

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of final action regarding technical and conforming amendments to federal sentencing guidelines effective November 1, 2012.

SUMMARY: On April 30, 2012, the Commission submitted to the Congress amendments to the sentencing guidelines and official commentary, which become effective on November 1, 2012, unless Congress acts to the contrary. Such amendments and the reasons for amendment subsequently were published in the Federal Register. 77 FR 28225 (May 11, 2012). The Commission has made technical and conforming amendments, set forth in this notice, to commentary provisions and policy statements related to those amendments.

DATES: The Commission has specified an effective date of November 1, 2012, for the amendments set forth in this notice.

FOR FURTHER INFORMATION CONTACT: Jeanne Doherty, Public Affairs Officer,
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SUPPLEMENTARY INFORMATION: The United States Sentencing Commission, an independent commission in the judicial branch of the United States government, is authorized by 28 U.S.C. § 994(a) to promulgate sentencing guidelines and policy statements for federal courts. Section 994 also directs the Commission to review and revise periodically promulgated guidelines and authorizes it to submit guideline amendments to Congress not later than the first day of May each year. See 28 U.S.C. § 994(o), (p). Absent an affirmative disapproval by Congress within 180 days after the Commission submits its amendments, the amendments become effective on the date specified by the Commission (typically November 1 of the same calendar year). See 28 U.S.C. § 994(p).

Unlike amendments made to sentencing guidelines, amendments to commentary and policy statements may be made at any time and are not subject to congressional review. To the extent practicable, the Commission endeavors to include amendments to commentary and policy statements in any submission of guideline amendments to Congress. Occasionally, however, the Commission determines that technical and conforming changes to commentary and policy statements are necessary. This notice sets forth technical and conforming amendments to commentary and policy statements that will become effective on November 1, 2012.

AUTHORITY: USSC Rules of Practice and Procedure 4.1.

Patti B. Saris,

Chair

1. Amendment:

The Commentary to §1B1.10 captioned "Application Notes" is amended in Note 4 by striking "Application Note 10 to §2D1.1" and inserting "the Drug Equivalency Tables in the Commentary to §2D1.1 (see §2D1.1, comment. (n.8))".

The Commentary to §2D1.1 captioned "Application Notes" is amended by renumbering Notes 1 through 29 according to the following table:

<u>Before Amendment</u>	<u>After Amendment</u>
1	1
17	2
13	3
2	4
12	5
5	6
6	7
10	8
11	9
15	10
3	11

18	12
23	13
25	14
26	15
27	16
28	17
19	18(A)
20	18(B)
29	19
21	20
24	21
8	22
7	23
22	24
4	25
14	26(A)
16	26(B)
9	26(C);

and by rearranging those Notes, as so renumbered, to place them in proper numerical order.

The Commentary to §2D1.1 captioned "Application Notes", as so renumbered and rearranged, is further amended by inserting headings at the beginning of certain notes, as follows (with Notes referred to by their new numbers):

Note Heading to Be Inserted at the Beginning

- 1 "Mixture or Substance".—
- 2 "Plant".—
- 3 Classification of Controlled Substances.—
- 4 Applicability to "Counterfeit" Substances.—
- 5 Determining Drug Types and Drug Quantities.—
- 7 Multiple Transactions or Multiple Drug Types.—
- 9 Determining Quantity Based on Doses, Pills, or Capsules.—
- 10 Determining Quantity of LSD.—
- 12 Application of Subsection (b)(5).—
- 18 Application of Subsection (b)(13).—
- 23 Cases Involving Mandatory Minimum Penalties.—
- 25 Cases Involving "Small Amount of Marihuana for No Remuneration".—
- 26 Departure Considerations.—
- 26(A) Downward Departure Based on Drug Quantity in Certain Reverse Sting
 Operations.—
- 26(B) Upward Departure Based on Drug Quantity.—

26(C) Upward Departure Based on Unusually High Purity.—

The Commentary to §2D1.1 captioned "Application Notes", as so renumbered and rearranged and amended, is further amended as follows (with Notes referred to by their new numbers):

in Note 8(A) by striking "Note 5" and inserting "Note 6";

in Note 15 by redesignating (i), (ii), and (iii) as (A), (B), and (C), respectively;

in Note 18(A) by inserting before the period at the end of the heading the following:

"(Subsection (b)(13)(A))"; and

in Note 18(B) by inserting before the period at the end of the heading the following:

"(Subsection (b)(13)(C)B(D))", by redesignating its component subdivision (A) (beginning "Factors to Consider") as (i), and that subdivision's component subdivisions (i) through (iv) as (I) through (IV), respectively, and by redesignating its component subdivision (B) (beginning "Definitions") as (ii).

The Commentary to §2D1.1 captioned "Background" is amended by striking the fifth through eighth undesignated paragraphs as follows:

" The last sentence of subsection (a)(5) implements the directive to the Commission in section 7(1) of Public Law 111–220.

Subsection (b)(2) implements the directive to the Commission in section 5 of Public Law 111–220.

Subsection (b)(3) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.

Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).";

in the paragraph beginning "The dosage weight" by striking "111 S.Ct. 1919" and inserting "500 U.S. 453"; and

by inserting before the paragraph beginning "Subsection (b)(11)" the following:

" Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).

The last sentence of subsection (a)(5) implements the directive to the Commission in section 7(1) of Public Law 111–220.

Subsection (b)(2) implements the directive to the Commission in section 5 of Public Law 111–220.

Subsection (b)(3) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988."

The Commentary to §2D1.6 captioned "Application Note" is amended in Note 1 by striking "Note 12" and inserting "Note 5".

The Commentary to §2D1.11 captioned "Application Notes", as amended by Amendment 3 of the amendments submitted to Congress on April 30, 2012, is further amended by renumbering Notes 1 through 9 according to the following table:

<u>Before Amendment</u>	<u>After Amendment</u>
4	1
1	2
5	3
6	4
7	5
8	6
9	7
2	8
3	9;

and by rearranging those Notes, as so renumbered, to place them in proper numerical order.

The Commentary to §2D1.11 captioned "Application Notes", as so renumbered and rearranged, is further amended by inserting headings at the beginning of certain notes, as follows (with Notes referred to by their new numbers):

Note Heading to Be Inserted at the Beginning

2 Application of Subsection (b)(1).—

3 Application of Subsection (b)(2).—

- 4 Application of Subsection (b)(3).—
- 8 Application of Subsection (c)(1).—
- 9 Offenses Involving Immediate Precursors or Other Controlled Substances
Covered Under §2D1.1.—

The Commentary to §2D1.11 captioned "Application Notes", as so renumbered and rearranged and amended, is further amended in Note 9 (as so renumbered) by striking "Note 12" and inserting "Note 5".

The Commentary to §5G1.2 captioned "Application Notes", as amended by Note 7 of the amendments submitted to Congress on April 30, 2012, is further amended by amending Note 1 to read as follows:

- "1. In General.—This section specifies the procedure for determining the specific sentence to be formally imposed on each count in a multiple-count case. The combined length of the sentences ('total punishment') is determined by the court after determining the adjusted combined offense level and the Criminal History Category and determining the defendant's guideline range on the Sentencing Table in Chapter Five, Part A (Sentencing Table).

Note that the defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, see §5G1.1 (Sentencing on a Single Count of Conviction), but also in a multiple-count case. See Note 3, below.

Except as otherwise required by subsection (e) or any other law, the total punishment is to be imposed on each count and the sentences on all counts are to be imposed to run concurrently to the extent allowed by the statutory maximum sentence of imprisonment for each count of conviction.

This section applies to multiple counts of conviction (A) contained in the same indictment or information, or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.

Usually, at least one of the counts will have a statutory maximum adequate to permit imposition of the total punishment as the sentence on that count. The sentence on each of the other counts will then be set at the lesser of the total punishment and the applicable statutory maximum, and be made to run concurrently with all or part of the longest sentence. If no count carries an

adequate statutory maximum, consecutive sentences are to be imposed to the extent necessary to achieve the total punishment."

Section 5K2.0 is amended in subsection (d)(1) by striking "the last sentence of 5K2.12 (Coercion and Duress), and 5K2.19 (Post-Sentencing Rehabilitative Efforts)" and inserting "and the last sentence of 5K2.12 (Coercion and Duress)".

Reason for Amendment:

This proposed amendment makes certain technical and conforming changes to commentary in the Guidelines Manual.

First, it reorganizes the commentary to the drug trafficking guideline, §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), so that the order of the application notes better reflects the order of the guidelines provisions to which they relate. The proposed amendment also makes stylistic changes to the Commentary to §2D1.1, such as by adding headings to certain application notes. To reflect the renumbering of application notes in §2D1.1, conforming changes are also made to the Commentary to §1B1.10 and §2D1.6.

Second, it makes certain clerical and stylistic changes in connection with certain recently promulgated amendments. See 77 Fed. Reg. 28226 (May 11, 2012). The clerical and stylistic changes are as follows:

- (1) Amendment 3 made revisions to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy). This proposed amendment reorganizes the commentary to §2D1.11 so that the order of the application notes better reflects the order of the guidelines provisions to which they relate. The proposed amendment also makes stylistic changes to the Commentary to §2D1.11 by adding headings to certain application notes.

- (2) Amendment 7 made revisions to §5G1.2 (Sentencing on Multiple Counts of Conviction), including a revision to Application Note 1. However, the amendatory instructions published in the Federal Register to implement those revisions included an erroneous instruction. This proposed amendment restates Application Note 1 in its entirety to ensure that it conforms with the version of Application Note 1 that appears in the unofficial, "reader-friendly" version of Amendment 7 that the Commission made available in May 2012.

- (3) Amendment 8 repealed the policy statement at §5K2.19 (Post-Sentencing Rehabilitative Efforts). However, a reference to that policy statement is contained in §5K2.0 (Grounds for Departure). This proposed amendment revises §5K2.0 to reflect the repeal of §5K2.19.