

expected to distribute one kilogram in a 30-day period.

It also is to be noted that the use of a time period to limit consideration of conduct for sentencing purposes is currently contained in at least one statutory provision. Subsection (b)(2)(B) of 21 U.S.C. § 848 (Continuing Criminal Enterprise) requires the consideration of gross receipts be in relation to any 12-month period of the existence of the enterprise.

Consideration of quantity over a specified period would also eliminate cases in which courts are obligated to make extrapolations over long periods of time (with often tenuous information) in order to assess the quantity of controlled substances involved over the course of the entire offense.

Under this amendment, the guideline range would be based upon the largest amount of controlled substances with which the defendant was involved in a specified time period. Bracketed language displays four options. Options include a one-year time frame; a 180-day time frame, a 30-day time frame, and an option using the largest quantity involved at any one time.

*Proposed Amendment:* Section 2D1.1(c) is amended by designating the notes immediately following the Drug Quantity Table as Notes (B)-(I), respectively; and by inserting the following immediately before those notes:

“Notes to Drug Quantity Table:

[Option 1: (A) If the offense involved a number of transactions over a period of more than [12 months][180 days][30 days], the offense level from the Drug Quantity Table shall be based on the quantity of controlled substances with which the defendant was involved in any continuous [12-month][180-day][30-day] period during the course of the offense, using the quantity from the time period that results in the greatest offense level].

[Option 2: (A) If the offense involved a number of transactions over a period of time, the offense level from the Drug Quantity Table shall be determined by the quantity of controlled substances with which the defendant was involved on any one occasion, using the quantity that results in the greatest offense level].”

*40. Synopsis of Proposed Amendment:* Some commentators have argued that the fact that the guidelines do not take into account drug purity can lead to unwarranted disparity in three types of cases. First, with some drugs, the purity of the drug generally increases with quantity (e.g., large quantities of heroin are generally purer than small quantities). With other drugs,

purity varies less or does not vary at all (e.g., Percodan does not vary in purity because it is in pill form). The net result is that if the offense levels assigned to various controlled substances are proportional at the lower offense levels, the offense levels for the controlled substances that do not vary in purity will overpunish at the higher offense levels. For example, if Percodan and heroin offenses are aligned correctly at level 12, Percodan offenses will be substantially over-punished at higher offense levels. Second, there are a number of controlled substances that typically use large proportions of filler material in distribution. Methadone and Percodan are examples. Consequently, the offense levels for these substances tend to be inflated grossly by the weight of the filler material. This is similar to the LSD blotter paper/sugar cube issue that the Commission addressed in the 1993 amendment cycle. Third, even with drugs that generally increase in purity as quantity increases (e.g., heroin), there are some points in the distribution scheme (particularly at the lower levels) in which purity may vary substantially and thus have a significant impact on offense level. In addition, when purity is not considered, the offense level can be affected substantially by the timing of the arrest. For example, if a retail drug dealer buys ten grams of heroin at 50 percent purity in order to cut it with 100 grams of quinine and resell it, the offense level if the defendant is arrested before cutting the heroin is level 16 (ten grams). The offense level if the same defendant is arrested after cutting the quinine is level 26 (110 grams) despite the fact that the amount of actual heroin involved has always been five grams (ten grams at 50 percent purity).

Adoption of a drug table that used the actual weight of the controlled substance itself (e.g., 10 grams at 25% purity = 2.5 grams) would address these issues and eliminate inflation of offense levels based on “filler” material. Purity information is routinely provided on DEA Form 7 using established sampling procedures. There are, however, two potential practical problems related to drug purity that would have to be addressed satisfactorily before adoption of such a proposal. Both of these practical problems apply primarily to controlled substances that vary in purity (e.g., heroin and cocaine), rather than to legitimately manufactured pharmaceuticals that have been diverted (for which purity can readily be established) and substances that do not vary greatly in purity and thus would continue to be assessed by gross weight

(e.g., marijuana). First, there is the possibility of increased litigation over purity assessments. It is noted, however, that (1) courts currently make estimates of drug quantity from information that is clearly less precise; (2) the Parole Commission has not found the use of quantity/purity to be problematic; and (3) quantity/purity currently is used for several controlled substances. For example, the instruction in § 2D1.1 to use “300 KG of Methamphetamine or 30 KG or more of Methamphetamine (actual)” directs the court to use the weight/purity of Methamphetamine with a conclusive presumption that the Methamphetamine is at least ten percent pure; the same instruction is contained in § 2D1.1 for PCP. Second, there is the issue of how to handle cases in which no controlled substance is seized (e.g., uncompleted offenses) and cases in which a controlled is seized but for some reason is not tested for purity.

Both of these concerns may be addressed by the adoption of a rebuttable presumption (or a set of rebuttable presumptions). For example, there could be a rebuttable presumption that the actual weight of the controlled substance was 50 percent of the weight of the mixture containing the controlled substance. In such case, the court would use a higher or lower percentage if such could be established by the government or the defense. Or, without much increase in complexity, there could be a set of rebuttable presumptions by drug type and/or gross quantity. The Parole Commission has used a chart with “fallback” purities as rebuttable presumptions based on the type and gross quantity of controlled substance for many years. The proposed amendment provides a set of rebuttable presumptions to address these issues.

*Proposed Amendment:* Section 2D1.1(c)(1) is amended by deleting:

“30 KG or more of PCP, or 3 KG or more of PCP (actual);

30 KG or more of Methamphetamine, or 3 KG or more of Methamphetamine (actual), or 3 KG or more of ‘Ice’;”

And inserting in lieu thereof:

“30 KG or more of PCP;

30 KG or more of Methamphetamine”.

Section 2D1.1(c)(2) is amended by deleting:

“At least 30 KG but less than 100 KG of PCP, or at least 3 KG but less than 10 KG of PCP (actual);

At least 30 KG but less than 100 KG of Methamphetamine, or at least 3 KG but less than 10 KG of ‘Ice’;”

And inserting in lieu thereof:

“At least 30 KG but less than 100 KG of PCP;

At least 30 KG but less than 100 KG of Methamphetamine;”.