

PROPOSED AMENDMENT: RE-PROMULGATION OF EMERGENCY AMENDMENT REGARDING ENHANCED PENALTIES FOR AMPHETAMINE OR METHAMPHETAMINE LABORATORY OPERATORS AS PERMANENT AMENDMENT

(Proposed Amendment 7 of User Friendly, Volume Two)

Synopsis of Proposed Amendment: *This proposed amendment addresses the "substantial risk" directive in the Methamphetamine and Club Drug Anti-Proliferation Act of 2000 (the "Act"), section 102 of Pub. L. 106–310.*

The Act requires the Commission to promulgate amendments under emergency amendment authority. Although the Act generally provides that the Commission shall promulgate various amendments "as soon as practicable," the substantial risk directive specifically requires that the amendment implementing the directive shall apply "to any offense occurring on or after the date that is 60 days after the date of the enactment" of the Act. Because of ex post facto concerns raised by this 60-day clause, the Commission promulgated an amendment in November 2000 that implemented the substantial risk directive. The amendment became effective December 16, 2000.

The directive instructs the Commission to amend the federal sentencing guidelines with respect to any offense relating to the manufacture, attempt to manufacture, or conspiracy to manufacture amphetamine or methamphetamine in (A) the Controlled Substances Act (21 U.S.C. § 801 et seq.); (B) the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.); or (C) the Maritime Drug Law Enforcement Act (46 U.S.C. App. § 1901 et seq.).

In carrying out this directive, the Act requires the Commission to provide the following enhancements—

(A) if the offense created a substantial risk of harm to human life (other than a life described in subparagraph (B)) or the environment, increase the base offense level for the offense—

(i) by not less than 3 offense levels above the applicable level in effect on the date of the enactment of this Act; or

(ii) if the resulting base offense level after an increase under clause (i) would be less than level 27, to not less than level 27; or

(B) if the offense created a substantial risk of harm to the life of a minor or incompetent, increase the base offense level for the offense—

- (i) by not less than 6 offense levels above the applicable level in effect on the date of the enactment of this Act; or*
- (ii) if the resulting base offense level after an increase under clause (i) would be less than level 30, to not less than level 30.*

The Commission originally published three options to implement the directive on a permanent basis. (See pink pages that follow.) This revised proposed amendment presents what was published originally as Option 2.

The revised proposed amendment proposes to expand the emergency amendment, as promulgated by the Commission on December 16, 2000 (See Option 1 on pink pages), to apply to the manufacture of all controlled substances rather than only amphetamine or methamphetamine. Although the directive specifically instructs the Commission to provide increased penalties for the manufacture of amphetamine and methamphetamine, the Commission may, under its general promulgation authority, expand the scope of an emergency amendment when it re-promulgates the amendment as a permanent amendment. The reason for the proposed expansion is that if the manufacture of any controlled substance creates a substantial risk of harm to human life or the environment, there is a strong argument that the increased penalties should apply regardless of the type of controlled substances involved in the offense. The pertinent parts of the revised proposed amendment are as follows:

- (1) §2D1.1.— The enhancement in subsection (b)(6) is proposed to apply to the manufacture of any controlled substance, not just to the manufacture of amphetamine or methamphetamine. The expansion to all controlled substances in §2D1.1 is rather straightforward. Conforming changes are made to the Commentary, but the amendment to §2D1.1 otherwise remains the same as the emergency amendment.*
- (2) §2D1.10.—The proposed expansion to all controlled substances in §2D1.10 requires a restructuring of the guideline (as it was amended by the emergency amendment).*

First, this revised amendment proposes to increase the alternative base offense level in subsection (a)(1) from "3 plus" to "6 plus the offense level from the Drug Quantity Table in §2D1.1". This proposed increase corresponds to the proposed deletion of subsection (b)(1)(A) of the emergency amendment. Subsection (b)(1)(A) currently provides a three-level increase "if the offense involved the manufacture of amphetamine or methamphetamine," without making application of the enhancement dependent upon whether the offense also involved a substantial risk of either harm to human life or the environment. This structure was used in the emergency amendment because §2D1.10 applies only to convictions under 21 U.S.C. § 858, and the creation of a substantial risk of harm to human life is an element of a section 858 offense. Therefore, the base offense

level already takes into account the substantial risk of harm to human life. Consideration of whether the offense involved a substantial risk of harm to the environment was unnecessary because the directive predicated application of the enhancement on substantial risk of harm to human life or to the environment, and creation of a substantial risk of harm to human life is necessarily present because it is an element of the offense.

If the emergency amendment is to be expanded to apply to the manufacture of all controlled substances, the enhancement no longer is appropriate. However, in order not to lose the three-level increase that was provided by this enhancement, the three levels from this enhancement are built into the alternative base offense level in subsection (a)(1).

Second, this revised proposed amendment increases the current alternative base offense level in subsection (a)(2) from level 20 to level 27. Although this option is consistent with expanding the entire emergency amendment to all controlled substances, the impact of this change is likely to be significant for lower level drug offenders.

Finally, the revised proposed amendment makes the enhancement that applies if the offense created a substantial risk of harm to the life of a minor or an incompetent applicable to all controlled substances. Conforming amendments are made to the Commentary.

(3) The revised proposed amendment also modifies the Background Commentary of §§2D1.1 and 2D1.10 to make clear that the Commission is implementing the directive "in a broader form."

Proposed Amendment:

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

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(b) Specific Offense Characteristics

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(6) (Apply the greater):

(A) If the offense (i) involved the manufacture of ~~amphetamine or methamphetamine~~ a controlled substance; and (ii) created a substantial risk of harm to (I) human life other than a life described in (b)(6)(B); or

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

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

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Commentary

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Application Notes:

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20. Hazardous or Toxic Substances.—Subsection (b)(5) 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), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b). In some cases, the enhancement under subsection (b)(5) may not adequately account 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, any costs of environmental cleanup and harm to individuals or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).

21. Substantial Risk of Harm Associated with the Manufacture of ~~Amphetamine and Methamphetamine~~ Controlled Substances.—

(A) Factors to Consider.—In determining, for purposes of subsection (b)(6), whether the offense created a substantial risk of harm to the environment or human life, the court may consider factors such as the following:

- (i) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, or the manner in which the chemicals or substances were stored.
- (ii) The manner in which hazardous or toxic substances were disposed, or the likelihood of release into the environment of hazardous or toxic substances.

- (iii) *The duration of the offense or extent of the manufacturing operation.*
- (iv) *The location of the ~~amphetamine or methamphetamine~~illicit laboratory (e.g., in a residential neighborhood or a remote area) and the number of human lives placed at substantial risk of harm.*

(B) Definitions.—For purposes of subsection (b)(6):

"Incompetent" means an individual who is incapable of taking care of the individual's self or property because of a mental or physical illness or disability, mental retardation, or senility.

"Minor" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).

Background:

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Subsections (b)(5) implements the instruction to the Commission in section 303 of Public Law 103–237.

Subsections (b)(6) implements, in a broader form, the instruction to the Commission in section 102 of Public Law 106–878310.

§2D1.10. Endangering Human Life While Illegally Manufacturing a Controlled Substance; Attempt or Conspiracy

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

- (1) **36** plus the offense level from the Drug Quantity Table in §2D1.1; or
- (2) **2027**.

(b) Specific Offense Characteristic

(1) ~~(Apply the greater):~~

~~(A) — If the offense involved the manufacture of amphetamine or methamphetamine, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.~~

~~(B) If the offense (i) involved the manufacture of amphetamine or~~

~~methamphetamine, and (ii)~~ created a substantial risk of harm to the life of a minor or an incompetent, increase by ~~63~~ levels. If the resulting offense level is less than level ~~30~~, increase to level ~~30~~.

Commentary

Statutory Provision: 21 U.S.C. § 858.

Application Note:

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

(A) Factors to Consider.—In determining, for purposes of subsections (b)(1), whether the offense created a substantial risk of harm to the life of a minor or an incompetent, the court may consider factors such as the following:

- (i) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, or the manner in which the chemicals or substances were stored.
- (ii) The manner in which hazardous or toxic substances were disposed, or the likelihood of release into the environment of hazardous or toxic substances.
- (iii) The duration of the offense or extent of the manufacturing operation.
- (iv) The location of the ~~amphetamine or methamphetamine laboratory~~ illicit (e.g., in a residential neighborhood or a remote area) and the number of human lives placed at substantial risk of harm.

(B) Definitions.—For purposes of subsection (b)(1):

"Incompetent" means an individual who is incapable of taking care of the individual's self or property because of a mental or physical illness or disability, mental retardation, or senility.

"Minor" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).

Background: Subsections (a)(2) and (b)(1) implements, in a broader form, the instruction to the Commission in section 102 of Public Law 106–878310.