *Application of Subsection (b)(2).—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, as provided in subsection (b)(2)(A), if the term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court may reduce the defendant’s term of imprisonment to a term that is no less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the term of imprisonment imposed was 70 months; and (C) the amended guideline range determined under subsection (b)(1) is 51 to 63 months, the court may reduce the defendant’s term of imprisonment, but shall not reduce it to a term less than 51 months.*

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

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

comparable reduction and may be appropriate.

The provisions authorizing such a government motion are §5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).

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

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

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

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

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

term of imprisonment. See §5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (i.e., unrestricted by operation of §5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.

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

56. *Supervised Release.*—

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

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

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

Background: Section 3582(c)(2) of Title 18, United States Code, provides: "[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently

been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." The Supreme Court has concluded that proceedings under section 3582(c)(2) are not governed by United States v. Booker, 543 U.S. 220 (2005), and this policy statement remains binding on courts in such proceedings. See Dillon v. United States, 130 S. Ct. 2683 (2010).

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

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

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

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

PROPOSED AMENDMENT: VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT

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

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

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

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

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

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

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

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

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

Before enactment of the Act, section 113(a)(2) applied to assault with intent to commit any felony, except murder or a felony under chapter 109A, and provided a statutory maximum term of imprisonment of 10 years. Felonies under chapter 109A include violations of sections 2241, 2242, 2243 (Sexual abuse of a minor or ward), and 2244 (Abusive sexual contact). Section 113(a)(2) is referenced in Appendix A to

§2A2.2 (Aggravated Assault).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Supervised Release

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

Proposed Amendment:

§2A2.2. Aggravated Assault

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

to the seriousness of the injury:

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

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

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

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

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

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

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

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

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

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

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

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

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

Subsection (b)(6)(7) implements the directive to the Commission in subsection 11008(e) of the 21st Century Department of Justice Appropriations Act (the "Act"), Public Law 107–273. The enhancement in subsection (b)(6)(7) is cumulative to the adjustment in §3A1.2 (Official Victim) in order

to address adequately the directive in section 11008(e)(2)(D) of the Act, which provides that the Commission shall consider "the extent to which sentencing enhancements within the Federal guidelines and the authority of the court to impose a sentence in excess of the applicable guideline range are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by" 18 U.S.C. §§ 111 and 115.

§2A2.3. Minor Assault

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

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

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

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

* * *

§2A6.2. Stalking or Domestic Violence

- (a) Base Offense Level: **18**
- (b) Specific Offense Characteristic
 - (1) If the offense involved one of the following aggravating factors: (A) the violation of a court protection order; (B) bodily injury; (C) **strangling, suffocating, or attempting to strangle or suffocate**; (D) possession, or threatened use, of a dangerous weapon; or ~~(D)~~(E) a pattern of activity involving stalking, threatening, harassing, or assaulting the same victim, increase by **2** levels. If the offense involved more than one of ~~these~~ **aggravating factors** subdivisions (A), (B), (C), (D), or (E), increase by **4** levels.
- (c) Cross Reference
 - (1) If the offense involved the commission of another criminal offense, apply the offense guideline from Chapter Two, Part A (Offenses Against the Person) most applicable to that other criminal offense, if the resulting offense level is greater than that determined above.

Commentary

* * *

Application Notes:

1. *For purposes of this guideline:*

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

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

"Stalking" means (A) traveling with the intent to kill, injure, harass, or intimidate another person

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

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

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

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

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

* * *

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

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

Commentary

Application Notes:

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

See 18 U.S.C. § 3583(c).

- (B) *Criminal History.—The court should give particular consideration to the defendant's criminal history (which is one aspect of the "history and characteristics of the defendant" in subparagraph (A)(i), above). In general, the more serious the defendant's criminal history, the greater the need for supervised release.*
- (C) *Substance Abuse.—In a case in which a defendant sentenced to imprisonment is an abuser of controlled substances or alcohol, it is highly recommended that a term of supervised release also be imposed. See §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).*
- (D) *Domestic Violence.—If the defendant is convicted for the first time of a domestic violence crime as defined in 18 U.S.C. § 3561(b), a term of supervised release is required by statute. See 18 U.S.C. § 3583(a). Such a defendant is also required by statute to attend an approved rehabilitation program, if available within a 50-mile radius of the legal residence of the defendant. See 18 U.S.C. § 3583(d); §5D1.3(a)(3). In any other case involving domestic violence or stalking in which the defendant is sentenced to imprisonment, it is highly recommended that a term of supervised release also be imposed.*

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

* * *

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- 18 U.S.C. § 113(a)(1) 2A2.1, 2A3.1
- 18 U.S.C. § 113(a)(2) 2A2.2, 2A3.2, 2A3.3, 2A3.4
- 18 U.S.C. § 113(a)(3) 2A2.2

18 U.S.C. § 113(a)(4) 2A2.3

18 U.S.C. § 113(a)(5)
(Class A misdemeanor
provisions only) 2A2.3

18 U.S.C. § 113(a)(6) 2A2.2

18 U.S.C. § 113(a)(7) 2A2.3

18 U.S.C. § 113(a)(8) 2A2.2

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

Synopsis of Proposed Amendment: *This part of the proposed amendment addresses changes to 18 U.S.C. § 1153 (Offenses committed within Indian country), commonly referred to as the Major Crimes Act. The Act contains a list of offenses and specifies that any Indian who commits against the person or property of another Indian or other person any of the listed offenses shall be subject to the same law and penalties as all other persons committing any of those offenses, within the exclusive jurisdiction of the United States.*

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

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

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

Proposed Amendment:

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* * *

18 U.S.C. § 1152	2B1.5
18 U.S.C. § 1153	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A4.1, 2B1.1, 2B1.5, 2B2.1, 2B3.1, 2K1.4

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

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

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

Proposed Amendment:

§2A6.2. Stalking or Domestic Violence

* * *

Commentary

* * *

Application Notes:

1. *For purposes of this guideline:*

* * *

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

* * *

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

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

The Act revised and strengthened the regulation of international marriage brokers. Among other things, such marriage brokers are required to collect certain information about the United States client and are restricted from disclosing certain information about children and foreign national clients. A broker who knowingly violates or attempts to violate these provisions is subject to a maximum term of imprisonment of five years. See section 1375a(d)(5)(B)(i)(II). If the violation is not a knowing violation, the maximum term of imprisonment is one year. See section 1375a(d)(5)(B)(i)(I).

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

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

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

Proposed Amendment:

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* * *

~~8 U.S.C. § 1375a(d)(3)(C), (d)(5)(B) — 2H3.1~~

8 U.S.C. § 1375a(d)(5)(B)(i) 2H3.1

8 U.S.C. § 1375a(d)(5)(B)(ii) 2H3.1

8 U.S.C. § 1375a(d)(5)(B)(iii) 2B1.1

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

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

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

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

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

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

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

Proposed Amendment:

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* * *

~~18 U.S.C. § 2423(a) ————— 2G1.3~~

~~18 U.S.C. § 2423(b) ————— 2G1.3~~

18 U.S.C. § 2423(a)-(d) 2G1.3

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

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

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

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

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

Proposed Amendment:

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 1593A 2H4.1

18 U.S.C. § 1597 2X5.2

PROPOSED AMENDMENT: DRUGS

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

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

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

Background

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

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

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

Framework of the Federal Sentencing Guidelines. *The Sentencing Reform Act of 1984 established the Commission's organic statute and provided that the Commission, "consistent with all pertinent provisions of any Federal statute," shall promulgate guidelines and policy statements. See 28 U.S.C. § 994(a). It also provided that the Commission shall establish a sentencing range "for each category of offense involving each category of defendant". See 28 U.S.C. § 994(b)(1). Each sentencing range must be "consistent with all pertinent provisions of title 18, United States Code". See 28 U.S.C. § 994(b)(1). Where the guidelines call for imprisonment, the maximum of the range cannot exceed the minimum by*

more than the greater of 25 percent or six months. See 28 U.S.C. § 994(b)(2).

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

Incorporation of Statutory Penalties into Drug Quantity Table. *The Commission has incorporated into the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) the penalty structure of federal drug laws and the relevant statutory mandatory minimum sentences and has extrapolated upward and downward to set guideline sentencing ranges for all drug quantities. See §2D1.1, comment. (backg'd.) ("The base offense levels in §2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking."). By extrapolating upward and downward, the guidelines avoid sharp differentials or "sentencing cliffs" based upon small differences in drug quantities.*

The drug quantity thresholds in the Drug Quantity Table have generally been set so that the drug quantity that triggers a statutory mandatory minimum penalty also triggers a base offense level that corresponds (at Criminal History Category I) to a guideline range slightly above the statutory mandatory minimum penalty. Thus, the quantity that triggers a statutory 5-year mandatory minimum term of imprisonment also triggers a base offense level of 26 (corresponding to a guideline range of 63 to 78 months), and the quantity that triggers a statutory 10-year mandatory minimum term of imprisonment also triggers a base offense level of 32 (corresponding to a guideline range of 121 to 151 months). See §2D1.1, comment. (backg'd.) ("The base offense levels at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; e.g., level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months."). The Commission has stated that "[t]he base offense levels are set at guideline ranges slightly higher than the mandatory minimum levels to permit some downward adjustment for defendants who plead guilty or otherwise cooperate with authorities." See United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy (February 1995) at 148.

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

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

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

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

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

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

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

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

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

Amendment to the Drug Quantity Table

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

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

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

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

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

Proposed Amendment:

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

* * *

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*

Base Offense Level

- (1) ● 90 KG or more of Heroin; **Level 38**
● 450 KG or more of Cocaine;
● 25.2 KG or more of Cocaine Base;
● 90 KG or more of PCP, or 9 KG or more of PCP (actual);
● 45 KG or more of Methamphetamine, or
4.5 KG or more of Methamphetamine (actual), or
4.5 KG or more of "Ice";
● 45 KG or more of Amphetamine, or
4.5 KG or more of Amphetamine (actual);
● 900 G or more of LSD;
● 36 KG or more of Fentanyl;
● 9 KG or more of a Fentanyl Analogue;
● 90,000 KG or more of Marihuana;
● 18,000 KG or more of Hashish;
● 1,800 KG or more of Hashish Oil;
● 90,000,000 units or more of Ketamine;
● 90,000,000 units or more of Schedule I or II Depressants;
● 5,625,000 units or more of Flunitrazepam.
- (±)(2) ● At least 30 KG ~~or more~~ but less than 90 KG of Heroin; **Level 3836**
● At least 150 KG ~~or more~~ but less than 450 KG of Cocaine;
● At least 8.4 KG ~~or more~~ but less than 25.2 KG of Cocaine Base;
● At least 30 KG ~~or more~~ but less than 90 KG of PCP, or at least 3 KG ~~or more~~ but less than 9 KG of PCP (actual);
● At least 15 KG ~~or more~~ but less than 45 KG of Methamphetamine, or
at least 1.5 KG ~~or more~~ but less than 4.5 KG of Methamphetamine (actual), or
at least 1.5 KG ~~or more~~ but less than 4.5 KG of "Ice";
● At least 15 KG ~~or more~~ but less than 45 KG of Amphetamine, or
at least 1.5 KG ~~or more~~ but less than 4.5 KG of Amphetamine (actual);
● At least 300 G ~~or more~~ but less than 900 G of LSD;
● At least 12 KG ~~or more~~ but less than 36 KG of Fentanyl;
● At least 3 KG ~~or more~~ but less than 9 KG of a Fentanyl Analogue;
● At least 30,000 KG ~~or more~~ but less than 90,000 KG of Marihuana;
● At least 6,000 KG ~~or more~~ but less than 18,000 KG of Hashish;
● At least 600 KG ~~or more~~ but less than 1,800 KG of Hashish Oil;
● At least 30,000,000 units ~~or more~~ but less than 90,000,000 units of Ketamine;
● At least 30,000,000 units ~~or more~~ but less than 90,000,000 units of
Schedule I or II Depressants;
● At least 1,875,000 units ~~or more~~ but less than 5,625,000 units of Flunitrazepam.
- (±)(3) ● At least 10 KG but less than 30 KG of Heroin; **Level 3634**
● At least 50 KG but less than 150 KG of Cocaine;

- At least 2.8 KG but less than 8.4 KG of Cocaine Base;
- At least 10 KG but less than 30 KG of PCP, or
at least 1 KG but less than 3 KG of PCP (actual);
- At least 5 KG but less than 15 KG of Methamphetamine, or
at least 500 G but less than 1.5 KG of Methamphetamine (actual), or
at least 500 G but less than 1.5 KG of "Ice";
- At least 5 KG but less than 15 KG of Amphetamine, or
at least 500 G but less than 1.5 KG of Amphetamine (actual);
- At least 100 G but less than 300 G of LSD;
- At least 4 KG but less than 12 KG of Fentanyl;
- At least 1 KG but less than 3 KG of a Fentanyl Analogue;
- At least 10,000 KG but less than 30,000 KG of Marihuana;
- At least 2,000 KG but less than 6,000 KG of Hashish;
- At least 200 KG but less than 600 KG of Hashish Oil;
- At least 10,000,000 but less than 30,000,000 units of Ketamine;
- At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
- At least 625,000 but less than 1,875,000 units of Flunitrazepam.

(3)(4) **Level 3432**

- 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.

(4)(5) **Level 3230**

- At least 1 KG but less than 3 KG of Heroin;
- At least 5 KG but less than 15 KG of Cocaine;
- At least 280 G but less than 840 G of Cocaine Base;
- At least 1 KG but less than 3 KG of PCP, or
at least 100 G but less than 300 G of PCP (actual);
- At least 500 G but less than 1.5 KG of Methamphetamine, or
at least 50 G but less than 150 G of Methamphetamine (actual), or
at least 50 G but less than 150 G of "Ice";
- At least 500 G but less than 1.5 KG of Amphetamine, or

- at least 50 G but less than 150 G of Amphetamine (actual);
- At least 10 G but less than 30 G of LSD;
- At least 400 G but less than 1.2 KG of Fentanyl;
- At least 100 G but less than 300 G of a Fentanyl Analogue;
- At least 1,000 KG but less than 3,000 KG of Marihuana;
- At least 200 KG but less than 600 KG of Hashish;
- At least 20 KG but less than 60 KG of Hashish Oil;
- At least 1,000,000 but less than 3,000,000 units of Ketamine;
- At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
- 1,000,000 units or more of Schedule III Hydrocodone;
- At least 62,500 but less than 187,500 units of Flunitrazepam.

- (5)(6) ● At least 700 G but less than 1 KG of Heroin; **Level 3028**
- At least 3.5 KG but less than 5 KG of Cocaine;
 - At least 196 G but less than 280 G of Cocaine Base;
 - At least 700 G but less than 1 KG of PCP, or
at least 70 G but less than 100 G of PCP (actual);
 - At least 350 G but less than 500 G of Methamphetamine, or
at least 35 G but less than 50 G of Methamphetamine (actual), or
at least 35 G but less than 50 G of "Ice";
 - At least 350 G but less than 500 G of Amphetamine, or
at least 35 G but less than 50 G of Amphetamine (actual);
 - At least 7 G but less than 10 G of LSD;
 - At least 280 G but less than 400 G of Fentanyl;
 - At least 70 G but less than 100 G of a Fentanyl Analogue;
 - At least 700 KG but less than 1,000 KG of Marihuana;
 - At least 140 KG but less than 200 KG of Hashish;
 - At least 14 KG but less than 20 KG of Hashish Oil;
 - At least 700,000 but less than 1,000,000 units of Ketamine;
 - At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
 - At least 700,000 or more but less than 1,000,000 units of Schedule III Hydrocodone;
 - At least 43,750 but less than 62,500 units of Flunitrazepam.

- (6)(7) ● At least 400 G but less than 700 G of Heroin; **Level 2826**
- At least 2 KG but less than 3.5 KG of Cocaine;
 - At least 112 G but less than 196 G of Cocaine Base;
 - At least 400 G but less than 700 G of PCP, or
at least 40 G but less than 70 G of PCP (actual);
 - At least 200 G but less than 350 G of Methamphetamine, or
at least 20 G but less than 35 G of Methamphetamine (actual), or
at least 20 G but less than 35 G of "Ice";
 - At least 200 G but less than 350 G of Amphetamine, or
at least 20 G but less than 35 G of Amphetamine (actual);
 - At least 4 G but less than 7 G of LSD;
 - At least 160 G but less than 280 G of Fentanyl;
 - At least 40 G but less than 70 G of a Fentanyl Analogue;
 - At least 400 KG but less than 700 KG of Marihuana;

- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil;
- At least 400,000 but less than 700,000 units of Ketamine;
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
- At least 400,000 but less than 700,000 units of Schedule III Hydrocodone;
- At least 25,000 but less than 43,750 units of Flunitrazepam.

- (7)(8) **Level 2624**
- At least 100 G but less than 400 G of Heroin;
 - At least 500 G but less than 2 KG of Cocaine;
 - At least 28 G but less than 112 G of Cocaine Base;
 - At least 100 G but less than 400 G of PCP, or
at least 10 G but less than 40 G of PCP (actual);
 - At least 50 G but less than 200 G of Methamphetamine, or
at least 5 G but less than 20 G of Methamphetamine (actual), or
at least 5 G but less than 20 G of "Ice";
 - At least 50 G but less than 200 G of Amphetamine, or
at least 5 G but less than 20 G of Amphetamine (actual);
 - At least 1 G but less than 4 G of LSD;
 - At least 40 G but less than 160 G of Fentanyl;
 - At least 10 G but less than 40 G of a Fentanyl Analogue;
 - At least 100 KG but less than 400 KG of Marihuana;
 - At least 20 KG but less than 80 KG of Hashish;
 - At least 2 KG but less than 8 KG of Hashish Oil;
 - At least 100,000 but less than 400,000 units of Ketamine;
 - At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
 - At least 100,000 but less than 400,000 units of Schedule III Hydrocodone;
 - At least 6,250 but less than 25,000 units of Flunitrazepam.

- (8)(9) **Level 2422**
- 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 80,000 but less than 100,000 units of Schedule III Hydrocodone;

- At least 5,000 but less than 6,250 units of Flunitrazepam.

- (9)(10) ● At least 60 G but less than 80 G of Heroin; **Level 2220**
- At least 300 G but less than 400 G of Cocaine;
 - At least 16.8 G but less than 22.4 G of Cocaine Base;
 - At least 60 G but less than 80 G of PCP, or
at least 6 G but less than 8 G of PCP (actual);
 - At least 30 G but less than 40 G of Methamphetamine, or
at least 3 G but less than 4 G of Methamphetamine (actual), or
at least 3 G but less than 4 G of "Ice";
 - At least 30 G but less than 40 G of Amphetamine, or
at least 3 G but less than 4 G of Amphetamine (actual);
 - At least 600 MG but less than 800 MG of LSD;
 - At least 24 G but less than 32 G of Fentanyl;
 - At least 6 G but less than 8 G of a Fentanyl Analogue;
 - At least 60 KG but less than 80 KG of Marihuana;
 - At least 12 KG but less than 16 KG of Hashish;
 - At least 1.2 KG but less than 1.6 KG of Hashish Oil;
 - At least 60,000 but less than 80,000 units of Ketamine;
 - At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
 - At least 60,000 but less than 80,000 units of Schedule III Hydrocodone;
 - 60,000 units or more of Schedule III substances (except Ketamine or Hydrocodone);
 - At least 3,750 but less than 5,000 units of Flunitrazepam.

- (10)(11) ● At least 40 G but less than 60 G of Heroin; **Level 2018**
- 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 Hydrocodone;
 - At least 40,000 or more but less than 60,000 units of Schedule III substances (except Ketamine or Hydrocodone);
 - At least 2,500 but less than 3,750 units of Flunitrazepam.

- (H12) ● At least 20 G but less than 40 G of Heroin; **Level 1816**
- At least 100 G but less than 200 G of Cocaine;
 - At least 5.6 G but less than 11.2 G of Cocaine Base;
 - At least 20 G but less than 40 G of PCP, or
at least 2 G but less than 4 G of PCP (actual);
 - At least 10 G but less than 20 G of Methamphetamine, or
at least 1 G but less than 2 G of Methamphetamine (actual), or
at least 1 G but less than 2 G of "Ice";
 - At least 10 G but less than 20 G of Amphetamine, or
at least 1 G but less than 2 G of Amphetamine (actual);
 - At least 200 MG but less than 400 MG of LSD;
 - At least 8 G but less than 16 G of Fentanyl;
 - At least 2 G but less than 4 G of a Fentanyl Analogue;
 - At least 20 KG but less than 40 KG of Marihuana;
 - At least 5 KG but less than 8 KG of Hashish;
 - At least 500 G but less than 800 G of Hashish Oil;
 - At least 20,000 but less than 40,000 units of Ketamine;
 - At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
 - At least 20,000 but less than 40,000 units of Schedule III Hydrocodone;
 - At least 20,000 but less than 40,000 units of Schedule III substances (except
Ketamine or Hydrocodone);
 - At least 1,250 but less than 2,500 units of Flunitrazepam.

- (H13) ● At least 10 G but less than 20 G of Heroin; **Level 1614**
- At least 50 G but less than 100 G of Cocaine;
 - At least 2.8 G but less than 5.6 G of Cocaine Base;
 - At least 10 G but less than 20 G of PCP, or
at least 1 G but less than 2 G of PCP (actual);
 - At least 5 G but less than 10 G of Methamphetamine, or
at least 500 MG but less than 1 G of Methamphetamine (actual), or
at least 500 MG but less than 1 G of "Ice";
 - At least 5 G but less than 10 G of Amphetamine, or
at least 500 MG but less than 1 G of Amphetamine (actual);
 - At least 100 MG but less than 200 MG of LSD;
 - At least 4 G but less than 8 G of Fentanyl;
 - At least 1 G but less than 2 G of a Fentanyl Analogue;
 - At least 10 KG but less than 20 KG of Marihuana;
 - At least 2 KG but less than 5 KG of Hashish;
 - At least 200 G but less than 500 G of Hashish Oil;
 - At least 10,000 but less than 20,000 units of Ketamine;
 - At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
 - At least 10,000 but less than 20,000 units of Schedule III Hydrocodone;
 - At least 10,000 but less than 20,000 units of Schedule III substances (except
Ketamine or Hydrocodone);
 - At least 625 but less than 1,250 units of Flunitrazepam.

- (H14) ● At least 5 G but less **Less** than 10 G of Heroin; **Level 1412**

- At least 25 G but less than 50 G of Cocaine;
- At least 1.4 G but less than 2.8 G of Cocaine Base;
- At least 5 G but less than 10 G of PCP, or
at least 500 MG but less than 1 G of PCP (actual);
- At least 2.5 G but less than 5 G of Methamphetamine, or
at least 250 MG but less than 500 MG of Methamphetamine (actual),
or at least 250 MG but less than 500 MG of "Ice";
- At least 2.5 G but less than 5 G of Amphetamine, or
at least 250 MG but less than 500 MG of Amphetamine (actual);
- At least 50 MG but less than 100 MG of LSD;
- At least 2 G but less than 4 G of Fentanyl;
- At least 500 MG but less than 1 G of a Fentanyl Analogue;
- At least 5 KG but less than 10 KG of Marihuana;
- At least 1 KG but less than 2 KG of Hashish;
- At least 100 G but less than 200 G of Hashish Oil;
- At least 5,000 but less than 10,000 units of Ketamine;
- At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
- At least 5,000 but less than 10,000 units of Schedule III Hydrocodone;
- At least 5,000 but less than 10,000 units of
Schedule III substances (except Ketamine or Hydrocodone);
- At least 312 but less than 625 units of Flunitrazepam;
- 80,000 units or more of Schedule IV substances (except Flunitrazepam).

(1415) ● ~~Less than 5 G of Heroin;~~

Level 1210

- ~~● Less than 25 G of Cocaine;~~
- ~~● Less than 1.4 G of Cocaine Base;~~
- ~~● Less than 5 G of PCP, or less than 500 MG of PCP (actual);~~
- ~~● Less than 2.5 G of Methamphetamine, or
less than 250 MG of Methamphetamine (actual), or
less than 250 MG of "Ice";~~
- ~~● Less than 2.5 G of Amphetamine, or
less than 250 MG of Amphetamine (actual);~~
- ~~● Less than 50 MG of LSD;~~
- ~~● Less than 2 G of Fentanyl;~~
- ~~● Less than 500 MG of a Fentanyl Analogue;~~
- At least 2.5 KG but less than 5 KG of Marihuana;
- At least 500 G but less than 1 KG of Hashish;
- At least 50 G but less than 100 G of Hashish Oil;
- At least 2,500 but less than 5,000 units of Ketamine;
- At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
- At least 2,500 but less than 5,000 units of Schedule III Hydrocodone;
- At least 2,500 but less than 5,000 units of Schedule III substances (except
Ketamine or Hydrocodone);
- At least 156 but less than 312 units of Flunitrazepam;
- At least 40,000 or more but less than 80,000 units of Schedule IV substances (except
Flunitrazepam).

- (1516) ● At least 1 KG but less than 2.5 KG of Marihuana; **Level 108**
 ● At least 200 G but less than 500 G of Hashish;
 ● At least 20 G but less than 50 G of Hashish Oil;
 ● At least 1,000 but less than 2,500 units of Ketamine;
 ● At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
 ● At least 1,000 but less than 2,500 units of Schedule III Hydrocodone;
 ● At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine or Hydrocodone);
 ● At least 62 but less than 156 units of Flunitrazepam;
 ● At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam);
 ● 160,000 units or more of Schedule V substances.

- (1617) ● At least 250 G but less than 1 KG of Marihuana; **Level 86**
 ● At least 50 G but less than 200 G of Hashish;
 ● At least 5 G but less than 20 G of Hashish Oil;
 ● At least 250 but less than 1,000 units of Ketamine;
 ● At least 250 but less than 1,000 units of Schedule I or II Depressants;
 ● At least 250 but less than 1,000 units of Schedule III Hydrocodone;
 ● At least 250 but less than 1,000 units of Schedule III substances (except Ketamine or Hydrocodone);
 ● Less than 62 units of Flunitrazepam;
 ● At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam);
 ● 40,000 or more less than 160,000 units of Schedule V substances.

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

* * *

Commentary

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Application Notes:

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8. Use of Drug Equivalency Tables.—

(A) Controlled Substances Not Referenced in Drug Quantity Table.—*The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences. The statute, however, provides direction only for the more common controlled substances, i.e., heroin, cocaine, PCP, methamphetamine, fentanyl, LSD and marihuana. In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:*

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

*(See also Application Note 6.) For example, in the Drug Equivalency Tables set forth in this Note, 1 gm of a substance containing oxymorphone, a Schedule I opiate, converts to an equivalent quantity of 5 kg of marihuana. In a case involving 100 gm of oxymorphone, the equivalent quantity of marihuana would be 500 kg, which corresponds to a base offense level of ~~28~~**26** in the Drug Quantity Table.*

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

*For certain types of controlled substances, the marihuana equivalencies in the Drug Equivalency Tables are "capped" at specified amounts (e.g., the combined equivalent weight of all Schedule V controlled substances shall not exceed ~~999 grams~~**2.49 kilograms** of marihuana). Where there are controlled substances from more than one schedule (e.g., a quantity of a Schedule IV substance and a quantity of a Schedule V substance), determine the marihuana equivalency for each schedule separately (subject to the cap, if any, applicable to that schedule). Then add the marihuana equivalencies to determine the combined marihuana equivalency (subject to the cap, if any, applicable to the combined amounts).*

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

(C) Examples for Combining Differing Controlled Substances.—

- (i) *The defendant is convicted of selling 70 grams of a substance containing PCP (Level ~~22~~20) and 250 milligrams of a substance containing LSD (Level ~~18~~16). The PCP converts to 70 kilograms of marihuana; the LSD converts to 25 kilograms of marihuana. The total is therefore equivalent to 95 kilograms of marihuana, for which the Drug Quantity Table provides an offense level of ~~24~~22.*
- (ii) *The defendant is convicted of selling 500 grams of marihuana (Level ~~8~~6) and five kilograms of diazepam (Level ~~8~~6). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of ~~10~~8 in the Drug Quantity Table.*
- (iii) *The defendant is convicted of selling 80 grams of cocaine (Level ~~16~~14) and 2 grams of cocaine base (Level ~~14~~12). The cocaine is equivalent to 16 kilograms of marihuana, and the cocaine base is equivalent to 7.142 kilograms of marihuana. The total is therefore equivalent to 23.142 kilograms of marihuana, which has an offense level of ~~18~~16 in the Drug Quantity Table.*
- (iv) *The defendant is convicted of selling ~~56,000~~76,000 units of a Schedule III substance, ~~100,000~~200,000 units of a Schedule IV substance, and ~~200,000~~600,000 units of a Schedule V substance. The marihuana equivalency for the Schedule III substance is ~~56~~76 kilograms of marihuana (below the cap of ~~59.99~~79.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule III substances). The marihuana equivalency for the Schedule IV substance is subject to a cap of ~~4.99~~9.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule IV substances (without the cap it would have been ~~6.25~~12.5 kilograms). The marihuana equivalency for the Schedule V substance is subject to the cap of ~~999~~grams ~~2.49~~ kilograms of marihuana set forth as the maximum equivalent weight for Schedule V substances (without the cap it would have been ~~1.25~~3.75 kilograms). The combined equivalent weight, determined by adding together the above amounts, is subject to the cap of ~~59.99~~79.99 kilograms of marihuana set forth as the maximum combined equivalent weight for Schedule III, IV, and V substances. Without the cap, the combined equivalent weight would have been ~~61.99~~88.48 (~~56~~76 + ~~4.99~~9.99 + ~~999~~2.49) kilograms.*

(D) Drug Equivalency Tables.—

Schedule I or II Opiates*

1 gm of Heroin =	1 kg of marihuana
1 gm of Alpha-Methylfentanyl =	10 kg of marihuana
1 gm of Dextromoramide =	670 gm of marihuana
1 gm of Dipipanone =	250 gm of marihuana
1 gm of 3-Methylfentanyl =	10 kg of marihuana
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm of marihuana

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

**Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.*

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

1 gm of Cocaine =	200 gm of marihuana
1 gm of N-Ethylamphetamine =	80 gm of marihuana
1 gm of Fenethylamine =	40 gm of marihuana
1 gm of Amphetamine =	2 kg of marihuana
1 gm of Amphetamine (Actual) =	20 kg of marihuana
1 gm of Methamphetamine =	2 kg of marihuana
1 gm of Methamphetamine (Actual) =	20 kg of marihuana
1 gm of "Ice" =	20 kg of marihuana
1 gm of Khat =	.01 gm of marihuana
1 gm of 4-Methylaminorex ("Euphoria")=	100 gm of marihuana
1 gm of Methylphenidate (Ritalin)=	100 gm of marihuana
1 gm of Phenmetrazine =	80 gm of marihuana
1 gm Phenylacetone/P ₂ P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm of marihuana
1 gm Phenylacetone/P ₂ P (in any other case) =	75 gm of marihuana
1 gm Cocaine Base ('Crack') =	3,571 gm of marihuana
1 gm of Aminorex =	100 gm of marihuana
1 gm of Methcathinone =	380 gm of marihuana
1 gm of N-N-Dimethylamphetamine =	40 gm of marihuana
1 gm of N-Benzylpiperazine =	100 gm of marihuana

**Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.*

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

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

Psilocybin (Wet) =	0.1 gm of marihuana
1 gm of Peyote (Dry) =	0.5 gm of marihuana
1 gm of Peyote (Wet) =	0.05 gm of marihuana
1 gm of Phencyclidine/PCP =	1 kg of marihuana
1 gm of Phencyclidine (actual) /PCP (actual) =	10 kg of marihuana
1 gm of Psilocin =	500 gm of marihuana
1 gm of Psilocybin =	500 gm of marihuana
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg of marihuana
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg of marihuana
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg of marihuana
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg of marihuana
1 gm of 3,4-Methylenedioxyamphetamine/MDA =	500 gm of marihuana
1 gm of 3,4-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

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

Flunitrazepam **

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

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

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

1 ml of gamma-hydroxybutyric acid =	8.8 gm of marihuana
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Schedule III Substances (except ketamine and hydrocodone)***

1 unit of a Schedule III Substance =	1 gm of marihuana
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****Provided*, that the combined equivalent weight of all Schedule III substances (except ketamine and hydrocodone), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed ~~59.99~~**79.99** kilograms of marihuana.

Schedule III Hydrocodone*****

1 unit of Schedule III hydrocodone = 1 gm of marihuana

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

Ketamine

1 unit of ketamine = 1 gm of marihuana

Schedule IV Substances (except flunitrazepam)*****

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

*****Provided, that the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed ~~4-999.99~~ kilograms of marihuana.

Schedule V Substances*****

1 unit of a Schedule V Substance = 0.00625 gm of marihuana

*****Provided, that the combined equivalent weight of Schedule V substances shall not exceed ~~999 grams~~2.49 kilograms of marihuana.

* * *

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

The base offense levels in §2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking. Levels ~~32 and 26~~30 and 24 in the Drug Quantity Table are the distinctions provided by the Anti-Drug Abuse Act; however, further refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses. To determine these finer distinctions, the Commission consulted numerous experts and practitioners, including authorities at the Drug Enforcement Administration, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Forces, who also advocate the necessity of these distinctions. Where necessary, this scheme has been modified in response to specific congressional directives to the Commission.

The base offense levels ~~at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; e.g., level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months.~~ at levels 24 and 30 establish guideline ranges such that the statutory minimum falls within the range; e.g., level 30 ranges from 97 to 121 months, where the statutory minimum term is ten years or 120 months.

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

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Commentary

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Application Note:

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

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

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

Quantity	Base Offense Level
(1) 9 KG or more of Ephedrine; 9 KG or more of Phenylpropanolamine; 9 KG or more of Pseudoephedrine.	Level 38
(+) At least 3 KG or more but less than 9 KG of Ephedrine; (2) At least 3 KG or more but less than 9 KG of Phenylpropanolamine; At least 3 KG or more but less than 9 KG of Pseudoephedrine.	Level 36
(2) At least 1 KG but less than 3 KG of Ephedrine; (3) At least 1 KG but less than 3 KG of Phenylpropanolamine; At least 1 KG but less than 3 KG of Pseudoephedrine.	Level 34

(3)	At least 300 G but less than 1 KG of Ephedrine;	Level 3432
(4)	At least 300 G but less than 1 KG of Phenylpropanolamine; At least 300 G but less than 1 KG of Pseudoephedrine.	
(4)	At least 100 G but less than 300 G of Ephedrine;	Level 3230
(5)	At least 100 G but less than 300 G of Phenylpropanolamine; At least 100 G but less than 300 G of Pseudoephedrine.	
(5)	At least 70 G but less than 100 G of Ephedrine;	Level 3028
(6)	At least 70 G but less than 100 G of Phenylpropanolamine; At least 70 G but less than 100 G of Pseudoephedrine.	
(6)	At least 40 G but less than 70 G of Ephedrine;	Level 2826
(7)	At least 40 G but less than 70 G of Phenylpropanolamine; At least 40 G but less than 70 G of Pseudoephedrine.	
(7)	At least 10 G but less than 40 G of Ephedrine;	Level 2624
(8)	At least 10 G but less than 40 G of Phenylpropanolamine; At least 10 G but less than 40 G of Pseudoephedrine.	
(8)	At least 8 G but less than 10 G of Ephedrine;	Level 2422
(9)	At least 8 G but less than 10 G of Phenylpropanolamine; At least 8 G but less than 10 G of Pseudoephedrine.	
(9)	At least 6 G but less than 8 G of Ephedrine;	Level 2220
(10)	At least 6 G but less than 8 G of Phenylpropanolamine; At least 6 G but less than 8 G of Pseudoephedrine.	
(10)	At least 4 G but less than 6 G of Ephedrine;	Level 2018
(11)	At least 4 G but less than 6 G of Phenylpropanolamine; At least 4 G but less than 6 G of Pseudoephedrine.	
(11)	At least 2 G but less than 4 G of Ephedrine;	Level 1816
(12)	At least 2 G but less than 4 G of Phenylpropanolamine; At least 2 G but less than 4 G of Pseudoephedrine.	
(12)	At least 1 G but less than 2 G of Ephedrine;	Level 1614
(13)	At least 1 G but less than 2 G of Phenylpropanolamine; At least 1 G but less than 2 G of Pseudoephedrine.	
(13)	At least 500 MG but less Less than 1 G of Ephedrine;	Level 1412
(14)	At least 500 MG but less Less than 1 G of Phenylpropanolamine; At least 500 MG but less Less than 1 G of Pseudoephedrine.	
(14)	Less than 500 MG of Ephedrine;	Level 12

- Less than 500 MG of Phenylpropanolamine;
- Less than 500 MG of Pseudoephedrine.

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

Listed Chemicals and Quantity

Base Offense Level

(1)	<p>List I Chemicals</p> <p>2.7 KG or more of Benzaldehyde;</p> <p>60 KG or more of Benzyl Cyanide;</p> <p>600 G or more of Ergonovine;</p> <p>1.2 KG or more of Ergotamine;</p> <p>60 KG or more of Ethylamine;</p> <p>6.6 KG or more of Hydriodic Acid;</p> <p>3.9 KG or more of Iodine;</p> <p>960 KG or more of Isosafrole;</p> <p>600 G or more of Methylamine;</p> <p>1500 KG or more of N-Methylephedrine;</p> <p>1500 KG or more of N-Methylpseudoephedrine;</p> <p>1.9 KG or more of Nitroethane;</p> <p>30 KG or more of Norpseudoephedrine;</p> <p>60 KG or more of Phenylacetic Acid;</p> <p>30 KG or more of Piperidine;</p> <p>960 KG or more of Piperonal;</p> <p>4.8 KG or more of Propionic Anhydride;</p> <p>960 KG or more of Safrole;</p> <p>1200 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;</p> <p>3406.5 L or more of Gamma-butyrolactone;</p> <p>2.1 KG or more of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid.</p>	Level 30
(+) (2)	<p>List I Chemicals</p> <p>At least 890 G or more but less than 2.7 KG of Benzaldehyde;</p> <p>At least 20 KG or more but less than 60 KG of Benzyl Cyanide;</p> <p>At least 200 G or more but less than 600 G of Ergonovine;</p> <p>At least 400 G or more but less than 1.2 KG of Ergotamine;</p> <p>At least 20 KG or more but less than 60 KG of Ethylamine;</p> <p>At least 2.2 KG or more but less than 6.6 KG of Hydriodic Acid;</p> <p>At least 1.3 KG or more but less than 3.9 KG of Iodine;</p> <p>At least 320 KG or more but less than 960 KG of Isosafrole;</p> <p>At least 200 G or more but less than 600 G of Methylamine;</p> <p>At least 500 KG or more but less than 1500 KG of N-Methylephedrine;</p> <p>At least 500 KG or more but less than 1500 KG of N-Methylpseudoephedrine;</p> <p>At least 625 G or more but less than 1.9 KG of Nitroethane;</p> <p>At least 10 KG or more but less than 30 KG of Norpseudoephedrine;</p> <p>At least 20 KG or more but less than 60 KG of Phenylacetic Acid;</p> <p>At least 10 KG or more but less than 30 KG of Piperidine;</p> <p>At least 320 KG or more but less than 960 KG of Piperonal;</p>	Level 3028

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

List II Chemicals

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

(2)
(3)

List I Chemicals

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

Level 2826

List II Chemicals

At least 11 KG or more but less than 33 KG of Acetic Anhydride;
At least 1175 KG or more but less than 3525 KG of Acetone;
At least 20 KG or more but less than 60 KG of Benzyl Chloride;
At least 1075 KG or more but less than 3225 KG of Ethyl Ether;
At least 1200 KG or more but less than 3600 KG of Methyl Ethyl Ketone;
At least 10 KG or more but less than 30 KG of Potassium Permanganate;
At least 1300 KG or more but less than 3900 KG of Toluene.

(3)

List I Chemicals

Level 2624

(4)

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

List II Chemicals

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

(4)

List I Chemicals

Level 2422

(5)

At least 62.3 G but less than 89 G of Benzaldehyde;
At least 1.4 KG but less than 2 KG of Benzyl Cyanide;
At least 14 G but less than 20 G of Ergonovine;
At least 28 G but less than 40 G of Ergotamine;
At least 1.4 KG but less than 2 KG of Ethylamine;
At least 154 G but less than 220 G of Hydriodic Acid;
At least 87.8 G but less than 125.4 G of Iodine;
At least 22.4 KG but less than 32 KG of Isosafrole;
At least 14 G but less than 20 G of Methylamine;
At least 35 KG but less than 50 KG of N-Methylephedrine;
At least 35 KG but less than 50 KG of N-Methylpseudoephedrine;
At least 43.8 G but less than 62.5 G of Nitroethane;
At least 700 G but less than 1 KG of Norpseudoephedrine;

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

List II Chemicals

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

(5) List I Chemicals

Level 2220

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

List II Chemicals

At least 726 G but less than 1.1 KG of Acetic Anhydride;
At least 82.25 KG but less than 117.5 KG of Acetone;
At least 1.4 KG but less than 2 KG of Benzyl Chloride;
At least 75.25 KG but less than 107.5 KG of Ethyl Ether;

At least 84 KG but less than 120 KG of Methyl Ethyl Ketone;
At least 700 G but less than 1 KG of Potassium Permanganate;
At least 91 KG but less than 130 KG of Toluene.

(6)
(7)

List I Chemicals

Level 2018

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

List II Chemicals

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

(7)
(8)

List I Chemicals

Level 1816

At least 7.1 G but less than 8.9 G of Benzaldehyde;
At least 160 G but less than 200 G of Benzyl Cyanide;
At least 1.6 G but less than 2 G of Ergonovine;
At least 3.2 G but less than 4 G of Ergotamine;
At least 160 G but less than 200 G of Ethylamine;
At least 17.6 G but less than 22 G of Hydriodic Acid;
At least 10 G but less than 12.5 G of Iodine;
At least 2.56 KG but less than 3.2 KG of Isosafrole;

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

List II Chemicals

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

(8)

List I Chemicals

Level 1614

(9)

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

List II Chemicals

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

(9) List I Chemicals

Level 1412

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

List II Chemicals

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

(10) List I Chemicals

Level 12

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

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

List II Chemicals

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

* * *

Commentary

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

Application Notes:

1. Cases Involving Multiple Chemicals.—

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

Example: The defendant was in possession of five kilograms of ephedrine and 300 grams of hydriodic acid. Ephedrine and hydriodic acid typically are used together in the same manufacturing process to manufacture methamphetamine. The base offense level for each chemical is calculated separately and the chemical with the higher base offense level is used. Five kilograms of ephedrine result in a base offense level of level ~~38~~**36**; 300 grams of hydriodic acid result in a base offense level of level ~~26~~**24**. In this case, the base offense level would be level ~~38~~**36**.

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

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

* * *

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

PROPOSED AMENDMENT: MARIJUANA CULTIVATION OPERATIONS

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

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

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

Proposed Amendment:

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

* * *

(b) Specific Offense Characteristics

* * *

- (12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by **2** levels.
- (13) (Apply the greatest):
 - (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
 - (B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
 - (C) If—
 - (i) the defendant was convicted under 21 U.S.C. § 860a of

manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or

- (ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

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

- (D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.

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

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

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

criminal conduct engaged in as a livelihood,

increase by **2** levels.

(~~15~~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.

(~~16~~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.

* * *

Commentary

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

Application Notes:

* * *

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

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

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

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

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

(A) Hazardous or Toxic Substances (Subsection (b)(13)(A)).—Subsection (b)(13)(A) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b); or 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). In some cases, the enhancement under subsection (b)(13)(A) may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of probation and supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release), respectively, any costs of environmental cleanup and harm to individuals or property shall be considered by the court in cases involving the manufacture of amphetamine or methamphetamine and should be considered by the court in cases involving the manufacture of a controlled substance other than amphetamine or methamphetamine. See 21 U.S.C. § 853(q) (mandatory restitution for cleanup costs relating to the manufacture of amphetamine and methamphetamine).

(B) Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine (Subsection (b)(13)(C)–(D)).—

- (i) Factors to Consider.—In determining, for purposes of subsection (b)(13)(C)(ii) or (D), whether the offense created a substantial risk of harm to human life or the environment, the court shall include consideration of the following factors:
- (I) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, and the manner in which the chemicals or substances were stored.
 - (II) The manner in which hazardous or toxic substances were disposed, and the likelihood of release into the environment of hazardous or toxic substances.
 - (III) The duration of the offense, and the extent of the manufacturing operation.
 - (IV) The location of the laboratory (e.g., whether the laboratory is located in a residential neighborhood or a remote area), and the number of human lives placed at substantial risk of harm.

(ii) Definitions.—For purposes of subsection (b)(13)(D):

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

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

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

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

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

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

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

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

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

* * *

PROPOSED AMENDMENT: FELON IN POSSESSION

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

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

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

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

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

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

When the Defendant Used the Firearm in Connection With Another Offense

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

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

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

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

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

The proposed amendment clarifies that subsection (b)(6)(B) is not limited to firearms and ammunition

cited in the offense of conviction, but amends subsection (c)(1) to limit its application to firearms and ammunition cited in the offense of conviction. The proposed amendment also makes conforming changes to the Commentary, clarifying the relevant conduct analysis that applies and providing examples.

Proposed Amendment:

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

* * *

(b) Specific Offense Characteristics

* * *

(6) If the defendant—

- (A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or
- (B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

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

* * *

(c) Cross Reference

- (1) If the defendant used or possessed any firearm or ammunition **cited in the offense of conviction** in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition **cited in the offense of conviction** with knowledge or intent that it would be used or possessed in connection with another offense, apply—
 - (A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

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

Commentary

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Application Notes:

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

- (A) In General.—Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.
- (B) Application When Other Offense is Burglary or Drug Offense.—Subsections (b)(6)(B) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.
- (C) Definitions.—

"Another felony offense", for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

"Another offense", for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.
- (D) Upward Departure Provision.—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.

(E) *Relationship Between the Instant Offense and the Other Offense.—In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. See §1B1.3(a)(1)–(4) and accompanying commentary.*

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

For example:

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

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

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

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

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

On the other hand, if the court determines that the two unlawful possession offenses were not "part of the same course of conduct or common scheme or

plan," then the handgun possession offense is not relevant conduct to the shotgun possession offense and subsection (b)(6)(B) does not apply.

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

PROPOSED AMENDMENT: ALIEN SMUGGLING

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

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

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

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

Proposed Amendment:

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

(a) Base Offense Level:

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

- (2) **23**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony; or
- (3) **12**, otherwise.

(b) Specific Offense Characteristics

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

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

- (3) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by **2** levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by **4** levels.
- (4) If the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent or grandparent, increase by **2** levels.
- (5) (Apply the Greatest):
 - (A) If a firearm was discharged, increase by **6** levels, but if the resulting offense level is less than level **22**, increase to level **22**.
 - (B) If a dangerous weapon (including a firearm) was brandished or otherwise used, increase by **4** levels, but if the resulting offense level is less than level **20**, increase to level **20**.
 - (C) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.
- (6) If the offense involved intentionally or recklessly creating a substantial risk

of death or serious bodily injury to another person, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.

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

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

- (8) (Apply the greater):

(A) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (i) after the alien was smuggled into the United States; or (ii) while the alien was transported or harbored in the United States, increase by **2** levels. If the resulting offense level is less than level **18**, increase to level **18**.

(B) If (i) the defendant was convicted of alien harboring, (ii) the alien harboring was for the purpose of prostitution, and (iii) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by **2** levels, but if the alien engaging in the prostitution had not attained the age of 18 years, increase by **6** levels.

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

(c) Cross Reference

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

Commentary

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Application Notes:

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5. Application of Subsection (b)(6).—Reckless conduct to which the adjustment from subsection (b)(6) applies includes a wide variety of conduct (e.g., transporting persons in the trunk or engine compartment of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, ~~or~~ harboring persons in a crowded, dangerous, or inhumane condition, or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements).

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

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

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

PROPOSED AMENDMENT: SUPERVISED RELEASE

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

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

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

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

A. When a Statutory Minimum Term of Supervised Release Applies

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

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

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

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

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

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

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

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

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

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

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

Proposed Amendment:

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

§5D1.2. Term of Supervised Release

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

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

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

* * *

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

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

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

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

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

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

§5D1.2. Term of Supervised Release

* * *

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

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

* * *

PROPOSED AMENDMENT: OTHER TERMS OF IMPRISONMENT

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

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

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

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

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

Proposed Amendment:

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

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

Commentary

Application Notes:

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

(c).

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

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

3. Application of Subsection (c).—

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

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

ensures a reasonable incremental punishment for the instant offense of conviction.

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

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

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

* * *

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

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

Proposed Amendment:

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

- (a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
- (b) If subsection (a) does not apply, and a term of imprisonment resulted from

another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:

- (1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
- (2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

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

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

Commentary

Application Notes:

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

34. *Application of Subsection ~~(c)~~(d).—*

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

* * *

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

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

45. Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of

imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. See §5K2.23 (Discharged Terms of Imprisonment).

* * *

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

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

Proposed Amendment:

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

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

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

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

history points;

- (C) a conviction for an aggravated felony, increase by **8** levels;
- (D) a conviction for any other felony, increase by **4** levels; or
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **4** levels.

Commentary

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

Application Notes:

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7. Departure Based on Seriousness of a Prior Conviction.—There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction. In such a case, a departure may be warranted. Examples: (A) In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted. (B) In a case in which the 12-level enhancement under subsection (b)(1)(A) or the 8-level enhancement in subsection (b)(1)(B) applies but that enhancement does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction, an upward departure may be warranted. (C) In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted.
8. Departure Based on Time Served in State Custody.—In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, the time served is not covered by an adjustment under §5G1.3(b) and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). In such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

Such a departure should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant. In determining whether such a departure is appropriate, the court should consider, among other things, (A) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (B) the seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or

induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant's other criminal history.

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

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.