

REVISED PROPOSED AMENDMENT: SAFETY VALVE (Proposed Amendment 9 of User Friendly, Volume Two)

Synopsis of Revised Proposed Amendment: *This revised proposed amendment deletes the language in §2D1.1(b)(6) that limits application of the safety valve to defendants at offense levels 26 and greater. The proposed amendment also adds subsection (b) to §5C1.2. This new subsection provides that a defendant who meets the criteria for the safety valve and for whom a statutorily required minimum sentence is at least five years shall not receive a Chapter Two and Three offense level lower than level 17. The level 17 minimum derives from the provision in the safety valve legislation that the lowest sentence that should result from the safety valve is 24 months, which is the bottom of the range at level 17, Criminal History Category I. The proposed amendment also deletes commentary that is outdated because of the operation of §5C1.2 (Limitation on Applicability on Statutory Minimum Sentences in Certain Cases). Conforming changes are made to §5C1.2.*

Please note that this revised proposed amendment differs from the published version only with respect to §2D1.1(b)(6). The language of this subsection has been modified slightly to eliminate an ambiguity that existed in the published version.

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) 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) and the offense level determined above is level ~~26~~ or greater, decrease by ~~2~~ levels.

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Commentary

Application Notes:

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~~14. Where (A) the amount of the controlled substance for which the defendant is accountable under §1B1.3 (Relevant Conduct) results in a base offense level greater than 36, (B) the~~

~~court finds that this offense level overrepresents the defendant's culpability in the criminal activity, and (C) the defendant qualifies for a mitigating role adjustment under §3B1.2 (Mitigating Role), a downward departure may be warranted. The court may depart to a sentence no lower than the guideline range that would have resulted if the defendant's Chapter Two offense level had been offense level 36. Provided, that a defendant is not eligible for a downward departure under this provision if the defendant:—~~

- ~~—— (a) has one or more prior felony convictions for a crime of violence or a controlled substance offense as defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1);~~
- ~~—— (b) qualifies for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill);—~~
- ~~—— (c) possessed or induced another participant to use or possess a firearm in the offense;—~~
- ~~—— (d) had decision-making authority;~~
- ~~—— (e) owned the controlled substance or financed any part of the offense; or~~
- ~~—— (f) sold the controlled substance or played a substantial part in negotiating the terms of the sale.~~

~~—— Example: A defendant, who the court finds meets the criteria for a downward departure under this provision, has a Chapter Two offense level of 38, a 2-level reduction for a minor role from §3B1.2, and a 3-level reduction for acceptance of responsibility from §3E1.1. His final offense level is 33. If the defendant's Chapter Two offense level had been 36, the 2-level reduction for a minor role and 3-level reduction for acceptance of responsibility would have resulted in a final offense level of 31. Therefore, under this provision, a downward departure not to exceed 2 levels (from level 33 to level 31) would be authorized.~~

The Commentary to §2D1.1 captioned "Application Notes" is amended by redesignating Notes 15 through 20 as Notes 14 through 19, respectively.

§5C1.2. Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

- (a) ~~In~~ Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth verbatim below:
 - (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

- (b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level 17.

Commentary

Application Notes:

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- 2. "Dangerous weapon" and "firearm," as used in ~~subdivision (2)~~ subsection (a)(2), and "serious bodily injury," as used in ~~subdivision~~ subsection (a)(3), are defined in the Commentary to §1B1.1 (Application Instructions).
- 3. "Offense," as used in ~~subdivisions~~ subsection (a)(2)-(4), and "offense or offenses that were part of the same course of conduct or of a common scheme or plan," as used in ~~subdivision~~ subsection (a)(5), mean the offense of conviction and all relevant conduct.
- 4. Consistent with §1B1.3 (Relevant Conduct), the term "defendant," as used in ~~subdivision~~ subsection (a)(2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.
- 5. "Organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines," as used in ~~subdivision~~ subsection (a)(4), means a defendant

who receives an adjustment for an aggravating role under §3B1.1 (Aggravating Role).

6. *"Engaged in a continuing criminal enterprise," as used in ~~subdivision~~ subsection (a)(4), is defined in 21 U.S.C. § 848(c). As a practical matter, it should not be necessary to apply this prong of ~~subdivision~~ subsection (a)(4) because (i) this section does not apply to a conviction under 21 U.S.C. § 848, and (ii) any defendant who "engaged in a continuing criminal enterprise" but is convicted of an offense to which this section applies will be an "organizer, leader, manager, or supervisor of others in the offense."*
7. *Information disclosed by the defendant with respect to ~~subdivision~~ subsection (a)(5) may be considered in determining the applicable guideline range, except where the use of such information is restricted under the provisions of §1B1.8 (Use of Certain Information). That is, ~~subdivision~~ subsection (a)(5) does not provide an independent basis for restricting the use of information disclosed by the defendant.*