



Proposed Amendments to the Sentencing Guidelines (Preliminary)

January 9, 2014

This document collects the proposed amendments to the sentencing guidelines, policy statements, and commentary, in the "reader-friendly" form in which they were made available at the public meeting on January 9, 2014. As with all proposed amendments on which a vote to publish for comment has been made but not yet officially submitted to the Federal Register for formal publication, authority to make technical and conforming changes may be exercised and motions to reconsider may be made. Once submitted to the Federal Register, official text of the proposed amendments as submitted will be posted on the Commission's website at www.usc.gov and will be available in a forthcoming edition of the Federal Register, and an updated "reader-friendly" version of the proposed amendments as submitted will be posted on the Commission's website at www.usc.gov.

Upon publication in the Federal Register, a 60-day period for public comment will begin. Further information on the submission of public comment will be provided in the forthcoming edition of the Federal Register referred to above. Such information will also be available at www.usc.gov.

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PROPOSED AMENDMENT: VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT

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

This proposed amendment and issues for comment address the issues raised by the statutory changes made by the Act in the following manner:

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

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

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

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

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

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

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

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

§2A2.2 (Aggravated Assault).

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

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

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

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

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

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

The Act expanded section 113(a)(7) so that it also applies to assault resulting in substantial bodily injury to a spouse or intimate partner or dating partner. The proposed amendment amends §2A2.3 to broaden the scope of the 4-level enhancement. Two options are presented:

Option 1 broadens the scope of the 4-level enhancement so that it applies not only to a case in which the offense resulted in substantial bodily injury to an individual who has not attained the age of 16 years, but also to a case in which the offense resulted in substantial bodily injury to a spouse or intimate partner or dating partner.

Option 2 broadens the scope of the 4-level enhancement so that it applies to any case in which the offense resulted in substantial bodily injury.

In addition, the proposed amendment brackets the possibility of amending Appendix A to provide that offenses under section 113(a)(7) would also be referenced to §2A6.2 (Stalking or Domestic Violence).

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

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

a statutory maximum term of imprisonment of 10 years.

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

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

Third, the proposed amendment adds a new specific offense characteristic to §2A2.2. Two options are presented:

***Option 1** provides an enhancement of [3] to [7] levels if the bodily injury enhancement in subsection (b)(3) does not apply and the offense involved strangling, suffocating, or attempting to strangle or suffocate.*

***Option 2** provides an enhancement of [3] to [7] levels if the offense involves strangling, suffocating, or attempting to strangle or suffocate. It brackets the possibility of limiting the cumulative impact of the bodily injury enhancement in subsection (b)(3) and this new enhancement to [10]-[12] levels. (Note that the guideline already contains a provision limiting the cumulative impact of subsections (b)(2) and (b)(3) to not more than 10 levels.)*

In addition, the proposed amendment brackets the possibility of amending Appendix A to provide offenses under section 113(a)(8) with a reference to §2A6.2 (Stalking or Domestic Violence). Section 2A6.2 has a 2-level enhancement that applies if the offense involved an aggravating factor such as bodily injury, and a 4-level enhancement that applies if the offense involved more than one such aggravating factor. The proposed amendment amends §2A6.2 to provide that the enhancement also applies if the offense involved strangling, suffocating, or attempting to strangle or suffocate. Two options are presented:

***Option 1** would establish strangling, suffocating, or attempting to strangle or suffocate as a separate new aggravating factor. Under this option, a case that involves this factor would receive the 2-level enhancement, and a case that involves both this factor and another factor (such as bodily injury) would receive the 4-level enhancement.*

***Option 2** would incorporate strangling, suffocating, or attempting to strangle or suffocate within the existing aggravating factor for bodily injury. Under this option, a case that involves both bodily injury and strangling or suffocating would receive the 2-level enhancement rather than a 4-level enhancement.*

Following the proposed amendment are issues for comment on whether certain other changes to the guidelines are appropriate to respond to these and other changes to section 113.

Proposed Amendment:

§2A2.2. Aggravated Assault

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

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

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

[Option 1: (4) **If (A) subdivision (3) does not apply; and (B) the offense involved assault by strangling, suffocating, or attempting to strangle or suffocate, increase by [3]-[7] levels.]**

[Option 2: (4) **If the offense involved assault by strangling, suffocating, or attempting to strangle or suffocate, increase by [3]-[7] levels. [However, the cumulative adjustments from application of subdivisions (3) and (4) shall not exceed [10]-[12] levels.]**

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

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

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

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

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

2. Application of Subsection (b)(1).—For purposes of subsection (b)(1), "more than minimal planning" means more planning than is typical for commission of the offense in a simple form. "More than minimal planning" also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which §3C1.1 (Obstructing or Impeding the Administration of Justice) applies. For example, waiting to commit the offense when no witnesses were present would not alone constitute more than minimal planning. By contrast, luring the victim to a specific location or wearing a ski mask to prevent identification would constitute more than minimal planning.

3. Application of Subsection (b)(2).—In a case involving a dangerous weapon with intent to cause bodily injury, the court shall apply both the base offense level and subsection (b)(2).

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

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

commit manslaughter. Assault with intent to commit murder is covered by §2A2.1. Assault with intent to commit rape is covered by §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

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

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

§2A2.3. Minor Assault

(a) Base Offense Level:

- (1) 7, if the offense involved physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened; or
- (2) 4, otherwise.

(b) Specific Offense Characteristic

[Option 1: (1) If (A) the victim sustained bodily injury, increase by 2 levels; or (B) the offense resulted in substantial bodily injury to a spouse or intimate partner, a dating partner, or an individual under the age of sixteen years, increase by 4 levels.]

[Option 2: (1) If (A) the victim sustained bodily injury, increase by 2 levels; or (B) the offense resulted in substantial bodily injury to an individual under the age of sixteen years, increase by 4 levels.]

(c) Cross Reference

- (1) If the conduct constituted aggravated assault, apply §2A2.2 (Aggravated Assault).

Commentary

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Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

[Option 1, continued:

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

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

2. Application of Subsection (b)(1).—Conduct that forms the basis for application of subsection (a)(1) also may form the basis for application of the enhancement in subsection (b)(1)(A) or (B).

Background: Minor assault and battery are covered in this section.

* * *

§2A6.2. Stalking or Domestic Violence

- (a) Base Offense Level: **18**
- (b) Specific Offense Characteristic

[Option 1: (1) If the offense involved one of the following aggravating factors: (A) the violation of a court protection order; (B) bodily injury; (C) **strangling, suffocating, or attempting to strangle or suffocate**; (D) possession, or threatened use, of a dangerous weapon; or ~~(D)~~(E) a pattern of activity involving stalking, threatening, harassing, or assaulting the same victim, increase by **2** levels. If the offense involved more than one of ~~these~~ **aggravating factors subdivisions (A), (B), (C), (D), or (E)**, increase by **4** levels.]

[Option 2: (1) If the offense involved one of the following aggravating factors: (A) the violation of a court protection order; (B) bodily injury **or strangling, suffocating, or attempting to strangle or suffocate**; (C) possession, or threatened use, of a dangerous weapon; or (D) a pattern of activity involving stalking, threatening, harassing, or assaulting the same victim, increase by **2** levels. If the offense involved more than one of ~~these~~ **aggravating factors subdivisions (A), (B), (C), or (D)**, increase by **4** levels.]

(c) Cross Reference

- (1) If the offense involved the commission of another criminal offense, apply the offense guideline from Chapter Two, Part A (Offenses Against the Person) most applicable to that other criminal offense, if the resulting offense level is greater than that determined above.

Commentary

* * *

Application Notes:

1. For purposes of this guideline:

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

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

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

[Options 1 & 2 would also include the following definition:

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

2. *Subsection (b)(1) provides for a two-level or four-level enhancement based on the degree to which the offense involved aggravating factors listed in that subsection. If the offense involved aggravating factors more serious than the factors listed in subsection (b)(1), the cross reference in subsection (c) most likely will apply, if the resulting offense level is greater, because the more serious conduct will be covered by another offense guideline from Chapter Two, Part A. For example, §2A2.2 (Aggravated Assault) most likely would apply pursuant to subsection (c) if the offense involved assaultive conduct in which injury more serious than bodily injury occurred or if a dangerous weapon was used rather than merely possessed.*

[Option 1 would also include the following conforming changes to Notes 3 and 4:

3. *In determining whether subsection (b)(1)(~~D~~)(E) applies, the court shall consider, under the totality of the circumstances, any conduct that occurred prior to or during the offense; however, conduct that occurred prior to the offense must be substantially and directly connected to the offense. For example, if a defendant engaged in several acts of stalking the same victim over a period of years (including acts that occurred prior to the offense), then for purposes of determining whether subsection (b)(1)(~~D~~)(E) applies, the court shall look to the totality of the circumstances, considering only those prior acts of stalking the victim that have a substantial and direct connection to the offense.*

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

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

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APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 113(a)(1)	2A2.1, 2A3.1
18 U.S.C. § 113(a)(2)	2A2.2, 2A3.2, 2A3.3, 2A3.4
18 U.S.C. § 113(a)(3)	2A2.2
18 U.S.C. § 113(a)(4)	2A2.3
18 U.S.C. § 113(a)(5) (Class A misdemeanor provisions only)	2A2.3
18 U.S.C. § 113(a)(6)	2A2.2
18 U.S.C. § 113(a)(7)	2A2.3 [, 2A6.2]
18 U.S.C. § 113(a)(8)	2A2.2 [, 2A6.2]

Issues for Comment:

1. Offenses Involving Strangulation, Suffocation, or Attempting to Strangle or Suffocate Under Section 113(a)(8). In light of the new offense at section 113(a)(8) made by the Act, a defendant who commits an assault of a spouse, intimate partner, or dating partner (as defined by the statute) by strangling, suffocating, or attempting to strangle or suffocate may be prosecuted under section 113 with a statutory maximum term of imprisonment of 10 years.

The Commission seeks comment on how, if at all, the guidelines should be amended to address cases involving strangling, suffocating, or attempting to strangle or suffocate. Are the existing provisions in the guidelines, such as the enhancements for bodily injury, adequate to address these cases? If not, how should the Commission amend the guidelines to address this factor?

In particular, should the Commission provide a new enhancement of [3]-[7] levels that applies if the offense involves strangling, suffocating, or attempting to strangle or suffocate? If so, how should such an enhancement interact with the existing enhancements, such as the weapon enhancement and the bodily injury enhancement? For example, should the new enhancement be cumulative with those enhancements, or should it interact with those enhancements in some other way, e.g., by applying only if the bodily injury enhancement does not apply, or by establishing a "cap" of [10]-[12] levels on its cumulative impact with those enhancements?

In addition, should such a new enhancement apply only to cases described in the statute (i.e., cases in which the victim was a spouse, intimate partner, or dating partner), or should it apply to any cases involving strangling, suffocating, or attempting to strangle or suffocate?

Finally, should the new offense be referenced in Appendix A (Statutory Index) to the aggravated assault guideline, to the domestic violence guideline, or to both guidelines? To the extent the offense is referenced to the domestic violence guideline, how, if at all, should that guideline be amended to address cases involving strangling, suffocating, or attempting to strangle or suffocate?

2. Supervised Release. The Commission seeks comment on the imposition of supervised release in cases involving domestic violence, e.g., cases in which the defendant was convicted of an assault offense or a domestic violence or stalking offense. Section 5D1.1 (Imposition of a Term of Supervised Release) requires the court to impose a term of supervised release only when required by statute or when a sentence of imprisonment of more than one year is imposed. Should the Commission provide additional guidance on the imposition of supervised release (or on the length of a term of supervised release) in cases involving domestic violence? How, if at all, should the Commission amend the guidelines to address the imposition of supervised release in such cases?
3. Assault With Intent to Commit Certain Sex Offenses Under Section 113(a)(1) and (2). In light of the changes to section 113(a)(1) and (2) made by the Act, a defendant who commits an assault with intent to commit certain sex offenses may now be prosecuted under section 113.

The Commission invites comment on offenses involving an assault with intent to commit a sex offense (as described in section 113(a)(1) and (2)) and how the guidelines should address such

offenses. In particular:

- (A) *To what extent should an assault with intent to commit a sex offense be treated by the guidelines as a type of assault, and to what extent as a type of attempted sex offense? For example, the proposed amendment would amend Appendix A (Statutory Index) to provide references to one or more sex offense guidelines. Should the Commission instead, or in addition, provide references to one or more assault guidelines?*

To the extent offenses under section 113(a)(1) and (2) are referenced to one or more sex offense guidelines, what changes, if any, to those guidelines would be appropriate to account for offenses under section 113(a)(1) and (2)?

Likewise, to the extent offenses under section 113(a)(1) and (2) are referenced to one or more assault guidelines, what changes, if any, to those guidelines would be appropriate to account for offenses under section 113(a)(1) and (2)? For example, should the Commission provide a new enhancement of [2][4][6] levels to account for an assault with an intent to commit a sex offense, or should the Commission provide a cross reference to one or more sex offense guidelines, or both?

- (B) *There are a variety of provisions in the guidelines that apply when the conduct involves a sex offense or attempted sex offense. To what extent should these provisions also apply when the conduct involves an assault with intent to commit a sex offense? How, if at all, should the Commission amend the guidelines to clarify whether or not these provisions apply when the conduct involves an assault with intent to commit a sex offense? For example:*

- (1) *Under §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in section 2241 or 2242), a cross reference to §2A3.1 applies. See §2A3.2(c)(1). If the offense involved assault with intent to commit criminal sexual abuse, should the cross reference also apply?*

Similar issues arise with the cross references in §§2A3.2(c)(2), 2A3.4(c)(1), 2G1.1(c)(1), and 2G1.3(c)(3). How, if at all, should they be revised?

- (2) *Under §§2A3.1 and 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), if the offense involved "conduct described in" section 2241(a) or (b) or 2242, an enhancement or a higher base offense level applies. See §§2A3.1(b)(1), 2A3.4(a). Should these provisions similarly apply if the offense involved an assault with intent to commit a violation of section 2241(a) or (b) or 2242?*

Similar issues arise with the enhancements in §2G2.1(b)(2)(A) and (B) and the accompanying commentary. How, if at all, should they be revised?

- (3) *Under §2A4.1 (Kidnapping, Abduction, Unlawful Restraint), if the victim was*

"sexually exploited," an enhancement of 6 levels applies. *See* §2A4.1(b)(5). Application Note 3 defines "sexually exploited" to include "offenses set forth in" sections 2241-2244, 2251, and 2421-2423. If the offense involved assault with intent to commit a sex offense under sections 2241-2244, should an enhancement of [6] levels also apply?

Similar issues arise with the enhancements at §§2G2.2(b)(1), (3), and (5) and 2G2.6(b)(3), and the accompanying commentary. How, if at all, should they be revised?

- (4) Under §2J1.2(b)(1)(A), an enhancement applies if (among other things) the defendant was convicted under 18 U.S.C. § 1001 and the statutory maximum term of eight years' imprisonment applies because "the matter relates to" a sex offense under chapter 109A. If the matter relates to an assault with intent to commit such a sex offense, should this enhancement apply?
- (5) Under §4B1.5, certain provisions apply if the instant offense of conviction is a "covered sex crime." That term is defined in Application Note 2 to include (among other things) an offense, perpetrated against a minor, under chapter 109A. If the offense involved an assault with intent to commit such an offense, should the definition of "covered sex crime" apply?
- (6) Under §5D1.2(b), certain provisions apply if the offense is a "sex offense." That term is defined in Application Note 1 to include (among other things) an offense, perpetrated against a minor, under chapter 109A. If the offense involved an assault with intent to commit such an offense, should the definition of "sex offense" apply?

Similar issues are presented in §§5H1.6, 5K2.0(a)(1)(B) and (b), 5K2.13, 5K2.20(a), and 5K2.22. How, if at all, should these provisions be revised?

(B) 18 U.S.C. § 1153 (Offenses committed within Indian country) ("Major Crimes Act")

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

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

Offenses under section 1153 are referenced in Appendix A to 17 guidelines to account for the various

listed offenses. These 17 guidelines include references to the three different guidelines (§§2A2.1, 2A2.2, and 2A2.3) to which felony assaults under section 113 are currently referenced.

Part A, above, would provide certain additional Appendix A references for offenses under section 113, including one possible reference not currently included among the 17 references for section 1153 — a reference to §2A6.2. This part of the proposed amendment would similarly revise the Appendix A references for offenses under section 1153 by including the bracketed possibility of a reference to §2A6.2.

An issue for comment is also included on 18 U.S.C. § 1152, commonly known as the General Crimes Act, and whether the Appendix A reference to §2B1.5 is appropriate.

Proposed Amendment:

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* * *

18 U.S.C. § 1152	2B1.5
18 U.S.C. § 1153	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A4.1, [2A6.2,] 2B1.1, 2B1.5, 2B2.1, 2B3.1, 2K1.4

Issue for Comment:

1. *The Commission seeks comment on offenses under 18 U.S.C. § 1152, commonly known as the General Crimes Act. Section 1152 generally provides that the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States shall extend to the Indian country.*

Section 1152 is referenced in Appendix A (Statutory Index) to a single guideline, §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources).

The Commission seeks comment on what, if any, Appendix A references are appropriate for offenses under section 1152. Is the reference to §2B1.5 appropriate? Should the Commission provide additional Appendix A references for section 1152 and, if so, to which guidelines? In the alternative, are Appendix A references unnecessary for section 1152 and, if so, should the Commission delete section 1152 from Appendix A?

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

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

Before these statutory changes, these offenses generally required as a jurisdictional element of the offense that the defendant travel in interstate or foreign commerce or into or out of Indian country or within the special maritime and territorial jurisdiction of the United States or, in the case of a stalking offense under section 2261A(2), that the defendant use the mail or any facility of interstate or foreign commerce. As a result of the statutory changes, the jurisdictional element may instead be met by presence in the special maritime and territorial jurisdiction of the United States or, in the case of a stalking offense under section 2261A(2), by using an interactive computer service, electronic communication service, or electronic communication system. The proposed amendment revises the definition of "stalking" in the Commentary to §2A6.2 to conform to these statutory changes.

These statutory changes have also expanded and restated the elements of stalking offenses under section 2261A to cover a broader range of conduct. As a result of these statutory changes, section 2261A has been extended to cover placing a person under surveillance with intent to kill, injure, harass, or intimidate; and conduct that causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress. The proposed amendment expands the definition of "stalking" in the Commentary to §2A6.2 to reflect the expanded conduct covered by these statutory changes to section 2261A.

Proposed Amendment:

§2A6.2. Stalking or Domestic Violence

* * *

Commentary

* * *

Application Notes:

1. *For purposes of this guideline:*

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

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

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

* * *

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

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

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

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

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

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

Proposed Amendment:

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* * *

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

8 U.S.C. § 1375a(d)(5)(B)(i) 2H3.1

8 U.S.C. § 1375a(d)(5)(B)(ii) 2H3.1

8 U.S.C. § 1375a(d)(5)(B)(iii) 2B1.1

(E) 47 U.S.C. § 223 (Obscene or harassing telephone calls)

Synopsis of Proposed Amendment: *This part of the proposed amendment addresses offenses under 47 U.S.C. § 223 (Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications), which were modified by the Act.*

Section 223(a) sets forth a range of prohibited acts involving communication that is obscene or that is made with intent to harass, or both. A person who commits any of these acts is subject to a maximum term of imprisonment of two years. Among other things, the Act clarified that communication with the intent to annoy is not prohibited by section 223(a). Three of the prohibited acts in section 223(a) are referenced in Appendix A (Statutory Index) to §2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens).

Other prohibited acts in section 223(a) are not referenced in Appendix A. The proposed amendment provides Appendix A references for these offenses.

Subsection (a)(1)(A) prohibits a communication that is obscene or child pornography, with intent to abuse, threaten, or harass another person. The proposed amendment references this offense to any one or more of three bracketed options:

§2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens);

§2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor); and

§2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names).

Subsection (a)(1)(B) prohibits a communication that is obscene or child pornography, knowing that the recipient of the communication is under 18 years of age. The proposed amendment references this offense to either or both of two bracketed options: §§2G2.2 and 2G3.1.

Subsection (a)(2) prohibits a person from knowingly permitting a telecommunications facility under his

control to be used for any activity covered by subsection (a)(1). The proposed amendment references this offense to any one or more of three bracketed options: §§2A6.1, 2G2.2, and 2G3.1.

Proposed Amendment:

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* * *

47 U.S.C. § 223(a)(1)(A)	[2A6.1][2G2.2][2G3.1]
47 U.S.C. § 223(a)(1)(B)	[2G2.2][2G3.1]
47 U.S.C. § 223(a)(1)(C)	2A6.1
47 U.S.C. § 223(a)(1)(D)	2A6.1
47 U.S.C. § 223(a)(1)(E)	2A6.1
47 U.S.C. § 223(a)(2)	[2A6.1][2G2.2][2G3.1]
47 U.S.C. § 223(b)(1)(A)	2G3.2

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

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

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

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

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

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

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

Proposed Amendment:

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* * *

18 U.S.C. § 2423(a) 2G1.3

18 U.S.C. § 2423(b) 2G1.3

18 U.S.C. § 2423(c) 2G1.3

18 U.S.C. § 2423(d) 2G1.3

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

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

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

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

The proposed amendment references this offense to any one or more of four bracketed options:

- §2B1.1 (Theft, Property Destruction, and Fraud);*
- §2H4.1 (Peonage, Involuntary Servitude, Slave Trade, and Child Soldiers);*
- §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien); and*
- §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport).*

An issue for comment is also included.

Proposed Amendment:

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* * *

18 U.S.C. § 1593A 2H4.1

18 U.S.C. § 1597 [2B1.1][2H4.1][2L1.1][2L2.2]

Issue for Comment:

1. *The Commission seeks comment on offenses under section 1597. What guideline or guidelines are appropriate for these offenses? Which, if any, of the bracketed options in the proposed amendment should the Commission provide? Should the Commission instead provide for such offenses to be sentenced under §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline))?*

To the extent the Commission does provide a reference to one or more guidelines, what changes, if any, to those guidelines would be appropriate to account for offenses under section 1597? For example, to the extent such offenses are referenced to §2H4.1, should the Commission provide a new alternative base offense level for offenses under section 1597 to account for the fact that such offenses are Class A misdemeanors? What alternative base offense level would be appropriate?

PROPOSED AMENDMENT: 1B1.10

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

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

Original Guideline Range Above the Mandatory Minimum

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

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

Bottom of Original Guideline Range Below the Mandatory Minimum

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

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

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

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

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

The proposed amendment presents two options for responding to these conflicts:

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

Option 2 *would generally adopt the approach of the Eleventh Circuit in Glover, the Sixth Circuit in Joiner, and the Second Circuit in Johnson, which is also consistent with the approach of the Eighth Circuit in Golden. It would amend §1B1.10 to specify that, if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of §1B1.10 the amended guideline range shall be determined after operation of §5G1.1 or §5G1.2, as appropriate.*

Each option also adds commentary with examples.

Proposed Amendment:

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

(a) Authority.—

- (1) In General.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c)(d) below, the court may reduce the defendant’s term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant’s term of imprisonment shall be consistent with this policy statement.
- (2) Exclusions.—A reduction in the defendant’s term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—
 - (A) none of the amendments listed in subsection (c)(d) is applicable to the defendant; or
 - (B) an amendment listed in subsection (c)(d) does not have the effect of lowering the defendant’s applicable guideline range.
- (3) Limitation.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

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

- (1) In General.—In determining whether, and to what extent, a reduction in the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c)(d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c)(d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.
- (2) Limitation and Prohibition on Extent of Reduction.—
 - (A) Limitation.—Except as provided in subdivision (B), the court shall not reduce the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range

determined under subdivision (1) of this subsection.

- (B) Exception for Substantial Assistance.—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.
- (C) Prohibition.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Cases Involving Mandatory Minimum Sentences and Substantial Assistance.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement:

[Option 1: the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction).]

[Option 2: the amended guideline range shall be determined after operation of §5G1.1 (Sentencing on a Single Count of Conviction) or §5G1.2 (Sentencing on Multiple Counts of Conviction), as appropriate.]

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

Commentary

Application Notes:

1. Application of Subsection (a).—

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

listed in subsection ~~(c)~~(d) is applicable to the defendant; or (ii) an amendment listed in subsection ~~(c)~~(d) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).

(B) Factors for Consideration.—

- (i) In General.—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).
- (ii) Public Safety Consideration.—The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).
- (iii) Post-Sentencing Conduct.—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the term of imprisonment in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

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

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

If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward

departure or variance), the court likewise may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

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

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

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

4. *Application of Subsection (c).—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement:*

[Option 1, continued:

the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

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

range remains 108 to 135 months.

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

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

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

[Option 2, continued:

the amended guideline range shall be determined after operation of §5G1.1 (Sentencing on a Single Count of Conviction) or §5G1.2 (Sentencing on Multiple Counts of Conviction), as appropriate. For example:

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

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent

below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 90 months (representing a reduction of 25 percent below the minimum of the amended guideline range of 120 months) would amount to a comparable reduction and may be appropriate.

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

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of 25 percent below the minimum of the original guideline range of 120 months. However, subsection (b)(2)(B) precludes this defendant from receiving any further reduction, because the point from which any comparable reduction would be determined has not changed; the minimum of the original guideline range (120 months) and the minimum of the amended guideline range (120 months) are the same, so any comparable reduction that may be appropriate under subsection (b)(2)(B) would be equivalent to the reduction Defendant B already received in the original sentence of 90 months.]

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

56. *Supervised Release.*—

- (A) *Exclusion Relating to Revocation.*—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.
- (B) *Modification Relating to Early Termination.*—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court

determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

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

Background: Section 3582(c)(2) of Title 18, United States Code, provides: "[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

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

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

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

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences

falling above the old guidelines^{} or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).*

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

PROPOSED AMENDMENT: FELON IN POSSESSION

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

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

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

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

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

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

When the Defendant Used the Firearm in Connection With Another Offense

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

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

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

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

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

The proposed amendment provides two options for clarifying the operation of the firearms guideline in

these situations.

Option 1 amends subsections (b)(6)(B) and (c)(1) to limit their application to firearms and ammunition identified in the offense of conviction. It makes conforming changes to the Commentary. Included among those conforming changes is an example of how the relevant conduct principles operate in a case in which the defendant is convicted of being a felon in possession of a firearm and also committed another offense with that same firearm. The example provides:

Defendant A is convicted of being a felon in possession of a shotgun. The court determines that Defendant A used the shotgun in connection with a robbery. Under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level. The use of the shotgun in connection with the robbery is a factor specified in subsections (b)(6)(B) and (c)(1) and therefore is relevant conduct under §1B1.3(a)(4) ("any other information specified in the applicable guideline").

Option 2 amends the Commentary to §2K2.1 to clarify that subsections (b)(6)(B) and (c)(1) are not limited to firearms and ammunition identified in the offense of conviction. For a case in which the defendant is convicted of being a felon in possession of a firearm and also committed another offense with that firearm, it provides the same example provided by Option 1. For a case in which the defendant is convicted of being a felon in possession of a firearm and also committed another offense with a different firearm, it provides an additional example. In such a case, the court must, as a threshold matter, determine whether the two felon in possession offenses are relevant conduct to each other. Specifically, it provides the following example:

Defendant B is convicted of being a felon in possession of a shotgun. The court determines that Defendant B also unlawfully possessed a handgun and that Defendant B used the handgun in connection with a robbery. Under these circumstances, the threshold question for the court is whether the two unlawful possession offenses (for the shotgun and for the handgun) were part of the same course of conduct or common scheme or plan. See §1B1.3(a)(2). If they were, then both felon in possession offenses are used in determining the offense level. Accordingly, subsection (b)(6)(B) would apply, and the cross reference in subsection (c)(1) would also apply if it results in a greater offense level.

Several issues for comment are also provided.

Proposed Amendment:

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

- (a) Base Offense Level (Apply the Greatest):

- (1) **26**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
- (2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
- (3) **22**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;
- (4) **20**, if—
 - (A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or
 - (B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d); or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;
- (5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a);
- (6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d); or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;
- (7) **12**, except as provided below; or
- (8) **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1).

(b) Specific Offense Characteristics

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

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

(2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level **6**.

(3) If the offense involved—

(A) a destructive device that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by **15** levels; or

(B) a destructive device other than a destructive device referred to in subdivision (A), increase by **2** levels.

(4) If any firearm (A) was stolen, increase by **2** levels; or (B) had an altered or obliterated serial number, increase by **4** levels.

The cumulative offense level determined from the application of subsections (b)(1) through (b)(4) may not exceed level **29**, except if subsection (b)(3)(A) applies.

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

(6) If the defendant—

(A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

[Option 1:

(B) used or possessed any firearm or ammunition **identified in the offense of conviction** in connection with another felony offense; or possessed or transferred any firearm or ammunition **identified**

in the offense of conviction with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,]

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

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

(c) Cross Reference

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

- (A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or
(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

* * *

Application Notes:

* * *

[Option 1, continued:

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

- (A) In General.—Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition identified in the offense of conviction facilitated, or had the potential of facilitating, another felony offense or another offense, respectively.
(B) Application When Other Offense is Burglary or Drug Offense.—Subsections (b)(6)(B) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm identified in the offense of conviction, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm identified in the count of

conviction is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.

(C) Definitions.—

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

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

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

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

Defendant A is convicted of being a felon in possession of a shotgun. The court determines that Defendant A used the shotgun in connection with a robbery. Under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level. The use of the shotgun in connection with the robbery is a factor specified in subsections (b)(6)(B) and (c)(1) and therefore is relevant conduct under §1B1.3(a)(4) ("any other information specified in the applicable guideline").]

[Option 2:

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

(A) In General.—Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively.

(B) Application When Other Offense is Burglary or Drug Offense.—Subsections (b)(6)(B) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing

materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.

(C) Definitions.—

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

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

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

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

(i) Defendant A is convicted of being a felon in possession of a shotgun. The court determines that Defendant A used the shotgun in connection with a robbery. Under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level. The use of the shotgun in connection with the robbery is a factor specified in subsections (b)(6)(B) and (c)(1) and therefore is relevant conduct under §1B1.3(a)(4) ("any other information specified in the applicable guideline").

(ii) Defendant B is convicted of being a felon in possession of a shotgun. The court determines that Defendant B also unlawfully possessed a handgun and that Defendant B used the handgun in connection with a robbery. Under these circumstances, the threshold question for the court is whether the two unlawful possession offenses (for the shotgun and for the handgun) were part of the same course of conduct or common scheme or plan. See §1B1.3(a)(2). If they were, then both felon in possession offenses are used in determining the offense level. Accordingly, subsection (b)(6)(B) would apply, and the cross reference in subsection (c)(1) would also apply if it results in a greater offense level.]

* * *

Issues for Comment:

1. *The Commission invites comment on cases in which the defendant is convicted of a firearms offense (e.g., being a felon in possession of a firearm) but also engaged in other offense conduct with a firearm, such as robbery or attempted murder. The firearms guideline accounts for such conduct through the operation of subsections (b)(6)(B) and (c)(1), and the proposed amendment would clarify the operation of these provisions.*

Does the proposed amendment adequately clarify the operation of subsections (b)(6)(B) and (c)(1) in these cases? If not, how should the Commission revise the proposed amendment to better clarify the operation of subsections (b)(6)(B) and (c)(1) in these cases?

2. *In addition, the Commission seeks comment on the operation and scope of subsections (b)(6)(B) and (c)(1). Are there inconsistencies in how these provisions are applied? Should the Commission consider narrowing or clarifying the scope of these provisions, particularly in cases in which the defendant was convicted of possessing one firearm but also used another firearm in connection with another offense? Should the cross reference in subsection (c)(1) be deleted?*

PROPOSED AMENDMENT: 5D1.2

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

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

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

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

A. When a Statutory Minimum Term of Supervised Release Applies

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

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

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

Part A provides two options for resolving these differences. Option 1 adopts the approach of the Seventh Circuit in Gibbs and Goodwin. Option 2 adopts the approach of the Eighth Circuit in Deans. Each option amends the commentary to provide examples of how subsection (c) would operate.

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

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

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

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

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

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

Part B responds to the application issue by amending the commentary to §5D1.2 to clarify that offenses under section 2250 are not "sex offenses". An issue for comment seeks comment on supervised release for offenses under section 2250, including what term should be provided by the supervised release guidelines and whether there are distinctions among section 2250 offenses that should be accounted for in the supervised release guidelines (e.g., in the length or conditions of supervised release).

Proposed Amendment:

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

§5D1.2. Term of Supervised Release

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

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

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

"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 determined under subsection (a).
3. 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. Factors Considered.—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 to §5D1.1 (Imposition of a Term of Supervised Release). The court should ensure that the term imposed on the defendant is long enough to address the purposes of imposing supervised release on the defendant.
5. Early Termination and Extension.—The court has authority to terminate or extend a term of supervised release. See 18 U.S.C. § 3583(e)(1), (2). The court is encouraged to exercise this authority in appropriate cases. The prospect of exercising this authority is a factor the court may wish to consider in determining the length of a term of supervised release. For example, the court may wish to consider early termination of supervised release if the defendant is an abuser of narcotics, other controlled substances, or alcohol who, while on supervised release, successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant.

[Option 1:

6. Application of Subsection (c).—Subsection (c) specifies how a statutorily required minimum term of supervised release may affect the minimum term of supervised release provided by the guidelines. For example, if subsection (a) provides a range of two years to five years, but the relevant statute requires a minimum term of supervised release of three years and a maximum term of life, the term of supervised release provided by the guidelines is restricted by subsection (c) to three years to five years. Similarly, if subsection (a) provides a range of two years to five years, but the relevant statute requires a minimum term of supervised release of five years and a maximum term of life, the term of supervised release provided by the guidelines is five years.

The following example illustrates the interaction of subsections (a) and (c) when subsection (b) is also involved. In this example, subsection (a) provides a range of two years to five years; the relevant statute requires a minimum term of supervised release of five years and a maximum term of life; and the offense is a sex offense under subsection (b). The effect of subsection (b) is to raise the maximum term of supervised release from five years (as provided by subsection (a)) to life, yielding a range of two years to life. The term of supervised release provided by the guidelines is then restricted by subsection (c) to five years to life. In this example, a term of

supervised release of more than five years would be a guideline sentence. In addition, subsection (b) contains a policy statement recommending that the maximum — a life term of supervised release — be imposed.]

[Option 2:

6. *Application of Subsection (c).—Subsection (c) specifies how a statutorily required minimum term of supervised release may affect the term of supervised release provided by the guidelines. In such a case, the range provided by statute supersedes the range provided by subsection (a). 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 three years to life.]*

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

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

§5D1.2. Term of Supervised Release

* * *

Commentary

Application Notes:

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

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

* * *

Issue for Comment:

1. *The Commission seeks comment on supervised release for defendants convicted under section 2250. Under section 2250(a), a defendant who fails to register as a sex offender shall be imprisoned for not more than 10 years. Under section 2250(c), an individual who fails to register under section 2250(a) and commits a crime of violence shall be imprisoned for not less than 5 years and not more than 30 years, in addition to and consecutive to the punishment for violating section 2250(a).*

First, the Commission seeks comment on what length term of supervised release the guidelines should provide for offenses under section 2250. When a defendant is convicted of such an offense, the court is required by statute to impose a term of supervised release of at least five years and up to life. See 18 U.S.C. § 3583(k). What term of supervised release should the guidelines provide? In particular, should the guidelines provide for a term of supervised release of:

- (A) not less than five years and up to life;*
- (B) not less than five years and up to life, with a life term recommended;*
- (C) precisely five years; or*
- (D) some other option?*

Second, the Commission seeks comment on whether there are distinctions among section 2250 offenses that should be accounted for in the supervised release guidelines (e.g., in the length or conditions of supervised release). In particular:

- (i) Should a defendant convicted under section 2250(c) be treated differently from a defendant convicted under section 2250(a)? For example, should the guidelines provide a longer term of supervised release for an offense under section 2250(c) than for an offense under section 2250(a)? If so, how much longer? Should the guidelines provide more conditions of supervised release for an offense under section 2250(c) than for an offense under section 2250(a)? If so, what conditions?*
- (ii) Should a defendant who was convicted of a sex offense against a minor, and was then convicted of failing to register that conviction, be treated differently from a defendant who was convicted of a sex offense against an adult? For example, should the guidelines provide a longer term of supervised release for a defendant whose underlying sex offense was against a minor than for a defendant whose underlying sex offense was against an adult? If so, how much longer? Should the guidelines provide more conditions of supervised release for a defendant whose underlying sex offense was against a minor than for a defendant whose underlying sex offense was against an adult? If so, what conditions?*
- (iii) Specifically for defendants convicted under section 2250(c), should a defendant whose "crime of violence" under section 2250(c) was committed against a minor be treated differently from a defendant whose "crime of violence" was committed against an adult? For example, should the guidelines provide a longer term of supervised release for a defendant whose "crime of violence" was against a minor than for a defendant whose "crime of violence" was against an adult? If so, how much longer? Should the guidelines provide more conditions of supervised release for a defendant whose "crime of violence" was against a minor than for a defendant whose "crime of violence" was against an adult? If so, what conditions?*

PROPOSED AMENDMENT: 2L1.1

Synopsis of Proposed Amendment: *This amendment responds to concerns that have been raised about cases in which aliens are transported through dangerous terrain, e.g., along the southern border of the United States. The Commission has heard that the guidelines may not adequately account for the harms that may be involved in such cases. For example, aliens transported through such terrain may face the risk of starvation, dehydration, or exposure, ranch property may be damaged or destroyed, and border patrol search and rescue teams may need to be involved.*

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

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

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

An issue for comment is also included.

Proposed Amendment:

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

(a) Base Offense Level:

(1) **25**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation

involving an alien who was inadmissible under 8 U.S.C. § 1182(a)(3);

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

(b) Specific Offense Characteristics

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

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

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

(6) If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.

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

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

(8) (Apply the greater):

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

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

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

(c) Cross Reference

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

Commentary

* * *

Application Notes:

* * *

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

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

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

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

Issue for Comment:

1. *The Commission seeks comment on cases in which individuals guide persons through, or abandon persons in, dangerous terrain (e.g., on the southern border of the United States). Are there aggravating or mitigating factors in such cases that the Commission should take into account in the guidelines? If so, what are the factors, and how should the Commission amend the guidelines to take them into account? Specifically:*
 - (A) *The Commission has heard concern that §2L1.1 may not be adequate in cases in which aliens are transported through desert-like terrain. Such transport, it has been argued, is inherently dangerous in that aliens may lack adequate food, water, and clothing for the climate and length of the journey, and guides may become lost or abandon the aliens whom they lead. Similar risks may be associated with transporting aliens through mountainous regions. See, e.g., United States v. Rodriguez-Cruz, 255 F.3d 1054 (9th Cir. 2001). Do these factors support a per se application of the enhancement at subsection (b)(6)? Instead, should the guideline account for these factors in some other way? If so, how should the Commission amend the guidelines to take these factors into account?*
 - (B) *Concern has also been raised that, in cases in which individuals guide aliens through private lands, ranch property may be damaged or destroyed. Should this guideline account for such damage? If so, how should the Commission amend the guidelines to take this into account?*
 - (C) *The Commission has also heard that some alien transportation cases involve the rescue of aliens by special border patrol search and rescue teams. Should this guideline account for the added resources required for these search and rescue missions? If so, how should the Commission amend the guidelines to take this into account?*

PROPOSED AMENDMENT: 5G1.3

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

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

The proposed amendment is in three parts, each of which amend §5G1.3. The first part addresses cases in which a defendant is subject to an undischarged term of imprisonment that is relevant conduct but does not result in a Chapter Two or Three Increase. The second part addresses the adjustment of sentences for defendants subject to anticipated state terms of imprisonment. The third part addresses cases in which certain deportable aliens are subject to undischarged terms of imprisonment. Although these three parts revise the same guideline in overlapping ways, the Commission seeks comment on each of them independently. They are presented not as alternatives to each other but rather as independent proposals that could, if appropriate, be adopted in combination.

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

Synopsis of Proposed Amendment: *Part A amends §5G1.3(b) to require a court to adjust the sentence and impose concurrent sentences in any case in which the prior offense is relevant conduct under the*

provisions of §1B1.3(a)(1), (a)(2), or (a)(3), whether or not it also formed the basis for a Chapter Two or Chapter Three increase. Conforming changes are made to the application notes as well.

An issue for comment is also included.

Proposed Amendment:

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

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

Commentary

Application Notes:

1. Consecutive Sentence - Subsection (a) Cases. Under subsection (a), the court shall impose a consecutive sentence when the instant offense was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.
2. Application of Subsection (b).—

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

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

3. *Application of Subsection (c).*—

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

- (i) *the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a));*
 - (ii) *the type (e.g., determinate, indeterminate/parolable) and length of the prior undischarged sentence;*
 - (iii) *the time served on the undischarged sentence and the time likely to be served before release;*
 - (iv) *the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and*
 - (v) *any other circumstance relevant to the determination of an appropriate sentence for the instant offense.*
- (B) *Partially Concurrent Sentence.*—*In some cases under subsection (c), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the prior undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.*
- (C) *Undischarged Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release.*—*Subsection (c) applies in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and has had such probation, parole, or supervised release revoked. Consistent with the policy set forth in Application Note 4 and subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.*
- (D) *Complex Situations.*—*Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (c) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.*
- (E) *Downward Departure.*—*Unlike subsection (b), subsection (c) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (c), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the*

relevant conduct for the instant offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

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

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

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

* * *

Issue for Comment:

1. *The Commission seeks comment on the application of §5G1.3(b) as it relates to the relevant conduct rules in §1B1.3 and any Chapter Two or Three offense level increases that may apply at sentencing. Specifically, the proposed amendment would amend §5G1.3(b) to delete the requirement that the prior offense form the basis for a Chapter Two or Chapter Three increase, but would maintain the requirement that the prior offense be relevant conduct under the provisions of only certain subsections of the relevant conduct rules, namely subsections (a)(1), (a)(2), or (a)(3) of §1B1.3. Should the proposed amendment also allow application of §5G1.3(b) if the prior offense was relevant conduct under subsection (a)(4) of §1B1.3, relating to "any other information specified in the applicable guideline"? Such an amendment would, for instance, authorize a court to apply §5G1.3(b) where the prior offense is an aggravated felony for which the defendant received an increase under §2L1.2 (Unlawfully Entering or Remaining in the United States), a circumstance not currently covered because the aggravated felony is not relevant conduct under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3.*

(B) Adjustment for An Anticipated State Term of Imprisonment

Synopsis of Proposed Amendment: *Part B amends §5G1.3 to provide for an adjustment to a federal sentence in cases in which there is an anticipated, but not yet imposed, state term of imprisonment. Similar to §5G1.3(b), the new subsection (c) allows a court to adjust the federal sentence for any anticipated state term of imprisonment if subsection (a) does not apply, and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct). The proposed amendment brackets for comment whether a sentencing court shall or whether it may adjust such a defendant's sentence for any anticipated period of imprisonment. The proposed amendment also brackets for comment whether the other offense must also be the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), or whether, as in Part A, this requirement should be removed. An issue for comment is also included.*

Proposed Amendment:

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

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

imprisonment will not be credited to the federal sentence by the Bureau of Prisons.

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

Commentary

Application Notes:

* * *

3. Application of Subsection (c).—Subsection (c) applies to cases in which the federal court anticipates that, after the federal sentence is imposed, the defendant may be sentenced in state court and will serve a state sentence before being transferred to federal custody for federal imprisonment. In such a case, where the other offense is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) [and was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments)], the court [may][shall] adjust the sentence for the period of time anticipated to be served in state custody. To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any such adjustment be clearly stated on the Judgment in a Criminal Case Order as an adjustment pursuant to §5G1.3(c), rather than as a credit for time served.

34. Application of Subsection (e)(d).—

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

* * *

(B) Partially Concurrent Sentence.—In some cases under subsection (e)(d), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the prior undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.

(C) Undischarged Terms of Imprisonment Resulting from Revocations of Probation, Parole

or Supervised Release.—Subsection ~~(c)~~(d) applies in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and has had such probation, parole, or supervised release revoked. Consistent with the policy set forth in Application Note 4 and subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.

- (D) *Complex Situations.*—Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection ~~(c)~~(d) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.
- (E) *Downward Departure.*—Unlike subsections (b) and (c), subsection ~~(c)~~(d) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection ~~(c)~~(d), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

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

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

* * *

Issue for Comment:

1. *The Commission seeks comment on whether there are cases in which a federal court anticipates that a period of time spent by the defendant in pretrial custody in connection with the anticipated state sentence will not be credited to the federal sentence by the Bureau of Prisons. How, if at*

all, should the guidelines account for such cases? Should the guidelines allow the federal court to adjust the sentence for that period of time? Should the guidelines provide a departure provision to account for such cases?

(C) Sentencing of Deportable Aliens With Unrelated Terms of Imprisonment

Synopsis of Proposed Amendment: *Part C amends §5G1.3 by adding a new subsection (c) to provide for an adjustment if a defendant is a deportable alien who is likely to be deported after imprisonment and the defendant is serving an undischarged term of imprisonment that resulted from an unrelated offense. The proposed amendment brackets for comment whether a sentencing court shall or whether it may adjust such a defendant's sentence for any period of imprisonment already served on the undischarged term. It also brackets for comment whether the new subsection (c) should apply notwithstanding whether either subsection (a) or (b) of §5G1.3 would ordinarily apply to the defendant, or whether subsection (c) only applies if subsection (a), relating to offenses committed while serving a sentence of imprisonment, does not otherwise apply to the defendant. The proposed amendment also adds a new application note to the commentary to §5G1.3 describing the new subsection (c) and providing an example of its application.*

The proposed amendment further amends §5K2.23 to provide that if a defendant who is a deportable alien who is likely to be deported after imprisonment has completed serving a term of imprisonment and the proposed subsection (c) of §5G1.3 would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense, a departure is warranted. The commentary to §5G1.3 is also amended in Note 4 (related to downward departures) to reflect the change to §5K2.23.

An issue for comment is also included requesting comment on whether the proposed amendment should instead amend §2L1.2 (Unlawfully Entering or Remaining in the United States) to provide for a downward departure.

Proposed Amendment:

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

- (a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
- (b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:

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

(c) Notwithstanding subsection[s (a) and] (b), if the defendant is a deportable alien who is likely to be deported after imprisonment and is serving an undischarged term of imprisonment that resulted from an unrelated offense, the court [may][shall] adjust the sentence for any period of imprisonment already served on the undischarged term if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons.

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

Commentary

Application Notes:

1. Consecutive Sentence - Subsection (a) Cases. Under subsection (a), the court shall impose a consecutive sentence when the instant offense was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.

2. Application of Subsection (b).—

(A) In General.—Subsection (b) applies in cases in which all of the prior offense (i) is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct); and (ii) has resulted in an increase in the Chapter Two or Three offense level for the instant offense. Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsections (c) and (d).

* * *

3. Application of Subsection (c).—

(A) In general.—Subsection (c) applies in cases in which the defendant is a deportable alien who likely will be deported after imprisonment and the defendant is serving an undischarged term of imprisonment for an unrelated offense. In such a case, the court [may][shall] adjust the defendant's sentence to account for any time already served on the undischarged term.

(B) *Example.—The following is an example in which subsection (c) applies and an adjustment to the sentence is appropriate:*

The defendant is convicted of a federal offense for illegal reentry after conviction for an aggravated felony. The defendant received a ten-month sentence of imprisonment for an unrelated state offense and has served four months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 18-24 months (Chapter Two offense level of 16 based on base offense level of 8 and 8-level increase for aggravated felony; 3-level reduction for acceptance of responsibility; final offense level of 13; Criminal History Category III). The court determines that the defendant is a deportable alien who likely will be deported after imprisonment and a sentence of 18 months provides the appropriate total punishment. Because the defendant has already served four months on the unrelated state charge as of the date of sentencing on the instant federal offense, a sentence of 14 months achieves this result.

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

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

* * *

(B) Partially Concurrent Sentence.—In some cases under subsection (c)(d), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the prior undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.

(C) Undischarged Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release.—Subsection (c)(d) applies in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and has had such probation, parole, or supervised release revoked. Consistent with the policy set forth in Application Note 4 and subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.

(D) Complex Situations.—Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may

exercise its discretion in accordance with subsection ~~(c)~~(d) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

- (E) Downward Departure.—Unlike subsection (b) and (c), subsection ~~(c)~~(d) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection ~~(c)~~(d), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

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

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

* * *

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

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

* * *

Issue for Comment:

1. The Commission seeks comment on whether the guidelines should instead address this issue by adding a downward departure provision. For instance, several courts have fashioned a

downward departure for those defendants still subject to undischarged state sentences to account for the delay between when an illegal reentry defendant is "found" by immigration authorities and when such a defendant is brought into federal custody. See, e.g., United States v. Sanchez-Rodriguez, 161 F.3d 556, 563-64 (9th Cir. 1998) (affirming downward departure on the basis that, because of the delay in indicting and sentencing the defendant with illegal reentry, he lost the opportunity to serve a greater portion of his state sentence concurrently with his federal sentence); United States v. Barrera-Saucedo, 385 F.3d 533, 537 (5th Cir. 2004) (holding that "it is permissible for a sentencing court to grant a downward departure to an illegal alien for all or part of time served in state custody from the time immigration authorities locate the defendant until he is taken into federal custody"); see also United States v. Los Santos, 283 F.3d 422, 428-29 (2d Cir. 2002) (departure appropriate if the delay was either in bad faith or unreasonable).

Should the Commission include a downward departure in §2L1.2 (Unlawfully Entering or Remaining in the United States) similar to those approved by the circuit courts above? Examples of such a downward departure are the following:

Example 1:

Departure Based on Unrelated State Sentence.—There may be cases in which the defendant is a deportable alien who likely will be deported after imprisonment and is serving [or has served] a sentence for an unrelated state crime. In such a case, a departure may be warranted to account for the time the defendant has already served in state custody.

Example 2:

Departure Based on Unrelated State Sentence.—There may be cases in which the defendant is a deportable alien who likely will be deported after imprisonment and is serving [or has served] a sentence for an unrelated state crime. In such a case, a departure may be warranted to account for the defendant's lost opportunity to serve a greater portion of his state sentence concurrently with his federal sentence.

PROPOSED AMENDMENT: DRUGS

Synopsis of Proposed Amendment: *In August 2013, the Commission indicated that one of its policy priorities would be "[r]eview, and possible amendment, of guidelines applicable to drug offenses, including possible consideration of amending the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) across drug types". See 78 FR 51820 (August 21, 2013). The Commission is publishing this proposed amendment and issue for comment to inform the Commission's consideration of these issues.*

The proposed amendment contains three parts. Part A contains a detailed request for comment on whether any changes should be made to the Drug Quantity Table across drug types, including whether any other changes may be appropriate. Part B contains a proposed amendment that illustrates one possible set of changes to the Drug Quantity Table (together with conforming changes to the chemical quantity tables and certain clerical changes). Part C contains an issue for comment on whether the guidelines adequately address the environmental and other harms of drug production operations (including, in particular, the cultivation of marijuana) on public lands or while trespassing on private property.

(A) Request for Public Comment on Whether Any Changes Should be Made to the Drug Quantity Table Across Drug Types, and Other Possible Changes

Issue for Comment:

1. *The Commission is requesting comment on whether any changes should be made to the Drug Quantity Table across drug types.*

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

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

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

Framework of the Federal Sentencing Guidelines. The Sentencing Reform Act of 1984 established the Commission's organic statute and provided that the Commission, "consistent with all pertinent provisions of any Federal statute," shall promulgate guidelines and policy statements. See 28 U.S.C. § 994(a). It also provided that the Commission shall establish a sentencing range "for each category of offense involving each category of defendant". See 28 U.S.C. § 994(b)(1). Each sentencing range must be "consistent with all pertinent provisions of title 18, United States Code". See 28 U.S.C. § 994(b)(1). Where the guidelines call for imprisonment, the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months. See 28 U.S.C. § 994(b)(2).

In addition, the Commission's organic statute contains a variety of directives to the Commission in promulgating the sentencing guidelines. Among other things, the Commission must ensure that the sentencing guidelines are "formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." See 28 U.S.C. § 994(g). Thus, "[p]ursuant to 28 U.S.C. § 994(g), the Commission intends to consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority." See 78 FR 51820 (August 21, 2013).

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

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

A minimum offense level of 6 and a maximum offense level of 38 are incorporated into the Drug Quantity Table across all drug types. In addition, certain higher minimum offense levels are incorporated into the Drug Quantity Table for particular drug types, e.g., a minimum offense level of 12 applies if the offense involved any quantity of certain Schedule I or II controlled substances. See, e.g., §2D1.1(c)(14); §2D1.1, comment. (n.8(D)) ("Provided, that the minimum

offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12."). Similarly, certain maximum offense levels and associated drug quantity "caps" are incorporated into the Drug Quantity Table for particular drug types, e.g., a maximum offense level of 8 and a combined equivalent weight "cap" of 999 grams of marihuana apply if the offense involved any quantity of Schedule V substances. *See, e.g.,* §2D1.1(c)(16); §2D1.1, comment. (n.8(D)) ("Provided, that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana.>").

Guideline Developments. Since the initial selection of offense levels 26 and 32, the guidelines have been amended many times — often in response to congressional directives — to provide greater emphasis on the defendant's conduct and role in the offense rather than drug quantity. The version of §2D1.1 in the original 1987 Guidelines Manual contained a single specific offense characteristic: a 2-level enhancement if a firearm or other dangerous weapon was possessed. The version of §2D1.1 now in effect contains fourteen enhancements and three downward adjustments (including the "mitigating role cap" provided in subsection (a)(5)), with four enhancements and one downward adjustment added effective November 1, 2010, in response to the emergency directive in the Fair Sentencing Act of 2010, Pub. L. 111–220.

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

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

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

directive in section 8 of the Fair Sentencing Act of 2010, the Commission moved crack cocaine offenses back to a guideline penalty structure based on levels 26 and 32.

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

For those same fiscal years, the overall rates at which crack cocaine defendants received substantial assistance departures under §5K1.1 (Substantial Assistance to Authorities) were 27.8 percent in the fiscal year before the 2007 amendment took effect and 25.3 percent and 25.6 percent in the two fiscal years after the 2007 amendment took effect.

In light of this information, the Commission seeks comment on whether the Commission should consider changing how the base offense levels in the Drug Quantity Table incorporate the statutory mandatory minimum penalties and, if so, how? For example, should the Commission amend the Drug Quantity Table across drug types so that the quantities that trigger the statutory mandatory minimum penalties trigger base offense levels 24 and 30, rather than 26 and 32?

If the Commission were to amend the Drug Quantity Table across drug types, are there any circumstances that should be wholly or partially excluded from such an amendment? If so, what circumstances? For example, if the Commission were to determine that a guideline penalty structure based on levels 24 and 30, rather than based on levels 26 and 32, is appropriate, should any existing specific offense characteristics be increased, or any new specific offense characteristics be promulgated, to offset any such change for certain offenders?

If the Commission were to make changes to the guidelines applicable to drug trafficking cases, what conforming changes, if any, should the Commission make to other provisions of the Guidelines Manual?

(B) Proposed Amendment

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

Under the proposed amendment, §2D1.1 would continue to reflect the minimum offense level of 6 and the maximum offense level of 38 that are incorporated into the Drug Quantity Table across all drug types. It also would continue to reflect the minimum offense levels that are incorporated into the Drug Quantity Table for particular drug types, e.g., the minimum offense level of 12 that applies if the offense involved any quantity of certain Schedule I or II controlled substances. See, e.g., §2D1.1(c)(14); §2D1.1, comment. (n.8(D)) ("Provided, that the minimum offense level from the Drug Quantity Table for any of

these controlled substances individually, or in combination with another controlled substance, is level 12."). Similarly, it would continue to reflect the maximum offense levels and associated drug quantity "caps" that are incorporated into the Drug Quantity Table for particular drug types, e.g., the maximum offense level of 8 and the combined equivalent weight "cap" of 999 grams of marihuana that apply if the offense involved any quantity of Schedule V substances. See, e.g., §2D1.1(c)(16); §2D1.1, comment. (n.8(D)) ("Provided, that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana.").

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

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

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

Proposed Amendment:

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

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

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

(b) Specific Offense Characteristics

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

- (9) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.
- (10) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by **2** levels.
- (11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by **2** levels.
- (12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by **2** levels.
- (13) (Apply the greatest):
- (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
- (B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
- (C) If—
- (i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or
- (ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,
- increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.
- (D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.
- (14) If the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:

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

increase by **2** levels.

- (15) If the defendant receives the **4**-level ("minimal participant") reduction in §3B1.2(a) and the offense involved all of the following factors:

- (A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;
- (B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and
- (C) the defendant had minimal knowledge of the scope and structure of the enterprise,

decrease by **2** levels.

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

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

(d) Cross References

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

(e) Special Instruction

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

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*

Base Offense Level

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

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

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

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

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

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

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

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

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

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

(7)(8) **Level 2624**

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

(8)(9) **Level 2422**

- At least 80 G but less than 100 G of Heroin;
- At least 400 G but less than 500 G of Cocaine;
- At least 22.4 G but less than 28 G of Cocaine Base;
- At least 80 G but less than 100 G of PCP, or
at least 8 G but less than 10 G of PCP (actual);
- At least 40 G but less than 50 G of Methamphetamine, or
at least 4 G but less than 5 G of Methamphetamine (actual), or
at least 4 G but less than 5 G of "Ice";
- At least 40 G but less than 50 G of Amphetamine, or
at least 4 G but less than 5 G of Amphetamine (actual);
- At least 800 MG but less than 1 G of LSD;
- At least 32 G but less than 40 G of Fentanyl;
- At least 8 G but less than 10 G of a Fentanyl Analogue;
- At least 80 KG but less than 100 KG of Marihuana;
- At least 16 KG but less than 20 KG of Hashish;
- At least 1.6 KG but less than 2 KG of Hashish Oil;
- At least 80,000 but less than 100,000 units of Ketamine;
- At least 80,000 but less than 100,000 units of Schedule I or II Depressants;

- At least 80,000 but less than 100,000 units of Schedule III Hydrocodone;
- At least 5,000 but less than 6,250 units of Flunitrazepam.

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

- (10)(11) ● At least 40 G but less than 60 G of Heroin; **Level 2018**
- At least 200 G but less than 300 G of Cocaine;
 - At least 11.2 G but less than 16.8 G of Cocaine Base;
 - At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
 - At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice";
 - At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
 - At least 400 MG but less than 600 MG of LSD;
 - At least 16 G but less than 24 G of Fentanyl;
 - At least 4 G but less than 6 G of a Fentanyl Analogue;
 - At least 40 KG but less than 60 KG of Marihuana;
 - At least 8 KG but less than 12 KG of Hashish;
 - At least 800 G but less than 1.2 KG of Hashish Oil;
 - At least 40,000 but less than 60,000 units of Ketamine;
 - At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
 - At least 40,000 but less than 60,000 units of Schedule III Hydrocodone;
 - At least 40,000 or more but less than 60,000 units of Schedule III substances (except Ketamine or Hydrocodone);

- At least 2,500 but less than 3,750 units of Flunitrazepam.

(H)(12)

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

Level 1816

(H)(13)

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

Level 1614

- (13)(14) ● At least 5 G but less Less than 10 G of Heroin; **Level 1412**
- At least 25 G but less Less than 50 G of Cocaine;
 - At least 1.4 G but less Less than 2.8 G of Cocaine Base;
 - At least 5 G but less Less than 10 G of PCP, or
at least 500 MG but less than 1 G of PCP (actual);
 - At least 2.5 G but less Less than 5 G of Methamphetamine, or
at least 250 MG but less than 500 MG of Methamphetamine (actual),
or at least 250 MG but less than 500 MG of "Ice";
 - At least 2.5 G but less Less than 5 G of Amphetamine, or
at least 250 MG but less than 500 MG of Amphetamine (actual);
 - At least 50 MG but less Less than 100 MG of LSD;
 - At least 2 G but less Less than 4 G of Fentanyl;
 - At least 500 MG but less Less than 1 G of a Fentanyl Analogue;
 - At least 5 KG but less than 10 KG of Marihuana;
 - At least 1 KG but less than 2 KG of Hashish;
 - At least 100 G but less than 200 G of Hashish Oil;
 - At least 5,000 but less than 10,000 units of Ketamine;
 - At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
 - At least 5,000 but less than 10,000 units of Schedule III Hydrocodone;
 - At least 5,000 but less than 10,000 units of
Schedule III substances (except Ketamine or Hydrocodone);
 - At least 312 but less than 625 units of Flunitrazepam;
 - 80,000 units or more of Schedule IV substances (except Flunitrazepam).

- (14)(15) ● Less than 5 G of Heroin; **Level 1210**
- ● Less than 25 G of Cocaine;
 - ● Less than 1.4 G of Cocaine Base;
 - ● Less than 5 G of PCP, or less than 500 MG of PCP (actual);
 - ● Less than 2.5 G of Methamphetamine, or
less than 250 MG of Methamphetamine (actual), or
less than 250 MG of "Ice";
 - ● Less than 2.5 G of Amphetamine, or
less than 250 MG of Amphetamine (actual);
 - ● Less than 50 MG of LSD;
 - ● Less than 2 G of Fentanyl;
 - ● Less than 500 MG of a Fentanyl Analogue;
 - At least 2.5 KG but less than 5 KG of Marihuana;
 - At least 500 G but less than 1 KG of Hashish;
 - At least 50 G but less than 100 G of Hashish Oil;
 - At least 2,500 but less than 5,000 units of Ketamine;
 - At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
 - At least 2,500 but less than 5,000 units of Schedule III Hydrocodone;
 - At least 2,500 but less than 5,000 units of Schedule III substances (except
Ketamine or Hydrocodone);
 - At least 156 but less than 312 units of Flunitrazepam;
 - At least 40,000 or more but less than 80,000 units of Schedule IV substances (except

Flunitrazepam).

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

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

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

***Notes to Drug Quantity Table:**

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

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

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

derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(31)), (ii) at least two of the following: cannabidiol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

Commentary

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Application Notes:

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8. Use of Drug Equivalency Tables.—

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

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

(See also Application Note 6.) For example, in the Drug Equivalency Tables set forth in this Note, 1 gm of a substance containing oxymorphone, a Schedule I opiate, converts to an equivalent quantity of 5 kg of marihuana. In a case involving 100 gm of oxymorphone, the equivalent quantity of marihuana would be 500 kg, which corresponds to a base offense level of 2826 in the Drug Quantity Table.

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

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

determine the combined marihuana equivalency (subject to the cap, if any, applicable to the combined amounts).

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

(C) Examples for Combining Differing Controlled Substances.—

- (i) The defendant is convicted of selling 70 grams of a substance containing PCP (Level ~~22~~20) and 250 milligrams of a substance containing LSD (Level ~~78~~16). The PCP converts to 70 kilograms of marihuana; the LSD converts to 25 kilograms of marihuana. The total is therefore equivalent to 95 kilograms of marihuana, for which the Drug Quantity Table provides an offense level of ~~24~~22.
- (ii) The defendant is convicted of selling 500 grams of marihuana (Level 86) and five kilograms of diazepam (Level 86). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of ~~70~~8 in the Drug Quantity Table.
- (iii) The defendant is convicted of selling 80 grams of cocaine (Level ~~16~~14) and 2 grams of cocaine base (Level ~~14~~12). The cocaine is equivalent to 16 kilograms of marihuana, and the cocaine base is equivalent to 7.142 kilograms of marihuana. The total is therefore equivalent to 23.142 kilograms of marihuana, which has an offense level of ~~78~~16 in the Drug Quantity Table.
- (iv) The defendant is convicted of selling ~~56,000~~76,000 units of a Schedule III substance, ~~100,000~~200,000 units of a Schedule IV substance, and ~~200,000~~600,000 units of a Schedule V substance. The marihuana equivalency for the Schedule III substance is ~~56~~76 kilograms of marihuana (below the cap of ~~59.99~~79.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule III substances). The marihuana equivalency for the Schedule IV substance is subject to a cap of ~~4.99~~9.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule IV substances (without the cap it would have been ~~6.25~~12.5 kilograms). The marihuana equivalency for the Schedule V substance is subject to the cap of ~~999~~grams 2.49 kilograms of marihuana set forth as the maximum equivalent weight for Schedule V substances (without the cap it would have been ~~1.25~~3.75 kilograms). The combined equivalent weight, determined by adding together the above amounts, is subject to the cap of ~~59.99~~79.99 kilograms of marihuana set forth as the maximum combined equivalent weight for Schedule III, IV, and V substances. Without the cap, the combined equivalent weight would have been ~~61.99~~88.48 (~~56~~76 + ~~4.99~~9.99 + ~~.999~~2.49) kilograms.

(D) Drug Equivalency Tables.—

Schedule I or II Opiates*

1 gm of Heroin =

1 gm of Alpha-Methylfentanyl =

1 kg of marihuana

10 kg of marihuana

1 gm of Dextromoramide =	670 gm of marihuana
1 gm of Dipipanone =	250 gm of marihuana
1 gm of 3-Methylfentanyl =	10 kg of marihuana
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm of marihuana
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP =	700 gm of marihuana
1 gm of Alphaprodine =	100 gm of marihuana
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) =	2.5 kg of marihuana
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg of marihuana
1 gm of Levorphanol =	2.5 kg of marihuana
1 gm of Meperidine/Pethidine =	50 gm of marihuana
1 gm of Methadone =	500 gm of marihuana
1 gm of 6-MonoacetylMorphine =	1 kg of marihuana
1 gm of Morphine =	500 gm of marihuana
1 gm of Oxycodone (actual) =	6700 gm of marihuana
1 gm of Oxymorphone =	5 kg of marihuana
1 gm of Racemorphan =	800 gm of marihuana
1 gm of Codeine =	80 gm of marihuana
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm of marihuana
1 gm of Ethylmorphine =	165 gm of marihuana
1 gm of Hydrocodone/Dihydrocodeinone =	500 gm of marihuana
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm of marihuana
1 gm of Opium =	50 gm of marihuana
1 gm of Levo-alpha-acetylmethadol (LAAM)=	3 kg of marihuana

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

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

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

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

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

1 gm of Bufotenine =	70 gm of marihuana
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =	100 kg of marihuana
1 gm of Diethyltryptamine/DET =	80 gm of marihuana
1 gm of Dimethyltryptamine/DMT =	100 gm of marihuana

1 gm of Mescaline =	10 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) =	1 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) =	0.1 gm of marihuana
1 gm of Peyote (Dry) =	0.5 gm of marihuana
1 gm of Peyote (Wet) =	0.05 gm of marihuana
1 gm of Phencyclidine/PCP =	1 kg of marihuana
1 gm of Phencyclidine (actual) /PCP (actual) =	10 kg of marihuana
1 gm of Psilocin =	500 gm of marihuana
1 gm of Psilocybin =	500 gm of marihuana
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg of marihuana
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg of marihuana
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg of marihuana
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg of marihuana
1 gm of 3,4-Methylenedioxyamphetamine/MDA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxymethamphetamine/MDMA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA=	500 gm of marihuana
1 gm of Paramethoxymethamphetamine/PMA =	500 gm of marihuana
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =	680 gm of marihuana
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg of marihuana

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

Schedule I Marihuana

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

Flunitrazepam **

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

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

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

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

1 unit of a Schedule III Substance =	1 gm of marihuana
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****Provided*, that the combined equivalent weight of all Schedule III substances (except ketamine and hydrocodone),

Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed ~~59.99~~79.99 kilograms of marihuana.

Schedule III Hydrocodone*****

1 unit of Schedule III hydrocodone = 1 gm of marihuana

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

Ketamine

1 unit of ketamine = 1 gm of marihuana

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

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

*****Provided, that the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed ~~4.999.99~~ kilograms of marihuana.

Schedule V Substances*****

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

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

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

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

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

statutory minimum term is ten years or 120 months.

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

* * *

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

- (a) Base Offense Level (Apply the greatest):
- (1) **2** plus the offense level from §2D1.1 applicable to the quantity of controlled substances directly involving a protected location or an underage or pregnant individual; or
 - (2) **1** plus the offense level from §2D1.1 applicable to the total quantity of controlled substances involved in the offense; or
 - (3) **26**, if the offense involved a person less than eighteen years of age; or
 - (4) **13**, otherwise.

Commentary

* * *

Application Note:

1. *This guideline applies only in a case in which the defendant is convicted of a statutory violation of drug trafficking in a protected location or involving an underage or pregnant individual (including an attempt or conspiracy to commit such a violation) or in a case in which the defendant stipulated to such a statutory violation. See §1B1.2(a). In a case involving such a conviction but in which only part of the relevant offense conduct directly involved a protected location or an underage or pregnant individual, subsections (a)(1) and (a)(2) may result in different offense levels. For example, if the defendant, as part of the same course of conduct or common scheme or plan, sold 5 grams of heroin near a protected location and 10 grams of heroin elsewhere, the offense level from subsection (a)(1) would be level ~~6~~**14** (2 plus the offense level for the sale of 5 grams of heroin, the amount sold near the protected location); the offense level from subsection (a)(2) would be level ~~7~~**15** (1 plus the offense level for the sale of 15 grams of heroin, the total amount of heroin involved in the offense).*

Background: This section implements the direction to the Commission in Section 6454 of the Anti-Drug Abuse Act of 1988.

* * *

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

- (a) Base Offense Level: The offense level from the Chemical Quantity Table set forth in subsection (d) or (e), as appropriate, except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (d) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels.
- (b) Specific Offense Characteristics
 - (1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.
 - (2) If the defendant is convicted of violating 21 U.S.C. § 841(c)(2) or (f)(1), or § 960(d)(2), (d)(3), or (d)(4), decrease by **3** levels, unless the defendant knew or believed that the listed chemical was to be used to manufacture a controlled substance unlawfully.
 - (3) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
 - (4) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a listed chemical through mass-marketing by means of an interactive computer service, increase by **2** levels.
 - (5) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.
 - (6) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.
- (c) Cross Reference
 - (1) If the offense involved unlawfully manufacturing a controlled substance, or attempting to manufacture a controlled substance unlawfully, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, Trafficking) if the resulting offense level is greater than that determined above.

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

Quantity	Base Offense Level
(1) [9] KG or more of Ephedrine; [9] KG or more of Phenylpropanolamine; [9] KG or more of Pseudoephedrine.	Level 38
(+) At least 3 KG or more but less than 9 KG of Ephedrine; (2) At least 3 KG or more but less than 9 KG of Phenylpropanolamine; At least 3 KG or more but less than 9 KG of Pseudoephedrine.	Level 336
(±) At least 1 KG but less than 3 KG of Ephedrine; (3) At least 1 KG but less than 3 KG of Phenylpropanolamine; At least 1 KG but less than 3 KG of Pseudoephedrine.	Level 3634
(±) At least 300 G but less than 1 KG of Ephedrine; (4) At least 300 G but less than 1 KG of Phenylpropanolamine; At least 300 G but less than 1 KG of Pseudoephedrine.	Level 3432
(±) At least 100 G but less than 300 G of Ephedrine; (5) At least 100 G but less than 300 G of Phenylpropanolamine; At least 100 G but less than 300 G of Pseudoephedrine.	Level 3230
(±) At least 70 G but less than 100 G of Ephedrine; (6) At least 70 G but less than 100 G of Phenylpropanolamine; At least 70 G but less than 100 G of Pseudoephedrine.	Level 3028
(±) At least 40 G but less than 70 G of Ephedrine; (7) At least 40 G but less than 70 G of Phenylpropanolamine; At least 40 G but less than 70 G of Pseudoephedrine.	Level 2826
(±) At least 10 G but less than 40 G of Ephedrine; (8) At least 10 G but less than 40 G of Phenylpropanolamine; At least 10 G but less than 40 G of Pseudoephedrine.	Level 2624
(±) At least 8 G but less than 10 G of Ephedrine; (9) At least 8 G but less than 10 G of Phenylpropanolamine; At least 8 G but less than 10 G of Pseudoephedrine.	Level 2422
(±) At least 6 G but less than 8 G of Ephedrine; (10) At least 6 G but less than 8 G of Phenylpropanolamine; At least 6 G but less than 8 G of Pseudoephedrine.	Level 2220

(10)	At least 4 G but less than 6 G of Ephedrine;	Level 20
(11)	At least 4 G but less than 6 G of Phenylpropanolamine; At least 4 G but less than 6 G of Pseudoephedrine.	18
(11)	At least 2 G but less than 4 G of Ephedrine;	Level 18
(12)	At least 2 G but less than 4 G of Phenylpropanolamine; At least 2 G but less than 4 G of Pseudoephedrine.	16
(12)	At least 1 G but less than 2 G of Ephedrine;	Level 16
(13)	At least 1 G but less than 2 G of Phenylpropanolamine; At least 1 G but less than 2 G of Pseudoephedrine.	14
(13)	At least 500 MG but less Less than 1 G of Ephedrine;	Level 14
(14)	At least 500 MG but less Less than 1 G of Phenylpropanolamine; At least 500 MG but less Less than 1 G of Pseudoephedrine.	12
(14)	Less than 500 MG of Ephedrine; Less than 500 MG of Phenylpropanolamine; Less than 500 MG of Pseudoephedrine.	Level 12

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

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

(†) List I Chemicals

Level 3028

- (2) At least 890 G ~~or more~~ but less than 2.7 KG of Benzaldehyde;
At least 20 KG ~~or more~~ but less than 60 KG of Benzyl Cyanide;
At least 200 G ~~or more~~ but less than 600 G of Ergonovine;
At least 400 G ~~or more~~ but less than 1.2 KG of Ergotamine;
At least 20 KG ~~or more~~ but less than 60 KG of Ethylamine;
At least 2.2 KG ~~or more~~ but less than 6.6 KG of Hydriodic Acid;
At least 1.3 KG ~~or more~~ but less than 3.9 KG of Iodine;
At least 320 KG ~~or more~~ but less than 960 KG of Isosafrole;
At least 200 G ~~or more~~ but less than 600 G of Methylamine;
At least 500 KG ~~or more~~ but less than 1500 KG of N-Methylephedrine;
At least 500 KG ~~or more~~ but less than 1500 KG of N-Methylpseudoephedrine;
At least 625 G ~~or more~~ but less than 1.9 KG of Nitroethane;
At least 10 KG ~~or more~~ but less than 30 KG of Norpseudoephedrine;
At least 20 KG ~~or more~~ but less than 60 KG of Phenylacetic Acid;
At least 10 KG ~~or more~~ but less than 30 KG of Piperidine;
At least 320 KG ~~or more~~ but less than 960 KG of Piperonal;
At least 1.6 KG ~~or more~~ but less than 4.8 KG of Propionic Anhydride;
At least 320 KG ~~or more~~ but less than 960 KG of Safrole;
At least 400 KG ~~or more~~ but less than 1200 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 1135.5 L ~~or more~~ but less than 3406.5 L of Gamma-butyrolactone;
At least 714 G ~~or more~~ but less than 2.1 KG of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid.

List II Chemicals

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

(‡) List I Chemicals

Level 2826

- (3) At least 267 G but less than 890 G of Benzaldehyde;
At least 6 KG but less than 20 KG of Benzyl Cyanide;
At least 60 G but less than 200 G of Ergonovine;
At least 120 G but less than 400 G of Ergotamine;
At least 6 KG but less than 20 KG of Ethylamine;
At least 660 G but less than 2.2 KG of Hydriodic Acid;
At least 376.2 G but less than 1.3 KG of Iodine;
At least 96 KG but less than 320 KG of Isosafrole;
At least 60 G but less than 200 G of Methylamine;
At least 150 KG but less than 500 KG of N-Methylephedrine;
At least 150 KG but less than 500 KG of N-Methylpseudoephedrine;
At least 187.5 G but less than 625 G of Nitroethane;
At least 3 KG but less than 10 KG of Norpseudoephedrine;

At least 6 KG but less than 20 KG of Phenylacetic Acid;
At least 3 KG but less than 10 KG of Piperidine;
At least 96 KG but less than 320 KG of Piperonal;
At least 480 G but less than 1.6 KG of Propionic Anhydride;
At least 96 KG but less than 320 KG of Safrole;
At least 120 KG but less than 400 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 340.7 L but less than 1135.5 L of Gamma-butyrolactone;
At least 214 G but less than 714 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

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

(3) List I Chemicals

Level 2624

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

List II Chemicals

At least 3.3 KG but less than 11 KG of Acetic Anhydride;
At least 352.5 KG but less than 1175 KG of Acetone;
At least 6 KG but less than 20 KG of Benzyl Chloride;
At least 322.5 KG but less than 1075 KG of Ethyl Ether;

At least 360 KG but less than 1200 KG of Methyl Ethyl Ketone;
At least 3 KG but less than 10 KG of Potassium Permanganate;
At least 390 KG but less than 1300 KG of Toluene.

(4)

List I Chemicals

Level 2422

(5)

At least 62.3 G but less than 89 G of Benzaldehyde;
At least 1.4 KG but less than 2 KG of Benzyl Cyanide;
At least 14 G but less than 20 G of Ergonovine;
At least 28 G but less than 40 G of Ergotamine;
At least 1.4 KG but less than 2 KG of Ethylamine;
At least 154 G but less than 220 G of Hydriodic Acid;
At least 87.8 G but less than 125.4 G of Iodine;
At least 22.4 KG but less than 32 KG of Isosafrole;
At least 14 G but less than 20 G of Methylamine;
At least 35 KG but less than 50 KG of N-Methylephedrine;
At least 35 KG but less than 50 KG of N-Methylpseudoephedrine;
At least 43.8 G but less than 62.5 G of Nitroethane;
At least 700 G but less than 1 KG of Norpseudoephedrine;
At least 1.4 KG but less than 2 KG of Phenylacetic Acid;
At least 700 G but less than 1 KG of Piperidine;
At least 22.4 KG but less than 32 KG of Piperonal;
At least 112 G but less than 160 G of Propionic Anhydride;
At least 22.4 KG but less than 32 KG of Safrole;
At least 28 KG but less than 40 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 79.5 L but less than 113.6 L of Gamma-butyrolactone;
At least 50 G but less than 71 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

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

(5)

List I Chemicals

Level 2220

(6)

At least 35.6 G but less than 62.3 G of Benzaldehyde;
At least 800 G but less than 1.4 KG of Benzyl Cyanide;
At least 8 G but less than 14 G of Ergonovine;
At least 16 G but less than 28 G of Ergotamine;
At least 800 G but less than 1.4 KG of Ethylamine;
At least 88 G but less than 154 G of Hydriodic Acid;
At least 50.2 G but less than 87.8 G of Iodine;
At least 12.8 KG but less than 22.4 KG of Isosafrole;
At least 8 G but less than 14 G of Methylamine;

At least 20 KG but less than 35 KG of N-Methylephedrine;
At least 20 KG but less than 35 KG of N-Methylpseudoephedrine;
At least 25 G but less than 43.8 G of Nitroethane;
At least 400 G but less than 700 G of Norpseudoephedrine;
At least 800 G but less than 1.4 KG of Phenylacetic Acid;
At least 400 G but less than 700 G of Piperidine;
At least 12.8 KG but less than 22.4 KG of Piperonal;
At least 64 G but less than 112 G of Propionic Anhydride;
At least 12.8 KG but less than 22.4 KG of Safrole;
At least 16 KG but less than 28 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 45.4 L but less than 79.5 L of Gamma-butyrolactone;
At least 29 G but less than 50 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

At least 726 G but less than 1.1 KG of Acetic Anhydride;
At least 82.25 KG but less than 117.5 KG of Acetone;
At least 1.4 KG but less than 2 KG of Benzyl Chloride;
At least 75.25 KG but less than 107.5 KG of Ethyl Ether;
At least 84 KG but less than 120 KG of Methyl Ethyl Ketone;
At least 700 G but less than 1 KG of Potassium Permanganate;
At least 91 KG but less than 130 KG of Toluene.

(6)

List I Chemicals

Level 2018

(7)

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

List II Chemicals

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

(7)

List I Chemicals

Level 1816

(8)

At least 7.1 G but less than 8.9 G of Benzaldehyde;
At least 160 G but less than 200 G of Benzyl Cyanide;
At least 1.6 G but less than 2 G of Ergonovine;
At least 3.2 G but less than 4 G of Ergotamine;
At least 160 G but less than 200 G of Ethylamine;
At least 17.6 G but less than 22 G of Hydriodic Acid;
At least 10 G but less than 12.5 G of Iodine;
At least 2.56 KG but less than 3.2 KG of Isosafrole;
At least 1.6 G but less than 2 G of Methylamine;
At least 4 KG but less than 5 KG of N-Methylephedrine;
At least 4 KG but less than 5 KG of N-Methylpseudoephedrine;
At least 5 G but less than 6.3 G of Nitroethane;
At least 80 G but less than 100 G of Norpseudoephedrine;
At least 160 G but less than 200 G of Phenylacetic Acid;
At least 80 G but less than 100 G of Piperidine;
At least 2.56 KG but less than 3.2 KG of Piperonal;
At least 12.8 G but less than 16 G of Propionic Anhydride;
At least 2.56 KG but less than 3.2 KG of Safrole;
At least 3.2 KG but less than 4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 9.1 L but less than 11.4 L of Gamma-butyrolactone;
At least 6 G but less than 7 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

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

(8)

List I Chemicals

Level 1614

(9)

3.6 KG or more of Anthranilic Acid;
At least 5.3 G but less than 7.1 G of Benzaldehyde;
At least 120 G but less than 160 G of Benzyl Cyanide;
At least 1.2 G but less than 1.6 G of Ergonovine;
At least 2.4 G but less than 3.2 G of Ergotamine;

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

List II Chemicals

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

(9) List I Chemicals

Level 1412

(10) At least 2.7 KG but less Less than 3.6 KG of Anthranilic Acid;
 At least 3.6 G but less Less than 5.3 G of Benzaldehyde;
 At least 80 G but less Less than 120 G of Benzyl Cyanide;
 At least 800 MG but less Less than 1.2 G of Ergonovine;
 At least 1.6 G but less Less than 2.4 G of Ergotamine;
 At least 80 G but less Less than 120 G of Ethylamine;
 At least 8.8 G but less Less than 13.2 G of Hydriodic Acid;
 At least 5 G but less Less than 7.5 G of Iodine;
 At least 1.44 KG but less Less than 1.92 KG of Isosafrole;
 At least 800 MG but less Less than 1.2 G of Methylamine;
 At least 3.6 KG but less Less than 4.8 KG of N-Acetylanthranilic Acid;
 At least 2.25 KG but less Less than 3 KG of N-Methylephedrine;
 At least 2.25 KG but less Less than 3 KG of N-Methylpseudoephedrine;
 At least 2.5 G but less Less than 3.8 G of Nitroethane;
 At least 40 G but less Less than 60 G of Norpseudoephedrine;
 At least 80 G but less Less than 120 G of Phenylacetic Acid;
 At least 40 G but less Less than 60 G of Piperidine;
 At least 1.44 KG but less Less than 1.92 KG of Piperonal;
 At least 7.2 G but less Less than 9.6 G of Propionic Anhydride;

At least 1.44 KG but less ~~Less~~ than 1.92 KG of Safrole;
At least 1.8 KG but less ~~Less~~ than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 4.5 L but less ~~Less~~ than 6.8 L of Gamma-butyrolactone;
At least 3 G but less ~~Less~~ than 4 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

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

(10) List I Chemicals

Level 12

Less than 2.7 KG of Anthranilic Acid;
Less than 3.6 G of Benzaldehyde;
Less than 80 G of Benzyl Cyanide;
Less than 800 MG of Ergonovine;
Less than 1.6 G of Ergotamine;
Less than 80 G of Ethylamine;
Less than 8.8 G of Hydriodic Acid;
Less than 5 G of Iodine;
Less than 1.44 KG of Isosafrole;
Less than 800 MG of Methylamine;
Less than 3.6 KG of N-Acetylanthranilic Acid;
Less than 2.25 KG of N-Methylephedrine;
Less than 2.25 KG of N-Methylpseudoephedrine;
Less than 2.5 G of Nitroethane;
Less than 40 G of Norpseudoephedrine;
Less than 80 G of Phenylacetic Acid;
Less than 40 G of Piperidine;
Less than 1.44 KG of Piperonal;
Less than 7.2 G of Propionic Anhydride;
Less than 1.44 KG of Safrole;
Less than 1.8 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
Less than 4.5 L of Gamma-butyrolactone;
Less than 3 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

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

*Notes:

- (A) Except as provided in Note (B), to calculate the base offense level in an offense that involves two or more chemicals, use the quantity of the single chemical that results in the greatest offense level, regardless of whether the chemicals are set forth in different tables or in different categories (i.e., list I or list II) under subsection (d) or (e) of this guideline, as appropriate.
- (B) To calculate the base offense level in an offense that involves two or more chemicals each of which is set forth in the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, (i) aggregate the quantities of all such chemicals, and (ii) determine the base offense level corresponding to the aggregate quantity.
- (C) In a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

Commentary

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

Application Notes:

1. Cases Involving Multiple Chemicals.—

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

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

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

Example: The defendant was in possession of 80 grams of ephedrine and 50 grams of phenylpropanolamine, an aggregate quantity of 130 grams of such chemicals. The base

offense level corresponding to that aggregate quantity is level ~~32~~**30**.

- (C) *Upward Departure.*—In a case involving two or more chemicals used to manufacture different controlled substances, or to manufacture one controlled substance by different manufacturing processes, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense.

* * *

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

(C) Issue for Comment on Environmental and Other Harms Caused by Drug Production Operations (Including, in Particular, the Cultivation of Marijuana)

1. *The Commission requests comment on the environmental and other harms caused by offenses involving drug production operations (including, in particular, the cultivation of marijuana). Specifically, the Commission requests comment on whether the guidelines provide penalties for these offenses that appropriately account for the environmental and other harms caused by these offenses and, if not, what changes to the guidelines would be appropriate.*

A person who cultivates or manufactures a controlled substance on Federal property may be prosecuted under 21 U.S.C. § 841 and subject to the same statutory penalty structure that applies to most other drug offenses. See 21 U.S.C. § 841(b)(5). As discussed in Part A, the base offense level for such an offense will generally be determined under §2D1.1 based on the type and quantity of the drug involved. The guideline also provides a range of other provisions that may apply in particular cases. For example:

- (1) *§2D1.1(b)(12) provides a 2-level enhancement if the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance; and*
- (2) *§2D1.1(b)(13) provides a tiered enhancement that includes, among other things, a 2-level enhancement if the offense involved an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance, see §2D1.1(b)(13)(A)(i), and a 3-level enhancement if the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to human life or the environment, see §2D1.1(b)(13)(C)(ii).*

An offense involving the cultivation or production of a controlled substance may also be prosecuted under certain other statutes that take into account environmental or other harms. For example:

- (A) *Section 841(b)(6) makes it unlawful to manufacture a controlled substance (or attempt to*

do so) and knowingly or intentionally use a poison, chemical, or other hazardous substance on Federal land, and by such use (A) create a serious hazard to humans, wildlife, or domestic animals; (B) degrade or harm the environment or natural resources; or (C) pollute an aquifer, spring, stream, river, or body of water. A person who violates section 841(b)(6) is subject to a statutory maximum term of imprisonment of five years. Section 841(b)(6) is not referenced in Appendix A (Statutory Index) to any offense guideline.

- (B) *Section 841(d) makes it unlawful to assemble, maintain, place, or cause to be placed a boobytrap on Federal property where a controlled substance is being manufactured. A person who violates section 841(d) is subject to a statutory maximum term of imprisonment of ten years. Section 841(d) is referenced in Appendix A (Statutory Index) to §2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy). Section 2D1.9 provides a base offense level of level 23 and contains no other provisions.*

The Commission seeks comment on offenses involving drug production operations, including, in particular, offenses involving the cultivation of marijuana. What conduct is involved in such offenses, and what is the nature and seriousness of the environmental and other harms posed by such offenses? What aggravating and mitigating circumstances may be present in such offenses? For example, if the offense was committed on federal property or caused environmental or other harm to federal property, should that circumstance be an aggravating factor? If the offense was committed while trespassing on private property or caused environmental or other harm while trespassing on private property, should that circumstance be an aggravating factor?

Do the provisions of §2D1.1 and §2D1.9, as applicable, adequately account for the conduct, the environmental and other harms, and the aggravating and mitigating circumstances? If not, how should the Commission amend the guidelines to account for the conduct, the environmental and other harms, and the aggravating and mitigating circumstances? Should the Commission provide a new specific offense characteristic, cross reference, or departure provision? If so, what should the new provision provide? Alternatively, should the Commission increase the amount, or the scope, of the existing specific offense characteristics, such as those in subsections (b)(12) and (b)(13)? If so, what should the new amount or scope of such provisions be?