

commentary to conform to statutory redesignations. Section 2D1.11(b)(2) currently provides a three-level reduction if the defendant was convicted of violating 21 U.S.C. 841(d)(2), (g)(1), or 960(d)(2), unless the defendant knew or believed that the listed chemical was to be used to manufacture a controlled substance unlawfully. Those statutory references should be 21 U.S.C. 841(c)(2), (f)(1), or 960(d)(2) to conform to statutory redesignations. The proposed amendment also expands application of § 2D1.11(b)(2) to include 21 U.S.C. 960(d)(3) and (d)(4) among the statutes of conviction for which the three-level reduction at subsection (b)(2) is available. Currently, the reduction applies in cases in which the defendant (convicted under 21 U.S.C. 841(c)(2), (f)(1), or 960(d)(2), as properly redesignated) did not have knowledge or actual belief that the listed chemical would be used to manufacture a controlled substance. Section 841(c)(2) of title 21, United States Code, requires a finding of either knowledge or a reasonable cause to believe that the listed chemical would be used to manufacture a controlled substance. Sections 960(d)(3) and (d)(4) of title 21, United States Code, similarly require a finding that a person who imports, exports, or serves as a broker for, a listed chemical knows or has a reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance. Appendix A (Statutory Index) currently references 21 U.S.C. 960(d)(3) and (d)(4) to § 2D1.11, but neither statute is included for purposes of the reduction. Given that the reduction applies in 21 U.S.C. 841(c)(2) cases in which the defendant had a reasonable cause to believe, but not knowledge or actual belief, that the listed chemical would be used to manufacture a controlled substance, and the mens rea in 21 U.S.C. 841(c)(2) is the same as in 21 U.S.C. 960(d)(3) and (d)(4), the proposed amendment adds 21 U.S.C. 960(d)(3) and (d)(4) to 2D1.11(b)(2).

Fifth, the proposed amendment adds white phosphorus and hypophosphorous acid to the Chemical Quantity Table in § 2D1.11(e). Both substances are List I chemicals used in the production of methamphetamine and, according to the DEA, are direct substitutes for red phosphorus. The Commission amended § 2D1.11(e) last amendment cycle to include red phosphorus but because of **Federal Register** notice issues was unable at that time to include white phosphorus and hypophosphorous acid.

Sixth, the proposed amendment also modifies Appendix A (Statutory Index) by deleting the reference to 21 U.S.C. 957, which is not a substantive criminal offense but rather a registration provision for which violations are prosecuted under 21 U.S.C. 960(a) or (b) (for controlled substances) or section 960(d)(6) (for listed chemicals).

Finally, four issues for comment follow the proposed amendment regarding (1) offenses involving anhydrous ammonia; (2) an enhancement for distribution of controlled substances and other illegal substances over the Internet; (3) drug facilitated sexual assault; and (4) a circuit conflict pertaining to Application Note 12 of § 2D1.1, which was most recently noted in *United States v. Smack*, F.3d ___, 2003 WL 22419914 (3rd Cir., October 24, 2003).

Proposed Amendment:

Section 2D1.1(c) is amended in subdivision (10) by striking “or Schedule III substances” in the thirteenth entry; and by inserting after the thirteenth entry the following: “40,000 or more units of Schedule III substances;”;

in subdivision (11) by striking “or Schedule III substances” in the thirteenth entry; and by inserting after the thirteenth entry the following: “At least 20,000 but less than 40,000 units of Schedule III substances;”;

in subdivision (12) by striking “or Schedule III substances” in the thirteenth entry; and by inserting after the thirteenth entry the following:

“At least 10,000 but less than 20,000 units of Schedule III substances;”;

in subdivision (13) by striking “or Schedule III substances” in the thirteenth entry; and by inserting after the thirteenth entry the following:

“At least 5,000 but less than 10,000 units of Schedule III substances;”;

in subdivision (14) by striking “or Schedule III substances” in the thirteenth entry; and by inserting after the thirteenth entry the following:

“At least 2,500 but less than 5,000 units of Schedule III substances;”;

in subdivision (15) by striking “or Schedule III substances” in the fourth entry; and by inserting after the fourth entry the following:

“At least 1,000 but less than 2,500 units of Schedule III substances;”;

in subdivision (16) by striking “or Schedule III substances” in the fourth entry; and by inserting after the fourth entry the following:

“At least 250 but less than 1,000 units of Schedule III substances;”;

and in subdivision (17) by striking “or Schedule III substances” in the fourth entry; and by inserting after the fourth entry the following:

“Less than 250 units of Schedule III substances;”.

Section 2D1.1 is amended in the subdivision captioned “*Notes to the Drug Quantity Table” in Note (F) in the first sentence by inserting “(except gamma-hydroxybutyric acid)” after “Depressants”; and in the second sentence by inserting “(except gamma-hydroxybutyric acid)” after “substance”.

The Commentary to § 2D1.1 captioned “Application Notes” is amended in Note 5 by striking “and” after “includes all salts, isomers;” and by inserting “, and, except as otherwise provided, any analogue of that controlled substance” after “all salts of isomers”.

The Commentary to § 2D1.1 captioned “Application Notes” is amended in Note 10 in the Drug Equivalency Tables by striking the subdivision captioned “Schedule I or II Depressants” in its entirety and inserting the following new subdivisions:

“Schedule I or II Depressants (Except Gamma-Hydroxybutyric Acid)

1 unit of a Schedule I or II Depressant (except gamma-hydroxybutyric acid) = 1 gm of marihuana

Gamma-Hydroxybutyric Acid

[Option One: 1 liter of gamma-hydroxybutyric acid = 26,420 gm of marihuana]

[Option Two: 1 liter of gamma-hydroxybutyric acid = 5,284 gm of marihuana]”.

Section 2D1.11(b)(2) is amended by striking “21 U.S.C. §§ 841(d)(2), (g)(1), or 960(d)(2),” and inserting “21 U.S.C. § 841(c)(2), (f)(1), or § 960(d)(2), (d)(3), or (d)(4),”.

Section 2D1.11(e) is amended in subdivision (1) by striking “10,000 KG or more of Gamma-butyrolactone;” and inserting “[757][3785] L or more of Gamma-butyrolactone;” and by inserting “, White Phosphorus, or Hypophosphorous Acid” after “Red Phosphorus”;

in subdivision (2) by striking “At least 3,000 KG but less than 10,000 KG of Gamma-butyrolactone;” and inserting “At least [227.1][1135.5] L but less than [757][3785] L of Gamma-butyrolactone;” and by inserting “, White Phosphorus, or Hypophosphorous Acid” after “Red Phosphorus”;

in subdivision (3) by striking “At least 1,000 KG but less than 3,000 KG of Gamma-butyrolactone;” and inserting “At least [75.7][378.5] L but less than [227.1][1135.5] L of Gamma-butyrolactone;” and by inserting “, White Phosphorus, or