

**United States Sentencing Commission Public Meeting Minutes
September 1, 2010**

Chair William K Sessions III called the meeting to order at 12:04 p.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Judge William K. Sessions III, Chair
- William B. Carr, Jr., Vice Chair
- Judge Ruben Castillo, Vice Chair
- Ketanji B. Jackson, Vice Chair
- Dabney L. Friedrich, Commissioner
- Judge Ricardo H. Hinojosa, Commissioner
- Beryl A. Howell, Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following Commissioner was not present:

- Isaac Fulwood, Jr., Commissioner Ex Officio

The following staff participated in the meeting:

- Judith Sheon, Staff Director
- Kenneth Cohen, General Counsel

The Chair called for a motion to adopt the April 7 and April 13, 2010, public meeting minutes. Commissioner Howell made a motion to adopt the minutes, with Vice Chair Castillo seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote.

The Chair asked if there is a motion to adopt and publish in the *Federal Register* the proposed policy priorities for the 2010-2011 amendment cycle, attached hereto as Exhibit A. Vice Chair Castillo made such a motion, with Commissioner Friedrich seconding. The Chair called for discussion on the vote.

Commissioner Wroblewski reminded the Commission of the letter the Department of Justice ("DOJ") submitted identifying the challenges and opportunities facing the Commission and the federal sentencing system. He stated his belief that the proposed policy priorities comprise an ambitious agenda addressing many of the challenges and opportunities identified in the letter. Commissioner Wroblewski stated the DOJ welcomed the Commission's plan to address systemic and crime-specific issues along with application-specific issues under the federal sentencing guidelines. He noted that the Fair Sentencing Act of 2010 is a significant achievement and that the DOJ looks forward to working with the Commission on its implementation.

Vice Chair Castillo agreed with Commissioner Wroblewski's assessment that the Commission's proposed agenda is ambitious, observing that a majority of the public comment supported the proposed priorities. Noting that the proposed agenda is a good faith effort by the Commission to prioritize important issues for the upcoming amendment cycle, Vice Chair Castillo stated he would not be surprised if the Commission had to defer action on some of the proposed priorities.

Chair Sessions also agreed the proposed agenda is ambitious and exciting because the Commission intends to take a broad look at the sentencing issues the nation faces. He added that he looks forward to working with the DOJ, the Federal Public Defenders, and the Commission's various advisory groups during the upcoming amendment cycle. Hearing no further discussion, the Chair called for a vote. The motion was adopted with the Chair noting that at least four commissioners voted in favor of the motion.

The Chair stated that the next matter concerned a possible vote to publish in the *Federal Register* a proposed emergency amendment and issues for comment that implements The Fair Sentencing Act of 2010, Pub. L. 111-220 (the "Act"), signed into law on August 3, 2010. The Act reduces statutory penalties for cocaine base ("crack cocaine") offenses and eliminates the statutory mandatory minimum sentence for simple possession of crack cocaine. The Act also contains directives to the Commission to review and amend the sentencing guidelines to account for certain aggravating and mitigating circumstances in drug trafficking cases.

Section 8 of the Act invokes the Commission's emergency, temporary amendment authority under section 21(a) of the Sentencing Act of 1987 (28 U.S.C. § 994 note) and directs the Commission to promulgate within 90 days — *i.e.*, not later than November 1, 2010 — the amendments to the *Guidelines Manual* provided for by the Act. The Chair called on Mr. Cohen to inform the Commission on the possible vote.

Mr. Cohen stated that the proposed amendment, attached hereto as Exhibit B, is a multi-part amendment in response to the Act. Part A responds to changes to the statutory penalties for crack cocaine offense. Section 2 of the Act amended these laws to raise the specified quantities of crack cocaine associated with the tiered penalties in 21 U.S.C. §§ 841 (Prohibited Acts [regarding controlled substances]) and 960 (Prohibited Acts [regarding the importation or exportation of controlled substances]). Before the Act, the 5-year mandatory minimum applied to offenses involving 5 grams (or more) of crack cocaine, and the 10-year mandatory minimum applied to offenses involving 50 grams (or more) of crack cocaine. Section 2 of the Act raised these quantities to 28 grams and 280 grams, respectively.

Part A of the proposed amendment requests comment on what temporary amendments to the *Guidelines Manual* it should promulgate in response to the statutory changes made by section 2 of the Act. In particular, the Commission requests comment on what amendments should be made to the Drug Quantity Table in USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). Two options for amending the Drug Quantity Table are presented for comment.

Part B of the proposed amendment responds to section 3 of the Act, which amended subsection (a) of 21 U.S.C. § 844 (Penalty for simple possession) to eliminate the 5-year mandatory minimum term of imprisonment for simple possession of more than 5 grams of crack cocaine. The proposed amendment deletes as obsolete the cross reference at USSG §2D2.1(b)(1) to USSG §2D1.1 that was established by the Commission in 1989 to account for the statutory minimum in section 844(a).

Part C of the proposed amendment responds to sections 5, 6, and 7 of the Act, which contain directives to the Commission to provide certain enhancements and adjustments for drug trafficking offenses. First, Part C of the proposed amendment responds to section 5 of the Act, which directs the Commission to "review and amend the Federal sentencing guidelines to ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense." The proposed amendment establishes a new specific offense characteristic in USSG §2D1.1 that provides an enhancement of [2][4][6] levels if violence as described in the directive was involved in the offense.

Second, Part C of the proposed amendment responds to section 6(1) of the Act, which directs the Commission to "review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if . . . the defendant bribed, or attempted to bribe, a Federal, State, or local law enforcement official in connection with a drug trafficking offense." The proposed amendment establishes a new specific offense characteristic in USSG §2D1.1 that provides an enhancement of [2][4] levels if the defendant [was convicted of bribing or attempting to bribe][bribed or attempted to bribe] a law enforcement officer to facilitate the commission of the offense.

Third, Part C of the proposed amendment responds to section 6(2) of the Act, which directs the Commission to "review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if . . . the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U.S.C. § 856)." The proposed amendment establishes a new specific offense characteristic in USSG §2D1.1 that provides an enhancement of [2][4] levels if the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as described in 21 U.S.C. § 856.

Fourth, Part C of the proposed amendment responds to section 6(3) of the Act, which directs the Commission to "review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if . . . (A) the defendant is an organizer, leader, manager, or supervisor of drug trafficking activity subject to an aggravating role enhancement under the guidelines; and (B) the offense involved 1 or more of " the factors enumerated in the directive was present in the offense. The proposed amendment establishes a new specific offense characteristic in §2D1.1 that provides an enhancement of [2][4] levels if the defendant receives an adjustment under USSG §3B1.1 (Aggravating Role) and the offense involved one or more of the factors listed in the directive.

Fifth, Part C of the proposed amendment responds to section 7(2) of the Act, which directs the Commission to "review and amend the Federal sentencing guidelines and policy statements to ensure that . . . there is an additional reduction of 2 offense levels if the defendant--" meets three criteria specified in the directive. The proposed amendment establishes a new specific offense characteristic in USSG §2D1.1 that provides a downward adjustment of 2 levels if the defendant receives an adjustment under subsection (a) of USSG §3B1.2 (Mitigating Role) and the factors listed in the directive apply.

Part C of the proposed amendment also includes several issues for comment regarding how the enhancements should interact with other guideline provisions, including whether they should apply cumulatively with other potential applicable provisions in the *Guidelines Manual*.

Part D of the proposed amendment responds to section 7(1) of the Act, which directs the Commission to review and amend the Federal sentencing guidelines to ensure that the base offense level based solely on drug quantity for a defendant who receives to a minimum role adjustment under USSG §3B1.2(a) shall not exceed level 32. The proposed amendment adds a sentence at the end of USSG §2D1.1(a)(5), the "mitigating role cap," to reflect the new maximum offense level of 32 required by the directive.

Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 30-day comment period, not the usual 60-day comment period provided for by the Commission's Rules of Practice and Procedure, due to the emergency nature of the proposed amendment and the 90-day deadline imposed by Congress, and with staff authorized to make technical and conforming changes as needed.

Chair Sessions called for a motion as suggested by Mr. Cohen. Vice Chair Carr made a motion to publish the proposed amendment, with Vice Chair Castillo seconding. The Chair called for discussion on the motion. Vice Chair Castillo commended Chair Sessions, past chairs Wilkins, Conaboy, and Hinojosa, his fellow commissioners, and staff for their tireless work to reach this historic moment. He recognized that the Act presents a great challenge for the Commission: 30 percent of the criminal docket involves drug trafficking offenses, and the Commission has 90 days to implement the Act. Vice Chair Castillo welcomed the opportunity to focus the drug trafficking guideline more on the defendant's role in the offense rather than drug quantity and urged caution in implementing the Act to ensure that the guideline amendment applies to the worst drug traffickers as Congress intended. He expressed cautious optimism that the Commission can accomplish this result in the required time period. Vice Chair Castillo stated his desire that the public would carefully read the proposed amendment and provide comment to the Commission. Vice Chair Jackson joined Vice Chair Castillo in looking forward to receiving robust public comment on the proposed amendment, especially regarding the application and interaction of the Act's sentencing enhancements with existing guideline provisions. Hearing no further discussion, the Chair called for a vote. The motion was adopted with the Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit C, makes certain

technical and conforming changes to commentary in the *Guidelines Manual*. First, the proposed amendment makes certain technical and conforming changes in connection with the amendments that the Commission submitted to Congress on April 29, 2010, specifically the commentary in USSG §§2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources), 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition), and 2P1.1 (Escape, Instigating or Assisting Escape). Second, the proposed amendment makes certain other stylistic and clerical changes to commentary in the *Guidelines Manual*, specifically in USSG §§3A1.2 (Official Victim), 3C1.1 (Obstructing or Impeding the Administration of Justice), 5E1.5 (Costs of Prosecution), 7B1.4 (Term of Imprisonment), and 8A1.2 (Application Instructions - Organizations). Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order, with a November 1, 2010, effective date, and with staff authorized to make technical and conforming changes as needed.

Chair Sessions called for a motion as suggested by Mr. Cohen. Vice Chair Jackson made a motion to promulgate the proposed amendment, with Commissioner Howell seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with the Chair noting that at least four commissioners voted in favor of the motion.

Chair Sessions asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Vice Chair Castillo made a motion to adjourn, with Vice Chair Carr seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 12:19 p.m.

EXHIBIT A

BAC2210-40

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of final priorities.

SUMMARY: In July 2010, the Commission published a notice of possible policy priorities for the amendment cycle ending May 1, 2011. See 75 FR 41927-41929 (July 19, 2010). After reviewing public comment received pursuant to the notice of proposed priorities, the Commission has identified its policy priorities for the upcoming amendment cycle and hereby gives notice of these policy priorities.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 502-4597.

SUPPLEMENTARY INFORMATION: 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 submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. § 994(p).

As part of its statutory authority and responsibility to analyze sentencing issues, including operation of the federal sentencing guidelines, the Commission has identified its policy priorities for the amendment cycle ending May 1, 2011. The Commission recognizes, however, that other factors, such as the enactment of any legislation requiring Commission action, may affect the Commission's ability to complete work on any or all of its identified priorities by the statutory deadline of May 1, 2011. Accordingly, it may be necessary to continue work on any or all of these issues beyond the amendment cycle ending on May 1, 2011.

As so prefaced, the Commission has identified the following priorities:

(1) Implementation of the Fair Sentencing Act of 2010, Pub. L. 111-220, regarding offenses involving cocaine base ("crack" cocaine) and offenses involving drug trafficking, including promulgation of a temporary, emergency amendment under section 8 of that Act and promulgation of a permanent amendment implementing that Act, including possible consideration of amending any related adjustments; and possible consideration of amending the

Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) across drug types.

(2) Continuation of its work with the congressional, executive, and judicial branches of government, and other interested parties, to study the manner in which United States v. Booker, 543 U.S. 220 (2005), and subsequent Supreme Court decisions have affected federal sentencing practices, the appellate review of those practices, and the role of the federal sentencing guidelines. The Commission anticipates that it will issue a report with respect to its findings, possibly including (A) an evaluation of the impact of those decisions on the federal sentencing guideline system; (B) development of recommendations for legislation regarding federal sentencing policy; (C) an evaluation of the appellate standard of review applicable to post-Booker federal sentencing decisions; and (D) possible consideration of amendments to the federal sentencing guidelines. Such findings will be informed by the testimony received at seven regional public hearings the Commission held in 2009-2010, feedback received from the judiciary contained in the Results of Survey of United States District Judges January 2010 through March 2010 issued in June 2010, and other information and input.

(3) Continuation of its study of and, pursuant to the directive in section 4713 of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, Pub. L. 111-84, report to Congress on statutory mandatory minimum penalties, including a review of the operation of the "safety valve" provision at 18 U.S.C. § 3553(e). The findings of the report will be informed by the testimony received at the hearing on statutory mandatory minimum penalties the Commission held on May 27, 2010, the regional public hearings and survey of United States District Judges referred to in paragraph (2), and other information and input.

(4) Study of and, pursuant to the directive in section 107(b) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. 111-195, report to Congress regarding violations of section 5(a) of the United Nations Participation Act of 1945 (22 U.S.C. § 287c(a)), sections 38, 39, and 40 of the Arms Export Control Act (22 U.S.C. §§ 2278, 2279, and 2780), and the Trading with the Enemy Act (50 U.S.C. App. 1 et seq.), including consideration of amendments to §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License) or other guidelines in Part K or Part M of Chapter Two of the Guidelines Manual that might be appropriate in light of the information obtained from such study.

(5) Implementation of the directive in section 10606(a)(2)(A) of the Patient Protection and Affordable Care Act, Pub. L. 111-148, regarding health care fraud offenses; the directives in section 1079A of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, regarding securities fraud offenses and financial institution fraud offenses; and any other crime legislation enacted during the 111th Congress warranting a Commission response.

(6) Continuation of its review of child pornography offenses and possible report to Congress as a result of such review. It is anticipated that any such report would include (A) a review of the incidence of, and reasons for, departures and variances from the guideline

sentence; (B) a compilation of studies on, and analysis of, recidivism by child pornography offenders; and (C) possible recommendations to Congress on any statutory changes that may be appropriate.

(7) Continuation of its review of departures within the guidelines, including provisions in Parts H and K of Chapter Five of the Guidelines Manual, and the extent to which pertinent statutory provisions prohibit, discourage, or encourage certain factors as forming the basis for departure from the guideline sentence.

(8) Continuation of its multi-year study of the statutory and guideline definitions of "crime of violence", "aggravated felony", "violent felony", and "drug trafficking offense", including (A) an examination of relevant circuit conflicts regarding whether any offense is categorically a "crime of violence", "aggravated felony", "violent felony", or "drug trafficking offense" for purposes of triggering an enhanced sentence under certain federal statutes and guidelines; (B) possible consideration of an amendment to provide an alternative approach to the "categorical approach", see Taylor v. United States, 495 U.S. 575 (1990); Shepard v. United States, 544 U.S. 13 (2005), for determining the applicability of guideline enhancements; and (C) possible consideration of an amendment to provide that the time period limitations in subsection (e) of §4A1.2 (Definitions and Instructions for Computing Criminal History) apply for purposes of determining the applicability of enhancements in §2L1.2 (Unlawfully Entering or Remaining in the United States).

(9) Consideration of a possible amendment to provide a reduction in the offense level for certain deportable aliens who agree to a stipulated order of deportation.

(10) Examination of, and possible amendments to, the guidelines and policy statements in Part D of Chapter Five of the Guidelines Manual pertaining to supervised release.

(11) Continued study of alternatives to incarceration, including possible consideration of any changes to the Guidelines Manual that might be appropriate in light of the information obtained from that study.

(12) Resolution of circuit conflicts, pursuant to the Commission's continuing authority and responsibility, under 28 U.S.C. § 991(b)(1)(B) and Braxton v. United States, 500 U.S. 344 (1991), to resolve conflicting interpretations of the guidelines by the federal courts.

(13) Multi-year review of the guidelines pertaining to environmental crimes, with particular consideration of whether the fine provisions in Part C of Chapter Eight of the Guidelines Manual should apply to such offenses.

(14) Consideration of miscellaneous guideline application issues coming to the Commission's attention from case law and other sources.

AUTHORITY: 28 U.S.C. § 994(a), (o); USSC Rules of Practice and Procedure 5.2.

William K. Sessions III

Chair

EXHIBIT B

PROPOSED AMENDMENT: FAIR SENTENCING ACT OF 2010

Synopsis of Proposed Amendment: *The Fair Sentencing Act of 2010, Pub. L. 111–220 (the "Act"), was signed into law on August 3, 2010. The Act reduces statutory penalties for cocaine base (crack cocaine) offenses and eliminates the mandatory minimum sentence for simple possession of crack cocaine. The Act also contains directives to the Commission to review and amend the sentencing guidelines to account for certain aggravating and mitigating circumstances in drug trafficking cases.*

Section 8 of the Act invokes the Commission's emergency, temporary amendment authority under section 21(a) of the Sentencing Act of 1987 (28 U.S.C. § 994 note) and directs the Commission to promulgate within 90 days — i.e., not later than November 1, 2010 — the amendments to the Guidelines Manual provided for by the Act. It provides in full as follows:

SEC. 8. EMERGENCY AUTHORITY FOR UNITED STATES SENTENCING COMMISSION.

The United States Sentencing Commission shall--

- (1) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act, in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note), as though the authority under that Act had not expired; and*
- (2) pursuant to the emergency authority provided under paragraph (1), make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.*

Section 21(a) of the Sentencing Act of 1987 provides in full as follows:

SEC. 21. EMERGENCY GUIDELINES PROMULGATION AUTHORITY.

(a) In General.—In the case of—

- (1) an invalidated sentencing guideline;*
- (2) the creation of a new offense or amendment of an existing offense; or*
- (3) any other reason relating to the application of a previously established sentencing guideline, and determined by the United States Sentencing Commission*

to be urgent and compelling;

the Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of title 28 and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System a temporary guideline or amendment to an existing guideline, to remain in effect until and during the pendency of the next report to Congress under section 994(p) of title 28, United States Code.

Any temporary amendment promulgated by the Commission under the section 21(a) authority will expire not later than November 1, 2011. See section 21(a); 28 U.S.C. § 994(p). The Commission will continue work on the issues raised by the Act during the regular amendment cycle ending May 1, 2011, with a view to re-promulgating any temporary amendment as a permanent amendment (in its original form, or with revisions) under 28 U.S.C. § 994(p).

The proposed amendment and issues for comment address the issues arising under the Act in the following manner:

(A) Changes to Statutory Terms of Imprisonment for Crack Cocaine

Issue for Comment:

1. Federal drug laws establish three tiers of penalties for manufacturing and trafficking in cocaine, each based on the amount of cocaine involved. See 21 U.S.C. §§ 841(b)(1)(A), (B), (C), 960(b)(1), (2), (3). For smaller quantities, the maximum term of imprisonment is 20 years, and there is no mandatory minimum term of imprisonment. If the amount of cocaine involved reaches a specified quantity, however, the maximum term increases to 40 years, and a mandatory minimum term of 5 years applies. If the amount of cocaine reaches ten times that specified quantity, the maximum term is life, and a mandatory minimum term of 10 years applies.

Section 2 of the Act amended these laws to raise the specified quantities of crack cocaine associated with these two higher tiers of penalties. Before the Act, the 5-year mandatory minimum applied to offenses involving 5 grams (or more) of crack cocaine, and the 10-year mandatory minimum applied to offenses involving 50 grams (or more) of crack cocaine. Section 2 of the Act raised these quantities to 28 grams and 280 grams, respectively.

The Commission requests comment on what temporary amendments to the Guidelines Manual it should promulgate in response to the statutory changes made by section 2 of the Act. In particular, the Commission requests comment on what amendments should be made to the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). When Congress has provided statutory mandatory minimum sentences based on drug quantity, the Commission has generally responded by incorporating the statutory mandatory minimum sentences into the Drug Quantity Table and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. The drug quantity thresholds in the Drug Quantity Table have generally been set so as to provide base offense levels corresponding to guideline ranges that are above the statutory mandatory minimum penalties.

Until 2007, the drug quantity thresholds for crack cocaine followed the same principle. Accordingly, offenses involving 5 grams or more of crack cocaine were assigned a base offense level (level 26) corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I (a guideline range that exceeds the 5-year statutory minimum for such offenses by at least three months). Similarly, offenses involving 50 grams or more of crack cocaine were assigned a base offense level (level 32) corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I (a guideline range that exceeds the 10-year statutory minimum for such offenses by at least 1 month). In Amendment 706, the Commission amended the Drug Quantity Table for crack cocaine, reducing the base offense levels for these quantities to level 24 and level 30, respectively, and extrapolating upward and downward for other crack cocaine quantities. See USSG App. C, Amendment 706 (effective November 1, 2007). Base offense levels 24 and 30 each correspond to a guideline range for a defendant in Criminal History Category I that includes the statutory mandatory minimum penalty. For base offense level 24, the guideline range is 51-63 months; for base offense level 30, the guideline range is 97-121 months. The Commission also amended the commentary to §2D1.1 to revise the manner in which combined offense levels are determined in cases involving both crack cocaine and one or more other controlled substances. See USSG App. C, Amendment 715 (effective May 1, 2008).

Given the statutory changes made by section 2 of the Act, how should the Commission revise the Drug Quantity Table for offenses involving crack cocaine?

In particular, should the base offense levels for crack cocaine again be set so that the statutory minimum penalties correspond to levels 26 and 32, using the new drug quantities established by the Act (the "level 26 option")? Or should the base offense levels for crack cocaine continue to be set so that the statutory minimum penalties correspond to levels 24 and 30, using the new drug quantities established by the Act (the "level 24 option")? A comparison of the base offense levels ("BOL") and quantities for these options is as follows:

<u>BOL</u>	<u>Quantity Under Level 26 Option</u>	<u>Quantity Under Level 24 Option</u>
38	8.4 KG or more	25.2 KG or more
36	At least 2.8 KG but less than 8.4 KG	At least 8.4 KG but less than 25.2 KG
34	At least 840 G but less than 2.8 KG	At least 2.8 KG but less than 8.4 KG
32	At least 280 G but less than 840 G	At least 840 G but less than 2.8 KG
30	At least 196 G but less than 280 G	At least 280 G but less than 840 G
28	At least 112 G but less than 196 G	At least 196 G but less than 280 G
26	At least 28 G but less than 112 G	At least 112 G but less than 196 G
24	At least 22.4 G but less than 28 G	At least 28 G but less than 112 G
22	At least 16.8 G but less than 22.4 G	At least 22.4 G but less than 28 G
20	At least 11.2 G but less than 16.8 G	At least 16.8 G but less than 22.4 G
18	At least 5.6 G but less than 11.2 G	At least 11.2 G but less than 16.8 G
16	At least 2.8 G but less than 5.6 G	At least 5.6 G but less than 11.2 G
14	At least 1.4 G but less than 2.8 G	At least 2.8 G but less than 5.6 G
12	Less than 1.4 G	Less than 2.8 G

Whichever option is adopted, conforming changes to the commentary to §2D1.1 will need to be made to revise the manner in which combined offense levels are determined in cases involving crack cocaine and one or more other controlled substances. Under either option, 1 gram of crack cocaine would be equivalent to 3,571 grams of marijuana. However, if the level 26 option is adopted, the combined offense level in such a case would be determined under Application Note 10 in the same manner as for any other case involving more than one controlled substance, *i.e.*, Application Note 10(D) would not apply. If the level 24 option is adopted, in contrast, Application Note 10(D) would continue to apply, except that Application Note 10(D)(ii)(I) would be amended to read "the offense involved 25.2 kg or more, or less than 1.4 g, of cocaine base; or", and the examples in Application Note 10(D)(iii) would be revised.

(B) Elimination of Mandatory Minimum for Simple Possession of Crack Cocaine

Synopsis of Proposed Amendment: *This part of the proposed amendment responds to section 3 of the Act, which amended 21 U.S.C. § 844(a) to eliminate the 5-year mandatory minimum term of imprisonment (and 20-year statutory maximum) for simple possession of more than 5 grams of crack cocaine (or, for certain repeat offenders, more than 1 gram of crack cocaine). Accordingly, the statutory penalty for simple possession of crack cocaine is now the same as for simple possession of most other controlled substances: for a first offender, a maximum term of imprisonment of one year; for repeat offenders, maximum terms of 2 years or 3 years, and minimum terms of 15 days or 90 days, depending on the prior convictions. See 21 U.S.C. § 844(a).*

Offenses under section 844(a) are referenced in Appendix A (Statutory Index) to §2D2.1 (Unlawful Possession; Attempt or Conspiracy). Section 2D2.1 contains a cross reference at subsection (b)(1) that was established by the Commission in 1989 to address the statutory minimum in section 844(a). See USSG App. C, Amendment 304 (effective November 1, 1989). Under the cross reference, an offender who possessed more than 5 grams of crack cocaine is sentenced under the drug trafficking guideline, §2D1.1.

To reflect the elimination of this statutory minimum, the proposed amendment deletes as obsolete the cross reference at §2D2.1(b)(1). Conforming changes to the commentary are also made.

Proposed Amendment:

§2D2.1. Unlawful Possession; Attempt or Conspiracy

(a) Base Offense Level:

- (1) **8**, if the substance is heroin or any Schedule I or II opiate, an analogue of these, or cocaine base; or
- (2) **6**, if the substance is cocaine, flunitrazepam, LSD, or PCP; or
- (3) **4**, if the substance is any other controlled substance or a list I chemical.

(b) Cross References

- ~~(1) If the defendant is convicted of possession of more than 5 grams of a mixture or substance containing cocaine base, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) as if the defendant had been convicted of possession of that mixture or substance with intent to distribute.~~
- (2) If the offense involved possession of a controlled substance in a prison,

correctional facility, or detention facility, apply §2P1.2 (Providing or Possessing Contraband in Prison).

Commentary

Statutory Provision: 21 U.S.C. § 844(a). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. *The typical case addressed by this guideline involves possession of a controlled substance by the defendant for the defendant's own consumption. Where the circumstances establish intended consumption by a person other than the defendant, an upward departure may be warranted.*

Background: Mandatory (statutory) minimum penalties for several categories of cases, ranging from fifteen days' to ~~five~~*three* years' imprisonment, are set forth in 21 U.S.C. § 844(a). When a mandatory minimum penalty exceeds the guideline range, the mandatory minimum becomes the guideline sentence. See §5G1.1(b). Note, however, that 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

~~Section 2D2.1(b)(1) provides a cross reference to §2D1.1 for possession of more than five grams of a mixture or substance containing cocaine base, an offense subject to an enhanced penalty under 21 U.S.C. § 844(a). Other cases for which enhanced penalties are provided under 21 U.S.C. § 844(a) (e.g., for a person with one prior conviction, possession of more than three grams of a mixture or substance containing cocaine base; for a person with two or more prior convictions, possession of more than one gram of a mixture or substance containing cocaine base) are to be sentenced in accordance with §5G1.1(b).~~

(C) Enhancements and Adjustments

Synopsis of Proposed Amendment: *This part of the proposed amendment responds to sections 5, 6, and 7 of the Act, which contain directives to the Commission to provide certain enhancements and adjustments for drug trafficking offenses.*

Violence Enhancement

First, this part of the proposed amendment responds to section 5 of the Act, which directs the Commission to "review and amend the Federal sentencing guidelines to ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense."

This part of the proposed amendment implements this directive by amending §2D1.1 to provide a new specific offense characteristic at subsection (b)(2) that provides an enhancement of [2][4][6] levels if violence as described in the directive was involved. A conforming amendment to Application Note 3 is also made.

Bribery Enhancement

Second, this part of the proposed amendment responds to section 6(1) of the Act, which directs the Commission to "review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if . . . the defendant bribed, or attempted to bribe, a Federal, State, or local law enforcement official in connection with a drug trafficking offense."

This part of the proposed amendment implements this directive by amending §2D1.1 to establish a new specific offense characteristic at subsection (b)(11) that provides an enhancement of [2][4] levels if the defendant [was convicted of bribing or attempting to bribe][bribed or attempted to bribe] a law enforcement officer to facilitate the commission of the offense.

Drug Establishment Enhancement

Third, this part of the proposed amendment responds to section 6(2) of the Act, which directs the Commission to "review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if . . . the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U.S.C. 856)."

This part of the proposed amendment implements this directive by amending §2D1.1 to establish a new specific offense characteristic at subsection (b)(12) that provides an enhancement of [2][4] levels if the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as described in 21 U.S.C. § 856.

Enhancement Based on "Super-Aggravating" Factors

Fourth, this part of the proposed amendment responds to section 6(3) of the Act, which directs the Commission to "review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if . . . (A) the defendant is an organizer, leader, manager, or supervisor of drug trafficking activity subject to an aggravating role enhancement under the guidelines; and (B) the offense involved 1 or more of the following super-aggravating factors:"

(i) The defendant--

- (I) used another person to purchase, sell, transport, or store controlled substances;
- (II) used impulse, fear, friendship, affection, or some combination thereof to involve such person in the offense; and
- (III) such person had a minimum knowledge of the illegal enterprise and was to receive little or no compensation from the illegal transaction.

(ii) The defendant--

- (I) knowingly distributed a controlled substance to a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual;
- (II) knowingly involved a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual in drug trafficking;
- (III) knowingly distributed a controlled substance to an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct; or
- (IV) knowingly involved an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct, in the offense.

- (iii) *The defendant was involved in the importation into the United States of a controlled substance.*
- (iv) *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.*
- (v) *The defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood.*

This part of the proposed amendment implements this directive by creating a new enhancement of [2][4] levels in subsection (b)(14) of §2D1.1 if the defendant receives an adjustment under §3B1.1 and the offense involved one or more of the factors described in the directive.

Downward Adjustment Based on Certain Mitigating Factors

Fifth, this part of the proposed amendment responds to section 7(2) of the Act, which directs the Commission to "review and amend the Federal sentencing guidelines and policy statements to ensure that . . . there is an additional reduction of 2 offense levels if the defendant--"

- (A) *otherwise qualifies for a minimal role adjustment under the guidelines and had a minimum knowledge of the illegal enterprise;*
- (B) *was to receive no monetary compensation from the illegal transaction; and*
- (C) *was motivated by an intimate or familial relationship or by threats or fear when the defendant was otherwise unlikely to commit such an offense.*

This part of the proposed amendment implements this directive by creating a new downward adjustment of 2 levels in subsection (b)(15) of §2D1.1 if the defendant receives an adjustment under §3B1.2(a) and the other factors described in the directive apply.

Technical and Conforming Changes

Finally, to reflect the renumbering of specific offense characteristics in §2D1.1(b) by this part of the proposed amendment, this part of the proposed amendment makes technical and conforming changes to the commentary to §2D1.1 and to §2D1.14 (Narco-Terrorism).

Issues for comment are also included.

Proposed Amendment:

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

* * *

(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~~**4**~~6~~ levels.

[renumber existing (2)-(9) as (3)-(10)]

- (11) If the defendant [was convicted of bribing or attempting to bribe][bribed or attempted to bribe] a law enforcement officer to facilitate the commission of the offense, increase by ~~2~~**4** levels.
- (12) If the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as described in 21 U.S.C. § 856, increase by ~~2~~**4** levels.

~~(13)~~ (Apply the greatest):

* * *

- (14) If the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:
 - (A) (i) the defendant used impulse, fear, friendship, affection, or some combination thereof to involve another individual in the purchase, sale, transport, or storage of controlled substances; and (ii) the individual (I) was to receive little or no compensation from that purchase, sale, transport, or storage of controlled substances and (II) had minimal knowledge of [the scope and

structure of] the enterprise;

- (B) the defendant knowingly (i) distributed a controlled substance to an individual under the age of 18 years, an individual over the age of 64 years, a pregnant individual, an individual who was unusually vulnerable due to physical or mental condition, or an individual who was particularly susceptible to criminal conduct, or (ii) involved such an individual in the offense;
- (C) the defendant was involved in the importation of a controlled substance;
- (D) the defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice;
- (E) the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood;

increase by ~~2~~**4** levels.

(15) If the defendant receives an adjustment under subsection (a) of §3B1.2 (Mitigating Role) 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 was to receive no monetary compensation from the offense; and
- (C) the defendant had minimal knowledge of [the scope and structure of] the enterprise,

decrease by **2** levels.

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

* * *

Commentary

* * *

Application Notes:

* * *

3. Definitions of "firearm" and "dangerous weapon" are found in the Commentary to §1B1.1 (Application Instructions). The enhancement for weapon possession in subsection (b)(1) reflects the increased danger of violence when drug traffickers possess weapons. ~~The adjustment~~ *Subsection (b)(1) should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement subsection (b)(1) would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to §2D1.1, see §§2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), 2D1.12(c)(1), and 2D2.1(b)(1). Although the enhancements for weapon possession in subsection (b)(1) and violence in subsection (b)(2) may be triggered by the same conduct (such as where the defendant uses the possessed weapon to make a credible threat to use violence), they are to 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).*

* * *

8. Interaction with §3B1.3.—A defendant who used special skills in the commission of the offense may be subject to an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill). Certain professionals often occupy essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense. Additionally, an enhancement under §3B1.3 ordinarily would apply in a case in which the defendant used his or her position as a coach to influence an athlete to use an anabolic steroid.

Note, however, that if an adjustment from subsection (b)(23)(C) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

* * *

18. *If the offense involved importation of amphetamine or methamphetamine, and an adjustment from subsection (b)(23) applies, do not apply subsection (b)(45).*
19. Hazardous or Toxic Substances.—*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).

20. Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine.—

(A) 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:

* * *

(B) Definitions.—For purposes of subsection (b)(~~13~~)(D):

* * *

21. Applicability of Subsection (b)(~~16~~).—The applicability of subsection (b)(~~16~~) 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)(~~16~~) applies.

* * *

23. Application of Subsection (b)(~~7~~).—For purposes of subsection (b)(~~7~~), "mass-marketing by means of an interactive computer service" means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(~~7~~) would apply to a defendant who operated a web site to promote the sale of Gamma-hydroxybutyric Acid (GHB) but would not apply to coconspirators

who use an interactive computer service only to communicate with one another in furtherance of the offense. "Interactive computer service", for purposes of subsection (b)(67) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

* * *

25. Application of Subsection (b)(78).—For purposes of subsection (b)(78), "masking agent" means a substance that, when taken before, after, or in conjunction with an anabolic steroid, prevents the detection of the anabolic steroid in an individual's body.
26. Application of Subsection (b)(89).—For purposes of subsection (b)(89), "athlete" means an individual who participates in an athletic activity conducted by (i) an intercollegiate athletic association or interscholastic athletic association; (ii) a professional athletic association; or (iii) an amateur athletic organization.

* * *

Background:

* * *

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

Specific Offense Characteristic Subsection (b)(23) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.

* * *

Subsection (b)(11) implements the directive to the Commission in section 6(1) of Public Law 111–220.

Subsection (b)(12) implements the directive to the Commission in section 6(2) of Public Law 111–220.

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

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

Subsection (b)(14) implements the directive to the Commission in section 6(1) of Public Law

111-220.

Subsection (b)(15) implements the directive to the Commission in section 7(2) of Public Law 111-220.

* * *

§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)(~~11~~16) shall not apply.

* * *

Issues for Comment:

1. *In the proposed new violence enhancement in subsection (b)(2) of §2D1.1, should the Commission provide a single level of enhancement for any conduct covered by the violence enhancement, or should the Commission distinguish among the different categories of conduct (use of violence; credible threat to use violence; directing others to use violence) by assigning different levels of enhancement to each?*
2. *The proposed amendment would amend Application Note 3 to §2D1.1 to provide that the enhancements for weapon possession in subsection (b)(1) and violence in subsection (b)(2) are to be applied cumulatively. Should the Commission instead provide that the enhancements are not to be applied cumulatively?*
3. *The Guidelines Manual uses the term "violence" in several provisions, e.g., §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) (the "safety valve" provision), without defining the term. Should the term "violence" be defined for purposes of the new violence enhancement in subsection (b)(2)? If so, what should the definition be? How, if at all, should such a definition interact with the other provisions in the Manual where the term is not defined?*
4. *The proposed new bribery enhancement in §2D1.1(b)(11) may interact with other provisions in the Guidelines Manual, such as §3C1.1 (Obstructing or Impeding the Administration of Justice). How should the new bribery enhancement interact with such other provisions? In particular, should they be applied cumulatively, or should they not be applied cumulatively?*

5. The proposed new enhancement in §2D1.1(b)(12) would apply if the defendant "maintained an establishment for the manufacture or distribution of a controlled substance, as described in 21 U.S.C. § 856." Should this enhancement apply more broadly, e.g., if the defendant "committed an offense described in 21 U.S.C. § 856"? How should this proposed new enhancement in subsection (b)(12) interact with §2D1.8 (Renting or Managing a Drug Establishment; Attempt or Conspiracy)? In particular, should the Commission raise the alternative base offense level 26 in §2D1.8 to [28][30]?
6. As an alternative to establishing new specific offense characteristics at subsections (b)(14) and (15) of §2D1.1, should the Commission instead implement these directives in Chapter Three? In particular, should the Commission amend §§3B1.1 and 3B1.2, or establish new Chapter Three guidelines, to provide the adjustments required by the directives?
7. For the proposed new specific offense characteristic in §2D1.1(b)(14), should the Commission distinguish among the different factors described by the directive (e.g., the factors set forth in subparagraphs (A) through (E) of the proposed new §2D1.1(b)(14)) by assigning different levels to each? For example, should the most egregious factor be assigned an adjustment of [6] levels, and other factors assigned adjustments of [4] or [2] levels? If more than one factor is present, should that have a cumulative effect, warranting a higher total adjustment for that defendant? As an alternative, should the Commission provide an upward departure provision for cases in which more than one factor is present?
8. The proposed new specific offense characteristic in §2D1.1(b)(14) may interact with other provisions in the Guidelines Manual, such as §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy), §3B1.4 (Using a Minor to Commit a Crime), §3C1.1 (Obstructing or Impeding the Administration of Justice), and §4B1.3 (Criminal Livelihood). How should the new specific offense characteristic in subsection (b)(14) interact with such other provisions? In particular, should they be applied cumulatively, or should they not be applied cumulatively?
9. The proposed new specific offense characteristic in §2D1.1(b)(14) and the proposed new specific offense characteristics in §2D1.1 for bribery (see Part C of this proposed amendment) and maintenance of a drug establishment (see Part D of this proposed amendment) all respond to section 6 of the Fair Sentencing Act of 2010. How should these provisions interact with each other? In particular, should they be applied cumulatively, or should they not be applied cumulatively?
10. This part of the proposed amendment establishes several new specific offense characteristics in §2D1.1. What, if any, changes should the Commission make to other Chapter Two offense guidelines involving drug trafficking to ensure consistency and proportionality? Many such guidelines refer to §2D1.1 in determining the offense level, but not in all cases. For example, if the base offense level is determined under subsection (a)(3) or (a)(4) of §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy), or under subsection (a)(2) of §2D1.5 (Continuing Criminal Enterprise; Attempt or Conspiracy), or under §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), the new specific offense characteristics would not apply. Should the Commission establish similar specific offense characteristics in §2D1.2, §2D1.5, and §2D1.11?
11. What other changes, if any, should the Commission make to the Guidelines Manual under the

emergency authority provided by section 8 of the Act?

(D) Maximum Base Offense Level for Minimal Role ("Minimal Role Cap")

Synopsis of Proposed Amendment: *This part of the proposed amendment responds to section 7(1) of the Act, which contains a directive to the Commission to "review and amend the Federal sentencing guidelines and policy statements to ensure that . . . if the defendant is subject to a minimal role adjustment under the guidelines, the base offense level for the defendant based solely on drug quantity shall not exceed level 32."*

This part of the proposed amendment implements the directive by adding a new sentence to the end of §2D1.1(a)(5) (the so-called "mitigating role cap"), to reflect the "minimal role cap" of level 32 required by the directive.

Proposed Amendment:

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

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

* * *

(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 an adjustment under subsection (a) of §3B1.2, decrease to level 32.**

* * *

EXHIBIT C

PROPOSED AMENDMENT: TECHNICAL AMENDMENT

Synopsis of Proposed Amendment: *This proposed amendment makes certain technical and conforming changes to commentary in the Guidelines Manual.*

First, the proposed amendment makes certain technical and conforming changes in connection with the amendments that the Commission submitted to Congress on April 29, 2010. See 75 Fed. Reg. 27388 (May 14, 2010). Those conforming changes are as follows:

- (1) Amendment 8 expanded the scope of §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources) to cover not only cultural heritage resources, but also paleontological resources. To reflect this expanded scope, conforming changes are made to §2B1.1 (Theft, Property Destruction, and Fraud), Application Notes 1 and 3.*
- (2) Amendment 9 made a technical change to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition), Application Note 10, to correct an inaccurate citation. To address a parallel inaccurate citation in §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), Application Note 9, a parallel technical change is made there.*
- (3) Amendment 5 eliminated the use of "recency" points in calculating the criminal history score. A conforming change is made in §2P1.1 (Escape, Instigating or Assisting Escape), Application Note 5, to delete an obsolete reference to "recency."*

Second, the proposed amendment makes certain other stylistic and clerical changes to commentary in the Guidelines Manual. It amends §3A1.2 (Official Victim), Application Note 3, to provide an accurate reference to an enhancement in the robbery guideline. It amends §3C1.1 (Obstructing or Impeding the Administration of Justice), Application Note 4, to replace the obsolete term "magistrate" with the term "magistrate judge." It amends §5E1.5 (Costs of Prosecution), Background, to correct a typographical error in a statutory citation. It amends §7B1.4 (Term of Imprisonment), Application Note 2, and §8A1.2 (Application Instructions - Organizations), Application Note 2, to provide accurate references to guideline titles. Finally, it makes certain other stylistic changes to promote stylistic consistency and gender neutrality.

Proposed 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

* * *

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

"Cultural heritage resource" has the meaning given that term in Application Note 1 of 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*).

* * *

3. * * *

(vii) Value of Cultural Heritage Resources *or Paleontological Resources*.—In a case involving a cultural heritage resource *or paleontological resource*, loss attributable to that cultural heritage resource shall be determined in accordance with the rules for determining the "value of the cultural heritage resource" set forth in Application Note 2 of the Commentary to §2B1.5.

* * *

§2K1.3. Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials

* * *

Commentary

* * *

Application Notes:

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9. For purposes of applying subsection (a)(1) or (2), use only those felony convictions that receive

criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). See §4A1.2(a)(2); §4A1.2, comment. (n.3).

* * *

§2P1.1. Escape, Instigating or Assisting Escape

* * *

Commentary

Application Notes:

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5. *Criminal history points under Chapter Four, Part A (Criminal History) are to be determined independently of the application of this guideline. For example, in the case of a defendant serving a one-year sentence of imprisonment at the time of the escape, criminal history points from §4A1.1(b) (for the sentence being served at the time of the escape); **and** §4A1.1(d) (custody status); ~~and §4A1.1(e) (recency)~~ would be applicable.*

* * *

§3A1.2. Official Victim

* * *

Commentary

Application Notes:

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3. *Application of Subsections (a) and (b).—"Motivated by such status", for purposes of subsections (a) and (b), means that the offense of conviction was motivated by the fact that the victim was a government officer or employee, or a member of the immediate family thereof. This adjustment would not apply, for example, where both the defendant and victim were employed by the same government agency and the offense was motivated by a personal dispute. This adjustment also would not apply in the case of a robbery of a postal employee because the offense guideline for robbery contains an enhancement (§2B3.1**(a)(b)(1)**) that takes such conduct into account.*

* * *

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

* * *

Commentary

Application Notes:

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4. Examples of Covered Conduct.—*The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:*

* * *

(F) *providing materially false information to a judge or magistrate judge;*

- 5.

* * *

(B) *making false statements, not under oath, to law enforcement officers, unless Application Note 4(~~g~~G) above applies;*

* * *

9. Accountability for §1B1.3(a)(1)(A) Conduct.—*Under this section, the defendant is accountable for ~~his~~the defendant's own conduct and for conduct that ~~he~~the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.*

* * *

§3C1.2. Reckless Endangerment During Flight

* * *

Commentary

Application Notes:

* * *

5. Under this section, the defendant is accountable for ~~his~~*the defendant's* own conduct and for conduct that ~~he~~*the defendant* aided or abetted, counseled, commanded, induced, procured, or willfully caused.

* * *

§3E1.1. Acceptance of Responsibility

* * *

Commentary

Application Notes:

* * *

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.

* * *

§4B1.3. Criminal Livelihood

* * *

Commentary

Application Notes:

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2. "Engaged in as a livelihood" means that ~~(A)~~ the defendant derived income from the pattern of

criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wage under federal law; and (2B) the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that twelve-month period (e.g., the defendant engaged in criminal conduct rather than regular, legitimate employment; or the defendant's legitimate employment was merely a front for ~~his~~ the defendant's criminal conduct).

* * *

Background: Section 4B1.3 implements 28 U.S.C. § 994(i)(2), which directs the Commission to ensure that the guidelines specify a "substantial term of imprisonment" for a defendant who committed an offense as part of a pattern of criminal conduct from which ~~he~~ the defendant derived a substantial portion of ~~his~~ the defendant's income.

* * *

§5B1.1. Imposition of a Term of Probation

* * *

Commentary

Application Notes:

1. Except where prohibited by statute or by the guideline applicable to the offense in Chapter Two, the guidelines authorize, but do not require, a sentence of probation in the following circumstances:

* * *

(aA) 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). In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.

(bB) 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). In such cases, the court may impose probation only if it imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, where the offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2-8 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or

conditions requiring at least two months of community confinement, home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months.

* * *

§5D1.1. Imposition of a Term of Supervised Release

* * *

Commentary

Application Notes:

1. *Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment if a sentence of imprisonment of more than one year is imposed or if a term of supervised release is required by a specific statute. The court may depart from this guideline and not impose a term of supervised release if it determines that supervised release is neither required by statute nor required for any of the following reasons: (~~1~~A) to protect the public welfare; (~~2~~B) to enforce a financial condition; (~~3~~C) to provide drug or alcohol treatment or testing; (~~4~~D) to assist the reintegration of the defendant into the community; or (~~5~~E) to accomplish any other sentencing purpose authorized by statute.*

* * *

§5E1.5. Costs of Prosecution (Policy Statement)

* * *

Commentary

Application Notes:

* * *

***Background:** Various statutes require the court to impose the costs of prosecution: 7 U.S.C. § 13 (larceny or embezzlement in connection with commodity exchanges); 21 U.S.C. § 844 (simple possession of controlled substances) (unless the court finds that the defendant lacks the ability to pay); 26 U.S.C. § 7201 (attempt to defeat or evade income tax); 26 U.S.C. § 7202 (willful failure to collect or pay tax); 26 U.S.C. § 7203 (willful failure to file income tax return, supply information, or pay tax); 26 U.S.C. § 7206 (fraud and false statements); 26 U.S.C. § 7210 (failure to obey summons); 26 U.S.C. § 7213 (unauthorized disclosure of information); 26 U.S.C. § 7215 (offenses with respect to collected taxes); 26 U.S.C. § 7216 (disclosure or*

use of information by preparers of returns); 26 U.S.C. § 7232 (failure to register or false statement by gasoline manufacturer or producer); 42 U.S.C. § 130220c-9 (improper FOIA disclosure); 43 U.S.C. § 942-6 (rights of way for Alaskan wagon roads).

* * *

§5G1.2. Sentencing on Multiple Counts of Conviction

* * *

Commentary

Application Notes:

1.

* * *

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.

* * *

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

* * *

Commentary

Application Notes:

* * *

2. Application of Subsection (b).—

* * *

(C) Imposition of Sentence.—*If subsection (b) applies, and the court adjusts the sentence for a period of time already served, the court should note on the ~~Judgement~~Judgment in a Criminal Case Order (i) the applicable subsection (e.g., §5G1.3(b)); (ii) the amount of time by which the sentence is being adjusted; (iii) the undischarged term of imprisonment for*

which the adjustment is being given; and (iv) that the sentence imposed is a sentence reduction pursuant to §5G1.3(b) for a period of imprisonment that will not be credited by the Bureau of Prisons.

* * *

§7B1.4. Term of Imprisonment (Policy Statement)

* * *

Commentary

Application Notes:

* * *

2. *Departure from the applicable range of imprisonment in the Revocation Table may be warranted when the court departed from the applicable range for reasons set forth in §4A1.3 (~~Adequacy~~ **Departures Based on Inadequacy** of Criminal History Category) in originally imposing the sentence that resulted in supervision. Additionally, an upward departure may be warranted when a defendant, subsequent to the federal sentence resulting in supervision, has been sentenced for an offense that is not the basis of the violation proceeding.*

* * *

3. *In the case of a Grade C violation that is associated with a high risk of new felonious conduct (e.g., a defendant, under supervision for conviction of criminal sexual abuse, violates the condition that ~~the~~ **the defendant** not associate with children by loitering near a schoolyard), an upward departure may be warranted.*

* * *

§8A1.2. Application Instructions - Organizations

* * *

Commentary

Application Notes:

* * *

2. *The definitions in the Commentary to §1B1.1 (Application Instructions) and the guidelines and commentary in §§1B1.2 through 1B1.8 apply to determinations under this chapter unless otherwise specified. The adjustments in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), C (Obstruction), and E (Acceptance of Responsibility) do not apply. The provisions of Chapter Six (Sentencing Procedures, ~~and~~ Plea Agreements, and Crime Victims' Rights) apply to proceedings in which the defendant is an organization. Guidelines and policy statements not referenced in this chapter, directly or indirectly, do not apply when the defendant is an organization; e.g., the policy statements in Chapter Seven (Violations of Probation and Supervised Release) do not apply to organizations.*

3. *The following are definitions of terms used frequently in this chapter:*

(aA) * * *

(bB) * * *

(cC) * * *

(dD) * * *

(eE) * * *

(fF) * * *

(gG) * * *

(hH) * * *

(iI) * * *

(jJ) * * *