



Amendments to the Sentencing Guidelines

April 30, 2018

Effective Date
November 1, 2018

This compilation contains unofficial text of amendments to the sentencing guidelines, policy statements, and commentary submitted to Congress, and is provided only for the convenience of the user. Official text of the amendments can be found on the Commission's website at www.ussc.gov and will appear in a forthcoming edition of the *Federal Register*.

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

The Commission specified an effective date of **November 1, 2018**, for the amendments listed above and included in this compilation.

2018 AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

1. TRIBAL ISSUES

Reason for Amendment: This two-part amendment addresses federal sentencing issues related to offenses committed in Indian country. The amendment responds to the findings and recommendations made by the Commission’s *ad hoc* Tribal Issues Advisory Group in its report to the Commission. See Report of the Tribal Issues Advisory Group (May 16, 2016), <http://www.ussc.gov/research/research-publications/report-tribal-issues-advisory-group>.

The amendment adds a definition of “court protection order” in the guidelines. This issue was initially raised by the Commission’s Victims Advisory Group and subsequently addressed in the Tribal Issues Advisory Group’s May 2016 report. The amendment amends §1B1.1 (Application Instructions) to add a definition of “court protection order” that incorporates by reference the statutory definition of a “protection order” as set forth in 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b). Under the Guidelines Manual, the violation of a court protection order is a specific offense characteristic in three Chapter Two offense guidelines. See USSG §§2A2.2 (Aggravated Assault), 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), and 2A6.2 (Stalking or Domestic Violence).

The amendment responds to concerns that the term “court protection order” has not been defined in the guidelines and should be clarified. Providing a clear definition of a “court protection order” in the Guidelines Manual will ensure that orders used for sentencing enhancements are the result of court proceedings assuring appropriate due process protections, that there is a consistent identification and treatment of such orders, and that such orders issued by tribal courts receive treatment consistent with that of other issuing jurisdictions. The amendment also makes conforming technical changes to the Commentary of §§2B1.3 (Robbery) and 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien).

The amendment addresses the treatment of tribal court convictions in Chapter Four (Criminal History and Criminal Livelihood) of the Guidelines Manual. Subsection (i) of §4A1.2 (Definitions and Instructions for Computing Criminal History) provides that sentences resulting from tribal court convictions are not counted in calculating a defendant’s criminal history score but may be considered for an upward departure under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). Section 4A1.3 provides for an upward departure for prior sentences that are not used in computing the criminal history category, such as sentences for tribal convictions, where reliable information suggests that the defendant’s criminal history category underrepresents the seriousness of the defendant’s prior record.

Tribal court convictions have been excluded from the criminal history score but have been a legitimate basis for upward departure since the original guidelines were promulgated in 1987. In recent years, some tribal courts have gained enhanced sentencing authority under the Tribal Law and Order Act of 2010, Pub. L. 111–211 (July 29, 2010), and expanded

jurisdiction over non-Indian defendants in domestic abuse cases under the Violence Against Women Act Reauthorization Act of 2013, Pub. L. 113–4 (Mar. 7, 2013). Many tribal courts have also begun to increase due process protections and reliable record-keeping.

In recognition of these developments, the amendment provides additional guidance to courts on how to apply the departure provision at §4A1.3 in cases involving a defendant with a history of tribal convictions. Specifically, the amendment amends the Commentary to §4A1.3 at Application Note 2(c) to provide the following non-exhaustive list of six factors that courts may consider in deciding whether or to what extent an upward departure based on a tribal conviction may be appropriate:

- (i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.
- (ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.
- (iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.
- (iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.
- (v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter.
- (vi) The tribal court conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).

Because of the many cultural and historical differences among federally-recognized tribes, and especially among their tribal court systems, the Commission determined that — despite recent developments in Indian law to enlarge the scope of tribal court jurisdiction and the availability of due process in tribal court proceedings — a single approach to the consideration of tribal convictions would be difficult and could potentially lead to a disparate result among Indian defendants in federal courts. The amendment, therefore, reflects the Commission’s view that additional guidance about how to apply the departure provision at §4A1.3 in cases involving a defendant with a history of tribal convictions is appropriate, and that the non-exhaustive list of factors provides appropriate guidance and a more structured analytical framework under §4A1.3. The Commission intends, as informed by the Tribal Issues Advisory Group Report and public comment, that none of the factors should be determinative, but collectively the factors reflect important considerations to help courts balance the rights of defendants, the unique and important status of tribal courts, the need to avoid disparate sentences because of varying tribal court practices and circumstances, and the goal of accurately assessing a defendant’s criminal history.

The amendment also includes two technical changes to §4A1.3. First, the amendment amends §4A1.3(a)(2)(A) to change the phrase “sentences for foreign and tribal offenses” to

“sentences for foreign and tribal convictions” to track the parallel language in §4A1.2(h) and (i). Second, the amendment makes a clerical change in Application Note 3 to correct an inaccurate reference to §4A1.3(b)(2)(B).

Amendment:

§1B1.1. Application Instructions

* * *

Commentary

Application Notes:

1. The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):

* * *

(D) “**Court protection order**” means “protection order” as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b).

(DE) “**Dangerous weapon**” means (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (e.g. a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).

(EF) “**Departure**” means (i) for purposes other than those specified in subdivision (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of §4A1.3 (Departures Based on Inadequacy of Criminal History Category), assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. “**Depart**” means grant a departure.

“**Downward departure**” means departure that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the guideline sentence. “**Depart downward**” means grant a downward departure.

“**Upward departure**” means departure that effects a sentence greater than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence. “**Depart upward**” means grant an upward departure.

(FG) “**Destructive device**” means any article described in 26 U.S.C. § 5845(f) (including an explosive, incendiary, or poison gas — (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses).

- (GH) **“Firearm”** means (i) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device. A weapon, commonly known as a “BB” or pellet gun, that uses air or carbon dioxide pressure to expel a projectile is a dangerous weapon but not a firearm.
- (HI) **“Offense”** means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context. The term **“instant”** is used in connection with “offense,” “federal offense,” or “offense of conviction,” as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (e.g., an offense before a state court involving the same underlying conduct).
- (IJ) **“Otherwise used”** with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon.
- (JK) **“Permanent or life-threatening bodily injury”** means injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent. In the case of a kidnapping, for example, maltreatment to a life-threatening degree (e.g., by denial of food or medical care) would constitute life-threatening bodily injury.
- (KL) **“Physically restrained”** means the forcible restraint of the victim such as by being tied, bound, or locked up.
- (LM) **“Serious bodily injury”** means injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. In addition, “serious bodily injury” is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

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§2B3.1. Robbery

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Commentary

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Application Notes:

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2. Consistent with Application Note 1(D)(ii) of §1B1.1 (Application Instructions), an object shall be considered to be a dangerous weapon for purposes of subsection (b)(2)(E) if (A) the object closely resembles an instrument capable of inflicting death or serious bodily injury; or (B) the defendant used the object in a manner that created the impression that the object was an instrument capable of inflicting death or serious bodily injury (e.g., a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).

* * *

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

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Commentary

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Application Notes:

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4. **Application of Subsection (b)(7) to Conduct Constituting Criminal Sexual Abuse.**— Consistent with Application Note 1(LM) of §1B1.1 (Application Instructions), “serious bodily injury” is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

* * *

§4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)

(a) UPWARD DEPARTURES.—

- (1) STANDARD FOR UPWARD DEPARTURE.—If reliable information indicates that the defendant’s criminal history category substantially underrepresents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.
- (2) TYPES OF INFORMATION FORMING THE BASIS FOR UPWARD DEPARTURE.—The information described in subsection (a)(1) may include information concerning the following:
 - (A) Prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offensesconvictions).
 - (B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.
 - (C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.
 - (D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.

- (E) Prior similar adult criminal conduct not resulting in a criminal conviction.
- (3) PROHIBITION.—A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.
- (4) DETERMINATION OF EXTENT OF UPWARD DEPARTURE.—
 - (A) IN GENERAL.—Except as provided in subdivision (B), the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's.
 - (B) UPWARD DEPARTURES FROM CATEGORY VI.—In a case in which the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.
- (b) DOWNWARD DEPARTURES.—
 - (1) STANDARD FOR DOWNWARD DEPARTURE.—If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.
 - (2) PROHIBITIONS.—
 - (A) CRIMINAL HISTORY CATEGORY I.—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.
 - (B) ARMED CAREER CRIMINAL AND REPEAT AND DANGEROUS SEX OFFENDER.—A downward departure under this subsection is prohibited for (i) an armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and (ii) a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

(3) LIMITATIONS.—

(A) LIMITATION ON EXTENT OF DOWNWARD DEPARTURE FOR CAREER OFFENDER.—The extent of a downward departure under this subsection for a career offender within the meaning of §4B1.1 (Career Offender) may not exceed one criminal history category.

(B) LIMITATION ON APPLICABILITY OF §5C1.2 IN EVENT OF DOWNWARD DEPARTURE TO CATEGORY I.—A defendant whose criminal history category is Category I after receipt of a downward departure under this subsection does not meet the criterion of subsection (a)(1) of §5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if, before receipt of the downward departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category).

(c) WRITTEN SPECIFICATION OF BASIS FOR DEPARTURE.—In departing from the otherwise applicable criminal history category under this policy statement, the court shall specify in writing the following:

(1) In the case of an upward departure, the specific reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.

(2) In the case of a downward departure, the specific reasons why the applicable criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.

Commentary

Application Notes:

1. **Definitions.**—For purposes of this policy statement, the terms “*depart*”, “*departure*”, “*downward departure*”, and “*upward departure*” have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. **Upward Departures.**—

(A) **Examples.**—An upward departure from the defendant’s criminal history category may be warranted based on any of the following circumstances:

(i) A previous foreign sentence for a serious offense.

(ii) Receipt of a prior consolidated sentence of ten years for a series of serious assaults.

(iii) A similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding.

- (iv) Commission of the instant offense while on bail or pretrial release for another serious offense.

(B) **Upward Departures from Criminal History Category VI.**—In the case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant’s criminal history, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant’s criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses.

(C) **Upward Departures Based on Tribal Court Convictions.**—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following:

- (i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.
- (ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.
- (iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.
- (iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.
- (v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter.
- (vi) The tribal court conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).

3. **Downward Departures.**—A downward departure from the defendant’s criminal history category may be warranted if, for example, the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(~~BA~~), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism.

Background: This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category

as a defendant who had a record of less serious conduct. Yet, the first defendant's criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (*e.g.*, defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.

2. BIPARTISAN BUDGET ACT

Reason for Amendment: This amendment responds to the Bipartisan Budget Act of 2015 (“the Act”), Pub. L. 114–74 (Nov. 2, 2015), which made numerous changes to the statutes governing Social Security fraud offenses at 42 U.S.C. §§ 408, 1011, and 1383a. The Act added new subsections criminalizing conspiracy to commit fraud for selected substantive offenses already proscribed in Title 42 and added an increased statutory penalty provision for certain persons who commit fraud offenses under the relevant Social Security programs.

In response to these statutory changes, the amendment makes changes to both §2B1.1 (Theft, Property Destruction, and Fraud) and Appendix A (Statutory Index). The amendment to §2B1.1 addresses the increased penalty provisions of the Act by adding a new specific offense characteristic with a 4-level enhancement and a minimum offense level of 12 for those defendants subject to a 10-year statutory maximum, and adds commentary precluding the application of an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) when the new enhancement applies. The amendment to Appendix A references the new conspiracy subsections to the appropriate guidelines.

First, the amendment adds a specific offense characteristic to §2B1.1 in response to the enhanced penalty provisions of the Act. The new enhancement provides for a 4-level increase, as well as a minimum offense level of 12, for those defendants convicted under the relevant statutes and subject to the 10-year statutory maximum. The enhancement reflects both Congress’s and the Commission’s determination regarding the seriousness of these offenses, and further reflects the difficulty in calculating the true harm caused by such defendants, including the harm to the integrity and financial strength of the Social Security program and to legitimate Social Security program benefit recipients who face delays as a result of the review of claims submitted in these cases. The Commission was also persuaded in its determination by the significant administrative efforts and costs resulting from the regulatory requirement that the Social Security Administration review and redetermine the benefit eligibility for every benefit recipient associated with the defendant, whether part of the fraudulent conduct or not. The new enhancement reflects the increased harm caused by these types of cases compared to those types of fraud sentenced under §2B1.1 for which the loss table more appropriately reflects the severity of the offense.

Similar to other minimum offense levels in §2B1.1, the minimum offense level is intended to account for the difficulty in calculating the amount of loss, as well as the unique and non-monetary harms associated with offenses sentenced under the Act. As previously explained in similar contexts, “[t]he Commission frequently adopts a minimum offense level in circumstances in which, as in these cases, loss as calculated by the guidelines is difficult to compute or does not adequately account for the harm caused by the offense.” USSG, App. C, Amendment 719 (effective Nov. 1, 2008).

In establishing the 4-level increase, the Commission also added commentary precluding the application of an adjustment under §3B1.3 to those defendants who are subject to the Act’s increased statutory maximum penalty. In the Act, Congress specifically defined positions of trust in the context of Social Security fraud by subjecting to the increased statutory maximum penalties those defendants who were:

a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this subchapter (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination

The Commission precluded application of §3B1.3 to these defendants because the new 4-level enhancement fully accounts for their special position. Addressing the abuse of special position in this manner will avoid uncertainty, prolonged sentencing hearings, and appeals regarding application of the abuse of trust adjustment to offenders subject to the increased statutory maximum penalties of the Act.

Second, the amendment amends Appendix A to reference the new conspiracy offenses under 42 U.S.C. §§ 408, 1011, and 1383a to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)). The Commission determined that referencing these conspiracy provisions to §2X1.1, as well as the guideline referenced in the statutory index for the substantive offense, is consistent with the instructions at §1B1.2 (Applicable Guidelines).

Amendment:

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level:

- (1) **7**, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or
- (2) **6**, otherwise.

(b) Specific Offense Characteristics

- (1) If the loss exceeded \$6,500, increase the offense level as follows:

	LOSS (APPLY THE GREATEST)	INCREASE IN LEVEL
(A)	\$6,500 or less	no increase
(B)	More than \$6,500	add 2
(C)	More than \$15,000	add 4
(D)	More than \$40,000	add 6
(E)	More than \$95,000	add 8

(F) More than \$150,000	add 10
(G) More than \$250,000	add 12
(H) More than \$550,000	add 14
(I) More than \$1,500,000	add 16
(J) More than \$3,500,000	add 18
(K) More than \$9,500,000	add 20
(L) More than \$25,000,000	add 22
(M) More than \$65,000,000	add 24
(N) More than \$150,000,000	add 26
(O) More than \$250,000,000	add 28
(P) More than \$550,000,000	add 30 .

- (2) (Apply the greatest) If the offense—
- (A) (i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by **2** levels;
 - (B) resulted in substantial financial hardship to five or more victims, increase by **4** levels; or
 - (C) resulted in substantial financial hardship to 25 or more victims, increase by **6** levels.
- (3) If the offense involved a theft from the person of another, increase by **2** levels.
- (4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.
- (5) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by **2** levels.
- (6) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by **2** levels.
- (7) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than \$1,000,000, increase by **2** levels; (ii) more than \$7,000,000, increase by **3** levels; or (iii) more than \$20,000,000, increase by **4** levels.

- (8) (Apply the greater) If—
- (A) the offense involved conduct described in 18 U.S.C. § 670, increase by **2** levels; or
 - (B) the offense involved conduct described in 18 U.S.C. § 670, and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product, increase by **4** levels.
- (9) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.
- (10) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (11) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (12) If the offense involved conduct described in 18 U.S.C. § 1040, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(13) If the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies, increase by 4 levels. If the resulting offense level is less than level 12, increase to level 12.

(14) (Apply the greater) If the offense involved misappropriation of a trade secret and the defendant knew or intended—

(A) that the trade secret would be transported or transmitted out of the United States, increase by 2 levels; or

(B) that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by 4 levels.

If subparagraph (B) applies and the resulting offense level is less than level 14, increase to level 14.

(15) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(16) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(17) (Apply the greater) If—

(A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels; or

(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; or (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees, increase by 4 levels.

(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(17)(B) shall not exceed 8 levels, except as provided in subdivision (D).

(D) If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.

(~~17~~18) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by **2** levels.

(~~18~~19) (A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by **2** levels.

(ii) 18 U.S.C. § 1030(a)(5)(A), increase by **4** levels.

(iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by **6** levels.

(B) If subdivision (A)(iii) applies, and the offense level is less than level **24**, increase to level **24**.

(~~19~~20) If the offense involved—

(A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator,

increase by **4** levels.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any 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 (Unlawful Manufacturing, Importing, Exporting, or Trafficking

(Including Possession with Intent to Commit These Offenses); 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), as appropriate.

- (2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.
- (3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (*e.g.*, 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.
- (4) If the offense involved a cultural heritage resource or a paleontological resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources), if the resulting offense level is greater than that determined above.

Commentary

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Application Notes:

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10. Application of Subsection (b)(11).—

* * *

(D) **Application of Subsection (b)(11)(C)(ii).**—Subsection (b)(11)(C)(ii) applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.

11. Interaction of Subsection (b)(13) and §3B1.3 (Abuse of Position of Trust or Use of Special Skill).—If subsection (b)(13) applies, do not apply §3B1.3.

12. Application of Subsection (b)(15).—Subsection (b)(15) provides a minimum offense level in the case of an ongoing, sophisticated operation (*e.g.*, an auto theft ring or “chop shop”) to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo

shipment. For purposes of this subsection, “*vehicle*” means motor vehicle, vessel, or aircraft. A “*cargo shipment*” includes cargo transported on a railroad car, bus, steamboat, vessel, or airplane.

1213. Gross Receipts Enhancement under Subsection (b)(1617)(A).—

- (A) **In General.**—For purposes of subsection (b)(1617)(A), the defendant shall be considered to have derived more than \$1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000.
- (B) **Definition.**—“*Gross receipts from the offense*” includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

1314. Application of Subsection (b)(1617)(B).—

- (A) **Application of Subsection (b)(1617)(B)(i).**—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:

* * *

- (B) **Application of Subsection (b)(1617)(B)(ii).**—

* * *

1415. Application of Subsection (b)(1819).—

- (A) **Definitions.**—For purposes of subsection (b)(1819):

* * *

- (B) **Subsection (b)(1819)(A)(iii).**—If the same conduct that forms the basis for an enhancement under subsection (b)(1819)(A)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)(1617)(B), do not apply the enhancement under subsection (b)(1617)(B).

1516. Application of Subsection (b)(1920).—

- (A) **Definitions.**—For purposes of subsection (b)(1920):

* * *

- (B) **In General.**—A conviction under a securities law or commodities law is not required in order for subsection (b)(1920) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant’s conduct violated a securities law or commodities law. For example, this subsection would apply if an officer of a publicly traded company violated regulations issued by the Securities and Exchange Commission by fraudulently influencing an independent audit of the company’s financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.

(C) **Nonapplicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill).**—If subsection (b)(1920) applies, do not apply §3B1.3.

1617. **Cross Reference in Subsection (c)(3).**—Subsection (c)(3) provides a cross reference to another guideline in Chapter Two (Offense Conduct) in cases in which the defendant is convicted of a general fraud statute, and the count of conviction establishes an offense involving fraudulent conduct that is more aptly covered by another guideline. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense involves fraudulent conduct that is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 (Structuring Transactions to Evade Reporting Requirements) likely would be more apt, and false statements to a customs officer, for which §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state employee who improperly influenced the award of a contract and used the mails to commit the offense may be prosecuted under 18 U.S.C. § 1341 for fraud involving the deprivation of the intangible right of honest services. Such a case would be more aptly sentenced pursuant to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).

1718. **Continuing Financial Crimes Enterprise.**—If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the “continuing financial crimes enterprise”.

1819. **Partially Completed Offenses.**—In the case of a partially completed offense (*e.g.*, an offense involving a completed theft or fraud that is part of a larger, attempted theft or fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. *See* Application Note 4 of the Commentary to §2X1.1.

1920. **Multiple-Count Indictments.**—Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. *See* Chapter Three, Part D (Multiple Counts).

2021. **Departure Considerations.**—

* * *

(B) **Upward Departure for Debilitating Impact on a Critical Infrastructure.**—An upward departure would be warranted in a case in which subsection (b)(1819)(A)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.

* * *

Background: This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States).

* * *

Subsection (b)(1314) implements the directive in section 3 of Public Law 112–269.

Subsection (b)(1516)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.

Subsection (b)(1617)(A) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101–647.

Subsection (b)(1617)(B)(i) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.

Subsection (b)(1718) implements the directive in section 209 of Public Law 110–326.

Subsection (b)(1819) implements the directive in section 225(b) of Public Law 107–296. The minimum offense level of level 24 provided in subsection (b)(1819)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.

* * *

APPENDIX A

STATUTORY INDEX

* * *

42 U.S.C. § 408	2B1.1, 2X1.1
42 U.S.C. § 1011	2B1.1, 2X1.1
42 U.S.C. § 1307(a)	2B1.1
42 U.S.C. § 1307(b)	2B1.1
42 U.S.C. § 1320a-7b	2B1.1, 2B4.1
42 U.S.C. § 1320a-8b	2X5.1, 2X5.2
42 U.S.C. § 1383(d)(2)	2B1.1
42 U.S.C. § 1383a(a)	2B1.1, 2X1.1

3. SYNTHETIC DRUGS

Reason for Amendment: This amendment is a result of the Commission’s multi-year study of offenses involving synthetic cathinones (such as methyldone, MDPV, and mephedrone) and synthetic cannabinoids (such as JWH-018 and AM-2201), as well as tetrahydrocannabinol (THC), fentanyl, and fentanyl analogues. The study included extensive data collection, review of scientific literature, multiple public comment periods, and four public hearings. The resulting amendment makes various changes to §2D1.1 pertaining to synthetic controlled substances.

The amendment first addresses fentanyl and fentanyl analogues. The Commission learned that while fentanyl has long been a drug of abuse, there are several indications that its abuse has become both more prevalent and more dangerous in recent years. For example, the Drug Enforcement Administration observed a dramatic increase in fentanyl reports between 2013 and 2015, and the Centers for Disease Control and Prevention reported that there were 9,580 deaths involving synthetic opioids (a category including fentanyl) in 2015, a 72.2 percent increase from 2014. The Commission received testimony and other information indicating that fentanyl and its analogues are often trafficked mixed with other controlled substances, including heroin and cocaine. In other instances, fentanyl is placed in pill or tablet form by drug traffickers. Although some purchasers of these substances may be aware that they contain fentanyl (or even seek them out for that reason), others may believe that they are purchasing heroin or pharmaceutically manufactured opioid pain relievers.

Because of fentanyl’s extreme potency, the risk of overdose death is great, particularly when the user is inexperienced or unaware of what substance he or she is using. To address this harm, the amendment adds a new specific offense characteristic at §2D1.1(b)(13) to provide for a 4-level increase whenever the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl or a fentanyl analogue. The Commission determined that it is appropriate for traffickers who knowingly misrepresent fentanyl or a fentanyl analogue as another substance to receive additional punishment. If an offender does not know the substance contains fentanyl or a fentanyl analogue, the enhancement does not apply. The specific offense characteristic includes a mens rea requirement to ensure that only the most culpable offenders are subjected to these increased penalties.

The amendment also makes a definitional change in the Guidelines Manual. Title 21, United States Code, refers to fentanyl by reference to its chemical name (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) and sets mandatory minimum penalties for certain quantities of this substance and for analogues of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide, although lesser quantities of the analogues are required to trigger the mandatory minimum penalties. See, e.g., 21 U.S.C. § 841(b)(1)(A)(vi). Consistent with its past practice concerning setting drug-trafficking penalties, the Commission relied upon the statutory framework in setting penalties for fentanyl and fentanyl analogues. Fentanyl has a marijuana equivalency of 1:2,500, while fentanyl analogues have a marijuana equivalency of 1:10,000. In the Guidelines Manual, however, the Commission did not use the chemical name for fentanyl reflected in Title 21. Instead, the Commission used the terms “fentanyl” and “fentanyl analogue” in the Drug Quantity Table.

Commission data suggests that offenses involving fentanyl analogues are increasing in the federal caseload. In studying these cases, the Commission has learned that the reference to “fentanyl analogue” in the Drug Quantity Table may interact in an unintended way with the definition of “analogue” provided by Application Note 6 and Section 802(32) of Title 21, United States Code. Because the guideline incorporates by reference the statutory definition of “controlled substance analogue,” and that definition specifically excludes already listed “controlled substances,” it appears that a scheduled fentanyl analogue cannot constitute a “controlled substance analogue,” and thus does not constitute a fentanyl “analogue” for purposes of §2D1.1. This may have the result that, at sentencing, fentanyl analogues that have already been scheduled must go through the Application Note 6 process to determine the substance most closely related to them.

Additionally, based on implementation of Application Note 6, many courts have then sentenced such analogue cases at the lower fentanyl ratio rather than the higher ratio applicable to fentanyl analogues in the Drug Quantity Table. To address this problem, the amendment adopts a new definition of “fentanyl analogue” as “any substance (including any salt, isomer, or salt of isomer), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide).” This portion of the amendment also amends the Drug Quantity Table to clarify that §2D1.1 uses the term “fentanyl” to refer to the chemical name identified by statute and deletes the current listings for alpha-methylfentanyl and 3-methylfentanyl from the Drug Equivalency Tables.

The Commission determined that adopting this definition of “fentanyl analogue” will create a class of fentanyl analogues identical to that already created by statute, clarify the legal confusion that has resulted from the current definition of “analogue” in §2D1.1, and reaffirm that fentanyl analogues are treated differently than fentanyl under the guidelines as well as the statute. Striking the separate references to alpha-methylfentanyl and 3-methylfentanyl will result in the treatment of these substances in common with all other fentanyl analogues. This change, in combination with the adoption of the definition of “fentanyl analogue” and addition of fentanyl analogue to the Drug Equivalency Tables, will limit the use of the listing for “fentanyl” to those cases involving the specific substance named in Title 21.

Next, the amendment addresses synthetic cathinones and synthetic cannabinoids. The Commission received comment from the Department of Justice and others expressing concern that the guidelines do not contain specific “marihuana equivalencies” for synthetic cathinones, such as methylone, mephedrone, and MDPV, or synthetic cannabinoids, such as JWH-018 and AM-2201. For substances that do not appear in either the Drug Quantity Table or the Drug Equivalency Table, Application Note 6 provides courts the process for calculating drug quantities. The note directs courts to identify the “most closely related controlled substance referenced in [§2D1.1]” and to then use that drug’s ratio to marihuana to calculate the quantity for purposes of determining the base offense level. Commenters advised that this process is a time-consuming, burdensome task that leads to sentencing disparities. Because Commission data indicated that the majority of cases relying on the Application Note 6 process involved synthetic cathinones and synthetic cannabinoids, the Commission concluded that this amendment will alleviate the burden associated with its application.

Synthetic cathinones, also known as “bath salts,” are human-made substances chemically related to cathinone, a stimulant found in the khat plant. Although the Commission’s study originally focused on specified cathinones, such as methyldone, MDPV, and mephedrone, the Commission received comments indicating that new substances are regularly developed and trafficked and that it would not be feasible to establish a new ratio as each new substance enters the market. Given the large number of potential substances, the Commission found it impracticable to add individual marijuana equivalencies for every synthetic cathinone. In contrast, the Commission determined a class-based approach for synthetic cathinones should capture both current and future synthetic cathinones.

The Commission has determined that synthetic cathinones constitute a well-defined class. Specifically, testimony and comment presented to the Commission consistently indicated that the whether a substance is a synthetic cathinone is not subject to debate. Likewise, comments and testimony made clear that synthetic cathinones share stimulant characteristics and hallucinogenic effects. The Commission determined that a precise definition is not necessary for such substances and that a class-based structure could be reasonably adopted. The Commission likewise determined that, because the class would encompass methcathinone, currently the lone specifically listed synthetic cathinone, the separate reference to methcathinone in the Drug Equivalency Table should be deleted. Given the Commission’s priority to alleviate the burdens associated with the Application Note 6 process and the impracticality of adding many new marijuana equivalencies, the Commission concluded the class-based approach strikes a middle ground between precision and ease of guideline application.

The amendment creates an entry in the Drug Equivalency Tables for the class of synthetic cathinones, providing a marijuana equivalency of 1 gram of a synthetic cathinone (except a Schedule III, IV, or V substance) equals 380 grams of marijuana and applies a minimum base offense level of 12 to the class of synthetic cathinones. The Commission set a minimum base offense level of 12 for the class of synthetic cathinones to maintain consistency with the treatment of other controlled substances. With limited exceptions, all other Schedule I and II controlled substances are subject to the same minimum base offense level. The Commission was not presented with testimony or commentary that indicated a compelling basis to except synthetic cathinones from the minimum offense level.

The Commission adopted the 380-gram equivalency for three reasons. First, a review of the Commission’s data indicated that the 380-gram equivalency was both the median and approximate mean ratio utilized by the courts when sentencing synthetic cathinone cases pursuant to Application Note 6. Thus, the Commission determined that the 380-gram equivalency best reflects the current sentencing practices for courts engaging in the Application Note 6 analysis.

Second, the Commission concluded that a ratio consistent with the existing methcathinone ratio was appropriate. The Commission set the methcathinone ratio based upon a scientific study that found that methcathinone was approximately 1.92 times more potent than amphetamine. At the time, amphetamine had a marijuana equivalency of 1:200, equivalent to the current marijuana equivalency of cocaine. The Commission’s current study of cathinones did not uncover any new scientific evidence undermining its rationale for setting the methcathinone ratio.

Third, the Commission was presented with substantial information about synthetic cathinones' risks. Testimony before the Commission established that the effects and potencies of synthetic cathinones range from "at least as dangerous as cocaine" to methamphetamine-like. Medical experts discussed the substantial potential health impacts of cathinone use, while law enforcement witnesses offered reports of cathinone users' aggressive behavior posing threats to first responders. With cocaine at a 1:200 ratio and methamphetamine at a 1:2,000 ratio, the Commission concluded that the ratio of 1:380 minimized the risk of frequent over-punishment for substances in this class while providing penalty levels sufficient to account for the specific harms caused by distribution of these substances.

In adopting a class-based approach for both ease of application and because of the impracticability of listing every new substance in the class as it enters the market, the Commission recognizes, however, that some substances may be significantly more or less potent than the typical substances in the class that the ratio was intended to reflect. Therefore, the Commission added a departure provision to address those substances for which a greater or lesser quantity is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone.

To provide guidance to the court in determining whether to apply the departure, the departure provision identifies substances that the Commission found to be fair representatives of the synthetic cathinones that would fall within the spectrum of substances included in the class, as well as those that may warrant a departure. Specifically, the departure provision notes that: a typical cathinone has a potency comparable to methcathinone or alpha-PVP; methylone is an example of a lower potency substance; and MDPV is an example of a higher potency substance.

Synthetic cannabinoids mimic the effects of tetrahydrocannabinol ("THC"), the main psychoactive chemical in marijuana. Unlike THC, however, most synthetic cannabinoids are "full agonists." That is, they activate the body's type 1 cannabinoid receptors (CB₁) to a greater degree (*i.e.*, at 100%) than THC, which activates the CB₁ receptors only at 30 to 50 percent. Additionally, unlike THC, synthetic cannabinoids do not contain the additional substances that moderate their adverse effects. To the contrary, they may contain additional substances that augment their hallucinogenic effects. Further, some forms of packaged mixtures (*e.g.*, "K2", "Spice") may contain preservatives, additives, and other chemicals such as benzodiazepines that may compound the adverse effects caused by the cannabinoids. Also unlike THC, synthetic cannabinoids have been associated with physical harms such as organ failure and death.

Through the Commission's multi-year synthetic drug study, the Commission learned that hundreds of synthetic cannabinoids exist. When first marketed, synthetic cannabinoids generally have not yet been scheduled as controlled substances. Often, once a synthetic cannabinoid is scheduled, a new one is created to replace it. Given the large number of potential substances, the Commission found it impracticable to add individual marijuana equivalencies for every synthetic cannabinoid. In contrast, the Commission determined that a class-based approach for synthetic cannabinoids would be a better means to capture both current and future synthetic cannabinoids.

Based on hearing testimony, the scientific literature, and public comment, the Commission determined that all synthetic cannabinoids can be covered by a single class because these substances share a similar pharmacological effect: all synthetic cannabinoids bind to and activate the CB₁ receptor. Given the Commission's priority to alleviate the burdens associated with the Application Note 6 process and the impracticality of adding many new marijuana equivalencies, the Commission concluded the class-based approach strikes a middle ground between precision and ease of guideline application.

The amendment defines the term "synthetic cannabinoid" as "any synthetic substance (other than synthetic tetrahydrocannabinol) that binds to and activates type 1 cannabinoid receptors (CB₁ receptors)." The amendment establishes a marijuana equivalency for the class of synthetic cannabinoids of 1 gram of a synthetic cannabinoid (except a Schedule III, IV, or V substance) equals 167 grams of marijuana and applies a minimum base offense level of 12 to the class.

The marijuana equivalency selected for the class is identical to the existing marijuana equivalencies for both organic and synthetic tetrahydrocannabinol (THC). The Commission originally derived the organic and synthetic THC equivalencies from a comparison of standard dosage units of THC (3 mg) and marijuana (500 mg) and the relationship between the two, rather than the actual amount of THC commonly found in a dose of marijuana. During its current study, the Commission considered whether to incorporate THC (synthetic) into the new synthetic cannabinoid class. As noted, the new synthetic cannabinoid class will be subject to the minimum base offense level of 12 applicable to most Schedule I and II controlled substances. The Commission set a minimum base offense level of 12 to the class for consistency with other Schedule I and II controlled substances. THC (synthetic) is not currently subject to the same minimum offense level. Thus, incorporating THC (synthetic) into the synthetic cannabinoid class would effectively change penalties for certain THC (synthetic) offenses, an outcome contrary to the Commission's intent. Consequently, THC (synthetic) is exempted from the class, its separate marijuana equivalency is retained, and that equivalency is applicable only in cases involving THC (synthetic).

Nevertheless, the Commission used the same marijuana equivalency for the class of synthetic cannabinoids. Commission data for cases involving synthetic cannabinoids indicates that the courts almost uniformly apply the marijuana equivalency for THC to such cases. Hence, the 1:167 ratio for the synthetic cannabinoid class reflects the courts' current sentencing practices. Although synthetic cannabinoids activate the CB₁ receptor to a greater degree than THC, the evidence also established that synthetic cannabinoids exhibit a range of potencies. Those most frequently encountered in the Commission's data exhibited potencies ranging from one to six times that of THC. Adoption of the existing THC marijuana equivalency minimizes the risk of frequent over-punishment for substances in this class while providing penalty levels that are sufficient to account for the specific harms caused by distribution of these substances.

Finally, the amendment provides two departure provisions addressing synthetic cannabinoids. First, the amendment provides for a departure based on the concentration of a synthetic cannabinoid. The Commission learned that synthetic cannabinoids are

manufactured as a powder or crystalline substance and are typically sprayed on or mixed with inert material (such as plant matter) before retail sale. As a result, a synthetic cannabinoid seized after it has been prepared for retail sale will typically weigh significantly more than the undiluted form of the same controlled substance.

Given the central role of drug quantity in setting the base offense level, an individual convicted of an offense involving a synthetic cannabinoid mixture would likely be subject to a guideline penalty range significantly higher than another individual convicted of an offense involving an undiluted synthetic cannabinoid (but who could nevertheless produce an equivalent amount of consumable product). In a case involving undiluted synthetic cannabinoid, an upward departure may be appropriate for that reason. By contrast, in a case where the mixture containing synthetic cannabinoids contained a high quantity of inert material, a downward departure may be warranted.

The second departure provision provides that a downward departure may be appropriate where a substantially greater quantity of the synthetic cannabinoid involved in the offense is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cannabinoid in the class. The two synthetic cannabinoids specifically cited in the Commission's priority, JWH-018 and AM-2201, are three and a half times and five times more potent, respectively, than THC. If an offense involves a substantially less potent synthetic cannabinoid than JWH-018 or AM-2201, the court may wish to consider whether a downward departure is appropriate.

Amendment:

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

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

and that the defendant committed the offense after one or more prior convictions for a similar offense; or

- (4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels. If the resulting offense level is greater than level **32** and the defendant receives the 4-level (“minimal participant”) reduction in §3B1.2(a), decrease to level **32**.

(b) Specific Offense Characteristics

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

- (6) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.
- (7) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.
- (8) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by **2** levels.
- (9) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.
- (10) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by **2** levels.
- (11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by **2** levels.
- (12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by **2** levels.
- (13) If the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, increase by **4** levels.
- (~~13~~14) (Apply the greatest):
 - (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
 - (B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
 - (C) If—
 - (i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture,

methamphetamine on premises where a minor is present or resides; or

- (ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

- (D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

- (~~14~~**15**) If (A) the offense involved the cultivation of marihuana on state or federal land or while trespassing on tribal or private land; and (B) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by **2** levels.

- (~~15~~**16**) If the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:

- (A) (i) the defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise;

- (B) the defendant, knowing that an individual was (i) less than 18 years of age, (ii) 65 or more years of age, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or otherwise particularly susceptible to the criminal conduct, distributed a controlled substance to that individual or involved that individual in the offense;

- (C) the defendant was directly involved in the importation of a controlled substance;

- (D) the defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense;

(E) the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood,

increase by **2** levels.

(~~16~~**17**) If the defendant receives the 4-level (“minimal participant”) reduction in §3B1.2(a) and the offense involved all of the following factors:

(A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;

(B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and

(C) the defendant had minimal knowledge of the scope and structure of the enterprise,

decrease by **2** levels.

(~~17~~**18**) If the defendant meets the criteria set forth in subdivisions (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

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

(d) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

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

(c) DRUG QUANTITY TABLE

CONTROLLED SUBSTANCES AND QUANTITY*	BASE OFFENSE LEVEL
<p>(1) ● 90 KG or more of Heroin; ● 450 KG or more of Cocaine; ● 25.2 KG or more of Cocaine Base; ● 90 KG or more of PCP, or 9 KG or more of PCP (actual); ● 45 KG or more of Methamphetamine, or 4.5 KG or more of Methamphetamine (actual), or 4.5 KG or more of "Ice"; ● 45 KG or more of Amphetamine, or 4.5 KG or more of Amphetamine (actual); ● 900 G or more of LSD; ● 36 KG or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); ● 9 KG or more of a Fentanyl Analogue; ● 90,000 KG or more of Marihuana; ● 18,000 KG or more of Hashish; ● 1,800 KG or more of Hashish Oil; ● 90,000,000 units or more of Ketamine; ● 90,000,000 units or more of Schedule I or II Depressants; ● 5,625,000 units or more of Flunitrazepam.</p>	<p>Level 38</p>
<p>(2) ● At least 30 KG but less than 90 KG of Heroin; ● At least 150 KG but less than 450 KG of Cocaine; ● At least 8.4 KG but less than 25.2 KG of Cocaine Base; ● At least 30 KG but less than 90 KG of PCP, or at least 3 KG but less than 9 KG of PCP (actual); ● At least 15 KG but less than 45 KG of Methamphetamine, or at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or at least 1.5 KG but less than 4.5 KG of "Ice"; ● At least 15 KG but less than 45 KG of Amphetamine, or at least 1.5 KG but less than 4.5 KG of Amphetamine (actual); ● At least 300 G but less than 900 G of LSD; ● At least 12 KG but less than 36 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)- 4-piperidinyl] Propanamide); ● At least 3 KG but less than 9 KG of a Fentanyl Analogue; ● At least 30,000 KG but less than 90,000 KG of Marihuana; ● At least 6,000 KG but less than 18,000 KG of Hashish; ● At least 600 KG but less than 1,800 KG of Hashish Oil; ● At least 30,000,000 units but less than 90,000,000 units of Ketamine; ● At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants;</p>	<p>Level 36</p>

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- At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam.
- (3) ● At least 10 KG but less than 30 KG of Heroin; **Level 34**
● At least 50 KG but less than 150 KG of Cocaine;
● At least 2.8 KG but less than 8.4 KG of Cocaine Base;
● At least 10 KG but less than 30 KG of PCP, or
at least 1 KG but less than 3 KG of PCP (actual);
● At least 5 KG but less than 15 KG of Methamphetamine, or
at least 500 G but less than 1.5 KG of Methamphetamine (actual), or
at least 500 G but less than 1.5 KG of “Ice”;
● At least 5 KG but less than 15 KG of Amphetamine, or
at least 500 G but less than 1.5 KG of Amphetamine (actual);
● At least 100 G but less than 300 G of LSD;
● At least 4 KG but less than 12 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-
4-piperidinyl] Propanamide);
● At least 1 KG but less than 3 KG of a Fentanyl Analogue;
● At least 10,000 KG but less than 30,000 KG of Marihuana;
● At least 2,000 KG but less than 6,000 KG of Hashish;
● At least 200 KG but less than 600 KG of Hashish Oil;
● At least 10,000,000 but less than 30,000,000 units of Ketamine;
● At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
● At least 625,000 but less than 1,875,000 units of Flunitrazepam.
- (4) ● At least 3 KG but less than 10 KG of Heroin; **Level 32**
● At least 15 KG but less than 50 KG of Cocaine;
● At least 840 G but less than 2.8 KG of Cocaine Base;
● At least 3 KG but less than 10 KG of PCP, or
at least 300 G but less than 1 KG of PCP (actual);
● At least 1.5 KG but less than 5 KG of Methamphetamine, or
at least 150 G but less than 500 G of Methamphetamine (actual), or
at least 150 G but less than 500 G of “Ice”;
● At least 1.5 KG but less than 5 KG of Amphetamine, or
at least 150 G but less than 500 G of Amphetamine (actual);
● At least 30 G but less than 100 G of LSD;
● At least 1.2 KG but less than 4 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-
4-piperidinyl] Propanamide);
● At least 300 G but less than 1 KG of a Fentanyl Analogue;
● At least 3,000 KG but less than 10,000 KG of Marihuana;
● At least 600 KG but less than 2,000 KG of Hashish;
● At least 60 KG but less than 200 KG of Hashish Oil;
● At least 3,000,000 but less than 10,000,000 units of Ketamine;
● At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
● At least 187,500 but less than 625,000 units of Flunitrazepam.
- (5) ● At least 1 KG but less than 3 KG of Heroin; **Level 30**
● At least 5 KG but less than 15 KG of Cocaine;
● At least 280 G but less than 840 G of Cocaine Base;
● At least 1 KG but less than 3 KG of PCP, or
at least 100 G but less than 300 G of PCP (actual);
● At least 500 G but less than 1.5 KG of Methamphetamine, or
at least 50 G but less than 150 G of Methamphetamine (actual), or
at least 50 G but less than 150 G of “Ice”;
● At least 500 G but less than 1.5 KG of Amphetamine, or

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- at least 50 G but less than 150 G of Amphetamine (actual);
 - At least 10 G but less than 30 G of LSD;
 - At least 400 G but less than 1.2 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 100 G but less than 300 G of a Fentanyl Analogue;
 - At least 1,000 KG but less than 3,000 KG of Marihuana;
 - At least 200 KG but less than 600 KG of Hashish;
 - At least 20 KG but less than 60 KG of Hashish Oil;
 - At least 1,000,000 but less than 3,000,000 units of Ketamine;
 - At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
 - At least 62,500 but less than 187,500 units of Flunitrazepam.
- (6) **Level 28**
- At least 700 G but less than 1 KG of Heroin;
 - At least 3.5 KG but less than 5 KG of Cocaine;
 - At least 196 G but less than 280 G of Cocaine Base;
 - At least 700 G but less than 1 KG of PCP, or
at least 70 G but less than 100 G of PCP (actual);
 - At least 350 G but less than 500 G of Methamphetamine, or
at least 35 G but less than 50 G of Methamphetamine (actual), or
at least 35 G but less than 50 G of “Ice”;
 - At least 350 G but less than 500 G of Amphetamine, or
at least 35 G but less than 50 G of Amphetamine (actual);
 - At least 7 G but less than 10 G of LSD;
 - At least 280 G but less than 400 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 70 G but less than 100 G of a Fentanyl Analogue;
 - At least 700 KG but less than 1,000 KG of Marihuana;
 - At least 140 KG but less than 200 KG of Hashish;
 - At least 14 KG but less than 20 KG of Hashish Oil;
 - At least 700,000 but less than 1,000,000 units of Ketamine;
 - At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
 - At least 43,750 but less than 62,500 units of Flunitrazepam.
- (7) **Level 26**
- At least 400 G but less than 700 G of Heroin;
 - At least 2 KG but less than 3.5 KG of Cocaine;
 - At least 112 G but less than 196 G of Cocaine Base;
 - At least 400 G but less than 700 G of PCP, or
at least 40 G but less than 70 G of PCP (actual);
 - At least 200 G but less than 350 G of Methamphetamine, or
at least 20 G but less than 35 G of Methamphetamine (actual), or
at least 20 G but less than 35 G of “Ice”;
 - At least 200 G but less than 350 G of Amphetamine, or
at least 20 G but less than 35 G of Amphetamine (actual);
 - At least 4 G but less than 7 G of LSD;
 - At least 160 G but less than 280 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 40 G but less than 70 G of a Fentanyl Analogue;
 - At least 400 KG but less than 700 KG of Marihuana;
 - At least 80 KG but less than 140 KG of Hashish;
 - At least 8 KG but less than 14 KG of Hashish Oil;
 - At least 400,000 but less than 700,000 units of Ketamine;
 - At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
 - At least 25,000 but less than 43,750 units of Flunitrazepam.

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- (8) ● At least 100 G but less than 400 G of Heroin; **Level 24**
● At least 500 G but less than 2 KG of Cocaine;
● At least 28 G but less than 112 G of Cocaine Base;
● At least 100 G but less than 400 G of PCP, or
at least 10 G but less than 40 G of PCP (actual);
● At least 50 G but less than 200 G of Methamphetamine, or
at least 5 G but less than 20 G of Methamphetamine (actual), or
at least 5 G but less than 20 G of “Ice”;
● At least 50 G but less than 200 G of Amphetamine, or
at least 5 G but less than 20 G of Amphetamine (actual);
● At least 1 G but less than 4 G of LSD;
● At least 40 G but less than 160 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-
4-piperidinyl] Propanamide);
● At least 10 G but less than 40 G of a Fentanyl Analogue;
● At least 100 KG but less than 400 KG of Marihuana;
● At least 20 KG but less than 80 KG of Hashish;
● At least 2 KG but less than 8 KG of Hashish Oil;
● At least 100,000 but less than 400,000 units of Ketamine;
● At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
● At least 6,250 but less than 25,000 units of Flunitrazepam.
- (9) ● At least 80 G but less than 100 G of Heroin; **Level 22**
● At least 400 G but less than 500 G of Cocaine;
● At least 22.4 G but less than 28 G of Cocaine Base;
● At least 80 G but less than 100 G of PCP, or
at least 8 G but less than 10 G of PCP (actual);
● At least 40 G but less than 50 G of Methamphetamine, or
at least 4 G but less than 5 G of Methamphetamine (actual), or
at least 4 G but less than 5 G of “Ice”;
● At least 40 G but less than 50 G of Amphetamine, or
at least 4 G but less than 5 G of Amphetamine (actual);
● At least 800 MG but less than 1 G of LSD;
● At least 32 G but less than 40 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-
4-piperidinyl] Propanamide);
● At least 8 G but less than 10 G of a Fentanyl Analogue;
● At least 80 KG but less than 100 KG of Marihuana;
● At least 16 KG but less than 20 KG of Hashish;
● At least 1.6 KG but less than 2 KG of Hashish Oil;
● At least 80,000 but less than 100,000 units of Ketamine;
● At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
● At least 5,000 but less than 6,250 units of Flunitrazepam.
- (10) ● At least 60 G but less than 80 G of Heroin; **Level 20**
● At least 300 G but less than 400 G of Cocaine;
● At least 16.8 G but less than 22.4 G of Cocaine Base;
● At least 60 G but less than 80 G of PCP, or
at least 6 G but less than 8 G of PCP (actual);
● At least 30 G but less than 40 G of Methamphetamine, or
at least 3 G but less than 4 G of Methamphetamine (actual), or
at least 3 G but less than 4 G of “Ice”;
● At least 30 G but less than 40 G of Amphetamine, or
at least 3 G but less than 4 G of Amphetamine (actual);

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- At least 600 MG but less than 800 MG of LSD;
- At least 24 G but less than 32 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 6 G but less than 8 G of a Fentanyl Analogue;
- At least 60 KG but less than 80 KG of Marihuana;
- At least 12 KG but less than 16 KG of Hashish;
- At least 1.2 KG but less than 1.6 KG of Hashish Oil;
- At least 60,000 but less than 80,000 units of Ketamine;
- At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
- 60,000 units or more of Schedule III substances (except Ketamine);
- At least 3,750 but less than 5,000 units of Flunitrazepam.

- (11) ● At least 40 G but less than 60 G of Heroin; **Level 18**
- At least 200 G but less than 300 G of Cocaine;
 - At least 11.2 G but less than 16.8 G of Cocaine Base;
 - At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
 - At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of “Ice”;
 - At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
 - At least 400 MG but less than 600 MG of LSD;
 - At least 16 G but less than 24 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 4 G but less than 6 G of a Fentanyl Analogue;
 - At least 40 KG but less than 60 KG of Marihuana;
 - At least 8 KG but less than 12 KG of Hashish;
 - At least 800 G but less than 1.2 KG of Hashish Oil;
 - At least 40,000 but less than 60,000 units of Ketamine;
 - At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
 - At least 40,000 but less than 60,000 units of Schedule III substances (except Ketamine);
 - At least 2,500 but less than 3,750 units of Flunitrazepam.

- (12) ● At least 20 G but less than 40 G of Heroin; **Level 16**
- At least 100 G but less than 200 G of Cocaine;
 - At least 5.6 G but less than 11.2 G of Cocaine Base;
 - At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
 - At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of “Ice”;
 - At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);
 - At least 200 MG but less than 400 MG of LSD;
 - At least 8 G but less than 16 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 2 G but less than 4 G of a Fentanyl Analogue;
 - At least 20 KG but less than 40 KG of Marihuana;
 - At least 5 KG but less than 8 KG of Hashish;
 - At least 500 G but less than 800 G of Hashish Oil;
 - At least 20,000 but less than 40,000 units of Ketamine;

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- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
- At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine);
- At least 1,250 but less than 2,500 units of Flunitrazepam.

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

- (14) **Level 12**
- Less than 10 G of Heroin;
 - Less than 50 G of Cocaine;
 - Less than 2.8 G of Cocaine Base;
 - Less than 10 G of PCP, or less than 1 G of PCP (actual);
 - Less than 5 G of Methamphetamine, or less than 500 MG of Methamphetamine (actual), or less than 500 MG of “Ice”;
 - Less than 5 G of Amphetamine, or less than 500 MG of Amphetamine (actual);
 - Less than 100 MG of LSD;
 - Less than 4 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - Less than 1 G of a Fentanyl Analogue;
 - At least 5 KG but less than 10 KG of Marihuana;
 - At least 1 KG but less than 2 KG of Hashish;
 - At least 100 G but less than 200 G of Hashish Oil;
 - At least 5,000 but less than 10,000 units of Ketamine;
 - At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
 - At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine);
 - At least 312 but less than 625 units of Flunitrazepam;
 - 80,000 units or more of Schedule IV substances (except Flunitrazepam).

- (15) **Level 10**
- At least 2.5 KG but less than 5 KG of Marihuana;
 - At least 500 G but less than 1 KG of Hashish;

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- At least 50 G but less than 100 G of Hashish Oil;
- At least 2,500 but less than 5,000 units of Ketamine;
- At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
- At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine);
- At least 156 but less than 312 units of Flunitrazepam;
- At least 40,000 but less than 80,000 units of Schedule IV substances (except Flunitrazepam).

- (16) ● At least 1 KG but less than 2.5 KG of Marihuana; **Level 8**
- At least 200 G but less than 500 G of Hashish;
 - At least 20 G but less than 50 G of Hashish Oil;
 - At least 1,000 but less than 2,500 units of Ketamine;
 - At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
 - At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine);
 - Less than 156 units of Flunitrazepam;
 - At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam);
 - 160,000 units or more of Schedule V substances.

- (17) ● Less than 1 KG of Marihuana; **Level 6**
- Less than 200 G of Hashish;
 - Less than 20 G of Hashish Oil;
 - Less than 1,000 units of Ketamine;
 - Less than 1,000 units of Schedule I or II Depressants;
 - Less than 1,000 units of Schedule III substances (except Ketamine);
 - Less than 16,000 units of Schedule IV substances (except Flunitrazepam);
 - Less than 160,000 units of Schedule V substances.

*Notes to Drug Quantity Table:

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

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

- (C) “**Ice**,” for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.
- (D) “**Cocaine base**,” for the purposes of this guideline, means “crack.” “**Crack**” is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.
- (E) In the case of an offense involving marihuana plants, treat each plant, regardless of sex, as equivalent to 100 grams of marihuana. *Provided*, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.
- (F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one “**unit**” means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one “**unit**” means 0.5 milliliters. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (*e.g.*, patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 milligrams of an anabolic steroid is one “unit”.
- (G) In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 milligrams of LSD for the purposes of the Drug Quantity Table.
- (H) **Hashish**, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(31)), (ii) at least two of the following: cannabiniol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).
- (I) **Hashish oil**, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(31)), (ii) at least two of the following: cannabiniol, 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.
- (J) **Fentanyl analogue**, for the purposes of this guideline, means any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidiny] propanamide).

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Commentary

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Application Notes:

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6. **Analogues and Controlled Substances Not Referenced in this Guideline.**—Any **Except as otherwise provided, any** reference to a particular controlled substance in these guidelines includes all salts, isomers, all salts of isomers, and, ~~except as otherwise provided,~~ any analogue of that controlled substance. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed. ~~For purposes of this guideline~~ **Unless otherwise specified, “analogue,” for purposes of this guideline,** has the meaning given the term “controlled substance analogue” in 21 U.S.C. § 802(32). In determining the appropriate sentence, the court also may consider whether the same quantity of analogue produces a greater effect on the central nervous system than the controlled substance for which it is an analogue.

In the case of a controlled substance that is not specifically referenced in this guideline, determine the base offense level using the marijuana equivalency of the most closely related controlled substance referenced in this guideline. In determining the most closely related controlled substance, the court shall, to the extent practicable, consider the following:

- (A) Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.
- (B) Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.
- (C) Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.

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

* * *

(D) **Drug Equivalency Tables.**—

SCHEDULE I OR II OPIATES*	
1 gm of Heroin =	1 kg of marijuana
1 gm of Alpha-Methylfentanyl =	10 kg of marijuana
1 gm of Dextromoramide =	670 gm of marijuana
1 gm of Dipipanone =	250 gm of marijuana
1 gm of 3-Methylfentanyl =	10 kg of marijuana
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm of marijuana
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP =	700 gm of marijuana

Synthetic Drugs

1 gm of Alphaprodine =	100 gm of marihuana
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) =	2.5 kg of marihuana
1 gm of a Fentanyl Analogue =	10 kg of marihuana
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg of marihuana
1 gm of Levorphanol =	2.5 kg of marihuana
1 gm of Meperidine/Pethidine =	50 gm of marihuana
1 gm of Methadone =	500 gm of marihuana
1 gm of 6-Monoacetylmorphine =	1 kg of marihuana
1 gm of Morphine =	500 gm of marihuana
1 gm of Oxycodone (actual) =	6700 gm of marihuana
1 gm of Oxymorphone =	5 kg of marihuana
1 gm of Racemorphan =	800 gm of marihuana
1 gm of Codeine =	80 gm of marihuana
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm of marihuana
1 gm of Ethylmorphine =	165 gm of marihuana
1 gm of Hydrocodone (actual) =	6700 gm of marihuana
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm of marihuana
1 gm of Opium =	50 gm of marihuana
1 gm of Levo-alpha-acetylmethadol (LAAM) =	3 kg of marihuana

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

COCAINE AND OTHER SCHEDULE I AND II STIMULANTS (AND THEIR IMMEDIATE PRECURSORS)*

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

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

SYNTHETIC CATHINONES (EXCEPT SCHEDULE III, IV, AND V SUBSTANCES)*

1 gm of a synthetic cathinone (except a Schedule III, IV, or V substance) =	380 gm of marihuana
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**Provided, that the minimum offense level from the Drug Quantity Table for any synthetic cathinone (except a Schedule III, IV, or V substance) individually, or in combination with another controlled substance, is level 12.*

LSD, PCP, AND OTHER SCHEDULE I AND II HALLUCINOGENS (AND THEIR IMMEDIATE PRECURSORS)*

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

Synthetic Drugs

1 gm of Dimethyltryptamine/DM =	100 gm of marihuana
1 gm of Mescaline =	10 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) =	1 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) =	0.1 gm of marihuana
1 gm of Peyote (Dry) =	0.5 gm of marihuana
1 gm of Peyote (Wet) =	0.05 gm of marihuana
1 gm of Phencyclidine/PCP =	1 kg of marihuana
1 gm of Phencyclidine (actual) /PCP (actual) =	10 kg of marihuana
1 gm of Psilocin =	500 gm of marihuana
1 gm of Psilocybin =	500 gm of marihuana
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg of marihuana
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg of marihuana
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg of marihuana
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg of marihuana
1 gm of 3,4-Methylenedioxyamphetamine/MDA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxymethamphetamine/MDMA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA =	500 gm of marihuana
1 gm of Paramethoxymethamphetamine/PMA =	500 gm of marihuana
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =	680 gm of marihuana
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg of marihuana

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

SCHEDULE I MARIHUANA

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

SYNTHETIC CANNABINOIDS (EXCEPT SCHEDULE III, IV, AND V SUBSTANCES)*

1 gm of a synthetic cannabinoid (except a Schedule III, IV, or V substance) =	167 gm of marihuana
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**Provided*, that the minimum offense level from the Drug Quantity Table for any synthetic cannabinoid (except a Schedule III, IV, or V substance) individually, or in combination with another controlled substance, is level 12.

“Synthetic cannabinoid.” for purposes of this guideline, means any synthetic substance (other than synthetic tetrahydrocannabinol) that binds to and activates type 1 cannabinoid receptors (CB₁ receptors).

FLUNITRAZEPAM **

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

SCHEDULE I OR II DEPRESSANTS (EXCEPT GAMMA-HYDROXYBUTYRIC ACID)

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

GAMMA-HYDROXYBUTYRIC ACID

1 ml of gamma-hydroxybutyric acid = 8.8 gm of marihuana

SCHEDULE III SUBSTANCES (EXCEPT KETAMINE)***

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

****Provided*, that the combined equivalent weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 79.99 kilograms of marihuana.

KETAMINE

1 unit of ketamine = 1 gm of marihuana

SCHEDULE IV SUBSTANCES (EXCEPT FLUNITRAZEPAM)*****

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

******Provided*, that the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 9.99 kilograms of marihuana.

SCHEDULE V SUBSTANCES*****

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

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

LIST I CHEMICALS (RELATING TO THE MANUFACTURE OF AMPHETAMINE OR METHAMPHETAMINE)*****

1 gm of Ephedrine = 10 kg of marihuana
 1 gm of Phenylpropanolamine = 10 kg of marihuana
 1 gm of Pseudoephedrine = 10 kg of marihuana

******Provided*, that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

DATE RAPE DRUGS (EXCEPT FLUNITRAZEPAM, GHB, OR KETAMINE)

1 ml of 1,4-butanediol = 8.8 gm marihuana
 1 ml of gamma butyrolactone = 8.8 gm marihuana

To facilitate conversions to drug equivalencies, the following table is provided:

MEASUREMENT CONVERSION TABLE

1 oz = 28.35 gm
 1 lb = 453.6 gm
 1 lb = 0.4536 kg
 1 gal = 3.785 liters
 1 qt = 0.946 liters
 1 gm = 1 ml (liquid)
 1 liter = 1,000 ml

1 kg = 1,000 gm
1 gm = 1,000 mg
1 grain = 64.8 mg.

* * *

16. **Application of Subsection (b)(11).**—Subsection (b)(11) does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant. Such conduct is covered by §3C1.1 (Obstructing or Impeding the Administration of Justice) and, if applicable, §2D1.1(b)(15)(D).

* * *

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

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

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

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

* * *

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

* * *

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

The enhancements in subsection (b)(1314)(A) and (b)(1415) may be applied cumulatively (added together), as is generally the case when two or more specific offense characteristics each apply. See §1B1.1 (Application Instructions), Application Note 4(A).

20. **Application of Subsection (b)(1516).**—

(A) **Distributing to a Specified Individual or Involving Such an Individual in the Offense (Subsection (b)(1516)(B)).**—If the defendant distributes a controlled substance to an individual or involves an individual in the offense, as specified in subsection (b)(1516)(B), the individual is not a “vulnerable victim” for purposes of §3A1.1(b).

(B) **Directly Involved in the Importation of a Controlled Substance (Subsection (b)(1516)(C)).**—Subsection (b)(1516)(C) applies if the defendant is accountable for the importation of a controlled substance under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), *i.e.*, the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the importation of a controlled substance.

If subsection (b)(3) or (b)(5) applies, do not apply subsection (b)(1516)(C).

(C) **Pattern of Criminal Conduct Engaged in as a Livelihood (Subsection (b)(1516)(E)).**—For purposes of subsection (b)(1516)(E), “*pattern of criminal conduct*” and “*engaged in as a livelihood*” have the meaning given such terms in §4B1.3 (Criminal Livelihood).

21. **Applicability of Subsection (b)(1718).**—The applicability of subsection (b)(1718) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection (b)(1718) applies.

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27. **Departure Considerations.**—

(A) **Downward Departure Based on Drug Quantity in Certain Reverse Sting Operations.**—If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant’s purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.

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

(C) **Upward Departure Based on Unusually High Purity.**—Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP, amphetamine, methamphetamine, hydrocodone, or oxycodone for which the guideline itself provides for the consideration of purity (*see* the footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.

(D) **Departure Based on Potency of Synthetic Cathinones.**—In addition to providing marihuana equivalencies for specific controlled substances and groups of substances, the Drug Equivalency Tables provide marihuana equivalencies for certain classes of controlled substances, such as synthetic cathinones. In the case of a synthetic cathinone that is not specifically referenced in this guideline, the marihuana equivalency for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially lesser or greater quantity of a synthetic cathinone is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone in the class, such as methcathinone or alpha-PVP. In such a case, a departure may be warranted. For example, an upward departure may be warranted in cases involving MDPV, a substance of which a lesser quantity is usually needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone. In contrast, a downward departure may be warranted in cases involving methylone, a substance of which a greater quantity is usually needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone.

(E) **Departures for Certain Cases involving Synthetic Cannabinoids.**—

(i) **Departure Based on Concentration of Synthetic Cannabinoids.**—Synthetic cannabinoids are manufactured as powder or crystalline substances. The concentrated substance is then usually sprayed on or soaked into a plant or other base material, and trafficked as part of a mixture. Nonetheless, there may be cases in which the substance involved in the offense is a synthetic cannabinoid not combined with any other substance. In such a case, an upward departure would be warranted.

There also may be cases in which the substance involved in the offense is a mixture containing a synthetic cannabinoid diluted with an unusually high quantity of base material. In such a case, a downward departure may be warranted.

(ii) **Downward Departure Based on Potency of Synthetic Cannabinoids.**—In the case of a synthetic cannabinoid that is not specifically referenced in this guideline, the marihuana equivalency for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially greater quantity of a synthetic cannabinoid is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cannabinoid in the class,

such as JWH-018 or AM-2201. In such a case, a downward departure may be warranted.

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

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Subsection (b)(13~~14~~)(A) implements the instruction to the Commission in section 303 of Public Law 103–237.

Subsections (b)(13~~14~~)(C)(ii) and (D) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106–310.

Subsection (b)(15~~16~~) implements the directive to the Commission in section 6(3) of Public Law 111–220.

Subsection (b)(16~~17~~) implements the directive to the Commission in section 7(2) of Public Law 111–220.

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§2D1.6. Use of Communication Facility in Committing Drug Offense; Attempt or Conspiracy

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Commentary

Statutory Provision: 21 U.S.C. § 843(b).

Application Note:

1. Where the offense level for the underlying offense is to be determined by reference to §2D1.1, *see* Application Note 5 of the Commentary to §2D1.1 for guidance in determining the scale of the offense. Note that the Drug Quantity Table in §2D1.1 provides a minimum offense level of 12 where the offense involves heroin (or other Schedule I or II opiates), cocaine (or other Schedule I or II stimulants), cocaine base, PCP, methamphetamine, LSD (or other Schedule I or II hallucinogens), fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide), or fentanyl analogue (§2D1.1(c)(14)); a minimum offense level of 8 where the offense involves flunitrazepam (§2D1.1(c)(16)); and a minimum offense level of 6 otherwise (§2D1.1(c)(17)).

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§2D1.14. Narco-Terrorism

(a) Base Offense Level:

- (1) The offense level from §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) applicable to the underlying offense, except that §2D1.1(a)(5)(A), (a)(5)(B), and (b)(17)(18) shall not apply.

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

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Commentary

Application Notes:

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2. Do not apply this adjustment if the Chapter Two offense guideline incorporates this factor. For example, if the defendant receives an enhancement under §2D1.1(b)(15)(16)(B) for involving an individual less than 18 years of age in the offense, do not apply this adjustment.

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

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Commentary

Application Notes:

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7. **Inapplicability of Adjustment in Certain Circumstances.**—If the defendant is convicted of an offense covered by §2J1.1 (Contempt), §2J1.2 (Obstruction of Justice), §2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), §2J1.5 (Failure to Appear by Material Witness), §2J1.6 (Failure to Appear by Defendant), §2J1.9 (Payment to Witness), §2X3.1 (Accessory After the Fact), or §2X4.1 (Misprision of Felony), this adjustment is not to be applied to the offense level for that offense except if a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (*e.g.*, if the defendant threatened a witness during the course of the prosecution for the obstruction offense).

Similarly, if the defendant receives an enhancement under §2D1.1(b)(15)(16)(D), do not apply this adjustment.

4. MARIHUANA EQUIVALENCY

Reason for Amendment: This amendment makes technical changes to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). It replaces the term “marihuana equivalency,” which is used in the Drug Equivalency Tables for determining penalties for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances, with the term “converted drug weight.”

The Commission received comment expressing concern that the term “marihuana equivalency” is misleading and results in confusion for individuals not fully versed in the guidelines. Some commenters suggested that the Commission should replace “marihuana equivalency” with another term.

Specifically, the amendment adds the new term “converted drug weight” to all provisions of the Drug Quantity Table at §2D1.1(c) and changes the title of the “Drug Equivalency Tables” to “Drug Conversion Tables.” In addition, the amendment makes technical changes throughout the Guidelines Manual to account for the new term.

This amendment is not intended as a substantive change in policy for §2D1.1.

Amendment:

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

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Commentary

Application Notes:

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

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

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(c) DRUG QUANTITY TABLE

CONTROLLED SUBSTANCES AND QUANTITY*	BASE OFFENSE LEVEL
<p>(1) ● 90 KG or more of Heroin; ● 450 KG or more of Cocaine; ● 25.2 KG or more of Cocaine Base; ● 90 KG or more of PCP, or 9 KG or more of PCP (actual); ● 45 KG or more of Methamphetamine, or 4.5 KG or more of Methamphetamine (actual), or 4.5 KG or more of “Ice”; ● 45 KG or more of Amphetamine, or 4.5 KG or more of Amphetamine (actual); ● 900 G or more of LSD; ● 36 KG or more of Fentanyl [(N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide)];[†] ● 9 KG or more of a Fentanyl Analogue; ● 90,000 KG or more of Marihuana; ● 18,000 KG or more of Hashish; ● 1,800 KG or more of Hashish Oil; ● 90,000,000 units or more of Ketamine; ● 90,000,000 units or more of Schedule I or II Depressants; ● 5,625,000 units or more of Flunitrazepam; ● 90,000 KG or more of Converted Drug Weight.</p>	<p>Level 38</p>
<p>(2) ● At least 30 KG but less than 90 KG of Heroin; ● At least 150 KG but less than 450 KG of Cocaine; ● At least 8.4 KG but less than 25.2 KG of Cocaine Base; ● At least 30 KG but less than 90 KG of PCP, or at least 3 KG but less than 9 KG of PCP (actual); ● At least 15 KG but less than 45 KG of Methamphetamine, or at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or at least 1.5 KG but less than 4.5 KG of “Ice”; ● At least 15 KG but less than 45 KG of Amphetamine, or at least 1.5 KG but less than 4.5 KG of Amphetamine (actual); ● At least 300 G but less than 900 G of LSD; ● At least 12 KG but less than 36 KG of Fentanyl [(N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide)];[†] ● At least 3 KG but less than 9 KG of a Fentanyl Analogue; ● At least 30,000 KG but less than 90,000 KG of Marihuana; ● At least 6,000 KG but less than 18,000 KG of Hashish; ● At least 600 KG but less than 1,800 KG of Hashish Oil; ● At least 30,000,000 units but less than 90,000,000 units of Ketamine; ● At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants;</p>	<p>Level 36</p>

[†] The bracketed text was added by Amendment 3 (Synthetic Drugs) of this document.

Marihuana Equivalency

- At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam;
- At least 30,000 KG but less than 90,000 KG of **Converted Drug Weight**.

- (3) **Level 34**
- At least 10 KG but less than 30 KG of Heroin;
 - At least 50 KG but less than 150 KG of Cocaine;
 - At least 2.8 KG but less than 8.4 KG of Cocaine Base;
 - At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);
 - At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of “Ice”;
 - At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual);
 - At least 100 G but less than 300 G of LSD;
 - At least 4 KG but less than 12 KG of Fentanyl [(N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide)];†
 - At least 1 KG but less than 3 KG of a Fentanyl Analogue;
 - At least 10,000 KG but less than 30,000 KG of Marihuana;
 - At least 2,000 KG but less than 6,000 KG of Hashish;
 - At least 200 KG but less than 600 KG of Hashish Oil;
 - At least 10,000,000 but less than 30,000,000 units of Ketamine;
 - At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
 - At least 625,000 but less than 1,875,000 units of Flunitrazepam;
 - At least 10,000 KG but less than 30,000 KG of **Converted Drug Weight**.

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

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

† The bracketed text was added by Amendment 3 (Synthetic Drugs) of this document.

Marihuana Equivalency

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

- (6) **Level 28**
- At least 700 G but less than 1 KG of Heroin;
 - At least 3.5 KG but less than 5 KG of Cocaine;
 - At least 196 G but less than 280 G of Cocaine Base;
 - At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
 - At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of “Ice”;
 - At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual);
 - At least 7 G but less than 10 G of LSD;
 - At least 280 G but less than 400 G of Fentanyl [(N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide)];[†]
 - At least 70 G but less than 100 G of a Fentanyl Analogue;
 - At least 700 KG but less than 1,000 KG of Marihuana;
 - At least 140 KG but less than 200 KG of Hashish;
 - At least 14 KG but less than 20 KG of Hashish Oil;
 - At least 700,000 but less than 1,000,000 units of Ketamine;
 - At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
 - At least 43,750 but less than 62,500 units of Flunitrazepam;
 - At least 700 KG but less than 1,000 KG of **Converted Drug Weight**.

- (7) **Level 26**
- At least 400 G but less than 700 G of Heroin;
 - At least 2 KG but less than 3.5 KG of Cocaine;
 - At least 112 G but less than 196 G of Cocaine Base;
 - At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
 - At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of “Ice”;
 - At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
 - At least 4 G but less than 7 G of LSD;

[†] The bracketed text was added by Amendment 3 (Synthetic Drugs) of this document.

Marihuana Equivalency

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

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

- (9) **Level 22**
- At least 80 G but less than 100 G of Heroin;
 - At least 400 G but less than 500 G of Cocaine;
 - At least 22.4 G but less than 28 G of Cocaine Base;
 - At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
 - At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of “Ice”;
 - At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
 - At least 800 MG but less than 1 G of LSD;
 - At least 32 G but less than 40 G of Fentanyl [(N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide)];†
 - At least 8 G but less than 10 G of a Fentanyl Analogue;
 - At least 80 KG but less than 100 KG of Marihuana;
 - At least 16 KG but less than 20 KG of Hashish;
 - At least 1.6 KG but less than 2 KG of Hashish Oil;
 - At least 80,000 but less than 100,000 units of Ketamine;

† The bracketed text was added by Amendment 3 (Synthetic Drugs) of this document.

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

- (10) **Level 20**
- At least 60 G but less than 80 G of Heroin;
 - At least 300 G but less than 400 G of Cocaine;
 - At least 16.8 G but less than 22.4 G of Cocaine Base;
 - At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);
 - At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of “Ice”;
 - At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);
 - At least 600 MG but less than 800 MG of LSD;
 - At least 24 G but less than 32 G of Fentanyl [(N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide)];[†]
 - At least 6 G but less than 8 G of a Fentanyl Analogue;
 - At least 60 KG but less than 80 KG of Marihuana;
 - At least 12 KG but less than 16 KG of Hashish;
 - At least 1.2 KG but less than 1.6 KG of Hashish Oil;
 - At least 60,000 but less than 80,000 units of Ketamine;
 - At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
 - 60,000 units or more of Schedule III substances (except Ketamine);
 - At least 3,750 but less than 5,000 units of Flunitrazepam;
 - At least 60 KG but less than 80 KG of **Converted Drug Weight**.

- (11) **Level 18**
- At least 40 G but less than 60 G of Heroin;
 - At least 200 G but less than 300 G of Cocaine;
 - At least 11.2 G but less than 16.8 G of Cocaine Base;
 - At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
 - At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of “Ice”;
 - At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
 - At least 400 MG but less than 600 MG of LSD;
 - At least 16 G but less than 24 G of Fentanyl [(N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide)];[†]
 - At least 4 G but less than 6 G of a Fentanyl Analogue;
 - At least 40 KG but less than 60 KG of Marihuana;
 - At least 8 KG but less than 12 KG of Hashish;
 - At least 800 G but less than 1.2 KG of Hashish Oil;
 - At least 40,000 but less than 60,000 units of Ketamine;
 - At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
 - At least 40,000 but less than 60,000 units of Schedule III substances (except Ketamine);
 - At least 2,500 but less than 3,750 units of Flunitrazepam;
 - At least 40 KG but less than 60 KG of **Converted Drug Weight**.

[†] The bracketed text was added by Amendment 3 (Synthetic Drugs) of this document.

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

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

- (14) ● Less than 10 G of Heroin; **Level 12**
 ● Less than 50 G of Cocaine;
 ● Less than 2.8 G of Cocaine Base;

[†] The bracketed text was added by Amendment 3 (Synthetic Drugs) of this document.

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- Less than 10 G of PCP, or
less than 1 G of PCP (actual);
 - Less than 5 G of Methamphetamine, or
less than 500 MG of Methamphetamine (actual), or
less than 500 MG of “Ice”;
 - Less than 5 G of Amphetamine, or
less than 500 MG of Amphetamine (actual);
 - Less than 100 MG of LSD;
 - Less than 4 G of Fentanyl [(N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide)];†
 - Less than 1 G of a Fentanyl Analogue;
 - At least 5 KG but less than 10 KG of Marihuana;
 - At least 1 KG but less than 2 KG of Hashish;
 - At least 100 G but less than 200 G of Hashish Oil;
 - At least 5,000 but less than 10,000 units of Ketamine;
 - At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
 - At least 5,000 but less than 10,000 units of Schedule III substances (except
Ketamine);
 - At least 312 but less than 625 units of Flunitrazepam;
 - 80,000 units or more of Schedule IV substances (except Flunitrazepam);
 - At least 5 KG but less than 10 KG of **Converted Drug Weight**.
- (15) ● At least 2.5 KG but less than 5 KG of Marihuana; **Level 10**
- At least 500 G but less than 1 KG of Hashish;
 - At least 50 G but less than 100 G of Hashish Oil;
 - At least 2,500 but less than 5,000 units of Ketamine;
 - At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
 - At least 2,500 but less than 5,000 units of Schedule III substances (except
Ketamine);
 - At least 156 but less than 312 units of Flunitrazepam;
 - At least 40,000 but less than 80,000 units of Schedule IV substances (except
Flunitrazepam);
 - At least 2.5 KG but less than 5 KG of **Converted Drug Weight**.
- (16) ● At least 1 KG but less than 2.5 KG of Marihuana; **Level 8**
- At least 200 G but less than 500 G of Hashish;
 - At least 20 G but less than 50 G of Hashish Oil;
 - At least 1,000 but less than 2,500 units of Ketamine;
 - At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
 - At least 1,000 but less than 2,500 units of Schedule III substances (except
Ketamine);
 - Less than 156 units of Flunitrazepam;
 - At least 16,000 but less than 40,000 units of Schedule IV substances (except
Flunitrazepam);
 - 160,000 units or more of Schedule V substances;
 - At least 1 KG but less than 2.5 KG of **Converted Drug Weight**.
- (17) ● Less than 1 KG of Marihuana; **Level 6**
- Less than 200 G of Hashish;
 - Less than 20 G of Hashish Oil;
 - Less than 1,000 units of Ketamine;
 - Less than 1,000 units of Schedule I or II Depressants;

† The bracketed text was added by Amendment 3 (Synthetic Drugs) of this document.

- Less than 1,000 units of Schedule III substances (except Ketamine);
 - Less than 16,000 units of Schedule IV substances (except Flunitrazepam);
 - Less than 160,000 units of Schedule V substances;
 - Less than 1 KG of **Converted Drug Weight**.
-

***Notes to Drug Quantity Table:**

(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

* * *

(J) **Fentanyl analogue**, for the purposes of this guideline, means any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide).]†

(K) The term “**Converted Drug Weight**,” for purposes of this guideline, refers to a nominal reference designation that is used as a conversion factor in the Drug Conversion Tables set forth in the Commentary below, to determine the offense level for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances.

Commentary

* * *

Application Notes:

* * *

6. **Analogues and Controlled Substances Not Referenced in this Guideline.**—[Except as otherwise provided, any reference to a particular controlled substance in these guidelines includes all salts, isomers, all salts of isomers, and any analogue of that controlled substance. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed. Unless otherwise specified, “**analogue**,” for purposes of this guideline, has the meaning given the term “controlled substance analogue” in 21 U.S.C. § 802(32).]†† In determining the appropriate sentence, the court also may consider whether the same quantity of analogue produces a greater effect on the central nervous system than the controlled substance for which it is an analogue.

In the case of a controlled substance that is not specifically referenced in this guideline, determine the base offense level using the ~~marihuana equivalency~~ converted drug weight of the most closely related controlled substance referenced in this guideline. **See Application Note 8.** In

† The bracketed text was added by Amendment 3 (Synthetic Drugs) of this document.

†† The bracketed text was revised by Amendment 3 (Synthetic Drugs) of this document.

determining the most closely related controlled substance, the court shall, to the extent practicable, consider the following:

- (A) Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.
- (B) Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.
- (C) Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.

* * *

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

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

- (i) Use the Drug Equivalency Conversion Tables to ~~convert the quantity~~ find the converted drug weight of the controlled substance involved in the offense to its equivalent quantity of marihuana.
- (ii) Find the equivalent quantity of marihuana corresponding converted drug weight in the Drug Quantity Table.
- (iii) Use the offense level that corresponds to the equivalent quantity of marihuana converted drug weight determined above as the base offense level for the controlled substance involved in the offense.

(See also Application Note 6.) For example, in the Drug Equivalency Conversion Tables set forth in this Note, 1 gram of a substance containing oxymorphone, a Schedule I opiate, converts to ~~an equivalent quantity of~~ 5 kilograms of marihuana converted drug weight. In a case involving 100 grams of oxymorphone, the ~~equivalent quantity of marihuana~~ converted drug weight would be 500 kilograms, which corresponds to a base offense level of 26 in the Drug Quantity Table.

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

For certain types of controlled substances, the marihuana equivalencies converted drug weights assigned in the Drug Equivalency Conversion Tables are “capped” at specified

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amounts (e.g., the combined equivalent converted weight of all Schedule V controlled substances shall not exceed 2.49 kilograms of marihuana converted drug weight). Where there are controlled substances from more than one schedule (e.g., a quantity of a Schedule IV substance and a quantity of a Schedule V substance), determine the marihuana equivalency converted drug weight for each schedule separately (subject to the cap, if any, applicable to that schedule). Then add the marihuana equivalencies converted drug weights to determine the combined marihuana equivalency converted drug weight (subject to the cap, if any, applicable to the combined amounts).

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

(C) Examples for Combining Differing Controlled Substances.—

- (i) The defendant is convicted of selling 70 grams of a substance containing PCP (Level 20) and 250 milligrams of a substance containing LSD (Level 16). The PCP converts to 70 kilograms of marihuana converted drug weight; the LSD converts to 25 kilograms of marihuana converted drug weight. The total is therefore equivalent converts to 95 kilograms of marihuana converted drug weight, for which the Drug Quantity Table provides an offense level of 22.
- (ii) The defendant is convicted of selling 500 grams of marihuana (Level 6) and 10,000 units of diazepam (Level 6). The marihuana converts to 500 grams of converted drug weight. The diazepam, a Schedule IV drug, is equivalent converts to 625 grams of marihuana converted drug weight. The total, 1.125 kilograms of marihuana converted drug weight, has an offense level of 8 in the Drug Quantity Table.
- (iii) The defendant is convicted of selling 80 grams of cocaine (Level 14) and 2 grams of cocaine base (Level 12). The cocaine is equivalent converts to 16 kilograms of marihuana converted drug weight, and the cocaine base is equivalent converts to 7.142 kilograms of marihuana converted drug weight. The total is therefore equivalent converts to 23.142 kilograms of marihuana converted drug weight, which has an offense level of 16 in the Drug Quantity Table.
- (iv) The defendant is convicted of selling 76,000 units of a Schedule III substance, 200,000 units of a Schedule IV substance, and 600,000 units of a Schedule V substance. The marihuana equivalency converted drug weight for the Schedule III substance is 76 kilograms of marihuana (below the cap of 79.99 kilograms of marihuana converted drug weight set forth as the maximum equivalent converted weight for Schedule III substances). The marihuana equivalency converted drug weight for the Schedule IV substance is subject to a cap of 9.99 kilograms of marihuana set forth as the maximum equivalent converted weight for Schedule IV substances (without the cap it would have been 12.5 kilograms). The marihuana equivalency converted drug weight for the Schedule V substance is subject to the cap of 2.49 kilograms of marihuana set forth as the maximum equivalent converted weight for Schedule V substances (without the cap it would have been 3.75 kilograms). The combined equivalent converted weight, determined by adding together the above amounts, is subject to the cap of 79.99 kilograms of marihuana converted drug weight set forth as the maximum combined equivalent converted weight for Schedule III, IV, and V substances. Without the cap, the combined equivalent converted weight would have been 88.48 (76 + 9.99 + 2.49) kilograms.

Marihuana Equivalency

(D) Drug Equivalency Conversion Tables.—

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

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

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

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

† The bracketed text was added by Amendment 3 (Synthetic Drugs) of this document. Amendment 3 also deleted the lines relating to Alpha-Methylfentanyl and Methylfentanyl from the table relating to Schedule I or II Opiates.

Marihuana Equivalency

[SYNTHETIC CATHINONES (EXCEPT SCHEDULE III, IV, AND V SUBSTANCES)*	CONVERTED DRUG WEIGHT
1 gm of a synthetic cathinone (except a Schedule III, IV, or V substance) =	380 gm of marihuana

**Provided, that the minimum offense level from the Drug Quantity Table for any synthetic cathinone (except a Schedule III, IV, or V substance) individually, or in combination with another controlled substance, is level 12.†*

LSD, PCP, AND OTHER SCHEDULE I AND II HALLUCINOGENS (AND THEIR IMMEDIATE PRECURSORS)*	CONVERTED DRUG WEIGHT
1 gm of Bufotenine =	70 gm of marihuana
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =	100 kg of marihuana
1 gm of Diethyltryptamine/DET =	80 gm of marihuana
1 gm of Dimethyltryptamine/DM =	100 gm of marihuana
1 gm of Mescaline =	10 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) =	1 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) =	0.1 gm of marihuana
1 gm of Peyote (Dry) =	0.5 gm of marihuana
1 gm of Peyote (Wet) =	0.05 gm of marihuana
1 gm of Phencyclidine/PCP =	1 kg of marihuana
1 gm of Phencyclidine (actual) /PCP (actual) =	10 kg of marihuana
1 gm of Psilocin =	500 gm of marihuana
1 gm of Psilocybin =	500 gm of marihuana
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg of marihuana
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg of marihuana
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg of marihuana
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg of marihuana
1 gm of 3,4-Methylenedioxyamphetamine/MDA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxy-methamphetamine/MDMA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA =	500 gm of marihuana
1 gm of Paramethoxymethamphetamine/PMA =	500 gm of marihuana
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =	680 gm of marihuana
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg of marihuana

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

SCHEDULE I MARIHUANA	CONVERTED DRUG WEIGHT
1 gm of Marihuana/Cannabis, granulated, powdered, etc. =	1 gm of marihuana
1 gm of Hashish Oil =	50 gm of marihuana
1 gm of Cannabis Resin or Hashish =	5 gm of marihuana
1 gm of Tetrahydrocannabinol, Organic =	167 gm of marihuana
1 gm of Tetrahydrocannabinol, Synthetic =	167 gm of marihuana

[SYNTHETIC CANNABINOIDS (EXCEPT SCHEDULE III, IV, AND V SUBSTANCES)*	CONVERTED DRUG WEIGHT
1 gm of a synthetic cannabinoid (except a Schedule III, IV, or V substance) =	167 gm of marihuana

**Provided, that the minimum offense level from the Drug Quantity Table for any synthetic cannabinoid (except a Schedule III, IV, or V substance) individually, or in combination with another controlled substance, is level 12.*

“Synthetic cannabinoid,” for purposes of this guideline, means any synthetic substance (other than synthetic tetrahydrocannabinol) that binds to and activates type 1 cannabinoid receptors (CB₁ receptors).†

† The bracketed text was added by Amendment 3 (Synthetic Drugs) of this document. Amendment 3 also deleted the line relating to Methcathinone from the table relating to Cocaine and Other Schedule I and II Stimulants.

Marihuana Equivalency

FLUNITRAZEPAM **	CONVERTED DRUG WEIGHT
1 unit of Flunitrazepam =	16 gm-of marihuana

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

SCHEDULE I OR II DEPRESSANTS (EXCEPT GAMMA-HYDROXYBUTYRIC ACID)	CONVERTED DRUG WEIGHT
1 unit of a Schedule I or II Depressant (except gamma-hydroxybutyric acid) =	1 gm-of marihuana

GAMMA-HYDROXYBUTYRIC ACID	CONVERTED DRUG WEIGHT
1 ml of gamma-hydroxybutyric acid =	8.8 gm-of marihuana

SCHEDULE III SUBSTANCES (EXCEPT KETAMINE)***	CONVERTED DRUG WEIGHT
1 unit of a Schedule III Substance =	1 gm-of marihuana

****Provided, that the combined equivalent converted weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 79.99 kilograms of marihuana converted drug weight.*

KETAMINE	CONVERTED DRUG WEIGHT
1 unit of ketamine =	1 gm-of marihuana

SCHEDULE IV SUBSTANCES (EXCEPT FLUNITRAZEPAM)*****	CONVERTED DRUG WEIGHT
1 unit of a Schedule IV Substance (except Flunitrazepam) =	0.0625 gm-of marihuana

******Provided, that the combined equivalent converted weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 9.99 kilograms of marihuana converted drug weight.*

SCHEDULE V SUBSTANCES*****	CONVERTED DRUG WEIGHT
1 unit of a Schedule V Substance =	0.00625 gm-of marihuana

******Provided, that the combined equivalent converted weight of Schedule V substances shall not exceed 2.49 kilograms of marihuana converted drug weight.*

LIST I CHEMICALS (RELATING TO THE MANUFACTURE OF AMPHETAMINE OR METHAMPHETAMINE)*****	CONVERTED DRUG WEIGHT
1 gm of Ephedrine =	10 kg-of marihuana
1 gm of Phenylpropanolamine =	10 kg-of marihuana
1 gm of Pseudoephedrine =	10 kg-of marihuana

******Provided, that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.*

Marihuana Equivalency

DATE RAPE DRUGS (EXCEPT FLUNITRAZEPAM, GHB, OR KETAMINE)	CONVERTED DRUG WEIGHT
1 ml of 1,4-butanediol =	8.8 gm marihuana
1 ml of gamma butyrolactone =	8.8 gm marihuana

To facilitate conversions to ~~drug equivalencies~~ converted drug weight, the following table is provided:

MEASUREMENT CONVERSION TABLE
1 oz = 28.35 gm
1 lb = 453.6 gm
1 lb = 0.4536 kg
1 gal = 3.785 liters
1 qt = 0.946 liters
1 gm = 1 ml (liquid)
1 liter = 1,000 ml
1 kg = 1,000 gm
1 gm = 1,000 mg
1 grain = 64.8 mg.

* * *

27. Departure Considerations.—

(A) **Downward Departure Based on Drug Quantity in Certain Reverse Sting Operations.**—If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.

* * *

[(D) **Departure Based on Potency of Synthetic Cathinones.**—In addition to providing ~~marihuana equivalencies~~ converted drug weights for specific controlled substances and groups of substances, the Drug Equivalency Conversion Tables provide ~~marihuana equivalencies~~ converted drug weights for certain classes of controlled substances, such as synthetic cathinones. In the case of a synthetic cathinone that is not specifically referenced in this guideline, the ~~marihuana equivalency~~ converted drug weight for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially lesser or greater quantity of a synthetic cathinone is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone in the class, such as methcathinone or alpha-PVP. In such a case, a departure may be warranted. For example, an upward departure may be warranted in cases involving MDPV, a substance of which a lesser quantity is usually needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone. In contrast, a downward departure may be warranted in cases involving methylone, a substance of which a greater quantity is usually needed to

produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone.

(E) Departures for Certain Cases involving Synthetic Cannabinoids.—

(i) **Departure Based on Concentration of Synthetic Cannabinoids.**—Synthetic cannabinoids are manufactured as powder or crystalline substances. The concentrated substance is then usually sprayed on or soaked into a plant or other base material, and trafficked as part of a mixture. Nonetheless, there may be cases in which the substance involved in the offense is a synthetic cannabinoid not combined with any other substance. In such a case, an upward departure would be warranted.

There also may be cases in which the substance involved in the offense is a mixture containing a synthetic cannabinoid diluted with an unusually high quantity of base material. In such a case, a downward departure may be warranted.

(ii) **Downward Departure Based on Potency of Synthetic Cannabinoids.**—In the case of a synthetic cannabinoid that is not specifically referenced in this guideline, the ~~marihuana equivalency~~ converted drug weight for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially greater quantity of a synthetic cannabinoid is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cannabinoid in the class, such as JWH-018 or AM-2201. In such a case, a downward departure may be warranted.][†]

* * *

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

* * *

[Subsection (b)(16) implements the directive to the Commission in section 7(2) of Public Law 111–220.]^{††}

The Drug Conversion Tables set forth in Application Note 8 were previously called the Drug Equivalency Tables. In the original 1987 *Guidelines Manual*, the Drug Equivalency Tables provided four conversion factors (or “equivalents”) for determining the base offense level in cases involving either a controlled substance not referenced in the Drug Quantity Table or multiple controlled substances: heroin, cocaine, PCP, and marihuana. In 1991, the Commission amended the Drug Equivalency Tables to provide for one substance, marihuana, as the single conversion factor in §2D1.1. See USSG App. C, Amendment 396 (effective November 1, 1991). In 2018, the Commission amended §2D1.1 to replace marihuana as the conversion factor with the new term “converted drug weight” and to change the title of the Drug Equivalency Tables to the “Drug Conversion Tables.”

* * *

[†] The bracketed provisions were added by Amendment 3 (Synthetic Drugs) of this document.

^{††} The bracketed text was revised by Amendment 3 (Synthetic Drugs) of this document.

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

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Commentary

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Application Notes:

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9. **Offenses Involving Immediate Precursors or Other Controlled Substances Covered Under §2D1.1.**—In certain cases, the defendant will be convicted of an offense involving a listed chemical covered under this guideline, and a related offense involving an immediate precursor or other controlled substance covered under §2D1.1 (Unlawfully Manufacturing, Importing, Exporting, or Trafficking). For example, P2P (an immediate precursor) and methylamine (a listed chemical) are used together to produce methamphetamine. Determine the offense level under each guideline separately. The offense level for methylamine is determined by using §2D1.11. The offense level for P2P is determined by using §2D1.1 (P2P is listed in the Drug Equivalency Conversion Table under Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)). Under the grouping rules of §3D1.2(b), the counts will be grouped together. Note that in determining the scale of the offense under §2D1.1, the quantity of both the controlled substance and listed chemical should be considered (*see* Application Note 5 in the Commentary to §2D1.1).

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CHAPTER THREE

ADJUSTMENTS

* * *

PART D — MULTIPLE COUNTS

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Concluding Commentary to Part D of Chapter Three
Illustrations of the Operation of the Multiple-Count Rules

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

* * *

Marihuana Equivalency

2. Defendant B was convicted of four counts: (1) distribution of 230 grams of cocaine; (2) distribution of 150 grams of cocaine; (3) distribution of 75 grams of heroin; (4) offering a DEA agent \$20,000 to avoid prosecution. The combined offense level for drug offenses is determined by the total quantity of drugs, converted to ~~marihuana equivalents~~ converted drug weight (using the Drug Equivalency Conversion Tables in the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking)). The first count translates into 46 kilograms of ~~marihuana~~ converted drug weight; the second count translates into 30 kilograms of ~~marihuana~~ converted drug weight; and the third count translates into 75 kilograms of ~~marihuana~~ converted drug weight. The total is 151 kilograms of ~~marihuana~~ converted drug weight. Under §2D1.1, the combined offense level for the drug offenses is 24. In addition, because of the attempted bribe of the DEA agent, this offense level is increased by 2 levels to 26 under §3C1.1 (Obstructing or Impeding the Administration of Justice). Because the conduct constituting the bribery offense is accounted for by §3C1.1, it becomes part of the same Group as the drug offenses pursuant to §3D1.2(c). The combined offense level is 26 pursuant to §3D1.3(a), because the offense level for bribery (20) is less than the offense level for the drug offenses (26).

* * *

5. ILLEGAL REENTRY GUIDELINE ENHANCEMENTS

Reason for Amendment: This amendment responds to two application issues that arose after §2L1.2 (Unlawfully Entering or Remaining in the United States) was extensively amended in 2016. See USSG, App. C, Amendment 802 (effective Nov. 1, 2016).

The specific offense characteristic at §2L1.2(b)(2) applies a sliding scale of enhancements, based on sentence length, if the “defendant sustained” a “conviction” before being ordered removed for the first time. Correspondingly, §2L1.2(b)(3) applies a parallel scale of enhancements if the defendant “engaged in criminal conduct resulting in” a conviction “at any time after” the first order of removal. In most situations, any prior felony conviction that received criminal history points will qualify under either subsection (b)(2) or (b)(3), with the extent of the increase depending on the length of the sentence imposed. In some scenarios, a felony will not qualify for an upward adjustment under either subsection (b)(2) or (b)(3) even though it received criminal history points. Those scenarios occur when a defendant committed a crime before being ordered removed for the first time but was not convicted (or sentenced) for that crime until after that first order of removal.

The amendment addresses this issue by establishing that the application of the §2L1.2(b)(2) enhancement depends on the timing of the underlying “criminal conduct,” and not on the timing of the resulting conviction. It does so by amending the first paragraph of subsection (b)(2) to state that the enhancement applies if pre-first removal conduct resulted in a conviction “at any time,” and makes a conforming change to the first paragraph of subsection (b)(3). In order to address how to treat an offense involving conduct that occurred both before and after a defendant’s first order of removal, the amendment adds a new Application Note 5 explaining that an offense involving such conduct should be counted only under subsection (b)(2). The Commission determined that a defendant with a prior non-illegal reentry felony conviction that received criminal history points should receive an enhancement for that conviction under either subsection (b)(2) or (b)(3). A defendant should not avoid an enhancement for an otherwise qualifying conviction because the conviction occurred after a defendant’s first order of removal or deportation but was premised on conduct that occurred before that order. Because a conviction could be premised on conduct that occurred both before and after the first order of removal or deportation, the Commission adopted Application Note 5 to explain that such convictions are only counted once, under subsection (b)(2).

The specific offense characteristics at §2L1.2(b)(2) and (b)(3) increase a defendant’s offense level based on the length of the “sentence imposed” for a prior felony conviction. An application note defines “sentence imposed” to mean “sentence of imprisonment” as that term is used in the criminal history guideline, §4A1.2. See USSG §2L1.2, comment. (n.2.). Consistent with that definition, the application note also directs that “[t]he length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.” Id.

Another part of the commentary to §2L1.2 directs that only convictions receiving criminal history points under “§4A1.1(a), (b), or (c)” (which assign points based on the length of the prior sentence imposed) are to be counted under §2L1.2(b). See USSG §2L1.2, comment. (n.3). In determining the length of a sentence for purposes of Chapter Four (and thus the number of criminal history points to be applied), the length of any term imposed on revocation of probation, parole, supervised release, or other similar status is added to the original term of imprisonment and the total term is used to calculate criminal history points under §4A1.1(a), (b), or (c). See USSG §4A1.2(k)(1).

A Fifth Circuit opinion interpreted §2L1.2(b)(2) to bar consideration of a revocation that did not occur until *after* a defendant’s first order of removal, even if the defendant was convicted prior to the first order of the removal. See *United States v. Franco-Galvan*, 864 F.3d 338 (5th Cir. 2017). The court found that Application Note 2, despite its instruction that “the length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release,” was insufficiently clear to resolve the “temporal” question of when a revocation must occur, given that the Commission had resolved a prior circuit conflict in 2012 by directing that revoked time should not be counted in the situation. See USSC, App. C, Amendment 764 (effective Nov. 1, 2012). A subsequent decision of the Ninth Circuit reached the same result. See *United States v. Martinez*, 870 F.3d 1163 (9th Cir. 2017). Although both cases involved an enhancement under subsection (b)(2), the same logic would seem to apply to enhancements under subsection (b)(3) when the conviction and revocation were separated by an intervening order of removal or deportation.

The amendment resolves this issue by adding the clarifying phrase “regardless of when the revocation occurred” to the definition of “sentence imposed” in Application Note 2. The Commission determined that, consistent with the purposes of the 2016 amendment to §2L1.2, the data underlying it, and the statement in Application Note 2, the length of a sentence imposed for purposes of §2L1.2(b)(2) and (b)(3) should include any additional term of imprisonment imposed upon revocation of probation, suspended sentence, or supervised release, regardless of whether the revocation occurred before or after the defendant’s first (or any subsequent) order of removal. As the reason for amendment for Amendment 802 explained, “[t]he Commission determined that a sentence-imposed approach is consistent with the Chapter Four criminal history rules, easily applied, and appropriately calibrated to account for the seriousness of prior offenses.” USSC, App. C, Amendment 802 (effective Nov. 1, 2016). Excluding sentence length added by post-removal revocations would be inconsistent with the purpose of Amendment 802 and its underlying data analysis. Id.

Amendment:

§2L1.2. Unlawfully Entering or Remaining in the United States

- (a) Base Offense Level: 8

(b) Specific Offense Characteristics

- (1) (Apply the Greater) If the defendant committed the instant offense after sustaining—
 - (A) a conviction for a felony that is an illegal reentry offense, increase by **4** levels; or
 - (B) two or more convictions for misdemeanors under 8 U.S.C. § 1325(a), increase by **2** levels.

- (2) (Apply the Greatest) If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant ~~sustained~~ engaged in criminal conduct that, at any time, resulted in—
 - (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by **10** levels;
 - (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by **8** levels;
 - (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by **6** levels;
 - (D) a conviction for any other felony offense (other than an illegal reentry offense), increase by **4** levels; or
 - (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **2** levels.

- (3) (Apply the Greatest) If, ~~at any time~~ after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, ~~resulting~~ resulted in—
 - (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by **10** levels;

- (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by **8** levels;
- (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by **6** levels;
- (D) a conviction for any other felony offense (other than an illegal reentry offense), increase by **4** levels; or
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **2** levels.

* * *

Commentary

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Application Notes:

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

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“*Sentence imposed*” has the meaning given the term “sentence of imprisonment” in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History). The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, **regardless of when the revocation occurred.**

* * *

4. **Cases in Which Sentences for An Illegal Reentry Offense and Another Felony Offense were Imposed at the Same Time.**—There may be cases in which the sentences for an illegal reentry offense and another felony offense were imposed at the same time and treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). In such a case, use the illegal reentry offense in determining the appropriate enhancement under subsection (b)(1), if it independently would have received criminal history points. In addition, use the prior sentence for the other felony offense in determining the appropriate enhancement under subsection **(b)(2) or (b)(3), as appropriate,** if it independently would have received criminal history points.

5. **Cases in Which the Criminal Conduct Underlying a Prior Conviction Occurred Both Before and After the Defendant Was First Ordered Deported or Ordered Removed.**—There may be cases in which the criminal conduct underlying a prior conviction occurred both before and after the defendant was ordered deported or ordered removed from the United States for the first time. **For purposes of subsections (b)(2) and (b)(3), count such a conviction only under subsection (b)(2).**

56. Departure Based on Seriousness of a Prior Offense.—There may be cases in which the offense level provided by an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense, because (A) the length of the sentence imposed does not reflect the seriousness of the prior offense; (B) the prior conviction is too remote to receive criminal history points (*see* §4A1.2(e)); or (C) the time actually served was substantially less than the length of the sentence imposed for the prior offense. In such a case, a departure may be warranted.

67. Departure Based on Time Served in State Custody.—In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, the time served is not covered by an adjustment under §5G1.3(b) and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). *See* §5G1.3(a). In such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

Such a departure should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant. In determining whether such a departure is appropriate, the court should consider, among other things, (A) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (B) the seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant’s other criminal history.

78. Departure Based on Cultural Assimilation.—There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant’s illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant’s continued residence in the United States, (4) the duration of the defendant’s presence outside the United States, (5) the nature and extent of the defendant’s familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant’s criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.

* * *

6. ACCEPTANCE OF RESPONSIBILITY

Reason for Amendment: This amendment responds to concerns that some courts have interpreted the commentary to §3E1.1 (Acceptance of Responsibility) to automatically preclude application of the 2-level reduction for acceptance of responsibility when the defendant makes an unsuccessful good faith, non-frivolous challenge to relevant conduct. Application Note 1 provides a non-exhaustive list of appropriate considerations in determining whether a defendant has clearly demonstrated acceptance of responsibility. Among those considerations is whether the defendant truthfully admitted the conduct comprising the offense(s) of conviction and truthfully admitted or did not falsely deny any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). See USSG §3E1.1, comment. (n.1(A)). The application note further provides that “a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.” The amendment clarifies that an unsuccessful challenge to relevant conduct does not necessarily establish that the challenge was either a false denial or frivolous. Specifically, the amendment adds “but the fact that a defendant’s challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous” to the end of Application Note 1(A).

Amendment:

§3E1.1. Acceptance of Responsibility

- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.
- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by **1** additional level.

Commentary

Application Notes:

1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:
 - (A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order

Acceptance of Responsibility

to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. ~~However, a~~ A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility, but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous;

- (B) voluntary termination or withdrawal from criminal conduct or associations;
 - (C) voluntary payment of restitution prior to adjudication of guilt;
 - (D) voluntary surrender to authorities promptly after commission of the offense;
 - (E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
 - (F) voluntary resignation from the office or position held during the commission of the offense;
 - (G) post-offense rehabilitative efforts (*e.g.*, counseling or drug treatment); and
 - (H) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.
2. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.
 3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (*see* Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.
 4. Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.
 5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.
 6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted

authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. For example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.

Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. *See* section 401(g)(2)(B) of Public Law 108–21. The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.

If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion.

Background: The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense by taking, in a timely fashion, the actions listed above (or some equivalent action) is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.

Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps specified in subsection (b). Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range.

Section 401(g) of Public Law 108–21 directly amended subsection (b), Application Note 6 (including adding the first sentence of the second paragraph of that application note), and the Background Commentary, effective April 30, 2003.

7. ALTERNATIVES TO INCARCERATION FOR NONVIOLENT FIRST OFFENDERS

Reason for Amendment: The amendment adds a new application note to the Commentary at §5C1.1 (Imposition of a Term of Imprisonment), which states that if a defendant is a “nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment.” This new application note is consistent with the statutory language in 28 U.S.C. § 994(j) regarding the “general appropriateness of imposing a sentence other than imprisonment” for “a first offender who has not been convicted of a crime of violence or an otherwise serious offense” and cites the statutory provision in support. It also is consistent with a recent Commission recidivism study, which demonstrated that offenders with zero criminal history points have a lower recidivism rate than offenders with one criminal history point, and that offenders with zero criminal history points and no prior contact with the criminal justice system have an even lower recidivism rate. See Tracey Kyckelhahn & Trishia Cooper, U.S. Sentencing Comm’n, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* at 6–9 (2017).

Where permitted by statute, the Guidelines Manual provides for non-incarceration sentences for offenders in Zones A and B of the Sentencing Table. Zone A (in which all sentencing ranges are zero to six months regardless of criminal history category) permits the full spectrum of sentencing options: (1) a fine only; (2) a term of probation only; (3) probation with conditions of confinement (home detention, community confinement, or intermittent confinement); (4) a “split sentence” (a term of imprisonment followed by a term of supervised release with condition of confinement that substitutes for a portion of the guideline term); or (5) a term of imprisonment only. Zone B (which includes sentencing ranges that have a low-end of one month and a high-end of 15 months, and vary by criminal history category) also authorizes non-prison sentences. However, Zone B sentencing options are more restrictive, authorizing (1) probation with conditions of confinement; (2) a “split sentence”; or (3) a term of imprisonment only. Consistent with the statutory mandate in section 994(j), the application note is intended to serve as a reminder to courts to consider imposing non-incarceration sentences for a defined class of “nonviolent first offenders” whose applicable guideline ranges are in Zones A or B of the Sentencing Table.

For purposes of the new application note, the amendment defines a “nonviolent first offender” as a defendant who (1) has no prior convictions or other comparable judicial dispositions of any kind; and (2) did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense. It explains that “comparable judicial dispositions of any kind” includes “diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of nolo contendere and juvenile adjudications.”

The amendment adopts language from the statutory and guidelines “safety-valve” provisions to exclude offenders who “use[d] violence or credible threats of violence or possess[ed] a firearm or other dangerous weapon in connection with the offense.” See 18 U.S.C § 3553(f)(2); USSG §5C1.2(a)(2). This real-offense definition of “violent” offense avoids the complicated application of the “categorical approach” to determine whether an offense qualifies as “violent.” See United States v. Starks, 861 F.3d 306, 324 (1st Cir. 2017) (describing the “immensely complicated analysis required by the categorical

approach”); see also USSG §5C1.2, comment. (n.3) (noting that the determination of whether “the offense” was violent or involved a firearm requires a court to consider not only the offense of conviction but also “all relevant conduct”). It also ensures that only nonviolent offenders are covered by the new application note.

The amendment also deletes language from the commentary to §5F1.2 (Home Detention) that generally encouraged courts to use electronic monitoring (also called location monitoring) when home detention is made a condition of supervision, and instead instructs that electronic monitoring or any alternative means of surveillance may each be used, as “appropriate.” The goal of this change is to increase the use of probation with home detention as an alternative to incarceration. The Commission received testimony indicating that location monitoring is resource-intensive and otherwise demanding on probation officers. Additionally, it heard testimony that imposing location monitoring by default is inconsistent with the evidence-based “risk-needs-responsivity” (RNR) model of supervision and may be counterproductive for certain lower-risk offenders. For many low-risk offenders, less intensive surveillance methods (e.g., telephonic contact, video conference, unannounced home visits by probation officers) are sufficient to enforce home detention. The revised language would allow probation officers and courts to exercise discretion to use surveillance methods that they deem appropriate in light of evidence-based practices.

Amendment:

§5C1.1. Imposition of a Term of Imprisonment

* * *

Commentary

Application Notes:

1. Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range specified in the Sentencing Table in Part A of this Chapter. For example, if the defendant has an Offense Level of 20 and a Criminal History Category of I, the applicable guideline range is 33–41 months of imprisonment. Therefore, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.
2. Subsection (b) provides that where the applicable guideline range is in Zone A of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is zero months), the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. Where imprisonment is not required, the court, for example, may impose a sentence of probation. In some cases, a fine appropriately may be imposed as the sole sanction.
3. Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than nine months), the court has three options:
 - (A) It may impose a sentence of imprisonment.

- (B) It may impose a sentence of probation provided that it includes a condition of probation requiring a period of intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community confinement, and home detention, sufficient to satisfy the minimum period of imprisonment specified in the guideline range. For example, where the guideline range is 4–10 months, a sentence of probation with a condition requiring at least four months of intermittent confinement, community confinement, or home detention would satisfy the minimum term of imprisonment specified in the guideline range.
- (C) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 4–10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

The preceding examples illustrate sentences that satisfy the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the applicable guideline range. For example, where the guideline range is 4–10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.

- 4. If the defendant is a nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3). *See* 28 U.S.C. § 994(j). For purposes of this application note, a “**nonviolent first offender**” is a defendant who has no prior convictions or other comparable judicial dispositions of any kind and who did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense of conviction. The phrase “comparable judicial dispositions of any kind” includes diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of *nolo contendere* and juvenile adjudications.
- 45. Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (*i.e.*, the minimum term specified in the applicable guideline range is ten or twelve months), the court has two options:
 - (A) It may impose a sentence of imprisonment.
 - (B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 10–16 months, a sentence of five months imprisonment followed by a term of supervised release with a condition requiring five months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.

The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 10–16 months, both a sentence of five months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of ten months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.

56. Subsection (e) sets forth a schedule of imprisonment substitutes.
67. There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant’s criminality is related to the treatment problem to be addressed.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.

Examples: The following examples both assume the applicable guideline range is 12–18 months and the court departs in accordance with this application note. Under Zone C rules, the defendant must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug offender in Criminal History Category I and probation is not prohibited by statute. The court departs downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B felony, so probation is prohibited by statute (*see* §5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.

78. The use of substitutes for imprisonment as provided in subsections (c) and (d) is not recommended for most defendants with a criminal history category of III or above.
89. In a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the residential treatment program.
910. Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is 15 months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).

* * *

§5F1.2. Home Detention

Home detention may be imposed as a condition of probation or supervised release, but only as a substitute for imprisonment.

Commentary

Application Notes:

1. “**Home detention**” means a program of confinement and supervision that restricts the defendant to his place of residence continuously, except for authorized absences, enforced by appropriate means of surveillance by the probation office. When an order of home detention is imposed, the defendant is required to be in his place of residence at all times except for approved absences for gainful employment, community service, religious services, medical care, educational or training programs, and such other times as may be specifically authorized. Electronic monitoring is an appropriate means of surveillance ~~and ordinarily should be used in connection with~~ **for** home detention. However, alternative means of surveillance may be used ~~so long as they are as effective as electronic monitoring~~ **if appropriate**.
2. The court may impose other conditions of probation or supervised release appropriate to effectuate home detention. If the court concludes that the amenities available in the residence of a defendant would cause home detention not to be sufficiently punitive, the court may limit the amenities available.
3. The defendant’s place of residence, for purposes of home detention, need not be the place where the defendant previously resided. It may be any place of residence, so long as the owner of the residence (and any other person(s) from whom consent is necessary) agrees to any conditions that may be imposed by the court, *e.g.*, conditions that a monitoring system be installed, that there will be no “call forwarding” or “call waiting” services, or that there will be no cordless telephones or answering machines.

Background: The Commission has concluded that ~~the surveillance necessary for effective use of home detention ordinarily requires~~ **is an appropriate means of surveillance for home detention**. However, in some cases home detention may effectively be enforced without electronic monitoring, *e.g.*, when the defendant is physically incapacitated, or where some other effective means of surveillance is available. Accordingly, the Commission has not required that electronic monitoring be a necessary condition for home detention. Nevertheless, before ordering home detention without electronic monitoring, the court should be confident that an alternative form of surveillance ~~will be equally effective~~ **is appropriate considering the facts and circumstances of the defendant’s case**.

In the usual case, the Commission assumes that a condition requiring that the defendant seek and maintain gainful employment will be imposed when home detention is ordered.

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

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In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* §5C1.1, Application Note **67**.

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

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In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* §5C1.1, Application Note 67.

8. MISCELLANEOUS

Reason for Amendment: This multi-part amendment responds to recently enacted legislation and miscellaneous guideline application issues.

First, the amendment responds to section 6 of the International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. 114–119 (Feb. 8, 2016), which added a new registration requirement for certain sex offenders required to register under the Sex Offender Registration and Notification Act (SORNA) at 34 U.S.C. § 20914. SORNA requires sex offenders to register in the sex offender registry, and keep their registration current, by providing certain identifying information including names, addresses, and Social Security Numbers. The new requirement at 34 U.S.C. § 20914(7) directs sex offenders to provide information relating to intended travel outside the United States, including any anticipated dates and places of departure, arrival or return, air carrier and flight numbers, and destination country. The Act also established a new offense at 18 U.S.C. § 2250(b). For those required to register under SORNA, knowingly failing to provide this travel-related information and engaging or attempting to engage in the intended travel outside of the United States, carries a statutory maximum of 10 years of imprisonment. Section 2250 offenses are referenced in Appendix A (Statutory Index) to §2A3.5 (Failure to Register as a Sex Offender). The amendment amends Appendix A so the new offense at 18 U.S.C. § 2250(b) is referenced to §2A3.5. The amendment also adds a new Application Note 2 to the Commentary to §2A3.5 providing that for purposes of §2A3.5(b)(1), a defendant shall be considered in a “failure to register status” during the time the defendant engaged in conduct described in either section 2250(a) (failing to register or update registration) or section 2250(b) (failing to provide required travel-related information). This application note reflects the Commission’s determination that failing to provide information about intended foreign travel meets the definition of failing to update registration information in the sex offender registry. In addition, the amendment makes clerical changes to §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender) to reflect the adoption of section 2250(b) and the associated redesignation of section 2250(c) as section 2250(d).

Second, the amendment responds to section 3 of the Transnational Drug Trafficking Act of 2016, Pub. L. 114–154 (May 16, 2016), which made changes relating to the trafficking of counterfeit drugs by amending the language in the penalty provision at 18 U.S.C. § 2320. The Act amended section 2320(b)(3) to replace the term “counterfeit drug” with the phrase “a drug that uses a counterfeit mark on or in connection with the drug.” The Act also revised section 2320(f) to define the term “drug” by reference to the term as defined in the Federal Food, Drug, and Cosmetic Act found at 21 U.S.C. § 321. Section 2320 offenses are referenced in Appendix A (Statutory Index) to §2B5.3 (Criminal Infringement of Copyright or Trademark). The amendment replaces the term “counterfeit drug” at §2B5.3(b)(5) with the new phrase in the revised section 2320(b)(3), to remain consistent with the language of the statute. Similarly, the amendment amends the commentary to §2B5.3 to remove a definition for the obsolete term “counterfeit drug” and replace it with definitions of the terms “drug” and “counterfeit mark” as found in the revised statute.

Third, the amendment responds to section 12 of the Frank R. Lautenberg Chemical Safety for the 21st Century Act of 2016, Pub. L. 114–182 (June 22, 2016), which amended

section 16 of the Toxic Substances Control Act (15 U.S.C. § 2615) by adding a new provision at section 2615(b)(2). The new provision prohibits any person from knowingly and willfully violating specific provisions of the Toxic Substances Control Act, knowing at the time of the violation that the violation puts a person in imminent danger of death or bodily injury, with a maximum penalty of 15 years of imprisonment. The Toxic Substances Control Act is referenced in Appendix A (Statutory Index) to §2Q1.2 (Mishandling of Hazardous or Toxic Substances of Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce). The amendment continues to reference the preexisting offense, now codified at section 2615(b)(1), to §2Q1.2, but references the new offense, codified at section 2615(b)(2), to §2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants). The Commission determined §2Q1.1 is the most analogous guideline because it covers similar “knowing endangerment” provisions and has a similar *mens rea* element found in similar statutes referenced in Appendix A to §2Q1.1.

Fourth, the amendment responds to section 2 of the Justice for All Reauthorization Act of 2016, Pub. L. 114–324 (Dec. 16, 2016), which amended 18 U.S.C. § 3583(d) (relating to conditions of supervised release) to require a court, when imposing a sentence of supervised release, to include as a condition that the defendant make restitution in accordance with sections 3663 and 3663A of Title 18 of the United States Code, or any other statute authorizing a sentence of restitution. The amendment amends subsection (a)(6)(A) of §5D1.3 (Conditions of Supervised Release) to include a mandatory condition of supervised release in conformance with the new statutory requirement. The amendment also parallels the Judicial Conference of the United States’ recent revision of the Judgment in a Criminal Case form to include a new mandatory condition of supervised release.

Fifth, the amendment clarifies an application issue that has arisen with respect to §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), which applies to several offenses involving the transportation of a minor for illegal sexual activity. A two-level enhancement at §2G1.3(b)(3) applies if the offense involved the use of a computer to either (A) persuade, entice or coerce a minor, or to facilitate the travel of a minor, to engage in prohibited sexual conduct, or (B) to entice, offer, or solicit a person to engage in prohibited sexual conduct with a minor. While Application Note 4 sets forth guidance on this enhancement, it fails to distinguish between the two prongs of subsection (b)(3). As a result, an application issue has arisen regarding whether the note prohibits application of the enhancement where a computer was used to solicit a third party to engage in prohibited sexual conduct with a minor, as set out in subsection (b)(3)(B). Courts have concluded that the application note is inconsistent with the language of §2G1.3(b)(3), and that application of the enhancement for the use of a computer in third party solicitation cases is proper. See e.g., United States v. Cramer, 777 F.3d 597, 606 (2d Cir. 2015); United States v. McMillian, 777 F.3d 444, 449–50 (7th Cir. 2015); United States v. Hill, 782 F.3d 842, 846 (11th Cir. 2015); United States v. Pringler, 765 F.3d 455 (5th Cir. 2014). The amendment is intended to clarify the Commission’s original intent that Application Note 4 apply only to subsection (b)(3)(A).

Amendment:

§2A3.5. Failure to Register as a Sex Offender

- (a) Base Offense Level (Apply the greatest):
 - (1) **16**, if the defendant was required to register as a Tier III offender;
 - (2) **14**, if the defendant was required to register as a Tier II offender; or
 - (3) **12**, if the defendant was required to register as a Tier I offender.

- (b) Specific Offense Characteristics
 - (1) (Apply the greatest):

If, while in a failure to register status, the defendant committed—

 - (A) a sex offense against someone other than a minor, increase by **6** levels;
 - (B) a felony offense against a minor not otherwise covered by subdivision (C), increase by **6** levels; or
 - (C) a sex offense against a minor, increase by **8** levels.

 - (2) If the defendant voluntarily (A) corrected the failure to register; or (B) attempted to register but was prevented from registering by uncontrollable circumstances and the defendant did not contribute to the creation of those circumstances, decrease by **3** levels.

Commentary

Statutory Provision: 18 U.S.C. § 2250(a), (b).

Application Notes:

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

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

“*Sex offense*” has the meaning given that term in 42 U.S.C. § 16911(5).

“*Tier I offender*”, “*Tier II offender*”, and “*Tier III offender*” have the meaning given the terms “tier I sex offender”, “tier II sex offender”, and “tier III sex offender”, respectively, in 42 U.S.C. § 16911.

2. **Application of Subsection (b)(1).**—For purposes of subsection (b)(1), a defendant shall be deemed to be in a “failure to register status” during the period in which the defendant engaged in conduct described in 18 U.S.C. § 2250(a) or (b).

23. **Application of Subsection (b)(2).**—

(A) **In General.**—In order for subsection (b)(2) to apply, the defendant’s voluntary attempt to register or to correct the failure to register must have occurred prior to the time the defendant knew or reasonably should have known a jurisdiction had detected the failure to register.

(B) **Interaction with Subsection (b)(1).**—Do not apply subsection (b)(2) if subsection (b)(1) also applies.

* * *

§2A3.6. Aggravated Offenses Relating to Registration as a Sex Offender

If the defendant was convicted under—

- (a) 18 U.S.C. § 2250(e)(d), the guideline sentence is the minimum term of imprisonment required by statute; or
- (b) 18 U.S.C. § 2260A, the guideline sentence is the term of imprisonment required by statute.

Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to any count of conviction covered by this guideline.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2250(e)(d), 2260A.

Application Notes:

1. **In General.**—Section 2250(e)(d) of title 18, United States Code, provides a mandatory minimum term of five years’ imprisonment and a statutory maximum term of 30 years’ imprisonment. The statute also requires a sentence to be imposed consecutively to any sentence imposed for a conviction under 18 U.S.C. § 2250(a) or (b). Section 2260A of title 18, United States Code, provides a term of imprisonment of 10 years that is required to be imposed consecutively to any sentence imposed for an offense enumerated under that section.
2. **Inapplicability of Chapters Three and Four.**—Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. *See* §§3D1.1 (Procedure for

Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction).

3. **Inapplicability of Chapter Two Enhancement.**—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic that is based on the same conduct as the conduct comprising the conviction under 18 U.S.C. § 2250(e)(d) or § 2260A.
4. **Upward Departure.**—In a case in which the guideline sentence is determined under subsection (a), a sentence above the minimum term required by 18 U.S.C. § 2250(e)(d) is an upward departure from the guideline sentence. A departure may be warranted, for example, in a case involving a sex offense committed against a minor or if the offense resulted in serious bodily injury to a minor.

* * *

§2B5.3. Criminal Infringement of Copyright or Trademark

- (a) Base Offense Level: 8
- (b) Specific Offense Characteristics

* * *

- (5) If the offense involved a counterfeit drug that uses a counterfeit mark on or in connection with the drug, increase by 2 levels.

* * *

Commentary

* * *

Application Notes:

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

* * *

“**Counterfeit drug**” has the meaning given that term in 18 U.S.C. § 2320(f)(6).

“**Counterfeit military good or service**” has the meaning given that term in 18 U.S.C. § 2320(f)(4).

“**Drug**” and “**counterfeit mark**” have the meaning given those terms in 18 U.S.C. § 2320(f).

* * *

2G1.3. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor

* * *

(b) Specific Offense Characteristics

* * *

- (3) If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, increase by 2 levels.

* * *

Commentary

* * *

Application Notes:

* * *

4. **Application of Subsection (b)(3)(A).**—Subsection (b)(3)(A) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3)(A) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline’s Internet site.

* * *

§5D1.3. Conditions of Supervised Release

(a) MANDATORY CONDITIONS

* * *

- (6) The defendant shall (A) make restitution in accordance with ~~18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664~~ 18 U.S.C. §§ 3663 and 3663A, or any other statute authorizing a sentence of restitution; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (*see* 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule.

* * *

APPENDIX A

STATUTORY INDEX

* * *

15 U.S.C. § 2615(b)(1) 2Q1.2

15 U.S.C. § 2615(b)(2) 2Q1.1

15 U.S.C. § 6821 2B1.1

* * *

18 U.S.C. § 2250(a), (b) 2A3.5

18 U.S.C. § 2250(e)(d) 2A3.6

9. TECHNICAL

Reason for Amendment: This amendment makes various technical changes to the Guidelines Manual.

First, the amendment sets forth clarifying changes to two guidelines. The amendment amends Chapter One, Part A, Subpart 1(4)(b) (Departures) to provide an explanatory note addressing the fact that §5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. The amendment also makes minor clarifying changes to Application Note 2(A) to §2B1.1 (Theft, Property Destruction, and Fraud), to make clear that, for purposes of subsection (a)(1)(A), an offense is “referenced to this guideline” if §2B1.1 is the applicable Chapter Two guideline specifically referenced in Appendix A (Statutory Index) for the offense of conviction.

Second, the amendment makes technical changes to provide updated references to certain sections in the United States Code that were restated in legislation. As part of an Act to codify existing law relating to the National Park System, Congress repealed numerous sections in Title 16 of the United States Code, and restated them in Title 18 and a newly enacted Title 54. See Pub. L. 113–287 (Dec. 19, 2014). The amendment amends the Commentary to §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources) to correct outdated references to certain sections in Title 16 that were restated, with minor revisions, when Congress enacted Title 54. It also deletes from the Commentary to §2B1.5 the provision relating to the definition of “historic resource,” as that term was omitted from Title 54. In addition, the amendment makes a technical change to Appendix A (Statutory Index), to correct an outdated reference to 16 U.S.C. § 413 by replacing it with the appropriate reference to 18 U.S.C. § 1865(c).

Third, the amendment makes additional technical changes to reflect the editorial reclassification of certain sections in the United States Code. Effective September 1, 2017, the Office of Law Revision Counsel transferred certain provisions bearing on crime control and law enforcement, previously scattered throughout various parts of the United States Code, to a new Title 34. To reflect the new section numbers of the reclassified provisions, the amendment makes changes to: the Commentary to §2A3.5 (Failure to Register as a Sex Offender); the Commentary to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)); subsection (a)(10) of §5B1.3 (Conditions of Probation); subsection (a)(8) of §5D1.3 (Conditions of Supervised Release); and Appendix A (Statutory Index).

Fourth, the amendment makes clerical changes in §§2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification), 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), 4A1.2 (Definitions and Instructions for Computing Criminal History), and 4B1.4 (Armed Career Criminal), to correct title references to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Finally, the amendment also makes clerical changes to—

- the Commentary to §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)), by inserting a missing word in Application Note 4;
- subsection (d)(6) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), by correcting a typographical error in the line referencing Pseudoephedrine;
- subsection (e)(2) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), by correcting a punctuation mark under the heading relating to List I Chemicals;
- the Commentary to §2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities) captioned “Statutory Provisions,” by adding a missing section symbol and a reference to Appendix A (Statutory Index);
- the Commentary to §2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants) captioned “Statutory Provisions,” by adding a missing reference to 42 U.S.C. § 7413(c)(5) and a reference to Appendix A (Statutory Index);
- the Commentary to §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) captioned “Statutory Provisions,” by adding a specific reference to 42 U.S.C. § 7413(c)(1)–(4);
- the Commentary to §2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification) captioned “Statutory Provisions,” by adding a specific reference to 42 U.S.C. § 7413(c)(1)–(4);
- subsection (a)(4) to §5D1.3. (Conditions of Supervised Release), by changing an inaccurate reference to “probation” to “supervised release”;
- subsection (a) of §8C2.1 (Applicability of Fine Guidelines), by deleting an outdated reference to §2C1.6, which was deleted by consolidation with §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity) effective November 1, 2004; and
- the lines referencing “18 U.S.C. § 371” and “18 U.S.C. § 1591” in Appendix A (Statutory Index), by rearranging the order of certain Chapter Two guidelines references to place them in proper numerical order.

Amendment:

CHAPTER ONE

INTRODUCTION, AUTHORITY, AND GENERAL APPLICATION PRINCIPLES

PART A – INTRODUCTION AND AUTHORITY

* * *

1. ORIGINAL INTRODUCTION TO THE GUIDELINES MANUAL

* * *

4. The Guidelines' Resolution of Major Issues (Policy Statement)

* * *

(b) Departures.

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a “heartland,” a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), the last sentence of §5K2.12 (Coercion and Duress), and §5K2.19 (Post-Sentencing Rehabilitative Efforts)* list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

*Note: Section 5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. (See USSG App. C, amendment 768.)

* * *

(d) Probation and Split Sentences.

The statute provides that the guidelines are to “reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a

first offender who has not been convicted of a crime of violence or an otherwise serious offense . . .” 28 U.S.C. § 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission’s view are “serious.”

The Commission’s solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through eight, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels nine and ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one-half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.*

*Note: Although the Commission had not addressed “single acts of aberrant behavior” at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (See Supplement to Appendix C USSG App. C, amendment 603.)

* * *

§1B1.13. Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)

* * *

Commentary

Application Notes:

4. **Motion by the Director of the Bureau of Prisons.**—A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A). The Commission encourages the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1. The court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction), after considering the factors set forth in 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement, such as the defendant’s medical condition, the defendant’s family circumstances, and whether the defendant is a danger to the safety of any other person or to the community.

This policy statement shall not be construed to confer upon the defendant any right not otherwise recognized in law.

* * *

§2A3.5. Failure to Register as a Sex Offender

* * *

Commentary

* * *

Application Notes:

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

* * *

“*Sex offense*” has the meaning given that term in ~~42 U.S.C. § 16911(5)~~ **34 U.S.C. § 20911(5)**.

“*Tier I offender*”, “*Tier II offender*”, and “*Tier III offender*” have the meaning given the terms “tier I sex offender”, “tier II sex offender”, and “tier III sex offender”, respectively, in ~~42 U.S.C. § 16911~~ **34 U.S.C. § 20911**.

* * *

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

- (a) Base Offense Level:

- (1) **7**, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or
- (2) **6**, otherwise.

* * *

Commentary

* * *

Application Notes:

* * *

2. **Application of Subsection (a)(1).**—

(A) “**Referenced to this Guideline**”.—For purposes of subsection (a)(1), an offense is “*referenced to this guideline*” if (i) this guideline is the applicable Chapter Two guideline

specifically referenced in Appendix A (Statutory Index) for the offense of conviction, as determined under the provisions of §1B1.2 (Applicable Guidelines) ~~for the offense of conviction~~; or (ii) in the case of a conviction for conspiracy, solicitation, or attempt to which §2X1.1 (Attempt, Solicitation, or Conspiracy) applies, this guideline is the appropriate guideline for the offense the defendant was convicted of conspiring, soliciting, or attempting to commit.

* * *

§2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources

* * *

Commentary

* * *

Application Notes:

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

(A) **“Cultural heritage resource”** means any of the following:

- (i) A historic property, as defined in ~~16 U.S.C. § 470w(5)~~ **54 U.S.C. § 300308** (see also section 16(l) of 36 C.F.R. pt. 800).
- ~~(ii) A historic resource, as defined in 16 U.S.C. § 470w(5).~~
- ~~(iii)~~ **(ii)** An archaeological resource, as defined in 16 U.S.C. § 470bb(1) (see also section 3(a) of 43 C.F.R. pt. 7; 36 C.F.R. pt. 296; 32 C.F.R. pt. 229; 18 C.F.R. pt. 1312).
- ~~(iv)~~ **(iii)** A cultural item, as defined in section 2(3) of the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001(3) (see also 43 C.F.R. § 10.2(d)).
- ~~(v)~~ **(iv)** A commemorative work. **“Commemorative work”** (I) has the meaning given that term in 40 U.S.C. § 8902(a)(1); and (II) includes any national monument or national memorial.
- ~~(vi)~~ **(v)** An object of cultural heritage, as defined in 18 U.S.C. § 668(a)(2).
- ~~(vii)~~ **(vi)** Designated ethnological material, as described in 19 U.S.C. §§ 2601(2)(ii), 2601(7), and 2604.

* * *

3. **Enhancement in Subsection (b)(2).**—For purposes of subsection (b)(2):

* * *

- (C) **“National Historic Landmark”** means a property designated as such pursuant to ~~16 U.S.C. § 470a(a)(1)(B)~~ **54 U.S.C. § 302102**.

- (D) “*National marine sanctuary*” means a national marine sanctuary designated as such by the Secretary of Commerce pursuant to 16 U.S.C. § 1433.
- (E) “*National monument or national memorial*” means any national monument or national memorial established as such by Act of Congress or by proclamation pursuant to the Antiquities Act of 1906 (16 U.S.C. § 431) **54 U.S.C. § 320301**.
- (F) “*National park system*” has the meaning given that term in ~~16 U.S.C. § 1e(a)~~ **54 U.S.C. § 100501**.

* * *

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

* * *

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

QUANTITY	BASE OFFENSE LEVEL
----------	--------------------

* * *

- (6) At least 70 G but less than 100 G of Ephedrine; **Level 28**
At least 70 G but less than 100 G of Phenylpropanolamine;
At least 70 G but less than 100 G of ~~Pseudoephedrine~~ **Pseudoephedrine**.

* * *

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

LISTED CHEMICALS AND QUANTITY	BASE OFFENSE LEVEL
-------------------------------	--------------------

* * *

- (2) **List I Chemicals** **Level 28**
 - At least 890 G but less than 2.7 KG of Benzaldehyde;
 - At least 20 KG but less than 60 KG of Benzyl Cyanide;
 - At least 200 G but less than 600 G of Ergonovine;
 - At least 400 G but less than 1.2 KG of Ergotamine;
 - At least 20 KG but less than 60 KG of Ethylamine;
 - At least 2.2 KG but less than 6.6 KG of Hydriodic Acid;
 - At least 1.3 KG but less than 3.9 KG of Iodine;
 - At least 320 KG but less than 960 KG of Isosafrole;
 - At least 200 G but less than 600 G of Methylamine;
 - At least 500 KG but less than 1500 KG of N-Methylephedrine;
 - At least 500 KG but less than 1500 KG of N-Methylpseudoephedrine;

At least 625 G but less than 1.9 KG of Nitroethane;
At least 10 KG but less than 30 KG of Norpseudoephedrine;
At least 20 KG but less than 60 KG of Phenylacetic Acid;
At least 10 KG but less than 30 KG of Piperidine;
At least 320 KG but less than 960 KG of Piperonal;
At least 1.6 KG but less than 4.8 KG of Propionic Anhydride;
At least 320 KG but less than 960 KG of Safrole;
At least 400 KG but less than 1200 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 1135.5 L but less than 3406.5 L of Gamma-butyrolactone;
At least 714 G but less than 2.1 KG of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid.;

List II Chemicals

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

* * *

§2M2.1. Destruction of, or Production of Defective, War Material, Premises, or Utilities

(a) Base Offense Level: **32**

Commentary

Statutory Provisions: 18 U.S.C. §§ 2153, 2154; 42 U.S.C. § 2284; 49 U.S.C. § 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2Q1.1. Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants

(a) Base Offense Level: **24**

Commentary

Statutory Provisions: 18 U.S.C. § 1992(b)(3); 33 U.S.C. § 1319(c)(3); 42 U.S.C. §§ 6928(e), 7413(c)(5). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2Q1.2. Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce

* * *

Commentary

Statutory Provisions: 7 U.S.C. §§ 136j–136l; 15 U.S.C. §§ 2614 and 2615; 33 U.S.C. §§ 1319(c)(1), (2), 1321(b)(5), 1517(b); 42 U.S.C. §§ 300h-2, 6928(d), 7413(c)(1)–(4), 9603(b), (c), (d); 43 U.S.C. §§ 1350, 1816(a), 1822(b); 49 U.S.C. §§ 5124, 46312. For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

§2Q1.3. Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

* * *

Commentary

Statutory Provisions: 33 U.S.C. §§ 403, 406, 407, 411, 1319(c)(1), (c)(2), 1415(b), 1907, 1908; 42 U.S.C. § 7413(c)(1)–(4). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

* * *

8. Where a defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. *See* §4A1.3 (~~Adequacy of Criminal History Category~~ Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

* * *

§2R1.1. Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors

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Commentary

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Application Notes:

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7. In the case of a defendant with previous antitrust convictions, a sentence at the maximum of the applicable guideline range, or an upward departure, may be warranted. *See* §4A1.3 (~~Adequacy of Criminal History Category~~ Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

* * *

§2X5.2. Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1365(f), 1801; ~~42 U.S.C. § 14133~~ 34 U.S.C. §12593; 49 U.S.C. § 31310.

* * *

§4A1.2. Definitions and Instructions for Computing Criminal History

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(h) FOREIGN SENTENCES

Sentences resulting from foreign convictions are not counted, but may be considered under §4A1.3 (~~Adequacy of Criminal History Category~~Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

(i) TRIBAL COURT SENTENCES

Sentences resulting from tribal court convictions are not counted, but may be considered under §4A1.3 (~~Adequacy of Criminal History Category~~Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

(j) EXPUNGED CONVICTIONS

Sentences for expunged convictions are not counted, but may be considered under §4A1.3 (~~Adequacy of Criminal History Category~~Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

* * *

Commentary

Application Notes:

* * *

6. **Reversed, Vacated, or Invalidated Convictions.**—Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted. With respect to the current sentencing proceeding, this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (*e.g.*, 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions).

Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 (~~Adequacy of Criminal History Category~~Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

* * *

8. **Applicable Time Period.**—Section 4A1.2(d)(2) and (e) establishes the time period within which prior sentences are counted. As used in §4A1.2(d)(2) and (e), the term “*commencement of the instant offense*” includes any relevant conduct. See §1B1.3 (Relevant Conduct). If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (Adequacy of Criminal History Category Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

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§4B1.4. Armed Career Criminal

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Commentary

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Background: This section implements 18 U.S.C. § 924(e), which requires a minimum sentence of imprisonment of fifteen years for a defendant who violates 18 U.S.C. § 922(g) and has three previous convictions for a violent felony or a serious drug offense. If the offense level determined under this section is greater than the offense level otherwise applicable, the offense level determined under this section shall be applied. A minimum criminal history category (Category IV) is provided, reflecting that each defendant to whom this section applies will have at least three prior convictions for serious offenses. In some cases, the criminal history category may not adequately reflect the defendant’s criminal history; see §4A1.3 (Adequacy of Criminal History Category Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

* * *

§5B1.3. Conditions of Probation

(a) MANDATORY CONDITIONS

* * *

- (10) The defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a-34 U.S.C. § 40702).

* * *

§5D1.3. Conditions of Supervised Release

(a) MANDATORY CONDITIONS

* * *

- (4) The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on ~~probation~~ supervised release and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (*see* 18 U.S.C. § 3583(d)).

* * *

- (8) The defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (~~42 U.S.C. § 14135a~~ 34 U.S.C. § 40702).

* * *

§8C2.1. Applicability of Fine Guidelines

The provisions of §§8C2.2 through 8C2.9 apply to each count for which the applicable guideline offense level is determined under:

- (a) §§2B1.1, 2B1.4, 2B2.3, 2B4.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, ~~2C1.6~~;
§§2D1.7, 2D3.1, 2D3.2;
§§2E3.1, 2E4.1, 2E5.1, 2E5.3;
§2G3.1;
§§2K1.1, 2K2.1;
§2L1.1;
§2N3.1;
§2R1.1;
§§2S1.1, 2S1.3;
§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.8, 2T1.9, 2T2.1, 2T2.2, 2T3.1; or
- (b) §§2E1.1, 2X1.1, 2X2.1, 2X3.1, 2X4.1, with respect to cases in which the offense level for the underlying offense is determined under one of the guideline sections listed in subsection (a) above.

* * *

APPENDIX A

STATUTORY INDEX

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16 U.S.C. § 146 2B1.1, 2B2.3

~~16 U.S.C. § 413~~ ~~2B1.1~~

16 U.S.C. § 470aaa-5 2B1.1, 2B1.5

* * *

18 U.S.C. § 371 2A1.5, 2C1.1 (if conspiracy to defraud by interference with governmental functions), ~~2T1.9~~, 2K2.1 (if a conspiracy to violate 18 U.S.C. § 924(c)), **2T1.9**, 2X1.1

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18 U.S.C. § 1591 2G1.1, ~~2G2.1~~, 2G1.3, **2G2.1**

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18 U.S.C. § 1864 2Q1.6

18 U.S.C. § 1865(c) 2B1.1

18 U.S.C. § 1901 2C1.3

* * *

33 U.S.C. § 3851 2Q1.2

34 U.S.C. § 10251 2B1.1

34 U.S.C. § 10271 2B1.1

34 U.S.C. § 12593 2X5.2

34 U.S.C. § 20962 2H3.1

34 U.S.C. § 20984 2H3.1

38 U.S.C. § 787 2B1.1

* * *

42 U.S.C. § 3631 2H1.1

~~42 U.S.C. § 3791~~ ~~2B1.1~~

42 U.S.C. § 3792 2B1.1

~~42 U.S.C. § 3795~~ ————— ~~2B1.1~~

42 U.S.C. § 5157(a) 2B1.1

* * *

42 U.S.C. § 9603(d) 2Q1.2

~~42 U.S.C. § 14133~~ ————— ~~2X5.2~~

42 U.S.C. § 14905 2B1.1

~~42 U.S.C. § 16962~~ ————— ~~2H3.1~~

~~42 U.S.C. § 16984~~ ————— ~~2H3.1~~

43 U.S.C. § 1350 2Q1.2

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