Proposed Amendments to the Sentencing Guidelines

January 24, 2025

Closing Date for Public Comment: March 3, 2025

Closing Date for Reply Comment: March 18, 2025

This compilation contains unofficial text of proposed amendments to the sentencing guidelines, policy statements, and official commentary, and is provided only for the convenience of the user in the preparation of public comment. Official text of the proposed amendments can be found on the Commission's website at www.ussc.gov and will appear in the February 4, 2025, edition of the Federal Register.

The proposed amendments and issues for comment will be subject to a public comment period running through **March 3, 2025**, and a reply comment period running through **March 18, 2025**. Comments during the reply phase are limited to issues raised in the original comment period. Public comment received after the close of the comment period may not be considered. All written comment should be sent to the Commission via any of the following two methods: (1) comments may be submitted electronically via the Commission's Public Comment Submission Portal at https://comment.ussc.gov; or (2) comments may be submitted by mail to the following address: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs – Proposed Amendments. For further information, see the full contents of the official notice published in the Federal Register (available at www.ussc.gov).

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SUPPLEMENTARY INFORMATION

Publication of a proposed amendment requires the affirmative vote of at least three voting members of the Commission and is deemed to be a request for public comment on the proposed amendment. *See* Rules 2.2 and 4.4 of the Commission's Rules of Practice and Procedure. In contrast, the affirmative vote of at least four voting members is required to promulgate an amendment and submit it to Congress. *See* Rule 2.2; 28 U.S.C. § 994(p).

The proposed amendments in this document are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

In addition to the issues for comment set forth in the proposed amendments, the Commission requests public comment regarding whether, pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u), any proposed amendment published in this document should be included in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in §1B1.10(d) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. § 3582(c)(2). The background commentary to §1B1.10 lists 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 §1B1.10(b) as among the factors the Commission considers in selecting the amendments included in §1B1.10(d). To the extent practicable, public comment should address each of these factors.

Additional information pertaining to the proposed amendments described in this document may be accessed through the Commission's website at www.ussc.gov.

2024–2025 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

1. PROPOSED AMENDMENT: SUPERVISED RELEASE

Synopsis of Proposed Amendment: The Sentencing Reform Act of 1984 establishes a framework for courts to order supervised release to be served after a term of imprisonment. *See* 18 U.S.C. § 3583. For certain offenses, the court is statutorily required to impose a term of supervised release. *See id.* This framework aims to "assure that [those] who will need post-release supervision will receive it" while "prevent[ing] probation system resources from being wasted on supervisory services for releasees who do not need them." *See* S. Rep. No. 225, 98th Cong., 1st Sess. 54 (1983); *see also Johnson v. United States*, 529 U.S. 694, 701 (2000) ("Supervised release departed from the parole system it replaced by giving district courts the freedom to provide postrelease supervision for those, and only those, who needed it.").

The length of the term of supervised release that a court may select depends on the class of the offense of conviction. The term may be not more than five years for a Class A or Class B felony, not more than three years for a Class C or Class D felony, and not more than one year for a Class E felony or a misdemeanor (other than a petty offense). *See* 18 U.S.C. § 3583(b). There is an exception for certain sex offenses and terrorism offenses, for which the term of supervised release may be up to life. *See* 18 U.S.C. § 3583(j) and (k).

If a court imposes a term of supervised release, the court must order certain conditions of supervised release, such as that the defendant not commit another crime or unlawfully possess a controlled substance during the term, and that the defendant make restitution. *See* 18 U.S.C. § 3583(d). The court may order other discretionary conditions it considers appropriate, as long as the condition meets certain criteria. *See id.* In determining whether to impose a term of supervised release and the length of the term and conditions of supervised release, the court must consider certain 18 U.S.C. § 3553 factors. *See* 18 U.S.C. § 3583(c).

Courts are authorized, under certain conditions, to extend or terminate a term of supervised release, or modify, enlarge, or reduce the conditions thereof. *See* 18 U.S.C. § 3583(f). Before doing so, the court must consider the 18 U.S.C. § 3553 factors listed above. *See id.* For certain violations, courts are required to revoke supervised release. *See* 18 U.S.C. § 3583(g).

The Sentencing Commission's policies regarding supervised release are included in Part D (Supervised Release) of Chapter Five (Determining the Sentence) and Part B (Probation and Supervised Release Violations) of Chapter Seven (Probation and Supervised Release Violations) of the *Guidelines Manual*. This proposed amendment contains two parts revising those policies:

Part A would amend Part D of Chapter Five, which addresses the imposition of a term of supervised release. Issues for comment are also provided.

Part B would amend Chapter Seven, which addresses the procedures for handling a violation of the terms of probation and supervised release. Issues for comment are also provided.

The Commission is considering whether to implement one or both parts, as they are not mutually exclusive.

(A) Imposition of a Term of Supervised Release

Synopsis of Proposed Amendment: Chapter Five, Part D (Supervised Release) of the *Guidelines Manual* covers supervised release, including the imposition decision itself, the length of a term of supervised release, and the conditions of supervised release.

Section 5D1.1 (Imposition of a Term of Supervised Release) governs the imposition of a term of supervised release. Under §5D1.1(a), a court shall order a term of supervised release (1) when it is required by statute or (2) when a sentence of more than one year is imposed. In any other case, §5D1.1(b) treats the decision to impose a term of supervised release as discretionary. The commentary to §5D1.1 describes the factors to consider in determining whether to impose a term of supervised release: (1) certain 18 U.S.C. § 3553 factors, which the court is statutorily required to consider (*see* 18 U.S.C. § 3583(c)); (2) an individual's criminal history; (3) whether an individual is an abuser of controlled substances or alcohol; and (4) whether an offense involved domestic violence or stalking. USSG §5D1.1 comment. (n.3).

Section 5D1.1(c) provides an exception to the rule in §5D1.1(a), directing that "[t]he 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." However, Application Note 5 directs that a court should consider imposing a term of supervised release if "it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case."

Section 5D1.2 (Term of Supervised Release) governs the length of a term of supervised release. First, §5D1.2(a) sets forth the recommended terms of supervised release for each classification of offense: (1) two to five years for an individual convicted of a Class A or B felony; (2) one to three years for an individual convicted of a Class C or D felony; and (3) one year for an individual convicted of a Class E felony or a Class A misdemeanor. Second, for offenses involving terrorism or a sex offense, §5D1.2(b) provides for a term of supervised release up to life, and a policy statement further directs that for a sex offense, as defined in Application Note 1, the statutory maximum term of supervised release is recommended. Lastly, §5D1.2(c) instructs that the term of supervised release shall not be less than any statutorily required term of supervised release.

The Commentary to §5D1.2 provides further guidance for setting a term of supervised release. Application Note 4 directs that the factors to be considered in selecting the length of a term of supervised release are the same as those for determining whether to impose such a term. Application Note 5 states that courts have "authority to terminate or extend a term of supervised release" and encourages courts to "exercise this authority in appropriate cases."

Section 5D1.3 (Conditions of Supervised Release) sets forth the mandatory, "standard," "special," and additional conditions of supervised release. It provides a framework for courts to use when imposing the standard, special, and additional conditions—those considered "discretionary."

The Commission has received feedback from commenters that the guidelines should provide courts with greater discretion to make determinations regarding the imposition of supervised release that are based on an individualized assessment of the defendant. Additionally, a bipartisan coalition in Congress has sought to address similar concerns. *See, e.g.,* Safer Supervision Act of 2023, S.2681, 118th Cong. (2023) and H.R. 5005, 118th Cong. (1st Sess. 2023).

Part A of the proposed amendment seeks to revise Chapter Five, Part D to accomplish two goals. The first is to provide courts greater discretion to impose a term of supervised release in the manner it determines is most appropriate based on an individualized assessment of the defendant. The second is to ensure the provisions in Chapter Five "fulfill[] rehabilitative ends, distinct from those of incarceration." *United States v. Johnson*, 529 U.S. 53, 59 (2000).

Part A of the proposed amendment would make a number of changes to the supervised release provisions in Chapters Five to serve these goals.

First, Part A of the proposed amendment would add introductory commentary to Part D of Chapter Five expressing the Commission's view that, when making determinations regarding supervised release, courts should assess a wide range of factors to ensure its decisions fulfill the rehabilitative needs of the defendant and protect the public from further crimes of the defendant.

Second, Part A of the proposed amendment would amend the provisions of §5D1.1 addressing the imposition of a term of supervised release. It would remove the requirement that a court impose a term of supervised release when a sentence of imprisonment of more than one year is imposed, so a court would be required to impose supervised release only when required by statute. For cases in which the decision whether to impose supervised release is discretionary, the court may order a term of supervised release when warranted by an individualized assessment of the need for supervision. Additionally, the court should state the reason for its decision on the record.

Third, Part A of the proposed amendment would amend §5D1.2, which addresses the length of the term of supervised release. The proposed amendment would remove the provisions requiring a minimum term of supervised release of two years for a Class A or B felony and one year for a Class C, D, or E felony or Class A misdemeanor. Instead, Part A of the proposed amendment would require the court to conduct an individualized assessment to determine the length of the term of supervised release, which must not exceed the maximum term allowed by statute. It would remove the policy statement recommending a supervised release term of life for sex offense cases and add a policy statement that the court should state on the record its reasons for selecting the length of the term of supervised release.

Fourth, Part A of the proposed amendment would amend §5D1.3, which addresses the conditions of supervised release. It would add a provision stating that courts should conduct an individualized assessment to determine what discretionary conditions are warranted. It brackets the possibility of redesignating "standard" conditions as "examples of common conditions" and brackets either that such conditions may be warranted in some appropriate

cases or may be modified, omitted, or expanded in appropriate cases. It would also add an example of a "special" condition that would require a defendant who has not obtained a high school or equivalent diploma to participate in a program to obtain such a diploma.

Finally, Part A of the proposed amendment would add a new policy statement at §5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement)) addressing a court's authority to extend or terminate a term of supervised release or modify the conditions thereof. It would encourage a court, as soon as practicable after a defendant's release from imprisonment, to conduct an individualized assessment to determine whether it is warranted to modify, reduce, or enlarge the conditions of supervised release. Additionally, any time after the expiration of one year of supervised release, it would encourage a court to terminate the remaining term of supervision and discharge the defendant if the court determines, following consultation with the government and the probation officer, that the termination is warranted by the conduct of the defendant and the interest of justice. Part A of the proposed amendment provides an option to list factors for a court to consider when determining whether to terminate supervised release. It would also provide that a court, any time before the expiration of a term of supervised release, may extend the term in a case in which the maximum term was not imposed.

Conforming changes are also made to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)), the Commentary to §4B1.5 (Repeat and Dangerous Sex Offenders Against Minors), §5B1.3 (Conditions of Probation), §5H1.3 (Mental and Emotional Conditions (Policy Statement)), and §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)).

Issues for comment are also provided.

Proposed Amendment:

PART D — SUPERVISED RELEASE

Introductory Commentary

The Sentencing Reform Act of 1984 requires the court to assess a wide range of factors "in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release." 18 U.S.C. § 3583(c). These determinations aim to make the imposition and scope of supervised release "dependent on the needs of the defendant for supervision." *See* S. Rep. No. 225, 98th Cong., 1st Sess. 124 (1983). In conducting such an individualized assessment, the court can "assure that [those] who will need post-release supervision will receive it" while "prevent[ing] probation system resources from being wasted on supervisory services for releasees who do not need them." *Id.* at 54; *see also Johnson v. United States,* 529 U.S. 694, 701 (2000) ("Supervised release departed from the parole system it replaced by giving district courts the freedom to provide postrelease supervision for those, and only those, who needed it. . . . Congress aimed, then, to use the district courts' discretionary judgment to allocate supervision to those releasees who needed it most."). Supervised release "fulfills

rehabilitative ends, distinct from those served by incarceration," *United States v. Johnson*, 529 U.S. 53, 59 (2000). Accordingly, a court should consider whether the defendant needs supervision in order to ease transition into the community or to provide further rehabilitation and whether supervision will promote public safety. *See* 18 U.S.C. §§ 3583(c), 3553(a)(2)(C)); *see also* S. Rep. No. 225, 98th Cong., 1st Sess. 124 (1983) (indicating that a "primary goal of [a term of supervised release] is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release").

* * *

§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~~When a term of supervised release is not required by statute, the court ~~may~~should order a term of supervised release to follow imprisonment ~~in any other case~~when, and only when, warranted by an individualized assessment of the need for supervision. ~~*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.

(d) The court should state on the record the reasons for imposing **[**or not imposing**]** a term of supervised release.

Commentary

Application Notes:

1. ~~**Application of Subsection (a).** Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment when supervised release is required by statute or, except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed. The court may depart from this guideline and not impose a term of supervised release if supervised release is not required by statute and the court determines, after considering the factors set forth in Note 3, that supervised release is not necessary.~~

2. ~~**Application of Subsection (b)**~~**Individualized Assessment**. ~~Under subsection (b), the court may impose a term of supervised release to follow a term of imprisonment in any other case, after considering the factors set forth in Note 3.~~

~~3. **Factors to Be Considered.—**~~

~~(A) **Statutory Factors.—**~~The statutory framework of supervised release aims to "assure that [those] who will need post-release supervision will receive it" while "prevent[ing] probation system resources from being wasted on supervisory services for releasees who do not need them." *See* S. Rep. No. 225, 98th Cong., 1st Sess. 54 (1983). To that end, 18 U.S.C. § 3583(c) requires the court to, "in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release," consider the following:

(~~i~~A) the nature and circumstances of the offense and the history and characteristics of the defendant (18 U.S.C. § 3553(a)(1));

(~~ii~~B) 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 (18 U.S.C. § 3553(a)(2)(B)–(D));

(C) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines (18 U.S.C. § 3553(a)(4));

(D) any pertinent policy statement issued by the Sentencing Commission (18 U.S.C. § 3553(a)(5));

(~~iii~~E) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct (18 U.S.C. § 3553(a)(6)); and

(~~iv~~F) the need to provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7)).

See 18 U.S.C. § 3583(c).

~~(B)~~2. **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),~~Application Note 1(A) above). In general, the more serious the defendant's criminal history, the greater the need for supervised release.

~~(C)~~3. **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)~~4. **Domestic Violence.**—If the defendant is convicted for the first time of a domestic violence crime as defined in 18 U.S.C. § 3561(b), a term of supervised release is required by statute. *See* 18 U.S.C. § 3583(a). Such a defendant is also required by statute to attend an approved rehabilitation program, if available within a 50-mile radius of the legal residence of the defendant. *See* 18 U.S.C. § 3583(d); §5D1.3(a)(3). In any other case involving domestic violence or stalking in which the defendant is sentenced to imprisonment, it is highly recommended that a term of supervised release also be imposed.

~~4~~5. **Community Confinement or Home Detention Following Imprisonment.**—A term of supervised release must be imposed if the court wishes to impose a "split sentence" under which

the defendant serves a term of imprisonment followed by a period of community confinement or home detention pursuant to subsection (c)(2) or (d)(2) of §5C1.1 (Imposition of a Term of Imprisonment). In such a case, the period of community confinement or home detention is imposed as a condition of supervised release.

~~5~~6. **Application of Subsection (c).**—In a case in which the defendant is a deportable alien specified in subsection (c) and supervised release is not required by statute, the court ordinarily should not impose a term of supervised release. Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution. The court should, however, consider imposing a term of supervised release on such a defendant if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case.

* * *

§5D1.2. Term of Supervised Release

(a) ~~Except as provided in subsections (b) and (c), if~~If a term of supervised release is ordered, ~~the length of the term shall be:~~the court shall conduct an individualized assessment to determine the length of the term, not to exceed the relevant statutory maximum term.

~~(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.

(c) The court should state on the record the reasons for the length of the term imposed.

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 110 of such title, not including a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (iv) an offense under 18 U.S.C. § 1201; or (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).~~

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

~~2.~~ **Safety Valve Cases.**—A defendant who qualifies under §5C1.2 (Limitation on Applicability of Statutory Minimum Sentence in Certain Cases) is not subject to any statutory minimum sentence of supervised release. *See* 18 U.S.C. § 3553(f). In such a case, the term of supervised release ~~shall be~~ is determined under subsection (a).

~~3~~2. **Substantial Assistance Cases.**—Upon motion of the Government, a defendant who has provided substantial assistance in the investigation or prosecution of another person who has committed an offense may be sentenced to a term of supervised release that is less than any minimum required by statute~~ or the guidelines~~. *See* 18 U.S.C. § 3553(e), §5K1.1 (Substantial Assistance to Authorities).

~~4~~3. ~~**Factors Considered**~~**Individualized Assessment.**—~~The~~When conducting an individualized assessment to determine the length of a term of supervised release, the factors to be considered ~~in determining the length of a term of supervised release~~ are the same as the factors considered in determining whether to impose such a term. *See* 18 U.S.C. § 3583(c); Application Note ~~3~~1 to §5D1.1 (Imposition of a Term of Supervised Release). The court should ensure that the term imposed on the defendant is ~~long enough~~sufficient to address the purposes of imposing supervised release on the defendant.

~~5~~4. **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); §5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement)). ~~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 (e).** Subsection (e) 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 (e) 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 (e) 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 (e) 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 (e) applies to statutes, such as the Anti-Drug Abuse Act of 1986, that require imposition of a specific minimum term of supervised release.~~

* * *

§5D1.3. Conditions of Supervised Release

(a) MANDATORY CONDITIONS

(1) The defendant shall not commit another federal, state or local offense (*see* 18 U.S.C. § 3583(d)).

(2) The defendant shall not unlawfully possess a controlled substance (*see* 18 U.S.C. § 3583(d)).

(3) The defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. § 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (*see* 18 U.S.C. § 3583(d)).

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

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

(5) If a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (*see* 18 U.S.C. § 3624(e)).

(6) The defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A, or any other statute authorizing a sentence of restitution; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (*see* 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule.

(7) If the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act (*see* 18 U.S.C. § 3583(d)).

(8) The defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (34 U.S.C. § 40702).

(b) DISCRETIONARY CONDITIONS

(1) IN GENERAL.—The court ~~may impose~~should conduct an individualized assessment to determine what, if any, other conditions of supervised release are warranted.

Such conditions are warranted to the extent that ~~such conditions~~ they (~~1~~A) are reasonably related to (~~A~~i) the nature and circumstances of the offense and the history and characteristics of the defendant; (~~B~~ii) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (~~C~~iii) the need to protect the public from further crimes of the defendant; and (~~D~~iv) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (~~2~~B) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission. *See* 18 U.S.C. § 3583(d).

(~~c~~2) **[**"STANDARD"**][**EXAMPLES OF COMMON**]** CONDITIONS (POLICY STATEMENT)

The following are **[**"standard" conditions of supervised release, which the court may modify, expand, or omit in appropriate cases**]** ~~are recommended for supervised release~~**[** examples of common conditions of supervised release that may be warranted in appropriate cases**][**~~. Several of the conditions are expansions of the conditions required by statute~~**]**:

(~~1~~A) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

(~~2~~B) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

(~~3~~C) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

(~~4~~D) The defendant shall answer truthfully the questions asked by the probation officer.

(~~5~~E) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(~~6~~F) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.

(~~7~~G) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer

excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(~~8~~H) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.

(~~9~~I) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

(~~10~~J) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (*i.e.*, anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

(~~11~~K) The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

(~~12~~L) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

(~~13~~M) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

(~~d~~3) "SPECIAL" CONDITIONS (POLICY STATEMENT)

~~The~~One or more conditions from the following non-exhaustive list of "special" conditions of supervised release ~~are recommended~~may be appropriate in a particular case, including in the circumstances described ~~and, in addition, may otherwise be appropriate in particular cases~~:

(~~1~~A) SUPPORT OF DEPENDENTS

(~~A~~i) If the defendant has one or more dependents — a condition specifying that the defendant shall support his or her dependents.

(~~B~~ii) If the defendant is ordered by the government to make child support payments or to make payments to support a person caring for a child — a condition specifying that the defendant shall make the payments and comply with the other terms of the order.

(~~2~~B) DEBT OBLIGATIONS

If an installment schedule of payment of restitution or a fine is imposed — a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(~~3~~C) ACCESS TO FINANCIAL INFORMATION

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine — a condition requiring the defendant to provide the probation officer access to any requested financial information.

(~~4~~D) SUBSTANCE ABUSE

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol — (~~A~~i) a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; and (~~B~~ii) a condition specifying that the defendant shall not use or possess alcohol.

(~~5~~E) MENTAL HEALTH PROGRAM PARTICIPATION

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment — a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(~~6~~F) DEPORTATION

If (~~A~~i) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)*); or (~~B~~ii) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable — a condition ordering deportation by a United States district court or a United States magistrate judge.

*So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(~~7~~G) SEX OFFENSES

If the instant offense of conviction is a sex offense~~, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release)~~ —

(~~A~~i) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(~~B~~ii) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(~~C~~iii) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

(~~8~~H) UNPAID RESTITUTION, FINES, OR SPECIAL ASSESSMENTS

If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

(I) HIGH SCHOOL OR EQUIVALENT DIPLOMA

If the defendant has not obtained a high school or equivalent diploma, a condition requiring the defendant to participate in a program to obtain such a diploma.

~~(e) ADDITIONAL CONDITIONS (POLICY STATEMENT)~~

~~The following "special conditions" may be appropriate on a case-by-case basis:~~

(~~1~~J) COMMUNITY CONFINEMENT

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. *See* §5F1.1 (Community Confinement).

(~~2~~K) HOME DETENTION

Home detention may be imposed as a condition of supervised release, but only as a substitute for imprisonment. *See* §5F1.2 (Home Detention).

(~~3~~L) COMMUNITY SERVICE

Community service may be imposed as a condition of supervised release. *See* §5F1.3 (Community Service).

(~~4~~M) OCCUPATIONAL RESTRICTIONS

Occupational restrictions may be imposed as a condition of supervised release. *See* §5F1.5 (Occupational Restrictions).

(~~5~~N) CURFEW

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to protect the public from crimes that the defendant might commit during those

hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(~~6~~O) INTERMITTENT CONFINEMENT

Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. *See* §5F1.8 (Intermittent Confinement).

Commentary

Application Notes:

1. **Individualized Assessment.**—When conducting an individualized assessment under this section, the court must consider the same factors used to determine whether to impose a term of supervised release, and shall impose conditions of supervision not required by statute only to the extent such conditions meet the requirements listed at 18 U.S.C. § 3583(d). *See* 18 U.S.C. § 3583(c), (d); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release).

2. **Application of Subsection ~~(e)(4)~~(b)(2)(D).**—Although the condition in subsection ~~(e)(4)~~(b)(2)(D) requires the defendant to "answer truthfully" the questions asked by the probation officer, a defendant's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of this condition.

3. **Application of Subsection (b)(3)(G).—** For purposes of subsection (b)(3)(G):

"***Sex offense***" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (iv) an offense under 18 U.S.C. § 1201; or (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).

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

* * *

§5D1.4. Modification, Early Termination, and Extension of Supervised Release (Policy Statement)

(a) MODIFICATION OF CONDITIONS.—At any time prior to the expiration or termination of the term of supervised release, the court **[**should**][**may**]** modify, reduce, or enlarge the conditions of supervised release whenever warranted by an individualized assessment of the appropriateness of existing conditions. *See* 18 U.S.C. § 3583(e)(2). The court is encouraged to conduct such an assessment as soon as practicable after the defendant's release from imprisonment.

(b) EARLY TERMINATION.—Any time after the expiration of one year of supervised release and after an individualized assessment of the need for ongoing supervision, the court **[**should**][**may**]** terminate the remaining term of supervision and discharge the defendant if the court determines, following consultation with the government and the probation officer, that the termination is warranted by the conduct of the defendant and the interest of justice. *See* 18 U.S.C. § 3583(e)(1).

[In determining whether termination is warranted, the court should consider the following non-exhaustive list of factors:

(1) any history of court-reported violations over the term of supervision;

(2) the ability of the defendant to lawfully self-manage beyond the period of supervision;

(3) the defendant's substantial compliance with all conditions of supervision;

(4) the defendant's engagement in appropriate prosocial activities and the existence or lack of prosocial support to remain lawful beyond the period of supervision;

(5) a demonstrated reduction in risk level over the period of supervision; and

(6) whether termination will jeopardize public safety, as evidenced by the nature of the defendant's offense, the defendant's criminal history, the defendant's record while incarcerated, the defendant's efforts to reintegrate into the community and avoid recidivism, any statements or information provided by the victims of the offense, and other factors the court finds relevant.**]**

The court is encouraged to conduct such assessments upon the expiration of one year of supervision and periodically throughout the term of supervision thereafter.

(c) EXTENDING A TERM OF SUPERVISED RELEASE.—The court may, at any time prior to the expiration or termination of a term of supervised release, extend the term of supervised release if less than the maximum authorized term of supervised release was previously imposed and the extension is warranted by an individualized assessment of the need for further supervision. *See* 18 U.S.C. § 3583(e)(2).

Commentary

Application Notes:

1. **Individualized Assessment.**—When making an individualized assessment under this section, the factors to be considered are the same factors used to determine whether to impose a term of supervised release. *See* 18 U.S.C. § 3583(c), (e); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release). **[**In particular, the court is encouraged to consider (A) the defendant's needs and risks and the conditions of supervised release imposed at the original sentencing; and (B) the defendant's conduct in custody, post-release circumstances, and the availability of resources required for compliance with conditions (*e.g.*, the availability of treatment facilities).**]**

2. **Extension or Modification of Conditions.**—In a case involving an extension of the term or a modification of the conditions of supervised release, the court shall comply with Rule 32.1 (Revoking or Modifying Probation or Supervised Release) of the Federal Rules of Criminal Procedure and the provisions applicable to the initial setting of the terms and conditions of post-release supervision. *See* 18 U.S.C. § 3583(e)(2). In both situations, the Commission encourages the court to make its best effort to ensure that any victim of the offense **[**and of any violation of a condition of supervised release**]** is reasonably, accurately, and timely notified, and provided, to the extent practicable, with an opportunity to be reasonably heard, unless any such victim previously requested not to be notified.

3. **Application of Subsection (c).**—Subsection (c) addresses a court's authority to extend a term of supervised release. In some cases, extending a term may be more appropriate than taking other measures, such as revoking the supervised release. For example, if a defendant violates a condition of supervised release, a court should determine whether extending the term would be more appropriate than revocation.

* * *

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

* * *

Commentary

Application Notes:

* * *

8. **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). *See* §5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement)). 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).

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§4B1.5. Repeat and Dangerous Sex Offender Against Minors

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Commentary

Application Notes:

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[5. **Treatment and Monitoring.—**

~~(A) **Recommended Maximum Term of Supervised Release.—** The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline.~~

~~(B) **Recommended Conditions of Probation and Supervised Release.—**~~Treatment and monitoring are important tools for supervising offenders and ~~should~~may be considered as special conditions of any term of probation or supervised release that is imposed.**]**

[~~5. **Treatment and Monitoring.—**~~

~~(A) **Recommended Maximum Term of Supervised Release.—** The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline.~~

~~(B) **Recommended Conditions of Probation and Supervised Release.—** Treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of any term of probation or supervised release that is imposed.~~**]**

* * *

§5B1.3. Conditions of Probation

* * *

(d) "SPECIAL" CONDITIONS (POLICY STATEMENT)

The following "special" conditions of probation are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

* * *

(7) SEX OFFENSES

If the instant offense of conviction is a sex offense~~, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release)~~ —

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects, upon reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

* * *

Commentary

Application Notes:

1. **Application of Subsection (c)(4).**—Although the condition in subsection (c)(4) requires the defendant to "answer truthfully" the questions asked by the probation officer, a defendant's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of this condition.

2. **Application of Subsection (d)(7).**—For purposes of subsection (d)(7):

"***Sex offense***" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (iv) an offense under 18 U.S.C. § 1201; or (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).

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

* * *

§5H1.3. Mental and Emotional Conditions (Policy Statement)

Mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. *See also* Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* §5C1.1, Application Note 7.

Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; *e.g.*, participation in a mental health program (*see* §§5B1.3(d)(5) and 5D1.3~~(d)(5)~~(b)(3)(E)).

* * *

§5H1.4. Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)

Physical condition or appearance, including physique, may be relevant in determining whether a departure is warranted, if the condition or appearance, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. An extraordinary physical impairment may be a reason to depart downward; *e.g.*, in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (*see* §5D1.3~~(d)(4)~~(b)(3)(D)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the probation office to judge the success of the program.

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* §5C1.1, Application Note 7.

In a case in which a defendant who is a substance abuser is sentenced to probation, it is strongly recommended that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program (*see* §5B1.3(d)(4)).

Addiction to gambling is not a reason for a downward departure.

* * *

Issues for Comment

1. The Commission has received feedback that courts should be afforded more discretion to tailor their supervised release decisions based on an individualized assessment of the defendant. At the same time, the Commission has received feedback that courts and probation officers would benefit from more guidance concerning the imposition, length, and conditions of supervised release.

   (A) Part A of the proposed amendment would add language throughout Chapter Five, Part D (Supervised Release) directing courts that supervised release decisions should be based on an "individualized assessment" of the statutory factors listed in 18 U.S.C. § 3583(c)–(e) and remove recommended minimum terms of supervised release. The Commission seeks comment on whether the inclusion of an individualized assessment based on statutory factors is sufficient to provide both discretion and useful guidance.

   (B) Part A of the proposed amendment would maintain the Commentary to §5D1.1 (Imposition of a Term of Supervised Release) that directs courts to pay particular attention to a defendant's criminal or substance abuse history. In addition, new proposed policy statement at §5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement)) includes as a bracketed option a non-exhaustive list of factors that a court should consider in determining whether early termination of supervised

release is warranted. The Commission seeks comment on whether such guidance should be retained or deleted and whether similar guidance should be included elsewhere. If the Commission provides further guidance, what should that guidance be?

(C) Is there any other approach the Commission should consider to provide courts with appropriate discretion while also including useful guidance, either throughout Chapter Five, Part D, or for certain guideline provisions?

2. Section 5D1.1(c) instructs that "[t]he 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." The Commission has received feedback that imposition of a term of supervised release in such cases varies substantially by jurisdiction, may be excessive, and may divert resources. Should the Commission amend §5D1.1(c) to further discourage the imposition of supervised release for individuals who are likely to be deported?

3. In §5D1.4, Part A of the proposed amendment provides an option to include a non-exhaustive list of factors for courts to consider when determining whether early termination is warranted. These factors are drawn from the Post-Conviction Supervision Policies in the *Guide to Judiciary Policy* (Vol. 8E, Ch. 3, § 360.20, *available at* https://www.uscourts.gov/file/78805/download) and the Safer Supervision Act—a bipartisan bill introduced in the Senate and House of Representatives in the 118th Congress that would have amended 18 U.S.C. § 3583. *See* S. 2861, H.R. 5005. Are the listed factors appropriate? Should the Commission omit or amend any of the listed factors, or should it include other specific factors?

4. The First Step Act of 2018 (FSA), Pub. L. 115—391, allows individuals in custody who successfully complete evidence-based recidivism reduction programming or productive activities to earn time credits. *See* 18 U.S.C. § 3632(d)(4)(A). How those time credits are applied may depend on whether the defendant's sentence includes a term of supervised release. Specifically, the FSA provides "[i]f the sentencing court included as a part of the prisoner's sentence a requirement that the prisoner be placed on a term of supervised release after imprisonment pursuant to [18 U.S.C. § 3583], the Director of the Bureau of Prisons may transfer the prisoner to begin any such term of supervised release at an earlier date, not to exceed 12 months, based on the application of time credits under [18 U.S.C. § 3632]." 18 U.S.C. § 3624(g)(3).

   The Commission seeks comment on whether and how the changes to supervised release set forth in Part A of the proposed amendment may impact defendants' eligibility to benefit from the FSA earned time credits. Should the Commission make any additional or different changes to Chapter Five to avoid any unintended consequences that would impact a defendant's eligibility? If so, what changes should be made?

5. At §5D1.3 (Conditions of Supervised Release), Part A of the proposed amendment retains two general categories of discretionary conditions of supervised release

without amending their substance—"standard" and "special" conditions. In doing so, the Commission brackets language that would alternatively refer to "standard" conditions as "examples of common conditions that may be warranted in appropriate cases." Part A of the proposed amendment also includes in its listing of "special" conditions those conditions that currently are labeled as "Additional Conditions." The Commission seeks comment on these proposals and on whether another approach is warranted.

6. Part A of the proposed amendment would establish a new policy statement at §5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement)), which, among other things, addresses a court's determination whether to terminate a term of supervised release. The Commission seeks comment on whether it should provide that the completion of reentry programs (more information available at https://www.ussc.gov/education/problem-solving-court-resources), such as the Supervision to Aid Reentry Program in the Eastern District of Pennsylvania, should be considered by a court when determining whether to terminate the supervision.

7. Furthermore, the Commission seeks comment on whether the new policy statement at §5D1.4 should provide guidance to courts on the appropriate procedures to employ when determining whether to terminate a term of supervised release. For example, should the Commission recommend that courts make the determination pursuant to a full public proceeding, or is a more informal proceeding sufficient? In either case, should the Commission encourage courts to appoint counsel to represent the defendant? How might the Commission encourage courts to ensure that any victim of the offense (or of any violation of a condition of supervised release) is notified of the early termination consideration and afforded a reasonable opportunity to be heard? Are there other appropriate approaches the Commission should recommend?

(B) Revocation of Supervised Release

Synopsis of Proposed Amendment: Chapter Seven (Violations of Probation and Supervised Release) of the *Guidelines Manual* addresses violations of probation and supervised release by means of an introductory framework and a series of policy statements. The introduction to Chapter Seven, Part A (Introduction to Chapter Seven) explains the framework the *Guidelines Manual* uses to address violations of probation and supervised release. It describes the Commission's resolution of several issues. First, the Commission decided in 1990 to promulgate policy statements rather than guidelines because of the flexibility of this option. *See generally* USSG Ch.7, Pt.A. Next, "[a]fter lengthy consideration," the Commission adopted a "breach of trust" framework for violations of supervised release; the alternative option would have sanctioned individuals who committed new criminal conduct by applying the offense guidelines in Chapters Two and Three to the criminal conduct that formed the basis of the new violation, along with a recalculated criminal history score. *Id.* Under this approach, the "sentence imposed upon revocation [is] intended to sanction the violator for failing to abide by the conditions of the court-ordered supervision, leaving the punishment for any new criminal conduct to the court responsible for imposing the sentence for that offense." *Id.* Finally, despite some debate, the Commission opted to "develop a single set of policy statements for revocation of both probation and supervised release." *Id.* The Commission signaled that it intended ultimately to issue "revocation guidelines," but it has not done so. *Id.*

Section 7B1.1 (Classification of Violations (Policy Statement)) governs the classification of violations of supervised release. Grade A Violations consist of conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years. USSG §7B1.1(a)(1). Grade B Violations involve conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding on year. USSG §7B1.1(a)(2). Grade C Violations involve conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision. USSG §7B1.1(a)(3). In cases with more than one violation of the conditions of supervision, or a single violation with conduct constituting more than one offense, the grade of the violation is determined by the violation having the most serious grade. USSG §7B1.1(b).

Section 7B1.2 (Reporting of Violations of Probation and Supervised Release (Policy Statement)) concerns the reporting of violations of supervised release to the court. In cases of Grade A or B violations, §7B1.2(a) directs that the probation officer "shall" promptly report them to the court. For Grade C violations, the probation officer also "shall" promptly report them to the court unless the officer determines that (1) the violation is minor and not part of a continuing pattern, and (2) non-reporting will not present an undue risk to the individual or the public or be inconsistent with any directive of the court. USSG §7B1.2(b).

Section 7B1.3 (Revocation of Probation or Supervised Release (Policy Statement)) governs a court's options when it finds that a violation of the terms of supervised release have occurred. Upon the finding of a Grade A or B violation, the court shall revoke an

individual's supervised release; upon the finding of a Grade C violation, the court may either revoke supervised release, or it may extend the term of supervision and/or modify the conditions of supervision. USSG §7B1.3(a). When a court does revoke supervised release, §7B1.3(b) directs that the applicable range of imprisonment is the one set forth in §7B1.4. Section 7B1.3(c) provides that in the case of a Grade B or C violation, certain community confinement or home detention sentences are available to satisfy at least a portion of the sentence. Section 7B1.3(f) directs that any term of imprisonment imposed upon revocation shall be ordered to be served consecutively to any sentence of imprisonment the individual is serving, regardless of whether that other sentence resulted from the conduct that is the basis for the revocation. If supervised release is revoked, the court may also include an additional term of supervised release to be imposed upon release from imprisonment, but that term may not exceed statutory limits. USSG §7B1.3(g).

Section 7B1.4 (Term of Imprisonment (Policy Statement)) contains the revocation table, which sets forth recommended ranges of imprisonment based on the grade of violation and an individual's criminal history category. Increased sentencing ranges apply where the individual has committed a Grade A violation while also on supervised release following imprisonment for a Class A felony. USSG §7B1.4(a)(2). An asterisked note to the revocation table notes that the criminal history category to be applied is the one "applicable at the time the defendant originally was sentenced to a term of supervision." USSG §7B1.4(a)(2). Trumping mechanisms apply if the terms of imprisonment required by statute exceed or fall below the suggested range. USSG §7B1.4(b).

Subsection (b) of 7B1.5 (No Credit for Time Under Supervision (Policy Statement)) directs that upon revocation of supervised release, "no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision." An exception applies for individuals serving a period of supervised release on a foreign sentence under the provisions of 18 U.S.C. § 4106A. USSG §7B1.5(c).

Part B of the proposed amendment seeks to revise Chapter Seven to accomplish two goals. The first is to provide courts greater discretion to respond to a violation of a condition of supervised release. The second is to ensure the provisions in Chapter Seven reflect the differences between probation and supervised release.

Part B of the proposed amendment revises the introductory commentary in Part A of Chapter Seven. It would add commentary explaining that the Commission has updated the policy statements addressing violations of supervised release in response to feedback from stakeholders identifying the need for more flexible, individualized responses to such violations. It would also add commentary highlighting the differences between probation and supervised release and how those differences have led the Commission to recommend different approaches to handling violations of probation, which serves a punitive function, and supervised release, a primary function of which is to "fulfill[] rehabilitative ends, distinct from those served by incarceration." *United States v. Johnson*, 529 U.S. 53, 59 (2000).

Part B of the proposed amendment separates the provisions addressing violations of probation from those addressing violations of supervised release by removing all references

to supervised release from Part B of Chapter Seven. It then duplicates the provisions of Part B as they pertain to supervised release in a new Part C.

Part B of the proposed amendment would create a new Part C in Chapter Seven to address supervised release violations. Part C would begin with introductory commentary explaining that – in responding to an allegation that a supervisee has violated the terms of supervision, addressing a violation found during revocation proceedings, or imposing a sentence upon revocation – the court should conduct the same kind of individualized assessment used throughout the process of imposing a term of supervised release. It would also express the Commission's view that courts should consider a wide array of options to address violations of supervised release.

The specific policy statements of Part C would duplicate the provisions of Part B as they pertain to supervised release, with a number of changes. Under the new §7C1.1 (Classification of Violations (Policy Statement)), which duplicates §7B1.1, there would be a fourth classification of violation: Grade D, which would include "a violation of any other condition of supervised release," which is currently classified as a Grade C violation.

Part B of the proposed amendment would duplicate §7B1.2, which addresses a probation officer's duty to report violations, in the new §7C1.2.

Part B of the proposed amendment would create a new §7C1.3 (Responses to Violations of Supervised Release (Policy Statement)), establishing the actions a court may take in response to an allegation of non-compliance with supervised release. Under the policy statement, upon an allegation of non-compliance, the court would be instructed to conduct an individualized assessment to determine the appropriate response. Part B of the proposed amendment brackets the possibility of creating in the guideline a non-exhaustive list of possible responses and brackets the possibility of including a list of other possible responses in an Application Note. It provides two options for addressing a court's response to a finding of a violation. Under Option 1, upon a finding of a violation for which revocation is not required, the court would be authorized, subject to an individualized assessment, to continue the term of supervised release without modification, extend the term of supervised release or modify the conditions, terminate the term, or revoke supervised release. Upon a finding of a violation for which revocation is required by statute, the court would be required to revoke supervised release. Under Option 2, the court would be required to revoke supervised release upon a finding of a violation for which revocation is required by statute or for a Grade A or B violation. Upon a finding of any other violation, the court would be authorized, subject to an individualized assessment, to continue the term of supervised release without modification, extend the term of supervised release or modify the conditions, terminate the term, or revoke supervised release.

Section 7C1.4 (Revocation of Supervised Release (Policy Statement)) would address instances of revocation. In such a case, the court would be required to conduct an individualized assessment to determine the appropriate length of the term of imprisonment. Part B of the proposed amendment provides two options, Option 1 and Option 2, for addressing whether such a term should be served concurrently or consecutively to any sentence of imprisonment the defendant is serving. Under Option 1, the court would be instructed to conduct an individualized assessment to determine

whether that term should be served concurrently, partially concurrently, or consecutively to any sentence of imprisonment the defendant is serving. Option 2 would maintain the current provision requiring the term to be served consecutively. Part B of the proposed amendment would also continue to recognize the court's authority to include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment.

Section 7C1.5 (Term of Imprisonment—Supervised Release (Policy Statement)), which duplicates §7B1.4, would set forth the Supervised Release Revocation Table. The Supervised Release Revocation Table would include recommended ranges of imprisonment, which would be subject to an individualized assessment conducted by the court. The Table would also include recommended ranges for Grade D violations. It would also remove the guidance addressing statutory maximum and minimum terms of imprisonment.

Finally, §7C1.6 (No Credit for Time Under Supervision (Policy Statement)) would duplicate §7B1.5, which provides that, upon revocation of supervised release, no credit shall be given for time previously served on post-release supervision.

Issues for comment are also provided.

Proposed Amendment:

Part A — Introduction to Chapter Seven

1. Authority

Under 28 U.S.C. § 994(a)(3), the Sentencing Commission is required to issue guidelines or policy statements applicable to the revocation of probation and supervised release. ~~At this time~~Initially, the Commission ~~has chosen~~chose to promulgate policy statements only. These policy statements ~~will~~were intended to provide guidance ~~while allowing~~and allow for the identification of any substantive or procedural issues that require further review. The Commission ~~views~~viewed these policy statements as evolutionary and ~~will~~intended to review relevant data and materials concerning revocation determinations under these policy statements. ~~Revocation guidelines will~~Updated policies would be issued after federal judges, probation officers, practitioners, and others ~~have~~had the opportunity to evaluate and comment on these policy statements.

2. Background

(a) Probation.

Prior to the implementation of the federal sentencing guidelines, a court could stay the imposition or execution of sentence and place a defendant on probation. When a court found that a defendant violated a condition of probation, the court could continue probation, with

or without extending the term or modifying the conditions, or revoke probation and either impose the term of imprisonment previously stayed, or, where no term of imprisonment had originally been imposed, impose any term of imprisonment that was available at the initial sentencing.

The statutory authority to "suspend" the imposition or execution of sentence in order to impose a term of probation was abolished upon implementation of the sentencing guidelines. Instead, the Sentencing Reform Act recognized probation as a sentence in itself. 18 U.S.C. § 3561. Under current law, if the court finds that a defendant violated a condition of probation, the court may continue probation, with or without extending the term or modifying the conditions, or revoke probation and impose any other sentence that initially could have been imposed. 18 U.S.C. § 3565. For certain violations, revocation is required by statute.

(b) Supervised Release.

Supervised release, a new form of post-imprisonment supervision created by the Sentencing Reform Act, accompanied implementation of the guidelines. A term of supervised release may be imposed by the court as a part of the sentence of imprisonment at the time of initial sentencing. 18 U.S.C. § 3583(a). Unlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court. Accordingly, supervised release is more analogous to the additional "special parole term" previously authorized for certain drug offenses.

The conditions of supervised release authorized by statute are the same as those for a sentence of probation, except for intermittent confinement. (Intermittent confinement is available for a sentence of probation, but is available as a condition of supervised release only for a violation of a condition of supervised release.) When the court finds that the defendant violated a condition of supervised release, it may continue the defendant on supervised release, with or without extending the term or modifying the conditions, or revoke supervised release and impose a term of imprisonment. The periods of imprisonment authorized by statute for a violation of the conditions of supervised release generally are more limited, however, than those available for a violation of the conditions of probation. 18 U.S.C. § 3583(e)(3).

3. Resolution of Major Issues

(a) Guidelines versus Policy Statements.

At the outset, the Commission faced a choice between promulgating guidelines or issuing advisory policy statements for the revocation of probation and supervised release. After considered debate and input from judges, probation officers, and prosecuting and defense attorneys, the Commission decided, for a variety of reasons, initially to issue policy statements. Not only was the policy statement option expressly authorized by statute, but this approach provided greater flexibility to both the Commission and the courts. Unlike guidelines, policy statements are not subject to the May 1 statutory deadline for submission to Congress, and the Commission believed that it would benefit from the additional time to

consider complex issues relating to revocation guidelines provided by the policy statement option.

Moreover, the Commission ~~anticipates~~anticipated that, because of its greater flexibility, the policy statement option ~~will~~would provide better opportunities for evaluation by the courts and the Commission. This flexibility is important, given that supervised release as a method of post-incarceration supervision and transformation of probation from a suspension of sentence to a sentence in itself ~~represent~~represented recent changes in federal sentencing practices. After an adequate period of evaluation, the Commission ~~intends~~intended to promulgate updated revocation ~~guidelines~~policies.

(b) Choice Between Theories.

The Commission initially debated two different approaches to sanctioning violations of probation and supervised release.

The first option considered a violation resulting from a defendant's failure to follow the court-imposed conditions of probation or supervised release as a "breach of trust." While the nature of the conduct leading to the revocation would be considered in measuring the extent of the breach of trust, imposition of an appropriate punishment for any new criminal conduct would not be the primary goal of a revocation sentence. Instead, the sentence imposed upon revocation would be intended to sanction the violator for failing to abide by the conditions of the court-ordered supervision, leaving the punishment for any new criminal conduct to the court responsible for imposing the sentence for that offense.

The second option considered by the Commission sought to sanction violators for the particular conduct triggering the revocation as if that conduct were being sentenced as new federal criminal conduct. Under this approach, offense guidelines in Chapters Two and Three of the Guidelines Manual would be applied to any criminal conduct that formed the basis of the violation, after which the criminal history in Chapter Four of the Guidelines Manual would be recalculated to determine the appropriate revocation sentence. This option would also address a violation not constituting a criminal offense.

After lengthy consideration, the Commission initially adopted an approach that is consistent with the theory of the first option; *i.e.*, at revocation the court should sanction primarily the defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator.

The Commission adopted this approach for a variety of reasons. First, although the Commission found desirable several aspects of the second option that provided for a detailed revocation guideline system similar to that applied at the initial sentencing, extensive testing proved it to be impractical. In particular, with regard to new criminal conduct that constituted a violation of state or local law, working groups expert in the functioning of federal criminal law noted that it would be difficult in many instances for the court or the parties to obtain the information necessary to apply properly the guidelines to this new conduct. The potential unavailability of information and witnesses necessary for a determination of specific offense characteristics or other guideline adjustments could create questions about the accuracy of factual findings concerning the existence of those factors.

In addition, the Commission rejected the second option because that option was inconsistent with its views that the court with jurisdiction over the criminal conduct leading to revocation is the more appropriate body to impose punishment for that new criminal conduct, and that, as a breach of trust inherent in the conditions of supervision, the sanction for the violation of trust should be in addition, or consecutive, to any sentence imposed for the new conduct. In contrast, the second option would have the revocation court substantially duplicate the sanctioning role of the court with jurisdiction over a defendant's new criminal conduct and would provide for the punishment imposed upon revocation to run concurrently with, and thus generally be subsumed in, any sentence imposed for that new criminal conduct.

Further, the sanctions available to the courts upon revocation are, in many cases, more significantly restrained by statute. Specifically, the term of imprisonment that may be imposed upon revocation of supervised release is limited by statute to not more than five years for persons convicted of Class A felonies, except for certain title 21 drug offenses; not more than three years for Class B felonies; not more than two years for Class C or D felonies; and not more than one year for Class E felonies. 18 U.S.C. § 3583(e)(3).

Given the relatively narrow ranges of incarceration available in many cases, combined with the potential difficulty in obtaining information necessary to determine specific offense characteristics, the Commission initially felt that it was undesirable at this time to develop guidelines that attempt to distinguish, in detail, the wide variety of behavior that can lead to revocation. Indeed, with the relatively low ceilings set by statute, revocation policy statements that attempted to delineate with great particularity the gradations of conduct leading to revocation would frequently result in a sentence at the statutory maximum penalty.

Accordingly, the Commission initially determined that revocation policy statements that provided for three broad grades of violations would permit proportionally longer terms for more serious violations and thereby would address adequately concerns about proportionality, without creating the problems inherent in the second option.

4. The Basic Approach

The revocation policy statements ~~categorize~~initially categorized violations of probation and supervised release in three broad classifications ranging from serious new felonious criminal conduct to less serious criminal conduct and technical violations. The grade of the violation, together with the violator's criminal history category calculated at the time of the initial sentencing, ~~fix~~fixed the applicable sentencing range.

The Commission ~~has~~initially elected to develop a single set of policy statements for revocation of both probation and supervised release. In reviewing the relevant literature, the Commission had determined that the purpose of supervision for probation and supervised release should focus on the integration of the violator into the community, while providing the supervision designed to limit further criminal conduct. Although there was considerable debate as to whether the sanction imposed upon revocation of probation should be different

from that imposed upon revocation of supervised release, the Commission ~~has~~ initially concluded that a single set of policy statements is appropriate.

5. ~~A Concluding Note~~Updating the Approach

The Commission ~~views these~~viewed the original policy statements for revocation of probation and supervised release as the first step in an evolutionary process. The Commission ~~expects~~intended to ~~issue revocation guidelines~~revise its approach after judges, probation officers, and practitioners ~~have~~ had an opportunity to apply and comment on the policy statements. In the three decades since the promulgation of those policy statements, a broad array of stakeholders has identified the need for more flexible, individualized responses to violations of supervised release.

~~In developing these policy statements, the Commission assembled two outside working groups of experienced probation officers representing every circuit in the nation, officials from the Probation Division of the Administrative Office of the U.S. Courts, the General Counsel's office at the Administrative Office of the U.S. Courts, and the U.S. Parole Commission. In addition, a number of federal judges, members of the Criminal Law and Probation Administration Committee of the Judicial Conference, and representatives from the Department of Justice and federal and community defenders provided considerable input into this effort.~~

In response, the Commission updated the policy statements in this Chapter to ensure judges have the discretion necessary to properly manage supervised release. The revised policy statements encourage judges to take an individualized approach in: (1) responding to allegations of non-compliance before initiating revocation proceedings; (2) addressing violations found during revocation proceedings; and (3) imposing a sentence of imprisonment upon revocation. These changes are intended to better allocate taxpayer dollars and probation resources, encourage compliance and improve public safety, and facilitate the reentry and rehabilitation of defendants.

This Chapter proceeds in two parts: Part B addresses violations of probation, and Part C addresses violations of supervised release. Both parts maintain an approach in which the court addresses primarily the defendant's failure to comply with court-ordered conditions, while reflecting, to a limited degree, the seriousness of the underlying violation and the criminal history of the individual. The Commission determined that violations of probation and supervised release should be addressed separately to reflect their different purposes. While probation serves a punitive function, supervised release "fulfills rehabilitative ends, distinct from those served by incarceration," *United States v. Johnson*, 529 U.S. 53, 59 (2000). In light of these differences, Part B continues to recommend revocation for most probation violations. Part C encourages courts to consider a graduated response to a violation of supervised release, including considering all available options focused on facilitating a defendant's transition into the community and promoting public safety. Parts B and C both recognize the important role of the court, which is best situated to consider the individual defendant's risks and needs and respond accordingly within its broad discretion.

* * *

PART B — Probation ~~and Supervised Release~~ Violations

Introductory Commentary

The policy statements in this ~~chapter~~part seek to prescribe penalties only for the violation of the judicial order imposing ~~supervision~~probation. Where a defendant is convicted of a criminal charge that also is a basis of the violation, these policy statements do not purport to provide the appropriate sanction for the criminal charge itself. The Commission has concluded that the determination of the appropriate sentence on any new criminal conviction should be a separate determination for the court having jurisdiction over such conviction.

~~Because these policy statements focus on the violation of the court-ordered supervision, this chapter, to the extent permitted by law, treats violations of the conditions of probation and supervised release as functionally equivalent.~~

Under 18 U.S.C. § 3584, the court, upon consideration of the factors set forth in 18 U.S.C. § 3553(a), including applicable guidelines and policy statements issued by the Sentencing Commission, may order a term of imprisonment to be served consecutively or concurrently to an undischarged term of imprisonment. It is the policy of the Commission that the sanction imposed upon revocation is to be served consecutively to any other term of imprisonment imposed for any criminal conduct that is the basis of the revocation.

This ~~chapter~~part is applicable in the case of a defendant ~~under supervision~~on probation for a felony or Class A misdemeanor. Consistent with §1B1.9 (Class B or C Misdemeanors and Infractions), this ~~chapter~~part does not apply in the case of a defendant ~~under supervision~~on probation for a Class B or C misdemeanor or an infraction.

* * *

§7B1.1. Classification of Violations (Policy Statement)

(a) There are three grades of probation ~~and supervised release~~ violations:

(1) GRADE A VIOLATIONS — conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years;

(2) GRADE B VIOLATIONS — conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year;

(3) GRADE C VIOLATIONS — conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of ~~supervision~~probation.

(b) Where there is more than one violation of the conditions of ~~supervision~~probation, or the violation includes conduct that constitutes more than one offense, the grade of the violation is determined by the violation having the most serious grade.

Commentary

Application Notes:

1. Under 18 U.S.C. §§ 3563(a)(1)~~ and 3583(d)~~, a mandatory condition of probation ~~and supervised release~~ is that the defendant not commit another federal, state, or local crime. A violation of this condition may be charged whether or not the defendant has been the subject of a separate federal, state, or local prosecution for such conduct. The grade of violation does not depend upon the conduct that is the subject of criminal charges or of which the defendant is convicted in a criminal proceeding. Rather, the grade of the violation is to be based on the defendant's actual conduct.

2. "***Crime of violence***" is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

3. "***Controlled substance offense***" is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2.

4. A "***firearm or destructive device of a type described in 26 U.S.C. § 5845(a)***" includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or a weapon made from a rifle, with a barrel or barrels of less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain large bore weapons.

5. Where the defendant is ~~under supervision~~on probation in connection with a felony conviction, or has a prior felony conviction, possession of a firearm (other than a firearm of a type described in 26 U.S.C. § 5845(a)) will generally constitute a Grade B violation, because 18 U.S.C. § 922(g) prohibits a convicted felon from possessing a firearm. The term "generally" is used in the preceding sentence, however, because there are certain limited exceptions to the applicability of 18 U.S.C. § 922(g). *See, e.g.*, 18 U.S.C. § 925(c).

* * *

§7B1.2. Reporting of Violations of Probation ~~and Supervised Release~~ (Policy Statement)

(a) The probation officer shall promptly report to the court any alleged Grade A or B violation.

(b) The probation officer shall promptly report to the court any alleged Grade C violation unless the officer determines: (1) that such violation is minor, and not part of a continuing pattern of violations; and (2) that non-reporting will not present an undue risk to an individual or the public or be inconsistent with any directive of the court relative to the reporting of violations.

Commentary

Application Note:

1. Under subsection (b), a Grade C violation must be promptly reported to the court unless the probation officer makes an affirmative determination that the alleged violation meets the criteria for non-reporting. For example, an isolated failure to file a monthly report or a minor traffic infraction generally would not require reporting.

* * *

§7B1.3. Revocation of Probation ~~or Supervised Release~~ (Policy Statement)

(a) (1) Upon a finding of a Grade A or B violation, the court shall revoke probation ~~or supervised release~~.

(2) Upon a finding of a Grade C violation, the court may (A) revoke probation ~~or supervised release~~; or (B) extend the term of probation ~~or supervised release~~ and/or modify the conditions ~~of supervision~~thereof.

(b) In the case of a revocation of probation ~~or supervised release~~, the applicable range of imprisonment is that set forth in §7B1.4 (Term of Imprisonment).

(c) In the case of a Grade B or C violation—

(1) Where the minimum term of imprisonment determined under §7B1.4 (Term of Imprisonment) is at least one month but not more than six months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e) for any portion of the minimum term; and

(2) Where the minimum term of imprisonment determined under §7B1.4 (Term of Imprisonment) is more than six months but not more than ten months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment.

(3) In the case of a revocation based, at least in part, on a violation of a condition specifically pertaining to community confinement, intermittent confinement, or home detention, use of the same or a less restrictive sanction is not recommended.

(d) Any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under §7B1.4 (Term of Imprisonment), and any such unserved period of community confinement, home detention, or intermittent confinement may be converted to an equivalent period of imprisonment.

(e) Where the court revokes probation ~~or supervised release~~ and imposes a term of imprisonment, it shall increase the term of imprisonment determined under subsections (b), (c), and (d) above by the amount of time in official detention that will be credited toward service of the term of imprisonment under 18 U.S.C. § 3585(b), other than time in official detention resulting from the federal probation ~~or supervised release~~ violation warrant or proceeding.

(f) Any term of imprisonment imposed upon the revocation of probation ~~or supervised release~~ shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation ~~or supervised release~~.

(g) ~~(1)~~ If probation is revoked and a term of imprisonment is imposed, the provisions of §§5D1.1–1.3 shall apply to the imposition of a term of supervised release.

~~(2) If supervised release is revoked, the court may include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. 18 U.S.C. § 3583(h).~~

Commentary

Application Notes:

1. Revocation of probation ~~or supervised release~~ generally is the appropriate disposition in the case of a Grade C violation by a defendant who, having been continued on ~~supervision~~probation after a finding of violation, again violates the conditions of his ~~supervision~~probation.

~~2. The provisions for the revocation, as well as early termination and extension, of a term of supervised release are found in 18 U.S.C. § 3583(e), (g) (i). Under 18 U.S.C. § 3583(h) (effective September 13, 1994), the court, in the case of revocation of supervised release, may order an additional period of supervised release to follow imprisonment.~~

~~3~~2. Subsection (e) is designed to ensure that the revocation penalty is not decreased by credit for time in official detention other than time in official detention resulting from the federal probation ~~or supervised release~~ violation warrant or proceeding. **Example**: A defendant, who was in pre-trial detention for three months, is placed on probation, and subsequently violates that probation. The court finds the violation to be a Grade C violation, determines that the applicable range of imprisonment is 4–10 months, and determines that revocation of probation and imposition of a term of imprisonment of four months is appropriate. Under subsection (e), a sentence of seven months imprisonment would be required because the Federal Bureau of Prisons, under 18 U.S.C. § 3585(b), will allow the defendant three months' credit toward the term of imprisonment imposed upon revocation.

~~4~~3. Subsection (f) provides that any term of imprisonment imposed upon the revocation of probation ~~or supervised release~~ shall run consecutively to any sentence of imprisonment being served by the defendant. Similarly, it is the Commission's recommendation that any sentence of imprisonment for a criminal offense that is imposed after revocation of probation ~~or supervised release~~ be run consecutively to any term of imprisonment imposed upon revocation.

~~5~~4. Intermittent confinement is authorized as a condition of probation during the first year of the term of probation. 18 U.S.C. § 3563(b)(10)~~. Intermittent confinement is authorized as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. See~~; *see also* §5F1.8 (Intermittent Confinement).

* * *

§7B1.4. Term of Imprisonment—Probation (Policy Statement)

(a) The range of imprisonment applicable upon revocation is set forth in the following table:

Probation Revocation Table
(in months of imprisonment)

Grade of Violation	Criminal History Category* I	II	III	IV	V	VI
Grade C	3–9	4–10	5–11	6–12	7–13	8–14
Grade B	4–10	6–12	8–14	12–18	18–24	21–27
Grade A ~~**(1)** Except as provided in subdivision (2) below:~~	12–18	15–21	18–24	24–30	30–37	33–41
~~**(2)** Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony:~~	~~24–30~~	~~27–33~~	~~30–37~~	~~37–46~~	~~46–57~~	~~51–63~~.

*The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of ~~supervision~~probation.

(b) *Provided*, that—

(1) Where the statutorily authorized maximum term of imprisonment that is imposable upon revocation is less than the minimum of the applicable range, the statutorily authorized maximum term shall be substituted for the applicable range; and

(2) Where the minimum term of imprisonment required by statute, if any, is greater than the maximum of the applicable range, the minimum term of imprisonment required by statute shall be substituted for the applicable range.

(3) In any other case, the sentence upon revocation may be imposed at any point within the applicable range, provided that the sentence—

(A) is not greater than the maximum term of imprisonment authorized by statute; and

(B) is not less than any minimum term of imprisonment required by statute.

Commentary

Application Notes:

1. The criminal history category to be used in determining the applicable range of imprisonment in the Revocation Table is the category determined at the time the defendant originally was sentenced to the term of ~~supervision~~probation. The criminal history category is not to be recalculated because the ranges set forth in the Revocation Table have been designed to take into account that the defendant violated ~~supervision~~probation. In the rare case in which no criminal history category was determined when the defendant originally was sentenced to the term of ~~supervision~~probation being revoked, the court shall determine the criminal history category that would have been applicable at the time the defendant originally was sentenced to the term of ~~supervision~~probation. (*See* the criminal history provisions of §§4A1.1–4B1.4.)

2. Departure from the applicable range of imprisonment in the Probation Revocation Table may be warranted when the court departed from the applicable range for reasons set forth in §4A1.3 (Departures Based on Inadequacy of Criminal History Category) in originally imposing the sentence that resulted in ~~supervision~~probation. Additionally, an upward departure may be warranted when a defendant, subsequent to the federal sentence resulting in ~~supervision~~probation, has been sentenced for an offense that is not the basis of the violation proceeding.

3. In the case of a Grade C violation that is associated with a high risk of new felonious conduct (*e.g.*, a defendant, ~~under supervision~~on probation for conviction of criminal sexual abuse, violates the condition that the defendant not associate with children by loitering near a schoolyard), an upward departure may be warranted.

4. Where the original sentence was the result of a downward departure (*e.g.*, as a reward for substantial assistance), or a charge reduction that resulted in a sentence below the guideline range applicable to the defendant's underlying conduct, an upward departure may be warranted.

5. Upon a finding that a defendant violated a condition of probation ~~or supervised release~~ by being in possession of a controlled substance or firearm or by refusing to comply with a condition requiring drug testing, the court is required to revoke probation ~~or supervised release~~ and impose a sentence that includes a term of imprisonment. 18 U.S.C. §§ 3565(b)~~, 3583(g)~~.

6. In the case of a defendant who fails a drug test, the court shall consider whether the availability of appropriate substance abuse programs, or a defendant's current or past participation in such programs, warrants an exception from the requirement of mandatory revocation and imprisonment under 18 U.S.C. §§ 3565(b) ~~and 3583(g)~~. 18 U.S.C. §§ 3563(a~~), 3583(d)~~.

* * *

§7B1.5. No Credit for Time ~~Under Supervision~~on Probation (Policy Statement)

~~(a)~~ Upon revocation of probation, no credit shall be given (toward any sentence of imprisonment imposed) for any portion of the term of probation served prior to revocation.

~~(b) Upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision.~~

~~(c) *Provided,* that in the case of a person serving a period of supervised release on a foreign sentence under the provisions of 18 U.S.C. § 4106A, credit shall be given for time on supervision prior to revocation, except that no credit shall be given for any time in escape or absconder status.~~

Commentary

~~**Application Note:**~~

~~1. Subsection (c) implements 18 U.S.C. § 4106A(b)(1)(C), which provides that the combined periods of imprisonment and supervised release in transfer treaty cases shall not exceed the term of imprisonment imposed by the foreign court.~~

Background: This section provides that time served on probation ~~or supervised release~~ is not to be credited in the determination of any term of imprisonment imposed upon revocation. Other aspects of the defendant's conduct, such as compliance with ~~supervision~~probation conditions and adjustment while ~~under supervision~~on probation, appropriately may be considered by the court in the determination of the sentence to be imposed within the applicable revocation range.

* * *

Part C — Supervised Release Violations

[The proposed amendment would create this new Part C to address violations of supervised release. To highlight how these new policy statements differ from the current policy statements addressing supervised release violations in Part B, the policy statements of Part B are duplicated below into this new Part C, with the changes noted.]

Introductory Commentary

~~The policy statements in this chapter seek to prescribe penalties only for the violation of the judicial order imposing supervision. Where a defendant is convicted of a criminal charge that also is a basis of the violation, these policy statements do not purport to provide the appropriate sanction for the criminal charge itself. The Commission has concluded that the determination of the appropriate sentence on any new criminal conviction should be a separate determination for the court having jurisdiction over such conviction.~~

~~Because these policy statements focus on the violation of the court-ordered supervision, this chapter, to the extent permitted by law, treats violations of the conditions of probation and supervised release as functionally equivalent.~~

~~Under 18 U.S.C. § 3584, the court, upon consideration of the factors set forth in 18 U.S.C. § 3553(a), including applicable guidelines and policy statements issued by the Sentencing Commission, may order a term of imprisonment to be served consecutively or concurrently to an undischarged term of imprisonment. It is the policy of the Commission that the sanction imposed upon revocation is to be served consecutively to any other term of imprisonment imposed for any criminal conduct that is the basis of the revocation.~~

~~This chapter is applicable in the case of a defendant under supervision for a felony or Class A misdemeanor. Consistent with §1B1.9 (Class B or C Misdemeanors and Infractions), this chapter does not apply in the case of a defendant under supervision for a Class B or C misdemeanor or an infraction.~~

At the time of original sentencing, the court may impose a term of supervised release to follow the sentence of imprisonment. *See* 18 U.S.C. § 3583(a). During that term, the court may receive allegations that the supervisee has violated a term of supervision. In responding to such allegations, addressing a violation found during revocation proceedings, and imposing a sentence upon revocation, the court should conduct the same kind of individualized assessment used "in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release." *See* 18 U.S.C. § 3583(c), (e); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release).

If the court finds that the defendant violated a condition of supervised release, it may continue the defendant on supervised release under existing conditions, modify the conditions, extend the term, or revoke supervised release and impose a term of imprisonment. *See* 18 U.S.C. § 3583(e)(3). The court also has authority to terminate a term of supervised release and discharge the defendant at any time after the expiration of one year of supervised release if it is satisfied that such action is warranted by the conduct of the defendant and the interest of justice. 18 U.S.C. § 3583(e)(1).

Because supervised release is intended to promote rehabilitation and ease the defendant's transition back into the community, the Commission encourages courts—where possible—to consider a wide array of options to respond to non-compliant behavior and violations of the conditions of supervised release. These interim steps before revocation are intended to allow courts to address the defendant's failure to comply with court-imposed conditions and to better address the needs of the defendant while also maintaining public safety. If revocation is mandated by statute or the court otherwise determines revocation to be necessary, the sentence imposed upon revocation should be tailored to address the failure to abide by the conditions of the court-ordered supervision; imposition of an appropriate punishment for new criminal conduct is not the primary goal of a revocation sentence. The determination of the appropriate sentence on any new criminal conviction that is also a basis of the violation should be a separate determination for the court having jurisdiction over such conviction.

* * *

§~~7B1.1~~7C1.1. Classification of Violations (Policy Statement)

(a) There are ~~three~~ four grades of ~~probation and~~ supervised release violations:

(1) GRADE A VIOLATIONS — conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or

local offense punishable by a term of imprisonment exceeding twenty years;

(2) GRADE B VIOLATIONS — conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year;

(3) GRADE C VIOLATIONS — conduct constituting ~~(A)~~ a federal, state, or local offense punishable by a term of imprisonment of one year or less; ~~or (B)~~

(4) GRADE D VIOLATIONS — a violation of any other condition of ~~supervision~~supervised release.

(b) Where there is more than one violation of the conditions of ~~supervision~~supervised release, or the violation includes conduct that constitutes more than one offense, the grade of the violation is determined by the violation having the most serious grade.

Commentary

Application Notes:

1. Under 18 U.S.C. §~~§ 3563(a)(1) and~~ 3583(d), a mandatory condition of ~~probation and~~ supervised release is that the defendant not commit another federal, state, or local crime. A violation of this condition may be charged whether or not the defendant has been the subject of a separate federal, state, or local prosecution for such conduct. The grade of violation does not depend upon the conduct that is the subject of criminal charges or of which the defendant is convicted in a criminal proceeding. Rather, the grade of the violation is to be based on the defendant's actual conduct.

2. "***Crime of violence***" is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

3. "***Controlled substance offense***" is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2.

4. A "***firearm or destructive device of a type described in 26 U.S.C. § 5845(a)***" includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or a weapon made from a rifle, with a barrel or barrels of less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain large bore weapons.

5. Where the defendant is ~~under supervision~~on supervised release in connection with a felony conviction, or has a prior felony conviction, possession of a firearm (other than a firearm of a type described in 26 U.S.C. § 5845(a)) will generally constitute a Grade B violation, because 18 U.S.C. § 922(g) prohibits a convicted felon from possessing a firearm. The term "generally" is used in the preceding sentence, however, because there are certain limited exceptions to the applicability of 18 U.S.C. § 922(g). *See, e.g.*, 18 U.S.C. § 925(c).

* * *

§~~7B1.2~~7C1.2. Reporting of Violations of ~~Probation and~~ Supervised Release (Policy Statement)

(a) The probation officer shall promptly report to the court any alleged Grade A or B violation.

(b) The probation officer shall promptly report to the court any alleged Grade C or D violation unless the officer determines: (1) that such violation is minor, and not part of a continuing pattern of violations; and (2) that non-reporting will not present an undue risk to an individual or the public or be inconsistent with any directive of the court relative to the reporting of violations.

Commentary

Application Note:

1. Under subsection (b), a Grade C or D violation must be promptly reported to the court unless the probation officer makes an affirmative determination that the alleged violation meets the criteria for non-reporting. For example, an isolated failure to file a monthly report or a minor traffic infraction generally would not require reporting.

* * *

§7C1.3. Responses to Violations of Supervised Release (Policy Statement)

(a) ALLEGATION OF NON-COMPLIANCE.—Upon receiving an allegation that the defendant is in non-compliance with a condition of supervised release, the court should conduct an individualized assessment to determine what response, if any, is appropriate. **[**When warranted by an individualized assessment, the court may, for example:

(1) Continue the term of supervised release without modification;

(2) Extend the term of supervised release and/or modify the conditions thereof;

(3) Terminate the term of supervised release, if more than one year of the term of supervised release has expired; or

(4) Initiate revocation proceedings.**]**

[Option 1 (Mandatory Revocation only when Statutorily Required):

(b) FINDING OF A VIOLATION.—Upon a finding of a violation for which revocation is not required by statute, the court should conduct an individualized

assessment to determine what response, if any, is appropriate. When warranted by an individualized assessment, the court may:

(1) Continue the term of supervised release without modification;

(2) Extend the term of supervised release and/or modify the conditions thereof;

(3) Terminate the term of supervised release, if more than one year of the term of supervised release has expired; or

(4) Revoke supervised release.

(c) Upon a finding of a violation for which revocation is required by statute, the court shall revoke supervised release. *See* 18 U.S.C. § 3583(g).**]**

[Option 2 (Mandatory Revocation when Statutorily Required and for Grade A and B Violations):

(b) FINDING OF A VIOLATION.—Upon a finding of a violation for which revocation is required by statute (*see* 18 U.S.C. § 3583(g)) or a Grade A or B violation, the court shall revoke supervised release.

(c) Upon a finding of any other violation, the court should conduct an individualized assessment to determine what response, if any, is appropriate. When warranted by an individualized assessment, the court may:

(1) Continue the term of supervised release without modification;

(2) Extend the term of supervised release and/or modify the conditions thereof;

(3) Terminate the term of supervised release, if more than one year of the term of supervised release has expired; or

(4) Revoke supervised release.**]**

Commentary

Application Notes:

1. **Individualized Assessment.**—When making an individualized assessment under this section, the factors to be considered are the same as the factors considered in determining whether to impose a term of supervised release. *See* 18 U.S.C. § 3583(c), (e); Application Note 2 to §5D1.1 (Imposition of a Term of Supervised Release).

[2. **Application of Subsection (a).**—Examples of responses to an allegation of non-compliance with a condition of supervised release include continuing a violation hearing to provide the defendant time to come into compliance or directing the defendant to additional resources needed to come into compliance.]

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§~~7B1.3~~7C1.4. Revocation of ~~Probation or~~ Supervised Release (Policy Statement)

~~(a) (1) Upon a finding of a Grade A or B violation, the court shall revoke probation or supervised release.~~

~~(2) Upon a finding of a Grade C violation, the court may (A) revoke probation or supervised release; or (B) extend the term of probation or supervised release and/or modify the conditions of supervision.~~

~~(b) In the case of a revocation of probation or supervised release, the applicable range of imprisonment is that set forth in §7B1.4 (Term of Imprisonment).~~

~~(c) In the case of a Grade B or C violation —~~

~~(1) Where the minimum term of imprisonment determined under §7B1.4 (Term of Imprisonment) is at least one month but not more than six months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e) for any portion of the minimum term; and~~

~~(2) Where the minimum term of imprisonment determined under §7B1.4 (Term of Imprisonment) is more than six months but not more than ten months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e), provided that at least one half of the minimum term is satisfied by imprisonment.~~

~~(3) In the case of a revocation based, at least in part, on a violation of a condition specifically pertaining to community confinement, intermittent confinement, or home detention, use of the same or a less restrictive sanction is not recommended.~~

~~(d) Any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the~~

~~sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under §7B1.4 (Term of Imprisonment), and any such unserved period of community confinement, home detention, or intermittent confinement may be converted to an equivalent period of imprisonment.~~

~~(c) Where the court revokes probation or supervised release and imposes a term of imprisonment, it shall increase the term of imprisonment determined under subsections (b), (c), and (d) above by the amount of time in official detention that will be credited toward service of the term of imprisonment under 18 U.S.C. § 3585(b), other than time in official detention resulting from the federal probation or supervised release violation warrant or proceeding.~~

[Option 1 (Concurrent or Consecutive Sentences):

(a) In the case of a revocation of supervised release, the court shall conduct an individualized assessment to determine:

(1) the appropriate length of the term of imprisonment, given the recommended range of imprisonment set forth in §7C1.5 (Term of Imprisonment—Supervised Release (Policy Statement)); and

(2) whether that term should be served concurrently, partially concurrently, or consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of supervised release.

~~(f) Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release.~~**]**

[Option 2 (Consecutive Sentences Only):

(a) In the case of a revocation of supervised release, the court shall conduct an individualized assessment to determine the appropriate length of the term of imprisonment, given the recommended range of imprisonment set forth in §7C1.5 (Term of Imprisonment—Supervised Release (Policy Statement)).

(~~f~~b) Any term of imprisonment imposed upon the revocation of ~~probation or~~ supervised release ~~shall~~should be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the

sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of ~~probation or~~ supervised release.**]**

~~(g) (1) If probation is revoked and a term of imprisonment is imposed, the provisions of §§5D1.1–1.3 shall apply to the imposition of a term of supervised release.~~

(~~2~~**[**b**][**c**]**) If supervised release is revoked, the court may include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. 18 U.S.C. § 3583(h).

Commentary

Application Notes:

1. ~~Revocation of probation or supervised release generally is the appropriate disposition in the case of a Grade C violation by a defendant who, having been continued on supervision after a finding of violation, again violates the conditions of his supervision.~~**Individualized Assessment.**—When making an individualized assessment under subsection (a), the factors to be considered are the same as the factors considered in determining whether to impose a term of supervised release. *See* 18 U.S.C. § 3583(c), (e); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release).

2. The provisions for the revocation, as well as early termination and extension, of a term of supervised release are found in 18 U.S.C. § 3583(e), (g)–(i). Under 18 U.S.C. § 3583(h) (effective September 13, 1994), the court, in the case of revocation of supervised release, may order an additional period of supervised release to follow imprisonment.

3. ~~Subsection (e) is designed to ensure that the revocation penalty is not decreased by credit for time in official detention other than time in official detention resulting from the federal probation or supervised release violation warrant or proceeding. **Example**: A defendant, who was in pre-trial detention for three months, is placed on probation, and subsequently violates that probation. The court finds the violation to be a Grade C violation, determines that the applicable range of imprisonment is 4–10 months, and determines that revocation of probation and imposition of a term of imprisonment of four months is appropriate. Under subsection (e), a sentence of seven months imprisonment would be required because the Bureau of Prisons, under 18 U.S.C. § 3585(b), will allow the defendant three months' credit toward the term of imprisonment imposed upon revocation.~~ In the case of a revocation based, at least in part, on a violation of a condition specifically pertaining to community confinement, intermittent confinement, or home detention, use of the same or a less restrictive sanction is not recommended.

4. ~~Subsection (f) provides that any term of imprisonment imposed upon the revocation of probation or supervised release shall run consecutively to any sentence of imprisonment being served by the defendant. Similarly, it is the Commission's recommendation that any sentence of imprisonment for a criminal offense that is imposed after revocation of probation or supervised release be run consecutively to any term of imprisonment imposed upon revocation.~~ Any

restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under §7C1.5 (Term of Imprisonment—Supervised Release), and any such unserved period of community confinement, home detention, or intermittent confinement may be converted to an equivalent period of imprisonment.

~~5. Intermittent confinement is authorized as a condition of probation during the first year of the term of probation. 18 U.S.C. § 3563(b)(10). Intermittent confinement is authorized as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. *See* §5F1.8 (Intermittent Confinement).~~

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§~~7B1.4~~7C1.5. Term of Imprisonment—Supervised Release (Policy Statement)

~~(a)~~ ~~The~~ Unless otherwise required by statute, and subject to an individualized assessment, the recommended range of imprisonment applicable upon revocation is set forth in the following table:

Supervised Release Revocation Table
(in months of imprisonment)

Grade of Violation	Criminal History Category* I	II	III	IV	V	VI
Grade D	Up to 7	2–8	3–9	4–10	5–11	6–12
Grade C	3–9	4–10	5–11	6–12	7–13	8–14
Grade B	4–10	6–12	8–14	12–18	18–24	21–27
Grade A **(1)** Except as provided in subdivision (2) below:	12–18	15–21	18–24	24–30	30–37	33–41
(2) Where the defendant was on ~~probation or~~ supervised release as a result of a sentence for a Class A felony:	24–30	27–33	30–37	37–46	46–57	51–63.

*The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of ~~supervision~~supervised release.

~~(b) *Provided*, that —~~

~~(1) Where the statutorily authorized maximum term of imprisonment that is imposable upon revocation is less than the minimum of the applicable range, the statutorily authorized maximum term shall be substituted for the applicable range; and~~

~~(2) Where the minimum term of imprisonment required by statute, if any, is greater than the maximum of the applicable range, the minimum term of imprisonment required by statute shall be substituted for the applicable range.~~

~~(3) In any other case, the sentence upon revocation may be imposed at any point within the applicable range, provided that the sentence —~~

~~(A) is not greater than the maximum term of imprisonment authorized by statute; and~~

~~(B) is not less than any minimum term of imprisonment required by statute.~~

Commentary

Application Notes:

1. The criminal history category to be used in determining the applicable range of imprisonment in the Supervised Release Revocation Table is the category determined at the time the defendant originally was sentenced to the term of supervision. The criminal history category is not to be recalculated because the ranges set forth in the Supervised Release Revocation Table have been designed to take into account that the defendant violated supervision. In the rare case in which no criminal history category was determined when the defendant originally was sentenced to the term of supervision being revoked, the court shall determine the criminal history category that would have been applicable at the time the defendant originally was sentenced to the term of supervision. (*See* the criminal history provisions of §§4A1.1–4B1.4.)

2. In the case of a Grade D violation and a criminal history category of I, the recommended range of imprisonment in the Supervised Release Revocation Table is up to 7 months. This range allows for a sentence of less than 1 month.

3. Departure from the applicable range of imprisonment in the Supervised Release Revocation Table may be warranted when the court departed from the applicable range for reasons set forth in §4A1.3 (Departures Based on Inadequacy of Criminal History Category) in originally imposing the sentence that resulted in ~~supervision~~supervised release. Additionally, an upward departure may be warranted when a defendant, subsequent to the federal sentence resulting in ~~supervision~~supervised release, has been sentenced for an offense that is not the basis of the violation proceeding.

~~3~~4. In the case of a Grade C or D violation that is associated with a high risk of new felonious conduct (*e.g.*, a defendant, under ~~supervision~~supervised release for conviction of criminal sexual abuse, violates the condition that the defendant not associate with children by loitering near a schoolyard), an upward departure may be warranted.

~~4~~5. Where the original sentence was the result of a downward departure (*e.g.*, as a reward for substantial assistance), or a charge reduction that resulted in a sentence below the guideline range applicable to the defendant's underlying conduct, an upward departure may be warranted.

~~5~~6. Upon a finding that a defendant violated a condition of ~~probation or~~ supervised release by being in possession of a controlled substance or firearm or by refusing to comply with a condition requiring drug testing, the court is required to revoke ~~probation or~~ supervised release and impose a sentence that includes a term of imprisonment. 18 U.S.C. §~~§ 3565(b),~~ 3583(g).

~~6~~7. ~~In the case of a defendant who fails a drug test, the court shall consider whether the~~The availability of appropriate substance abuse programs, or a defendant's current or past participation in such programs, ~~warrants~~may warrant an exception from the requirement of mandatory revocation and imprisonment under 18 U.S.C. §~~§ 3565(b) and~~ 3583(g). 18 U.S.C. §~~§ 3563(a),~~ 3583(d).

* * *

§~~7B1.5~~7C1.6. No Credit for Time Under Supervision (Policy Statement)

(a) ~~Upon revocation of probation, no credit shall be given (toward any sentence of imprisonment imposed) for any portion of the term of probation served prior to revocation.~~

~~(b)~~ Upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision. *See* 18 U.S.C. § 3583(e)(3).

(~~c~~b) *Provided,* that in the case of a person serving a period of supervised release on a foreign sentence under the provisions of 18 U.S.C. § 4106A, credit shall be given for time on supervision prior to revocation, except that no credit shall be given for any time in escape or absconder status.

Commentary

Application Note:

1. Subsection (~~c~~b) implements 18 U.S.C. § 4106A(b)(1)(C), which provides that the combined periods of imprisonment and supervised release in transfer treaty cases shall not exceed the term of imprisonment imposed by the foreign court.

Background: This section provides that time served on ~~probation or~~ supervised release is not to be credited in the determination of any term of imprisonment imposed upon revocation. Other aspects of the defendant's conduct, such as compliance with supervision conditions and adjustment while under supervision, appropriately may be considered by the court in the determination of the sentence to be imposed within the applicable revocation range.

* * *

Issues for Comment

1. Part B of the proposed amendment adds language to address feedback indicating both that courts and probation officers should be afforded more discretion in their ability to address a defendant's non-compliant behavior while on supervised release and that they would benefit from more guidance concerning revocations of supervised release.

   (A) Part B would include throughout Chapter Seven, Part C (Supervised Release Violations) a recommendation that courts use an "individualized assessment" based on the statutory factors listed in 18 U.S.C. § 3583(e) when addressing non-compliant behavior. The Commission seeks comment on whether the recommendation of an individualized assessment based on statutory factors is sufficient to provide both discretion and useful guidance.

   (B) New policy statement §7C1.3 (Responses to Violations of Supervised Release (Policy Statement)) includes in the Commentary examples of how a court might address allegations of non-compliant behavior short of the more formal options listed in 18 U.S.C. § 3583(e). In addition, Part B maintains instructions on violations related to community confinement conditions in the Commentary to new policy statement §7C1.4 (Revocation of Supervised Release (Policy Statement)). The Commission seeks comment on whether such guidance should be retained or deleted and whether similar guidance should be included elsewhere. If the Commission provides further guidance, what should that guidance be?

   (C) Is there any other approach the Commission should consider to provide courts with appropriate discretion while also providing useful guidance, either throughout Chapter Seven, Part C, or for certain guideline provisions?

2. Part B of the proposed amendment includes two options to address when revocation is required or appropriate under new §7C1.3 (Responses to Violations of Supervised Release (Policy Statement)). Option 1 would remove the language indicating that revocation is mandatory in all cases of Grade A or B violations and provide that the court should conduct an individualized assessment to determine whether to revoke in any cases that revocation is not required by statute. Option 2 would duplicate the language in §7B1.3(a) that provides that "the court shall revoke" supervised release upon a finding of a Grade A or B violation and may revoke in other cases. Should the Commission continue to provide guidance tying whether revocation is required to the grade of the violation, or should the Commission remove this instruction and permit courts to make revocation determinations based on an individualized assessment in all cases? If the latter, should the Commission provide further guidance about when revocation is appropriate?

3. Given the proposed amendment's goal of promoting judicial discretion at revocation, the Commission seeks comment on whether it should replace the Supervised Release Revocation Table set forth in proposed §7C1.4 (Term of Imprisonment—Supervised Release) with guidance indicating that courts abide by the statutory limits regarding

maximum and minimum terms. If the Commission decides to retain the Revocation Table, would any further changes beyond those set forth in Part B of the proposed amendment be appropriate? For example, should the Commission recommend a sentence range that begins at less than one month in all cases, not just those involving Grade D violations for individuals in Criminal History Category I? Should it eliminate the higher set of ranges for cases in which the defendant is on supervised release as a result of a sentence for a Class A felony?

4. The Commission further seeks comment on whether and how a retained Supervised Release Revocation Table should make recommendations to courts regarding their consideration of criminal history. Should the defendant's criminal history category be recalculated at the time of revocation for a violation of supervised release? For example, should a court recalculate a defendant's criminal history score to exclude prior sentences that are no longer countable under the rules in §4A1.2 (Definitions and Instructions for Computing Criminal History) or to account for new offenses a defendant may have been sentenced for after commission of the offense for which probation or supervised release is being revoked?

5. The Commission seeks comment on whether it should issue more specific guidance on the appropriate response to Grade D violations. Should the Commission state that revocation is not ordinarily appropriate for such violations, unless revocation is required under 18 U.S.C. § 3583(g)? Should the Commission further state that revocation may be appropriate for Grade D violations if there have been multiple violations or if the court determines that revocation is necessary for protection of the public? Would such statements imply that revocation is ordinarily appropriate for Grade A, B, and C violations?

6. The recommended ranges of imprisonment set forth in the Revocation Tables at §7B1.4 (Term of Imprisonment—Probation) and §7C1.4 (Term of Imprisonment—Supervised Release) are determined, in part, by the defendant's criminal history category. For both tables, the criminal history category "is the category applicable at the time the defendant originally was sentenced" to a term of probation or supervised release. The Commission seeks comment on whether a defendant's criminal history score should be recalculated at the time of revocation to reflect changes made by amendments listed in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) if one or more of those amendments have the effect of lowering the defendant's criminal history category. For example, Part A of Amendment 821, which is applied retroactively, limits the overall criminal history impact of "status points," potentially resulting in a defendant's criminal history being lowered (*e.g.*, a defendant assigned criminal history category IV at the time of original sentencing may have that category reduced to III). Should the Revocation Tables at §7B1.4 (Term of Imprisonment—Probation) and §7C1.4 (Term of Imprisonment—Supervised Release) allow for a defendant to benefit from these types of retroactive changes? Should these changes apply equally to both tables or, given the different purposes of probation and supervised release, should the Commission adopt different rules for each table?

2. PROPOSED AMENDMENT: DRUG OFFENSES

Synopsis of Proposed Amendment: This proposed amendment contains five parts (Parts A through E). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive.

Part A of the proposed amendment includes two subparts to address concerns that the Drug Quantity Table at subsection (c) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) overly relies on drug type and quantity as a measure of offense culpability and results in sentences greater than necessary to accomplish the purposes of sentencing. Subpart 1 sets forth three options for amending §2D1.1 to set the highest base offense level in the Drug Quantity Table at a lower base offense level. Subpart 2 sets forth two options for amending §2D1.1 to add a new specific offense characteristic providing for a reduction relating to low-level trafficking functions. Both subparts include issues for comment.

Part B of the proposed amendment includes two subparts. Subpart 1 would amend §2D1.1 to address offenses involving "Ice." Subpart 2 sets forth two options for amending §2D1.1 to address the purity distinction in §2D1.1 between methamphetamine in "actual" form and methamphetamine as part of a mixture. Both subparts include issues for comment.

Part C of the proposed amendment would amend §2D1.1 to revise the enhancement for misrepresentation of fentanyl and fentanyl analogue at subsection (b)(13). Issues for comment are also provided.

Part D of the proposed amendment addresses the application of §2D1.1(b)(1) to machineguns. An issue for comment is also provided.

Part E of the proposed amendment would amend the Commentary to §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) to address the manner by which a defendant may satisfy §5C1.2(a)(5)'s requirement of providing truthful information and evidence to the Government. An issue for comment is also provided.

(A) Recalibrating the Use of Drug Weight in §2D1.1

Synopsis of Proposed Amendment: Part A of the proposed amendment contains two subparts (Subpart 1 and Subpart 2). The Commission is considering whether to promulgate one or both of these subparts, as they are not mutually exclusive.

Subpart 1 sets forth three options for amending §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to set the highest base offense level in the Drug Quantity Table at subsection (c) at a lower base offense level.

Subpart 2 sets forth two options for amending §2D1.1 to add a new specific offense characteristic providing for a reduction relating to low-level trafficking functions.

Drug Penalties in General

The most commonly prosecuted federal drug statutes prohibit the manufacture, distribution, importation, and exportation of controlled substances. The statutory penalties for these offenses vary based on (1) the quantity of the drug, (2) the defendant's prior commission of certain felony offenses, and (3) any serious bodily injury or death that resulted from using the drug. Section 2D1.1 applies to violations of 21 U.S.C. §§ 841 and 960, among other drug statutes. This guideline provides five alternative base offense levels, 18 specific offense characteristics, and two cross references.

The first four base offense levels, set out in §2D1.1(a)(1)–(a)(4), apply when the defendant was convicted of an offense under 21 U.S.C. § 841(b) or § 960(b) to which the applicable enhanced statutory minimum or maximum term of imprisonment applies or when the parties have stipulated to such an offense or such base offense level. The fifth base offense level, at §2D1.1(a)(5), applies in any other case and sets forth as the base offense level "the offense level specified in the Drug Quantity Table," subject to special provisions that apply when a defendant receives a mitigating role adjustment under §3B1.2 (Mitigating Role).

The Drug Quantity Table at §2D1.1(c) applies in the overwhelming majority of drug cases. The penalty structure of the Drug Quantity Table is based on the penalty structure of federal drug laws for most major drug types. That penalty structure generally establishes several tiers of penalties for manufacturing and trafficking in controlled substances, each based on the type and quantity of controlled substances involved. *See generally* 21 U.S.C. §§ 841(b)(1)(A), (B), (C), 960(b)(1), (2), (3). Thus, the offense levels set forth in the Drug Quantity Table depend primarily on drug type and drug quantity. For most drugs listed in the Drug Quantity Table, quantity is determined by the drug's weight. The Drug Quantity Table also includes "Converted Drug Weight," which is used to determine the base offense level in two circumstances: (1) when the defendant's relevant conduct involves two or more controlled substances (and not merely a single mixture of two substances); and (2) when the defendant's relevant conduct involves a controlled substance not specifically listed on the Drug Quantity Table. In either situation, the weight of the controlled substances is converted into a Converted Drug Weight using the Drug Conversion Tables set forth in Application Note 8(D) of the Commentary to §2D1.1.

Section 2D1.1 generally incorporates the statutory mandatory minimum sentences into the guidelines and extrapolates upward and downward to set offense levels for all drug quantities. Under the original guidelines, the quantity thresholds in the Drug Quantity Table were set to provide base offense levels corresponding to guideline ranges that were slightly above the statutory mandatory minimum penalties. Accordingly, offenses involving drug quantities that triggered a five-year statutory minimum were assigned a base offense level of 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 triggered a ten-year statutory minimum were assigned a base offense level of 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).

In 2014, the Commission determined that setting the base offense levels slightly above the mandatory minimum penalties was no longer necessary and instead set the base offense levels to straddle the mandatory minimum penalties. *See* USSG App. C, amend. 782 (effective Nov. 1, 2014). Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum are assigned a base offense level of 24, corresponding to a sentencing guideline range of 51 to 63 months for a defendant in Criminal History Category I (a guideline range that straddles the five-year statutory minimum). Similarly, offenses that trigger a ten-year statutory minimum are assigned a base offense level of 30, corresponding to a sentencing guideline range of 97 to 121 months for a defendant in Criminal History Category I (a guideline range that straddles the ten-year statutory minimum).

Feedback from Stakeholders

The Commission has received comment over the years indicating that §2D1.1 overly relies on drug type and quantity as a measure of offense culpability and results in sentences greater than necessary to accomplish the purposes of sentencing. Some commenters have suggested that the Commission should again lower penalties in §2D1.1, citing Commission data indicating that judges impose sentences below the guideline range in most drug trafficking cases. Commission data reflects that the difference between the average guideline minimum and average sentence imposed varies depending on the base offense level, with the greatest difference occurring at the highest offense levels on the Drug Quantity Table. In addition, commenters have raised concerns that the mitigating role adjustment from Chapter Three, Part B (Role in the Offense) is applied inconsistently in drug trafficking cases and does not adequately reflect individuals' roles in drug trafficking offenses.

Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table)

Subpart 1 of Part A of the proposed amendment sets forth three options for amending §2D1.1 to set the highest base offense level in the Drug Quantity Table at subsection (c) at a lower base offense level.

Option 1 would set the highest base offense level in the Drug Quantity Table at level 34. Accordingly, it would delete subsections (c)(1) and (c)(2) of the table, redesignate

subsection (c)(3) as subsection (c)(1), and renumber the remainder of the provisions of the table accordingly.

Option 2 would set the highest base offense level in the Drug Quantity Table at level 32. Accordingly, it would delete subsections (c)(1) through (c)(3) of the table, redesignate subsection (c)(4) as subsection (c)(1), and renumber the remainder of the provisions of the table accordingly.

Option 3 would set the highest base offense level in the Drug Quantity Table at level 30. Accordingly, it would delete subsections (c)(1) through (c)(4) of the table, redesignate subsection (c)(5) as subsection (c)(1), and renumber the remainder of the provisions of the table accordingly.

Subpart 1 brackets §2D1.1(a)(5) to indicate that all three options would require changes to the special provisions that apply when a defendant receives a mitigating role adjustment under §3B1.2. The third issue for comment below provides some background information on §2D1.1(a)(5) and sets forth a request for comment on the changes that should be made to this provision in light of the revisions proposed by the three options described above.

Additional issues for comment are also provided.

Subpart 2 (New Trafficking Functions Adjustment)

Subpart 2 of Part A of the proposed amendment would add a new specific offense characteristic providing for a [2][4][6]-level reduction relating to low-level trafficking functions. It provides two options for this new reduction.

Option 1 would make the reduction applicable if §2D1.1(b)(2) (relating to use of violence) does not apply, [the defendant did not possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense,] and [the defendant's most serious conduct in the offense was limited to][the defendant's primary function in the offense was] performing any of the low-level trafficking functions listed in the new provision.

Option 2, like Option 1, would make the reduction applicable if §2D1.1(b)(2) does not apply, [the defendant did not possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense,] and [the defendant's most serious conduct in the offense was limited to][the defendant's primary function in the offense was] a low-level trafficking function. However, unlike Option 1, Option 2 would not list low-level trafficking functions to which the reduction would necessarily apply. Instead, Option 2 would list functions that may qualify for the reduction as examples.

Both options would include a provision indicating that the reduction at proposed §2D1.1(b)(17) shall apply regardless of whether the defendant acted alone or in concert with others. In addition, Options 1 and 2 would add a special instruction to §2D1.1 providing that §3B1.2 does not apply to cases where the defendant's offense level is determined under §2D1.1. It would also include a new application note in the Commentary to §2D1.1 relating to the new low-level trafficking functions adjustment. The new application note would provide guidance taken from the Commentary to §3B1.2. Options 1 and 2 would also make

conforming changes in §2D1.1 to replace all references to §3B1.2 with references to the new low-level trafficking functions reduction. These conforming changes include tying the additional decreases and mitigating role cap at §2D1.1(a)(5) to the application of the proposed reduction at new §2D1.1(b)(17) for low-level trafficking functions.

Issues for comment are also provided.

Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table)

Proposed Amendment:

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

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

(1) **43**, if (A) the defendant is convicted of an offense 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), to which the mandatory statutory term of life imprisonment applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(2) **38**, if (A) the defendant is convicted of an offense 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), to which the statutory term of imprisonment of not less than 20 years to life applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(3) **30**, if (A) the defendant is convicted of an offense under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) to which the statutory maximum term of imprisonment of 30 years applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(4) **26**, if (A) the defendant is convicted of an offense under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) to which the statutory maximum term of imprisonment of 15 years applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

[Options 1, 2, and 3 would require changes to §2D1.1(a)(5) (see issue for comment 3):

(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**.**]**

* * *

(c) DRUG QUANTITY TABLE

CONTROLLED SUBSTANCES AND QUANTITY*	BASE OFFENSE LEVEL

[Option 1 (Highest Base Offense Level at Level 34):

~~(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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);~~
~~● 9 KG or more of a Fentanyl Analogue;~~
~~● 90,000 KG or more of Marihuana;~~
~~● 18,000 KG or more of Hashish;~~
~~● 1,800 KG or more of Hashish Oil;~~
~~● 90,000,000 units or more of Ketamine;~~
~~● 90,000,000 units or more of Schedule I or II Depressants;~~
~~● 5,625,000 units or more of Flunitrazepam;~~
~~● 90,000 KG or more of ***Converted Drug Weight***.~~

~~(2) ● At least 30 KG but less than 90 KG of Heroin; **Level 36**~~
~~● At least 150 KG but less than 450 KG of Cocaine;~~
~~● At least 8.4 KG but less than 25.2 KG of Cocaine Base;~~
~~● At least 30 KG but less than 90 KG of PCP, or~~
~~at least 3 KG but less than 9 KG of PCP (actual);~~
~~● At least 15 KG but less than 45 KG of Methamphetamine, or~~
~~at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or~~
~~at least 1.5 KG but less than 4.5 KG of "Ice";~~
~~● At least 15 KG but less than 45 KG of Amphetamine, or~~
~~at least 1.5 KG but less than 4.5 KG of Amphetamine (actual);~~
~~● At least 300 G but less than 900 G of LSD;~~
~~● At least 12 KG but less than 36 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);~~
~~● At least 3 KG but less than 9 KG of a Fentanyl Analogue;~~
~~● At least 30,000 KG but less than 90,000 KG of Marihuana;~~
~~● At least 6,000 KG but less than 18,000 KG of Hashish;~~
~~● At least 600 KG but less than 1,800 KG of Hashish Oil;~~
~~● At least 30,000,000 units but less than 90,000,000 units of Ketamine;~~
~~● At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants;~~
~~● At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam;~~
~~● At least 30,000 KG but less than 90,000 KG of ***Converted Drug Weight***.~~

(~~3~~1) ● ~~At least~~ 10 KG ~~but less than 30 KG~~or more of Heroin; **Level 34**
● ~~At least~~ 50 KG ~~but less than 150 KG~~or more of Cocaine;

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

[Option 2 (Highest Base Offense Level at Level 32) (which would also delete §2D1.1(a)(1) through (a)(3)):

(~~4~~1) - ~~At least~~ 3 KG ~~but less than 10 KG~~or more of Heroin; **Level 32**
- ~~At least~~ 15 KG ~~but less than 50 KG~~or more of Cocaine;
- ~~At least~~ 840 G ~~but less than 2.8 KG~~or more of Cocaine Base;
- ~~At least~~ 3 KG ~~but less than 10 KG~~or more of PCP, or
  ~~at least~~ 300 G ~~but less than 1 KG~~or more of PCP (actual);
- ~~At least~~ 1.5 KG ~~but less than 5 KG~~or more of Methamphetamine, or
  ~~at least~~ 150 G ~~but less than 500 G~~or more of Methamphetamine (actual), or
  ~~at least~~ 150 G ~~but less than 500 G~~or more of "Ice";
- ~~At least~~ 1.5 KG ~~but less than 5 KG~~or more of Amphetamine, or
  ~~at least~~ 150 G ~~but less than 500 G~~or more of Amphetamine (actual);
- ~~At least~~ 30 G ~~but less than 100 G~~or more of LSD;
- ~~At least~~ 1.2 KG ~~but less than 4 KG~~or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- ~~At least~~ 300 G ~~but less than 1 KG~~or more of a Fentanyl Analogue;
- ~~At least~~ 3,000 KG ~~but less than 10,000 KG~~or more of Marihuana;
- ~~At least~~ 600 KG ~~but less than 2,000 KG~~or more of Hashish;
- ~~At least~~ 60 KG ~~but less than 200 KG~~or more of Hashish Oil;
- ~~At least~~ 3,000,000 ~~but less than 10,000,000~~ units or more of Ketamine;
- ~~At least~~ 3,000,000 ~~but less than 10,000,000~~ units or more of Schedule I or II Depressants;
- ~~At least~~ 187,500 ~~but less than 625,000~~ units or more of Flunitrazepam;
- ~~At least~~ 3,000 KG ~~but less than 10,000 KG~~or more of ***Converted Drug Weight***.**]**

[Option 3 (Highest Base Offense Level of Drug Quantity Table at Level 30) (which would also delete §2D1.1(a)(1) through (a)(4)):

(~~5~~1) - ~~At least~~ 1 KG ~~but less than 3 KG~~or more of Heroin; **Level 30**
- ~~At least~~ 5 KG ~~but less than 15 KG~~or more of Cocaine;
- ~~At least~~ 280 G ~~but less than 840 G~~or more of Cocaine Base;
- ~~At least~~ 1 KG ~~but less than 3 KG~~or more of PCP, or
  ~~at least~~ 100 G ~~but less than 300 G~~or more of PCP (actual);

- ~~At least~~ 500 G ~~but less than 1.5 KG~~or more of Methamphetamine, or
  ~~at least~~ 50 G ~~but less than 150 G~~or more of Methamphetamine (actual), or
  ~~at least~~ 50 G ~~but less than 150 G~~or more of "Ice";
- ~~At least~~ 500 G ~~but less than 1.5 KG~~or more of Amphetamine, or
  ~~at least~~ 50 G ~~but less than 150 G~~or more of Amphetamine (actual);
- ~~At least~~ 10 G ~~but less than 30 G~~or more of LSD;
- ~~At least~~ 400 G ~~but less than 1.2 KG~~or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- ~~At least~~ 100 G ~~but less than 300 G~~or more of a Fentanyl Analogue;
- ~~At least~~ 1,000 KG ~~but less than 3,000 KG~~or more of Marihuana;
- ~~At least~~ 200 KG ~~but less than 600 KG~~or more of Hashish;
- ~~At least~~ 20 KG ~~but less than 60 KG~~or more of Hashish Oil;
- ~~At least~~ 1,000,000 ~~but less than 3,000,000~~ units or more of Ketamine;
- ~~At least~~ 1,000,000 ~~but less than 3,000,000~~ units or more of Schedule I or II Depressants;
- ~~At least~~ 62,500 ~~but less than 187,500~~ units or more of Flunitrazepam;
- ~~At least~~ 1,000 KG ~~but less than 3,000 KG~~or more of ***Converted Drug Weight***.**]**

[All three options would renumber the remaining provisions of the Drug Quantity Table accordingly]

(6) **Level 28**

- At least 700 G but less than 1 KG of Heroin;
- At least 3.5 KG but less than 5 KG of Cocaine;
- At least 196 G but less than 280 G of Cocaine Base;
- At least 700 G but less than 1 KG of PCP, or
  at least 70 G but less than 100 G of PCP (actual);
- At least 350 G but less than 500 G of Methamphetamine, or
  at least 35 G but less than 50 G of Methamphetamine (actual), or
  at least 35 G but less than 50 G of "Ice";
- At least 350 G but less than 500 G of Amphetamine, or
  at least 35 G but less than 50 G of Amphetamine (actual);
- At least 7 G but less than 10 G of LSD;
- At least 280 G but less than 400 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 70 G but less than 100 G of a Fentanyl Analogue;
- At least 700 KG but less than 1,000 KG of Marihuana;
- At least 140 KG but less than 200 KG of Hashish;
- At least 14 KG but less than 20 KG of Hashish Oil;
- At least 700,000 but less than 1,000,000 units of Ketamine;
- At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
- At least 43,750 but less than 62,500 units of Flunitrazepam;
- At least 700 KG but less than 1,000 KG of ***Converted Drug Weight***.

(7) **Level 26**

- At least 400 G but less than 700 G of Heroin;
- At least 2 KG but less than 3.5 KG of Cocaine;
- At least 112 G but less than 196 G of Cocaine Base;
- At least 400 G but less than 700 G of PCP, or
  at least 40 G but less than 70 G of PCP (actual);
- At least 200 G but less than 350 G of Methamphetamine, or
  at least 20 G but less than 35 G of Methamphetamine (actual), or
  at least 20 G but less than 35 G of "Ice";
- At least 200 G but less than 350 G of Amphetamine, or
  at least 20 G but less than 35 G of Amphetamine (actual);
- At least 4 G but less than 7 G of LSD;

- At least 160 G but less than 280 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 40 G but less than 70 G of a Fentanyl Analogue;
- At least 400 KG but less than 700 KG of Marihuana;
- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil;
- At least 400,000 but less than 700,000 units of Ketamine;
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
- At least 25,000 but less than 43,750 units of Flunitrazepam;
- At least 400 KG but less than 700 KG of ***Converted Drug Weight***.

(8)
- At least 100 G but less than 400 G of Heroin; **Level 24**
- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 10 G but less than 40 G of a Fentanyl Analogue;
- At least 100 KG but less than 400 KG of Marihuana;
- At least 20 KG but less than 80 KG of Hashish;
- At least 2 KG but less than 8 KG of Hashish Oil;
- At least 100,000 but less than 400,000 units of Ketamine;
- At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
- At least 6,250 but less than 25,000 units of Flunitrazepam;
- At least 100 KG but less than 400 KG of ***Converted Drug Weight***.

(9)
- At least 80 G but less than 100 G of Heroin; **Level 22**
- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 8 G but less than 10 G of a Fentanyl Analogue;
- At least 80 KG but less than 100 KG of Marihuana;
- At least 16 KG but less than 20 KG of Hashish;
- At least 1.6 KG but less than 2 KG of Hashish Oil;
- At least 80,000 but less than 100,000 units of Ketamine;
- At least 80,000 but less than 100,000 units of Schedule I or II Depressants;

- At least 5,000 but less than 6,250 units of Flunitrazepam;
- At least 80 KG but less than 100 KG of ***Converted Drug Weight***.

(10) **Level 20**

- At least 60 G but less than 80 G of Heroin;
- At least 300 G but less than 400 G of Cocaine;
- At least 16.8 G but less than 22.4 G of Cocaine Base;
- At least 60 G but less than 80 G of PCP, or
  at least 6 G but less than 8 G of PCP (actual);
- At least 30 G but less than 40 G of Methamphetamine, or
  at least 3 G but less than 4 G of Methamphetamine (actual), or
  at least 3 G but less than 4 G of "Ice";
- At least 30 G but less than 40 G of Amphetamine, or
  at least 3 G but less than 4 G of Amphetamine (actual);
- At least 600 MG but less than 800 MG of LSD;
- At least 24 G but less than 32 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 6 G but less than 8 G of a Fentanyl Analogue;
- At least 60 KG but less than 80 KG of Marihuana;
- At least 12 KG but less than 16 KG of Hashish;
- At least 1.2 KG but less than 1.6 KG of Hashish Oil;
- At least 60,000 but less than 80,000 units of Ketamine;
- At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
- 60,000 units or more of Schedule III substances (except Ketamine);
- At least 3,750 but less than 5,000 units of Flunitrazepam;
- At least 60 KG but less than 80 KG of ***Converted Drug Weight***.

(11) **Level 18**

- At least 40 G but less than 60 G of Heroin;
- At least 200 G but less than 300 G of Cocaine;
- At least 11.2 G but less than 16.8 G of Cocaine Base;
- At least 40 G but less than 60 G of PCP, or
  at least 4 G but less than 6 G of PCP (actual);
- At least 20 G but less than 30 G of Methamphetamine, or
  at least 2 G but less than 3 G of Methamphetamine (actual), or
  at least 2 G but less than 3 G of "Ice";
- At least 20 G but less than 30 G of Amphetamine, or
  at least 2 G but less than 3 G of Amphetamine (actual);
- At least 400 MG but less than 600 MG of LSD;
- At least 16 G but less than 24 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 4 G but less than 6 G of a Fentanyl Analogue;
- At least 40 KG but less than 60 KG of Marihuana;
- At least 8 KG but less than 12 KG of Hashish;
- At least 800 G but less than 1.2 KG of Hashish Oil;
- At least 40,000 but less than 60,000 units of Ketamine;
- At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
- At least 40,000 but less than 60,000 units of Schedule III substances (except Ketamine);
- At least 2,500 but less than 3,750 units of Flunitrazepam;
- At least 40 KG but less than 60 KG of ***Converted Drug Weight***.

(12) **Level 16**

- At least 20 G but less than 40 G of Heroin;
- At least 100 G but less than 200 G of Cocaine;
- At least 5.6 G but less than 11.2 G of Cocaine Base;

- At least 20 G but less than 40 G of PCP, or
  at least 2 G but less than 4 G of PCP (actual);
- At least 10 G but less than 20 G of Methamphetamine, or
  at least 1 G but less than 2 G of Methamphetamine (actual), or
  at least 1 G but less than 2 G of "Ice";
- At least 10 G but less than 20 G of Amphetamine, or
  at least 1 G but less than 2 G of Amphetamine (actual);
- At least 200 MG but less than 400 MG of LSD;
- At least 8 G but less than 16 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 2 G but less than 4 G of a Fentanyl Analogue;
- At least 20 KG but less than 40 KG of Marihuana;
- At least 5 KG but less than 8 KG of Hashish;
- At least 500 G but less than 800 G of Hashish Oil;
- At least 20,000 but less than 40,000 units of Ketamine;
- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
- At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine);
- At least 1,250 but less than 2,500 units of Flunitrazepam;
- At least 20 KG but less than 40 KG of ***Converted Drug Weight***.

(13) **Level 14**

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

(14) **Level 12**

- Less than 10 G of Heroin;
- Less than 50 G of Cocaine;
- Less than 2.8 G of Cocaine Base;
- Less than 10 G of PCP, or
  less than 1 G of PCP (actual);
- Less than 5 G of Methamphetamine, or
  less than 500 MG of Methamphetamine (actual), or
  less than 500 MG of "Ice";
- Less than 5 G of Amphetamine, or
  less than 500 MG of Amphetamine (actual);

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

(15) **Level 10**

- 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 substances (except Ketamine);
- At least 156 but less than 312 units of Flunitrazepam;
- At least 40,000 but less than 80,000 units of Schedule IV substances (except Flunitrazepam);
- At least 2.5 KG but less than 5 KG of ***Converted Drug Weight***.

(16) **Level 8**

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

(17) **Level 6**

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

* * *

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:

* * *

[All three options would make appropriate conforming changes to Application Note 27]

27. **Departure Considerations.—**

* * *

(B) **Upward Departure Based on Drug Quantity.**—In an extraordinary case, an upward departure above offense level ~~38~~**[**34**][**32**][**30**]** on the basis of drug quantity may be warranted. For example, an upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level ~~38~~**[**34**][**32**][**30**]**. Similarly, in the case of a controlled substance for which the maximum offense level is less than level ~~38~~**[**34**][**32**][**30**]**, an upward departure may be warranted if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance.

* * *

Issues for Comment:

1. Commission data reflects that the difference between the average guideline minimum and average sentence imposed varies depending on the base offense level, with the greatest difference occurring at the highest base offense levels. Subpart 1 sets forth three options for amending the Drug Quantity Table at subsection (c) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to set the highest base offense level at [34][32][30]. Should the Commission consider setting the highest base offense level at another level? If so, what is the appropriate highest base offense level for the Drug Quantity Table?

2. Subpart 1 of Part A of the proposed amendment would amend §2D1.1 to reduce the highest base offense level in the Drug Quantity Table. The Commission seeks comment on whether it should instead consider reducing all base offense levels in the Drug Quantity Table. If so, to what extent? Should this reduction apply to all drug types and at all offense levels? Are there drug types for which the base offense levels should not be reduced or for which there should be a different base offense level reduction?

3. The mitigating role cap at §2D1.1(a)(5) provides a decrease for base offense levels of 32 or greater when the mitigating role adjustment at §3B1.2 applies. The mitigating role cap also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction ("minimal participant") at §3B1.2(a). Subpart 1 sets forth three options to decrease the highest base offense level of the Drug Quantity Table to level [34][32][30]. If the Commission adopts any of these options,

it will require changes to the mitigating role cap at §2D1.1(a)(5). The Commission seeks comment on how it should address the interaction between the options set forth in Subpart 1 and the mitigating role cap. Specifically, should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap? If so, what base offense levels should trigger the mitigating role cap? What is the appropriate decrease from those base offense levels?

4. Section 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) includes two chemical quantity tables at subsections (d) and (e). Section 2D1.11 is generally structured to provide base offense levels that are tied to, but less severe than, the base offense levels in §2D1.1 for offenses involving the same substance. If the Commission were to promulgate Option 1, 2, or 3 from Subpart 1, should the Commission amend the chemical quantity tables at §2D1.11?

5. Subpart 1 of Part A of the Proposed Amendment sets forth three options to decrease the highest base offense level of the Drug Quantity Table from level 38 to level [34][32][30]. Part B of the proposed amendment would revise the Drug Quantity Table with respect to methamphetamine, which is the most common drug type in federal drug trafficking offenses. The Commission seeks comment on the interaction between these parts of the proposed amendment. If the Commission were to amend the Drug Quantity Table relating to methamphetamine, should that affect the Commission's consideration of a reduction of the highest base offense level in the Drug Quantity Table? If so, how?

Subpart 2 (New Trafficking Functions Adjustment)

Proposed Amendment:

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

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

(1) **43**, if (A) the defendant is convicted of an offense 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), to which the mandatory statutory term of life imprisonment applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(2) **38**, if (A) the defendant is convicted of an offense 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), to which the statutory term of imprisonment of not less than 20 years to life applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(3) **30**, if (A) the defendant is convicted of an offense under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) to which the statutory maximum term of imprisonment of 30 years applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(4) **26**, if (A) the defendant is convicted of an offense under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) to which the statutory maximum term of imprisonment of 15 years applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; 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)~~a reduction under subsection (b)(17); 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)~~a reduction under subsection (b)(17), decrease to level **32**.

(b) Specific Offense Characteristics

* * *

(2) If the defendant used violence, made a credible threat to use violence, or directed the use of violence, 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)~~a reduction under subsection (b)(17), increase by **2** levels.

* * *

(16) 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.

[Option 1 (Specifying functions that trigger reduction):

(17) If—

(A) subsection (b)(2) does not apply;

[(B) the defendant did not possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;**]** and

(C) **[**the defendant's most serious conduct in the offense was limited to performing any of the following low-level trafficking functions**][**the defendant's primary function in the offense was performing any of the following low-level trafficking functions**]**—

(i) carried one or more controlled substances (regardless of the quantity of the controlled substance involved) on their person, vehicle, vessel, or aircraft for purposes of transporting the controlled substance, without holding an ownership interest in the controlled substance or claiming a significant share of profits from the offense;

(ii) performed any low-level function in the offense other than the selling of controlled substances (such as running errands, sending or receiving phone calls or messages, scouting, receiving packages, packaging controlled substances, acting as a lookout, storing controlled substances, or acting as a deckhand or crew member on a vessel or aircraft used to transport controlled substances), without holding an ownership interest in the controlled substance or claiming a significant share of profits from the offense; or

(iii) distributed retail or user-level quantities of controlled substances to end users **[**or similarly situated distributors**]** and **[**one or more of the following factors is**][**two or more of the following factors are**]** present: (I) 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; (II) the defendant was motivated primarily by a substance abuse disorder; (III) the defendant was engaged in the distribution of controlled

substances infrequently or for brief duration; (IV) the defendant received little or no compensation from the distribution of the controlled substance involved in the offense; **[**or (V) the defendant had limited knowledge of the distribution network and an additional factor similar to any of the factors described in subclauses (I) through (IV) is present**]**;

decrease by **[2][4][6]** levels. This reduction shall apply regardless of whether the defendant acted alone or in concert with others.**]**

[Option 2 (Functions listed as examples):

(17) If—

(A) subsection (b)(2) does not apply;

[(B) the defendant did not possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;**]** and

(C) **[**the defendant's most serious conduct in the offense was limited to performing a low-level trafficking function**][**the defendant's primary function in the offense was performing a low-level trafficking function**]**; decrease by **[2][4][6]** levels. This reduction shall apply regardless of whether the defendant acted alone or in concert with others.

Examples:

Functions that may qualify as low-level trafficking functions, depending on the scope and structure of the criminal activity, include where the defendant:

(A) carried one or more controlled substances (regardless of the quantity of the controlled substance involved) on their person, vehicle, vessel, or aircraft for purposes of transporting the controlled substance, without holding an ownership interest in the controlled substance or claiming a significant share of profits from the offense;

(B) performed any low-level function in the offense other than the selling of controlled substances (such as running errands, sending or receiving phone calls or messages, scouting, receiving packages, packaging controlled substances, acting as a lookout, storing controlled substances, or acting as a deckhand or crew member on a vessel or aircraft used to transport controlled

substances), without holding an ownership interest in the controlled substance or claiming a significant share of profits from the offense; or

(C) distributed retail or user-level quantities of controlled substances to end users **[**or similarly situated distributors**]** and **[**one or more of the following factors is**][**two or more of the following factors are**]** present: (i) 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; (ii) the defendant was motivated primarily by a substance abuse disorder; (iii) the defendant was engaged in the distribution of controlled substances infrequently or for brief duration; (iv) the defendant received little or no compensation from the distribution of the controlled substance involved in the offense; **[**or (v) the defendant had limited knowledge of the distribution network and an additional factor similar to any of the factors described in clauses (i) through (iv) is present**].]**

(~~17~~18) If the defendant receives ~~the 4-level ("minimal participant") reduction in §3B1.2(a)~~a reduction under subsection (b)(17) 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.

(~~18~~19) If the defendant meets the criteria set forth in paragraphs (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

* * *

(e) Special ~~Instruction~~Instructions

(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.

(2) If the defendant's offense level is determined under this guideline, do not apply §3B1.2 (Mitigating Role).

* * *

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:

* * *

21. **Application of Subsection (b)(17).—**

(A) A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a low-level trafficking function may receive an adjustment under subsection (b)(17). For example, a defendant who is convicted of a drug trafficking offense, whose participation in that offense was limited to transporting or storing drugs, and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored may receive an adjustment under subsection (b)(17).

(B) If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by the defendant's actual criminal conduct, a reduction under subsection (b)(17) ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense.

~~21~~22. **Applicability of Subsection (b)(~~18~~19).—**The applicability of subsection (b)(~~18~~19) 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 that the applicable guideline range shall not be less than 24 to 30 months of imprisonment, is not pertinent to the determination of whether subsection (b)(18) applies.

[Subpart 2 would renumber the rest of the application notes accordingly]

* * *

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.

* * *

Subsection (b)(~~17~~18) 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)(~~18~~19) shall not apply.

* * *

§3B1.2. Mitigating Role

* * *

Commentary

Application Notes:

* * *

3. **Applicability of Adjustment.—**

(A) **Substantially Less Culpable than Average Participant.**—This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity.

A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in the criminal activity may receive an adjustment under this guideline. For example, ~~a defendant who is convicted of a drug trafficking offense, whose participation in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored may receive an adjustment under this guideline.~~

~~Likewise,~~ a defendant who is accountable under §1B1.3 for a loss amount under §2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal gain from a fraud offense or who had limited knowledge of the scope of the scheme may receive an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose participation in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, may receive an adjustment under this guideline.

(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 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.

* * *

6. **~~Application~~Non-Applicability of Role Adjustment ~~in Certain Drug Cases~~to Cases Where Offense Level is Determined under §2D1.1.** ~~In a case in which the court applied §2D1.1 and the defendant's base offense level under that guideline was reduced by operation of the maximum base offense level in §2D1.1(a)(5), the court also shall apply the appropriate adjustment under this guideline.~~In accordance with subsection (e)(2) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §3B1.2 does not apply to a defendant whose offense level is determined under §2D1.1.

* * *

Issues for Comment:

1. Subpart 2 of Part A of the proposed amendment would add a new specific offense characteristic at subsection (b) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) relating to low-level trafficking functions in drug offenses. The Commission has proposed that this specific offense characteristic decrease the offense levels by [2][4][6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?

2. The Commission seeks comment on whether the new specific offense characteristic at §2D1.1(b)(17) properly captures low-level trafficking functions. Are there other factors that this provision should capture? Are there factors included in the proposed amendment that should not be included?

3. One of the low-level trafficking functions listed in proposed §2D1.1(b)(17) is the distribution of retail or user-level quantities of controlled substances when certain mitigating circumstances are present. The Commission seeks comment on whether the distribution of retail or user-level quantities of controlled substances, when certain mitigating circumstances are present, merits a reduction. If so, what mitigating circumstances should the Commission provide?

4. Section 2D1.1(a)(5) provides an additional decrease to the base offense level based on the application of the mitigating role adjustment at §3B1.2 (Mitigating Role). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?

5. Section 2D1.1(a)(5) also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction ("minimal participant") at §3B1.2(a). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?

6. Subpart 2 of Part A of the proposed amendment includes a special instruction providing that §3B1.2 (Mitigating Role) does not apply to cases where the defendant's offense level is determined under §2D1.1. The Commission seeks comment on whether this special instruction is appropriate.

7. Some guidelines provide an instruction to use the offense level from another Chapter Two offense guideline, which generally refers to the entire offense guideline (*i.e.*, the base offense level, specific offense characteristics, cross references, and special instructions). This can result in a case in which the defendant is sentenced under a guideline other than §2D1.1 but the offense level is determined under §2D1.1. In such a case, the defendant could qualify for both a low-level trafficking functions adjustment under §2D1.1 and a role adjustment under Chapter Three, Part B. The Commission seeks comment on how it should address this issue.

8. Subpart 2 of Part A of the proposed amendment would add Commentary to §2D1.1 that closely tracks certain provisions currently contained in Application Note 3 of the Commentary to §3B1.2. The proposed Commentary would provide that a low-level trafficking functions reduction applies even when the defendant's relevant conduct is limited to conduct in which the defendant was personally involved. Additionally, the proposed Commentary would state that a reduction ordinarily is not warranted when the defendant received a lower offense level by virtue of being convicted of a significantly less serious offense than warranted by the defendant's actual criminal conduct. The Commission seeks comment on whether including this guidance in the Commentary to §2D1.1 is appropriate. Is the guidance provided in these provisions applicable in the context of the new low-level trafficking functions adjustment at §2D1.1? If appropriate, should the Commission alternatively consider incorporating the prohibition and guidance by reference to the Commentary to §3B1.2?

(B) Methamphetamine

Synopsis of Proposed Amendment: Part B of the proposed amendment contains two subparts (Subpart 1 and Subpart 2). The Commission is considering whether to promulgate one or both of these subparts, as they are not mutually exclusive.

Subpart 1 addresses offenses involving "Ice" under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

Subpart 2 addresses the purity distinction in §2D1.1 between methamphetamine in "actual" form and methamphetamine as part of a mixture.

Methamphetamine in General

The statutory provisions and penalties associated with the trafficking of methamphetamine are found at 21 U.S.C. §§ 841 and 960. While the statutory penalties for most drug types are based solely on drug quantity, the statutory penalties for methamphetamine are also based on the purity of the substance involved in the offense. Sections 841 and 960 contain quantity threshold triggers for five- and ten-year mandatory minimums for methamphetamine (actual) (*i.e.*, "pure" methamphetamine) and methamphetamine (mixture) (*i.e.*, "a mixture or substance containing a detectable amount of methamphetamine"). *See* 21 U.S.C. §§ 841(b)(1)(A)(viii), (B)(viii), 960(b)(1)(H), & 960(b)(2)(H). Two different 10-to-1 quantity ratios set the mandatory minimum penalties for methamphetamine trafficking offenses. First, the quantity of substance triggering the ten-year minimum is ten times the quantity triggering the five-year minimum. Second, the quantity of methamphetamine mixture triggering each mandatory minimum is set at ten times the quantity of methamphetamine actual triggering the same statutory minimum penalty.

Under §2D1.1, the base offense level for offenses involving methamphetamine varies based on the purity of the substance. Specifically, the Drug Quantity Table at §2D1.1(c) contains three different entries relating to methamphetamine: (1) "Methamphetamine," which refers to the entire weight of a mixture or substance containing a detectable amount of methamphetamine; (2) "Methamphetamine (actual)," which refers to the weight of methamphetamine itself contained in a mixture or substance; and (3) "Ice," which is defined as "a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity" (*see* USSG §2D1.1(c) (Note C)). The Drug Quantity Table sets base offense levels for methamphetamine mixture and methamphetamine (actual) in a manner that reflects the 10:1 quantity ratio of the applicable statutory provisions, such that it takes ten times more methamphetamine mixture than methamphetamine (actual) to trigger the same base offense level.

Although "Ice" is included in the guidelines, the term "Ice" does not appear in the statutory provisions setting penalties for methamphetamine offenses. "Ice" was added to the guidelines in response to the 1990 Crime Control Act, which directed the Commission to amend the guidelines "for offenses involving smokable crystal methamphetamine . . . so that convictions for [such offenses] will be assigned an offense level . . . two levels above

that which would have been assigned to the same offense involving other forms of methamphetamine." *See* Pub. L. No. 101–67, §2701 (1990). The 1990 Crime Control Act did not, however, define "smokable crystal methamphetamine," and the Commission and commenters struggled to determine its meaning. Ultimately, the Commission responded to the Act by adding "Ice" to the Drug Quantity Table—even though the 1990 Crime Control Act did not use that term—and developed a definition of "Ice" based on the type and purity of methamphetamine. *See* USSG App. C, amend. 370 (effective Nov. 1, 1991). The Commission set the base offense levels for quantities of "Ice" equal to the base offense levels for the same quantities of methamphetamine (actual).

Commission Data

Commission data shows that, since fiscal year 2002, the number of offenses involving methamphetamine mixture has remained relatively steady, but the number of offenses involving methamphetamine (actual) and "Ice" has risen substantially. Offenses involving methamphetamine (actual) increased 299 percent from 910 offenses in fiscal year 2002 to 3,634 offenses in fiscal year 2022. As a result, in fiscal year 2022, methamphetamine (actual) accounted for more than half (52.2%) of all methamphetamine cases. Offenses involving "Ice" also have risen during the past 20 years. In fiscal year 2002, there were 88 offenses involving "Ice" in the federal case load; that number rose by 881 percent to 863 offenses in fiscal year 2022. Offenses involving "Ice" now make up more than ten percent (12.4%) of all methamphetamine cases. Offenses involving methamphetamine mixture comprise roughly a third (35.4%) of all methamphetamine cases.

In addition, data published by the Commission in a recent report shows that methamphetamine today is highly and uniformly pure, with an average purity of 93.2 percent and a median purity of 98.0 percent. The methamphetamine tested in fiscal year 2022 was uniformly highly pure regardless of whether it was sentenced as methamphetamine mixture (91.0% pure on average), methamphetamine actual (92.6%), or "Ice" (97.6%). *See* U.S. SENT'G COMM'N, METHAMPHETAMINE TRAFFICKING OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 4 (June 2024) at https://www.ussc.gov/research/research-reports/methamphetamine-trafficking-offenses-federal-criminal-justice-system.

Feedback from Stakeholders

The Commission has received significant comment regarding §2D1.1's methamphetamine purity distinction. Some commenters suggest that the Commission should revisit or eliminate the disparity in §2D1.1's treatment of methamphetamine mixture, on the one hand, and methamphetamine (actual) and "Ice," on the other. Most of these commenters state that purity is no longer an accurate measure of offense culpability because methamphetamine today is highly and uniformly pure and that "Ice" cases do not involve a higher level of purity than other forms of methamphetamine. Some of these commenters also point to disparities in testing practices across judicial districts, which, in turn, have yielded disparate sentences.

Subpart 1 ("Ice")

Subpart 1 of Part B of the proposed amendment would amend the Drug Quantity Table at §2D1.1(c) and the Drug Equivalency Tables at Application Note 8(D) of the Commentary to

§2D1.1 to delete all references to "Ice." In addition, it brackets the possibility of adding a new specific offense characteristic at subsection (b)(19) that would provide a 2-level reduction if the offense involved methamphetamine in a non-smokable, non-crystalline form, which would continue to ensure that "convictions for offenses involving smokable crystal methamphetamine will be assigned an offense level under the guidelines which is two levels above" other forms of methamphetamine.

Issues for comment are also provided.

Subpart 2 (Methamphetamine Purity Distinction)

Subpart 2 of Part B of the proposed amendment would address the 10:1 quantity ratio for methamphetamine mixture and methamphetamine (actual) by deleting all references to "methamphetamine (actual)" from the Drug Quantity Table at §2D1.1(c) and the Drug Conversion Tables at Application Note 8(D). The weight of methamphetamine in the tables would then be the entire weight of any mixture or substance containing a detectable amount of methamphetamine. Subpart 2 of Part B of the proposed amendment provides two options for setting the quantity thresholds applicable to methamphetamine.

Option 1 would set the quantity thresholds for methamphetamine at the current level for methamphetamine mixture.

Option 2 would set the quantity thresholds for methamphetamine at the current level of methamphetamine (actual).

Issues for comment are also provided.

Subpart 1 ("Ice")

Proposed Amendment:

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

* * *

(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.

* * *

(14) (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 subparagraph (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**.

* * *

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

[(19) If the offense involved methamphetamine in a non-smokable, non-crystalline form, decrease by **[2]** levels.**]**

* * *

(c) DRUG QUANTITY TABLE

CONTROLLED SUBSTANCES AND QUANTITY*	BASE OFFENSE LEVEL
(1) ● 90 KG or more of Heroin; ● 450 KG or more of Cocaine; ● 25.2 KG or more of Cocaine Base; ● 90 KG or more of PCP, or 9 KG or more of PCP (actual); ● 45 KG or more of Methamphetamine, or 4.5 KG or more of Methamphetamine (actual)~~, or 4.5 KG or more of "Ice"~~; ● 45 KG or more of Amphetamine, or 4.5 KG or more of Amphetamine (actual); ● 900 G or more of LSD; ● 36 KG or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); ● 9 KG or more of a Fentanyl Analogue; ● 90,000 KG or more of Marihuana; ● 18,000 KG or more of Hashish; ● 1,800 KG or more of Hashish Oil; ● 90,000,000 units or more of Ketamine; ● 90,000,000 units or more of Schedule I or II Depressants; ● 5,625,000 units or more of Flunitrazepam; ● 90,000 KG or more of ***Converted Drug Weight***.	**Level 38**
(2) ● At least 30 KG but less than 90 KG of Heroin; ● At least 150 KG but less than 450 KG of Cocaine; ● At least 8.4 KG but less than 25.2 KG of Cocaine Base; ● At least 30 KG but less than 90 KG of PCP, or at least 3 KG but less than 9 KG of PCP (actual); ● At least 15 KG but less than 45 KG of Methamphetamine, or at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual)~~, or at least 1.5 KG but less than 4.5 KG of "Ice"~~; ● At least 15 KG but less than 45 KG of Amphetamine, or at least 1.5 KG but less than 4.5 KG of Amphetamine (actual);	**Level 36**

- At least 300 G but less than 900 G of LSD;
- At least 12 KG but less than 36 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 3 KG but less than 9 KG of a Fentanyl Analogue;
- At least 30,000 KG but less than 90,000 KG of Marihuana;
- At least 6,000 KG but less than 18,000 KG of Hashish;
- At least 600 KG but less than 1,800 KG of Hashish Oil;
- At least 30,000,000 units but less than 90,000,000 units of Ketamine;
- At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants;
- At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam;
- At least 30,000 KG but less than 90,000 KG of ***Converted Drug Weight***.

(3) **Level 34**

- At least 10 KG but less than 30 KG of Heroin;
- At least 50 KG but less than 150 KG of Cocaine;
- At least 2.8 KG but less than 8.4 KG of Cocaine Base;
- At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);
- At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual)~~, or at least 500 G but less than 1.5 KG of "Ice"~~;
- At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual);
- At least 100 G but less than 300 G of LSD;
- At least 4 KG but less than 12 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 1 KG but less than 3 KG of a Fentanyl Analogue;
- At least 10,000 KG but less than 30,000 KG of Marihuana;
- At least 2,000 KG but less than 6,000 KG of Hashish;
- At least 200 KG but less than 600 KG of Hashish Oil;
- At least 10,000,000 but less than 30,000,000 units of Ketamine;
- At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
- At least 625,000 but less than 1,875,000 units of Flunitrazepam;
- At least 10,000 KG but less than 30,000 KG of ***Converted Drug Weight***.

(4) **Level 32**

- At least 3 KG but less than 10 KG of Heroin;
- At least 15 KG but less than 50 KG of Cocaine;
- At least 840 G but less than 2.8 KG of Cocaine Base;
- At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
- At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual)~~, or at least 150 G but less than 500 G of "Ice"~~;
- At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual);
- At least 30 G but less than 100 G of LSD;
- At least 1.2 KG but less than 4 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 300 G but less than 1 KG of a Fentanyl Analogue;
- At least 3,000 KG but less than 10,000 KG of Marihuana;
- At least 600 KG but less than 2,000 KG of Hashish;
- At least 60 KG but less than 200 KG of Hashish Oil;
- At least 3,000,000 but less than 10,000,000 units of Ketamine;
- At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;

- At least 187,500 but less than 625,000 units of Flunitrazepam;
- At least 3,000 KG but less than 10,000 KG of ***Converted Drug Weight***.

(5) **Level 30**

- At least 1 KG but less than 3 KG of Heroin;
- At least 5 KG but less than 15 KG of Cocaine;
- At least 280 G but less than 840 G of Cocaine Base;
- At least 1 KG but less than 3 KG of PCP, or
  at least 100 G but less than 300 G of PCP (actual);
- At least 500 G but less than 1.5 KG of Methamphetamine, or
  at least 50 G but less than 150 G of Methamphetamine (actual)~~, or at least 50 G but less than 150 G of "Ice"~~;
- At least 500 G but less than 1.5 KG of Amphetamine, or
  at least 50 G but less than 150 G of Amphetamine (actual);
- At least 10 G but less than 30 G of LSD;
- At least 400 G but less than 1.2 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 100 G but less than 300 G of a Fentanyl Analogue;
- At least 1,000 KG but less than 3,000 KG of Marihuana;
- At least 200 KG but less than 600 KG of Hashish;
- At least 20 KG but less than 60 KG of Hashish Oil;
- At least 1,000,000 but less than 3,000,000 units of Ketamine;
- At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
- At least 62,500 but less than 187,500 units of Flunitrazepam;
- At least 1,000 KG but less than 3,000 KG of ***Converted Drug Weight***.

(6) **Level 28**

- At least 700 G but less than 1 KG of Heroin;
- At least 3.5 KG but less than 5 KG of Cocaine;
- At least 196 G but less than 280 G of Cocaine Base;
- At least 700 G but less than 1 KG of PCP, or
  at least 70 G but less than 100 G of PCP (actual);
- At least 350 G but less than 500 G of Methamphetamine, or
  at least 35 G but less than 50 G of Methamphetamine (actual)~~, or at least 35 G but less than 50 G of "Ice"~~;
- At least 350 G but less than 500 G of Amphetamine, or
  at least 35 G but less than 50 G of Amphetamine (actual);
- At least 7 G but less than 10 G of LSD;
- At least 280 G but less than 400 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 70 G but less than 100 G of a Fentanyl Analogue;
- At least 700 KG but less than 1,000 KG of Marihuana;
- At least 140 KG but less than 200 KG of Hashish;
- At least 14 KG but less than 20 KG of Hashish Oil;
- At least 700,000 but less than 1,000,000 units of Ketamine;
- At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
- At least 43,750 but less than 62,500 units of Flunitrazepam;
- At least 700 KG but less than 1,000 KG of ***Converted Drug Weight***.

(7) **Level 26**

- At least 400 G but less than 700 G of Heroin;
- At least 2 KG but less than 3.5 KG of Cocaine;
- At least 112 G but less than 196 G of Cocaine Base;
- At least 400 G but less than 700 G of PCP, or
  at least 40 G but less than 70 G of PCP (actual);
- At least 200 G but less than 350 G of Methamphetamine, or

at least 20 G but less than 35 G of Methamphetamine (actual)~~, or~~
~~at least 20 G but less than 35 G of "Ice"~~;
- At least 200 G but less than 350 G of Amphetamine, or
  at least 20 G but less than 35 G of Amphetamine (actual);
- At least 4 G but less than 7 G of LSD;
- At least 160 G but less than 280 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 40 G but less than 70 G of a Fentanyl Analogue;
- At least 400 KG but less than 700 KG of Marihuana;
- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil;
- At least 400,000 but less than 700,000 units of Ketamine;
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
- At least 25,000 but less than 43,750 units of Flunitrazepam;
- At least 400 KG but less than 700 KG of ***Converted Drug Weight***.

(8) **Level 24**
- At least 100 G but less than 400 G of Heroin;
- At least 500 G but less than 2 KG of Cocaine;
- At least 28 G but less than 112 G of Cocaine Base;
- At least 100 G but less than 400 G of PCP, or
  at least 10 G but less than 40 G of PCP (actual);
- At least 50 G but less than 200 G of Methamphetamine, or
  at least 5 G but less than 20 G of Methamphetamine (actual)~~, or~~
  ~~at least 5 G but less than 20 G of "Ice"~~;
- At least 50 G but less than 200 G of Amphetamine, or
  at least 5 G but less than 20 G of Amphetamine (actual);
- At least 1 G but less than 4 G of LSD;
- At least 40 G but less than 160 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 10 G but less than 40 G of a Fentanyl Analogue;
- At least 100 KG but less than 400 KG of Marihuana;
- At least 20 KG but less than 80 KG of Hashish;
- At least 2 KG but less than 8 KG of Hashish Oil;
- At least 100,000 but less than 400,000 units of Ketamine;
- At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
- At least 6,250 but less than 25,000 units of Flunitrazepam;
- At least 100 KG but less than 400 KG of ***Converted Drug Weight***.

(9) **Level 22**
- At least 80 G but less than 100 G of Heroin;
- At least 400 G but less than 500 G of Cocaine;
- At least 22.4 G but less than 28 G of Cocaine Base;
- At least 80 G but less than 100 G of PCP, or
  at least 8 G but less than 10 G of PCP (actual);
- At least 40 G but less than 50 G of Methamphetamine, or
  at least 4 G but less than 5 G of Methamphetamine (actual)~~, or~~
  ~~at least 4 G but less than 5 G of "Ice"~~;
- At least 40 G but less than 50 G of Amphetamine, or
  at least 4 G but less than 5 G of Amphetamine (actual);
- At least 800 MG but less than 1 G of LSD;
- At least 32 G but less than 40 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 8 G but less than 10 G of a Fentanyl Analogue;
- At least 80 KG but less than 100 KG of Marihuana;

- At least 16 KG but less than 20 KG of Hashish;
- At least 1.6 KG but less than 2 KG of Hashish Oil;
- At least 80,000 but less than 100,000 units of Ketamine;
- At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
- At least 5,000 but less than 6,250 units of Flunitrazepam;
- At least 80 KG but less than 100 KG of ***Converted Drug Weight***.

(10) **Level 20**

- At least 60 G but less than 80 G of Heroin;
- At least 300 G but less than 400 G of Cocaine;
- At least 16.8 G but less than 22.4 G of Cocaine Base;
- At least 60 G but less than 80 G of PCP, or
  at least 6 G but less than 8 G of PCP (actual);
- At least 30 G but less than 40 G of Methamphetamine, or
  at least 3 G but less than 4 G of Methamphetamine (actual)~~, or at least 3 G but less than 4 G of "Ice"~~;
- At least 30 G but less than 40 G of Amphetamine, or
  at least 3 G but less than 4 G of Amphetamine (actual);
- At least 600 MG but less than 800 MG of LSD;
- At least 24 G but less than 32 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 6 G but less than 8 G of a Fentanyl Analogue;
- At least 60 KG but less than 80 KG of Marihuana;
- At least 12 KG but less than 16 KG of Hashish;
- At least 1.2 KG but less than 1.6 KG of Hashish Oil;
- At least 60,000 but less than 80,000 units of Ketamine;
- At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
- 60,000 units or more of Schedule III substances (except Ketamine);
- At least 3,750 but less than 5,000 units of Flunitrazepam;
- At least 60 KG but less than 80 KG of ***Converted Drug Weight***.

(11) **Level 18**

- At least 40 G but less than 60 G of Heroin;
- At least 200 G but less than 300 G of Cocaine;
- At least 11.2 G but less than 16.8 G of Cocaine Base;
- At least 40 G but less than 60 G of PCP, or
  at least 4 G but less than 6 G of PCP (actual);
- At least 20 G but less than 30 G of Methamphetamine, or
  at least 2 G but less than 3 G of Methamphetamine (actual)~~, or at least 2 G but less than 3 G of "Ice"~~;
- At least 20 G but less than 30 G of Amphetamine, or
  at least 2 G but less than 3 G of Amphetamine (actual);
- At least 400 MG but less than 600 MG of LSD;
- At least 16 G but less than 24 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 4 G but less than 6 G of a Fentanyl Analogue;
- At least 40 KG but less than 60 KG of Marihuana;
- At least 8 KG but less than 12 KG of Hashish;
- At least 800 G but less than 1.2 KG of Hashish Oil;
- At least 40,000 but less than 60,000 units of Ketamine;
- At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
- At least 40,000 but less than 60,000 units of Schedule III substances (except Ketamine);
- At least 2,500 but less than 3,750 units of Flunitrazepam;
- At least 40 KG but less than 60 KG of ***Converted Drug Weight***.

(12) **Level 16**
- At least 20 G but less than 40 G of Heroin;
- At least 100 G but less than 200 G of Cocaine;
- At least 5.6 G but less than 11.2 G of Cocaine Base;
- At least 20 G but less than 40 G of PCP, or
  at least 2 G but less than 4 G of PCP (actual);
- At least 10 G but less than 20 G of Methamphetamine, or
  at least 1 G but less than 2 G of Methamphetamine (actual)~~, or at least 1 G but less than 2 G of "Ice"~~;
- At least 10 G but less than 20 G of Amphetamine, or
  at least 1 G but less than 2 G of Amphetamine (actual);
- At least 200 MG but less than 400 MG of LSD;
- At least 8 G but less than 16 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 2 G but less than 4 G of a Fentanyl Analogue;
- At least 20 KG but less than 40 KG of Marihuana;
- At least 5 KG but less than 8 KG of Hashish;
- At least 500 G but less than 800 G of Hashish Oil;
- At least 20,000 but less than 40,000 units of Ketamine;
- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
- At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine);
- At least 1,250 but less than 2,500 units of Flunitrazepam;
- At least 20 KG but less than 40 KG of ***Converted Drug Weight***.

(13) **Level 14**
- At least 10 G but less than 20 G of Heroin;
- At least 50 G but less than 100 G of Cocaine;
- At least 2.8 G but less than 5.6 G of Cocaine Base;
- At least 10 G but less than 20 G of PCP, or
  at least 1 G but less than 2 G of PCP (actual);
- At least 5 G but less than 10 G of Methamphetamine, or
  at least 500 MG but less than 1 G of Methamphetamine (actual)~~, or at least 500 MG but less than 1 G of "Ice"~~;
- At least 5 G but less than 10 G of Amphetamine, or
  at least 500 MG but less than 1 G of Amphetamine (actual);
- At least 100 MG but less than 200 MG of LSD;
- At least 4 G but less than 8 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 1 G but less than 2 G of a Fentanyl Analogue;
- At least 10 KG but less than 20 KG of Marihuana;
- At least 2 KG but less than 5 KG of Hashish;
- At least 200 G but less than 500 G of Hashish Oil;
- At least 10,000 but less than 20,000 units of Ketamine;
- At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
- At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine);
- At least 625 but less than 1,250 units of Flunitrazepam;
- At least 10 KG but less than 20 KG of ***Converted Drug Weight***.

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

~~less than 500 MG of "Ice"~~;
- Less than 5 G of Amphetamine, or
  less than 500 MG of Amphetamine (actual);
- Less than 100 MG of LSD;
- Less than 4 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- Less than 1 G of a Fentanyl Analogue;
- At least 5 KG but less than 10 KG of Marihuana;
- At least 1 KG but less than 2 KG of Hashish;
- At least 100 G but less than 200 G of Hashish Oil;
- At least 5,000 but less than 10,000 units of Ketamine;
- At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
- At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine);
- At least 312 but less than 625 units of Flunitrazepam;
- 80,000 units or more of Schedule IV substances (except Flunitrazepam);
- At least 5 KG but less than 10 KG of ***Converted Drug Weight***.

* * *

***Notes to Drug Quantity Table:**

* * *

(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.

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

~~(C) "***Ice***," for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.~~

* * *

Commentary

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Application Notes:

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8. **Use of Drug Conversion Tables.—**

* * *

(D) **Drug Conversion Tables.—**

* * *

COCAINE AND OTHER SCHEDULE I AND II STIMULANTS (AND THEIR IMMEDIATE PRECURSORS)*	CONVERTED DRUG WEIGHT
1 gm of 4-Methylaminorex ("Euphoria") =	100 gm
1 gm of Aminorex =	100 gm
1 gm of Amphetamine =	2 kg
1 gm of Amphetamine (actual) =	20 kg
1 gm of Cocaine =	200 gm
1 gm of Cocaine Base ("Crack") =	3,571 gm
1 gm of Fenethylline =	40 gm
~~1 gm of "Ice" =~~	~~20 kg~~
1 gm of Khat =	.01 gm
1 gm of Methamphetamine =	2 kg
1 gm of Methamphetamine (actual) =	20 kg
1 gm of Methylphenidate (Ritalin) =	100 gm
1 gm of N-Benzylpiperazine =	100 gm
1 gm of N-Ethylamphetamine =	80 gm
1 gm of N-N-Dimethylamphetamine =	40 gm
1 gm of Phenmetrazine =	80 gm
1 gm of Phenylacetone (P_2P) (when possessed for the purpose of manufacturing methamphetamine) =	416 gm
1 gm of Phenylacetone (P_2P) (in any other case) =	75 gm

**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.

* * *

Issues for Comment:

1. Subpart 1 of Part B of the proposed amendment would amend the Drug Quantity Table at subsection (c) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and the Drug Conversion Tables at Application Note 8(D) of the Commentary to §2D1.1 to delete all references to "Ice." The Commission invites comment on whether deleting all references to "Ice" in §2D1.1 is consistent with the 1990 congressional directive (Pub. L. No. 101–67, § 2701 (1990)) and other provisions of federal law.

2. Subpart 1 of Part B of the proposed amendment brackets the possibility of adding a new specific offense characteristic at §2D1.1(b)(19) that provides a 2-level reduction if the offense involved methamphetamine in a non-smokable, non-crystalline form. The Commission invites comment on whether deleting all references to "Ice," while adding a new specific offense characteristic addressing methamphetamine in a non-smokable, non-crystalline form, is consistent with the 1990 congressional directive (Pub. L. No. 101–67, § 2701 (1990)) and other provisions of federal law.

   In addition, the Commission invites general comment on methamphetamine in a non-smokable, non-crystalline form, particularly on its pharmacological effects, potential for addiction and abuse, the patterns of abuse and harms associated with

their abuse, and the patterns of trafficking and harms associated with its trafficking. How is non-smokable, non-crystalline methamphetamine manufactured, distributed, possessed, and used? What are the characteristics of the individuals involved in these various criminal activities? What harms are posed by these activities? How do these harms differ from those associated with other forms of methamphetamine?

Subpart 2 (Methamphetamine Purity Distinction)

Proposed Amendment:

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

* * *

(c) DRUG QUANTITY TABLE

CONTROLLED SUBSTANCES AND QUANTITY*	BASE OFFENSE LEVEL
(1) ● 90 KG or more of Heroin; ● 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); **[Option 1 (Using methamphetamine mixture quantity thresholds):** ● 45 KG or more of Methamphetamine, or ~~4.5 KG or more of Methamphetamine (actual), or~~ 4.5 KG or more of "Ice";**]** **[Option 2 (Using methamphetamine (actual) quantity thresholds):** ● ~~45~~4.5 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); ● 9 KG or more of a Fentanyl Analogue; ● 90,000 KG or more of Marihuana; ● 18,000 KG or more of Hashish; ● 1,800 KG or more of Hashish Oil; ● 90,000,000 units or more of Ketamine; ● 90,000,000 units or more of Schedule I or II Depressants; ● 5,625,000 units or more of Flunitrazepam; ● 90,000 KG or more of ***Converted Drug Weight***.	**Level 38**
(2) ● At least 30 KG but less than 90 KG of Heroin; ● At least 150 KG but less than 450 KG of Cocaine; ● At least 8.4 KG but less than 25.2 KG of Cocaine Base; ● At least 30 KG but less than 90 KG of PCP, or at least 3 KG but less than 9 KG of PCP (actual);	**Level 36**

[Option 1 (Using methamphetamine mixture quantity thresholds):

- At least 15 KG but less than 45 KG of Methamphetamine, or
  ~~at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or~~
  at least 1.5 KG but less than 4.5 KG of "Ice";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- At least ~~15~~1.5 KG but less than ~~45~~4.5 KG of Methamphetamine, or
  ~~at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or~~
  at least 1.5 KG but less than 4.5 KG of "Ice";**]**

- At least 15 KG but less than 45 KG of Amphetamine, or
  at least 1.5 KG but less than 4.5 KG of Amphetamine (actual);
- At least 300 G but less than 900 G of LSD;
- At least 12 KG but less than 36 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 3 KG but less than 9 KG of a Fentanyl Analogue;
- At least 30,000 KG but less than 90,000 KG of Marihuana;
- At least 6,000 KG but less than 18,000 KG of Hashish;
- At least 600 KG but less than 1,800 KG of Hashish Oil;
- At least 30,000,000 units but less than 90,000,000 units of Ketamine;
- At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants;
- At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam;
- At least 30,000 KG but less than 90,000 KG of ***Converted Drug Weight***.

(3) **Level 34**

- At least 10 KG but less than 30 KG of Heroin;
- At least 50 KG but less than 150 KG of Cocaine;
- At least 2.8 KG but less than 8.4 KG of Cocaine Base;
- At least 10 KG but less than 30 KG of PCP, or
  at least 1 KG but less than 3 KG of PCP (actual);

[Option 1 (Using methamphetamine mixture quantity thresholds):

- 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- At least ~~5 KG~~500 G but less than ~~15~~1.5 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 1 KG but less than 3 KG of a Fentanyl Analogue;
- At least 10,000 KG but less than 30,000 KG of Marihuana;
- At least 2,000 KG but less than 6,000 KG of Hashish;
- At least 200 KG but less than 600 KG of Hashish Oil;
- At least 10,000,000 but less than 30,000,000 units of Ketamine;
- At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
- At least 625,000 but less than 1,875,000 units of Flunitrazepam;

- At least 10,000 KG but less than 30,000 KG of ***Converted Drug Weight***.

(4) **Level 32**

- At least 3 KG but less than 10 KG of Heroin;
- At least 15 KG but less than 50 KG of Cocaine;
- At least 840 G but less than 2.8 KG of Cocaine Base;
- At least 3 KG but less than 10 KG of PCP, or
  at least 300 G but less than 1 KG of PCP (actual);

[Option 1 (Using methamphetamine mixture quantity thresholds):

- 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- At least ~~1.5 KG~~150 G but less than ~~5 KG~~500 G 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 300 G but less than 1 KG of a Fentanyl Analogue;
- At least 3,000 KG but less than 10,000 KG of Marihuana;
- At least 600 KG but less than 2,000 KG of Hashish;
- At least 60 KG but less than 200 KG of Hashish Oil;
- At least 3,000,000 but less than 10,000,000 units of Ketamine;
- At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
- At least 187,500 but less than 625,000 units of Flunitrazepam;
- At least 3,000 KG but less than 10,000 KG of ***Converted Drug Weight***.

(5) **Level 30**

- At least 1 KG but less than 3 KG of Heroin;
- At least 5 KG but less than 15 KG of Cocaine;
- At least 280 G but less than 840 G of Cocaine Base;
- At least 1 KG but less than 3 KG of PCP, or
  at least 100 G but less than 300 G of PCP (actual);

[Option 1 (Using methamphetamine mixture quantity thresholds):

- 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- At least ~~500~~50 G but less than ~~1.5 KG~~150 G 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 100 G but less than 300 G of a Fentanyl Analogue;
- At least 1,000 KG but less than 3,000 KG of Marihuana;
- At least 200 KG but less than 600 KG of Hashish;
- At least 20 KG but less than 60 KG of Hashish Oil;
- At least 1,000,000 but less than 3,000,000 units of Ketamine;
- At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
- At least 62,500 but less than 187,500 units of Flunitrazepam;
- At least 1,000 KG but less than 3,000 KG of ***Converted Drug Weight***.

(6) **Level 28**

- At least 700 G but less than 1 KG of Heroin;
- At least 3.5 KG but less than 5 KG of Cocaine;
- At least 196 G but less than 280 G of Cocaine Base;
- At least 700 G but less than 1 KG of PCP, or
  at least 70 G but less than 100 G of PCP (actual);

[Option 1 (Using methamphetamine mixture quantity thresholds):

- 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- At least ~~350~~35 G but less than ~~500~~50 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 70 G but less than 100 G of a Fentanyl Analogue;
- At least 700 KG but less than 1,000 KG of Marihuana;
- At least 140 KG but less than 200 KG of Hashish;
- At least 14 KG but less than 20 KG of Hashish Oil;
- At least 700,000 but less than 1,000,000 units of Ketamine;
- At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
- At least 43,750 but less than 62,500 units of Flunitrazepam;
- At least 700 KG but less than 1,000 KG of ***Converted Drug Weight***.

(7) **Level 26**

- At least 400 G but less than 700 G of Heroin;
- At least 2 KG but less than 3.5 KG of Cocaine;
- At least 112 G but less than 196 G of Cocaine Base;
- At least 400 G but less than 700 G of PCP, or
  at least 40 G but less than 70 G of PCP (actual);

[Option 1 (Using methamphetamine mixture quantity thresholds):

- 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- At least ~~200~~20 G but less than ~~350~~35 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 40 G but less than 70 G of a Fentanyl Analogue;
- At least 400 KG but less than 700 KG of Marihuana;
- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil;
- At least 400,000 but less than 700,000 units of Ketamine;
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
- At least 25,000 but less than 43,750 units of Flunitrazepam;
- At least 400 KG but less than 700 KG of ***Converted Drug Weight***.

(8) **Level 24**

- At least 100 G but less than 400 G of Heroin;
- At least 500 G but less than 2 KG of Cocaine;
- At least 28 G but less than 112 G of Cocaine Base;
- At least 100 G but less than 400 G of PCP, or
  at least 10 G but less than 40 G of PCP (actual);

[Option 1 (Using methamphetamine mixture quantity thresholds):

- 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- At least ~~50~~5 G but less than ~~200~~20 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 10 G but less than 40 G of a Fentanyl Analogue;
- At least 100 KG but less than 400 KG of Marihuana;
- At least 20 KG but less than 80 KG of Hashish;
- At least 2 KG but less than 8 KG of Hashish Oil;
- At least 100,000 but less than 400,000 units of Ketamine;
- At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
- At least 6,250 but less than 25,000 units of Flunitrazepam;
- At least 100 KG but less than 400 KG of ***Converted Drug Weight***.

(9) **Level 22**

- At least 80 G but less than 100 G of Heroin;
- At least 400 G but less than 500 G of Cocaine;
- At least 22.4 G but less than 28 G of Cocaine Base;

- At least 80 G but less than 100 G of PCP, or
  at least 8 G but less than 10 G of PCP (actual);

[Option 1 (Using methamphetamine mixture quantity thresholds):

- 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- At least ~~40~~4 G but less than ~~50~~5 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 8 G but less than 10 G of a Fentanyl Analogue;
- At least 80 KG but less than 100 KG of Marihuana;
- At least 16 KG but less than 20 KG of Hashish;
- At least 1.6 KG but less than 2 KG of Hashish Oil;
- At least 80,000 but less than 100,000 units of Ketamine;
- At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
- At least 5,000 but less than 6,250 units of Flunitrazepam;
- At least 80 KG but less than 100 KG of ***Converted Drug Weight***.

(10) **Level 20**

- At least 60 G but less than 80 G of Heroin;
- At least 300 G but less than 400 G of Cocaine;
- At least 16.8 G but less than 22.4 G of Cocaine Base;
- At least 60 G but less than 80 G of PCP, or
  at least 6 G but less than 8 G of PCP (actual);

[Option 1 (Using methamphetamine mixture quantity thresholds):

- 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- At least ~~30~~3 G but less than ~~40~~4 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 6 G but less than 8 G of a Fentanyl Analogue;
- At least 60 KG but less than 80 KG of Marihuana;
- At least 12 KG but less than 16 KG of Hashish;
- At least 1.2 KG but less than 1.6 KG of Hashish Oil;

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

(11) **Level 18**

- At least 40 G but less than 60 G of Heroin;
- At least 200 G but less than 300 G of Cocaine;
- At least 11.2 G but less than 16.8 G of Cocaine Base;
- At least 40 G but less than 60 G of PCP, or
  at least 4 G but less than 6 G of PCP (actual);

[Option 1 (Using methamphetamine mixture quantity thresholds):

- 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- At least ~~20~~2 G but less than ~~30~~3 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 4 G but less than 6 G of a Fentanyl Analogue;
- At least 40 KG but less than 60 KG of Marihuana;
- At least 8 KG but less than 12 KG of Hashish;
- At least 800 G but less than 1.2 KG of Hashish Oil;
- At least 40,000 but less than 60,000 units of Ketamine;
- At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
- At least 40,000 but less than 60,000 units of Schedule III substances (except Ketamine);
- At least 2,500 but less than 3,750 units of Flunitrazepam;
- At least 40 KG but less than 60 KG of ***Converted Drug Weight***.

(12) **Level 16**

- At least 20 G but less than 40 G of Heroin;
- At least 100 G but less than 200 G of Cocaine;
- At least 5.6 G but less than 11.2 G of Cocaine Base;
- At least 20 G but less than 40 G of PCP, or
  at least 2 G but less than 4 G of PCP (actual);

[Option 1 (Using methamphetamine mixture quantity thresholds):

- 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- At least ~~10~~1 G but less than ~~20~~2 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 2 G but less than 4 G of a Fentanyl Analogue;
- At least 20 KG but less than 40 KG of Marihuana;
- At least 5 KG but less than 8 KG of Hashish;
- At least 500 G but less than 800 G of Hashish Oil;
- At least 20,000 but less than 40,000 units of Ketamine;
- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
- At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine);
- At least 1,250 but less than 2,500 units of Flunitrazepam;
- At least 20 KG but less than 40 KG of ***Converted Drug Weight***.

(13) - At least 10 G but less than 20 G of Heroin; **Level 14**
- 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);

[Option 1 (Using methamphetamine mixture quantity thresholds):

- 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- At least ~~5 G~~500 MG but less than ~~10~~1 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 1 G but less than 2 G of a Fentanyl Analogue;
- At least 10 KG but less than 20 KG of Marihuana;
- At least 2 KG but less than 5 KG of Hashish;
- At least 200 G but less than 500 G of Hashish Oil;
- At least 10,000 but less than 20,000 units of Ketamine;
- At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
- At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine);
- At least 625 but less than 1,250 units of Flunitrazepam;
- At least 10 KG but less than 20 KG of ***Converted Drug Weight***.

(14) - Less than 10 G of Heroin; **Level 12**
- Less than 50 G of Cocaine;
- Less than 2.8 G of Cocaine Base;
- Less than 10 G of PCP, or
  less than 1 G of PCP (actual);

[Option 1 (Using methamphetamine mixture quantity thresholds):

- Less than 5 G of Methamphetamine, or
  ~~less than 500 MG of Methamphetamine (actual), or~~
  less than 500 MG of "Ice";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- Less than ~~5 G~~500 MG of Methamphetamine, or
  ~~less than 500 MG of Methamphetamine (actual), or~~
  less than 500 MG of "Ice";**]**

- Less than 5 G of Amphetamine, or
  less than 500 MG of Amphetamine (actual);
- Less than 100 MG of LSD;
- Less than 4 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- Less than 1 G of a Fentanyl Analogue;
- At least 5 KG but less than 10 KG of Marihuana;
- At least 1 KG but less than 2 KG of Hashish;
- At least 100 G but less than 200 G of Hashish Oil;
- At least 5,000 but less than 10,000 units of Ketamine;
- At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
- At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine);
- At least 312 but less than 625 units of Flunitrazepam;
- 80,000 units or more of Schedule IV substances (except Flunitrazepam);
- At least 5 KG but less than 10 KG of ***Converted Drug Weight***.

* * *

***Notes to Drug Quantity Table:**

* * *

[Both options would make the following changes to Note B:

(B) The terms "***PCP (actual)***"~~,~~ and "***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~~,~~ or 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)~~,~~ or amphetamine (actual)~~, or methamphetamine (actual)~~, whichever is greater.

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

* * *

Commentary

* * *

Application Notes:

* * *

8. **Use of Drug Conversion Tables.—**

* * *

(D) **Drug Conversion Tables.—**

* * *

COCAINE AND OTHER SCHEDULE I AND II STIMULANTS (AND THEIR IMMEDIATE PRECURSORS)*	CONVERTED DRUG WEIGHT
1 gm of 4-Methylaminorex ("Euphoria") =	100 gm
1 gm of Aminorex =	100 gm
1 gm of Amphetamine =	2 kg
1 gm of Amphetamine (actual) =	20 kg
1 gm of Cocaine =	200 gm
1 gm of Cocaine Base ("Crack") =	3,571 gm
1 gm of Fenethylline =	40 gm
[Option 1 (Using methamphetamine mixture quantity thresholds):	
1 gm of "Ice" =	20 kg
1 gm of Khat =	.01 gm
1 gm of Methamphetamine =	2 kg
~~1 gm of Methamphetamine (actual) =~~	~~20 kg~~**]**
[Option 2 (Using methamphetamine (actual) quantity thresholds):	
1 gm of "Ice" =	20 kg
1 gm of Khat =	.01 gm
1 gm of Methamphetamine =	~~2~~20 kg
~~1 gm of Methamphetamine (actual) =~~	~~20 kg~~**]**
1 gm of Methylphenidate (Ritalin) =	100 gm
1 gm of N-Benzylpiperazine =	100 gm
1 gm of N-Ethylamphetamine =	80 gm
1 gm of N-N-Dimethylamphetamine =	40 gm
1 gm of Phenmetrazine =	80 gm
1 gm of Phenylacetone (P_2P) (when possessed for the purpose of manufacturing methamphetamine) =	416 gm
1 gm of Phenylacetone (P_2P) (in any other case) =	75 gm

**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.

* * *

[Both options would make the following changes to Application Note 27(C):

27. **Departure Considerations.—**

* * *

(C) **Upward Departure Based on Unusually High Purity.**—Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP, amphetamine, ~~methamphetamine,~~ hydrocodone, or oxycodone for which the guideline itself provides for the consideration of purity (*see* the

footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.**]**

* * *

Issues for Comment:

1. The Commission seeks comment on how, if at all, the guidelines should be amended to address the 10:1 quantity ratio between methamphetamine mixture and methamphetamine (actual). Should the Commission adopt either of the above options or neither? Should the Commission equalize the treatment of methamphetamine mixture and methamphetamine (actual) but at some level other than the current quantity thresholds for methamphetamine mixture or methamphetamine (actual)? Should the Commission retain references to both methamphetamine mixture and methamphetamine (actual) and set a quantity ratio between these substances but at some level other than the current 10:1 ratio? If so, what ratio should the Commission establish, and what is the basis for such ratio?

2. Option 2 in Subpart 2 of Part B of the proposed amendment would amend §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to establish a 1:1 quantity ratio for methamphetamine (actual) and methamphetamine mixture by setting the quantity thresholds for all methamphetamine at the level of methamphetamine (actual). However, this change may result in an increased offense level for some cases involving methamphetamine (actual). For example, under the current §2D1.1, 5 grams of a mixture or substance containing 80 percent methamphetamine is treated as 4 grams of methamphetamine (actual), which triggers a base offense level of 22. By contrast, under Option 2, 5 grams of a mixture or substance containing 80 percent methamphetamine would be treated as 5 grams of methamphetamine, which would trigger a base offense level of 24. Is this an appropriate outcome? Why or why not? If not, how should the Commission revise §2D1.1 to avoid this outcome?

3. Section 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) includes a chemical quantity table specifically for ephedrine, pseudoephedrine, and phenylpropanolamine at subsection (d). The table ties the base offense levels for these chemicals to the base offense levels for methamphetamine (actual) set forth in §2D1.1, assuming a 50 percent actual yield of the controlled substance from the chemicals.

   As provided above, Option 1 in Subpart 2 of Part B of the proposed amendment would amend the Drug Quantity Table at §2D1.1(c) and the Drug Equivalency

Tables at Application Note 8(D) of the Commentary to §2D1.1 to set the quantity thresholds for methamphetamine (actual) at the same level as methamphetamine mixture. If the Commission were to promulgate Option 1, should the Commission amend the table at §2D1.11(d) and make conforming changes to the quantity thresholds? Should the Commission revise the quantity thresholds in §2D1.11(d) in a different way? If so, what quantity thresholds should the Commission set and on what basis?

4. Subpart 2 of Part B of the proposed amendment addresses the quantity ratio between methamphetamine mixture and methamphetamine (actual) in §2D1.1. In addition to comment on the methamphetamine purity distinction, the Commission has received comment suggesting that the Commission should reconsider the different treatment between cocaine (*i.e.*, "powder cocaine") and cocaine base (*i.e.*, "crack cocaine") in the Drug Quantity Table at §2D1.1(c). Section 2D1.1 provides base offense levels for offenses involving powder cocaine and crack cocaine that reflect an 18:1 quantity ratio, which tracks the statutory penalty structure for those substances. *See* 21 U.S.C. §§ 841(b)(1)(A) & (B); 960(b)(1) & (2). The Commission has examined this issue for many years and seeks comment on whether to take action in a future amendment cycle. If so, what action should the Commission take?

(C) Misrepresentation of Fentanyl and Fentanyl Analogues

Synopsis of Proposed Amendment: In 2018, the Commission amended §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to add a new specific offense characteristic at subsection (b)(13) providing a 4-level increase whenever the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl or a fentanyl analogue. *See* USSG, App. C. amend. 807 (effective Nov. 1, 2018). To address the increase in cases involving the distribution of fentanyl and fentanyl analogues and the seizure of fake prescription pills containing fentanyl, the Commission revised §2D1.1(b)(13) in 2023 to add a new subparagraph (B) with an alternative 2-level enhancement for offenses where the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug. *See* USSG, App. C. amend. 818 (effective Nov. 1, 2023). In doing so, the Commission cited data showing that, of the fake pills seized containing fentanyl, most contained a potentially lethal dose of the substance. *Id.*

The Commission has received some comment urging the Commission to revise §2D1.1(b)(13) because courts rarely apply this enhancement. According to those commenters, the enhancement is vague and has led to disagreement on when it should be applied. Some commenters suggested that the Commission lower the *mens rea* requirement in §2D1.1(b)(13) to solve the application issues with the enhancement and to address the dangerous nature of substances containing fentanyl or a fentanyl analogue.

Part C of the proposed amendment would revise the enhancement at §2D1.1(b)(13) to address these concerns. Three options are provided.

Option 1 would set forth an offense-based enhancement with no *mens rea* requirement at §2D1.1(b)(13). The revised enhancement would provide a [2][4]-level enhancement if the offense involved representing or marketing a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance.

Option 2 would set forth a defendant-based enhancement with a *mens rea* requirement at §2D1.1(b)(13). The revised enhancement would provide for a [2][4]-level enhancement if the defendant represented or marketed a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance, with two bracketed alternatives for the *mens rea* requirement. The first bracketed alternative would require that the defendant had knowledge or reason to believe that the mixture or substance contained fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue. The second bracketed alternative would require that the defendant acted with knowledge of or reckless disregard as to the actual content of the mixture or substance.

Option 3 would set forth a tiered alternative enhancement at §2D1.1(b)(13). Subparagraph (A) would provide for a [4]-level increase if the defendant represented or

marketed a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance, with two bracketed alternatives for the *mens rea* requirement. The first bracketed alternative would require that the defendant had knowledge or reason to believe that the mixture or substance contained fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue. The second bracketed alternative would require that the defendant acted with knowledge of or reckless disregard as to the actual content of the mixture or substance. Subparagraph (B) would provide for a [2]-level increase if the offense otherwise involved representing or marketing a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance. Subparagraph (B) would not contain a *mens rea* requirement.

Issues for comment are also provided.

Proposed Amendment:

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

* * *

(b) Specific Offense Characteristics

* * *

[Option 1 (Offense-based enhancement with no *mens rea* requirement):

(13) If the ~~defendant (A) knowingly misrepresented or knowingly marketed as another substance~~offense involved representing or marketing a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance, increase by **[2]**[**4]** levels~~; or (B) represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug, increase by **2** levels. The term "***drug***," as used in subsection (b)(13)(B), has the meaning given that term in 21 U.S.C. § 321(g)(1)~~.

* * ***]**

[Option 2 (Defendant-based enhancement with *mens rea* requirement):

(13) If the defendant ~~(A) knowingly misrepresented or knowingly marketed as another substance~~represented or marketed a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-

piperidinyl] propanamide) or a fentanyl analogue as any other substance, **[**with knowledge or reason to believe that it contained fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue**][**with knowledge of or reckless disregard as to the actual content of the mixture or substance**]**, increase by **[2][4]** levels~~; or (B) represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug, increase by **2** levels. The term "***drug***," as used in subsection (b)(13)(B), has the meaning given that term in 21 U.S.C. § 321(g)(1)~~.

* * ***]**

[Option 3 (Tiered alternative provision with a defendant-based enhancement with *mens rea* requirement and an offense-based enhancement with no *mens rea* requirement):

(13) If ~~the defendant~~ (A) ~~knowingly misrepresented or knowingly marketed as another substance~~the defendant represented or marketed a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance, **[**with knowledge or reason to believe that it contained fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue**][**with knowledge of or reckless disregard as to the actual content of the mixture or substance**]**, increase by **[4]** levels; or (B) ~~represented or marketed as a legitimately manufactured drug another~~the offense otherwise involved representing or marketing a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance~~, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug~~, increase by **[2]** levels. ~~The term "***drug***," as used in subsection (b)(13)(B), has the meaning given that term in 21 U.S.C. § 321(g)(1).~~

* * ***]**

Issues for Comment:

1. Part C of the proposed amendment would amend subsection (b)(13) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to address some concerns relating to application issues with the enhancement. The Commission seeks comment on whether any of the three options set forth above is

appropriate to address the concerns raised by commenters. If not, is there an alternative approach that the Commission should consider? Should the Commission provide a different *mens rea* requirement for §2D1.1(b)(13)? If so, what *mens rea* requirement should the Commission provide?

2. The Commission enacted §2D1.1(b)(13) to address cases where individuals purchasing a mixture or substance containing fentanyl or a fentanyl analogue may believe they are purchasing a different substance. The Commission invites general comment on whether the proposed revisions to §2D1.1(b)(13) are appropriate to address this harm and the culpability of the defendants in these cases. Is the use of terms such as "representing" and "marketing" sufficient to achieve this purpose? If not, should the Commission use different terminology to appropriately reflect the criminal conduct in these cases? What terms should the Commission use? Should the Commission consider any other changes to §2D1.1(b)(13) to address the harm in these cases?

(D) Machineguns

Synopsis of Proposed Amendment: Subsection (b)(1) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) provides a 2-level enhancement for cases in which a "dangerous weapon (including a firearm)" is possessed. Section 2D1.1(b)(1) does not distinguish between different types of dangerous weapons involved in the offense, which is different from some statutory enhancements. For example, greater statutory penalties are imposed for possession of a machinegun in furtherance of a drug trafficking crime than possession of other firearms. *See* 18 U.S.C. § 924(c).

The Department of Justice has expressed concern that §2D1.1(b)(1) fails to differentiate between machineguns and other weapons. The Department of Justice and other commenters have also noted the increased prevalence of machinegun conversion devices ("MCDs") (*i.e.*, devices designed to convert weapons into fully automatic firearms), pointing out that weapons equipped with MCDs pose an increased danger because they can fire more quickly and are more difficult to control.

Part D of the proposed amendment would amend the enhancement at §2D1.1(b)(1) for cases involving the possession of a weapon. It would create a tiered enhancement based on whether the weapon possessed was a machinegun (as defined in 26 U.S.C. § 5845(b)) or some other dangerous weapon. Courts would be instructed to apply the greater of either a 4-level enhancement if a machinegun was possessed or a 2-level enhancement if a dangerous weapon was possessed.

An issue for comment is also provided.

Proposed Amendment:

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

* * *

(b) Specific Offense Characteristics

(1) (Apply the greater):

(A) If a machinegun (as defined in 26 U.S.C. § 5845(b)) was possessed, increase by **[4]** levels;

(B) 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.

* * *

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:

* * *

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

(A) **Application of Subsection (b)(1).—**Definitions of "***firearm***" and "***dangerous weapon***" are found in the Commentary to §1B1.1 (Application Instructions). The enhancement for weapon possession in subsection (b)(1) reflects the increased danger of violence when drug traffickers possess weapons. The enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at the defendant's residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to §2D1.1; *see* §§2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), and 2D1.12(c)(1).

(B) **Interaction of Subsections (b)(1) and (b)(2).—**The enhancements in subsections (b)(1) and (b)(2) may be applied cumulatively (added together), as is generally the case when two or more specific offense characteristics each apply. *See* §1B1.1 (Application Instructions), Application Note 4(A). However, in a case in which the defendant merely possessed a ~~dangerous~~ weapon but did not use violence, make a credible threat to use violence, or direct the use of violence, subsection (b)(2) would not apply.

* * *

Issue for Comment:

1. Subsection (b)(1) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) applies if "a dangerous weapon . . . was possessed" as part of the offense and does not require that the defendant possessed the weapon. In addition, the Commentary to §2D1.1 provides that the enhancement "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." *See* USSG §2D1.1, comment. (n.11(A)). Therefore, §2D1.1(b)(1) may apply more broadly than other weapons-related provisions elsewhere in the guidelines. The Commission seeks comment on whether the changes set forth in Part D of the proposed amendment are appropriate in light of these factors. Should the Commission consider additional changes to §2D1.1(b)(1) to address these considerations? What changes, if any, should the Commission consider?

(E) Safety Valve

Synopsis of Proposed Amendment: Section 3553(f) of title 18, United States Code, allows a court to impose a sentence without regard to any statutory minimum penalty if it finds that a defendant meets certain criteria. The safety valve applies only to offenses under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, or 46 U.S.C. § 70503 or § 70506, and to defendants who, among other things, "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). When it first enacted the safety valve, Congress directed the Commission to promulgate or amend guidelines and policy statements to "carry out the purposes of [section 3553(f)]." *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 80001(b). The Commission implemented the directive by incorporating the statutory text of section 3553(f) into the guidelines at §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

Section 5C1.2(a)(5) does not prescribe any particular manner by which a defendant must satisfy the requirement of providing truthful information and evidence to the Government. The Commission has heard concerns, however, that this requirement has been understood to require that the defendant meet directly with the Government. Due to safety concerns, defendants otherwise eligible for the safety valve may forego that benefit due to the requirement of an in-person meeting.

Part E of the proposed amendment would address these concerns by amending the Commentary to §5C1.2 to add a provision stating that subsection (a)(5) does not specify how the defendant should provide such information and evidence to the Government. It would also provide that the specific manner by which the defendant has disclosed the information—whether by written disclosure or in-person meeting—should not preclude a determination by the court that the defendant has complied with the requirement of disclosing information about the offense, provided that the disclosure satisfies the requirements of completeness and truthfulness. It would state that the fact that the defendant provided the information as a written disclosure shall not by itself render the disclosure—if otherwise found complete and truthful—insufficient.

An issue for comment is also provided.

Proposed Amendment:

§5C1.2. Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

(a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, or 46 U.S.C. § 70503 or § 70506, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)–(5) as follows:

(1) the defendant does not have—

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and

(5) not later than the time of the sentencing hearing, 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, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

(b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the applicable guideline range shall not be less than 24 to 30 months of imprisonment.

Commentary

Application Notes:

* * *

4. **Application of Subsection (a)(5).—**

(A) Disclosure of Information by the Defendant.—Under subsection (a)(5), the defendant is required, not later than the time of the sentencing hearing, to truthfully provide 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. Subsection (a)(5) does not specify how the defendant should provide such information and evidence to the Government. The specific manner by which the defendant has disclosed the information—whether by written disclosure or in-person meeting—should not preclude a determination by the court that the defendant has complied with this requirement, provided that the disclosure satisfies the requirements of completeness and truthfulness. The fact that the defendant provided the information as a written disclosure shall not by itself render the disclosure—if otherwise found complete and truthful—insufficient.

(B) **Use of Information Disclosed ~~under Subsection (a).~~**—Information disclosed by a defendant under subsection (a) may not be used to enhance the sentence of the defendant unless the information relates to a violent offense, as defined in Application Note 1(A).

* * *

Issue for Comment:

1. The Commission seeks comment on whether the changes set forth in Part E of the proposed amendment are appropriate to address the concerns raised by commenters. If not, is there an alternative approach that the Commission should consider?