

SECOND REVISED PROPOSED AMENDMENT: DRUGS

Synopsis of Proposed Amendment: *The proposed amendment achieves the following:*

Base Offense Level and Mitigating Role Adjustment

First, the proposed amendment provides a maximum base offense level of 30 if the defendant receives an adjustment under §3B1.2 (Mitigating Role). This base offense level cap is designed to limit the exposure of low level drug offenders to increased penalties based on drug quantities that overstate the defendant's culpability given the defendant's role and function in the drug trafficking offense while also providing a guideline range (97 to 121 months) that is consistent with mandatory minimum penalties.

The proposed mitigating role cap would apply to 6.2% of all defendants sentenced under §2D1.1, and the average length of imprisonment for those effected defendants would decrease from 70 months to 50 months.

Ecstasy Offenses

Second, the proposed amendment amends the Typical Weight Per Unit (Dose, Pill, or Capsule) Table in Application Note 11 of §2D1.1 to more accurately reflect the type and quantity of ecstasy typically trafficked and consumed. Specifically, the proposed amendment adds a reference for MDMA (3,4-methylenedioxymethamphetamine) in the Typical Weight Per Unit Table and sets the typical weight at 250 milligrams per pill. Ecstasy usually is trafficked and used as MDMA, not MDA, the drug currently listed in the table. In addition, the proposed amendment revises upward the typical weight for MDA from 100 milligrams to 250 milligrams and deletes the asterisk that previously indicated that the weight per unit shown is the weight of the actual controlled substance, and not the weight of the mixture or substance containing the controlled substance. The absence of MDMA from the table and the use of an estimate of the actual weight of the controlled substance (MDA) rather than an estimate of the weight of the mixture or substance containing the controlled substance may create an incentive to improperly apply the MDA estimate in cases in which the drug involved is MDMA, resulting in underpunishment in some cases, and generally resulting in unwarranted disparity.

Maintaining Drug-Involved Premises

Third, the proposed amendment addresses concerns that §2D1.8 (Renting or Managing a Drug Establishment; Attempt or Conspiracy) does not adequately punish certain defendants convicted under 21 U.S.C. § 856 (Establishment of manufacturing operations). That statute originally was enacted to target so-called "crack houses" and more recently has been applied to defendants who promote drug use at commercial dance parties frequently called "raves."

Currently, §2D1.8 provides two alternative base offense level computations. For defendants who participate in the underlying controlled substance offense, the offense level from

§2D1.1 applies pursuant to §2D1.8(a)(1). For defendants who had no participation in the underlying controlled substance offense other than allowing use of the premises, subsection (a)(2) provides a four level reduction from the offense level from §2D1.1 and a maximum offense level of 16. Because many club owners and rave promoters who do not participate in the underlying offense nonetheless facilitate, promote, and profit, at least indirectly, from the use of illegal drugs (primarily ecstasy), the maximum offense level of 16 may not adequately account for the seriousness of these offenses.

The proposed amendment increases the maximum offense level under §2D1.8(a)(2) to level 26. A maximum base offense level of 26 is appropriate because, in conjunction with the current instruction in §2D1.8(b) not to apply a mitigating role adjustment under §3B1.2, the resulting base offense level will be the same as for an offender sentenced under §2D1.1 who receives a four level reduction for minimal role. The impact of the maximum offense level increase will be limited, but it will provide increased sentences in appropriate cases. Compared to the 22,639 defendants sentenced under §2D1.1 in FY2000, only 69 were sentenced under §2D1.8. However, 95.6 percent of defendants sentenced under §2D1.8 received a base offense level of 16 and likely would be effected by the proposed maximum offense level increase.

Clarification of Operation of §2D1.1(b)(6)

Fourth, the proposed amendment addresses two application concerns regarding application of the two level reduction under §2D1.1(b)(6). The proposed amendment clarifies that application of the two level reduction under §2D1.1(b)(6) does not depend on whether the defendant is convicted under a statute that carries a mandatory minimum term of imprisonment. Some have expressed the concern that the reference in subsection (b)(6) to the criteria of subsections (a)(1) through (a)(5) of §5C1.2 may lead to the incorrect conclusion that a defendant also must be convicted of one of the offenses specifically listed in §5C1.2 in order to qualify for the two level reduction under §2D1.1(b)(6). This proposed amendment provides an application note in §2D1.1 that specifically states that application of the two level reduction applies regardless of whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment.

The proposed amendment also addresses the interaction of §2D1.1(b)(6) and §5C1.2(b), which provides a minimum offense level of 17 for certain offenders. Specifically, the proposed amendment clarifies that §5C1.2(b) is not pertinent to the application of §2D1.1(b)(6).

Proposed Amendment:

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

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

(1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A),

(b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

- (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below, **except that if the defendant receives an adjustment under §3B1.2 (Mitigating Role), the base offense level under this subsection shall be not more than level 30.**

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Commentary

Statutory Provisions: 21 U.S.C. §§ 841(a), (b)(1)-(3), (7), 960(a), (b); 49 U.S.C. § 46317(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

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- 11. *If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance (e.g., 100 doses of Mescaline at 500 mg per dose = 50 gms of mescaline). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information.*

TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE

Hallucinogens

MDA*	100 mg 250 mg
MDMA	250 mg
Mescaline	500 mg
PCP*	5 mg
Peyote (dry)	12 gm
Peyote (wet)	120 gm
Psilocin*	10 mg
Psilocybe mushrooms (dry)	5 gm
Psilocybe mushrooms (wet)	50 gm

Psilocybin* 10 mg
2,5-Dimethoxy-4-methylamphetamine (STP, DOM)* 3 mg

* * *

21. *Application of Subsection (b)(6).—Subsection (b)(6) applies regardless of 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 application of subsection (b)(6).*

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§2D1.8. Renting or Managing a Drug Establishment; Attempt or Conspiracy

(a) Base Offense Level:

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(2) If the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises, the offense level shall be 4 levels less than the offense level from §2D1.1 applicable to the underlying controlled substance offense, but not greater than level ~~16~~**26**.

(b) Special Instruction

(1) If the offense level is determined under subsection (a)(2), do not apply an adjustment under §3B1.2 (Mitigating Role).

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§3B1.2. Mitigating Role

Commentary

Application Notes:

6. *In a case in which the court applied §2D1.1 and the defendant's base offense level under that guideline was reduced by operation of the maximum base offense level in §2D1.1(c), the court also shall apply the appropriate adjustment under this guideline.*

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