

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 626-8500
FAX (202) 662-7631

William W. Wilkins, Jr. Chairman
Julie E. Carnes
Helen G. Corrothers
Michael S. Gelacak
George E. MacKinnon
A. David Mazzone
Ilene H. Nagel
Benjamin F. Baer (ex officio)
Paul L. Maloney (ex officio)



Memorandum

To: Commissioner Carnes
Andy Purdy, Coordinator, Drug Working Group

From: Richard Murphy

Date: November 2, 1990

Subject: Drug Working Group -- Listed Chemicals Report

Attached is the background report on Listed Precursor and Essential Chemicals.

INDEX TO LISTED CHEMICALS REPORT

I. INTRODUCTION.....3

II. OVERVIEW OF CLANDESTINE DRUG PROBLEM.....5

III. CURRENT TRENDS AND VIOLATORS.....16

 a. Differences between geographic regions.....16

 b. Who are the "typical" violators?.....19

IV. HOW MANY CASES ARE LIKELY TO BE BROUGHT
 UNDER THE CDTA?.....23

V. TREATMENT OF CASES UNDER EXISTING OR
 PRIOR GUIDELINES.....26

VI. MONITORING DATA.....27

VII. RELEVANT APPELLATE DECISIONS.....27

I. INTRODUCTION

This memo is intended to provide general background information pertinent to the development of proposed sentencing guidelines for violations of The Chemical Diversion and Trafficking Act of 1988 (hereafter the "CDTA"). The CDTA, effective March 18, 1989¹, establishes criminal penalties and recordkeeping requirements for persons who deal in certain "listed chemicals", machines and equipment used to clandestinely manufacture a variety of controlled substances.²

In an effort to determine the nature of the problem and to attempt to identify the "heartland case", I followed up on our October 4, 1990 meeting with DEA and DOJ officials by contacting Tom F. O'Grady, Acting Chief, Narcotics and Dangerous Drugs Section, DEA Headquarters. Through his efforts, I was able to personally interview a number of DEA personnel, both at Headquarters in Washington and in the field. The people I interviewed were responsible for current and past investigations involving "precursor"³ and "essential"⁴ chemicals, as well as

¹ Although the CDTA became effective March 18, 1989, the companion regulations pertaining to the domestic and import/export provisions of the CDTA were not first published until August 1, 1989. As a result the "actual" effective dates for investigations and prosecutions under the CDTA are August 1, 1989, for the domestic provisions and November 1, 1989 for the import/export provisions.

² A summary of The Act and the criminal penalties is in Appendix A of this memorandum.

³ The DEA defines a "precursor" as a raw material for a controlled substance that becomes part of the finished product. For purposes of the CDTA, only "listed precursor chemicals" are regulated. This term is defined at 21 U.S.C. § 802 (34) as a

"clandestine laboratory"⁵ cases and, more recently, cases involving specific violations of the CDTA. Primarily, the DEA contacts were supervisory field agents responsible for clandestine laboratory investigative groups or their supervisors in the Narcotics and Dangerous Drugs Section at Headquarters. I also spoke with officials in the DEA Diversion section and diversion personnel in the field. Diversion personnel have primary responsibility for monitoring compliance with the recordkeeping requirements of the CDTA. Finally, I contacted state and local prosecutors in some

chemical specified by regulation which is used in the manufacturing of a controlled substance and is critical to the creation of the controlled substance.

⁴ "Essential" chemicals are chemicals, other than those specified as "precursor chemicals", which are also utilized in the manufacturing of controlled substances. However, unlike the "precursor chemicals", "essential" chemicals do not themselves become part of the finished product. Rather, an "essential" chemical is used as a reagent, solvent, or catalyst in the manufacturing process.

A "reagent" is a substance that reacts chemically with one or more precursors to alter the chemical makeup of the precursor such that a controlled substance results. However, a "reagent" does not become part of the finished product.

A "solvent" does not react chemically with a precursor or reagent and does not become part of the finished product. Solvents are used to dissolve solid precursors or reagents, to dilute reaction mixtures, and to separate and purify other chemicals.

The term "listed essential chemical" is defined at 21 U.S.C. § 802 (35) as " a chemical specified by regulation of the Attorney General as a chemical that is used as a solvent, reagent, or catalyst in manufacturing a controlled substance ...".

⁵ The DEA defines a "clandestine laboratory" as "[an] illicit operation consisting of a sufficient combination of apparatus and chemicals that either has been or could be used in the manufacture or synthesis of controlled substances. This definition specifically excludes LSD blotter or other dosage unit production operations, heroin or cocaine 'cutting mill'/dilution operations, and 'crack'/cocaine freebase operations, each of which is a unique and significant enforcement problem, but not a clandestine laboratory for [DEA definitional purposes]."

districts where the CDTA cases are now being made and prosecuted.

The information outlined below has been primarily derived from the sources mentioned above. In addition, Ronnie Scotkin and Elizabeth Murphy, attorney in the DEA Office of Chief Counsel, assisted by providing background information. Ronnie has also prepared a summary of the available monitoring case information. (Appendix M of this memorandum). Pam Barron has reviewed appellate decisions involving precursors and labs and prepared an accompanying report. (Appendix N of this memorandum).

II. OVERVIEW OF CLANDESTINE DRUG PRODUCTION PROBLEM.

A significant portion of certain major drugs abused in the United States has always been attributable to the domestic operation of clandestine manufacturing operations (labs).⁶ However,

⁶ It is difficult to precisely determine the number of users of clandestinely produced drugs or the market share of those drugs in the overall drug market. However, statistics obtained from DEA indicate that it was estimated in 1988 that 2.9 million Americans used cocaine at least once a month, whereas 1.7 million Americans used other stimulants (primarily methamphetamine or amphetamine) that often.

Another indicator of the scope of the problem is the number of hospital emergency room "mentions" for various drugs. The Drug Abuse Warning Network (DAWN) maintains such data. In 1989, DAWN statistics showed that six of the top twelve drugs responsible for drug related emergency room admissions were illicit substances. The top two were cocaine and heroin which are primarily clandestinely produced overseas. Number three was marijuana which is clandestinely produced although not in a "lab". The other three of the top six illicit drugs were amphetamine/methamphetamine, PCP, and LSD, all which are domestically clandestinely produced.

A report summarizing the DAWN statistics noted the "large proportion of the mentions which can be attributed to clandestinely manufactured drugs. In fact this figure has been increasing steadily over the last several years". (A copy of the report

particularly in recent years these labs produced more diversified "products," utilizing new and more diverse methods of production, with the result being that a larger share of all drugs available were being domestically produced in clandestine labs.

Directly related to the increase in diversity and availability of lab-produced drugs was the lack of significant controls on the distribution, import, or export of precursor and essential chemicals used to produce and refine those drugs. Intelligence information showed that not only were certain chemicals produced in this country being used in clandestine labs in this country, but many chemicals exported from the United States were ending up, at alarming rates, in cocaine or heroin lab operations in foreign countries. Similarly, precursor and essential chemicals produced in foreign countries have been imported and diverted to clandestine labs operating here.

In an effort to stem the clandestine manufacture of drugs and to regulate and restrict the distribution, import and export of precursors, essential chemicals and certain materials used to manufacture illicit drugs, in 1987 Congress passed the CDTA.

Two of the most widely clandestinely produced drugs are heroin and cocaine. However, because heroin and cocaine are derived from plants that are not indigenous to the United States they are almost exclusively produced abroad then imported to the United States or other nations for consumption. The CDTA, through its

summarizing 1989 DAWN statistics and comparing them to previous years is in Appendix B of this memorandum).

import and export provisions is designed to attack the foreign manufacturer of illicit controlled substances.⁷

Perhaps the most significant features of the CDTA are those provisions that: require records to be made of certain "regulated transactions;"⁸ prohibit possession of a "listed chemical" with intent to manufacture a controlled substance; and prohibit distributing a "listed chemical" "knowing or having reasonable cause to believe" that the chemical will be used to manufacture a controlled substance. These provisions are designed to attack the domestic clandestine production of controlled substances. See, 21 U.S.C. §§ 841 (d) & 842 (a).

There seems to be universal agreement that the primary drug being clandestinely manufactured in the United States is methamphetamine or a version of it (e.g. amphetamine). As a Schedule II Controlled Substance, methamphetamine is a stimulant that produces effects upon its user similar to those of cocaine. Indeed, methamphetamine has sometimes been referred to as the "poor man's cocaine." However, methamphetamine is often viewed as posing a more serious drug control problem, in part, because it can be domestically produced by drug traffickers themselves, utilizing chemicals and equipment that are widely available in commercial

⁷ As an example, within the past year, The United States Customs Service made over 60 seizures of chemicals destined for export to foreign countries that were not in compliance with the CDTA. See, 21 U.S.C. § 971. An itemization of these seizures is in Appendix C of this memorandum.

⁸ The term "regulated transaction" is defined at 21 U.S.C. § 802 (39).

channels, with little or no dependence upon foreign contacts or resources. Methamphetamine is also viewed as having a high potential for abuse and addiction. It is often ingested by injection into the veins, creating health problems associated with the sharing and reuse of syringes by drug users. Moreover, due to the highly toxic and volatile nature of the precursors and essential chemicals used to manufacture methamphetamine there is a substantial risk of personal and environmental injury whether merely handling the chemicals or actually using them to manufacture methamphetamine.

Methamphetamine can be produced from chemicals and glassware that would require no more than an initial investment of several hundred dollars, although sophisticated operations may involve the investment of tens of thousands of dollars or more, depending upon their size. Nonetheless, regardless of the size of the operation, the final product will command a price on the street comparable to that received for a similar quantity of cocaine. Methamphetamine trafficking can be quite profitable given the relatively low costs of production and distribution and the lack of a foreign producer or domestic "middleman" who might otherwise demand a share of drug profits.

To a much lesser degree, clandestine lab operators have also engaged in the domestic production of controlled substances other than methamphetamine.⁹ However, as indicated by

⁹ ⁹ These other substances include P2P (phenylacetone); PCP (phencyclidine); methaqualone; psilocybin; MDA (3,4-methylenedioxyamphetamine); fentanyl; and cocaine.

the charts contained in Appendix D of this memo, the number of such operations seized by law enforcement in recent years pales in comparison to the number of seizures of "methamphetamine-related" labs.¹⁰ Of the 3,647 labs seized by DEA since 1985, 3,483 have been "methamphetamine-related". Through August of 1990, of the 375 total labs seized by DEA, 354 (94%) have been "methamphetamine-related." This ratio has remained relatively constant since 1987, however, as the available seizure statistics reveal, prior to 1987 there were significantly fewer clandestine "methamphetamine-related" labs in operation (or at least fewer seized).¹¹

While many of the precursor or essential chemicals¹² utilized in the clandestine production of controlled substances are

¹⁰ The term "methamphetamine-related" refers to labs that produced either methamphetamine, amphetamine, or P2P (phenylacetone). Although P2P is itself a Schedule II Controlled Substance, it is perhaps most importantly an "immediate precursor" to methamphetamine. In other words, P2P can be directly converted into methamphetamine and is usually possessed or manufactured with the intent to convert it to methamphetamine.

¹¹ The lab seizure information reveals that "methamphetamine-related" lab seizures comprised the following percentages of the total clandestine drug labs seized in any one year. Also shown are the total number of "methamphetamine-related" lab seizures in each respective year.

<u>Year</u>	<u>%</u>	<u>Total</u>	<u>Year</u>	<u>%</u>	<u>Total</u>
1990	94%	375 (Aug.)	1985	83%	419
1989	95%	852	1984	74%	290
1988	94%	810	1983	64%	239
1987	94%	682	1982	66%	203
1986	90%	509	1981	62%	197

For more detailed information see Appendix D to this memorandum.

¹² A summary of the listed precursor and essential chemicals and the controlled substances which they are utilized to produce is contained at Appendix E of this memorandum.

manufactured in the United States,¹³ a large proportion of all such chemicals used in the United States each year are imported from foreign producers.¹⁴ Similarly, chemical manufacturing companies in the United States export substantial quantities of precursor and essential chemicals each year.¹⁵ While there are some limited legitimate commercial and medical uses for "precursor" and "essential" chemicals¹⁶, there is no doubt that significant quantities of these chemicals are utilized in both foreign and domestic clandestine drug production.¹⁷

¹³ For a listing of the domestic chemical companies and the foreign nations that serve as sources for each precursor and essential chemical, see the "Precursor & Essential Chemical Reference Guide" in Appendix F of this memorandum.

¹⁴ The DEA summary of import applications for precursor and essential chemicals imported to the United States between 10/89 and 10/90 is in Appendix G of this memorandum.

¹⁵ The DEA summary of export applications for precursor and essential chemicals exported from the United States between 10/89 and 10/90 is in Appendix H of this memorandum.

¹⁶ For a summary of the commercial, medical, and other legitimate uses for each precursor and essential chemical, see the "Precursor & Essential Chemical Reference Guide" in Appendix F of this memorandum.

¹⁷ For example, at the time the CDTA was enacted in 1987, the DEA reported that its research had shown that 95 percent of the ether going into Columbia was used for illicit purposes. Moreover, one-half of this quantity came from the United States.

While most of the chemicals exported from the United States, that are used in the clandestine production of controlled substances overseas, are used in the production of cocaine or heroin, a different pattern exists in this country. Indeed, because methamphetamine is the illicit drug most widely manufactured in this country, methamphetamine precursors and essential chemicals represent the largest area of present domestic concern. In this regard, law enforcement and other experts seem to agree that the amount of certain methamphetamine precursors, such as ephedrine, imported or produced in this country each year, exceeds that

Prior to the enactment of the CDTA, the DEA had a precursor control program that was largely voluntary. Although the program was successful in providing some investigatory leads and resulted in the disruption of several lab operations, it simply was not adequate to significantly reduce the availability of essential and precursor chemicals to the criminal element. However, with the benefit of the CDTA, DEA offices nationwide are reporting that a significant impact is now being made. Among the accomplishments are the following:

1. The United States entered into bilateral chemical control agreements with several countries since the passage of the CDTA. In addition, following the lead and urging of the United States, several more countries have agreed to reconsider or modify their domestic chemical controls/regulations. These foreign laws, in combination with the CDTA, have allowed authorities to more closely track the movement of precursor and essential chemicals and thereby more easily identify and investigate clandestine manufacturing operations.¹⁸

required for legitimate uses.

¹⁸ A summary of the various international laws to control the sale and distribution of essential and precursor chemicals is in Appendix I of this memo.

2. DEA projects a 40% decrease in ephedrine and pseudoephedrine¹⁹ imports into the United States in 1990 versus 1989 attributed to tighter recordkeeping and tracking controls. Simply put, the criminals know that it is easier to get caught and are either getting out of the drug business altogether or finding other ways around the laws. These alternative methods of operation include:

a) smuggling chemicals into the United States from Canada given Canada's present lack of laws restricting the diversion or distribution of essential and precursor chemicals.

b) greater utilization of chemical "brokers" who obtain chemicals for the clandestine lab operators under the guise of conducting a legitimate business.

c) reliance upon chemical supply companies who operate in defiance of either the spirit or the letter of the CDTA. This includes companies who do not report suspicious activity; who contend they see nothing "suspicious;" who distribute chemicals in quantities lower than the "threshold" levels established by the CDTA; and those "rogue" chemical companies who operate in conjunction with the dope dealers either out of sheer greed or as knowing and willing accomplices.

¹⁹ Ephedrine and psuedoephedrine are two precursors commonly used in the manufacture of methamphetamine.

d) finally, there is some indication that clandestine manufacturers of controlled substances are experimenting with new methods of synthesis (formulas) to produce controlled substances or their analogues, including the use of chemicals or substances not regulated by the CDTA or other laws.²⁰

3. Seizures of methamphetamine labs in fiscal year 1990 are projected to be about 40% lower nationwide versus fiscal year 1989. In some areas lab seizures are off 50% from this time last year when the CDTA began to be implemented. According to DEA officials across the

²⁰ One glaring example is the use of 25mg ephedrine tablets that are crushed into powder then converted to methamphetamine. Apparently, there are no restrictions on the distribution, import, or export of 25mg ephedrine tablets. These tablets were apparently excluded from the coverage of the CDTA because they had not been previously viewed as being utilized in the manufacture of methamphetamine or any other illicit substance. However, faced with the restrictions now placed upon the "powder" (hydrochloride) form of ephedrine, some ingenious criminals are now producing and/or purchasing millions of 25mg ephedrine tablets to be used in the production of methamphetamine. Although legitimate supply companies may report this activity to the DEA, it would seem to be exempt from the provisions of the CDTA.

Other examples of efforts taken to avoid the impact of the federal drug laws have included the production by clandestine drug lab operators of substances that closely resemble or mimic the strength and effect of controlled substances but differ slightly in their chemical makeup from the actual controlled substance. The chemical composition is intentionally altered in an attempt to evade the laws. However, Congress responded to this tactic prohibiting the manufacture of these so-called "designer drugs" or "analogues." See, 21 U.S.C. § 813.

The CDTA also prohibits the creation or possession of a "chemical mixture" for the purpose of evading the recordkeeping requirements of the Act. See, 21 U.S.C. § 843 (a) (8).

~~be implemented. According to DEA officials across the~~
country, these statistics are a direct result of the
CDTA.

In short, apparently fewer people are willing to take the risks associated with the production of illicit controlled substances. Moreover, it appears that the CDTA has had the effect of chasing "smaller" operators out of business, apparently because the return is not large enough when compared with the potential adverse penal consequences. On the other hand, the larger producers, who most often have been in the business the majority of their lives, are willing to take the risks or to find ways to continue in operation.

An additional consequence of the reduction in number of labs seized is that DEA now has more time and resources to devote to the investigation and prosecution of larger violators.²¹

²¹ Traditionally, DEA has been called in to assist on about 90% or more of the labs seized nationwide, whether or not DEA was otherwise involved in the investigation that led to the seizure. The reason for this involvement is that DEA, unlike most state or local law enforcement agencies, has specially trained and equipped lab removal teams. Special expertise and care needs to be given to the handling of lab equipment and chemicals which, even in small quantities, can be highly toxic and explosive. Improper handling of these materials by lab operators and law enforcement officials has often resulted in contamination, serious injury or even death.

In recognition of the above concerns, DEA is simply not able to refuse to assist on a lab removal when so requested. Hence, a reduction in number of labs seized means that DEA will have more time to devote to the "proactive" identification and investigation of larger lab operators and will need to devote less merely

4. The DEA, primarily through its diversion investigators (with assistance from its special agents), initiated a nationwide "survey" of chemical suppliers beginning in late 1989. The purpose of this survey was to identify those chemical suppliers that were dealing in regulated substances or items and to determine the extent of those dealings. Additionally, the "survey" had as a primary purpose, the education of the chemical industry concerning the requirements of the CDTA and its implementing regulations. The survey took the form of a written inquiry and notice sent to each company and a personal visit to as many as possible.²²

The DEA reports that this survey is now virtually complete and the information derived therefrom is being tabulated for use in future investigations and for follow-up or compliance checks that will be periodically conducted by the diversion investigators. However, at least three consequences of this survey (or of the CDTA) now seem apparent:

1. Several truly "rogue" chemical companies (those that could not survive in business if they were forced to comply with the CDTA and stop selling

"reactive" time to the removal of large and small labs alike.

²² A copy of one of the notices is contained in Appendix J of this memorandum.

products to criminals) simply went out of business.

2. Those legitimate companies that do not depend upon clandestine labs for their livelihood are largely willing to comply with the CDTA. Indeed, as a general matter, compliance with the CDTA reporting requirements has been reported as "excellent."

3. The number of reports, calls and questions to DEA concerning "suspicious" transactions has increased significantly. As a result, DEA is better able to follow the chemicals to a lab site or to prevent their sale in the first instance to known drug manufacturers.

III. CURRENT TRENDS AND VIOLATORS

A. Differences between geographic regions.

The bulk of the clandestine lab related criminal activity today seems to be concentrated, where such activity has always been concentrated, on the west coast (California, Oregon, Washington); in the south (Texas); or on the east coast (New Jersey, New York, Pennsylvania). However, the current east coast activity differs significantly in at least two respects. First, there are far fewer labs located in eastern states. Rather, these states, as large chemical producing or importing states, serve as a major sources of supply for precursor and essential chemicals utilized in the manufacture of illicit controlled substances elsewhere. West coast lab operators apparently feel less intimidated ordering chemicals

from supply companies located hundreds or thousands of miles away.

A second significant difference between the lab activity on the coasts is the method of synthesis used to manufacture the primary lab-produced drug, methamphetamine. Although there are a variety of synthesis methods or "formulas" that can be used to manufacture most illicit controlled substances,²³ the two primary methods used today are the "PA" (phenylacetic acid) method²⁴ and the "ephedrine" method,²⁵ both used to manufacture methamphetamine. These two methods rely on different precursors (either phenylacetic acid or ephedrine) as the initial component in the production of methamphetamine.

While the west coast and the southwest almost exclusively use the ephedrine method, the PA method is preferred, where labs are found, in the east. The two methods differ in complexity in that the PA method uses phenylacetic acid to produce P2P

²³ A list of the most frequently encountered methods used to manufacture drugs in clandestine laboratories is in Appendix K of this memorandum.

²⁴ PA (phenylacetic acid) is a precursor to P2P, which is an immediate precursor to methamphetamine. Therefore, methamphetamine is ultimately produced using both substances. However, depending on whether the process is started with PA or P2P, the same basic method may be referred to as the "PA" or the "P2P" method. For purposes of this memorandum, reference to the "PA" method will include the P2P method.

²⁵ Although the "PA" and "ephedrine" methods are referred to in this memorandum as "two" methods, as Appendix K indicates there is more than one way to make methamphetamine from either ephedrine or phenylacetic acid. However, because the respective precursor is the same in each of those methods, any one of the methods, depending upon which precursor it contained, could be called the "PA" or "ephedrine" method.

(phenylacetone), an "immediate precursor"²⁶ to methamphetamine. Under the PA method, the P2P must then be converted into methamphetamine. On the other hand, the ephedrine method converts ephedrine into methamphetamine without the intermediate step. Unlike the PA method, which produces a foul, permeating odor, the ephedrine method is virtually odorless and therefore less capable of detection.

As the foregoing points out, depending upon which method of synthesis is used to manufacture a drug (or depending upon which drug is being made), a variety of methods, chemicals, and precursors, may be used to reach similar results.

Although most of the enforcement activity under the CDTA is anticipated to be concentrated in the states outlined above there does seem to be some increase in chemical and precursor activity/purchases in states such as Arkansas, Arizona, Nevada, Colorado, and Oklahoma. The DEA indicates that lab operators in Texas or on the west coast are driving to these other states or having "runners" pick up chemicals in these states and return to Texas or the west coast where the chemicals will be used to produce

²⁶ As pointed out in previous footnotes, P2P is an "immediate precursor" to methamphetamine. Immediate precursors are generally treated as controlled substances and are regulated under the Controlled Substance Act, the same as any controlled substance. An "immediate precursor" is a substance designated by regulation by the Attorney General as being "the principal compound used, or produced primarily for use, in the manufacture of a controlled substance." See, 21 U.S.C. §802 (23).

Several immediate precursors are treated as controlled substances. A list of these precursors, indicating the Schedule under which they are classified and the controlled substance to which they are a precursor, is in Appendix L of this memorandum.

drugs in existing or mobile labs. There appear to be two primary reasons for going to these lengths to obtain the necessary materials:

- 1) to avoid detection in the state where the lab is located; and
- 2) to avoid the double burden of having to comply with both state and federal laws.²⁷

The clandestine production of controlled substances in other parts of the country is simply too sporadic to draw any general conclusions. However, because the CDTA seems to have scared many smaller operators out of business (many of whom operated or experimented in regions not dominated by the larger producers) it is quite possible any activity in states or regions other than those mentioned above will be minimal.

B. Who are the "typical" violators?

Although it is difficult to pigeon-hole the offenders, it does seem that there are some very distinct groups of individuals who will most likely be subject to potential prosecution under the CDTA:

²⁷ Unlike most other states, California, Texas, Oregon, and Washington have enacted their own state restrictions on the sale of precursors or essential chemicals. In some respects these laws impose more severe requirements than the federal law (such as by requiring a permit to buy certain substances; by imposing an application and waiting period before a sale can be consummated; or by imposing a reporting requirement on the sale of even small quantities of certain substances).

The very fact these states have acted in this way points up the severity of the problem they face.

1. The first group contains the "rogue" or wilfully noncomplying chemical companies or their employees. These are the people who know or have good reason to know what is going on but elect to not comply with the CDTA generally because it would have an adverse economic impact on their companies. In the rare case these companies may have direct involvement and participation in the lab and would potentially share in the proceeds from the sales of the clandestinely produced drugs.

2. The second group includes the precursor or chemical "broker". This is the person who knows they are not complying with the CDTA but violates it anyway, again probably for financial gain. According to agents and prosecutors, this is the person who is in the greatest demand today. Precursors and chemicals are in tight supply, thus, any person who has access to them will be in demand and will be able to "name their price" for what they have to sell. In the rare case, this person may also have more direct involvement in the lab and potentially share in the proceeds of the illicit drugs sold.

3. The third group is comprised of the lab operators²⁸ or persons who actually possess the

²⁸ It seems there are really three levels of lab operators: 1) Those small time operators who produce enough drug for themselves and their friends but aren't in the business as their livelihood;

chemicals, precursors and equipment with the intent to manufacture a controlled substance. Particularly in the larger operations, these people tend to make a career out of their illegal activity. They tend to be armed, especially when cooking the drugs or preparing the lab to cook. However, these persons have also achieved a certain level of sophistication and patience. For instance, it is not at all unusual for the lab operators to keep the various chemicals or glassware at separate locations until they are actually ready to cook. This makes it tougher to prove intent in the event they are detected.

Further, it is not unusual for operators to store or virtually "abandon" precursors or chemicals for long periods of time in non-lab site locations. This tactic reduces the chance that the ultimate lab site will be detected because, as the criminals realize, law enforcement officials are unable to conduct longterm 24 hour surveillance of the chemicals even if they know the location of the initial storage site. Moreover, this tactic helps insure that no tracing to the ultimate destination will be successful even if an

2) Those who manufacture up to one kilogram a month for redistribution and profit; and 3) The larger, original operators, such as the bikers in California who have the capability of producing tens or hundreds of kilos a month. Often times the larger operator may make large batches of drugs but only do so once or twice a year.

electronic tracking device is placed in the package at the chemical company, because the batteries in such a device could expire weeks before the next move is made.

4. Finally, among the most minor violators would be those who unknowingly fail to comply with the recordkeeping requirements of the CDTA or those who are paid to purchase certain chemicals or equipment but don't really know what they are buying or what it will be used for.²⁹ In the first instance, 21 U.S.C. § 842 provides only for a civil penalty unless criminal knowledge can be established. In the second instance, knowledge or intent would also have to be proven. In most of these cases, given the difficulty in proof and the desire to get to the lab or the lab operator, prosecutors and agents contend such persons would likely not be prosecuted, but would be asked to provide whatever information they could.

²⁹ As an example, in California, street people are being approached and offered money to go into a chemical company to buy certain precursors or chemicals. Often they purchase quantities below the "threshold" limits of the statute so that no records are required to be kept. By operating in this fashion and using multiple "unknowing" accomplices the criminals may be able to accumulate large quantities of the needed chemicals or precursors. Of course, if this activity appears to be unusual or uncommon to the chemical company they are required to report it. See, 21 U.S.C. § 830. Further, if it can proven the transactions are being structured to avoid the reporting requirements, a criminal charge could be brought. See, 21 U.S.C. § 841(d).

IV. HOW MANY CASES ARE LIKELY TO BE BROUGHT UNDER THE CDTA?

There is some question as to whether the CDTA is likely to result in large numbers of prosecutions or whether it may simply end up being used as a "plea bargain statute." To date, the monitoring section has records of only five (5) cases which ~~have~~ have been sentenced under the CDTA. Of these, three (3) have been under 21 U.S.C. § 841(d) for possession of a precursor or chemical with intent to manufacture. One (1) case charged the possession of a three neck round bottom flask but was joined with more serious non-CDTA drug charges. The final case involved the sale of a tableting machine to an undercover agent.³⁰ No cases have been located involving a prosecution for recordkeeping violations of the CDTA.

In discussing this issue with prosecutors and agents, they ~~seemed~~ to feel that § 841(d) may be used in an appropriate case to effectively cap a sentence at 10 years in exchange for a defendant's cooperation and the dismissal or foregoing of more serious manufacturing or conspiracy charges. Further the agents and prosecutors pointed out that in most cases where an § 841(d) charge may be available, it would usually also be possible to charge conspiracy, manufacture, or attempted manufacture, each carrying much higher penalties. Thus, in many cases, even if charged, any sentence for a § 841(d) conviction would likely be grouped or considered as relevant conduct for other drug

³⁰ Ronnie Scotkin's supplemental report further detailing these cases is attached as Appendix M of this memorandum.

convictions carrying a higher penalty.

Assuming the foregoing is true, then the real question is, in how many cases will a CDTA charge be the sole basis for prosecution? Initially, it appears that chemical companies or others who possess, distribute, or import/export listed chemicals "knowing" or "having reasonable cause to believe" the chemicals would be used to manufacture a controlled substance would stand the greatest chance of being prosecuted solely under the CDTA without companion conspiracy or manufacturing charges. Only in the rarest cases will the chemical company or other person have sufficient criminal knowledge and intent to warrant a more serious charge.

Secondly, it may be possible to prosecute an individual or entity under § 841(d) solely on the basis of evidence that they possessed listed chemicals. However, without more evidence of intent, it is doubtful. Of course, if additional intent evidence did exist then prosecution on a greater charge would usually be available.

A third possible group of defendants are those who violate the recordkeeping requirements of the CDTA. Although compliance is now considered excellent, there remain a few defiant chemical companies who apparently will not fully comply until convinced the Act will be enforced. Hence, while it may be possible that some prosecutions will result, the consensus is that those will be the exception. The CDTA is doing its job and is resulting in greatly improved tracking of chemicals and precursors. As one agent described it, "the legitimate supplier was never selling these

chemicals in the first place" -- "there's only one use for these substances -- that's to make meth" and "everyone in the business knows it."

Another provision of the law makes it unlawful to furnish false information or identification when receiving a chemical or completing a report covered by the CDTA. This is usually going to apply to the person who goes to buy chemicals and gives a fake name or address. Other scenarios would include prosecution of those persons who have formed bogus companies or business fronts to which they have chemicals shipped.³¹ Undoubtedly there will be prosecutions under this section, however, it will also be used as a "plea bargain statute" where it is used to limit the sentence of a cooperating defendant whose actual offense was attempting to obtain chemicals for the purpose of making drugs. This section may also apply where it is impossible to prove the intent of the defendant but prosecution is desired perhaps because no other charge is warranted or available. It is likely that a number of these violations will never be charged if potential defendants simply agree to cooperate or provide information to authorities.

Finally, prosecutions will be available for violations of the equipment, flask and machinery provisions. Many of the same considerations will again come into play, e.g., if a flask or other equipment is found in an operational lab, these charges may well be ignored or be meaningless. They will only apply where evidence of

³¹ In one such case investigated by the DEA, the "business" was a vacant lot with a mailbox on a post.

intent or knowledge of intent to manufacture exists, however, once again greater charges may then be available.

Thus, it does not appear that there will be a flood of cases under the CDTA. Rather, it appears the Act will be used as a plea bargain device and to prosecute a limited number of cases that fall between the level of proof sufficient to sustain conspiracy, manufacture, or attempt to manufacture charges in contrast with CDTA violations for "possession with intent", "knowledge" or "reasonable cause to believe".

IV. TREATMENT OF CASES UNDER EXISTING OR PRIOR GUIDELINES

At the present time, the sentencing guidelines do not explicitly address the specific statutory provisions of the CDTA. The Statutory Index (Guidelines Appendix A) does direct that certain portions of the CDTA should be sentenced under existing provisions of the guidelines, but, the Statutory Index does not provide a reference for all provisions of the CDTA. A summary of the violations and the present method of treatment under the

guidelines follows:

21 U.S.C. § 841(d)(1); (d)(2); and (d)(3).

Current Guideline reference is to 2D1.1 (under this guideline, quantity of drugs that could be produced by chemicals would determine offense level.)

21 U.S.C. § 841(g)(1) and (g)(2).

No current Guideline reference.

21 U.S.C. § 842(a)(9) and (a)(10).

No specific current Guideline reference although The Statutory Index does refer to Guidelines 2D3.1; 2D3.2; and 2D3.3 for violations of "§842 (a)". However, none of the referenced guidelines are directly on point. This makes sense because the referenced guidelines are directed at the other violations of §842 (a) which were in existence prior to the amendments added by the CDTA.

21 U.S.C. § 843(a)(6); (7); and (8).

No current Guideline reference. There are provisions for the unrelated violations of §843 (a)(1)-(a)(4).

21 U.S.C. § 960(d)(1) and (d)(2).

Current Guideline reference is to 2D1.1

21 U.S.C. § 961

Current Guideline reference to §2D3.4 although no specific reference in that guideline to §961.

V. MONITORING DATA

Ronnie Scotkin has prepared a separate memorandum summarizing the cases prosecuted under the CDTA on which the monitoring section has files. This memorandum is attached as Appendix M. As this data indicates, there have been very few prosecutions under the CDTA. Moreover, other more serious charges will often accompany CDTA violations.

VI. RELEVANT APPELLATE DECISIONS

Pam Barron has prepared a separate memorandum discussing reported appellate decisions involving defendants who were

sentenced based upon the amount of precursors seized or the capacity of the lab, as determined by experts considering the facts of each case. This memorandum is attached as Appendix N. Although these cases do not directly deal with violations of the CDTA, they do discuss issues that may be relevant to the formulation of sentencing guidelines for violations of the CDTA.

APPENDIX INDEX

- APPENDIX A -- Summary of CDTA
- APPENDIX B -- DAWN (Drug abuse warning network) statistics
- APPENDIX C -- Customs Chemical Seizures
- APPENDIX D -- DEA lab seizure statistics
- APPENDIX E -- Listed Chemicals and drugs they make
- APPENDIX F -- Essential Chemical Reference Guide
- APPENDIX G -- International Laws
- APPENDIX H -- DEA Import Applications
- APPENDIX I -- DEA Export Applications
- APPENDIX J -- DEA Diversion Notice re: CDTA
- APPENDIX K -- List of synthesis methods for drug manufacture
- APPENDIX L -- List of Controlled Precursors
- APPENDIX M -- Monitoring case review
- APPENDIX N -- Appellate case review