

# **Amendments to the United States Sentencing Guidelines**

Effective November 1, 2004

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## **Highlights of Key Points**

On May 1, 2004, the Sentencing Commission transmitted to Congress a series of amendments that will take effect on November 1, 2004, absent Congressional action to disapprove any or all of the amendments. The amendments will apply at sentencings held after November 1, 2004, except to the extent that application of any provision would violate the *ex post facto* clause of the United States Constitution, which prohibits retroactive increases in punishment. With limited exception, as noted below, most of the proposed amendments increase penalties for existing crimes or establish guidelines for new offenses. In cases involving those few amendments that may result in a lower guideline range, you may wish to continue the sentencing until after November 1, 2004. A reader-friendly version of the proposed amendments is posted on the Commission website at: <http://www.ussc.gov/2004guid/RFMay04.pdf>

## **Amendments That May Result in Reduced Sentences**

Four of the amendments that the Commission has submitted to Congress may result in reduced sentences for some offenders. If a case comes up for sentencing before the amendment goes into effect on November 1, the new amendment will not apply. Although the Commission has the authority to designate these amendments for retroactive application to persons already sentenced, it has not taken this action. Moreover, it is unclear whether the Commission will at some later time designate any of these amendments for retroactive application. Consequently, if you have a case involving any of these four guidelines, you may want to seek a continuance of sentencing until after November 1.

If you are unable to obtain a continuance, you may wish to seek a downward departure on the basis that the current guideline overstates the culpability of the defendant as it is not clear that simply relying on the pending amendment will get you a departure. See, e.g., United States v. Morelli, 169 F.3d 798, 809, n.13 (3d Cir. 1999) (“proposed amendments to the Sentencing Guidelines do not provide independent legal authority for a downward departure”); accord United States v. Anderson, 82 F.3d 436 (D.C. Cir. 1996) (pending crack cocaine amendment not a basis for departure); see also 18 U.S.C. § 3553(b) (“In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.”).

The amendments that have a potential for reducing the sentence are:

**1. U.S.S.G. § 2A2.2 – Aggravated Assault**

The base offense level for aggravated assault will be decreased from offense level 15 to offense level 14. This change may not result in a reduced sentence, however, as the amendment, at the same time, proposes to increase the existing enhancements for bodily injury and also adopts new enhancements.

**2. U.S.S.G. § 2D1.1, comment. (n. 12) – Sting Operations**

Resolving a circuit conflict with respect to reverse drug stings, the new amendment makes clear that the court shall exclude from the offense level determination the amount of the controlled substance, if any, that the defendant establishes that he or she did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, regardless of whether the defendant agreed to be the seller or the buyer of the controlled substance. The amendment addresses a circuit conflict regarding the interpretation of the last sentence in Application Note 12 of §2D1.1, which covers offenses involving an agreement to sell a specific quantity of a controlled substance. See United States v. Smack, 347 F.3d 533 (3rd Cir. 2003) (criticizing language of note); compare United States v. Gomez, 103 F.3d 249, 252-53 (2d Cir. 1997) (holding that the last sentence of the note is intended to apply only to sellers); United States v. Perez de Dios, 237 F.3d 1192 (10th Cir. 2001) (same); United States v. Brassard, 212 F.3d 54, 58 (1st Cir. 2000) (same), with United States v. Minore, 40 Fed. Appx. 536, 537 (9th Cir. 2002) (mem. op.) (applying the final sentence of the new Note 12 to a buyer in reverse sting operation); United States v. Estrada, 256 F.3d 466, 476 (7th Cir. 2001) (same).

The final sentence to U.S.S.G. § 2D1.1, comment. (n.12), will read :

If, however, the defendant establishes that the defendant did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing.

### 3. U.S.S.G. § 2D1.11 – Listed Chemicals

The Commission proposes to extend to defendants convicted of trafficking in listed precursor chemicals, sentenced under U.S.S.G. § 2D1.11, a version of the “Role Cap” that it adopted two years ago.<sup>1</sup> The new amendment uses a new method – similar but not identical to the “role cap” – to address the overstatement of culpability in the drug guidelines. It reduces somewhat the effect of quantity on the offense level by giving greater consideration to the defendant’s role in the offense.

At the same time, the Commission used a different method to accomplish a more equitable measure of culpability. The new approach “compresses” rather than “caps” the effect of quantity and provides for a graduated reduction based on the quantity of drugs.

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<sup>1</sup> In November 2001, the Sentencing Commission adopted an amendment to the drug guideline that, as the Commission explained:

modifie[d] § 2D1.1(a)(3) to provide a maximum base offense level of level 30 if the defendant receives an adjustment under § 3B1.2 (Mitigating Role). The maximum base offense level somewhat limits the sentencing impact of drug quantity for offenders who perform relatively low level trafficking functions, have little authority in the drug trafficking organization, and have a lower degree of individual culpability (e.g., “mules” or “couriers” whose most serious trafficking function is transporting drugs and who qualify for a mitigating role adjustment.

This part of the amendment responds to concerns that base offense levels derived from the Drug Quantity Table in § 2D1.1 overstates the culpability of certain drug offenders who meet the criteria for a mitigating role adjustment under § 3B1.2. The Commission determined that, ordinarily, a maximum base offense level of level 30 adequately reflects the culpability of a defendant who qualifies for a mitigating role adjustment. Other aggravating adjustments in the trafficking guideline (e.g., the weapon enhancement at § 2D1.1(b)(1)), or other general, aggravating adjustments in Chapter Three (Adjustments), may increase the offense level above level 30. The maximum base offense level is expected to apply narrowly, affecting approximately six percent of all drug trafficking offenders.

As amended, Section 2D1.11(a) will read:

**(a) Base Offense Level:** The offense level from the Chemical Quantity Table set forth in subsection (d) or (e), as appropriate, except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (e) 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.

Section 2D1.1(a)(3) will be amended to provide:

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.

#### **4. U.S.S.G. § 4B1.4(b)(3)(A) – Armed Career Criminal Enhancement.**

The amendment eliminates a double-counting issue for defendants who face conviction of both a violation of 18 U.S.C. § 924(c) and of 18 U.S.C. § 922(g) and meet the requirements for enhanced punishment under the Armed Career Criminal Act, 18 U.S.C. § 924(e). In such cases, do not enhance the Offense Level under U.S.S.G. § 4B1.4(b)(3)(A) to Offense Level 34, enhance it only to Offense Level 33; also do not increase the Criminal History category to VI, increase it only to category IV.

#### **Current Application & Ex Post Facto Issues**

For persons coming up for sentencing, the court must apply the guidelines that are in effect on the date the defendant is sentenced. See 18 U.S.C. § 3553(a)(4)(A)(i); U.S.S.G. § 1B1.11. Indeed, on April 30, 2003, Congress amended § 3553(a)(4) to provide that courts must also apply any changes made by Congress, even if not yet incorporated into the official sentencing guidelines. 18 U.S.C. § 3553(a)(4)(A)(i) (courts shall consider the current guidelines “subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28)).” PROTECT Act, Pub. L. 108-21, § 401(j)(5).

Notwithstanding this statutory requirement, the *ex post facto* clause in Article 1, § 9, cl. 3 of the United States Constitution prohibits retroactive increases in punishment. Collins v. Youngblood, 497 U.S. 37, 42 (1990). Hence, if a court determines that a current guideline, and any applicable amendments, “makes more burdensome the punishment for a crime, after its commission” the court cannot apply the amendments but must instead apply the guideline in effect at the time the offense was committed. Id.; see also U.S.S.G. § 1B1.11(b)(1).<sup>2</sup> For *ex post facto* purposes, the controlling date is the “last date of the offense, as alleged in the indictment.” United States v. Broderson, 67 F.3d 452, 456 (2d Cir.1995); U.S.S.G. § 1B1.11(b), comment. (n. 2).<sup>3</sup>

### New Amendments

1. **Homicide, Manslaughter & Assault Guidelines** – Generally, the base offense level for all these guidelines was increased and other enhancements added or existing ones increased.
  - a. **§ 2A1.1 – First Degree Murder**
  - b. **§ 2A1.2 – Second Degree Murder**
  - c. **§ 2A1.3 – Voluntary Manslaughter**
  - d. **§ 2A1.4 – Involuntary Manslaughter**
  - e. **§ 2A1.5 – Conspiracy or Solicitation to Commit Murder**

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<sup>2</sup> Section 1B1.11(b)(1) provides:

If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

<sup>3</sup> For cases addressing the *ex post facto* issue in the guidelines context, see United States v. Haroutunian, 920 F.2d 1040, 1042 (1<sup>st</sup> Cir. 1990); United States v. Young, 932 F.2d 1035, 1038 n.3 (2d Cir. 1991); United States v. Yeaman, 248 F.3d 223, 227-28 (3d Cir. 2001) (prohibition on departing downward for post-sentence rehabilitation, § 5K2.19 could not be applied to an offense that had been committed before the provision came into effect); United States v. Morrow, 925 F.2d 779, 782-83 (4<sup>th</sup> Cir. 1991); United States v. Suarez, 911 F.2d 1016, 1021-22 (5<sup>th</sup> Cir. 1990); United States v. Yagi, 947 F.2d 211, 213 n.1 (6<sup>th</sup> Cir. 1991); United States v. Seacott, 15 F.3d 1380, 1386 (7<sup>th</sup> Cir. 1994); United States v. Bell, 991 F.2d 1445, 1448-52 (8<sup>th</sup> Cir. 1993); United States v. Sweeten, 933 F.2d 765, 772 (9<sup>th</sup> Cir. 1991); United States v. Smith, 930 F.1450 (10<sup>th</sup> Cir. 1991); United States v. Worthy, 915 F.2d 1514, 1516 n.7 (11<sup>th</sup> Cir. 1990); United States v. Clark, 8 F.3d 839, 844-45 (D.C. Cir. 1993) (departure based on lack of youthful guidance was not precluded where offense was committed before effective date of § 5H1.12, prohibiting such departures).

- f.     **§ 2A2.1 – Assault with Intent to Commit Murder**
  - g.     **§ 2A2.2 – Aggravated Assault**
  - h.     **§ 2A2.3 – Minor Assault**
  - i.     **§ 2A2.4 – Obstructing or Impeding Officers**
- 2. Child Pornography & Sexual Abuse Offenses** – This amendment implements a number of the directives in the PROTECT Act, including increasing base offense levels to correspond to new or increased statutory mandatory minimum and maximum penalties; it also makes other changes that increase punishment.
- a.     **§ 2A3.1 – Criminal Sexual Abuse.**
  - b.     **§ 2A3.2 – Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years.**
  - c.     **§ 2A3.3 – Criminal Sexual Abuse of a Ward.**
  - d.     **§ 2A3.4 – Abusive Sexual Contact.**
  - e.     **§ 2G1.1 – Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other Than a Minor.**
  - f.     **§ 2G1.3 – Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; use of Interstate Facilities to Transport Information about a Minor (new guideline).**
  - g.     **§ 2G2.1(a) – Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material.**
  - h.     **§ 2G2.2 – Trafficking in, Receiving, Soliciting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor.**
  - i.     **§ 2G3.1 – Importing, Mailing, or Transporting Obscene Matter.**
  - j.     **§ 3D1.2(d) – Groups of Closely Related Counts.**
  - k.     **§ 5B1.3(d)(7) – Conditions of Probation (Sex Offense).**
  - l.     **§ 5D1.2 – Terms of Supervised Release.**

- m.     **§ 5D1.3 – Conditions of Supervised Release.**
  - n.     **§ 7B1.3(g) – Revocation of Probation or Supervised Release.**
3.     **CAN-SPAM Offenses – § 2B1.1** – Creates new adjustments in the white collar guideline applicable to five new felony offenses, codified at 18 U.S.C. § 1937, created by the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Act) of 2003, Pub. L. 108–187, which went into effect January 1, 2004. The CAN-SPAM Act criminalized conduct involving the transmitting of large volumes of unsolicited electronic mail that may facilitate fraud, identity theft, obscenity, child pornography and sexual exploitation of children.
  4.     **Public Corruption Offenses** – Increases punishment for bribery, gratuity and “honest services” cases.
    - a.     **§ 2C1.1 – Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving Honest Services.** Consolidates § 2C1.1, the bribery guideline with § 2C1.7, the guideline for fraud involving deprivation of “honest services.”
    - b.     **§ 2C1.2 – Offering, Giving, Soliciting, or Receiving a Gratuity.** Consolidates §2C1.2, the gratuity guideline with § 2C1.6, the guideline for loans or gratuities involving bank loans.
  5.     **Drug Offenses – § 2D1.1, 2D1.11, 2D1.12.**
    - a.     **GHB – Increases penalties for these offenses** and adds a “special instruction” directing application of the vulnerable victim adjustment (§ 3A1.1) if the defendant commits a sexual offense by distributing a controlled substance to another individual.
    - b.     **Mass Marketing.** Adds two level enhancement for mass marketing of controlled substances, listed chemicals, or prohibited equipment.
    - c.     **Analogues of Controlled Substances.** Provides a uniform mechanism for determining sentences in cases involving drug analogues.
    - d.     **Sting Operations – § 2D1.1, comment. (n. 12).** Resolving a circuit split, clarifies that the commentary applies to sting operations, regardless of whether the defendant is the buyer or seller, providing that the Court “shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing.”
    - e.     **Adds white phosphorus and hypophosphorous acid to Chemical Quantity table.**
  6.     **Reduction in Drug Offense Level for Mitigating Role Defendants – § 2D1.1(a)(3) & §**

**2D1.11(a).** See discussion above.

7. **MANPADS & Explosive Devices – § 2K2.1.** The amendment provides a steep increase of 15 levels if the destructive device involved in the offense was a man-portable air defense system (MANPADS), a portable rocket, a missile, or a device used for launching a portable rocket or missile; and eliminates the cumulative specific offense characteristic offense level cap (29 levels) for these types of destructive devices. For all other destructive devices, the amendment maintains the two-level enhancement and the cumulative specific offense characteristic cap.
8. **Body Armor Offenses – § 2K2.6.** Creates a new guideline, with a base offense level 10 for a new offense, codified at 18 U.S.C. § 931, which was created by section 11009 of the 21<sup>st</sup> Century Department of Justice Appropriations Authorization Act, Pub. L. 107–273. Section 931 prohibits the purchase, ownership, or possession of body armor (bullet proof vests and such) by individuals who have been convicted of either a federal or state felony that is a crime of violence and carries a statutory maximum term of imprisonment of three years. The amendment also provides a 4-level upward adjustment at §2K2.6(b)(1) "[i]f the defendant used the body armor in connection with another felony offense." A "felony offense" for purposes of the §2K2.6(b)(1) enhancement need not have been brought or a conviction sustained.
9. **Immigration Offenses – § 2L2.2(b).** The amendment provides a new 4-level upward adjustment at U.S.S.G. § 2L2.2(b)(3) (Fraudulently Acquiring or Using US Passports) defendant fraudulently obtained or used a United States passport. The amendment also adds commentary that explains that "use" is to be construed broadly and includes the attempted renewal of a previously issued United States passport. U.S.S.G. § 2L2.2, comment. (n. 3). The amendment also invites an upward departure if the defendant fraudulently obtained or used a United States passport with the intent to engage in terrorist activity. U.S.S.G. § 2L2.2, comment. (n. 5).
10. **Hazardous Materials Offenses - § 2Q1.2.** Adds a 2-level enhancement if the offense involves a conviction for transporting hazardous materials prosecuted under 49 U.S.C. § 43612 or under 49 U.S.C. § 5124. Also adds upward departure provisions to the commentary that may apply if the defendant has a terrorist motive or if the offense resulted in extreme psychological injury.
11. **Chapter 8 – Organizational Guidelines.** Modifies a number of provisions in the organizational guidelines.

**12. Technical & Conforming Amendments (9-part amendment).** Five of the amendments in this group involve substantive changes. These are:

- a. **§2B1.1, comment. (n. 4(C)(ii)).** Expands the special “multiple victim rule” in Application Note 4(C)(ii) of §2B1.1 to include theft of mail from housing unit cluster boxes, whether owned by the United States Postal Service or otherwise. The amendment provides a presumption that a theft from such a cluster box involves the number of victims corresponding to the number of mailboxes contained in the cluster box.
- b. **§2B1.1(b)(10).** Makes the 2-level enhancement in § 2B1.1(b)(10) with a minimum offense level of 12 applicable to offenses involving “authentication features.” The amendment responds to the Secure Authentication Feature and Enhanced Identification Defense Act of 2003 (the "SAFE ID Act"), § 607 of the PROTECT Act, Pub. L. 108–21, which created a new offense at 18 U.S.C. § 1028(a)(8) that prohibits the trafficking of authentication features (e.g., a hologram or symbol used by a government agency to determine whether a document is counterfeit, altered, or otherwise falsified).
- c. **§ 2K2.1 and § 4B1.1. Career Offender & Firearms Offenses involving short-barreled rifles and shotguns, machine guns, silencers, destructive devices and other 26 U.S.C. § 5845(a) firearms.** Expands the definition of “crime of violence” to include unlawful possession of any firearm described in § 5845(a). A conviction for being a felon-in-possession of one of the § 5845(a) firearms will after November 1, 2004, be a “crime of violence” for purposes of the career offender guidelines that enhanced base offense levels in § 2K2.1.
- d. **§ 2X6.1 (Use of a Minor to Commit a Crime of Violence).** Creates a new guideline in response to a new offense, codified at 18 U.S.C. § 25, which prohibits any person 18 years of age or older from intentionally using a minor to commit a crime of violence or to assist in avoiding detection or apprehension for such offense. See PROTECT Act, § 601. The new guideline directs the court to increase by 4 levels the offense level from the guideline applicable to the underlying crime of violence. Commentary provides that an adjustment under §3B1.4 (Using a Minor to Commit a Crime) does not apply if §2X6.1 is used and provides rules for grouping multiple counts.
- e. **U.S.S.G. § 4B1.4(b)(3)(A) – Armed Career Criminal Enhancement.** As described above, this new provision eliminates a double-counting issue for defendants whose stand convicted of both a violation of 18 U.S.C. § 924(c) and of 18 U.S.C. § 922(g) and are Armed Career Criminals as defined in 18 U.S.C. § 924(e). In such cases, do not enhance the Offense Level under U.S.S.G. § 4B1.4(b)(3)(A) to Offense Level 34, enhance it only to Offense Level 33; also do not increase the Criminal History category to VI, increase it only to category IV.