

UNITED STATES SENTENCING COMMISSION

Amendments to the Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of submission to Congress of amendments to the sentencing guidelines.

SUMMARY: Pursuant to its authority under section 994(p) of title 28, United States Code, the United States Sentencing Commission, on May 1, 1995, submitted to the Congress amendments to the sentencing guidelines, policy statements, and official commentary together with reasons for the amendments.

DATES: Pursuant to 28 U.S.C. 994(p), the Commission has specified an effective date of November 1, 1995, for these amendments. Comments regarding amendments that the Commission should specify for retroactive application to previously sentenced defendants should be received no later than June 16, 1995.

ADDRESSES: Comments should be sent to: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, South Lobby, Washington, DC 20002-8002, Attn: Public Information.

FOR FURTHER INFORMATION CONTACT: Mike Courlander, Public Information Specialist, telephone: (202) 273-4590.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission, an independent agency in the judicial branch of the U.S. Government, is empowered by 28 U.S.C. 994(a) to promulgate sentencing guidelines and policy statements for federal sentencing courts. The statute further directs the Commission to review periodically and revise guidelines previously promulgated and authorizes it to submit guideline amendments to the Congress no later than the first day of May each year. See 28 U.S.C. 994 (o), (p). Absent action of Congress to the contrary, the amendments become effective on the date specified by the Commission (i.e., November 1, 1995) by operation of law.

Notice of the amendments submitted to the Congress on May 1, 1995, was published in the **Federal Registers** of January 9, 1995 (60 FR 2430) and March 15, 1995 (60 FR 14054). A public hearing on the proposed amendments was held in Washington, DC, on March 14, 1995. After review of the hearing testimony and additional public comment, the Commission promulgated the amendments set forth below, each

having been approved by at least four voting Commissioners.

In connection with its ongoing process of guideline review, the Commission welcomes comment on any aspect of the sentencing guidelines, policy statements, and official commentary. Specifically, the Commission solicits comment on which, if any, of the amendments submitted to the Congress that may result in a lower guideline range should be made retroactive to previously sentenced defendants under Policy Statement 1B1.10.

Authority: 28 U.S.C. 994 (a), (o), (p).

Richard P. Conaboy,
Chairman.

Amendments to the Sentencing Guidelines

Pursuant to Section 994(p) of Title 28, United States Code, the United States Sentencing Commission reports to the Congress the following amendments to the sentencing guidelines, and the reasons therefor. As authorized by this section, the Commission specifies an effective date of November 1, 1995, for these amendments.

Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary

1. Amendment: Section 2A2.3 is amended by inserting the following additional subsection:

“(b) Specific Offense Characteristic

(1) If the offense resulted in substantial bodily injury to an individual under the age of sixteen years, increase by 4 levels.”

The Commentary to § 2A2.3 captioned “Application Notes” is amended by inserting the following additional note:

“3. ‘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.’ 18 U.S.C. 113(b)(1).”

Reason for Amendment: This amendment addresses the enactment of 18 U.S.C. 113(a)(7) (pertaining to certain assaults against minors) by section 170201 of the Violent Crime Control and Law Enforcement Act of 1994.

2. Amendment: The Commentary to § 2A3.1 captioned “Application Notes” is amended by inserting the following additional notes:

“6. If a victim was sexually abused by more than one participant, an upward departure may be warranted. See § 5K2.8 (Extreme Conduct).

“7. If the defendant’s criminal history includes a prior sentence for conduct

that is similar to the instant offense, an upward departure may be warranted.”

The Commentary to § 2A3.2 captioned “Application Notes” is amended by inserting the following additional note:

“4. If the defendant’s criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.”

The Commentary to § 2A3.3 captioned “Application Note” is amended by deleting “Note” and inserting in lieu thereof “Notes”; and by inserting the following additional note:

“2. If the defendant’s criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.”

The Commentary to § 2A3.4 captioned “Application Notes” is amended by inserting the following additional note:

“5. If the defendant’s criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.”

Reason for Amendment: Section 40111 of the Violent Crime Control and Law Enforcement Act of 1994 doubles the authorized maximum term of imprisonment for defendants convicted of sexual abuse offenses who have been convicted previously of aggravated sexual abuse, sexual abuse, or aggravated sexual contact (18 U.S.C. 2247). Section 40111 also directs the Sentencing Commission to implement this provision by promulgating amendments, if appropriate, to the applicable sentencing guidelines. Although the Chapter Two sexual abuse guidelines do not provide for enhancement for repeat sex offenses, Chapter Four (Criminal History and Criminal Livelihood) does include a determination of the seriousness of the defendant’s criminal record based upon prior convictions (§ 4A1.1). Section 4B1.1 (Career Offender) also provides substantially enhanced penalties for offenders who engage in a crime of violence (including forcible sexual offenses) or controlled substance trafficking offense, having been sentenced previously on two or more occasions for offenses of either type.

Moreover, § 4A1.3 (Adequacy of Criminal History category) provides that an upward departure may be considered “[i]f reliable information indicates that the criminal history category does not reflect the seriousness of the defendant’s past criminal conduct or the likelihood that the defendant will commit other crimes.” This amendment strengthens the sexual offense guidelines by expressly listing as a basis for upward departure the fact that the defendant has a prior sentence for conduct similar to the instant sexual offense.

Section 40112 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to conduct a study and consider the adequacy of the guidelines for sexual offenses with respect to a number of factors. The provision also requires the preparation of a report to Congress analyzing federal rape sentences and obtaining comment from independent experts. See Report to Congress: Analysis of Penalties for Federal Rape Cases (March 13, 1995). The Commission found that, in general, the current guidelines provide appropriate penalties for these offenses. This amendment strengthens § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) in one respect by expressly listing as a basis for an upward departure the fact that a victim was sexually abused by more than one participant.

3. Amendment: Section 2B1.1(b) is amended by deleting subdivision (2); and by renumbering the remaining subdivisions, and any references thereto, accordingly.

Section 2B1.1 is amended by inserting the following additional subsection:

“(c) Cross Reference

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of such item was an object of the offense, or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply § 2D1.1, § 2D2.1, § 2K1.3, or § 2K2.1, as appropriate, if the resulting offense level is greater than that determined above.”

The Commentary to § 2B1.1 captioned “Background” is amended by deleting the fourth paragraph.

Reason for Amendment: This amendment addresses an inconsistency in guideline penalties between theft offenses involving the taking of firearms or controlled substances that are sentenced under § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property) and similar offenses sentenced under § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy), § 2D2.1 (Unlawful Possession; Attempt or Conspiracy), § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). It accomplishes this by providing a cross

reference in § 2B1.1 directing the application of § 2D1.1, § 2D2.1, § 2K1.3, or § 2K2.1, as appropriate, if the resulting offense level is greater.

4. Amendment: Section 2B5.1(b) is amended by inserting the following additional subdivision:

“(3) If a dangerous weapon (including a firearm) was possessed in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.”

The Commentary to § 2B5.1 captioned “Application Notes” is amended in Note 2 by deleting “2B5.2” and inserting in lieu thereof “2F1.1”.

The Commentary to § 2B5.1 captioned “Background” is amended by inserting the following additional paragraph as the second paragraph:

“ Subsection (b)(3) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.”

Section 2F1.1(b)(4) is amended by inserting “(A)” immediately after “involved”; and by inserting “or (B) possession of a dangerous weapon (including a firearm) in connection with the offense,” immediately after “injury.”

The Commentary to § 2F1.1 captioned “Background” is amended by inserting the following additional paragraph as the sixth paragraph:

“ Subsection (b)(4)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.”

Reason for Amendment: Section 110512 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to amend its sentencing guidelines to provide an appropriate enhancement for a defendant convicted of a felony under Chapter 25 (Counterfeiting and Forgery) of title 18, United States Code, if the defendant used or carried a firearm during and in relation to the offense. This amendment implements this directive in a somewhat broader form. In addition, it corrects an outdated reference in the Commentary to § 2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States).

5. Amendment: Section 2D1.1(b) is amended by deleting subdivision (1); by renumbering subdivision (2) as (3); and by inserting:

“(1) (Apply the greatest):

(A) If the defendant discharged a firearm, increase by 6 levels, but if the resulting offense level is less than level 24, increase to level 24.

(B) If the defendant brandished or otherwise used a dangerous weapon (including a firearm), increase by 4

levels, but if the resulting offense level is less than level 19, increase to level 19.

(C) If a dangerous weapon (including a firearm) was possessed, increase by 3 levels, but if the dangerous weapon was a firearm and the resulting offense level is less than level 18, increase to level 18.

(2) If the defendant possessed a firearm described in 26 U.S.C. 5845(a) or 18 U.S.C. 921(a)(30), increase by 2 levels.”

Section 2D1.1(c)(1) is amended by deleting “1.5 KG or more of Cocaine Base;”.

Section 2D1.1(c)(2) is amended by deleting “At least 500 G but less than 1.5 KG of Cocaine Base;”.

Section 2D1.1(c)(3) is amended by deleting “At least 150 G but less than 500 G of Cocaine Base;”.

Section 2D1.1(c)(4) is amended by deleting “At least 50 G but less than 150 G of Cocaine Base;”.

Section 2D1.1(c)(5) is amended by deleting “At least 35 G but less than 50 G of Cocaine Base;”.

Section 2D1.1(c)(6) is amended by deleting “At least 20 G but less than 35 G of Cocaine Base;”.

Section 2D1.1(c)(7) is amended by deleting “At least 5 G but less than 20 G of Cocaine Base;”.

Section 2D1.1(c)(8) is amended by deleting “At least 4 G but less than 5 G of Cocaine Base;”.

Section 2D1.1(c)(9) is amended by deleting “At least 3 G but less than 4 G of Cocaine Base;”.

Section 2D1.1(c)(10) is amended by deleting “At least 2 G but less than 3 G of Cocaine Base;”.

Section 2D1.1(c)(11) is amended by deleting “At least 1 G but less than 2 G of Cocaine Base;”.

Section 2D1.1(c)(12) is amended by deleting “At least 500 MG but less than 1 G of Cocaine Base;”.

Section 2D1.1(c)(13) is amended by deleting “At least 250 MG but less than 500 MG of Cocaine Base;”.

Section 2D1.1(c)(14) is amended by deleting “Less than 250 MG of Cocaine Base;”.

Section 2D1.1(c) is amended by deleting:

“ ‘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.”,

and inserting in lieu thereof:

“ ‘Cocaine,’ for the purposes of this guideline, includes cocaine hydrochloride, cocaine base, and crack cocaine.”.

The Commentary to § 2D1.1 captioned “Application Notes” is amended in

Note 10 in the subdivision captioned "Cocaine and Other Schedule I and II Stimulants" by deleting:

"1 gm of Cocaine Base ('Crack') = 20 kg of marihuana".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 3 by deleting "'firearm' and 'dangerous weapon'" and inserting in lieu thereof "'firearm,' 'dangerous weapon,' 'brandished,' and 'otherwise used'"; and by inserting the following additional paragraph at the end:

"A 'firearm described in 18 U.S.C. 921(a)(30)' (pertaining to semiautomatic assault weapons) does not include a weapon exempted under the provisions of 18 U.S.C. 922(v)(3). A 'firearm described in 26 U.S.C. 5845(a)' is discussed in the Commentary to § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)."

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 13 by deleting "(b)(2)(B)" and inserting in lieu thereof "(b)(3)(B)".

The Commentary to § 2D1.1 captioned "Application Notes" is amended by inserting the following additional notes:

"20. Under subsections (b)(1) (A), (B) and (b)(2), the defendant is accountable for his own conduct and the conduct of others that he aided, abetted, counseled, commanded, induced, procured, or willfully caused. If a firearm is discharged by a participant in the same vehicle as the defendant, or otherwise in close proximity to the defendant, there shall be a rebuttable presumption that the defendant aided or abetted, counseled, commanded, or induced the discharge of the firearm.

"21. If the offense resulted in bodily injury to any victim, an upward departure may be warranted."

The Commentary to § 2D1.1 captioned "Background" is amended in the fifth paragraph by deleting "(b)(2)" and inserting in lieu thereof "(b)(3)".

Section 2D2.1 is amended in subsection (a)(1) by deleting "an analogue of these, or cocaine base" and inserting in lieu thereof "(or an analogue thereof)".

Section 2D2.1 is amended by deleting subsection (b).

The Commentary to § 2D2.1 captioned "Background" is amended by deleting the second paragraph.

Reason for Amendment: This amendment further implements section 280006 of the Violent Crime Control and Law Enforcement Act of 1994 in which Congress directed the Commission to study federal sentencing policy as it relates to possession and distribution of all forms of cocaine, specifically

including the differences in penalty levels that apply to powder cocaine and crack cocaine. The Commission conducted public hearings, received written comment, and conducted its own analyses of the relevant research and of the Commission's extensive database on cocaine sentences imposed in the federal courts. The results of this study are contained in the Special Report to Congress: Cocaine and Federal Sentencing Policy (February 1995).

This amendment specifically responds to the Congressional directive to make recommendations for retention or modification of current cocaine penalties. The Commission is recommending separately that Congress eliminate the differential treatment of crack and powder cocaine in the mandatory minimum penalties found in current statutes. With this amendment, the Commission also makes changes in the sentencing guidelines that it believes will better accomplish the purposes of sentencing and will do so more fairly than the current guidelines. This amendment equalizes sentences for offenses involving similar amounts of crack cocaine and powder cocaine at the level currently provided for powder cocaine. It also increases punishment for all drug offenses that involve firearms or other dangerous weapons, and authorizes an upward departure for bodily injury.

In public comment and testimony received by the Commission, several problems with the current penalty differential between crack and powder cocaine were cited. Critics questioned whether lengthier penalties for crack are justified by differences between the two forms of cocaine. Also, many commentators and a study issued by the U.S. Department of Justice, Bureau of Justice Statistics, noted that the discrepancy in the sentence lengths for crack and powder cocaine has been a major factor in a growing gap between the average sentence imposed on Whites and on minorities in the federal courts. (See *Sentencing in the Federal Courts: Does Race Matter?*, November 1993.)

To evaluate current cocaine sentencing policy, the Commission reviewed the legislative history of the relevant penalty provisions and the goals that Congress has established for cocaine sentencing. On the question of the impact of current penalties on Blacks, the Commission concluded that no evidence supports a finding that racial bias or animus undergirded the current penalty structure. However, the Commission was deeply concerned that almost ninety percent of offenders convicted of crack cocaine offenses in the federal courts are Black. The

Commission concluded that it is important that sufficient policy bases exist to justify a penalty differential that has a severe impact on a particular minority group.

For reasons discussed below, the Commission concluded that sufficient policy bases for the current penalty differential do not exist. Instead of differential treatment of crack and powder cocaine defendants based solely on the form of the drug involved in the offense, the Commission concluded that fairer sentencing would result from guideline enhancements that are targeted to the particular harms that are associated with some, but not all, crack cocaine offenses. Harm-specific guideline enhancements will better punish the most culpable offenders and protect the public from the most dangerous offenders, while avoiding blanket increases for all offenders involved with the crack form of cocaine.

As described in the Special Report, the 100-to-1 quantity ratio was established before the guideline system was in effect and before Congress could know how many of the harms associated with crack cocaine offenses would be captured by other guideline sentence enhancements. For example, the guidelines ensure lengthier imprisonment for leaders and managers of drug distribution offenses (§ 3B1.1), for the sale of controlled substances to juveniles or pregnant women (§ 2D1.2), for the sale of controlled substances in protected locations (§ 2D1.2), for the use of juveniles in controlled substance offenses (§ 2D1.2), and for repeat offenders (Chapter 4). For offenses involving death, a cross-reference to the first-degree murder guideline is provided (§ 2D1.1). Consequently, to the extent that these other guideline provisions take into account the increased harms associated with some crack offenses, the Commission has concluded that the higher offense levels based solely on the form of the drug that are found in the current drug quantity table should be reduced.

The Commission also has determined that, given the increased dangers posed by the possession and use of firearms or other dangerous weapons in connection with controlled substance offenses (including crack cocaine offenses), the enhancements provided by the guidelines for these factors should be increased. Consequently, the amendment increases the enhancement for possession of a firearm or other dangerous weapon from two to three levels, with a minimum offense level of 18 for possession of a firearm. A new four-level adjustment for brandishing or otherwise using a dangerous weapon

and a six-level adjustment for discharging a firearm are added. Additionally, a two-level enhancement for possession of a firearm of the type described in 26 U.S.C. 5845(a) or 18 U.S.C. 921(a)(30) is added (e.g., a machine gun, sawed-off shotgun, or a semi-automatic assault weapon). A new application note expressly lists bodily injury to any victim as a grounds for an upward departure.

With guideline enhancements that are targeted to factors associated with some crack cocaine offenses, the Commission concluded that the penalty differential based solely on the form of the drug should be eliminated. Crack and powder cocaine are pharmacologically the same drug. Both are dangerous and have a serious potential for abuse. Cocaine is imported and distributed in powder form, meaning that those persons highest in the distribution chain—whom the Commission considers the most culpable and the most responsible for the nation's cocaine problem—deal only in powder. Crack is manufactured from powder cocaine, generally near the point of retail sale, using a simple conversion process.

This cocaine distribution pattern, in combination with the current penalty differential, has resulted in cases in which retail crack dealers sometimes get longer sentences than the wholesale powder distributors who supply them. Under this amendment, the drug trafficking guidelines (§§ 2D1.1, 2D1.2, 2D1.5) will provide for the same significant punishment for crack distributors that is currently provided for distributors of like quantities of powder cocaine. The amended guideline will base punishment on the amount of cocaine involved and other associated, systematic harms, not on the form of cocaine. Hence, large-scale powder or crack cocaine suppliers will get longer sentences than small-scale street dealers. Conforming changes are also made in the simple possession guideline (§ 2D2.1).

The Commission is aware that an increase in cocaine addiction has been attributed to crack cocaine. Addiction is more likely when a drug is administered, as is crack, through smoking rather than through nasal insufflation (snorting). However, the Commission determined that this is not a reliable basis for establishing longer penalties for crack cocaine, because powder cocaine may be injected and injection is even more likely to lead to addiction than is smoking.

After careful consideration, the Commission concluded that increased penalties are also not an appropriate response to concerns about social

maladies that have been associated with crack, such as health problems and parental neglect among user groups. The Commission was unable to establish that these social problems result from the drug itself rather than from the disadvantaged social and economic environment in which the drug often is used. Moreover, these problems are not unique to crack cocaine but are associated with any serious drug or alcohol abuse. The Commission believes that increased punishment for crack cocaine solely because it is more commonly used by members of disadvantaged groups is not appropriate. Nor does the fact that crack cocaine is typically sold in smaller amounts, which may make it more readily available among lower-income groups, justify increased punishment compared to a form of the drug that is more commonly sold in amounts available only to more affluent persons.

After consideration of the factors in the Special Report to Congress and the purposes of sentencing set forth in 18 U.S.C. 3553, the Commission has concluded that the guideline provisions, as amended, will better take into account the increased harms associated with some crack cocaine offenses and, thus, the different offense levels based solely on the form of cocaine are not required.

6. Amendment: Section 2D1.1(b) is amended by inserting the following additional subdivision:

“(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.”.

Section 2D2.1 is amended by inserting the following new subsection:

“(b) Cross Reference

(1) If the offense involved possession of a controlled substance in a prison, correctional facility, or detention facility, apply § 2P1.2 (Providing or Possessing Contraband in Prison).”.

Reason for Amendment: Section 90103 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to amend the guidelines to provide an adequate enhancement for an offense under 21 U.S.C. 841 that involves distributing a controlled substance in a federal prison or detention facility. This amendment addresses this directive by adding a two-level enhancement to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) for an offense involving a prison or detention facility, similar to the two-level increase provided for other protected locations in § 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving

Underage or Pregnant Individuals; Attempt or Conspiracy).

Section 90103 also directs the Commission to amend the guidelines to provide an appropriate enhancement for an offense of simple possession of a controlled substance under 21 U.S.C. 844 that occurs in a federal prison or detention facility. This amendment addresses this directive by providing a cross reference from § 2D2.1 (Unlawful Possession; Attempt or Conspiracy) to § 2P1.2 (Providing or Possessing Contraband in Prison) in such cases.

7. Amendment: Section 2D1.1(b) is amended by inserting the following additional subdivision:

“(5) If the defendant meets the criteria set forth in subdivisions (1)–(5) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and the offense level determined above is level 26 or greater, decrease by 2 levels.”.

Section 5C1.2 is repromulgated without change.

Reason for Amendment: Section 80001(b) of the Violent Crime Control and Law Enforcement Act of 1994 (the “Safety Valve” provision) directs the Commission to promulgate guidelines and policy statements to implement section 80001(a) (providing an exception to otherwise applicable statutory mandatory minimum sentences for certain defendants convicted of specified drug offenses). Pursuant to this provision, the Commission promulgated § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) as an emergency amendment effective September 23, 1994. Under the terms of the congressionally-granted authority, this amendment is temporary unless repromulgated in the next amendment cycle under regularly applicable amendment procedures. See Public Law No. 100–182, section 21, set forth as an editorial note under 28 U.S.C. 994. This amendment repromulgates § 5C1.2, as set forth in the Guidelines Manual effective November 1, 1994. In addition, this amendment adds a new subsection to § 2D1.1 to implement this provision by providing a two-level decrease in offense level for cases meeting the criteria set forth in § 5C1.2(1)–(5).

8. Amendment: Section 2D1.1(c) is amended in the fifth note immediately following the Drug Quantity Table by deleting “if the offense involved (A) 50 or more marihuana plants, treat each plant as equivalent to 1 KG of marihuana; (B) fewer than 50 marihuana plants,” and by inserting “, regardless of sex,” immediately following “plant”. The Commentary to § 2D1.1 captioned “Background” is amended in the fourth

paragraph by deleting "In cases involving fifty or more marihuana plants, an equivalency of one plant to one kilogram of marihuana is derived from the statutory penalty provisions of 21 U.S.C. 841(b)(1)(A), (B), and (D). In cases involving fewer than fifty plants, the statute is silent as to the equivalency. For cases involving fewer than fifty" and inserting in lieu thereof "For marihuana"; and by deleting ", in the case of fewer than fifty marihuana plants,".

Reason for Amendment: For offenses involving 50 or more marihuana plants, the guidelines currently use an equivalency of one plant = one kilogram of marihuana, reflecting the quantities associated with the five- and ten-year mandatory minimum penalties in 21 U.S.C. 841. For offenses involving fewer than 50 marihuana plants, the guidelines use an equivalency of one plant = 100 grams of marihuana, unless the weight of the actual marihuana is greater. In actuality, a marihuana plant does not produce a yield of one kilogram of marihuana. The one plant = 100 grams of marihuana equivalency used by the Commission for offenses involving fewer than 50 marihuana plants was selected as a reasonable approximation of the actual average yield of marihuana plants taking into account (1) studies reporting the actual yield of marihuana plants (37.5 to 412 grams depending on growing conditions); (2) that all plants regardless of size are counted for guideline purposes while, in actuality, not all plants will produce useable marihuana (e.g., some plants may die of disease before maturity, and when plants are grown outdoors some plants may be consumed by animals); and (3) that male plants, which are counted for guideline purposes, are frequently culled because they do not produce the same quality of marihuana as do female plants. To enhance fairness and consistency, this amendment adopts the equivalency of 100 grams per marihuana plant for all guideline determinations.

9. Amendment: Section 2D1.1(c)(10) is amended by deleting:

"20 KG or more of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids); 40,000 or more units of Anabolic Steroids."

and by inserting in lieu thereof:

"40,000 or more units of Schedule I or II Depressants or Schedule III substances."

Section 2D1.1(c)(11) is amended by deleting:

"At least 10 KG but less than 20 KG of Secobarbital (or the equivalent

amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

At least 20,000 but less than 40,000 units of Anabolic Steroids."

and by inserting in lieu thereof:

"At least 20,000 but less than 40,000 units of Schedule I or II Depressants or Schedule III substances."

Section 2D1.1(c)(12) is amended by deleting:

"At least 5 KG but less than 10 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

At least 10,000 but less than 20,000 units of Anabolic Steroids."

and by inserting in lieu thereof:

"At least 10,000 but less than 20,000 units of Schedule I or II Depressants or Schedule III substances."

Section 2D1.1(c)(13) is amended by deleting:

"At least 2.5 KG but less than 5 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

At least 5,000 but less than 10,000 units of Anabolic Steroids."

and by inserting in lieu thereof:

"At least 5,000 but less than 10,000 units of Schedule I or II Depressants or Schedule III substances."

Section 2D1.1(c)(14) is amended by deleting:

"At least 1.25 KG but less than 2.5 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

At least 2,500 but less than 5,000 units of Anabolic Steroids; 20 KG or more of Schedule IV substances."

and inserting in lieu thereof:

"At least 2,500 but less than 5,000 units of Schedule I or II Depressants or Schedule III substances.

40,000 or more units of Schedule IV substances."

Section 2D1.1(c)(15) is amended by deleting:

"At least 500 G but less than 1.25 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

At least 1,000 but less than 2,500 units of Anabolic Steroids;

At least 8 KG but less than 20 KG of Schedule IV substances."

and inserting in lieu thereof:

"At least 1,000 but less than 2,500 units of Schedule I or II Depressants or Schedule III substances;

At least 16,000 but less than 40,000 or more units of Schedule IV substances."

Section 2D1.1(c)(16) is amended by deleting:

"At least 125 G but less than 500 G of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

At least 250 but less than 1,000 units of Anabolic Steroids;

At least 2 KG but less than 8 KG of Schedule IV substances; 20 KG or more of Schedule V substances."

and inserting in lieu thereof:

"At least 250 but less than 1,000 units of Schedule I or II Depressants or Schedule III substances;

At least 4,000 but less than 16,000 units of Schedule IV substances;

At least 40,000 or more units of Schedule V substances."

Section 2D1.1(c)(17) is amended by deleting:

"Less than 125 G of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

Less than 250 units of Anabolic Steroids;

Less than 2 KG of Schedule IV substances;

Less than 20 KG of Schedule V substances."

and inserting in lieu thereof:

"Less than 250 units of Schedule I or II Depressants or Schedule III substances;

Less than 4,000 units of Schedule IV substances;

Less than 40,000 units of Schedule V substances."

Section 2D1.1(c) is amended in the notes following the Drug Quantity Table by inserting the following additional note as the sixth note:

"In the case of Schedule I or II Depressants, Schedule III substances (except anabolic steroids), Schedule IV substances, and Schedule V substances, one 'unit' means one pill, capsule, or tablet. If the substance is in liquid form, one 'unit' means 0.5 gms."

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10d by deleting "28 kilograms" and inserting in lieu thereof "56,000 units"; by deleting "50 kilograms" and inserting in lieu thereof "100,000 units"; and by deleting "100 kilograms" and inserting in lieu thereof "200,000 units".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subsection captioned "Secobarbital and Other Schedule I or II Depressants" by deleting "Secobarbital and Other"; and by deleting:

"1 gm of Amobarbital = 2 gm of marihuana
 1 gm of Glutethimide = 0.4 gm of marihuana
 1 gm of Methaqualone = 0.7 gm of marihuana
 1 gm of Pentobarbital = 2 gm of marihuana
 1 gm of Secobarbital = 2 gm of marihuana", and inserting in lieu thereof:

"1 unit of a Schedule I or II Depressant = 1 gm of marihuana".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subsection captioned "Schedule III Substances" by deleting:

"1 gm of a Schedule III Substance (except anabolic steroids) = 2 gm of marihuana

1 unit of anabolic steroids = 1 gm of marihuana",

and inserting in lieu thereof:

"1 unit of a Schedule III Substance = 1 gm of marihuana".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subsection captioned "Schedule IV Substances" by deleting:

"1 gm of a Schedule IV Substance = 0.125 gm of marihuana",

and inserting in lieu thereof:

"1 unit of a Schedule IV Substance = 0.0625 gm of marihuana".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subsection captioned "Schedule V Substances" by deleting:

"1 gm of a Schedule V Substance = 0.0125 gm of marihuana",

and inserting in lieu thereof:

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

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 11 in the "Typical Weight Per Unit Table" by deleting the caption "Depressants"; and by deleting "Methaqualone* 300 mg".

Reason for Amendment: This amendment modifies the determination of the base offense level with respect to Schedule I and II Depressants and Schedule III, IV, and V controlled substances by applying the Drug Quantity Table according to the number of pills, capsules, or tablets rather than by the gross weight of the pills, capsules, or tablets. Schedule I and II Depressants and Schedule III, IV, and V substances are almost always in pill, capsule, or tablet form. The current guidelines use the total weight of the pill, tablet, or capsule containing the controlled substance. This method leads

to anomalies because the weight of most pills is determined primarily by the filler rather than the controlled substance. Thus, heavy pills lead to higher offense levels even though there is little or no relationship between gross weight and the potency of the pill. Applying the Drug Quantity Table according to the number of pills will both simplify guideline application and more fairly assess the scale and seriousness of the offense.

10. Amendment: Section 2D1.1(c) is amended in the notes following the Drug Quantity Table by inserting the following additional notes at the end:

"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 CFR § 1308.11(d)(25)), (ii) at least two of the following: cannabitol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).

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 CFR 1308.11(d)(25)) and (ii) at least two of the following: cannabitol, 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."

Section 2D1.1(c) is amended by inserting "Notes to Drug Quantity Table:" immediately following the asterisk at the beginning of the notes to the Drug Quantity Table; and by inserting a letter designation immediately before each note in alphabetical order beginning with "(A)".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 1 by inserting the following additional paragraph at the end:

"Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used."

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Table in the subdivision captioned "Schedule I or II Opiates" by inserting at the end:

"1 gm of Levo-alpha-acetylmethadol (LAAM) = 3 kg of marihuana".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in

Note 10 in the Drug Equivalency Table in the subdivision captioned "Cocaine and Other Schedule I and II Stimulants" by deleting:

"1 gm of L-Methamphetamine/Levo-methamphetamine/L-Desoxyephedrine = 40 gm of marihuana";

and inserting in lieu thereof:

"1 gm of Khat = .01 gm of marihuana".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 12 by deleting:

"In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount.

However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing."

and by inserting in lieu thereof:

"In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance—actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing."

The Commentary to § 2D1.1 captioned "Application Notes" is amended by inserting the following additional note:

"22. For purposes of the guidelines, a 'plant' is an organism having leaves and a readily observable root formation (e.g., a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant)."

Reason for Amendment: This is a six-part amendment. First, this amendment adds definitions of hashish and hashish oil to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) in the notes following the Drug Quantity Table. Currently, these terms are not defined by statute or in the guidelines, leading to litigation as to which substances are to be classified as hashish or hashish oil, as opposed to marihuana. See *United States v. Gravelle*, 819 F. Supp. 1076 (S.D. Fla. 1993); *United States v. Schultz*, 810 F. Supp. 230 (S.D. Ohio 1992).

Second, this amendment clarifies the treatment of marihuana that has a moisture content sufficient to render it unusable without drying (e.g., a bale of marihuana left in the rain or recently harvested marihuana that has not had time to dry). In such cases, using the weight of the wet marihuana can increase the offense level for a factor that bears no relationship to the scale of the offense or the marketable form of the marihuana. Prior to the effective date of the 1993 amendments, two circuits had approved weighing wet marihuana despite the fact that the marihuana was not in a usable form. *United States v. Pinedo-Montoya*, 966 F.2d 591 (10th Cir. 1992); *United States v. Garcia*, 925 F.2d 170 (7th Cir. 1991). Although Application Note 1 in the Commentary to § 2D1.1, effective November 1, 1993 (pertaining to unusable parts of a mixture or substance) should produce the appropriate result because marihuana must be dried before being used, this type of case is sufficiently distinct to warrant a specific reference in this application note to ensure correct application of the guideline.

Third, this amendment addresses the issue of what constitutes a marihuana plant. Several circuits have confronted the issue of when a cutting from a marihuana plant becomes a "plant." The appellate courts generally have held that the term "plant" should be defined by "its plain and ordinary dictionary meaning * * *. [A] marihuana 'plant' includes those cuttings accompanied by root balls." *United States v. Edge*, 989 F.2d 871, 878 (6th Cir. 1993) (quoting *United States v. Eves*, 932 F.2d 856, 860 (10th Cir. 1991), appeal after remand 30 F.3d 134 (6th Cir. 1994)). See also *United States v. Malbrough*, 922 F.2d 458, 465 (8th Cir. 1990) (acquiescing in the district court's apparent determination that certain marihuana cuttings that did not have their own "root system" should not be counted as plants), cert. denied, 501 S. Ct. 1258 (1991); *United States v. Carlisle*, 907 F.2d 94, 96 (9th Cir. 1990) (finding that

cuttings were plants where each cutting had previous degrees of root formation not clearly erroneous); *United States v. Angell*, 794 F. Supp. 874, 875 (D. Minn. 1990) (refusing to count as plants marihuana cuttings that have no visible root structure), aff'd in part and rev'd in part, 11 F.3d 806 (8th Cir.), cert. denied, 114 S. Ct. 3747 (1994); *United States v. Fitol*, 733 F. Supp. 1312, 1316 (D. Minn. 1990) ("individual cuttings, planted with the intent of growing full size plants, and which had grown roots, are 'plants' both within common parlance and within Section 841(b)"); *United States v. Speltz*, 733 F. Supp. 1311, 1312 (D. Minn. 1990) (small marihuana plants, e.g., cuttings with roots, are nonetheless still marihuana plants), aff'd, 938 F.2d 188 (8th Cir. 1991). Because this issue arises frequently, this amendment adds an application note to the Commentary of § 2D1.1 setting forth the definition of a plant for guidelines purposes.

Fourth, this amendment provides equivalencies for two additional controlled substances: (1) Khat, and (2) levo-alpha-acetylmethadol (LAAM) in the Drug Equivalency Tables in the Commentary to § 2D1.1.

Fifth, this amendment deletes the distinction between d- and l-methamphetamine in the Drug Equivalency Tables in the Commentary to § 2D1.1. L-methamphetamine, which is a rather weak form of methamphetamine, is rarely seen and is not made intentionally, but rather results from a botched attempt to produce d-methamphetamine. Under this amendment, l-methamphetamine would be treated the same as d-methamphetamine (i.e., as if an attempt to manufacture or distribute d-methamphetamine). Currently, unless the methamphetamine is specifically tested to determine its form, litigation can result over whether the methamphetamine is l-methamphetamine or d-methamphetamine. In addition, there is another form of methamphetamine (dl-methamphetamine) that is not listed in the Drug Equivalency Table. The listing of l-methamphetamine as a separate form of methamphetamine has led to litigation as to how dl-methamphetamine should be treated. In *United States v. Carroll*, 6 F.3d 735 (11th Cir. 1993), cert. denied, 114 S. Ct. 1234 (1994), a case in which the Eleventh Circuit held that dl-methamphetamine should be treated as d-methamphetamine, the majority and dissenting opinions both point out the complexity engendered by the current distinction between d- and l-methamphetamine. Under this

amendment, all forms of methamphetamine are treated alike, thereby simplifying guideline application.

Sixth, this amendment revises the Commentary to § 2D1.1 to provide that in a case involving negotiation for a quantity of a controlled substance, the negotiated quantity is used to determine the offense level unless the completed transaction establishes a different quantity, or the defendant establishes that he or she was not reasonably capable of producing the negotiated amount or otherwise did not intend to produce that amount. Disputes over the interpretation of this application note have produced much litigation. See, e.g., *United States v. Tillman*, 8 F.3d 17 (11th Cir. 1993); *United States v. Smiley*, 997 F.2d 475 (8th Cir. 1993); *United States v. Barnes*, 993 F.2d 680 (9th Cir. 1993), cert. denied, 115 S. Ct. 96 (1994); *United States v. Rodriguez*, 975 F.2d 999 (3d Cir. 1992); *United States v. Christian*, 942 F.2d 363 (6th Cir. 1991), cert. denied, 502 U.S. 1045 (1992); *United States v. Richardson*, 939 F.2d 135 (4th Cir.), 502 U.S. 987 (1991); *United States v. Ruiz*, 932 F.2d 1174 (7th Cir.), cert. denied, 502 U.S. 849 (1991); *United States v. Bradley*, 917 F.2d 601 (1st Cir. 1990).

11. Amendment: Section 2D1.11 and the commentary thereto is amended by deleting "listed precursor" wherever it appears and inserting in lieu thereof "list I"; by deleting "listed essential" wherever it appears and inserting in lieu thereof "list II"; and by deleting "Precursor Chemical Equivalency Table" wherever it appears and inserting in lieu thereof "List I Chemical Equivalency Table".

Section 2D1.11(d) is amended by deleting all lines referencing d-lysergic acid.

The Chemical Quantity Table in § 2D1.11(d) is amended in subdivisions (1)-(9) by adding the following list I chemicals (formerly Listed Precursor Chemicals) in the appropriate place in alphabetical order by subdivision as follows:

- (1) "17.8 KG or more of Benzaldehyde;";
"12.6 KG or more of Nitroethane;";
- (2) "At least 5.3 KG but less than 17.8 KG of Benzaldehyde;";
"At least 3.8 KG but less than 12.6 KG of Nitroethane;";
- (3) "At least 1.8 KG but less than 5.3 KG of Benzaldehyde;";
"At least 1.3 KG but less than 3.8 KG of Nitroethane;";
- (4) "At least 1.2 KG but less than 1.8 KG of Benzaldehyde;";
"At least 879 G but less than 1.3 KG of Nitroethane;";

- (5) "At least 712 G but less than 1.2 KG of Benzaldehyde;"
 "At least 503 G but less than 879 G of Nitroethane;"
- (6) "At least 178 G but less than 712 G of Benzaldehyde;"
 "At least 126 G but less than 503 G of Nitroethane;"
- (7) "At least 142 G but less than 178 G of Benzaldehyde;"
 "At least 100 G but less than 126 G of Nitroethane;"
- (8) "At least 107 G but less than 142 G of Benzaldehyde;"
 "At least 75 G but less than 100 G of Nitroethane;"
- (9) "Less than 107 G of Benzaldehyde;"
 "Less than 75 G of Nitroethane;"

and by adding the following chemicals, in the appropriate place in alphabetical order, to the List I Chemical Equivalency Table:

"1 gm of Benzaldehyde** = 1.124 gm of Ephedrine"
 "1 gm of Nitroethane** = 1.592 gm of Ephedrine"

Section 2D1.11(d) is amended in the notes following the Chemical Quantity Table by deleting Note (A) and inserting in lieu thereof:

"(A) The List I Chemical Equivalency Table provides a method for combining different precursor chemicals to obtain a single offense level. In a case involving two or more list I chemicals used to manufacture different controlled substances or to manufacture one controlled substance by different manufacturing processes, convert each to its ephedrine equivalency from the table below, add the quantities, and use the Chemical Quantity Table to determine the base offense level. In a case involving two or more list I chemicals used together to manufacture a controlled substance in the same manufacturing process, use the quantity of the single list I chemical that results in the greatest base offense level.";

and by deleting the first paragraph of Note D and inserting in lieu thereof:

"In a case involving ephedrine tablets, use the weight of the ephedrine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.".

Section 2D1.11(d) is amended by designating the List I Chemical Equivalency Table (formerly the Precursor Chemical Equivalency Table) as Note "(E)".

Section 2D1.11(d) is amended in the List I Chemical Equivalency Table (formerly the Precursor Chemical Equivalency Table) by inserting "***" immediately after each of the following substances: Ethylamine, N-Methylephedrine, N-

Methylpseudoephedrine, Norpseudoephedrine, Phenylpropanolamine, Pseudoephedrine, and 3,4-Methylenedioxyphenyl-2-propanone.

Section 2D1.11(d) is amended in the note following the List I Chemical Equivalency Table (formerly the Precursor Chemical Equivalency Table) designated by two asterisks by deleting "both hydriodic acid and ephedrine" and inserting in lieu thereof:

"(A) hydriodic acid and one of the following: ephedrine, N-methylephedrine, N-methylpseudoephedrine, norpseudoephedrine, phenylpropanolamine, or pseudoephedrine; or (B) ethylamine and 3,4-methylenedioxyphenyl-2-propanone; or (C) benzaldehyde and nitroethane,".

The Commentary to § 2D1.11 captioned "Application Notes" is amended in Note 3 by deleting "3, 4 methylenedioxyphenyl-2-propanone" wherever it appears and inserting in lieu thereof in each instance "methylamine".

The Commentary to § 2D1.11 captioned "Application Notes" is amended by deleting Note 4 and inserting in lieu thereof:

"4. When two or more list I chemicals are used together in the same manufacturing process, calculate the offense level for each separately and use the quantity that results in the greatest base offense level. In any other case, the quantities should be added together (using the List I Chemical Equivalency Table) for the purpose of calculating the base offense level.

Examples:

(a) The defendant was in possession of five kilograms of ephedrine and three kilograms of hydriodic acid. Ephedrine and hydriodic acid typically are used together in the same manufacturing process to manufacture methamphetamine. Therefore, the base offense level for each listed chemical is calculated separately and the list I chemical with the higher base offense level is used. Five kilograms of ephedrine result in a base offense level of 24; 300 grams of hydriodic acid result in base offense level of 14. In this case, the base offense level would be 24.

(b) The defendant was in possession of five kilograms of ephedrine and two kilograms of phenylacetic acid. Although both of these chemicals are used to manufacture methamphetamine, they are not used together in the same manufacturing process. Therefore, the quantity of phenylacetic acid should be converted to an ephedrine equivalency using the List I Chemical Equivalency Table and then added to the quantity of

ephedrine. In this case, the two kilograms of phenylacetic acid convert to two kilograms of ephedrine (see List I Chemical Equivalency Table), resulting in a total equivalency of seven kilograms of ephedrine."

The Commentary to § 2D1.11 captioned "Background" is amended in the second sentence by deleting "Listed precursor" and inserting in lieu thereof "List I"; by deleting "critical to the formation" and inserting in lieu thereof "important to the manufacture"; and by inserting "usually" immediately before "become".

The Commentary to § 2D1.11 captioned "Background" is amended in the last sentence by deleting "Listed essential" and inserting in lieu thereof "List II"; by inserting "used as" immediately following "generally"; and by deleting ", and do not become part of the finished product".

The Commentary to § 2D1.11 captioned "Application Notes" is amended by deleting Note 14; and by renumbering the remaining notes accordingly.

Reason for Amendment: The Domestic Chemical Diversion Act of 1993, Public Law 103-200, 107 Stat. 2333, changed the designations of the listed chemicals from "listed precursor chemicals" and "listed essential chemicals" to "list I chemicals" and "list II chemicals," respectively. Section 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) currently refers to "listed precursor chemicals" and "listed essential chemicals." This amendment conforms § 2D1.11 to these statutory changes.

The Act also adds pills containing ephedrine as a list I chemical. Ephedrine itself is a list I chemical under 21 U.S.C. 802(34). Pills containing ephedrine previously were not covered by the statute and thus legally could be purchased "over the counter." Purchases of these pills were sometimes made in large quantities and the pills crushed and processed to extract the ephedrine (which can be used to make methamphetamine). Unlike ephedrine, which is purchased from a chemical company and is virtually 100 percent pure, these tablets contain a substantially lower percentage of ephedrine (about 25 percent). To avoid unwarranted disparity, this amendment adds a note to § 2D1.11 providing that the amount of actual ephedrine contained in a pill is to be used in determining the offense level.

In addition, the Act removes three chemicals from, and adds two others to, the listed chemicals controlled under the Controlled Substances Act. Two of

the chemicals removed from the list are not currently listed in § 2D1.11 because the Commission was aware that they are not used in the manufacture of any controlled substance. The third chemical removed from the list, d-lysergic acid, was listed both as a listed chemical in § 2D1.11 and as a controlled substance in § 2D1.1. This amendment conforms § 2D1.11 by deleting all references to d-lysergic acid. The two chemicals added as listed chemicals are benzaldehyde and nitroethane. Both of these chemicals are used to make methamphetamine. The base offense levels for listed chemicals in § 2D1.11 are determined by reference to the most common controlled substance the chemical is used to manufacture; consequently, this amendment adds these chemicals to the Chemical Quantity Table based on information provided by the Drug Enforcement Administration regarding their use in the production of methamphetamine.

A number of the chemicals in the Chemical Quantity Table are used in the same process to make a controlled substance. Currently, a note at the end of the Precursor Chemical Equivalency Table addresses this situation for hydriodic acid and ephedrine. This amendment expands this note to cover other chemicals that similarly are used together.

Finally, the amendment corrects the Commentary to § 2D1.11 with respect to an example of a listed chemical that is used with P2P to manufacture methamphetamine.

12. Amendment: Section 2D1.12(a) is amended by inserting "(Apply the greater)" immediately after "Base Offense Level"; and by deleting "12" and inserting in lieu thereof:

"(1) 12, if the defendant intended to manufacture a controlled substance or knew or believed the prohibited equipment was to be used to manufacture a controlled substance; or (2) 9, if the defendant had reasonable cause to believe the prohibited equipment was to be used to manufacture a controlled substance."

Reason for Amendment: The Domestic Chemical Diversion Act of 1993, Public Law 103-200, 107 Stat. 2333, broadens the prohibition in 21 U.S.C. 843(a) to cover possessing, manufacturing, distributing, exporting, or importing three-neck, round-bottom flasks, tableting machines, encapsulating machines, or gelatin capsules having reasonable cause to believe they will be used to manufacture a controlled substance. Section 2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment; Attempt

or Conspiracy) applies to this conduct. Consistent with the treatment of similar conduct under §§ 2D1.11(b)(2) and 2D1.13(b)(2), this amendment provides an alternative base offense level in § 2D1.12 to address the case in which the defendant had reasonable cause to believe, but not actual knowledge or belief, that the equipment was to be used to manufacture a controlled substance.

13. Amendment: The Introductory Commentary to Chapter Two, Part H, Subpart I, and §§ 2H1.1, 2H1.3, 2H1.4, and 2H1.5 are deleted and the following inserted in lieu thereof:

"§ 2H1.1. Offenses Involving Individual Rights

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

(1) the offense level from the offense guideline applicable to any underlying offense;

(2) 12, if the offense involved two or more participants;

(3) 10, if the offense involved (A) the use or threat of force against a person; or (B) property damage or the threat of property damage; or

(4) 6, otherwise.

(b) Specific Offense Characteristics

(1) If (A) the defendant was a public official at the time of the offense; or (B) the offense was committed under color of law, increase by 6 levels.

Commentary

Statutory Provisions: 18 U.S.C. 241, 242, 245(b), 246, 247, 248, 1091; 42 U.S.C. 3631.

Application Notes

1. 'Offense guideline applicable to any underlying offense' means the offense guideline applicable to any conduct established by the offense of conviction that constitutes an offense under federal, state, or local law (other than an offense that is itself covered under Chapter Two, Part H, Subpart 1).

In certain cases, conduct set forth in the count of conviction may constitute more than one underlying offense (e.g., two instances of assault, or one instance of assault and one instance of arson). In such cases, determine the number and nature of underlying offenses by applying the procedure set forth in Application Note 5 of § 1B1.2 (Applicable Guidelines). If the Chapter Two offense level for any of the underlying offenses under subsection (a)(1) is the same as, or greater than, the alternative base offense level under subsection (a)(2), (3), or (4), as applicable, use subsection (a)(1) and treat each underlying offense as if contained in a separate count of conviction. Otherwise, use subsection

(a)(2), (3), or (4), as applicable, to determine the base offense level.

2. 'Participant' is defined in the Commentary to § 3B1.1 (Aggravating Role).

3. The burning or defacement of a religious symbol with an intent to intimidate shall be deemed to involve the threat of force against a person for the purposes of subsection (a)(3)(A).

4. If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, an additional 3-level enhancement from § 3A1.1(a) will apply.

5. If subsection (b)(1) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill)."

Section 3A1.1 is deleted and the following inserted in lieu thereof:

"§ 3A1.1. Hate Crime Motivation or Vulnerable Victim

(a) If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by 3 levels.

(b) If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels.

(c) Special Instruction

(1) Subsection (a) shall not apply if an adjustment from § 2H1.1(b)(1) applies.

Commentary

Application Notes

1. Subsection (a) applies to offenses that are hate crimes. Note that special evidentiary requirements govern the application of this subsection.

Do not apply subsection (a) on the basis of gender in the case of a sexual offense. In such cases, this factor is taken into account by the offense level of the Chapter Two offense guideline.

2. Subsection (b) applies to offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim's unusual vulnerability. The adjustment would apply, for example, in a fraud

case where the defendant marketed an ineffective cancer cure or in a robbery where the defendant selected a handicapped victim. But it would not apply in a case where the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile. Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank.

Do not apply subsection (b) if the offense guideline specifically incorporates this factor. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection should not be applied unless the victim was unusually vulnerable for reasons unrelated to age.

3. The adjustments from subsections (a) and (b) are to be applied cumulatively. Do not, however, apply subsection (b) in a case in which subsection (a) applies unless a victim of the offense was unusually vulnerable for reasons unrelated to race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation.

4. If an enhancement from subsection (b) applies and the defendant's criminal history includes a prior sentence for an offense that involved the selection of a vulnerable victim, an upward departure may be warranted.

Background: Subsection (a) reflects the directive to the Commission, contained in Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994, to provide an enhancement of not less than three levels for an offense when the finder of fact at trial determines beyond a reasonable doubt that the defendant had a hate crime motivation (i.e., a primary motivation for the offense was the race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of the victim). To avoid unwarranted sentencing disparity based on the method of conviction, the Commission has broadened the application of this enhancement to include offenses that, in the case of a plea of guilty or nolo contendere, the court at sentencing determines are hate crimes."

The Commentary to § 1B1.5 captioned "Application Notes" is amended in Note 1 by deleting "2H1.1(a)(2)" and inserting in lieu thereof "2H1.1(a)(1)".

The Commentary to § 2H4.1 captioned "Application Note" is amended in Note 1 by deleting "2 plus the offense" and inserting in lieu thereof "Offense".

Section 3D1.2(d) is amended in the third paragraph by deleting "2H1.2, 2H1.3, 2H1.4,".

Reason for Amendment: This is a five-part amendment. First, the amendment

adds an additional subsection to § 3A1.1 (Vulnerable Victim) to implement the directive contained in Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994 by providing a three-level increase in the offense level for offenses that are "hate crimes." Second, the amendment consolidates §§ 2H1.1, 2H1.3, 2H1.4, and 2H1.5, and adjusts the offense levels in these guidelines to harmonize them with each other, reflect the additional enhancement now contained in § 3A1.1, and better reflect the seriousness of the underlying conduct. Third, the amendment references violations of 18 U.S.C. 248 (the Freedom of Access to Clinic Entrances Act of 1994, Public Law 103-259, 108 Stat. 694) to the consolidated § 2H1.1. Fourth, the amendment clarifies the operation of § 3A1.1 with respect to a vulnerable victim. Fifth, the amendment addresses the directive to the Commission in section 240002 of the Violent Crime Control and Law Enforcement Act of 1994 (pertaining to elderly victims of crimes of violence).

Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to provide a minimum enhancement of three levels for offenses that the finder of fact at trial determines are hate crimes. This directive also instructs the Commission to ensure that there is reasonable consistency with other guidelines and that duplicative punishments for the same offense are avoided. The congressional directive in section 280003 requires that the three-level hate crimes enhancement apply where "the finder of fact at trial determines beyond a reasonable doubt" that the offense of conviction was a hate crime. This amendment makes the enhancement applicable if either the finder of fact at trial or, in the case of a guilty or nolo contendere plea, the court at sentencing determines that the offense was a hate crime. By broadening the applicability of the congressionally mandated enhancement, this amendment will avoid unwarranted sentencing disparity based on the mode of conviction. The Commission's general guideline promulgation authority, see 28 U.S.C. 994, permits such a broadening of the enhancement.

The addition of a generally applicable Chapter Three hate crimes enhancement requires amendment of the civil rights offense guidelines to avoid duplicative punishments. In addition, to further the Commission's goal of simplifying the operation of the guidelines, the proposed amendment consolidates the four current civil rights offense guidelines into one guideline and

adjusts these guidelines to take into account the new enhancement under § 3A1.1(a).

The Freedom of Access to Clinic Entrances Act of 1994 makes it a crime to interfere with access to reproductive services or to interfere with certain religious activities. This Act criminalizes a broad array of conduct, from non-violent obstruction of the entrance to a clinic to murder. The amendment treats these violations in the same way as other offenses involving individual rights.

Section 240002 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to ensure that the guidelines provide sufficiently stringent penalties for crimes of violence against elderly victims. Upon review of the guidelines, the Commission determined that the penalties currently provided generally appear appropriate; however, this amendment strengthens the Commentary to § 3A1.1 in one area by expressly providing a basis for an upward departure if both the current offense and a prior offense involved a vulnerable victim (including an elderly victim), regardless of the type of offense.

Finally, Section 250003 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to review, and if necessary, amend the sentencing guidelines to ensure that victim-related adjustments for fraud offenses against older victims are adequate. Section 250003 also directs the Commission to study and report to the Congress on this issue. See Report to Congress: Adequacy of Penalties for Fraud Offenses Involving Elderly Victims (March 13, 1995). Although the Commission found that the current guidelines generally provided adequate penalties in these cases, it noted some inconsistency in the application of § 3A1.1 regarding whether this adjustment required proof that the defendant had "targeted the victim on account of the victim's vulnerability." This amendment revises the Commentary of § 3A1.1 to clarify application with respect to this issue.

14. Amendment: Section 2K2.1(a)(1) is amended by deleting: "defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense, and the instant offense involved a firearm listed in 26 U.S.C. 5845(a)",

and inserting in lieu thereof:

"offense involved a firearm described in 26 U.S.C. 5845(a) or 18 U.S.C. 921(a)(30), and the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense".

Section 2K2.1(a)(3) is amended by deleting:

“defendant had one prior felony conviction of either a crime of violence or a controlled substance offense, and the instant offense involved a firearm listed in 26 U.S.C. 5845(a)”,

and inserting in lieu thereof:

“offense involved a firearm described in 26 U.S.C. 5845(a) or 18 U.S.C. 921(a)(30), and the defendant had one prior conviction of either a crime of violence or controlled substance offense”.

Section 2K2.1(a)(4)(B) is amended by deleting “listed in 26 U.S.C. 5845(a)” and inserting in lieu thereof “described in 26 U.S.C. 5845(a) or 18 U.S.C. 921(a)(30)”.

Section 2K2.1(a)(5) is amended by deleting “listed in 26 U.S.C. 5845(a)” and inserting in lieu thereof “described in 26 U.S.C. 5845(a) or 18 U.S.C. 921(a)(30)”.

Section 2K2.1(a)(8) is amended by deleting “or (m)” and by inserting in lieu thereof “(m), (s), (t), or (x)(1)”.

The Commentary to § 2K2.1 captioned “Statutory Provisions” is amended by inserting “-(w), (x)(1)” immediately following “(r)”, and by inserting “, (h), (j)-(n)” immediately following “(g)”.

The Commentary to § 2K2.1 captioned “Application Notes” is amended by deleting Note 3 and inserting in lieu thereof:

“3. A ‘firearm described in 26 U.S.C. 5845(a)’ includes: (i) A shotgun having a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; a rifle having a barrel or barrels of less than 16 inches in length; or a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (ii) a machinegun; (iii) a silencer; (iv) a destructive device; and (v) certain unusual weapons defined in 26 U.S.C. 5845(e) (that are not conventional, unaltered handguns, rifles, or shotguns). For a more detailed definition, refer to 26 U.S.C. 5845.

A ‘firearm described in 18 U.S.C. 921(a)(30)’ (pertaining to semiautomatic assault weapons) does not include a weapon exempted under the provisions of 18 U.S.C. 922(v)(3).”.

The Commentary to § 2K2.1 captioned “Application Notes” is amended in Note 6 by deleting “or (v)” and inserting “(v)” in lieu thereof; and by inserting “; or (vi) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate

partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child as defined in 18 U.S.C. 922(d)(8)” immediately following “States”.

The Commentary to § 2K2.1 captioned “Application Notes” is amended by deleting Note 12 and inserting in lieu thereof:

“12. If the only offense to which § 2K2.1 applies is 18 U.S.C. 922 (i), (j), or (u), 18 U.S.C. 924 (j) or (k), or 26 U.S.C. 5861 (g) or (h) (offenses involving a stolen firearm or ammunition) and the base offense level is determined under subsection (a)(7), do not apply the adjustment in subsection (b)(4) unless the offense involved a firearm with an altered or obliterated serial number. This is because the base offense level takes into account that the firearm or ammunition was stolen.

Similarly, if the only offense to which § 2K2.1 applies is 18 U.S.C. 922(k) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the adjustment in subsection (b)(4) unless the offense involved a stolen firearm or ammunition. This is because the base offense level takes into account that the firearm had an altered or obliterated serial number.”.

Reason for Amendment: This is a five-part amendment. First, the amendment revises § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to provide increased offense levels for possession of a semiautomatic assault weapon that correspond to those currently provided for possession of machineguns and other firearms described in 26 U.S.C. 5845(a). Second, the amendment addresses section 110201 of the Violent Crime Control Law Enforcement Act of 1994 by providing an offense level of six for the misdemeanor portion of 18 U.S.C. 922(x)(1) (involving sale or transfer of a handgun or ammunition to a juvenile). For an offense under the felony portion of 18 U.S.C. 922(x)(1) (involving the sale or transfer of a handgun or handgun ammunition to a juvenile knowing or having reasonable cause to believe that the handgun or ammunition was intended to be used in a crime), the enhancement in subsection (b)(5) will provide a minimum offense level of 18. Third, the amendment addresses section 110401 of the Violent Crime Control and Law Enforcement Act of 1994 by adding to the definition of a “prohibited person” in § 2K2.1 a

person under the court order described in that crime bill section. Fourth, the amendment provides an offense level of six for the misdemeanors set forth in 18 U.S.C. 922 (s) and (t) (involving violations of the Brady Act). Fifth, the amendment clarifies that Application Note 6 in § 2K2.1 applies only to cases in which the base offense level is determined under § 2K2.1(a)(7).

15. Amendment: The Commentary to § 2L1.2 captioned “Application Notes” is amended in Note 2 by deleting:

“a sentence at or near the maximum of the applicable guideline range may be warranted”,

and inserting in lieu thereof:

“an upward departure may be warranted. See § 4A1.3 (Adequacy of Criminal History Category)”.

Reason for Amendment: This amendment revises § 2L1.2 (Unlawfully Entering or Remaining in the United States) to authorize the court to consider an upward departure in the case of a defendant with repeated prior instances of deportation not resulting in a criminal conviction.

16. Amendment: Section 2L2.1(b)(2) is amended by deleting “sets of”, and by deleting “Sets of”.

Section 2L2.1(b) is amended by inserting the following additional subdivision:

“(3) If the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws, increase by 4 levels.”.

The Commentary to § 2L2.1 captioned “Application Notes” is amended in Note 2 by inserting “of documents” immediately before “intended”; and by deleting “documents as one set” and inserting in lieu thereof “set as one document”.

The Commentary to § 2L2.1 captioned “Application Notes” is amended by inserting the following additional note:

“3. Subsection (b)(3) provides an enhancement if the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws. If the defendant knew, believed, or had reason to believe that the felony offense to be committed was of an especially serious type, an upward departure may be warranted.”.

Section 2L2.2 is amended by inserting the following additional subsection:

“(c) Cross Reference

(1) If the defendant used a passport or visa in the commission or attempted

commission of a felony offense, other than an offense involving violation of the immigration laws, apply—

(A) § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that felony 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.”.

Reason for Amendment: This is a three-part amendment. First, this amendment provides an enhancement in § 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law) if the defendant trafficked in a passport or visa knowing, believing, or having reason to believe that the passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws. Second, this amendment corrects a technical error in § 2L2.1(b)(2). Third, this amendment adds a cross reference to § 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) that addresses the case of a defendant who uses a passport or visa in the commission or attempted commission of a felony offense, other than an offense involving violation of the immigration laws.

17. Amendment: Section 2P1.2(a)(2) is amended by inserting “methamphetamine,” immediately following “PCP.”.

Section 2P1.2(a)(3) is amended by inserting “methamphetamine,” immediately following “PCP.”.

Section 2P1.2 is amended by deleting subsection (c)(1) and inserting in lieu thereof:

“(1) If the object of the offense was the distribution of a controlled substance, apply the offense level from § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy). Provided, that if the defendant is convicted under 18 U.S.C. 1791(a)(1) and is punishable under 18 U.S.C. 1791(b)(1), and the resulting offense level is less than level 26, increase to level 26.”.

Reason for Amendment: This amendment conforms the offense level

for methamphetamine offenses in a correctional or detention facility to that of other controlled substance offenses committed in a correctional or detention facility that have the same statutory maximum penalty. This change reflects the increase in the maximum penalty for methamphetamine offenses in section 90101 of the Violent Crime Control and Law Enforcement Act of 1994. In addition, the amendment expands the cross reference in subsection (c)(1) to cover distribution of all controlled substances in a correctional or detention facility.

18. Amendment: Sections 2S1.1 and 2S1.2 are deleted and the following inserted in lieu thereof:

“§ 2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

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

(1) The offense level for the underlying offense from which the funds were derived, if the defendant committed the underlying offense (or otherwise would be accountable for the commission of the underlying offense under § 1B1.3 (Relevant Conduct)) and the offense level for that offense can be determined; or

(2) 12 plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds, if the defendant knew or believed that the funds were the proceeds of, or were to be used to promote, an offense involving the manufacture, importation, or distribution of controlled substances or listed chemicals; a crime of violence; or an offense involving firearms or explosives, national security, or international terrorism; or

(3) 8 plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds.

(b) Specific Offense Characteristics

(1) If the defendant knew or believed that (A) the financial or monetary transactions, transfers, transportation, or transmissions were designed in whole or in part to conceal or disguise the proceeds of criminal conduct, or (B) the funds were to be used to promote further criminal conduct, increase by 2 levels.

(2) If subsection (b)(1)(A) is applicable and the offense (A) involved placement of funds into, or movement of funds through or from, a company or financial institution outside the United States, or (B) otherwise involved a sophisticated form of money laundering, increase by 2 levels.

Commentary

Statutory Provisions: 18 U.S.C. 1956, 1957.

Application Notes

1. ‘Value of the funds’ means the value of the funds or property involved in the financial or monetary transactions, transportation, transfers, or transmissions that the defendant knew or believed (A) were criminally derived funds or property, or (B) were to be used to promote criminal conduct.

When a financial or monetary transaction, transfer, transportation, or transmission involves legitimately derived funds that have been commingled with criminally derived funds, the value of the funds is the amount of the criminally derived funds, not the total amount of the commingled funds. For example, if the defendant deposited \$50,000 derived from a bribe together with \$25,000 of legitimately derived funds, the value of the funds is \$50,000, not \$75,000.

Criminally derived funds are any funds that are derived from a criminal offense; e.g., in a drug trafficking offense, the total proceeds of the offense are criminally derived funds. In a case involving fraud, however, the loss attributable to the offense occasionally may be considerably less than the value of the criminally derived funds (e.g., the defendant fraudulently sells stock for \$200,000 that is worth \$120,000 and deposits the \$200,000 in a bank; the value of the criminally derived funds is \$200,000, but the loss is \$80,000). If the defendant is able to establish that the loss, as defined in § 2F1.1 (Fraud and Deceit), was less than the value of the funds (or property) involved in the financial or monetary transactions, transfers, transportation, or transmissions, the loss from the offense shall be used as the “value of the funds.”

2. If the defendant is to be sentenced both on a count for an offense from which the funds were derived and on a count under this guideline, the counts will be grouped together under subsection (c) of § 3D1.2 (Groups of Closely-Related Counts).

3. Subsection (b)(1)(A) provides an increase for those cases that involve efforts to make criminally derived funds appear to have a legitimate source. This subsection will apply, for example, when the defendant conducted a transaction through a straw party or a front company, concealed a money-laundering transaction in a legitimate business, or used an alias or otherwise provided false information to disguise the true source or ownership of the funds.

4. In order for subsection (b)(1)(B) to apply, the defendant must have known or believed that the funds would be used to promote further criminal conduct, i.e., criminal conduct beyond the underlying criminal conduct from which the funds were derived.

5. Subsection (b)(2) provides an additional increase for those money laundering cases that are more difficult to detect because sophisticated steps were taken to conceal the origin of the money. Subsection (b)(2)(B) will apply, for example, if the offense involved the "layering" of transactions, i.e., the creation of two or more levels of transactions that were intended to appear legitimate.

Background: The statutes covered by this guideline were enacted as part of the Anti-Drug Abuse Act of 1986. These statutes cover a wide range of conduct. For example, they apply to large-scale operations that engage in international laundering of illegal drug proceeds. They also apply to a defendant who deposits \$11,000 of fraudulently obtained funds in a bank. In order to achieve proportionality in sentencing, this guideline generally starts from a base offense level equivalent to that which would apply to the specified unlawful activity from which the funds were derived. The specific offense characteristics provide enhancements "if the offense was designed to conceal or disguise the proceeds of criminal conduct and if the offense involved sophisticated money laundering."

Section 3D1.2(d) is amended in the second paragraph by deleting "2S1.2,".

Section 8C2.1(a) is amended by deleting "2S1.2,".

The Commentary to § 8C2.4 captioned "Application Notes" is amended in Note 5 by deleting "§ 2S1.1 (Laundering of Monetary Instruments); § 2S1.2 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity); and § 2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports)"; and by inserting "or" immediately before "§ 2R1.1".

Appendix A (Statutory Index) is amended in the line reference to 18 U.S.C. 1957 by deleting "2S1.2" and inserting in lieu thereof "2S1.1".

Reason for Amendment: This revises and consolidates §§ 21/1 and 2S1.2 to simplify application and better assure that the offense levels comport with the relative seriousness of the offense conduct. When the Commission originally promulgated §§ 2S1.1 and 2S1.2 to govern sentencing for the

money laundering and monetary transaction offenses found at 18 U.S.C. 1956 and 1957, these statutes were relatively new and, therefore, the Commission had little case experience upon which to base the guidelines. Since then, courts have construed the elements of these offenses broadly. As a result, the Commission has found that §§ 2S1.1 and 2S1.2 do not adequately distinguish the varying degrees of offense conduct that are sentenced under these guidelines.

This amendment responds to concerns about the operation of these guidelines by tying the base offense levels of the revised guideline more closely to the underlying conduct that was the source of the illegal proceeds. If the defendant committed the underlying offense and the offense level can be determined, subsection (a)(1) provides a base offense level equal to that for the underlying offense. In other instances, the base offense level is keyed to the value of funds involved. The amendment uses specific offense characteristics to assure greater punishment when the defendant knew or believed that the transactions were designed to conceal the criminal nature of the proceeds or when the funds were to be used to promote further criminal activity. An additional increase is provided under subsection (b)(2) if sophisticated efforts at concealment were involved.

Subsections (a)(2) and (a)(3) provide "fallback" offense levels that will apply primarily in cases in which the offense level for the underlying conduct cannot be determined. Subsection (a)(3) provides an offense level of eight plus the offense level from the table in § 2F1.1 (Fraud and Deceit). This offense level generally corresponds to the offense level for fraud and theft offenses with more than minimal planning. Subsection (a)(2) provides an offense level of 12 plus the offense level from the table in § 2F1.1 for cases in which the defendant knew or believed the funds were derived from, or were to be used to further, certain serious offenses (e.g., drug trafficking offenses). This approach is consistent with the current guideline structure, which generally treats such offenses as at least four levels more serious than typical economic offenses (e.g., fraud).

19. Amendment: Chapter Three, Part A, is amended by inserting the following additional section:

"§ 3A1.4. International Terrorism

(a) If the offense is a felony that involved, or was intended to promote, international terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.

(b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

Commentary

Application Notes

1. Subsection (a) increases the offense level if the offense involved, or was intended to promote, international terrorism. 'International terrorism' is defined at 18 U.S.C. 2331.

2. Under subsection (b), if the defendant's criminal history category as determined under Chapter Four (Criminal History and Criminal Livelihood) is less than Category VI, it shall be increased to Category VI."

Section 5K2.15 is deleted.

Reason for Amendment: Section 12004 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to provide an appropriate enhancement for any felony that involves or is intended to promote international terrorism. The amendment addresses this directive by adding a Chapter Three enhancement at § 3A1.4 (Terrorism) in place of the current upward departure provision at § 5K2.15 (Terrorism).

20. Amendment: Section 3B1.4 is deleted and the following inserted in lieu thereof:

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

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

Commentary

Application Note

1. 'Used or attempted to use' includes directing, commanding, encouraging, intimidating, counseling, training, processing, recruiting, or soliciting.

2. Do not apply this adjustment if the Chapter Two offense guideline incorporates this factor.

3. If the defendant used or attempted to use more than one person less than eighteen years of age, an upward departure may be warranted."

Reason for Amendment: This amendment implements the directive in Section 14008 of the Violent Crime Control and Law Enforcement Act of 1994 (pertaining to the use of a minor in the commission of an offense) in a slightly broader form.

21. Amendment: The Commentary to § 4B1.1 captioned "Background" is amended by deleting the text and inserting in lieu thereof:

"Section 994(h) of title 28, United States Code, mandates that the

Commission assure that certain 'career' offenders receive a sentence of imprisonment 'at or near the maximum term authorized.' Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. 994(a)-(f), and its amendment authority under 28 U.S.C. 994 (o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and avoid 'unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct * * * ' 28 U.S.C. 991(b)(1)(B). The Commission's refinement of this definition over time is consistent with Congress' choice of a directive to the Commission rather than a mandatory minimum sentencing statute ('The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers.' S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

The legislative history of this provision suggests that the phrase 'maximum term authorized' should be construed as the maximum term authorized by statute. See S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983), 128 Cong. Rec. 26, 511-12 (1982) (text of 'Career Criminals' amendment by Senator Kennedy) id. at 26, 515 (brief summary of amendment) id. at 26, 517-18 (statement of Senator Kennedy)."

Application Note 1 of the Commentary to § 4B1.2 is repromulgated without change.

Reason for Amendment: This amendment inserts additional background commentary explaining the Commission's rationale and authority for § 4B1.1 (Career Offender). The amendment responds to a decision by the United States Court of Appeals for the District of Columbia Circuit in *United States v. Price*, 990 F.2d 1367 (D.C. Cir. 1993). In *Price*, the court invalidated application of the career offender guideline to a defendant convicted of a drug conspiracy because 28 U.S.C. 994(h), which the Commission cites as the mandating authority for the career offender guideline, does not expressly refer to inchoate offenses. The court indicated that it did not foreclose

Commission authority to include conspiracy offenses under the career offender guideline by drawing upon its broader guideline promulgation authority in 28 U.S.C. 994(a). See also *United States v. Mendoza-Figueroa*, 28 F.3d 766 (8th Cir. 1994), vacated (Sept. 2, 1994); *United States v. Bellazerius*, 24 F.3d 698 (5th Cir.), cert. denied, 115 S. Ct. 375 (1994). Other circuits have rejected the Price analysis and upheld the Commission's definition of "controlled substance offense." For example, the Ninth Circuit considered the legislative history to 994(h) and determined that the Senate Report clearly indicated that 994(h) was not the sole enabling statute for the career offender guidelines. *United States v. Heim*, 15 F.3d 830 (9th Cir.), cert. denied, 115 S. Ct. 55 (1994). See also *United States v. Hightower*, 25 F.3d 182 (3d Cir.), cert. denied, 115 S. Ct. 370 (1994); *United States v. Damerville*, 27 F.3d 254 (7th Cir.), cert. denied, 115 S. Ct. 445 (1994); *United States v. Allen*, 24 F.3d 1180 (10th Cir.), cert. denied, 115 S. Ct. 493 (1994); *United States v. Baker*, 16 F.3d 854 (8th Cir. 1994); *United States v. Linnear*, 40 F.3d 215 (7th Cir. 1994); *United States v. Kennedy*, 32 F.3d 876 (4th Cir. 1994), cert. denied, 115 S. Ct. 939 (1995); *United States v. Piper*, 35 F.3d 611 (1st Cir. 1994), cert. denied, 115 S. Ct. 1118 (1995).

22. Amendment: The Commentary to § 5D1.1 captioned "Application Notes" is amended in Note 1 by deleting:

"While there may be cases within this category that do not require post release supervision, these cases are the exception and may be handled by a departure from this guideline.", and inserting in lieu thereof:

"The court may depart from this guideline and not impose a term of supervised release if it determines that supervised release is neither required by statute nor required for any of the following reasons: (1) To protect the public welfare; (2) to enforce a financial condition; (3) to provide drug or alcohol treatment or testing; (4) to assist the reintegration of the defendant into the community; or (5) to accomplish any other sentencing purpose."

Section 5D1.2 is amended by deleting subsection (a); and by redesignating subsection (b) as subsection (a).

Section 5D1.2(a) (formerly § 5D1.2(b)) is amended by deleting "Otherwise, when" and inserting in lieu thereof "If".

Section 5D1.2 is amended by inserting the following additional subsection:

"(b) Provided, that the term of supervised release imposed shall in no event be less than any statutorily required term of supervised release."

Reason for Amendment: This amendment sets forth with greater specificity the circumstances under which the court may depart from the requirements of § 5D1.1 (Imposition of a Term of Supervised Release) and impose no term of supervised release. In addition, the amendment deletes, as unnecessary, the requirement in § 5D1.2 (Term of Supervised Release) of a term of supervised release of three to five years whenever a statute requires any term of supervised release. Instead, the amendment provides that, in the case of a statute requiring a term of supervised release, the length of the term of supervised release shall be determined by the class of felony of which the defendant was convicted, but shall not be less than any term required by statute.

23. Amendment: Section 5E1.1(a)(2) is amended by deleting "§ 1472 (h), (i), (j), or (n)" and inserting in lieu thereof "§ 46312, § 46502, or § 46504".

The Commentary to § 5E1.1 captioned "Background" is amended in the first paragraph by deleting "and of designated subdivisions of 49 U.S.C. 1472" and inserting in lieu thereof "or 49 U.S.C. 46312, 46502, or 46504".

The Commentary to § 5E1.1 captioned "Background" is amended in the second paragraph by deleting "§ 1472 (h), (i), (j), or (n)" wherever it appears and inserting in lieu thereof in each instance "§ 46312, § 46502, or § 46504".

The Commentary to § 5E1.1 is amended by inserting the following immediately before "Background":

"Application Note

1. In the case of a conviction under certain statutes, additional requirements regarding restitution apply. See 18 U.S.C. 2248 and 2259 (applying to convictions under 18 U.S.C. 2241-2258 for sexual-abuse offenses and sexual exploitation of minors); 18 U.S.C. 2327 (applying to convictions under 18 U.S.C. 1028-1029, 1341-1344 for telemarketing-fraud offenses); 18 U.S.C. 2264 (applying to convictions under 18 U.S.C. 2261-2262 for domestic-violence offenses). To the extent that any of the above-noted statutory provisions conflicts with the provisions of this guideline, the applicable statutory provision shall control."

Reason for Amendment: Section 40113 of the Violent Crime Control and Law Enforcement Act of 1994 requires "mandatory" restitution for offenses involving sexual abuse and sexual exploitation of children under 18 U.S.C. 2241-2258. Sections 250002 and 40221 add similar "mandatory" restitution provisions for offenses involving telemarketing fraud (18 U.S.C. 2327)

and domestic violence (18 U.S.C. 2264). These provisions also require that compliance with a restitution order be a condition of probation or supervised release, have broader definitions of loss than 18 U.S.C. 3663, and apply "notwithstanding section 3663, and in addition to any civil or criminal penalty authorized by law." This amendment adds commentary to § 5E1.1 (Restitution) to alert the courts to the new statutory provisions.

In addition, this amendment conforms § 5E1.1 to the redesignation of 49 U.S.C. 1472 (h), (i), (j), and (n) as 49 U.S.C. 46312, 46502 (a), (b), and 46504.

24. Amendment: Chapter Five, Part K, Subpart Two is amended by inserting the following additional section:

"§ 5K2.17. High-Capacity, Semiautomatic Firearms (Policy Statement)

If the defendant possessed a high-capacity, semiautomatic firearm in connection with a crime of violence or controlled substance offense, an upward departure may be warranted. A 'high-capacity, semiautomatic firearm' means a semiautomatic firearm that has a magazine capacity of more than ten cartridges. The extent of any increase should depend upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case.

Commentary

Application Note

1. 'Crime of violence' and 'controlled substance offense' are defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1)."

Reason for Amendment: This amendment addresses the directive in section 110501 of the Violent Crime Control and Law Enforcement Act of 1994 to provide an "appropriate" enhancement for a crime of violence or drug trafficking crime if a semiautomatic firearm is involved.

According to data reviewed by the Commission, semiautomatic firearms are used in 50–70 percent of offenses involving a firearm. Thus, offenses involving a semiautomatic firearm represent the typical or "heartland" case under the guidelines. Consequently, the firearms enhancements in the guidelines for crimes of violence and drug trafficking can be considered to take into account the fact that firearms involved in these offenses typically are semiautomatic. Moreover, the "firepower" or "dangerousness" of semiautomatic firearms, compared to other types of firearms, varies substantially with caliber and magazine

capacity. For example, a .25 caliber, six-shot semiautomatic pistol is not considered as having as much firepower as a .38 caliber, six-shot revolver or a .357 magnum, six-shot revolver. A nine-millimeter semiautomatic pistol fires a somewhat more powerful cartridge than a .38 caliber revolver and a somewhat less powerful cartridge than a .357 magnum revolver. But some nine-millimeter semiautomatic pistols hold from 14–18 cartridges, compared to six cartridges for a revolver. A high magazine capacity, nine-millimeter semiautomatic pistol can be said to have significantly more firepower than a revolver because it can fire a significantly larger number of shots without reloading.

If harm actually results (e.g., death or bodily injury), the guidelines generally take that harm into account directly. Consequently, in considering any distinction between semiautomatic firearms and other firearms, the issue is whether there is any significant difference in the risk of harm. The difference in the risk of harm also varies widely with the circumstances of the offense. For example, in a robbery at very close range, the difference in the likelihood of death or bodily injury between a revolver and semiautomatic pistol would seem to be small. In contrast, in a drive-by shooting the greater firepower of a semiautomatic weapon likely would have a more significant effect on the likelihood of death or injury.

After considering the above factors, the Commission determined that the most appropriate approach at this time was to provide a specific basis for an upward departure when a high-capacity semiautomatic firearm is possessed in connection with a crime of violence or drug trafficking offense, thereby allowing the courts the flexibility to take this factor into account as appropriate in the circumstances of the particular case. Additionally, the Commission amended § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) to provide greater enhancement when a firearm (including a semiautomatic firearm) is involved.

25. Amendment: Chapter Five, Part K, Subpart Two is amended by inserting the following additional section:
"§ 5K2.18. Violent Street Gangs (Policy Statement)

If the defendant is subject to an enhanced sentence under 18 U.S.C. 521 (pertaining to criminal street gangs), an upward departure may be warranted. The purpose of this departure provision is to enhance the sentences of defendants who participate in groups,

clubs, organizations, or associations that use violence to further their ends. It is to be noted that there may be cases in which 18 U.S.C. 521 applies, but no violence is established. In such cases, it is expected that the guidelines will account adequately for the conduct and, consequently, this departure provision would not apply."

Reason for Amendment: This amendment expressly provides a basis for an upward departure in the case of a defendant subject to a statutorily enhanced maximum penalty under 18 U.S.C. 521 (pertaining to criminal street gangs), as enacted by section 150000 of the Violent Crime and Law Enforcement Act of 1994.

26. Amendment: Section 7B1.3(g)(2) is amended by deleting "the defendant may, to the extent permitted by law, be ordered to recommence supervised release upon release from imprisonment", and inserting in lieu thereof:

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

The Commentary to § 7B1.3 captioned "Application Notes" is amended in Note 2 by deleting:

"This statute, however, neither expressly authorizes nor precludes a court from ordering that a term of supervised release recommence after revocation. Under § 7B1.3(g)(2), the court may order, to the extent permitted by law, the recommencement of a supervised release term following revocation",

and inserting in lieu thereof:

"(g)-(i). Under 18 U.S.C. 3583(h) (effective September 13, 1994), the court, in the case of revocation of supervised release and imposition of less than the maximum imposable term of imprisonment, may order an additional period of supervised release to follow imprisonment".

The Commentary to § 7B1.3 captioned "Application Notes" is amended by deleting Note 3, and by renumbering the remaining notes accordingly.

The Commentary to § 7B1.4 captioned "Application Notes" is amended by deleting Notes 5 and 6 and inserting in lieu thereof:

"5. Upon a finding that a defendant violated a condition of probation or

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

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

Reason for Amendment: Section 110505 of the Violent Crime Control and Law Enforcement Act of 1994 amends 18 U.S.C. 3583(e)(3) by specifying that a defendant whose supervised release term is revoked may not be required to serve more than five years in prison if the offense that resulted in the term of supervised release is a Class A felony. The provision also amends section 3583(g) by eliminating the mandatory re-imprisonment period of at least one-third of the term of supervised release if the defendant possesses a controlled substance or a firearm, or refuses to participate in drug testing. Finally, the provision expressly authorizes the court to order an additional, limited period of supervision following revocation of supervised release and re-imprisonment.

Section 20414 of the Violent Crime Control and Law Enforcement Act of 1994 makes mandatory a condition of probation requiring that the defendant refrain from any unlawful use of a controlled substance. 18 U.S.C. 3563(a)(4). The section also establishes a condition that the defendant, with certain exceptions, submit to periodic drug tests. The existing mandatory condition of probation requiring the defendant not to possess a controlled substance remains unchanged. 18 U.S.C. 3563(a)(3). Similar requirements are made with respect to conditions of supervised release. 18 U.S.C. 3583(d).

Section 110506 of the Violent Crime Control and Law Enforcement Act of 1994 mandates revocation of probation and imposition of a term of imprisonment if the defendant violates probation by possessing a controlled substance or a firearm, or by refusing to comply with drug testing. 18 U.S.C. 3565(b). It does not require revocation in the case of use of a controlled substance (although use presumptively may establish possession). No minimum term of imprisonment is required other

than a sentence that includes a "term of imprisonment" consistent with the sentencing guidelines and revocation policy statements. Similar requirements are set forth in 18 U.S.C. 3583(g) with respect to conditions of supervised release.

Section 20414 permits "an exception in accordance with United States Sentencing Commission guidelines" from the mandatory revocation provisions of section 3565(b), "when considering any action against a defendant who fails a drug test administered in accordance with [section 3563(a)(4)]." The exception from the mandatory revocation provisions appears limited to a defendant who fails the test and does not appear to apply to a defendant who refuses to take the test.

This amendment conforms §§ 7B1.3 (Revocation of Probation or Supervised Release) and 7B1.4 (Term of Imprisonment) to these revised statutory provisions.

27. Amendment: Appendix A is amended by inserting the following at the appropriate place by title and section:

Title	Section
"7 U.S.C. 2018(c)	2N2.1"
"7 U.S.C. 6810	2N2.1"
"18 U.S.C. 36	2D1.1."
"18 U.S.C. 37	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2A5.1, 2A5.2, 2B1.3, 2B3.1, 2K1.4"
"18 U.S.C. 113(a)(1)	2A2.1"
"18 U.S.C. 113(a)(2)	2A2.2"
"18 U.S.C. 113(a)(3)	2A2.2"
"18 U.S.C. 113(a)(5) (Class A misdemeanor provisions only).	2A2.3"
"18 U.S.C. 113(a)(6)	2A2.2"
"18 U.S.C. 113(a)(7)	2A2.3"
"18 U.S.C. 470	2B5.1, 2F1.1"
"18 U.S.C. 668	2B1.1"
"18 U.S.C. 844(m) ...	2K1.3"
"18 U.S.C. 880	2B1.1"
"18 U.S.C. 922(s)-(w).	2K2.1"
"18 U.S.C. 922(x)(1)	2K2.1"
"18 U.S.C. 924(i)	2A1.1, 2A1.2"
"18 U.S.C. 924(j)-(n)	2K2.1"
"18 U.S.C. 1033	2B1.1, 2F1.1, 2J1.2"
"18 U.S.C. 1118	2A1.1, 2A1.2"
"18 U.S.C. 1119	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1"
"18 U.S.C. 1120	2A1.1, 2A1.2, 2A1.3, 2A1.4"
"18 U.S.C. 1121	2A1.1, 2A1.2"
"18 U.S.C. 1204	2J1.2"
"18 U.S.C. 1716D ...	2Q2.1"
"18 U.S.C. 2114(b) ..	2B1.1"
"18 U.S.C. 2258(a),(b).	2G2.1, 2G2.2"

Title	Section
"18 U.S.C. 2261	2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2B3.1, 2B3.2, 2K1.4"
"18 U.S.C. 2262	2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2B3.1, 2B3.2, 2K1.4"
"18 U.S.C. 2280	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2B1.3, 2B3.1, 2B3.2, 2K1.4"
"18 U.S.C. 2281	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2B1.3, 2B3.1, 2B3.2, 2K1.4"
"18 U.S.C. 2332a	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A1.5, 2A2.1, 2A2.2, 2B1.3, 2K1.4"
"18 U.S.C. 2423(b) ..	2A3.1, 2A3.2, 2A3.3"
"21 U.S.C. 843(a)(9)	2D3.1"
"21 U.S.C. 843(c)	2D3.1"
"21 U.S.C. 849	2D1.2"
"21 U.S.C. 960(d)(3), (4).	2D1.11"
"21 U.S.C. 960(d)(5)	2D1.13"
"21 U.S.C. 960(d)(6)	2D3.1"
"42 U.S.C. 1307(b) ..	2F1.1"

In the line referenced to 18 U.S.C. 113(a) by inserting "(for offenses committed prior to September 13, 1994)" immediately following "2A2.1";

In the line referenced to 18 U.S.C. 113(b) by inserting "(for offenses committed prior to September 13, 1994)" immediately following "2A2.2";

In the line referenced to 18 U.S.C. 113(c) by inserting "(for offenses committed prior to September 13, 1994)" immediately following "2A2.2";

In the line referenced to 18 U.S.C. 113(f) by inserting "(for offenses committed prior to September 13, 1994)" immediately following "2A2.2";

In the line referenced to 18 U.S.C. 371 by inserting "2K2.1 (if a conspiracy to violate 18 U.S.C. 924(c)), immediately before "2X1.1";

In the line referenced to 18 U.S.C. 1153 by inserting "2A2.3," immediately before "2A3.1";

In the line referenced to 18 U.S.C. 2114 by deleting "2114" and inserting in lieu thereof "2114(a)";

and in the line referenced to 18 U.S.C. 2423 by deleting "2423" and by inserting in lieu thereof "2423(a)".

Appendix A is amended by deleting:

"49 U.S.C. 1472(c)	2A5.2
49 U.S.C. 1472(h)(2)	2Q1.2
49 U.S.C. 1472(i)(1)	2A5.1
49 U.S.C. 1472(j)	2A5.2
49 U.S.C. 1472(k)(1)	2A5.3
49 U.S.C. 1472(l)	2K1.5
49 U.S.C. 1472(n)(1)	2A5.1"
and inserting in lieu thereof:	
"49 U.S.C. 46308	2A5.2
49 U.S.C. 46312	2Q1.2

49 U.S.C. 46502(a), (b)	2A5.1
49 U.S.C. 46504	2A5.2
49 U.S.C. 46506	2A5.3
49 U.S.C. 46505	2K1.5
49 U.S.C. 46502(b)	2A5.1"

Section 2D3.1 is amended in the title by deleting: "Illegal Use of Registration Number to Manufacture, Distribute, Acquire, or Dispense a Controlled Substance" and inserting in lieu thereof "Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Schedule I Substances".

Section 2D3.2 is amended by inserting "or Listed Chemicals" immediately after "Controlled Substances".

Section 2Q2.1 is amended by deleting the title and inserting in lieu thereof "Offenses Involving Fish, Wildlife, and Plants".

Reason for Amendment: This amendment makes Appendix A (Statutory Index) more comprehensive. References are added for new offenses enacted by the Violent Crime Control and Law Enforcement Act of 1994, Public Law 103-322, 108 Stat. 1796; the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, Public Law 103-190, 107 Stat. 2266; the Food Stamp Program Improvements Act of 1994, Public Law 103-225, 108 Stat.

106; the Social Security Independence and Program Improvements Act of 1994, Public Law 103-296 108 Stat. 1464; the Domestic Chemical Diversion Act of 1993, Public Law 103-200, 107 Stat. 2333; and the International Parental Kidnapping Crime Act of 1993, Public Law 103-173, 107 Stat. 1998. In addition, the amendment conforms Appendix A to revisions in existing statutes. Finally, the amendment revises the titles of several offense guidelines to better reflect their scope.

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