

# Deconstructing the New Guideline Enhancements Implemented in Response to the Fair Sentencing Act of 2010

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The Fair Sentencing Act of 2010 increased the quantity thresholds for the five- and ten-year mandatory minimums under 21 U.S.C. §§ 841(b)(1) & 960(b) in crack cases and eliminated the five-year mandatory minimum for simple possession of crack cocaine. *See* Pub. L. No. 111-220, §§ 2, 3 (Aug. 23, 2010). The resulting 18:1 powder-to-crack ratio reflects political compromise rather than an empirically based policy judgment about the relative harms of crack and powder cocaine.<sup>1</sup> The Act improves fairness but cannot be said to “restore fairness” when fairness in federal cocaine sentencing never existed. These ameliorative changes came at a significant price. Congress also directed the Commission to ensure that the guidelines provide penalty increases for a variety of aggravating factors for *all* drug offenses. *See* Pub. L. No. 111-220, §§ 5, 6. It directed an enhancement of at least two levels if the defendant used or threatened violence, *id.* § 5, bribed a law enforcement officer, *id.* § 6(1), or maintained an establishment for the manufacture or distribution of drugs, *id.* § 6(2). It also directed an enhancement of at least two levels for defendants who receive an aggravating role enhancement and who engaged in other specified conduct, *id.* § 6(3)(A), such as using another person through fear, friendship or affection to engage in illegal conduct, *id.* § 6(3)(B)(i), or distributing drugs to, or involving, a person under 18, over 64, or pregnant, *id.* § 6(3)(B)(ii)(I)-(II), or distributing drugs to, or involving, a person unusually vulnerable due to physical or mental condition or particularly susceptible to criminal conduct, *id.* § 6(3)(B)(ii)(III)-(IV), or importing drugs, *id.* § 6(3)(B)(iii), or obstruction of justice, *id.* § 6(3)(B)(iv), or the offense was part of a pattern of criminal activity, *id.* § 6(3)(B)(v).

In relatively meager balance against these twelve new enhancements, Congress directed the Commission to add two mitigating provisions, both limited to defendants who receive the four-level minimal role reduction under USSG § 3B1.2(a): (1) a base offense level cap of 32 and (2) an additional two-level decrease if the defendant “had a minimum knowledge of the illegal enterprise” and “was to receive no monetary compensation from the illegal transaction,” and was “motivated by an intimate or familial relationship or by threats or fear when the defendant was otherwise unlikely to commit such an offense.” Pub. L. No. 111-220, § 7.

This paper provides a brief overview of why guideline increases promulgated in response to a congressional directive are unlikely to advance the purposes of sentencing. It then demonstrates that the guideline increases promulgated in response to the directives in the FSA do not advance the purposes of sentencing, focusing first on the two new enhancements most likely to impact your cases (use or threatened use of violence and maintaining a drug-involved premises), how

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<sup>1</sup> *See United States v. Williams*, \_\_\_ F. Supp. 2d \_\_\_, 2011 U.S. Dist. LEXIS 48599, at \*\*53-100 (N.D. Iowa Apr. 7, 2011) (Bennett, J.) (describing in exhaustive detail the historical and legislative backdrop of the 18:1 ratio and the absence of rationale for it); *United States v. Shull*, \_\_\_ F. Supp. 2d \_\_\_, 2011 2559426 (S.D. Ohio June 29, 2011) (excellent review of same and war on drugs).

the Commission amended the guidelines in response to these directives, and ways to argue that the resulting enhancement either does not apply or should not be followed as a matter of policy. When relevant, important language and commentary serving to limit their scope is highlighted.

For completeness, the two new provisions for defendants receiving the minimal role adjustment under Chapter 3 are set forth, with important language highlighted.

## **I. Guideline Enhancements Directed by Congress Are Unlikely to Reflect Sound Policy.**

Unlike the Sentencing Commission, Congress is under no obligation to ensure that its policies meet the purposes of sentencing, to conduct empirical research, or to consult with all stakeholders. Nor is Congress obliged to ensure that its enactments are consistent with each other, or with the guidelines, or with any overarching theory of how to best achieve the purposes of sentencing. Congress is free to legislate piecemeal in response to a highly publicized case, or in response to lobbying by the Department of Justice or other interest groups seeking sentence increases for purposes other than those set forth in § 3553(a).<sup>2</sup>

The ink had hardly dried on the first set of guidelines when Congress began directing the Commission to take particular actions through what are referred to as “directives,” both general and specific.<sup>3</sup> A general directive instructs the Commission to study a particular issue and report back to Congress or amend the guidelines if the Commission determines it is needed. Specific directives, however, require the Commission to take particular actions. Specific directives, unlike mandatory minimums, are binding on the Commission, and this is so even if they conflict with the goals of the SRA. *See United States v. LaBonte*, 520 U.S. 751 (1997).

After only a handful of these specific directives had been issued, the Commission formally said to Congress in 1991 that it would prefer general directives to mandatory minimums and specific directives.<sup>4</sup> It explained that specific directives are “potentially in tension with the fundamental Sentencing Reform Act objectives of delegating to an independent, expert body in the judicial branch of the government the finer details of formulating sentencing policy, and

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<sup>2</sup> *See* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 72-73 (2003).

<sup>3</sup> The Sentencing Reform Act itself contained a number of specific directives. For example, it required the Commission (1) to set the guideline range for certain repeat offenders “at or near the maximum term authorized,” 28 U.S.C. § 994(h), and (2) to recommend a sentence other than prison for first offenders not convicted of a violent or otherwise serious offense, 28 U.S.C. § 994(j). The Commission implemented the career offender directive more broadly than required, *see* Amy Baron-Evans *et al.*, *Deconstructing the Career Offender Guideline*, 2 Charlotte L. Rev. 39 (2010), and never implemented the first offender directive at all. Another directive, at 28 U.S.C. § 994(i), is discussed in Part II.C.2.d., *infra*.

<sup>4</sup> USSC, *Mandatory Minimum Penalties in the Federal Criminal Justice System* 122-23 (1991).

revising that policy in light of actual court sentencing experience over time.”<sup>5</sup> Unfortunately, Congress has continued to issue specific directives, now having issued over 65 such directives since the guidelines were implemented and affecting all of the most frequently applied guidelines, almost always to increase guideline ranges. Because the Commission has historically responded to Congress’s orders without having independently determined, based on empirical evidence, that the increase will serve the purposes of § 3553(a), it is particularly unlikely that a guideline range spawned by a specific directive recommends a sentence that complies with 18 U.S.C. § 3553(a). And in many cases, the Commission made changes that were broader than required, also for no apparent reason.<sup>6</sup> Only a small number of these amendments were as or more narrow than required.

## **II. The Guideline Enhancements Directed by the FSA Do Not Reflect Sound Policy.**

The directives in the Fair Sentencing Act of 2010 are specific directives. They require the Commission to promulgate a penalty increase “of at least 2 levels” for certain categories of offense conduct in all drug cases. Even if the Commission itself has not determined that doing so will further the purposes of sentencing under § 3553(a), or believes that doing so will conflict with the purposes of sentencing, the Commission has no choice but to implement specific directives, at least in the most narrow manner.

At a minimum, each of the new enhancements in § 2D1.1 and promulgated in response to these directives is amenable to challenge as unsound policy because it is not the product of the “Commission’s exercise of its characteristic institutional role.” *Kimbrough v. United States*, 552 U.S. 85, 109 (2007).<sup>7</sup> Though the Commission has previously indicated that certain enhancements might be appropriate if the 100:1 drug quantity ratio were significantly decreased, and suggested that Congress might *generally* direct it to make appropriate enhancements, *see* U.S. Sent’g Comm’n, *Report to the Congress: Cocaine and Federal Sentencing Policy* viii (2002), it did not suggest these particular enhancements or ask Congress to issue specific directives that leave it no room for appropriate policy-making. Now that the Commission has begun to explain some of its amendments in terms of empirical data, judicial feedback, and the

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<sup>5</sup> *Id.* (citing S. Rep. No. 98-225, at 160, 169, 177-78 (1983)).

<sup>6</sup> *See* Sentencing Resource Counsel Project, *Congressional Directives to the Sentencing Commission 1988-2010* (Nov. 2010), available at [www.fd.org](http://www.fd.org) (collecting every congressional directive since 1987, the Commission’s response, and guidelines affected).

<sup>7</sup> *See, e.g., United States v. Henderson*, \_\_\_ F.3d \_\_\_, 2011 WL 1613411, at \*7 & n.3 (9th Cir. Cal. Apr. 29, 2011) (history of § 2G2.2 demonstrates that “the child pornography Guidelines are, to a large extent, not the result of the Commission’s ‘exercise of its characteristic institutional role,’ which requires that it base its determinations on ‘empirical data and national experience,’ but of frequent mandatory minimum legislation and specific congressional directives to the Commission to amend the Guidelines”); *United States v. Grober*, 624 F.3d 592, 608-09 (3d Cir. 2010) (§ 2G2.2 was not developed pursuant to the Commission’s characteristic institutional role and district courts may, but are not obligated to vary on policy basis from it).

purposes of sentencing,<sup>8</sup> it is significant that the Commission states for each enhancement only that it was promulgated in response to a congressional directive. *See* USSG App. C, Amend. 748 (Supp. Nov. 1, 2010).

In addition, by mandating these actions through an administrative agency located in the judicial branch, Congress has effectively “cloak[ed] [its] work in the neutral colors of judicial action,” in violation of the separation of powers. *Mistretta v. United States*, 488 U.S. 361, 407 (1989). With the Supreme Court’s more recent insistence that the Commission is an independent body whose characteristic institutional role is to shape sentencing policy based on empirical evidence and national experience, a guideline driven by congressional mandates may be open to renewed constitutional challenge as a violation of the separation of powers. *See id.*

The Commission hewed fairly closely to the terms of these directives, and in some ways made the new enhancements as narrow as possible in light of the directive. In other ways, however, the Commission unnecessarily expanded upon a directive without apparent reason. What follows are brief analyses of each enhancement, focusing first on the two enhancements that are likely to be the most frequently applied and for which there are strong arguments for limiting their scope or for asking a court not to follow them because they are otherwise unsound. For the remaining enhancements, important limiting language and commentary are highlighted, along with arguments for arguing unsoundness when relevant.

#### **A. Use of violence – USSG § 2D1.1(b)(2)**

Congress directed as follows:

[The Commission] shall review and amend the Federal sentencing guidelines to ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense.

Pub. L. No. 111-220, § 5 (Aug. 3, 2010).

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<sup>8</sup> *See* USSG App. C, Amend. 742 (Nov. 1, 2010) (eliminating “recency” points from the criminal history score after being alerted of a problem by frequent variances in cases in which such points were added, empirical research showing that recency points only minimally predict recidivism, and public comment indicating that recidivism soon after release is often due to difficulties with re-entry); *id.* Amend. 740 (Nov. 1, 2010) (adding a new departure provision encouraging downward departure in illegal reentry cases based on cultural assimilation to acknowledge that some circuit courts have already upheld such departures and “in order to promote uniform consideration of cultural assimilation by courts”); *id.* Amend. 738 (Nov. 1, 2010) (slightly expanding Zones B and C of the Sentencing Table to allow for somewhat greater availability of alternatives to incarceration, relying on judicial feedback and empirical data of actual sentencing practices); *see also* 76 Fed. Reg. 24,960, 24,969 (May 3, 2011) (in response to “case law and public comment,” reducing by four levels the 16- and 12- level enhancements under § 2L1.2 if the prior conviction is too old to be counted for criminal history purposes).

In response, the Commission added a new specific offense characteristic at § 2D1.1(b)(2) providing that “[i]f the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by 2 levels.” USSG App. C, Amend. 748 (Nov. 1, 2010).<sup>9</sup>

The Commission also added commentary, at Application Note 3(B), explaining that the new enhancement for use of violence may be applied in addition to the enhancement for possession of a dangerous weapon under § 2D1.1(b)(1). However, “in a case in which the defendant merely possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence,” this new enhancement would not apply. *Id.*

As its reason for adding the enhancement, the Commission stated that it “responds to section 5 of the Act.” *Id.* (Reason for Amendment).

Note that the enhancement only applies if the defendant engaged in the conduct described. This is important (and helpful) because it is more narrow than other enhancements, such as the enhancement for possession of a dangerous weapon at § 2D1.1(b)(1), which because of its passive phrasing and interaction with the relevant conduct guideline, USSG § 1B1.3, can apply to a weapon possessed by a co-defendant without the defendant’s knowledge. The Commission’s commentary is also helpful because it makes clear that possession of a weapon by the defendant does not necessarily mean that he or she “used violence” or “made a credible threat to use violence.” Additional conduct must be proven for this new enhancement to apply in addition to the weapon enhancement at subsection (b)(1).

#### *Definition of “violence”*

The Commission did not define the term “violence.” To ensure that the term does not sweep too broadly, argue that “violence” should be consistent with its ordinary meaning, with the Commission’s identification of what may constitute “aggravating conduct” in crack cases, with the Department of Justice’s position before Congress before the FSA was passed, and the Supreme Court’s analysis in *Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010). It should not include acts against property, and should only include intentional acts to cause physical harm to a person. “Violence” in this context should mean “physical force that is intended to cause and capable of causing serious bodily injury to another person.” Threats of violence should be “credible.”

First, “violence” is ordinarily defined as “the use of physical force, usually accompanied by fury, vehemence, or outrage, especially physical force unlawfully exercised with *the intent to harm.*” Black’s Law Dictionary (8th ed. 2004); *see also Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (term “use” does not mean accidental); *Begay v. United States*, 553 U.S. 137, 145 (2008)

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<sup>9</sup> As with each of these new enhancements, the Commission re-promulgated this amendment as permanent, and sent it to Congress at the end of April. U.S. Sent’g Comm’n, *Notice of submission to Congress of amendments to the sentencing guidelines*, 76 Fed. Reg. 24,960 (May 3, 2011). Unless Congress acts to reject it or directs otherwise, the amendment will go into effect on November 1, 2011. *Id.*; 28 U.S.C. § 994(p).

(holding that DUI is not a “violent felony” for purposes of the ACCA because it does not involve “purposeful, violent, and aggressive” conduct).

Second, Congress did not specify that “violence” should include acts against property, and construing the term “violence” to include only acts against the person is more consistent with the Commission’s previous analyses of aggravating factors that may be present in crack cases. When the Commission recommended that Congress lower the drug quantity ratio and at the same time *generally* direct the Commission to rely on its independent expertise to account for aggravating conduct through enhancements targeted at conduct actually occurring in crack cases, the Commission referred to one possible enhancement as “bodily injury resulting from violence.” *2002 Crack Report* at viii. Similarly, in its 2007 crack report, the Commission examined conduct presenting a “credible threat” or causing “actual physical harm to another person.” USSC, *Report to Congress: Cocaine and Federal Sentencing Policy* 37 (2007). Defining violence by reference to physical force against the person of another is also consistent with the Department of Justice’s testimony before Congress, in which it stated its support for enhancements for those “who injure or kill someone in relation to a drug trafficking offense.”<sup>10</sup> Defining violence as the use of physical force against another also tracks the definition of violence set forth in USSG § 4B1.2(a)(1) and § 2L1.2 comment. (n.1(B)(iii)).

Third, “physical force” should be construed in a way that is consistent with the Supreme Court’s analysis in *Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010), *i.e.*, “force capable of causing physical pain or injury to another person.”

#### *Cumulative application*

The Commission expressly states in commentary that the violence enhancement is to apply *in addition to* the weapon enhancement. USSG § 2D1.1(b)(2) cmt. (n.3(B)) (Supp. Nov. 1, 2010). However, Congress did not require the Commission to implement this directive so that it would apply cumulatively to the weapon enhancement, and no witness before Congress suggested that use or threatened use of violence should be treated as a harm *in addition to* weapon possession.<sup>11</sup> The cumulative nature of this new enhancement provides another reason

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<sup>10</sup> See *Unfairness in Federal Cocaine Sentencing: Is It Time to Crack the 100 to 1 Disparity?*, Hearing Before the House Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 111th Cong. 39 (2009) (statement of Lanny Breuer, Ass’t Attorney General).

<sup>11</sup> See generally *Unfairness in Federal Cocaine Sentencing: Is It Time to Crack the 100 to 1 Disparity?*, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 111th Cong. (May 21, 2009); *id.* at 6 (statement of Rep. Lamar Smith, R-Texas); *id.* at 28 (testimony of Lanny A. Breuer, Assistant Attorney General, U.S. Dep’t of Justice) (supporting increased penalties to address “concerns about violence and guns used to commit drug offenses”); *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity*, Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary, 111th Cong. 23 (Apr. 29, 2009) (weapon enhancement used to describe level of violence associated with crack distribution).

for interpreting the term “violence” to mean a distinct and truly escalated aggravating harm by requiring intentional physical force capable of inflicting serious bodily injury.

*“Double whammy”*

The new enhancement is bad enough for other drug offenders, but is even worse for crack offenders. Crack offenders are now hit with the “double whammy” of heightened base offense levels that are still presumably intended to serve as a proxy for additional harms in crack cases, and enhancements for those same assumed harms. If your judge sticks to the 18:1 ratio in the guideline, argue that it already accounts for an assumption of increased violence in crack cases. For a useful discussion of the “double whammy” effect and citations to Commission reports in support, see Judge Bennett’s decision in *United States v. Williams*, \_\_ F. Supp. 2d \_\_, 2011 U.S. Dist. LEXIS 48599, at \*\*97-99, 102-05 (N.D. Iowa Apr. 7, 2011) (Bennett, J.).

**B. Maintaining a premises for the purpose of manufacturing or distributing a controlled substance -- USSG § 2D1.1(b)(12)**

Congress directed as follows:

[The Commission] shall review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 levels if . . . the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in . . . 21 U.S.C. 856.

Section 856 (“Maintaining a drug-involved premises”) currently makes it unlawful to

- (1) knowingly open, lease, rent, use, or maintain *any place*, whether permanently or temporarily, for the purpose of *manufacturing, distributing, or using any controlled substance*; [or]
- (2) manage or control *any place*, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully *manufacturing, storing, distributing, or using a controlled substance*.

While 21 U.S.C. § 856 covers a range of conduct, Congress specifically directed the Commission to enhance penalties for maintaining an “establishment” for the purpose of “manufacturing” and “distributing” a controlled substance. Thus, Congress excluded from the scope of the directive any establishment maintained only for “storing” or “using” a controlled substance. As will be shown, it is also important that before 2003, the statute read as follows:

- (1) knowingly open or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance; [or]

- (2) manage or control any *building, room, or enclosure*, either as an owner, lessee, agent, employee, or mortgagee, and knowingly and intentionally rent, lease, or make available for use, with or without compensation, the *building, room, or enclosure* for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

Thus, before 2003, liability attached under subsection (a)(2) only if the drug-involved premises was a “building, room, or enclosure.” As part of the PROTECT Act, Pub. L. No. 108-21, § 608(b)(1) & (2), Congress amended subsection (a)(2) so that it now covers “any place,” as under subsection (a)(1). There do not appear to be any cases expressly recognizing this change, or the reasons for it, though it does appear that the effect was to expand the coverage of subsection (a)(2) beyond buildings, rooms, or enclosures. For example, in *United States v. Auger*, 338 Fed. App’x 823 (11th Cir. 2009), the defendant was prosecuted under subsection (a)(2) for allowing others to use his property to plant marijuana outside on his 1000-acre property, which presumably would not have been possible under the earlier version of the statute, as there was no building, room, or enclosure involved.

In response to the FSA directive to add an enhancement if “the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in . . . 21 U.S.C. 856,” the Commission proposed the following new specific offense characteristic:

If the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as described in 21 U.S.C. § 856, increase by [2][4] levels.

U.S. Sent’g Comm’n, *Notice of proposed amendment; request for comment*, 75 Fed. Reg. 54,700, 54,704 (Sept. 8, 2010). The proposed language almost exactly tracked the directive, and was limited to maintaining an “establishment for the manufacture or distribution” of a controlled substance. The Commission asked at the same time if the enhancement “should apply more broadly, *e.g.*, if the defendant committed an ‘offense described in 21 U.S.C. § 856.’” *Id.* The only public comment addressing this question came from the Federal Public and Community Defenders, in which we said that the Commission should not expand the enhancement to cover all offenses under 21 U.S.C. § 856, and further that it should expressly state that it does not apply to “storing” or “using” a controlled substance.<sup>12</sup> We noted that “a narrow reading of the directive is especially warranted” because the new enhancement effectively frees the government of the

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<sup>12</sup> Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee to Hon. Patti B. Saris, Chair, U.S. Sent’g Comm’n, at 20 (Oct. 8, 2010), *available at* [http://www.ussc.gov/Meetings\\_and\\_Rulemaking/Public\\_Comment/20101013/FedPubDef\\_Comment\\_100810.pdf](http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20101013/FedPubDef_Comment_100810.pdf).

burden of proving beyond a reasonable doubt that the defendant maintained a drug-involved premises,” as required for a conviction under 21 U.S.C. § 856.<sup>13</sup>

When the emergency amendment was promulgated effective November 1, 2010, the enhancement read as follows:

If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by 2 levels.

USSG § 2D1.1(b)(12) (Supp. Nov. 1, 2010). The emergency amendment also included new Application Note 28, which explained the circumstances to which the enhancement would apply:

*Application of Subsection (b)(12).* --Subsection (b)(12) applies to a defendant who knowingly maintains a premises (*i.e.*, a “building, room, or enclosure,” *see* § 2D1.8, comment. (backg’d.)) for the purpose of manufacturing or distributing a controlled substance.

Among the factors the court should consider in determining whether the defendant “maintained” the premises are (A) whether the defendant held a possessory interest in (*e.g.*, owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises.

Manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant’s primary or principal uses for the premises, rather than one of the defendant’s incidental or collateral uses for the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.

USSG § 2D1.1 cmt. (n.28) (Supp. 2010). Thus, as currently written, the enhancement applies only to maintaining a premises for purposes of “distribution” or “manufacture.” However, when the Commission re-promulgated this amendment as permanent in May 2011, to be effective November 1, 2011, it changed the first sentence of Application Note 28 to read as follows:

Subsection (b)(12) applies to a defendant who knowingly maintains a premises (*i.e.*, a building, room, or enclosure) for the purpose of manufacturing or distributing a controlled substance, *including storage of a controlled substance for the purpose of distribution.*

U.S. Sent’g Comm’n, *Notice of submission to Congress of amendments to the sentencing guidelines effective November 1, 2011*, 76 Fed. Reg. 24,960, 24,963 (May 3, 2011) (emphasis added).

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<sup>13</sup> *Id.* at 19.

As its reason for the new enhancement generally, the Commission said simply that the enhancement “responds to section 6(2) of the [FSA].” USSG App. C, Amend. 748 (Nov. 1, 2010) (Reason for Amendment). The Commission did not provide any insight on the accompanying commentary, either when it promulgated the emergency amendment or when it re-promulgated it as permanent. As will be shown, however, the commentary could prove important in defining the scope of the enhancement.

*“Storage of a controlled substance for purposes of distribution”*

The Commission expanded the scope of the enhancement in a manner strikingly inconsistent with the directive, and did so without notice. As set forth above, the emergency amendment effective November 1, 2010 limited the enhancement to maintaining a premises for the purpose of “manufacturing or distributing” a controlled substance, *see* USSG § 2D1.1(b)(12) & comment. (n.28) (Supp. Nov. 1, 2010), as Congress directed. In January 2011, when the Commission proposed making the emergency amendment permanent, it did not give notice that it was contemplating any change related to “*storage of a controlled substance for the purpose of distribution.*” *See* U.S. Sent’g Comm’n, *Notice of proposed amendments to sentencing guidelines, policy statements and commentary*, 76 Fed. Reg. 3193 (Jan. 19, 2011). No public comment received by the Commission suggested that it should amend Application Note 28 to include “storage . . . for purposes of distribution.”

However, when the Commission re-promulgated the FSA amendments as permanent in May 2011, it amended new Application Note 28 so that the enhancement applies not only to “manufacturing or distributing,” but also to “*storage of a controlled substance for the purpose of distribution.*” U.S. Sent’g Comm’n, *Notice of submission to Congress of amendments to the sentencing guidelines effective November 1, 2011*, 76 Fed. Reg. 24,960, 24,963 (May 3, 2011). As its reason, the Commission stated only that “the new amendment differs from the temporary, emergency revisions in clarifying that distribution includes storage of a controlled substance for the purpose of distribution.” *Id.* at 24,965. Thus, without giving any reason and contrary to the only public comment received on the matter, the Commission made the enhancement apply to “storage” for distribution when the directive clearly excluded “storing” a controlled substance from the conduct described in § 856 to be covered by the enhancement.

As a result of this amendment, the enhancement applies to maintaining a “building, room, or enclosure . . . for storage for purposes of distributing a controlled substance.” While it is not clear yet how this language will play out in practice, its broad terms could be read to mean the enhancement applies in any distribution case in which *one* of the defendant’s *principal* uses of a building, room or enclosure was to store drugs, which could conceivably be almost any case. In the event the government or probation reads Application Note 28 as broadly as it is written, we should be prepared to show that this is broader than what Congress directed, and for no reason.

Moreover, to the extent that it expands the scope of § 2D1.1(b)(12), it is invalid because it was promulgated without proper notice and comment. For purposes of promulgating

“guidelines” or amendments to “guidelines,” the Commission is required to follow the provisions of the Administrative Procedure Act relating to publication in the Federal Register. *See* 28 U.S.C. § 994(x); *Mistretta v. United States*, 488 U.S. 361, 394 (1989) (§ 994(x) subjects the Commission’s “rulemaking . . . to the notice and comment requirements of the Administrative Procedure Act”).<sup>14</sup> Section 553 of the APA requires an agency to include in its notice of proposed rulemaking “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b)(3). Notice fails this requirement if it consists of “ambiguous comments and weak signals” as to the proposed rule’s substance. *Int’l Union v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1261 (D.C. Cir. 2005) (internal quotation marks omitted). Unless, due to the agency’s notice, “interested parties should have anticipated” that the final rule was under consideration, the notice is inadequate and the rule invalid. *Id.* (internal quotation marks omitted).

The Commission’s notice in January 2010 did not state “either the terms or substance” of a proposed amendment to Application Note 28.<sup>15</sup> *See* 5 U.S.C. § 553(b)(3). Nor did it provide an adequate “description” of the “subjects and issues involved.” *Id.* Given that the Commission had originally limited the enhancement to “manufacture” and “distribution,” no interested party anticipated that the Commission would include “storage . . . for distribution.” The only public comment on the topic requested that the Commission specifically exclude “storing” or “using.” Because of that failure, extending the scope of the guideline to apply to “storage” for purposes of distribution is invalid.

Not only has the Commission exceeded Congress’s directive by including “storage for distribution” (and for no reason), but the enhancement in general is unsound policy and should not be followed. At bottom, the prosecutor can now obtain a two-level enhancement, based on a preponderance of the evidence, for conduct that previously required a conviction under 21 U.S.C. § 856 and which did not even result in a higher offense level if there was a conviction. *See* USSG § 2D1.8 (2009). In addition, the guideline applicable to § 856 offenses requires a four-level *decrease* and an offense level cap of 26 if “the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises.” *See* USSG § 2D1.8(a)(2). This functions as a sort of specialized mitigating role reduction for § 856 offenses, because if the defendant receives the 4-level reduction, then the mitigating role adjustment under § 3B1.2 does not apply. *See id.* § 2D1.8(b)(1). But no such decrease was incorporated into § 2D1.1(b)(12), so that a person sentenced under § 2D1.1(b)(12) but who meets the requirements

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<sup>14</sup> “[O]fficial commentary,” which assists in the interpretation or application of particular guidelines, “is akin to an agency’s interpretation of its own legislative rules.” *Stinson v. United States*, 508 U.S. 36, 45 (1993). Guideline commentary that serves the “functional purpose” of an interpretive rule has the derivative authority of the guideline itself. *Stinson* at 42, 45; 1 Richard J. Pierce, *Administrative Law Treatise* § 6.11 at 400 (4th ed. 2002).

<sup>15</sup>The Commission asked only “[w]hether the Commission should make any changes to the Fair Sentencing Act emergency amendment in re-promulgating it as a permanent amendment.” *See* 76 Fed. Reg. 3193, 3195 (Jan. 19, 2011).

for the 4-level reduction under § 2D1.8 will not benefit from the reduction or the offense level cap that would apply *had he or she actually been convicted* of the offense. So not only can the government obtain a higher sentence without a conviction, but it can also avoid the specialized reduction for those with the described mitigating role. If this occurs, argue that the court should vary downward equivalent to the 4-level role reduction under § 2D1.8(a)(2) and that the sentence should not be greater than the top of the guideline range for offense level 26. For those sentenced under § 2D1.8, point out that the 2-level increase in the base offense level for most offenders (by reference to new § 2D1.1(b)(12)), effectively reduced the impact of the special role reduction under § 2D1.8 by increasing the starting point by two levels, again for no reason.

In short, this amendment not only increased the offense level for nearly every defendant whose offense involved conduct covered by § 856, whether convicted or not, but it also eliminated the reduction for those with a mitigating role in the offense for those sentenced under § 2D1.1, and reduced the impact of the special role reduction for those sentenced under § 2D1.8. The Commission has not provided any policy rationale – much less one supported by empirical evidence and in terms of serving the purposes of sentencing under 18 U.S.C. § 3553(a) – for this change in course, or for the effective increase in sentences for those with a mitigating role in an § 856 offense.

### **C. Remaining Enhancements**

Though still without independent rationale, the remaining amendments in response to the FSA are generally not broader than required by the directive. Set forth below is the exact language used by Congress, along with the amendments promulgated in response with useful (and narrowing) commentary also highlighted. Arguments supporting a finding of unsoundness as a matter of policy are also suggested where relevant.

#### **1. Bribery of a law enforcement officer -- USSG § 2D1.1(b)(11)**

Congress directed as follows:

The [Commission] shall review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if [] the defendant bribed, or attempted to bribe, a Federal, State, or local law enforcement official in connection with a drug trafficking offense.

Pub. L. No. 111-220, § 6(1) (Aug. 3, 2010).

In response, the Commission added a new specific offense characteristic at USSG § 2D1.1(b)(11) providing that “[i]f the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by 2 levels.” USSG App. C, Amend. 748 (Nov. 1, 2010).<sup>16</sup> Note that the enhancement applies only if the defendant engaged in the

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<sup>16</sup> The Commission re-promulgated this amendment as permanent, and sent it to Congress at the end of April. U.S. Sent’g Comm’n, *Notice of submission to Congress of amendments to the sentencing*

bribery, as Congress directed. This choice of words is important (and helpful) because it is more narrow than other enhancements, such as the enhancement for possession of a dangerous weapon at § 2D1.1(b)(1), which because of its passive phrasing and interaction with the relevant conduct guideline, USSG § 1B1.3, can apply to a weapon possessed by a co-defendant without the defendant's knowledge.

In addition, because the guidelines already provide for a two-level enhancement for bribery "with respect to the investigation, prosecution, or sentencing" under the Chapter 3 adjustment for obstruction of justice, *see* USSG § 3C1.1 & comment. (n.4(i)), the Commission included commentary at new Application Note 27 to clarify that the enhancement "does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant," as "such conduct is covered by §3C1.1 (Obstructing or Impeding the Administration of Justice), and if applicable, §2D1.1(b)(14)(D)." USSG § 2D1.1(11) & comment. (n.27) (Supp. Nov. 1, 2010). (The latter provision, § 2D1.1(b)(14)(D), is one of the new "super-aggravators," set forth below.) Because the enhancement applies only to the distinct conduct of using bribery "in order to facilitate the offense," there is no double-counting of the same conduct.

As with the other enhancements, the Commission did not provide any reason for the amendment based on its independent expertise or the purposes of sentencing, but stated simply that the new enhancement "responds to section (6)(1) of the Act." USSG App. C, Amend. 748 (Nov. 1, 2010).

## **2. "Super-aggravating" factors – USSG § 2D1.1(b)(14)**

Congress directed as follows:

The [Commission] shall review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if –

(A) the defendant is an organizer, leader, manager, or supervisor of drug trafficking activity subject to an aggravating role enhancement under the guidelines; and

(B) the offense involved 1 or more of the following super-aggravating factors:

(i) The defendant--

(I) used another person to purchase, sell, transport, or store controlled substances;

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*guidelines*, 76 Fed. Reg. 24,960 (May 3, 2011). Unless Congress acts to reject it or directs otherwise, the amendment will go into effect on November 1, 2011. *Id.*; 28 U.S.C. § 994(p).

- (II) used impulse, fear, friendship, affection, or some combination thereof to involve such person in the offense; and
- (III) such person had a minimum knowledge of the illegal enterprise and was to receive little or no compensation from the illegal transaction.

(ii) The defendant--

- (I) knowingly distributed a controlled substance to a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual;
- (II) knowingly involved a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual in drug trafficking;
- (III) knowingly distributed a controlled substance to an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct; or
- (IV) knowingly involved an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct, in the offense.

(iii) The defendant was involved in the importation into the United States of a controlled substance.

(iv) The defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense.

(v) The defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood.

Pub. L. No. 111-220 § 6(3) (Aug. 3, 2010).

In response, the Commission added a new specific offense characteristic at USSG § 2D1.1(b)(14), which generally tracks the directive with little significant change, except as noted below. By the terms of both the directive and the new enhancement, the new specific offense characteristic applies only if the defendant received an upward role adjustment under Chapter 3 and the defendant engaged in some or all of the “super-aggravating” conduct. As its reason, the Commission stated simply that the new specific offense characteristic “responds to section 6(3) of the Act.” USSG App. C, Amend. 748 (Nov. 1, 2010).

The Commission implemented these super-aggravators in relatively narrow form, though not in every respect. They do not apply cumulatively to each other, so that even if all of the factors are present, the offense level is enhanced only once under this section. For those that address conduct already covered by another guideline, the Commission clarified that the conduct is not to be double-counted. Set forth below are aspects of the new guideline language and commentary that deserve special attention.

#### **a. Use of another person**

The Commission implemented subsection (3)(B)(i) of the directive at USSG § 2D1.1(b)(14)(A) in what might seem to be a straightforward manner. However, the Commission compacted the terms used by Congress so that the first requirement for the enhancement is eliminated. By the terms of the directive, Congress required both that the defendant (1) used another person to engage in illegal activity and (2) used fear (or another listed factor) to involve that person in the illegal activity. The enhancement, however, states that the enhancement applies “if the defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of a controlled substance.” As written, the super-aggravator in the guideline does not clearly require that the defendant *used the other person to engage in illegal conduct*, only that the defendant used fear to involve another person in an offense.

Elsewhere in the guidelines, the Commission has defined “use” of another person to commit an offense as including “directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting, or soliciting.” USSG § 3B1.4 cmt. (n.1). This definition came from Congress’s directive in 1994 to add an enhancement if the defendant involved a minor in the commission of the offense, which Congress specified to mean that the defendant “solicited, procured, recruited, counseled, encouraged, trained, directed, commanded, intimidated, or otherwise used or attempted to use any person less than 18 years of age with the intent that the minor would commit a Federal offense.” Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 140008(a)(2) (1994). In this case, Congress expressly required “use” of another person, yet the Commission seems to have removed that aspect from scope of the enhancement, requiring only that the other person be “involved” in committing an offense. If the defendant is subject to this super-aggravator by its terms but involved the other person in an offense in a manner that falls short of “using” that person to commit an offense, as Congress intended the term “used” to mean for purposes of a similar enhancement, ask the court to vary downward by the same two levels on the policy ground that the Commission’s implementation of the super-aggravator is broader than the directive, without basis in reason or experience, and should not be followed.

#### **b. Distributing to, or involving, certain persons**

The Commission implemented subsection (3)(B)(ii) of the directive at USSG § 2D1.1(b)(14)(B), generally tracking the language of the directive but in a more compact form.

In new Application Note 29, the Commission clarified that if the super-aggravator applies because the defendant distributed a controlled substance to, or involved, a person under 18 or 65 or older, or pregnant, or unusually vulnerable due to mental or physical condition, “the individual is not a ‘vulnerable victim’ for purposes of §3A1.1(b).” USSG § 2D1.1(b)(14)(B) & cmt. (n.29(A)). It also amended the commentary to § 3B1.4 (Using a Minor to Commit a Crime) to clarify that the two-level upward adjustment under that section does not apply if the defendant receives the super-aggravator under § 2D1.1 for involving a person under the age of 18 in the offense. USSG § 3B1.4 cmt. (n.2) (Supp. 2010).

### **c. Importation of a controlled substance**

In implementing subsection (3)(B)(iii) of the directive regarding importation of a controlled substance, the Commission specified that the defendant must be “directly involved” in the importation of the controlled substance. USSG § 2D1.1(b)(14)(C). In new Application Note 29, the Commission further clarified that this super-aggravator applies only if “if the defendant is accountable for the importation of a controlled substance under subsection (a)(1)(A) of § 1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)).” In other words, it applies only to acts the defendant “committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused . . . that occurred during the course of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.” USSG § 1B1.3(a)(1)(A). It does not apply to any other form of relevant conduct under the relevant conduct rules.

The Commission also provided that if the defendant receives an enhancement for unlawfully importing a controlled substance by non-commercial aircraft or by submersible vessel, or if the defendant acted as an operation officer on any vessel carrying a controlled substance under § 2D1.1(b)(3), then the new super-aggravator for importation does not apply. USSG § 2D1.1(b)(14)(C) & cmt. (n.29)). In addition, if the defendant receives the enhancement for the importation of amphetamine and methamphetamine under subsection (b)(5), then the new super-aggravator for importation does not apply. *Id.*

### **d. Obstruction of justice**

The Commission implemented subsection (3)(B)(iv) of the directive at USSG § 2D1.1(b)(14)(D) by tracking the language of the directive without change. It also added commentary to § 3C1.1 to clarify that the two-level increase under that section would not apply if the defendant receives the super-aggravator for obstruction of justice.

### **d. Pattern of criminal activity engaged in as a livelihood**

The Commission implemented subsection (3)(B)(v) of the directive at USSG § 2D1.1(b)(14)(E) by tracking its language with no significant change. In commentary, the Commission defined ‘pattern of criminal activity’ and ‘engaged in as a livelihood’ as those terms are defined under § 4B1.3. Under that guideline, the Commission established a minimum

offense level of 13 (or 11 if the defendant receives an adjustment for acceptance of responsibility) for defendants who committed their offenses as part of a pattern of criminal conduct, engaged in as a livelihood.” USSG § 4B1.3.

Section 4B1.3 was promulgated in 1987 as part of the initial set of guidelines as an implementation of one of the directives in the SRA itself. *See* USSG App. C, Amend. 269 (Nov. 1, 1989). There, Congress directed the Commission to

assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant [] committed the offense as part of a pattern of criminal conduct from which [the defendant] derived a substantial portion of [the defendant’s] income.

Pub. L. No. 98-473, § 217(a), codified at 28 U.S.C. § 994(i)(2). This provision was itself derived from former 18 U.S.C. § 3575(e), which provided for enhanced sentences above the maximum sentence otherwise provided for defendants who committed a felony “as part of a pattern of [criminal] conduct ... which constituted a substantial source of his income, and in which he manifested a special skill or expertise.” *See* S. Rep. No. 98-225, at 176 (1983); 18 U.S.C. § 3585(e)(1984). The purpose of this little-used special offender provision was to impose “enhanced punishment to incapacitate professional criminals who may lack the prior convictions necessary to bring them within recidivist statutes.” *United States v. Kerr*, 686 F. Supp. 1174, 1180 (W.D. Pa. 1988) (citing legislative history). In enacting the SRA, however, Congress decided not to provide for enhanced penalties for such offenders, but only that “the guidelines insure a substantial sentence to imprisonment that is nevertheless within the range generally available for the offense.” S. Rep. 98-225, at 176 (1983).

The Commission’s response to this directive was to set a minimum floor at level 13 (corresponding to a guideline range of 12 to 18 months at Criminal History Category I), which strongly suggests that the Commission views one year in prison as “substantial.”<sup>17</sup> Because the base offense level in the vast majority of drug cases is already over 13, *see* U.S. Sent’g Comm’n, *Guideline Application Frequencies* (2010), and because level 13 falls in Zone D of the Sentencing Table, it ensured that defendants who committed their offense as part of a pattern of criminal conduct receive a “substantial” term of imprisonment, as required by the 1987 directive. The Commission also took care to clarify that § 4B1.3 was intended to address the same considerations as 18 U.S.C. § 3585(e), and was not to apply more broadly. *See* USSG App. C, Amend. 269 (Nov. 1, 1989) (clarifying scope). Like the statute from which it was derived, the guideline was targeted at ensuring a “substantial” term of imprisonment for “those who derive large enough income from criminal activity that they can be considered likely to recidivate.” *United States v. Rivera*, 694 F. Supp. 1105, 1107 (S.D.N.Y. 1988). As a result, the minimum floor required by § 4B1.3 has had little if any application in drug cases because it was

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<sup>17</sup> As originally promulgated, § 4B1.3 read as follows: “If the defendant committed an offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income, his offense level shall be not less than 13. In no such case will the defendant be eligible for a sentence of probation.” 52 Fed. Reg. 18,046 (May 13, 1987); USSG § 4B1.3 (1987).

unnecessary to achieve Congress’s goal to incapacitate those with large incomes from criminal activity, which the Commission determined can be achieved by a period of imprisonment of as little as one year.

By requiring the Commission to add this “super-aggravating” factor to the guideline calculation in drug cases, Congress effectively overrode the purpose of its earlier directive (without apparent recognition or explanation), as well as the Commission’s determination that the drug guideline already recommends a “substantial” term of imprisonment for the vast majority of drug defendants who committed the offense as part of a pattern of criminal conduct engaged in as a livelihood. Further, instead of operating as a minimum offense level, the new enhancement applies *on top of* the already high base offense levels in most drug cases, *on top of* other specific offense characteristics in the drug guidelines, and *on top of* the aggravating role adjustment. For defendants who fall in the most commonly applied base offense levels (26 and 32),<sup>18</sup> and who receive even the smallest upward role adjustment (2 levels) but no other upward enhancements, the guidelines already call for 78-97 and 151-188 months’ imprisonment, approximately 8 and 15 *years*, respectively. With zero evidence that further incapacitation of any drug defendant is necessary – to reduce the risk of recidivism or for any other legitimate purpose – argue that the court should disagree with this enhancement as a matter of policy and vary downward to eliminate its impact on the advisory guideline range.

## **II. The Guideline Reductions Directed by the FSA Are Too Restrictive.**

### **A. Minimal role cap**

Congress directed as follows:

[T]he [Commission] shall review and amend the Federal sentencing guidelines and policy statements to ensure that [] if the defendant is subject to a minimal role adjustment under the guidelines, the base offense level for the defendant based solely on drug quantity shall not exceed level 32.

Pub. L. No. 111-220, § 7(1) (Aug. 3, 2010).

In response, the Commission amended § 2D1.1(a)(5), which sets forth a graduated base offense level cap ranging from 30 to 34 for defendants who receive a mitigating role adjustment under § 3B1.2, by adding the following new provision: “If the resulting offense level is greater than level 32 and the defendant receives the 4-level (“minimal participant”) reduction in §

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<sup>18</sup> See U.S. Sent’g Comm’n, *Use of Guidelines and Specific Offense Characteristics Fiscal Year 2010*, at 25, [http://www.ussc.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/Guideline\\_Application\\_Frequencies/2010/10\\_glinexgline.pdf](http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2010/10_glinexgline.pdf).

3B1.2(a), decrease to level **32**. USSG App. C, Amend. 748 (Nov. 1, 2010).<sup>19</sup> As its reason, the Commission said only that it “responds to section 7(1) of the Act.” *Id.*

Unlike the enhancements directed by the FSA, the new minimal role cap at § 2D1.1(a)(5) serves to better reflect the seriousness of the offense for defendants whose role was truly minor, but for whom the role reduction under Chapter 3 is inadequate to offset the impact of drug quantity. The Commission explained in 2004 that the original mitigating role cap, promulgated in 2002,<sup>20</sup> was intended to “ameliorate the influence of large quantities on sentences for the least culpable offenders.”<sup>21</sup> Rather than being the product of political forces unmoored from the purposes of sentencing, the new minimal role cap clearly builds on the Commission’s earlier implementation of the mitigating role cap by further limiting the impact of drug quantity for the lowest level participants “who perform relatively low level trafficking functions, have little authority in the drug trafficking organization, and have a lower degree of individual culpability.”<sup>22</sup>

Of course, the Commission did not need Congress to direct the new cap before it could take action. The Commission could have promulgated it in the independent exercise of its authority under 28 U.S.C. § 994(o), and could have implemented an even lower cap. And it should have. Courts have recognized that the reductions under Chapter 3 hardly offset the impact of quantity. *See, e.g., United States v. Cabrera*, 567 F. Supp. 2d 271, 272-73 (D. Mass. 2008) (“[D]eductions for a defendant’s minor role . . . are limited and do not come close to offsetting the high quantity-driven offense level.”); *United States v. Whigham*, 754 F. Supp. 2d 239, 245 (D. Mass. 2010) (“While the Guidelines permit an adjustment for ‘role’ in the offense, those adjustments . . . hardly offset the substantial impact of quantity in the other direction.”). There is no apparent reason for the choice of level 32, while there is good reason for a court to decide that a base offense level of 32, tied to drug quantity alone and calling for *ten years* of prison even in Criminal History Category I, still vastly overstates the culpability of some drug offenders whose participation in the offense was truly minimal.

If the defendant receives a minimal role adjustment under Chapter 3 and the offense level is capped at 32 by this new provision, point out that level 32 is an arbitrary number and ask the

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<sup>19</sup> The Commission re-promulgated this amendment as permanent, and sent it to Congress at the end of April. U.S. Sent’g Comm’n, *Notice of submission to Congress of amendments to the sentencing guidelines*, 76 Fed. Reg. 24,960 (May 3, 2011). Unless Congress acts to reject it or directs otherwise, the amendment will go into effect on November 1, 2011. *Id.*; 28 U.S.C. § 994(p).

<sup>20</sup> USSG App. C, Amend. 640 (Nov. 1, 2002). The cap was amended two years later to reflect the graduated reductions currently in place. USSG App. C, Amend. 668 (2004);

<sup>21</sup> *See* U.S. Sent’g Comm’n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 51 (2004); USSG App. C, Amend. 640 (Nov. 1, 2002) (explaining the purpose of the mitigating role cap).

<sup>22</sup> USSG App. C, Amend. 640 (Nov. 1, 2002).

court to vary downward to impose a sentence that more appropriately accounts for the defendant's reduced culpability.

## **B. Minimal role reduction**

Congress directed as follows:

[T]he [Commission] shall review and amend the Federal sentencing guidelines and policy statements to ensure that [] there is an additional reduction of 2 offense levels if the defendant –

(A) otherwise qualifies for a minimal role adjustment under the guidelines and had a minimum knowledge of the illegal enterprise;

(B) was to receive no monetary compensation from the illegal transaction; and

(C) was motivated by an intimate or familial relationship or by threats or fear when the defendant was otherwise unlikely to commit such an offense.

Pub. L. No. 111-220, § 7(2) (Aug. 3, 2010).

In response, the Commission added a new subsection, at USSG § 2D1.1(b)(15), which tracks the language of the directive fairly closely (though in a slightly different order) except that the guideline requires that the defendant had “minimal knowledge *of the scope and structure* of the illegal enterprise.” USSG App. C, Amend. 748 (Nov. 1, 2010).<sup>23</sup> As its reason, the Commission stated that it “responds to section 7(2) of the Act.”

This new reduction is not likely to apply by its terms in many cases. Note that the defendant must have received *no* monetary compensation from the illegal transaction to be eligible for a reduction, whereas a defendant can be subject to the super-aggravator for “using” another person when the other person received “little or no” compensation. In addition, the defendant must have been “otherwise unlikely” to commit the offense, whereas there is no such requirement for purposes of the super-aggravator. In other words, the provision allowing for consideration of this *mitigating* factor sets forth stricter requirements than the aggravator, for no reason.

While this reduction was clearly designed to lower sentences in what are commonly known as the “girlfriend” drug cases, we do not know why the provision was drawn so narrowly or why it was drawn more narrowly than a similar aggravator. If the defendant almost meets

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<sup>23</sup> The Commission re-promulgated this amendment as permanent, and sent it to Congress at the end of April. U.S. Sent’g Comm’n, *Notice of submission to Congress of amendments to the sentencing guidelines*, 76 Fed. Reg. 24,960 (May 3, 2011). Unless Congress acts to reject it or directs otherwise, the amendment will go into effect on November 1, 2011. *Id.*; 28 U.S.C. § 994(p).

these requirements, or meets every requirement except those that make it stricter than the aggravator, argue that the court should not limit its consideration to its literal terms and should vary downward by the equivalent of at least two levels.