

Hypophosphorous Acid" after "Red Phosphorus";

in subdivision (4) by striking "At least 700 KG but less than 1,000 KG of Gamma-butyrolactone;" and inserting "At least [53][265] L but less than [75.7][378.5] L of Gamma-butyrolactone;"; and by inserting ", White Phosphorus, or Hypophosphorous Acid" after "Red Phosphorus";

in subdivision (5) by striking "At least 400 KG but less than 700 KG of Gamma-butyrolactone;" and inserting "At least [30.3][151.4] L but less than [53][265] L of Gamma-butyrolactone;"; and by inserting ", White Phosphorus, or Hypophosphorous Acid" after "Red Phosphorus";

in subdivision (6) by striking "At least 100 KG but less than 400 KG of Gamma-butyrolactone;" and inserting "At least [7.6][37.9] L but less than [30.3][151.4] L of Gamma-butyrolactone;"; and by inserting ", White Phosphorus, or Hypophosphorous Acid" after "Red Phosphorus";

in subdivision (7) by striking "At least 80 KG but less than 100 KG of Gamma-butyrolactone;" and inserting "At least [6.1][30.3] L but less than [7.6][37.9] L of Gamma-butyrolactone;"; and by inserting ", White Phosphorus, or Hypophosphorous Acid" after "Red Phosphorus";

in subdivision (8) by striking "At least 60 KG but less than 80 KG of Gamma-butyrolactone;" and inserting "At least [4.5][22.7] L but less than [6.1][30.3] L of Gamma-butyrolactone;"; and by inserting ", White Phosphorus, or Hypophosphorous Acid" after "Red Phosphorus";

in subdivision (9) by striking "At least 40 KG but less than 60 KG of Gamma-butyrolactone;" and inserting "At least [3][15.1] L but less than [4.5][22.7] L of Gamma-butyrolactone;"; and by inserting ", White Phosphorus, or Hypophosphorous Acid" after "Red Phosphorus"; and

in subdivision (10) by striking "Less than 40 KG of Gamma-butyrolactone;" and inserting "Less than [3][15.1] L of Gamma-butyrolactone;"; and by inserting ", White Phosphorus, or Hypophosphorous Acid" after "Red Phosphorus".

The Commentary to § 2D1.11 captioned "Statutory Provisions" is amended by inserting ", (3), (4)" after "(d)(1), (2)".

The Commentary to § 2D1.11 captioned "Application Notes" is amended in Note 5 by striking "21 U.S.C. 841(d)(2), (g)(1), and 960(d)(2)" and inserting "21 U.S.C. 841(c)(2), (f)(1), and 960(d)(2), (d)(3), and (d)(4)"; and by

striking "Where" and inserting "In a case in which".

Appendix A (Statutory Index) is amended by striking the following: "21 U.S.C. 957 2D1.1".

Issues for Comment:

1. A concern has been expressed to the Commission regarding offenses involving anhydrous ammonia. Anhydrous ammonia is a volatile chemical generally used in farming but that can also be used in the manufacture of methamphetamine. Section 864 of title 21, United States Code, prohibits stealing anhydrous ammonia or transporting stolen anhydrous ammonia across state lines. The statutory maximum term of imprisonment for an anhydrous ammonia offense is four years, except if the offense involved the intent to manufacture methamphetamine in which case the statutory maximum term of imprisonment is ten years. (A section 864 offense committed subsequent to a specified drug trafficking conviction carries a maximum term of imprisonment of eight years, unless the offense involved the intent to manufacture methamphetamine in which case the maximum term of imprisonment is 20 years.) Appendix A (Statutory Index) references 21 U.S.C. 864 to § 2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy). The Commission requests comment regarding whether it should provide a specific offense characteristic in § 2D1.12 specifically to cover anhydrous ammonia offenses. For example, the Commission could provide an enhancement that would apply if the offense involved anhydrous ammonia, or alternatively if the defendant was convicted under 21 U.S.C. 864. If such an enhancement should be provided, what would be an appropriate offense level increase? For example, should the Commission provide an offense level increase of eight or ten levels for convictions under 21 U.S.C. 864?

2. The Commission requests comment regarding whether it should amend the drug guidelines in Chapter Two, Part D, particularly, §§ 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), 2D1.11 (Unlawful Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), and 2D1.12 to provide a specific offense characteristic for defendants who unlawfully distribute controlled

substances, precursors, listed chemicals, and other illegal substances and items used in the manufacture of controlled substances or listed chemicals over the Internet. There is a concern with the unlawful distribution over the Internet because of the ability to reach a broader market than possible through "traditional" drug trafficking methods. If the Commission provides such a specific offense characteristic, what would be an appropriate offense level increase?

3. The Commission requests comment regarding whether it should amend § 2D1.1 to account more adequately for offenses that involve drug facilitated sexual assault, specifically in a case in which the victim of the sexual assault knowingly and voluntarily ingested the drug. Currently, the cross reference in § 2D1.1(d)(2) applies if the defendant was convicted under 21 U.S.C. 841(b)(7) and the victim of the sexual assault did not knowingly ingest the drug. However, if the victim of the sexual assault knowingly and voluntarily ingested the drug, neither 21 U.S.C. 841(b)(7) nor the cross reference applies. The Commission requests comment regarding whether the scope of the cross reference should be expanded to include a case in which the victim of a sexual assault knowingly and voluntarily ingested the drug, even if the defendant is not convicted under 21 U.S.C. 841(b)(7). Alternatively, would the heightened base offense levels in § 2D1.1(a)(1) and (2) apply in such a case and, if so, would they account adequately for drug facilitated sexual assaults of this nature? If not, should the heightened base offenses levels be modified or should the Commission provide a specific offense characteristic to account more adequately for drug facilitated sexual assaults?

4. The Commission has become aware of a circuit split regarding the interpretation of the last sentence in Application Note 12 of § 2D1.1. The relevant language of the note states that "[i]f, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, 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 he or she did not intend to provide or was not reasonably capable of providing." A conflict has arisen over whether this language is limited to a defendant who is the seller in a sting operation. See *United States v. Smack*, ___ F.3d ___, 2003 WL 22419914 (3rd Cir., October 24, 2003) (opining that the language in Note 12 is ambiguous);