



# **Amendments to the Sentencing Guidelines**

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**April 30, 2014**

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The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and generally submits guideline amendments to Congress pursuant to 28 U.S.C. § 994(p) not later than the first day of May each year. Absent action of Congress to the contrary, submitted amendments become effective by operation of law on the date specified by the Commission (generally November 1 of the year in which the amendments are submitted to Congress).

The Commission specified an effective date of **November 1, 2014**, for the amendments listed above and included in this compilation.

## 1. 1B1.10

**Reason for Amendment:** *This amendment clarifies an application issue that has arisen with respect to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) (Policy Statement). Circuits have conflicting interpretations of when, if at all, §1B1.10 provides that a statutory minimum continues to limit the amount by which a defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2) when the defendant's original sentence was below the statutory minimum due to substantial assistance.*

*This issue arises in two situations. 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.*

*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 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. The amendment also adds a new application note with examples.

This clarification ensures that defendants who provide substantial assistance to the government in the investigation and prosecution of others have the opportunity to receive the full benefit of a reduction that accounts for that assistance. See USSG App. C. Amend 759 (Reason for Amendment). As the Commission noted in the reason for that amendment: "The guidelines and the relevant statutes have long recognized that defendants who provide substantial assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum even when defendants who are otherwise similar (but did not provide substantial assistance) are subject to a guideline or statutory minimum. Applying this principle when the guideline range has been reduced and made available for retroactive application under section 3582(c)(2) appropriately maintains this distinction and furthers the purposes of sentencing." *Id.*

**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 ~~(e)~~(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).

(c)(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 (c)(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 (c)(d) is applicable to the defendant; or (ii) an amendment listed in subsection (c)(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.

\* \* \*

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.

\* \* \*

## 2. VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT

**Reason for Amendment:** *This amendment responds to recent statutory changes made by the Violence Against Women Reauthorization Act of 2013 (the "Act"), Pub. L. No. 113–4 (March 7, 2013), which provided new and expanded criminal offenses and increased penalties for certain crimes pertaining to assault, sexual abuse, stalking, domestic violence, and human trafficking.*

*The Act established new assault offenses and enhanced existing assault offenses at 18 U.S.C. § 113 (Assaults within maritime and territorial jurisdiction). In general, section 113 sets forth a range of penalties for assaults within the special maritime and territorial jurisdiction of the United States. The legislative history of the Act indicates that Congress intended many of these changes to allow federal prosecutors to address domestic violence against Native American women more effectively. Such violence often occurs in a series of incidents of escalating seriousness.*

*First, the amendment responds to changes in sections 113(a)(1) and (a)(2). Section 113(a)(1) prohibits assault with intent to commit murder, and the Act amended it to also prohibit assault with intent to commit a violation of 18 U.S.C. §§ 2241 (Aggravated sexual abuse) or 2242 (Sexual abuse), with a statutory maximum term of imprisonment of 20 years. Section 113(a)(2) prohibits assault with intent to commit any felony except murder, and prior to the Act had also excluded assault with intent to commit a violation of Chapter 109A, including sections 2241, 2242, 2243 (Sexual abuse of a minor or ward) and 2244 (Abusive sexual contact), with a statutory maximum term of imprisonment of 10 years. The Act amended section 113(a)(2) to prohibit assault with intent to commit any felony except murder or a violation of section 2241 or 2242. The effect of the statutory change is that an assault with intent to commit a violation of section 2243 or 2244 may now be prosecuted under section 113(a)(2). Offenses under section 2241 and 2242 are referenced to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), and offenses under section 2243 and 2244 are referenced to §§2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts); 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts); and 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact).*

*The amendment amends Appendix A (Statutory Index) to reference the expanded offense conduct prohibited by 18 U.S.C. § 113(a)(1) to §2A3.1 and to reference the expanded offense conduct prohibited by 18 U.S.C. 113(a)(2) to §§2A3.2, 2A3.3, and 2A3.4. The Commission concluded that an assault offense committed with the intent to commit a sexual abuse offense is analogous to, and in some cases more serious than, an attempted sexual abuse offense under Chapter 109A, and the criminal sexual abuse guidelines which apply to attempted sexual abuse offenses were therefore appropriate for this conduct.*

*Second, the Act increased the statutory maximum penalty for violations of 18 U.S.C. § 113(a)(4) from six months to one year of imprisonment. Section 113(a)(4) prohibits an assault by striking, beating, or wounding. Because the crime had been categorized as a Class B misdemeanor, Appendix A did not previously include a reference for section 113(a)(4). The amendment adds such a reference to §2A2.3 (Assault). The Commission determined that §2A2.3 will provide appropriate punishment that is consistent with the statutory maximum term of imprisonment, while sufficiently addressing the possible levels of bodily harm that may result to victims in individual cases of assault by striking, beating, or wounding.*

*Third, the Act expanded 18 U.S.C. § 113(a)(7), which prohibits assaults resulting in substantial bodily*

*injury to an individual who has not attained the age of sixteen years, to also apply to assaults resulting in substantial bodily injury to a spouse, intimate partner, or dating partner, and provides a statutory maximum term of imprisonment of five years. Offenses under section 113(a)(7) are referenced in Appendix A to §2A2.3 (Assault). The amendment broadened the scope of §2A2.3(b)(1)(B), which provides a 4-level enhancement if the offense resulted in substantial bodily injury to an individual under the age of sixteen years, to also provide a 4-level enhancement if the offense resulted in substantial bodily injury to a spouse, intimate partner, or dating partner. The Commission determined that because the expanded assaultive conduct of a victim of domestic violence has the same statutory maximum term of imprisonment, the same enhancement was warranted as for assaults of individuals under the age of sixteen resulting in substantial bodily injury.*

*Fourth, the Act created a new section 113(a)(8) in title 18, which prohibits the assault of a spouse, intimate partner, or dating partner by strangulation, suffocation, or attempting to strangle or suffocate, with a statutory maximum term of imprisonment of ten years. After reviewing legislative history, public comment, testimony at a public hearing on February 13, 2014, and data, the Commission determined that strangulation and suffocation of a spouse, intimate partner, or dating partner represents a significant harm not addressed by existing guidelines and specific offense characteristics.*

*Comment and testimony that the Commission received indicated that strangulation and suffocation in the domestic violence context is serious conduct that warrants enhanced punishment regardless of whether it results in a provable injury that would lead to a bodily injury enhancement; this conduct harms victims physically and psychologically and can be a predictor of future serious or lethal violence. Testimony and data also indicated that cases of strangulation and suffocation often involve other bodily injury to a victim separate from the strangulation and suffocation. Congress specifically addressed strangulation and suffocation in the domestic violence context, and testimony and data indicated that almost all cases involving this conduct occur in that context and that strangulation and suffocation is most harmful in such cases.*

*Accordingly, the amendment amends Appendix A to reference section 113(a)(8) to §2A2.2 (Aggravated Assault) and 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. The amendment amends §2A2.2 to provide a 3-level enhancement at §2A2.2(b)(4) for strangling, suffocating, or attempting to strangle or suffocate a spouse, intimate partner, or dating partner. The amendment also provides that the cumulative impact of the enhancement for use of a weapon at §2A2.2(b)(2), bodily injury at §2A2.2(b)(3), and strangulation or suffocation at §2A2.2(b)(4) is capped at 12 levels. The Commission determined that the cap would assure that these three specific offense characteristics, which data suggests co-occur frequently, will enhance the ultimate sentence without leading to an excessively severe result.*

*Although the amendment refers section 113(a)(8) offenses to §2A2.2, it also amends §2A6.2 (Stalking or Domestic Violence) to address cases involving strangulation, suffocation, or attempting to strangle or suffocate, as a conforming change. The amendment adds strangulation and suffocation as a new aggravating factor at §2A6.2(b)(1), which results in a 2-level enhancement, or in a 4-level enhancement if it applies in conjunction with another aggravating factor such as bodily injury or the use of a weapon.*

*Fifth, the amendment removes the term "minor assault" from the Guidelines Manual. Misdemeanor assaults and other felonious assaults are referenced to §2A2.3, which prior to this amendment was titled*

*"Minor Assault." Informed by public comment, the Commission determined that use of the term "minor" is inconsistent with the severity of the underlying crimes and does a disservice to the victims and communities affected. Therefore, the amendment changes the title of §2A2.3 to "Assault," and it removes other references to "minor assault" from the Background and Commentary sections of §§2A2.2 and 2A2.3. This is a stylistic change that does not affect the application of §2A2.3.*

*Sixth, the amendment amended the Commentary to §5D1.1 (Imposition of a Term of Supervised Release) to provide additional guidance on the imposition of supervised release for domestic violence and stalking offenders. The amendment describes the statutory requirements pursuant to 18 U.S.C. § 3583(a) if a defendant is convicted for the first time of a domestic violence offense as defined in 18 U.S.C. § 3561(b). Under section 3583, a term of supervised release is required, and the defendant is also required to attend an approved rehabilitation program if one is available within a 50-mile radius from the defendant's residence.*

*The Commission received public comment and testimony that supervised release should be recommended in every case of domestic violence and stalking, and the Commission's sentencing data showed that in more than ninety percent of the cases sentenced under §2A6.2, supervised release was imposed. Based on this comment, testimony, and data, the amendment amends the Commentary to §5D1.1 to provide that in any other case involving either a domestic violence or a stalking offense, it is "highly recommended" that a term of supervised release be imposed.*

*Seventh, the amendment responds to changes made by the Act amending the federal statutes related to stalking and domestic violence. For the crimes of interstate domestic violence (18 U.S.C. § 2261), stalking (18 U.S.C. § 2261A), and interstate violation of a protective order (18 U.S.C. § 2262), the Act expanded the scope of each offense to provide that a defendant's mere presence in a special maritime or territorial jurisdiction is sufficient for purposes of satisfying the jurisdictional element of the crimes. The Act also revised the prohibited conduct set forth in section 2261A to now include stalking with intent to "intimidate" the victim, and it added the use of an "electronic communication service" or "electronic communication system" as prohibited means of committing the crime.*

*The amendment updates the definition of "stalking" in §2A6.2 to reflect these changes by tying the definition to the conduct described in 18 U.S.C. §2261A. The Commission determined that such a change would simplify the application of §2A6.2, while also ensuring that the definition of stalking remains consistent with any future statutory changes.*

*Eighth, the Act amended 8 U.S.C. § 1375a (Regulation of international marriage brokers) by reorganizing existing offenses and increasing the statutory maximum term of imprisonment for knowing violations of the regulations concerning marriage brokers from one year to five years. The Act also added a new criminal provision for "knowingly and with intent to defraud another person outside of the United States in order to recruit, solicit, entice, or induce that person into entering a dating or matrimonial relationship," making false or fraudulent representations regarding the background information required to be provided to an international marriage brokers. The new offense has a statutory maximum term of imprisonment of one year. The amendment referenced this new offense in Appendix A to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). The Commission concluded that §2B1.1 is the appropriate guideline because the elements of the new offense*

*include fraud and deceit. The amendment also amended Appendix A by revising the other criminal subsections, which continue to be referred to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information), to accord with the reorganization of the statute.*

*Ninth, the Trafficking Victims Protection Reauthorization Act, passed as part of the Act, included a provision expanding subsection (c) of 18 U.S.C. § 2423 (Transportation of minors), which had previously prohibited U.S. citizens or permanent residents who traveled abroad from engaging in illicit sexual conduct. After the Act, the same prohibition now also applies to those individuals who reside temporarily or permanently in a foreign country and engage in such conduct. Section 2423 contains four offenses, set forth in subsections (a) through (d), each of which prohibits sexual conduct with minors. Prior to the amendment, Appendix A referenced sections 2423(a) and 2423(b) to §2G1.3 (Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors; Travel to Engage in Commercial Sex or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children), but provided no reference for sections 2423(c) or 2423(d), which prohibits arranging, inducing, procuring, or facilitating the travel of a person for illicit sexual conduct, for the purpose of commercial advantage or financial gain. Both subsections (c) and (d) provide a 30 year statutory maximum term of imprisonment.*

*The amendment adds references in Appendix A for 18 U.S.C. §§ 2423(c) and (d). Based on the seriousness of the prohibited conduct, the severity of the penalties, and the vulnerability of the victims involved, the Commission concluded that 18 U.S.C. §§ 2423(c) and (d) should also be referenced in Appendix A to §2G1.3.*

*Tenth, the Act created a new Class A misdemeanor offense at 18 U.S.C. § 1597 prohibiting the knowing destruction, concealment, confiscation or possession of an actual or purported passport or other immigration documents of another individual if done in the course of violating or with the intent to violate 18 U.S.C. § 1351, relating to fraud in foreign labor contracting, or 8 U.S.C. § 1324, relating to bringing in or harboring certain aliens. The new offense also prohibits this conduct if it is done in order to, without lawful authority, maintain, prevent, or restrict the labor or services of the individual, and the knowing obstruction, attempt to obstruct, or interference with or prevention of the enforcement of section 1597. Section 1597 has a statutory maximum term of imprisonment of one year.*

*The amendment references this misdemeanor offense to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). This reference comports with the Commission's intent when it promulgated §2X5.2, as stated in Amendment 685 (effective November 1, 2006), that the Commission will reference new Class A misdemeanor offenses either to §2X5.2 or to another, more specific Chapter Two guideline, if appropriate. The Commission determined that with a base offense level of 6, §2X5.2 covers the range of sentencing possibilities that are available for defendants convicted of this offense, regardless of their criminal history. The Commission may consider referencing section 1597 to another substantive guideline in the future after more information becomes available regarding the type of conduct that constitutes the typical violation and the aggravating or mitigating factors that may apply.*

*Finally, the amendment removes from Appendix A the guideline references for two jurisdictional statutes in title 18 related to crimes committed within Indian country. Section 1152, also known as the General Crimes Act, grants federal jurisdiction for federal offenses committed by non-Indians within Indian country. Section 1153, also known as the Major Crimes Act, grants federal jurisdiction over Indians who commit certain enumerated offenses within Indian country. The Act expanded section 1153 to include any felony assault under section 113. Because sections 1152 and 1153 are simply jurisdictional*

statutes that do not provide substantive offenses, the Commission determined there is no need for Appendix A to provide a guidelines reference for those statutes.

**Amendment:**

**§2A2.2. Aggravated Assault**

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

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

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

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

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

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

- (5)(6) If the offense involved the violation of a court protection order, increase by 2 levels.
- (6)(7) If the defendant was convicted under 18 U.S.C. § 111(b) or § 115, increase by 2 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 112, 113(a)(2), (3), (6), (8), 114, 115(a), (b)(1), 351(e), 1751(e), 1841(a)(2)(C), 1992(a)(7), 2199, 2291, 2332b(a)(1), 2340A. For additional statutory provision(s), see Appendix A (Statutory Index).

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)~~ (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.

\* \* \*

4. Application of Official Victim Adjustment.—If subsection (b)(6)(7) applies, §3A1.2 (Official Victim) also shall apply.

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

Abuse).

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

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

**§2A2.3. Minor Assault**

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

Commentary

*Statutory Provisions:* 18 U.S.C. §§ 112, 113(a)(4), (5), (7), 115(a), 115(b)(1), 351(e), 1751(e), 2199, 2291. For additional statutory provision(s), see Appendix A (Statutory Index).

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)~~ (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 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.~~

**"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.

\* \* \*

**§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**

\* \* \*

Commentary

Statutory Provisions: 16 U.S.C. §§ 470aaa–5, 470ee, 668(a), 707(b); 18 U.S.C. §§ 541-546, 554, 641, 661-662, 666, 668, ~~1152-1153~~, 1163, 1168, 1170, 1361, 1369, 2232, 2314-2315.

\* \* \*

**§2B2.1. Burglary of a Residence or a Structure Other than a Residence**

\* \* \*

Commentary

Statutory Provisions: 18 U.S.C. §§ ~~1153~~, 2113(a), 2115, 2117, 2118(b). For additional statutory provision(s), see Appendix A (Statutory Index).

\* \* \*

**§2H3.1. Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information**

\* \* \*

Commentary

Statutory Provisions: 8 U.S.C. § ~~1375a(d)(3)(C), (d)(5)(B)~~ **1375a(d)(5)(B)(i), (ii)**; 18 U.S.C. §§ 119,

1039, 1905, 2511; 26 U.S.C. §§ 7213(a)(1)-(3), (a)(5), (d), 7213A, 7216; 42 U.S.C. §§ 16962, 16984; 47 U.S.C. § 605. For additional statutory provision(s), see Appendix A (Statutory Index).

\* \* \*

**§2K1.4. Arson; Property Damage by Use of Explosives**

\* \* \*

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(a), (b), 33, 81, 844(f), (h) (only in the case of an offense committed prior to November 18, 1988), (i), ~~1153~~, 1855, 1992(a)(1), (a)(2), (a)(4), 2275, 2282A, 2282B, 2291, 2332a, 2332f; 49 U.S.C. § 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

\* \* \*

**§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:

\* \* \*

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.*

\* \* \*

## APPENDIX A - STATUTORY INDEX

\* \* \*

~~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

\* \* \*

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

\* \* \*

~~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~~

\* \* \*

18 U.S.C. § 1593A 2H4.1

18 U.S.C. § 1597 2X5.2

\* \* \*

~~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

\* \* \*

### 3. DRUGS

**Reason for Amendment:** *This amendment revises the guidelines applicable to drug trafficking offenses by changing how the base offense levels in the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) incorporate the statutory mandatory minimum penalties for such offenses.*

*When Congress passed the Anti-Drug Abuse Act of 1986, Pub. L. 99–570, the Commission responded by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. The quantity thresholds in the Drug Quantity Table were set so as to provide base offense levels corresponding to guideline ranges that were slightly above the statutory mandatory minimum penalties. Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum were assigned a base offense level (level 26) corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I (a guideline range that exceeds the five-year statutory minimum for such offenses by at least three months). Similarly, offenses that trigger a ten-year statutory minimum were assigned a base offense level (level 32) corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I (a guideline range that exceeds the ten-year statutory minimum for such offenses by at least one month). The base offense levels for drug quantities above and below the mandatory minimum threshold quantities were extrapolated upward and downward to set guideline sentencing ranges for all drug quantities, see §2D1.1, comment. (backg'd.), with a minimum base offense level of 6 and a maximum base offense level of 38 for most drug types.*

*This amendment changes how the applicable statutory mandatory minimum penalties are incorporated into the Drug Quantity Table while maintaining consistency with such penalties. See 28 U.S.C. § 994(b)(1) (providing that each sentencing range must be "consistent with all pertinent provisions of title 18, United States Code"); see also 28 U.S.C. § 994(a) (providing that the Commission shall promulgate guidelines and policy statements "consistent with all pertinent provisions of any Federal statute").*

*Specifically, the amendment reduces by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties, resulting in corresponding guideline ranges that include the mandatory minimum penalties. Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum are assigned a base offense level of 24 (51 to 63 months at Criminal History Category I, which includes the five-year (60 month) statutory minimum for such offenses), and offenses involving drug quantities that trigger a ten-year statutory minimum are assigned a base offense level of 30 (97 to 121 months at Criminal History Category I, which includes the ten-year (120 month) statutory minimum for such offenses). Offense levels for quantities above and below the mandatory minimum threshold quantities similarly are adjusted downward by two levels, except that the minimum base offense level of 6 and the maximum base offense level of 38 for most drug types is retained, as are previously existing minimum and maximum base offense levels for particular drug types.*

*The amendment also 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 chemical precursors of controlled substances. Section 2D1.11 is generally structured to provide offense levels that are tied to, but less severe than, the base offense levels in §2D1.1 for offenses involving the final product.*

*In considering this amendment, the Commission held a hearing on March 13, 2014, and heard expert testimony from the Executive Branch, including the Attorney General and the Director of the Federal Bureau of Prisons, defense practitioners, state and local law enforcement, and interested community representatives. The Commission also received substantial written public comment, including from the Federal judiciary, members of Congress, academicians, community organizations, law enforcement groups, and individual members of the public.*

*The Commission determined that setting the base offense levels slightly above the mandatory minimum penalties is no longer necessary to achieve its stated purpose. Previously, the Commission has stated that "[t]he base offense levels are set at guideline ranges slightly higher than the mandatory minimum levels [levels 26 and 32] to permit some downward adjustment for defendants who plead guilty or otherwise cooperate with authorities." However, changes in the law and recent experience with similar reductions in base offense levels for crack cocaine offenses indicate that setting the base offense levels above the mandatory minimum penalties is no longer necessary to provide adequate incentives to plead guilty or otherwise cooperate with authorities.*

*In 1994, after the initial selection of levels 26 and 32, Congress enacted the "safety valve" provision, which applies to certain non-violent drug defendants and allows the court, without a 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). The guidelines incorporate the "safety valve" at §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and, furthermore, provide a 2-level reduction if the defendant meets the "safety valve" criteria. See §§2D1.1(b)(16).*

*These statutory and guideline provisions, which are unrelated to the guideline range's relationship to the mandatory minimum, provide adequate incentive to plead guilty. Commission data indicate that defendants charged with a mandatory minimum penalty in fact are more likely to plead guilty if they qualify for the "safety valve" than if they do not. 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.*

*Recent experience with similar reductions in the base offense levels for crack cocaine offenses indicates that the amendment should not negatively affect the rates at which offenders plead guilty or otherwise cooperate with authorities. Similar to this amendment, the Commission in 2007 amended the Drug Quantity Table for cocaine base ("crack" cocaine) so that the quantities that trigger mandatory minimum penalties were assigned base offense levels 24 and 30, rather than 26 and 32. See USSG App. C, Amendment 706 (effective November 1, 2007). In 2010, in implementing the emergency directive in section 8 of the Fair Sentencing Act of 2010, Pub. L. 111–220, 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. This recent experience indicates that this amendment, which is similar in nature to the 2007 crack cocaine amendment, should not negatively affect the willingness of defendants to plead guilty or otherwise cooperate with authorities. *See* 28 U.S.C. § 991(b) (specifying that sentencing policies are to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process").

The amendment also reflects the fact that the guidelines now more adequately differentiate among drug trafficking offenders than when the Drug Quantity Table was initially established. 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 a greater emphasis on the defendant's conduct and role in the offense rather than on 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. Section 2D1.1 in effect at the time of this amendment contains fourteen enhancements and three downward adjustments (including the "mitigating role cap" provided in subsection (a)(5)). These numerous adjustments, both increasing and decreasing offense levels based on specific conduct, reduce the need to rely on drug quantity in setting the guideline penalties for drug trafficking offenders as a proxy for culpability, and the amendment permits these adjustments to differentiate among offenders more effectively.

The amendment was also motivated by the significant overcapacity and costs of the Federal Bureau of Prisons. The Sentencing Reform Act directs the Commission to 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). Reducing the federal prison population and the costs of incarceration has become an urgent consideration. The Commission observed that the federal prisons are now 32 percent overcapacity, and drug trafficking offenders account for approximately 50 percent of the federal prison population (100,114 of 199,810 inmates as of October 26, 2013, for whom the Commission could determine the offense of conviction). Spending on federal prisons exceeds \$6 billion a year, or more than 25 percent of the entire budget for the Department of Justice. The Commission received testimony from the Department of Justice and others that spending on federal prisons is now crowding out resources available for federal prosecutors and law enforcement, aid to state and local law enforcement, crime victim services, and crime prevention programs, all of which promote public safety.

In response to these concerns, the Commission considered the amendment an appropriate step toward alleviating the overcapacity of the federal prisons. Based on an analysis of the 24,968 offenders sentenced under §2D1.1 in fiscal year 2012, the Commission estimates the amendment will affect the sentences of 17,457 — or 69.9 percent — of drug trafficking offenders sentenced under §2D1.1, and their average sentence will be reduced by 11 months — or 17.7 percent — from 62 months to 51 months. The Commission estimates these sentence reductions will correspond to a reduction in the federal prison population of approximately 6,500 inmates within five years after its effective date.

The Commission carefully weighed public safety concerns and, based on past experience, existing statutory and guideline enhancements, and expert testimony, concluded that the amendment should not jeopardize public safety. In particular, the Commission was informed by its studies that compared the recidivism rates for offenders who were released early as a result of retroactive application of the Commission's 2007 crack cocaine amendment with a control group of offenders who served their full

terms of imprisonment. *See* USSG App. C, Amendment 713 (effective March 3, 2008). The Commission detected no statistically significant difference in the rates of recidivism for the two groups of offenders after two years, and again after five years. This study suggests that modest reductions in drug penalties such as those provided by the amendment will not increase the risk of recidivism.

Furthermore, existing statutory enhancements, such as those available under 18 U.S.C. § 924(c), and guideline enhancements for offenders who possess firearms, use violence, have an aggravating role in the offense, or are repeat or career offenders, ensure that the most dangerous or serious offenders will continue to receive appropriately severe sentences. In addition, the Drug Quantity Table as amended still provides a base offense level of 38 for offenders who traffic the greatest quantities of most drug types and, therefore, sentences for these offenders will not be reduced. Similarly, the Drug Quantity Table as amended maintains minimum base offense levels that preclude sentences of straight probation for drug trafficking offenders with small quantities of most drug types.

Finally, the Commission relied on testimony from the Department of Justice that the amendment would not undermine public safety or law enforcement initiatives. To the contrary, the Commission received testimony from several stakeholders that the amendment would permit resources otherwise dedicated to housing prisoners to be used to reduce overcrowding, enhance programming designed to reduce the risk of recidivism, and to increase law enforcement and crime prevention efforts, thereby enhancing public safety.

**Amendment:**

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

- (a) Base Offense Level (Apply the greatest):
- (1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
  - (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
  - (3) **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
  - (4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death

or serious bodily injury resulted from the use of the substance; or

- (5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels. If the resulting offense level is greater than level **32** and the defendant receives the 4-level ("minimal participant") reduction in §3B1.2(a), decrease to level **32**.

(b) Specific Offense Characteristics

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

masking agent, increase by **2** levels.

- (9) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.
- (10) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by **2** levels.
- (11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by **2** levels.
- (12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by **2** levels.
- (13) (Apply the greatest):
  - (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
  - (B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
  - (C) If—
    - (i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or
    - (ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.
  - (D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

- (14) If 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) 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) If the defendant meets the criteria set forth in subdivisions (1)-(5) of

subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

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

(d) Cross References

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.
- (2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

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

## (c) DRUG QUANTITY TABLE

### Controlled Substances and Quantity\*

### Base Offense Level

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

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

(3)(4) **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 but 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.

**\*Notes to Drug Quantity Table:**

- (A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.
- (B) The terms "PCP (actual)", "Amphetamine (actual)", and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a

mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

The term "Oxycodone (actual)" refers to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.

- (C) "Ice," for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.
- (D) "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.
- (E) In the case of an offense involving marijuana plants, treat each plant, regardless of sex, as equivalent to 100 **grams** of marijuana. *Provided*, however, that if the actual weight of the marijuana is greater, use the actual weight of the marijuana.
- (F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one "unit" means 0.5 **milliliters**. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (*e.g.*, patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 **milligrams** of an anabolic steroid is one "unit".
- (G) In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 **milligrams** of LSD for the purposes of the Drug Quantity Table.
- (H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(31)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).
- (I) Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(31)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (*e.g.*, plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

#### Commentary

\* \* \*

Application Notes:

\* \* \*

8. Use of Drug Equivalency Tables.—

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

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

(See also Application Note 6.) For example, in the Drug Equivalency Tables set forth in this Note, 1 ~~gm~~gram of a substance containing oxymorphone, a Schedule I opiate, converts to an equivalent quantity of 5 ~~kg~~kilograms of marihuana. In a case involving 100 ~~gm~~grams of oxymorphone, the equivalent quantity of marihuana would be 500 ~~kg~~kilograms, 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 ~~10,000 units~~ 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/Dihydromorphanone =	2.5 kg of marihuana
1 gm of Levorphanol =	2.5 kg of marihuana
1 gm of Meperidine/Pethidine =	50 gm of marihuana
1 gm of Methadone =	500 gm of marihuana
1 gm of 6-Monoacetylmorphine =	1 kg of marihuana
1 gm of Morphine =	500 gm of marihuana
1 gm of Oxycodone (actual) =	6700 gm of marihuana
1 gm of Oxymorphone =	5 kg of marihuana
1 gm of Racemorphan =	800 gm of marihuana
1 gm of Codeine =	80 gm of marihuana
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm of marihuana
1 gm of Ethylmorphine =	165 gm of marihuana
1 gm of Hydrocodone/Dihydrocodeinone =	500 gm of marihuana
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm of marihuana
1 gm of Opium =	50 gm of marihuana
1 gm of Levo-alpha-acetylmethadol (LAAM)=	3 kg of marihuana

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

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

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

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

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

1 gm of Bufotenine =	70 gm of marihuana
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =	100 kg of marihuana
1 gm of Diethyltryptamine/DET =	80 gm of marihuana
1 gm of Dimethyltryptamine/DMT =	100 gm of marihuana
1 gm of Mescaline =	10 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) =	1 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) =	0.1 gm of marihuana
1 gm of Peyote (Dry) =	0.5 gm of marihuana
1 gm of Peyote (Wet) =	0.05 gm of marihuana
1 gm of Phencyclidine/PCP =	1 kg of marihuana

1 gm of Phencyclidine (actual) /PCP (actual) =	10 kg of marihuana
1 gm of Psilocin =	500 gm of marihuana
1 gm of Psilocybin =	500 gm of marihuana
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg of marihuana
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg of marihuana
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg of marihuana
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg of marihuana
1 gm of 3,4-Methylenedioxyamphetamine/MDA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxy-methamphetamine/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
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\*\*\*\*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.

\* \* \*

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

\* \* \*

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 ~~7~~**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 ~~7~~**15** (1 plus the offense level for the sale of 15 grams of heroin, the total amount of heroin involved in the offense).*

\* \* \*

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

- (a) Base Offense Level: The offense level from the Chemical Quantity Table set forth in subsection (d) or (e), as appropriate, except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (d) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels.
- (b) Specific Offense Characteristics
  - (1) If a dangerous weapon (including a firearm) was possessed, increase by

2 levels.

- (2) If the defendant is convicted of violating 21 U.S.C. § 841(c)(2) or (f)(1), or § 960(d)(2), (d)(3), or (d)(4), decrease by 3 levels, unless the defendant knew or believed that the listed chemical was to be used to manufacture a controlled substance unlawfully.
- (3) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.
- (4) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a listed chemical through mass-marketing by means of an interactive computer service, increase by 2 levels.
- (5) If the defendant is convicted under 21 U.S.C. § 865, increase by 2 levels.
- (6) 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.

(c) Cross Reference

- (1) If the offense involved unlawfully manufacturing a controlled substance, or attempting to manufacture a controlled substance unlawfully, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, Trafficking) if the resulting offense level is greater than that determined above.

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

<b>Quantity</b>	<b>Base Offense Level</b>
(1) 9 KG or more of Ephedrine; 9 KG or more of Phenylpropanolamine; 9 KG or more of Pseudoephedrine.	<b>Level 38</b>
(+) 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.	<b>Level 3836</b>
(±) At least 1 KG but less than 3 KG of Ephedrine; (3) At least 1 KG but less than 3 KG of Phenylpropanolamine;	<b>Level 3634</b>

	At least 1 KG but less than 3 KG of Pseudoephedrine.	
(3)	At least 300 G but less than 1 KG of Ephedrine;	<b>Level 3432</b>
(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;	<b>Level 3230</b>
(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;	<b>Level 3028</b>
(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;	<b>Level 2826</b>
(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;	<b>Level 2624</b>
(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;	<b>Level 2422</b>
(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;	<b>Level 2220</b>
(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;	<b>Level 2018</b>
(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;	<b>Level 1816</b>
(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;	<b>Level 1614</b>
(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 <b>Less</b> than 1 G of Ephedrine;	<b>Level 1412</b>
(14)	At least 500 MG but less <b>Less</b> than 1 G of Phenylpropanolamine; At least 500 MG but less <b>Less</b> 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) List I Chemicals **Level 30**

- 2.7 KG or more of Benzaldehyde;
- 60 KG or more of Benzyl Cyanide;
- 600 G or more of Ergonovine;
- 1.2 KG or more of Ergotamine;
- 60 KG or more of Ethylamine;
- 6.6 KG or more of Hydriodic Acid;
- 3.9 KG or more of Iodine;
- 960 KG or more of Isosafrole;
- 600 G or more of Methylamine;
- 1500 KG or more of N-Methylephedrine;
- 1500 KG or more of N-Methylpseudoephedrine;
- 1.9 KG or more of Nitroethane;
- 30 KG or more of Norpseudoephedrine;
- 60 KG or more of Phenylacetic Acid;
- 30 KG or more of Piperidine;
- 960 KG or more of Piperonal;
- 4.8 KG or more of Propionic Anhydride;
- 960 KG or more of Safrole;
- 1200 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;
- 3406.5 L or more of Gamma-butyrolactone;
- 2.1 KG or more of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid.

(+) List I Chemicals **Level 30**

- (2) ~~At least 890 G or more but less than 2.7 KG of Benzaldehyde;~~  
~~At least 20 KG or more but less than 60 KG of Benzyl Cyanide;~~  
~~At least 200 G or more but less than 600 G of Ergonovine;~~  
~~At least 400 G or more but less than 1.2 KG of Ergotamine;~~  
~~At least 20 KG or more but less than 60 KG of Ethylamine;~~  
~~At least 2.2 KG or more but less than 6.6 KG of Hydriodic Acid;~~  
~~At least 1.3 KG or more but less than 3.9 KG of Iodine;~~  
~~At least 320 KG or more but less than 960 KG of Isosafrole;~~  
~~At least 200 G or more but less than 600 G of Methylamine;~~  
~~At least 500 KG or more but less than 1500 KG of N-Methylephedrine;~~  
~~At least 500 KG or more but less than 1500 KG of N-Methylpseudoephedrine;~~  
~~At least 625 G or more but less than 1.9 KG of Nitroethane;~~  
~~At least 10 KG or more but less than 30 KG of Norpseudoephedrine;~~

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

List II Chemicals

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

(2) List I Chemicals

**Level 2826**

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

List II Chemicals

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

At least 1075 KG ~~or more~~ but less than 3225 KG of Ethyl Ether;  
At least 1200 KG ~~or more~~ but less than 3600 KG of Methyl Ethyl Ketone;  
At least 10 KG ~~or more~~ but less than 30 KG of Potassium Permanganate;  
At least 1300 KG ~~or more~~ but less than 3900 KG of Toluene.

(3) List I Chemicals

Level 2624

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

List II Chemicals

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

(4) 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)

List I Chemicals

**Level 2018**

(7)

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

List II Chemicals

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

(7)

List I Chemicals

**Level 1816**

(8)

At least 7.1 G but less than 8.9 G of Benzaldehyde;  
At least 160 G but less than 200 G of Benzyl Cyanide;  
At least 1.6 G but less than 2 G of Ergonovine;

At least 3.2 G but less than 4 G of Ergotamine;  
At least 160 G but less than 200 G of Ethylamine;  
At least 17.6 G but less than 22 G of Hydriodic Acid;  
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

(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;

**Level 1614**

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.

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\*Notes:

- (A) Except as provided in Note (B), to calculate the base offense level in an offense that 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 subsection (d) or (e) of this guideline, as appropriate.
- (B) To calculate the base offense level in an offense that 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.
- (C) In a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

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.*

\* \* \*

**§3B1.2. Mitigating Role**

Based on the defendant's role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
- (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

Commentary

Application Notes:

\* \* \*

3. Applicability of Adjustment.—

\* \* \*

- (B) Conviction of Significantly Less Serious Offense.—*If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level ~~4~~**12** under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under §2D2.1 (Unlawful Possession; Attempt or Conspiracy)), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.*

\* \* \*

**§3D1.5. Determining the Total Punishment**

Use the combined offense level to determine the appropriate sentence in accordance with the provisions of Chapter Five.

Commentary

*This section refers the court to Chapter Five (Determining the Sentence) in order to determine the total punishment to be imposed based upon the combined offense level. The combined offense level is subject to adjustments from Chapter Three, Part E (Acceptance of Responsibility) and Chapter Four, Part B (Career Offenders and Criminal Livelihood).*

\* \* \* \* \*

Illustrations of the Operation of the Multiple-Count Rules

*The following examples, drawn from presentence reports in the Commission's files, illustrate the operation of the guidelines for multiple counts. The examples are discussed summarily; a more thorough, step-by-step approach is recommended until the user is thoroughly familiar with the guidelines.*

\* \* \*

2. *Defendant C was convicted on four counts: (1) distribution of 230 grams of cocaine; (2) distribution of 150 grams of cocaine; (3) distribution of 75 grams of heroin; (4) offering a DEA agent \$20,000 to avoid prosecution. The combined offense level for drug offenses is determined by the total quantity of drugs, converted to marihuana equivalents (using the Drug Equivalency Tables in the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking)). The first count translates into 46 kilograms of marihuana; the second count translates into 30 kilograms of marihuana; and the third count translates into 75 kilograms of marihuana. The total is 151 kilograms of marihuana. Under §2D1.1, the combined offense level for the drug offenses is 2624. In addition, because of the attempted bribe of the DEA agent, this offense level is increased by 2 levels to 2826 under §3C1.1 (Obstructing or Impeding the Administration of Justice). Because the conduct constituting the bribery offense is accounted for by §3C1.1, it becomes part of the same Group as the drug offenses pursuant to §3D1.2(c). The combined offense level is 2826 pursuant to §3D1.3(a), because the offense level for bribery (22) is less than the offense level for the drug offenses (2826).*

\* \* \*

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

\* \* \*

Commentary

Application Notes:

\* \* \*

2. Application of Subsection (b).—

\* \* \*

- (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~~90 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional ~~15~~25 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~~115 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.*

\* \* \*

#### 4. MARIJUANA CULTIVATION OPERATIONS

**Reason for Amendment:** *This amendment provides increased punishment for certain defendants involved in marihuana cultivation operations on state or federal land or while trespassing on tribal or private land. The amendment adds a new specific offense characteristic at subsection (b)(14) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). The new specific offense characteristic provides an increase of two levels if the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved the cultivation of marihuana on state or federal land or while trespassing on tribal or private land.*

*The amendment responds to concerns raised by federal and local elected officials, law enforcement groups, trade groups, environmental advocacy groups and others, especially in areas of the country where unlawful outdoor marihuana cultivation is occurring with increasing frequency. The concerns included the fact that such operations typically involve acts such as clearing existing vegetation, diverting natural water sources for irrigation, using potentially harmful chemicals, killing wild animals, and leaving trash and debris at the site. The concerns also included the risk to public safety of marihuana cultivation operations on federal or state land or while trespassing on tribal or private land. Additionally, when an operation is located on public land or on private land without the owner's permission, the operation deprives the public or the owner of lawful access to and use of the land.*

*Accordingly, this amendment provides an increase of two levels when a marihuana cultivation operation is located on state or federal land or while trespassing on tribal or private land, but only applies to defendants who received an adjustment under §3B1.1 (Aggravating Role). These defendants are more culpable and have greater decision-making authority in the operation. The amendment also adds commentary in §2D1.1 at Application Note 19 clarifying that, consistent with ordinary guideline operation, the new increase may be applied cumulatively with the existing enhancement at subsection (b)(13)(A) of §2D1.1, which applies if an offense involved certain conduct relating to hazardous or toxic substances or waste.*

**Amendment:**

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

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

(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:

\* \* \*

16. Application of Subsection (b)(11).—Subsection (b)(11) does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant. Such conduct is covered by §3C1.1 (Obstructing or Impeding the Administration of Justice) and,

if applicable, §2D1.1(b)(~~4~~15)(D).

\* \* \*

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

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

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

(i) Factors to Consider.—In determining, for purposes of subsection (b)(13)(C)(ii) or (D), whether the offense created a substantial risk of harm to human life or the environment, the court shall include consideration of the following factors:

- (I) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, and the manner in which the chemicals or substances were stored.
- (II) The manner in which hazardous or toxic substances were disposed, and the likelihood of release into the environment of hazardous or toxic substances.
- (III) The duration of the offense, and the extent of the manufacturing operation.
- (IV) The location of the laboratory (*e.g.*, whether the laboratory is located in a residential neighborhood or a remote area), and the number of human

lives placed at substantial risk of harm.

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

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

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

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

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

~~19~~20. Application of Subsection (b)(~~14~~15).—

(A) Distributing to a Specified Individual or Involving Such an Individual in the Offense (Subsection (b)(~~14~~15)(B)).—If the defendant distributes a controlled substance to an individual or involves an individual in the offense, as specified in subsection (b)(~~14~~15)(B), the individual is not a "vulnerable victim" for purposes of §3A1.1(b).

(B) Directly Involved in the Importation of a Controlled Substance (Subsection (b)(~~14~~15)(C)).—Subsection (b)(~~14~~15)(C) applies if the defendant is accountable for the importation of a controlled substance under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), i.e., the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the importation of a controlled substance.

If subsection (b)(3) or (b)(5) applies, do not apply subsection (b)(~~14~~15)(C).

(C) Pattern of Criminal Conduct Engaged in as a Livelihood (Subsection (b)(~~14~~15)(E)).—For purposes of subsection (b)(~~14~~15)(E), "pattern of criminal conduct" and "engaged in as a livelihood" have the meaning given such terms in §4B1.3 (Criminal Livelihood).

~~20~~21. Applicability of Subsection (b)(~~16~~17).—The applicability of subsection (b)(~~16~~17) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection (b)(~~16~~17) applies.

- 2122. Application of Subsection (e)(1).— \* \* \*
- 2223. Interaction with §3B1.3.— \* \* \*
- 2324. Cases Involving Mandatory Minimum Penalties.— \* \* \*
- 2425. Imposition of Consecutive Sentence for 21 U.S.C. § 860a or § 865.— \* \* \*
- 2526. Cases Involving "Small Amount of Marihuana for No Remuneration".— \* \* \*
- 2627. Departure Considerations.— \* \* \*

\* \* \*

*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.*

\* \* \*

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

\* \* \*

*Subsection (b)(~~4~~15) implements the directive to the Commission in section 6(3) of Public Law 111–220.*

*Subsection (b)(~~5~~16) implements the directive to the Commission in section 7(2) of Public Law 111–220.*

\* \* \*

**§2D1.14. Narco-Terrorism**

(a) Base Offense Level:

- (1) The offense level from §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) applicable to the underlying offense, except that §2D1.1(a)(5)(A), (a)(5)(B), and (b)(~~6~~17) shall not apply.

(b) Specific Offense Characteristic

- (1) If §3A1.4 (Terrorism) does not apply, increase by 6 levels.

Commentary

Statutory Provision: 21 U.S.C. § 960a.

\* \* \*

**§3B1.4. Using a Minor To Commit a Crime**

If the defendant used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense, increase by 2 levels.

Commentary

Application Notes:

\* \* \*

2. *Do not apply this adjustment if the Chapter Two offense guideline incorporates this factor. For example, if the defendant receives an enhancement under §2D1.1(b)(1+15)(B) for involving an individual less than 18 years of age in the offense, do not apply this adjustment.*

\* \* \*

**§3C1.1. Obstructing or Impeding the Administration of Justice**

If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.

Commentary

Application Notes:

\* \* \*

7. *Inapplicability of Adjustment in Certain Circumstances.—If the defendant is convicted of an offense covered by §2J1.1 (Contempt), §2J1.2 (Obstruction of Justice), §2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), §2J1.5 (Failure to Appear by Material Witness), §2J1.6 (Failure to Appear by Defendant), §2J1.9 (Payment to Witness), §2X3.1 (Accessory After the Fact), or §2X4.1 (Misprision of Felony), this adjustment is not to be applied to the offense*

*level for that offense except if a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (e.g., if the defendant threatened a witness during the course of the prosecution for the obstruction offense).*

*Similarly, if the defendant receives an enhancement under §2D1.1(b)(~~1~~15)(D), do not apply this adjustment.*

\* \* \*

## 5. FELON IN POSSESSION

**Reason for Amendment:** *This amendment addresses cases in which the defendant is convicted of a firearms offense (in particular, being a felon in possession of a firearm) and also possessed a firearm in connection with another offense, such as robbery or attempted murder.*

*In such a case, the defendant is sentenced under the firearms guideline, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). If the defendant possessed any firearm in connection with another felony offense, subsection (b)(6)(B) provides a 4-level enhancement and a minimum offense level of 18. If the defendant possessed any firearm in connection with another offense, subsection (c)(1) provides a cross reference to the offense guideline applicable to the other offense, if it results in a higher offense level. (For example, if the defendant possessed any firearm in connection with a robbery, a cross reference to the robbery guideline may apply.)*

*This amendment is a result of the Commission's review of the operation of subsections (b)(6)(B) and (c)(1). The review was prompted in part because circuits have been following a range of approaches in determining whether these provisions apply. Several circuits have taken the view that subsections (b)(6)(B) and (c)(1) apply only if the other offense is a "groupable" offense under §3D1.2(d). 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 cross reference does not apply because murder is not "groupable"); United States v. Settle, 414 F.3d 629, 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). But see United States v. Kulick, 629 F.3d 165, 170 (3d Cir. 2010) (felon in possession used a firearm in connection with extortion; the cross reference may apply even though extortion is not "groupable"); United States v. Gonzales, 996 F.2d 88, 92 n.6 (5th Cir. 1993) (relevant conduct principles do not restrict the application of subsection (b)(6)(B)); United States v. Outley, 348 F.3d 476 (5th Cir. 2003) (relevant conduct principles do not restrict the application of subsection (c)(1)).*

*The amendment clarifies how relevant conduct principles operate in determining whether subsections (b)(6)(B) and (c)(1) apply. Subsections (b)(6)(B) and (c)(1) are not intended to apply only when the other felony offense is a "groupable" offense. Such an approach would result in unwarranted disparities, with defendants who possess a firearm in connection with a "groupable" offense (such as a drug offense) being subject to higher penalties than defendants who possess a firearm in connection with a "non-groupable" offense (such as murder or robbery). Instead, the central question for the court in these cases is whether the defendant's two firearms offenses — the firearms offense of conviction, and his unlawful possession of a firearm in connection with the other felony offense — were "part of the same course of conduct or common scheme or plan". See §1B1.3(a)(2). The amendment adds examples to the commentary to clarify how relevant conduct principles are intended to operate in this context.*

*The amendment also responds to concerns regarding the impact of subsection (c)(1), particularly in cases in which the defendant was convicted of unlawfully possessing a firearm on one occasion but was found to have possessed a different firearm on another occasion in connection with another, more serious, offense. Because unlawfully possessing a firearm is an offense based on a status (i.e., being a felon) that can continue for many years, the cross reference at subsection (c)(1) may, in effect, expose such a defendant to the highest offense level of any crime he may have committed at any time, regardless*

*of its connection to the instant offense.*

*While relevant conduct principles provide a limitation on the scope of subsection (c)(1) (and, as discussed above, this amendment clarifies how those principles operate in this context), the Commission determined that a further limitation on the scope of subsection (c)(1) is appropriate. Specifically, the instant offense and the other offense must be related to each other by, at a minimum, having an identifiable firearm in common. Accordingly, the amendment revises the cross reference so that it applies only to the particular firearm or firearms cited in the offense of conviction.*

**Amendment:**

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

- (a) Base Offense Level (Apply the Greatest):
- (1) **26**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
  - (2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
  - (3) **22**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;
  - (4) **20**, if—
    - (A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or
    - (B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d); or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm

or ammunition to a prohibited person;

- (5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a);
- (6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d); or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;
- (7) **12**, except as provided below; or
- (8) **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1).

(b) Specific Offense Characteristics

- (1) If the offense involved three or more firearms, increase as follows:

	<u>Number of Firearms</u>	<u>Increase in Level</u>
(A)	3-7	add <b>2</b>
(B)	8-24	add <b>4</b>
(C)	25-99	add <b>6</b>
(D)	100-199	add <b>8</b>
(E)	200 or more	add <b>10</b> .

- (2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level **6**.
- (3) If the offense involved—
  - (A) a destructive device that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by **15** levels; or
  - (B) a destructive device other than a destructive device referred to in subdivision (A), increase by **2** levels.
- (4) If any firearm (A) was stolen, increase by **2** levels; or (B) had an altered or obliterated serial number, increase by **4** levels.

The cumulative offense level determined from the application of subsections

(b)(1) through (b)(4) may not exceed level **29**, except if subsection (b)(3)(A) applies.

(5) If the defendant engaged in the trafficking of firearms, increase by **4** levels.

(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**.

(7) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

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

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

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

Commentary

\* \* \*

Application Notes:

\* \* \*

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

(A) In General.—Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.

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

(C) Definitions.—

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

"Another offense", for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.

(D) Upward Departure Provision.—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.

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

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

For example:

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

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

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

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

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

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

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

\* \* \*

## 6. ALIEN SMUGGLING

**Reason for Amendment:** *This amendment accounts for the risks of death, injury, starvation, dehydration, or exposure that aliens potentially face when transported through dangerous and remote geographical areas, e.g., along the southern border of the United States.*

*Section 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) currently has an enhancement at subsection (b)(6), which provides for a 2-level increase and a minimum offense level of 18, for intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person. The Commentary for subsection (b)(6), Application Note 5, explains that §2L1.1(b)(6) may apply to 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 the concerns addressed in this amendment is United States v. Mateo Garza, 541 F.3d 290 (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 the 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 amendment adds to Application Note 5 the following new example of the conduct to which §2L1.1(b)(6) 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." The Commission determined that this new example will clarify application of subsection (b)(6), highlight the potential risks in these types of cases, provide guidance for the courts to determine whether to apply the enhancement, and promote uniformity in sentencing by providing factors to consider when determining whether to apply §2L1.1(b)(6).*

### **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 <b>3</b>
(B)	25-99	add <b>6</b>
(C)	100 or more	add <b>9</b> .

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

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

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

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

- (8) (Apply the greater):

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

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

(c) Cross Reference

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

Commentary

\* \* \*

Application Notes:

\* \* \*

5. Application of Subsection (b)(6).—Reckless conduct to which the adjustment from subsection (b)(6)

*applies includes a wide variety of conduct (e.g., transporting persons in the trunk or engine compartment of a motor vehicle; carrying substantially more passengers than the rated capacity of a motor vehicle or vessel; 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.*

## 7. SUPERVISED RELEASE

**Reason for Amendment:** *This amendment resolves a circuit conflict and a related guideline application issue about the calculation of terms of supervised release. The circuit conflict involves defendants sentenced under statutes providing for mandatory minimum terms of supervised release, while the application issue relates specifically to defendants convicted of failure to register as a sex offender, in violation of 18 U.S.C. § 2250.*

*The guideline term of supervised release is determined by §5D1.2 (Term of Supervised Release). Section 5D1.2(a) sets forth general rules for determining the guideline term of supervised release, based on the statutory classification of the offense. See §5D1.2(a)(1)-(3); 18 U.S.C. § 3559 (sentencing classification of offenses). For certain terrorism-related and sex offenses, §5D1.2(b) operates to replace the top end of the guideline term calculated under subsection (a) with a life term of supervised release. In the case of a "sex offense," as defined by Application Note 1 to §5D1.2, a policy statement recommends that a life term of supervised release be imposed. See §5D1.2(b), p.s. Finally, §5D1.2(c) states that "the term of supervised release imposed shall be not less than any statutorily required term of supervised release."*

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

*First, there appear to be differences among the circuits in how to calculate the guideline term 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 has 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 term provided by (a)) and, if the statutory minimum equals or exceeds the top of the guideline term provided by subsection (a), the guideline "range" becomes 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 of three years to life. Under the Seventh Circuit's approach in Gibbs, the guideline "range" would 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.*

*The amendment adopts the approach of the Seventh Circuit in Gibbs and Goodwin. The amendment provides a new Application Note and examples explaining that, under subsection (c), a statutorily required minimum term of supervised release operates to restrict the low end of the guideline term of supervised release.*

The Commission determined that this resolution was most consistent with its statutory obligation to determine the "appropriate length" of supervised release terms, and with how a statutory minimum term of imprisonment operates to restrict the range of imprisonment provided by the guidelines. See 28 U.S.C. § 994(a)(1)(c); USSG §5G1.1(a). This outcome is also consistent with the Commission's 2010 report on supervised release, which found that most supervised release violations occur in the first year after release from incarceration. See U.S. Sentencing Comm'n, Federal Offenders Sentenced to Supervised Release, at 63 & n. 265 (July 2010). If an offender shows non-compliance during the initial term of supervised release, the court may extend the term of supervision up to the statutory maximum, pursuant to 18 U.S.C. § 3583(e)(2).

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

Second, there are differences among the circuits over how to calculate the guideline range of supervised release when a defendant is convicted, under 18 U.S.C. § 2250, of failing to register as a sex offender. That offense carries a statutory minimum term of supervised release of at least five years, with a term up to life permitted. See 18 U.S.C. § 3583(k).

There is 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 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); see also United States v. Segura, No. 12-11262, \_\_\_ F.3d \_\_\_, 2014 WL 1282759, at \*4 (5th Cir. Mar. 31, 2014) (agreeing with Goodwin). 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).

The Commission agrees with the Seventh Circuit that failure to register is not an offense that is "perpetrated against a minor." In addition, expert testimony and research reviewed by the Commission

*indicated that commission of a failure-to-register offense is not correlated with sex offense recidivism. The amendment resolves the application issue by amending the commentary to §5D1.2 to clarify that offenses under Section 2250 are not "sex offenses."*

**Amendment:**

**§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) (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 (v) of this note. Such term does not include an offense under 18 U.S.C. § 2250 (Failure to register).

\* \* \*

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.

## 8. OTHER TERMS OF IMPRISONMENT

**Reason for Amendment:** *This multi-part 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).*

*Section 5G1.3 identifies three categories of cases in which a federal defendant is also subject to an undischarged term of imprisonment. First, there are cases in which the federal offense was committed while the defendant was serving the undischarged term of imprisonment (including work release, furlough, or escape status). In these cases, the federal sentence is to be imposed consecutively to the remainder of the undischarged term of imprisonment. See §5G1.3(a). Second, assuming subsection (a) does not apply, there are cases in which the conduct involved in the undischarged term of imprisonment is related to the conduct involved in the federal offense — specifically, the offense for which the defendant is serving an undischarged term of imprisonment is relevant conduct under subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) — and was the basis for an increase in the offense level under Chapter Two or Chapter Three. In these cases, the court is directed to adjust the federal sentence to account for the time already served on the undischarged term of imprisonment (if the Bureau of Prisons will not itself provide credit for that time already served) and is further directed to run the federal sentence concurrently with the remainder of the sentence for the undischarged term of imprisonment. See §5G1.3(b). Finally, in all other cases involving an undischarged state term of imprisonment, the court may impose the federal sentence concurrently, partially concurrently, or consecutively, to achieve a reasonable punishment for the federal offense. See §5G1.3(c), p.s.*

*Within the category of cases covered by subsection (b), where the conduct involved in the undischarged term of imprisonment is related to the federal offense conduct, the Commission considered whether the benefit of subsection (b) should continue to be limited to cases in which the offense conduct related to the undischarged term of imprisonment resulted in a Chapter Two or Three increase. The Commission determined that this limitation added complexity to the guidelines and may lead to unwarranted disparities. For example, a federal drug trafficking defendant who is serving an undischarged state term of imprisonment for a small amount of a controlled substance that is relevant conduct to the federal offense may not receive the benefit of subsection (b) because the amount of the controlled substance may not be sufficient to increase the offense level under Chapter Two. In contrast, a federal drug trafficking defendant who is serving an undischarged state term of imprisonment for a large amount of a controlled substance that is relevant conduct to the federal offense may be more likely to receive the benefit of subsection (b) because the amount of the controlled substance may be more likely to increase the offense level under Chapter Two. The amendment 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), regardless of whether the conduct from the prior offense formed the basis for a Chapter Two or Chapter Three increase. The Commission determined that this amendment will simplify the operation of §5G1.3(b) and will also address concerns that the requirement that the relevant conduct increase the offense level under Chapters Two or Three is somewhat arbitrary.*

*Second, the amendment addresses 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). This amendment creates a new*

subsection (c) at §5G1.3 that directs the court to impose the sentence for the instant federal offense to run concurrently with the anticipated but not yet imposed period of imprisonment if §5G1.3(a) does not apply.

This amendment is a further response to the Supreme Court's decision in Setser v. United States, 132 S. Ct. 1463 (2012). Last year, the Commission amended the Background Commentary to §5G1.3 to provide heightened awareness of the court's authority under Setser. See USSG App. C, Amend. 776 (effective November 1, 2013). In Setser, the Supreme Court held that a federal sentencing court has the authority to order that a federal term of imprisonment run concurrent with, or consecutive to, an anticipated but not yet imposed state sentence. This amendment reflects the Commission's determination that the concurrent sentence benefits of subsection (b) of §5G1.3 should be available not only in cases in which the state sentence has already been imposed at the time of federal sentencing (as subsection (b) provides), but also in cases in which the state sentence is anticipated but has not yet been imposed, as long as the other criteria in subsection (b) are satisfied (i.e., the state offense is relevant conduct under subsections (a)(1), (a)(2), or (a)(3) of §1B1.3, and subsection (a) of §5G1.3 does not apply). By requiring courts to impose a concurrent sentence in these cases, the amendment reduces disparities between defendants whose state sentences have already been imposed and those whose state sentences have not yet been imposed. The amendment also promotes certainty and consistency.

Third, the amendment addresses certain cases in which the defendant is an alien and is subject to an undischarged term of imprisonment. The amendment provides a new departure provision in §2L1.2 (Unlawfully Entering or Remaining in the United States) for cases in which the defendant is located by immigration authorities while the defendant is in state custody, whether pre- or post- conviction, for a state offense unrelated to the federal illegal reentry 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 for the unrelated offense, from the time federal 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 new departure provision also sets forth factors for the court to consider in determining whether to provide such a departure, and states that a departure should be considered only if the departure will not increase the risk to the public from further crimes of the defendant.

This amendment addresses concerns that the amount of time a defendant serves in state custody after being located by immigration authorities may be somewhat arbitrary. Several courts have recognized a downward departure to account for the delay between when the defendant is "found" by immigration authorities and when the defendant is brought into federal custody. See, e.g., United States v. Sanchez-Rodriguez, 161 F.3d 556, 563-64 (9th Cir. 1998) (affirming downward departure on the basis that, because of the delay in proceeding with the illegal reentry case, the defendant lost the opportunity to serve a greater portion of his state sentence concurrently with his illegal reentry sentence); United States v. Barrera-Saucedo, 385 F.3d 533, 537 (5th Cir. 2004) (holding that "it is permissible for a sentencing court to grant a downward departure to an illegal alien for all or part of time served in state custody from the time immigration authorities locate the defendant until he is taken into federal custody"); see also United States v. Los Santos, 283 F.3d 422, 428-29 (2d Cir. 2002) (departure appropriate if the delay was either in bad faith or unreasonable). The amendment provides guidance to the courts in the determination of an appropriate sentence in such a case.

**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). See §5G1.3(a). 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.*

\* \* \*

**§2X5.1. Other Felony Offenses**

If the offense is a felony for which no guideline expressly has been promulgated, apply the most analogous offense guideline. If there is not a sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553 shall control, except that any guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline shall remain applicable.

If the defendant is convicted under 18 U.S.C. § 1841(a)(1), apply the guideline that covers the conduct the defendant is convicted of having engaged in, as that conduct is described in 18 U.S.C. § 1841(a)(1) and listed in 18 U.S.C. § 1841(b).

Commentary

Statutory Provision: 18 U.S.C. § 1841(a)(1).

Application Notes:

1. *In General.*—Guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline include: §5B1.3 (Conditions of Probation); §5D1.1 (Imposition of a Term of Supervised Release); §5D1.2 (Term of Supervised Release); §5D1.3 (Conditions of Supervised Release); §5E1.1 (Restitution); §5E1.3 (Special Assessments); §5E1.4 (Forfeiture); Chapter Five, Part F (Sentencing Options); §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment **or Anticipated State Term of Imprisonment**); Chapter Five, Part H (Specific Offender Characteristics); Chapter Five, Part J (Relief from Disability); Chapter Five, Part K (Departures); Chapter Six, Part A (Sentencing Procedures); Chapter Six, Part B (Plea Agreements).

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**§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:

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 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 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).—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:

- (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)(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).*

*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.*

\* \* \*

**§5K2.23. Discharged Terms of Imprisonment (Policy Statement)**

A downward departure may be appropriate if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of §5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment **or Anticipated Term of Imprisonment**) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.