defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), completed the actions sufficient to constitute the offense of unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully.

3. *In certain cases, the defendant will be convicted of an offense involving a listed chemical covered under this guideline, and a related offense involving an immediate precursor or other controlled substance covered under §2D1.1 (Unlawfully Manufacturing, Importing, Exporting, or Trafficking). For example, P2P (an immediate precursor) and methylamine (a listed chemical) are used together to produce methamphetamine. Determine the offense level under each guideline separately. The offense level for methylamine is determined by using §2D1.11. The offense level for P2P is determined by using §2D1.1 (P2P is listed in the Drug Equivalency Table under Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)). Under the grouping rules of §3D1.2(b), the counts will be grouped together. Note that in determining the scale of the offense under §2D1.1, the quantity of both the controlled substance and listed chemical should be considered (see Application Note 12 in the Commentary to §2D1.1).*

4. *Cases Involving Multiple Chemicals.—*

   (A) *Determining the Base Offense Level for Two or More Chemicals.—Except as provided in subdivision (B), if the offense involves two or more chemicals, use the quantity of the single chemical that results in the greatest offense level, regardless of whether the chemicals are set forth in different tables or in different categories (i.e., list I or list II) under this guideline.*

   Example: The defendant was in possession of five kilograms of ephedrine and 300 grams of hydriodic acid. Ephedrine and hydriodic acid typically are used together in the same manufacturing process to manufacture methamphetamine. The base offense level for each chemical is calculated separately and the chemical with the higher base offense level is used. Five kilograms of ephedrine result in a base offense level of level 38; 300 grams of hydriodic acid result in a base offense level of level 26. In this case, the base offense level would be level 38.

   (B) *Determining the Base Offense Level for Offenses involving Ephedrine, Pseudoephedrine, or Phenylpropanolamine.—If the offense involves two or more chemicals each of which is set forth in the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, (i) aggregate the quantities of all such chemicals, and (ii) determine the base offense level corresponding to the aggregate quantity.*

   Example: The defendant was in possession of 80 grams of ephedrine and 50 grams of phenylpropanolamine, an aggregate quantity of 130 grams of such chemicals. The base offense level corresponding to that aggregate quantity is level 32.

   (C) *Upward Departure.—In a case involving two or more chemicals used to manufacture different controlled substances, or to manufacture one controlled substance by different manufacturing processes, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense.*

5. *Convictions under 21 U.S.C. §§ 841(c)(2) and (f)(1), and 960(d)(2), (d)(3), and (d)(4) do not require that the defendant have knowledge or an actual belief that the listed chemical was to be used to manufacture a controlled substance unlawfully. In a case in which the defendant*

possessed or distributed the listed chemical without such knowledge or belief, a 3-level reduction is provided to reflect that the defendant is less culpable than one who possessed or distributed listed chemicals knowing or believing that they would be used to manufacture a controlled substance unlawfully.

6. *Subsection (b)(3) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b). In some cases, the enhancement under subsection (b)(3) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).*

7. *Application of Subsection (b)(4).—For purposes of subsection (b)(4), "mass-marketing by means of an interactive computer service" means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(4) would apply to a defendant who operated a web site to promote the sale of Gamma-butyrolactone (GBL) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. "Interactive computer service", for purposes of subsection (b)(4) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).*

8. *Imposition of Consecutive Sentence for 21 U.S.C. § 865.—Section 865 of title 21, United States Code, requires the imposition of a mandatory consecutive term of imprisonment of not more than 15 years. In order to comply with the relevant statute, the court should determine the appropriate "total punishment" and, on the judgment form, divide the sentence between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. § 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. § 865. [For example, if the applicable adjusted guideline range is 151-188 months and the court determines a "total punishment" of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. § 865 would achieve the "total punishment" in a manner that satisfies the statutory requirement of a consecutive sentence.]*

Background: Offenses covered by this guideline involve list I chemicals (including ephedrine, pseudoephedrine, and pheylpropanolamine) and list II chemicals. List I chemicals are important to the manufacture of a controlled substance and usually become part of the final product. For example, ephedrine reacts with other chemicals to form methamphetamine. The amount of ephedrine directly affects the amount of methamphetamine produced. List II chemicals are generally used as solvents, catalysts, and reagents.

Appendix A (Statutory Index)

21 U.S.C. § 841(f)(1)	2D1.11, 2D1.13
21 U.S.C. § 841(g)	2D1.1

* * *

21 U.S.C. § 860	2D1.2
21 U.S.C. § 860a	2D1.1

* * *

21 U.S.C. § 864	2D1.12
21 U.S.C. § 865	2D1.1, 2D1.11

Issues for Comment:

1. *Section 201 of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109–248, created a new offense in 21 U.S.C. § 841(g) for "knowingly using the Internet to distribute a date rape drug to any person, knowing or with reasonable cause to believe that (A) the drug would be used in the commission of criminal sexual conduct; or (B) the person is not an authorized purchaser." The Commission requests comment regarding this offense, particularly with respect to the criminal sexual conduct aspect. The proposed amendment presents two options. Option One would provide a [two-][four-]level increase if the defendant was convicted under 21 U.S.C. § 841(g), regardless of what the defendant knew or had reasonable cause to believe. Option Two would provide a four-level increase if the defendant was convicted under 21 U.S.C. § 841(g) and the defendant knew or had reason to believe the drug would be used in the commission of criminal sexual conduct. Option Three would provide a six level increase with a floor of 29 if the defendant knew the drug would be used in the commission of criminal sexual conduct, and a three level increase with a floor of 26 if the defendant had reasonable cause to believe that the drug would be used to commit criminal sexual conduct. Where the defendant sold the drug using the internet to an unauthorized purchaser, add two levels. Is there an alternative approach that the Commission should consider with respect to the criminal sexual abuse aspect of the offense? For example, should the Commission provide a cross reference to the criminal sexual abuse guidelines (§§2A3.1-2A3.4) for defendants convicted under 21 U.S.C. § 841(g)(A) even though it is not the defendant who committed the criminal sexual conduct?*

   The Commission also requests comment regarding whether any enhancement for a conviction under 21 U.S.C. § 841(g) also should provide a minimum offense level. If so, what offense level would be appropriate?

2. *Section 860a of title 21, United States Code, prohibits manufacturing or distributing, or possessing with the intent to manufacture or distribute, methamphetamine on a premises in which an individual under the age of 18 years is present or resides. Two options are presented. The first option uses the existing §2D1.1(b)(8)(C) in cases where the government proves that manufacturing methamphetamine poses a substantial risk of harm to the minor (add 6 levels with a floor of 30), and in all other cases (i.e. distribution and possession with intent to distribute), add two levels. The second option presumes that manufacturing methamphetamine on premises where a minor resides or was present poses a risk of harm and thus calls for adding six levels with a floor of 29. In distribution or possession with intent to distribute cases, option two would add three levels with a floor of 15. The Commission requests comment on which option is preferable, or whether there is an alternative approach that should be considered. If Option One's approach were to be adopted, the Commission requests comment regarding whether the substantial risk of harm enhancement (currently in §2D1.1(b)(8)(C) but proposed to be redesignated as §2D1.1(b)(11)(C)) should be expanded to include distribution of methamphetamine such that distribution offenses that create a substantial risk of harm to the life of a minor or incompetent also would be subject to the six-level enhancement and the minimum offense level of 30. Similarly, should it be expanded to include possession with intent to distribute or manufacture? If so, what would constitute a substantial risk of harm to the life of a minor or incompetent in a case involving methamphetamine distribution or possession with intent to*

distribute or manufacture methamphetamine? With regard to Option Two, the Commission requests comment on whether the six level increase with a floor of 29, and the three level increase with a floor of 15, in manufacturing and distribution cases, respectively, is appropriate, or whether other levels would be more appropriate for the offense.

Both options presented in the proposed amendment are statute of conviction based. As an alternative to a statute of conviction based enhancement, the Commission requests comment regarding whether any enhancement that implements 21 U.S.C. § 860a should be relevant conduct based. Additionally, rather than limit an enhancement to the manufacture and/or distribution of methamphetamine where a minor resides or is present, should the Commission expand any enhancement to all drugs. Finally, should the Commission expand the enhancement to apply when this conduct occurs where an incompetent resides or is present?

3. *The USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109–177, established a new offense at 21 U.S.C. § 865 that provides a mandatory consecutive sentence of not more than 15 years' imprisonment for any drug offense involving the smuggling of methamphetamine or methamphetamine precursor chemical while using a dedicated commuter lane, an alternative or accelerated inspection system, or other facilitated entry program for entry into the United States. The proposed amendment provides a two-level enhancement in §§2D1.1(b)(5) and 2D1.11(b)(5) if the defendant is convicted in 21 U.S.C. § 865.*

The Commission requests comment regarding this proposed enhancement. Specifically, the Commission requests comment on the following:

(a) Should this enhancement be greater than two levels and, if so, what would be appropriate? Additionally, should there be a minimum offense level and, if so, what offense level would be appropriate?

(b) Should the Commission provide an enhancement in §§2D1.1 and 2D1.11. that applies if the offense involved the use of a facilitated entry program to import drugs, regardless of the type of drug the defendant is convicted of importing, or conspiring to import, under 21 U.S.C. § 960 or § 963, respectively?

(c) Should the Commission amend §3B1.3 (Abuse of Position of Trust or Use of Special Skill), Application Note 2, to include offenses that involve use of a facilitated entry program into the United States among cases that receive the §3B1.3 adjustment? If so, should the Commission provide a special instruction in §§2D1.1 and 2D1.11 that §3B1.3 applies if the defendant is convicted of an offense under 21 U.S.C. § 865?

8. Immigration

Synopsis of Proposed Amendment: *In April 2006, the Commission promulgated a number of amendments to the immigration guidelines, primarily focusing on smuggling offenses. These amendments became effective November 1, 2006. This proposed amendment addresses the number of aliens involved in an offense, the number of documents involved in an offense, and options for modifying to §2L1.2 (Unlawfully Entering or Remaining in the United States). Two issues for comment follow the proposed amendment. The first requests input regarding base offense levels in §§2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien), 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law), and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport). The second issue requests comment regarding Lopez v. Gonzalez, 127 S.Ct. 625 (Dec. 5, 2006).*

Number of Aliens and Number of Documents

The proposed amendment provides two options for amending §2L1.1(b)(2) and 2L2.1(b)(2) regarding the number of aliens and number of documents, respectively, involved in the offense. The first option maintains the current structure of the table, which provides a three-level increase for offenses involving six to 24 aliens, a six-level increase for offenses involving 25 to 99 aliens, and a nine-level increase for offenses involving 100 or more aliens. Option One amends the table to provide a nine-level increase for offenses involving 100 to 199 aliens, a [12]-level increase for offenses involving 200 to 299 aliens, and a [15]-level increase for offenses involving 300 or more aliens. Option Two, in part, mirrors Option One by providing the same increases at the top end of the table for offenses involving 100 or more aliens. However, Option Two also provides smaller categories at the low end of the table. Offenses involving six to [15] aliens would receive an increase of three levels, [16 to 49] aliens would receive an increase of [six] levels, and [50 to 99] aliens would receive an increase of [nine] levels.

§2L1.2 (Unlawfully Entering or Remaining in the United States)

The current structure of §2L1.2 requires the court, using the "categorical approach," to assess whether a prior conviction qualifies for a particular category under the guideline. This analysis is often complicated by lack of documentation, competing case law decisions, and the volume of cases. In addition, §2L1.2 contains different definitions of covered offenses from the statute. Courts, then, are faced with making these assessments multiple times in the same case. The proposed amendment provides six options to address the complexity of this guideline.

The first, second, and third options amend the structure of §2L1.2 by using the statutory definition of aggravated felony in combination with the length of the sentence imposed for that prior felony conviction. Option One provides a 16-level increase for an aggravated felony in which the sentence of imprisonment imposed exceeded 13 months; a 12-level increase for an aggravated felony in which the sentence of imprisonment imposed was less than 13 months; and an eight-level increase for all other aggravated felonies. Option Two provides a 16-level increase for an aggravated felony in which the sentence of imprisonment imposed exceeded two years; a 12-level increase for an aggravated felony in which the sentence of imprisonment imposed was at least one year, but less than two years; and an eight-level increase for all other aggravated felonies. Option Three, mirroring the criminal history guidelines, provides a 16-level increase for an aggravated felony in which the sentence imposed exceeded 13 months; a 12-level increase for an aggravated felony in which the sentence imposed was at least 60 days but did not exceed 13 months; and an eight-level increase for

all other aggravated felonies.

For Options One through Three, the proposed amendment also eliminates the categories of crimes of violence and drug trafficking offenses from §2L1.2(b)(1)(E) (three or more misdemeanor offenses).

The fourth option maintains the current structure of §2L1.2, except that the categories of offenses delineated under this guideline are defined by 8 U.S.C. §1101(a)(43), the statute providing definitions for "aggravated felonies". Additionally, this option provides use of length of sentence of imprisonment imposed in conjunction with "crime of violence" to further distinguish between the numerous types of prior convictions that fall within this category.

The proposed amendment also provides for an upward departure in any case in which reliable information indicates that the elements of the offense set forth in the prior conviction under-represent the seriousness of that prior offense. This note is modeled after §4A1.3 and could be used in conjunction with any of Options One through Four.

The fifth option provides an increased base offense level and a reduction if the prior conviction is not a felony.

The sixth option provides a 20-level increase for prior convictions for a national security or terrorism offense and creates further distinctions among type of conviction and length of prior sentence in relation to enhancements based on specific offense characteristics.

Proposed Amendment:

§2L1.1. **Smuggling, Transporting, or Harboring an Unlawful Alien**

(a) Base Offense Level:

(1) **25**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who was inadmissible under 8 U.S.C. § 1182(a)(3);

(2) **23**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony; or

(3) **12**, otherwise.

(b) Specific Offense Characteristics

(1) If (A) the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), and (B) the base offense level is determined under subsection (a)(2), decrease by **3** levels.

(2) If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

Number of Unlawful Aliens
Smuggled, Transported, or

[Option 1 (number of aliens):

Harbored		Increase in Level
(A)	6-24	add **3**
(B)	25-99	add **6**
(C)	100 ~~or more~~-199	add **9**;
(D)	200-299	add **[12]**
(E)	300 or more	add **[15].]**

[Option 2 (number of aliens):

(A)	6-[15]	add **3**
(B)	[16-49]	add **[6]**
(C)	[50-99]	add **[9]**
(D)	[100-199]	add **[12]**
(E)	[200-299]	add **[15]**
(F)	[300 or more]	add **[18].]**

(3) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by **2** levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by **4** levels.

(4) If the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent or grandparent, increase by **2** levels.

(5) (Apply the Greatest):

(A) If a firearm was discharged, increase by **6** levels, but if the resulting offense level is less than level **22**, increase to level **22**.

(B) If a dangerous weapon (including a firearm) was brandished or otherwise used, increase by **4** levels, but if the resulting offense level is less than level **20**, increase to level **20**.

(C) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.

(6) If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.

(7) If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury:

	Death or Degree of Injury	Increase in Level
(A)	Bodily Injury	add **2** levels

(B)	Serious Bodily Injury	add **4** levels
(C)	Permanent or Life-Threatening Bodily Injury	add **6** levels
(D)	Death	add **10** levels.

(8) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (A) after the alien was smuggled into the United States; or (B) while the alien was transported or harbored in the United States, increase by **2** levels. If the resulting offense level is less than level **18**, increase to level **18**.

(9) If the defendant was convicted under 8 U.S.C. § 1324(a)(4), increase by **2** levels.

(c) Cross Reference

(1) If death resulted, apply the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined under this guideline.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1324(a), 1327. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"The offense was committed other than for profit" means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.

"Number of unlawful aliens smuggled, transported, or harbored" does not include the defendant.

"Aggravated felony" is defined in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States).

"Child" has the meaning set forth in section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)).

"Spouse" has the meaning set forth in 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).

"Immigration and naturalization offense" means any offense covered by Chapter Two, Part L.

"Minor" means an individual who had not attained the age of 16 years.

"Parent" means (A) a natural mother or father; (B) a stepmother or stepfather; or (C) an adoptive mother or father.

2. *Interaction with §3B1.1.—For the purposes of §3B1.1 (Aggravating Role), the aliens smuggled, transported, or harbored are not considered participants unless they actively assisted in the smuggling, transporting, or harboring of others. In large scale smuggling, transporting, or harboring cases, an additional adjustment from §3B1.1 typically will apply.*

3. *Upward Departure Provisions.—An upward departure may be warranted in any of the following cases:*

   (A) The defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior.

   (B) The defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds, as set forth under 8 U.S.C. § 1182(a)(3).

   (C) The offense involved substantially more than ~~100~~ 300 aliens.

4. *Prior Convictions Under Subsection (b)(3).—Prior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*

5. *Application of Subsection (b)(6).—Reckless conduct to which the adjustment from subsection (b)(6) applies includes a wide variety of conduct (e.g., transporting persons in the trunk or engine compartment of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in a crowded, dangerous, or inhumane condition). If subsection (b)(6) applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2 (Reckless Endangerment During Flight). Additionally, do not apply the adjustment in subsection (b)(6) if the only reckless conduct that created a substantial risk of death or serious bodily injury is conduct for which the defendant received an enhancement under subsection (b)(5).*

6. *Inapplicability of §3A1.3.—If an enhancement under subsection (b)(8) applies, do not apply §3A1.3 (Restraint of Victim).*

Background: This section includes the most serious immigration offenses covered under the Immigration Reform and Control Act of 1986.

§2L2.1. Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law

(a) Base Offense Level: **11**

(b) Specific Offense Characteristics

(1) If the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), decrease by **3** levels.

(2) If the offense involved six or more documents or passports, increase

as follows:

	Number of Documents/Passports	Increase in Level
[Option 1:		
(A)	6-24	add **3**
(B)	25-99	add **6**
(C)	100 ~~or more~~-199	add **9**~~.~~
(D)	200-299	add **[12]**
(E)	300 or more	add **[15.]]**
[Option 2:		
(A)	6-[15]	add **3**
(B)	[16-49]	add [**6**]
(C)	[50-99]	add [**9**]
(D)	[100-199]	add [**12**]
(E)	[200-299]	add [**15**]
(F)	[300 or more]	add [**18**].]

(3) If the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws, increase by **4** levels.

(4) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by **2** levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by **4** levels.

(5) If the defendant fraudulently obtained or used (A) a United States passport, increase by **4** levels; or (B) a foreign passport, increase by **2** levels.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (4), 1325(b), (c); 18 U.S.C. §§ 1015, 1028, 1425-1427, 1542, 1544, 1546. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline—

"The offense was committed other than for profit" means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.

"Immigration and naturalization offense" means any offense covered by Chapter Two, Part L.

"Child" has the meaning set forth in section 101(b)(1) of the Immigration and Nationality Act

(8 U.S.C. § 1101(b)(1)).

"Spouse" has the meaning set forth in section 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).

2. *Where it is established that multiple documents are part of a set of documents intended for use by a single person, treat the set as one document.*

3. *Subsection (b)(3) provides an enhancement if the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws. If the defendant knew, believed, or had reason to believe that the felony offense to be committed was of an especially serious type, an upward departure may be warranted.*

4. *Prior felony conviction(s) resulting in an adjustment under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*

5. *Application of Subsection (b)(2).—If the offense involved substantially more than ~~100~~300 documents, an upward departure may be warranted.*

* * *

~~§2L1.2. Unlawfully Entering or Remaining in the United States~~

~~(a) Base Offense Level: 8~~

~~(b) Specific Offense Characteristic~~

~~(1) Apply the Greatest:~~

~~If the defendant previously was deported, or unlawfully remained in the United States, after—~~

~~(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels;~~

~~(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels;~~

~~(C) a conviction for an aggravated felony, increase by 8 levels;~~

~~(D) a conviction for any other felony, increase by 4 levels; or~~

~~(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.~~

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

(i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.

(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

(B) Definitions.—For purposes of subsection (b)(1):

(i) "Alien smuggling offense" has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).

(ii) "Child pornography offense" means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260, or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(iii) "Crime of violence" means any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

(iv) "Drug trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

~~(v) "Firearms offense" means any of the following:~~

~~(I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).~~

~~(II) An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).~~

~~(III) A violation of 18 U.S.C. § 844(h).~~

~~(IV) A violation of 18 U.S.C. § 924(c).~~

~~(V) A violation of 18 U.S.C. § 929(a).~~

~~(VI) An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.~~

~~(vi) "Human trafficking offense" means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591, or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.~~

~~(vii) "Sentence imposed" has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.~~

~~(viii) "Terrorism offense" means any offense involving, or intending to promote, a "Federal crime of terrorism", as that term is defined in 18 U.S.C. § 2332b(g)(5).~~

~~2. Definition of "Felony".—For purposes of subsection (b)(1)(A), (B), and (D), "felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.~~

~~3. Application of Subsection (b)(1)(C).—~~

~~(A) Definitions.—For purposes of subsection (b)(1)(C), "aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.~~

~~(B) In General.—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).~~

~~*4. Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):*~~

~~*(A) "Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.*~~

~~*(B) "Three or more convictions" means at least three convictions for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2 (Definitions and Instructions for Computing Criminal History).*~~

~~*5. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.*~~

~~*6. Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).*~~

[Option 1:

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: **8**

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for an aggravated felony for which a sentence of imprisonment exceeding 13 months was imposed, increase by **16** levels;

(B) a conviction for an aggravated felony for which a sentence of imprisonment of 13 months or less was imposed, increase by **12** levels;

(C) a conviction for an aggravated felony not covered by subdivision (b)(1)(A) or (b)(1)(B), increase by **8** levels;

(D) a conviction for any other felony, increase by **4** levels; or

(E) three or more convictions for misdemeanors, increase by **4** levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

(i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.

(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

(B) Definitions.—For purposes of subsection (b)(1):

(i) "Aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

(ii) "Aggravated felony not covered by subdivision (b)(1)(A) or (b)(1)(B)" means an aggravated felony for which the sentence imposed was a sentence other than imprisonment (e.g., probation).

(iii) "Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

(iv) "Sentence of imprisonment" has the meaning given that term in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.

2. Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):

(A) "Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

(B) "Three or more convictions" means at least three convictions for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2 (Definitions and Instructions for Computing Criminal History).

3. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.

4. *Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).*

[5. *Upward Departure Provision.—If reliable information indicates that the elements of the offense set forth in the prior conviction under-represent the seriousness of that prior offense, an upward departure may be warranted.]]*

[Option 2:

§2L1.2. **Unlawfully Entering or Remaining in the United States**

(a) Base Offense Level: **8**

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for an aggravated felony for which the sentence imposed exceeded 2 years, increase by **16** levels;

(B) a conviction for an aggravated felony for which the sentence imposed was at least 12 months but did not exceed 2 years, increase by **12** levels;

(C) a conviction for an aggravated felony, not covered in (b)(1)(A) or (b)(1)(B), increase by **8** levels;

(D) a conviction for any other felony, increase by **4** levels; or

(E) three or more convictions for misdemeanors, increase by **4** levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *Application of Subsection (b)(1).—*

(A) *In General.—For purposes of subsection (b)(1):*

(i) *A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.*

(ii) *A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.*

(iii) *A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.*

(iv) *Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.*

(B) *Definitions.—For purposes of subsection (b)(1):*

(i) *"Aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.*

(ii) *"Aggravated felony not covered by subdivision (b)(1)(A) or (b)(1)(B)" means an aggravated felony for which the sentence imposed was a sentence other than imprisonment (e.g., probation).*

(iii) *"Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.*

(iv) *"Sentence of imprisonment" has the meaning given that term in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.*

2. *Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):*

(A) *"Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.*

(B) *"Three or more convictions" means at least three convictions for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2 (Definitions and Instructions for Computing Criminal History).*

3. *Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.*

4. *Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).*

[5. Upward Departure Provision.—If reliable information indicates that the elements of the offense set forth in the prior conviction under-represent the seriousness of that prior offense,

an upward departure may be warranted.]]

[Option 3:

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: **8**

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for an aggravated felony for which the sentence imposed exceeded 13 months, increase by **16** levels;

(B) a conviction for an aggravated felony for which the sentence imposed was at least 60 days but did not exceed 13 months, increase by **12** levels;

(C) a conviction for an aggravated felony not covered in (b)(1)(A) or (b)(1)(B), increase by **8** levels;

(D) a conviction for any other felony, increase by **4** levels; or

(E) three or more convictions for misdemeanors, increase by **4** levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

(i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.

(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

(B) Definitions.—For purposes of subsection (b)(1):

(i) "Aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

(ii) "Aggravated felony not covered by subdivision (b)(1)(A) or (b)(1)(B)" means an aggravated felony for which the sentence imposed was a sentence other than imprisonment (e.g., probation).

(iii) "Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

(iv) "Sentence of imprisonment" has the meaning given that term in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.

2. Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):

(A) "Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

(B) "Three or more convictions" means at least three convictions for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2 (Definitions and Instructions for Computing Criminal History).

3. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.

4. Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

[5. Upward Departure Provision.—If reliable information indicates that the elements of the offense set forth in the prior conviction under-represent the seriousness of that prior offense, an upward departure may be warranted.]

[Option 4:

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: **8**

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for an aggravated felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence for which the sentence imposed exceeded 13 months; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by **16** levels;

(B) a conviction for an aggravated felony that is a (i) drug trafficking offense for which the sentence imposed was 13 months or less; or (ii) crime of violence for which the sentence imposed was 13 months or less, increase by **12** levels;

(C) a conviction for an aggravated felony not covered by subdivisions (b)(1)(A) or (b)(1)(B), increase by **8** levels;

(D) a conviction for any other felony, increase by **4** levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **4** levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

(i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.

(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is

classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

(B) *Definitions.—For purposes of subsection (b)(1):*

(i) *"Alien smuggling offense" has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).*

(ii) *"Child pornography offense" is an offense described in 8 U.S.C. § 1101(a)(43)(I).*

(iii) *"Crime of violence" has the meaning given that term in 18 U.S.C. § 16.*

(iv) *"Drug trafficking offense" has the meaning given that term in 18 U.S.C. § 924(c).*

(v) *"Firearms offense" is an offense described in 8 U.S.C. §§ 1101(a)(43)(C) and (E).*

(vi) *"Human trafficking offense" is an offense described in 8 U.S.C. § 1101(a)(43)(K).*

(vii) *"Sentence imposed" has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.*

(viii) *"National security or terrorism offense" is an offense described in 8 U.S.C. § 1101(a)(43)(L).*

2. *Definition of "Felony".—For purposes of subsection (b)(1)(A), (B), and (D), "felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.*

3. *Application of Subsection (b)(1)(C).—*

(A) *Definitions.—For purposes of subsection (b)(1)(C), "aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.*

(B) *In General.—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).*

4. *Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):*

(A) *"Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.*

(B) "Three or more convictions" means at least three convictions for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2 (Definitions and Instructions for Computing Criminal History).

5. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.

6. Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

[7. Upward Departure Provision.—If reliable information indicates that the elements of the offense set forth in the prior conviction under-represent the seriousness of that prior offense, an upward departure may be warranted.]]

[Option 5:

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level:**[16]** [**20**] [**24**]

(b) Specific Offense Characteristic

[(1) If the defendant does not have a prior conviction for a felony, decrease by [**8**][**6**][**4**] levels.]

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A.

Application Notes:

1. Definition of "Felony".—For purposes of subsection (b)(1)(A), (B), and (D), "felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

2. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.]

[Option 6:

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: **8**

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was removed, deported, or unlawfully

remained in the United States, after—

(A) a prior conviction for a national security or terrorism offense, increase by **20** levels;

(B) a prior conviction resulting in a sentence of imprisonment of at least 13 months, or a prior conviction for murder, rape, a child pornography offense or an offense involving sexual abuse of a child, or three prior convictions resulting in sentences of imprisonment of at least 60 days, increase by **16** levels;

(C) a prior conviction resulting in a sentence of imprisonment of at least 6 months, or two prior convictions resulting in sentences of imprisonment of at least 60 days, increase by **12** levels;

(D) a prior conviction resulting in a sentence of imprisonment of at least 60 days, increase by **8** levels;

(E) a prior conviction resulting in a sentence of imprisonment or a conviction for any other felony, increase by **4** levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

(i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.

(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

(B) Definitions.—For purposes of subsection (b)(1):

(i) *"Child pornography offense" means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*

(ii) *"Offense involving sexual abuse of a child" means an offense where the victim is under 18 years of age and is any of the following: an offense described in 18 U.S.C. § 2242, a forcible sex offense, statutory rape, or sexual abuse of a minor.*

(iii) *"Sentence of imprisonment" has the meaning given in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.*

(iv) *"National security offense" means an offense to which the Chapter 2M guidelines apply. "Terrorism offense" means any offense involving, or intending to promote, a "Federal crime of terrorism", as that term is defined in 18 U.S.C. § 2332b(g)(5).*

2. *Definition of "Felony".—For purposes of subsection (b)(1)(E), "felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.*

3. *Sentences of imprisonment are counted separately if they are for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2 (Definitions and Instructions for Computing Criminal History).*

4. *Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.*

5. *Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).*

Issues for Comment:

1. *In April 2006, the Commission promulgated an amendment that increased the base offense level in §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) for offenses related to national security. See USSG App C (amendment 692)(effective Nov. 1, 2006). The Commission requests comment regarding whether it should increase the base offense levels in §2L1.1(a)(2) (providing level 23 for previous conviction for an aggravated felony) and (a)(3) (providing level 12, otherwise). Should the Commission increase the base offense levels in §§2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law) and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport)? If so, what offense levels would be appropriate for each relevant guideline?*

2. *The Commission requests comment regarding the Supreme Court's decision in Lopez v. Gonzalez, 126 S.Ct. 625 (Dec. 5, 2006). In Lopez, the Supreme Court held that state drug convictions for conduct treated as a felony by the state, but as a misdemeanor under the federal Controlled Substances Act, do not constitute aggravated felonies under the Immigration and Nationality Act. Under federal criminal law, a conviction for an aggravated felony subjects an alien who unlawfully re-enters the United States to an enhanced statutory maximum penalty (see 8 U.S.C. § 1326(b)(2)) and to an 8-level enhancement under the subsection (b)(1)(C) of §2L1.2. Section 2L1.2 defines "aggravated felony" as having the same meaning given that term in 8 U.S.C. § 1101(a)(43). Given that the guidelines reference the statutory definition of "aggravated felony," the Commission requests comment regarding whether the guidelines should be amended, if at all, in light of Lopez v. Gonzalez?*

9. Issue for Comment: Reductions In Sentence Based on BOP Motion (Compassionate Release)

In April 2006, the Commission promulgated a new policy statement at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons), which became effective November 1, 2006. On May 15, 2006, the Commission published an issue for comment stating its intent to consider, in the 2006-2007 amendment cycle, developing further criteria and a list of specific examples of extraordinary and compelling reasons for sentence reduction pursuant to such statute. See 71 FR 28062. The Commission requested comment and specific suggestions for appropriate criteria and examples, as well as guidance regarding the extent of any such reduction and modifications to a term of supervised release.

The Commission received comment pursuant to this request and hereby requests any additional comment regarding appropriate criteria and examples of extraordinary and compelling reasons. For example, should the Commission modify §1B1.13 to provide that a reduction in a term of imprisonment should be made only if the extraordinary and compelling reason warranting the reduction involves a circumstance or condition that (i) was unknown to the court at the time of sentencing; (ii) was known to or anticipated by the court at the time of sentencing but that has changed substantially since that time; or (iii) was prohibited from being taken into account by the court at the time of sentencing but is no longer prohibited because of a change in applicable law? With respect to examples of extraordinary and compelling reasons, should the fact that the defendant is suffering from a terminal illness be a sufficient basis for a reduction, or should a reduction be limited to situations in which the defendant's terminal illness reduces the defendant's life expectancy to less than 12 months? Should examples of extraordinary and compelling reasons be limited to medical conditions, and if not, what other factors should provide a basis for a reduction under §1B1.13? Should the Commission provide for a combination approach, allowing the court to consider more than one reason, each of which alone is not extraordinary and compelling but that, taken together, make the rationale for a reduction extraordinary and compelling? Should §1B1.13 provide that the Bureau of Prisons may determine that, in any particular defendant's case, an extraordinary and compelling reason other than a reason identified by the Commission warrants a reduction?

10. Issues for Comment: Criminal History

1. *The Commission has identified as a policy priority for this amendment cycle the continuation of its policy work on Chapter Four (Criminal History and Criminal Livelihood), in part because criminal history is among the most frequently cited reasons for a below guideline range sentence. See 71 FR 56578 (Sept. 27, 2006). The Commission has begun examining ways to improve the operation of Chapter Four.*

   As part of this process the Commission held two round-table discussions regarding criminal history in Washington, D.C., on November 1 and 3, 2006, to gather input from judges, academics, federal prosecutors, federal public defenders and other defense practitioners, probation officers, and other users of the federal sentencing guidelines. One topic of interest was the use of minor offenses (i.e., misdemeanor and petty offenses) in determining a defendant's criminal history score. Pursuant to §4A1.2(c), sentences for misdemeanors and petty offenses ("minor offenses") are counted for criminal history purposes with a limited number of exceptions. Some minor offenses are counted only if the sentence was a term of probation of at least one year or a term of imprisonment of at least 30 days, or the prior offense was similar to the instant offense. Examples of offenses that fall within this exception include reckless driving, disorderly conduct, driving with a suspended license, gambling, prostitution, and resisting arrest. See §4A1.2(c)(1) for the full list of offenses in this category. Certain minor offenses such as hitchhiking, juvenile status offenses and truancy, loitering, minor traffic infractions (e.g., speeding), public intoxication, and vagrancy are never counted in criminal history. See §4A1.2(c)(2). Furthermore, several circuit courts have developed varying tests to determine if a conviction falls within the list of offenses provided in §4A1.2(c)(1) or (c)(2).

   The Commission requests comment regarding the use of minor offenses in determining a defendant's criminal history score. Specifically, how reflective of the defendant's culpability are minor offenses? Should the Commission consider specifically excluding other minor offenses from the criminal history determination and, if so, which offenses should be excluded? Conversely, should the Commission consider specifically including additional minor offenses for purposes of determining a defendant's criminal category? Should the Commission include any minor offense that has a term of probation of at least one year, or a term of imprisonment of at least 30 days, or if the prior offense was similar to the instant offense (as currently provided in §4A1.2(c)(1))?

   The Commission also requests comment regarding whether there is an alternate point value that the Commission should consider assigning to minor offenses, or whether there is an alternative way of counting minor offenses for criminal history purposes. For example, should the Commission consider providing criminal history points only after a defendant has multiple convictions for minor offenses? Should the Commission consider not assigning or assigning some alternative point value for recency and status points to minor offenses? (See §4A1.1(d)-(e).) Alternatively, should minor offenses be used only for purposes of an upward departure under §4A1.3 (Departures Based on Inadequacy of Criminal History Category)?

2. *Another topic of interest among the round-table participants was the definition of "related cases" under Application Note 3 of §4A1.2 (Definitions and Instructions for Computing Criminal History). Currently, prior sentences are considered related if there is not intervening arrest and they resulted from offenses that (A) occurred on the same occasion; (B) were part of a single common scheme or plan; or (C) were consolidated for trial or sentencing. Each of these criteria has been the subject of much litigation in the district and appellate courts, including a decision by the Supreme Court regarding the consolidation aspect of the definition. See Buford v. United States, 532 US 59 (2001). Furthermore, a*

number of appellate opinions have suggested that the Commission reexamine the application of the definition of related cases when sentences are not separated by an intervening arrest. The Commission requests comment regarding the definition of "related cases." With respect to the instances described in subdivisions (A), (B), and (C), are there factors that would help the court determine whether a case is related to another case? For example, should the Commission provide a list of factors for the court to use in determining whether prior convictions are consolidated for sentencing? In general, is the current definition for related cases too restrictive and, if so, how should the definition be modified or expanded?

11. Issue for Comment: Implementation of the Telephone Records and Privacy Protection Act of 2006

The Telephone Records and Privacy Protection Act of 2006, Pub. L. 109–476, created a new offense in 18 U.S.C. § 1039 pertaining to the fraudulent acquisition or disclosure of confidential telephone records. Section 4 of the Act requires the Commission to "review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under section 1039 of title 18, United States Code." The Act requires the Commission to promulgate an amendment not later than 180 days after the enactment of the Act.

The Commission requests comment regarding how best to implement this legislation, particularly in light of the mandatory consecutive penalties provided for certain forms of aggravated conduct, and keeping in mind the Commission's simplification efforts. For example, should the Commission reference this offense to §2H3.1 as it is proposed to be amended in the Miscellaneous Laws proposed amendment? That proposed amendment expands the heading of the guideline to include the unauthorized disclosure of any private information, which would include confidential telephone records. If it should be referenced to §2H3.1, are there additional modifications (e.g. special offense characteristics) that should be made to that guideline to implement the new offense?

12. Issue for Comment: Cocaine Sentencing Policy

The Commission identified as a policy priority for the current amendment cycle ending May 1, 2007, the "continuation of its work with the congressional, executive, and judicial branches of the government and other interested parties on cocaine sentencing policy", including updating the Commission's 2002 Report to Congress, Cocaine and Federal Sentencing Policy, which is available on the Commission's website at www.ussc.gov.

In working to address this priority, the Commission currently is updating the information contained in its 2002 Report. As part of this process, the Commission gathered information at a public hearing it held on cocaine sentencing policy on November 14, 2006. At that hearing, the Commission received testimony from the executive and judicial branches of the federal government, State and local agencies, the defense bar, medical and drug treatment experts, academics, and community interest groups. Witnesses at that hearing expressed a variety of views about the nature and characteristics of cocaine offenses and offenders and suggested a number of proposals for addressing federal cocaine penalties. Testimony of the witnesses, as well as a transcript of the public hearing, can be found on the Commission's website.

The Commission invites comment on any or all of the testimony received at the November 14, 2006, public hearing, including comment on any of the suggestions at that hearing or any other suggestions (such as possible changes in the Drug Quantity Table) for addressing federal cocaine penalties.

COMMITTEE ON CRIMINAL LAW
of the
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March 16, 2007

Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Comments on Sentencing Commission Amendments: Incorporation of Mandatory Minimum Terms of Imprisonment created or increased by the Adam Walsh Child Protection Act of 2006

Dear Chairman Hinojosa,

The Criminal Law Committee of the Judicial Conference is pleased to respond to the U.S. Sentencing Commission's Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings for the amendment cycle ending May 1, 2007.[1] While the Committee recognizes that the Commission is considering several important revisions to the guidelines, we would like to focus on one issue that we believe impacts the fair administration of justice. Specifically, the Committee believes that when the Commission is promulgating base offense levels for guidelines used for offenses with mandatory minimums, the Commission should set the base offense level irrespective of the mandatory minimum term of imprisonment that may be imposed by statute.

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[1] 72 Fed. Reg. 4372-4398 (Jan. 30, 2007).

On July 27, 2006, the President signed the Adam Walsh Child Protection and Safety Act of 2006 into law.[2] Among the many provisions in the Act were several new or increased mandatory minimum terms of imprisonment. The Commission has offered four options to harmonize the new and enhanced mandatory penalties with the base offense levels of the guideline system:

> First, the Commission can set the base offense level to correspond to the first offense level on the sentencing table with a guideline range in excess of the mandatory minimum. Historically, this is the approach the Commission has taken with respect to drug offenses. For example, a 10-year mandatory minimum would correspond to a base offense level of 32 (121 - 151 months).
>
> Second, the Commission can set the base offense level such that the guideline range is the first on the sentencing table to include the mandatory minimum term of imprisonment at any point within the range. Under this approach, a 10-year mandatory minimum would correspond to a base offense level of 31 (108 - 135 months).
>
> Third, the Commission could set the base offense level such that the corresponding guideline range is lower than the mandatory minimum term of imprisonment but then anticipate that certain frequently applied specific offense characteristics would increase the offense level and corresponding guideline range to encompass the mandatory minimum. The Commission took this approach in 2004 when it implemented the PROTECT Act.
>
> Fourth, the Commission could decide not to change the base offense levels and allow §5G1.1(b) to operate. Section 5G1.1(b) provides that if a mandatory minimum term of imprisonment is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.[3]

The Criminal Law Committee has considered each of the options offered by the Commission, and believes that Option Four, with a slight modification, is the preferred method to employ when promulgating guidelines to be used in conjunction with mandatory minimum terms of imprisonment. The Committee believes that the Commission should set the base offense level, irrespective of the mandatory minimum, and furthermore encourages the Commission to review each base offense level affected by the Adam Walsh Child Protection and Safety Act of 2006 to ensure that, in the Commission's own expert opinion, the levels adequately address the seriousness of the offenses.

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[2] Public Law No. 109-248 (July 27, 2006).

[3] 72 Fed. Reg. 4382 (Jan. 30, 2007).

The Judicial Conference has a long history of opposing mandatory minimum terms of imprisonment.[4] The basis of the Conference's position is that not only do mandatory minimums unnecessarily limit judicial discretion, but that they interfere with the operation of the Sentencing Reform Act and may, in fact, create unwarranted sentencing disparity.[5] The Conference supports the Sentencing Commission's role as an independent commission in the judicial branch charged with establishing sentencing policies for the federal criminal justice system.[6] The Conference, like the Commission, has opposed efforts by the Congress to directly amend the sentencing guidelines, and favors allowing the Commission to amend the guidelines based on its own expert opinion.[7] While the Commission must respect the intent of Congress when promulgating guidelines, the Conference believes that the Commission is also obligated to make an independent assessment of what the appropriate sentence should be. For these reasons, the Committee does not support Options One or Two.

Likewise, the Committee can not support Option Three. Although the Commission does not propose to set the base offense level to correspond to the mandatory minimum term of imprisonment, the Commission explains that the intent is to still arrive at a guideline range at or above the mandatory minimum term of imprisonment by combining the base offense level with several frequently anticipated specific offense characteristics. The Commission has noted that this was the method used to promulgate guideline amendments in 2004, following the passage of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the PROTECT Act).[8] However, in a March 8, 2004, letter, then Committee Chair, Hon. Sim Lake, informed the Commission that the Committee opposed such an approach. While the Committee

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[4] *See, e.g.*, JCUS-SEP 53, p. 28; JCUS-SEP 61, p. 98; JCUS-MAR 62, p. 22; JCUS-MAR 65, p. 20; JCUS-SEP 67, p. 79; JCUS-OCT 71, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 81, p. 90; JCUS-MAR 90, p.16; JCUS-SEP 90, p. 62; JCUS-SEP 91, pp. 45, 56; JCUS-MAR 93, p. 13.

[5] *See* JCUS-MAR 90, p.16 (paraphrasing the recommendation of the Criminal Law Committee to "reconsider the wisdom of mandatory minimum sentencing statutes and restructure them in such a way that the Sentencing Commission may uniformly establish guidelines for all criminal statutes in order to avoid unwarranted sentencing disparity" as contemplated by the Sentencing Reform Act); *see also* Speech of Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited* (Nov. 18, 1998), *reprinted at* 11 FED. SENT. REP. 180 (1999):

> [S]tatutory mandatory sentences prevent the Commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments.... Every system, after all, needs some kind of escape valve for unusual cases.... For this reason, the Guideline system is a stronger, more effective sentencing system in practice. In sum, Congress, in simultaneously requiring Guideline sentencing and mandatory minimum sentencing, is riding two different horses. And those horses, in terms of coherence, fairness, and effectiveness, are traveling in opposite directions. [In my view, Congress should] abolish mandatory minimums altogether.

Id. at 184-85.

[6] 28 U.S.C. § 991.

[7] JCUS-SEP 03, pp. 5-6

[8] Public Law No. 108-21.

acknowledged the need to address proportionality concerns as a result of the PROTECT Act's many mandatory minimum provisions and direct amendments, the Committee stated that it believed that "the goal of proportionality should not become a one-way ratchet for increasing sentences."[9] The Commission should not feel obligated to follow the approach it used following the enactment of the PROTECT Act since even Congress contemplated the need to revisit the implementation of the Act after some time.[10]

It is the view of the Criminal Law Committee that Option Four represents the best approach to harmonizing what are essentially two competing approaches to criminal sentencing (i.e., a matrix of a comprehensive sentencing guideline system and a collection of powerful but indiscriminate blunderbuss of mandatory minimum sentences). Where mandatory minimum sentences are applicable, they must be imposed, of course, thereby trumping the guideline system. But it is the view of the Judicial Conference that mandatory minimum sentences are less prudent and less efficient than guideline sentencing,[11] and that a system of sentencing guidelines, developed and promulgated by the expert Commission, should remain the foundation of punishment in the federal system. The guideline system should operate as the principal means of establishing criminal penalties for violations of federal law, and the Sentencing Reform Act's principles of parity, proportionality, and parsimony should be observed wherever possible. Thus, Option Four appears to best preserve the primacy of the guidelines as a coherent system, and to avoid injustices that may stem from efforts to engraft meaningful guidelines upon a framework of mandatory minimum sentences.

There is another rationale for establishing meaningful base offense levels without keying these to applicable mandatory minimum sentences: the need to provide meaningful benchmarks for cases in which mandatory minimum penalties do not apply. Setting the base offense level at or near the guideline range that includes the mandatory minimum, as is often seen in drug cases, often leaves the court without guidance on what the appropriate guideline range should be in cases where the mandatory minimum term does not apply. For example, for mandatory minimum offenses covered by §2D1.1, the Commission has set the base offense level, as determined by the drug quantity table, so that the resulting offense level meets or exceeds the mandatory minimum; however, in cases where either §§5K1.1 or 5C1.2 apply, the courts are left with little guidance on what the appropriate sentence should be. If the Commission were to independently set the base offense level to reflect the seriousness of the offense, in its own expert opinion and irrespective of the mandatory minimum term of imprisonment, then the courts would have some benchmark to use when the mandatory minimum would not apply.

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[9] Letter from Hon. Sim Lake, Chair of the Judicial Conference Committee on Criminal Law to Members of the Sentencing Commission, March 8, 2004.

[10] See, Public Law No. 108-21, Title IV, § 401(j)(2), authorizing the Commission to promulgate amendments after May 1, 2005, to certain sections of the sentencing guidelines revised by the PROTECT Act.

[11] See, JCUS-APR 76, p. 10; JCUS-SEP 81, pp. 90, 93.

Of course, the fact that Congress has raised a mandatory minimum sentence for a particular offense is something that the Sentencing Commission must consider, along with all other relevant factors, in exercising its expert judgment on what an appropriate sentence for an offense might be. In raising a mandatory minimum, Congress may be signaling its view that existing guidelines have, at least in some cases, produced sentences that were too low. It is also frequently the case that in raising a mandatory minimum sentence, Congress will have held hearings or published reports explaining the seriousness of a particular offense. These materials will often provide useful information to the Sentencing Commission in reviewing Guideline levels and should be given careful consideration.

Accordingly, the Committee recommends that the Commission should make an assessment of the adequacy of the existing guidelines, independent of any potentially applicable mandatory minimums and adjust the guidelines as the Commission deems appropriate. If the resulting guideline is less than any potentially applicable mandatory minimum sentence, §5G1.1(b) should be utilized to allow for imposition of that statutorily-required sentence.

We appreciate the opportunity to present our views. If you need additional information, please feel free to contact me at (801) 524-3005, or Judge Reggie B. Walton at (202) 354-3290.

Sincerely,

Paul Cassell

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April 6, 2007

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1. Amendment No. 1: Transportation

U.S. Department of Justice (DOJ)
Benton J. Campbell, Acting Deputy Assistant Attorney General and Chief of Staff

Issue #1: USSG §2Q1.2 (49 U.S.C. § 5124)

DOJ recommends adding specific offense characteristics to §2Q1.2 that enhance penalties in cases where death or injury results from the transport of hazardous materials. Currently, §2Q1.2 provides an enhancement in cases where there was a substantial likelihood of death or serious bodily injury, and Application Note 6 suggests a possible upward departure in the case of actual death or injury. Changing §2Q1.2's structure would be consistent with other guidelines that contain similar provisions, such as §2L1.1 and §2A4.1.

Issue #2: USSG §2B2.3 (18 U.S.C. § 1036)

DOJ recommends keeping the §2B2.3 guideline for trespass as it is, where a cross-reference for the relevant underlying felony allows for correlating the sentence to the gravity of potential underlying crimes. A general specific offense characteristic would not achieve the same proportionality with the seriousness of the intended offense that potentially ranges from minor thefts to the bombing of a port.

Issue #3: USSG §2C1.1 (18 U.S.C. § 226)

DOJ supports using the cross-reference under §2C1.1(c)(1) to accommodate the new statute against bribery affecting port security because it offers the advantage of providing a penalty correlated to the gravity of the plotted offense. DOJ would not object to an additional cross-reference to §2M5.3 or providing a material-support-like specific offense characteristic in addition to the cross-reference in §2C1.1(c)(1). DOJ does not support the Practitioners Advisory Group proposal.

Issue #4: USSG §2A5.2

DOJ favors using the term "mass transportation" as opposed to "public transportation" because the former term is defined under 18 U.S.C. § 1992 to include school bus, charter, and sightseeing transportation and passenger vessels.

Practitioners' Advisory Group (PAG)
David Debold & Todd Bussert, Co-Chairs

Appropriateness of Sentence Enhancement For Convictions Under 18 U.S.C. §§ 659 or 2311 (Section 307(c) of PATRIOT Act)

The PAG advises the Commission not to expand the two-level enhancement under §2B1.1(b)(4) to include cases where the defendant was convicted under § 659. The PAG notes that this proposed amendment would eliminate the distinction between defendants who are *in the business* of receiving and selling stolen property from those who merely receive or sell stolen property without being in the business of doing so.

The PAG similarly rejects the suggestion of expanding §2B1.1(b)(11) to include convictions under § 659. A two-level enhancement is currently reserved for those "involved in an organized scheme" to steal vehicles or vehicle parts. The PAG notes that § 659 is not limited to those involved in organized schemes, nor is it limited to offenses involving vehicles or vehicle parts.

Adequacy of §2Q1.2 For New Aggravated Felony Under 49 U.S.C. § 5124 (Request for Comment 1)

The PAG recommends against enhancing penalties under §2Q1.2 for the offense of releasing a hazardous material causing bodily injury or death. The PAG notes that the guideline already encourages an upward departure where death or serious bodily injury occurs.

Cross Reference or Specific Offense Characteristic For Trespasses Committed With Intent to Commit Another Offense (Request for Comment 2)

The PAG recommends that trespasses committed with the intent to commit other offenses be punished through a specific offense characteristic rather than through a cross reference to another guideline. The PAG opposes cross references in the absence of a jury finding because it raises serious due process concerns.

Bribery Affecting Port Security (Request for Comment 3)

The PAG finds that an enhancement to § 2C1.1 is preferable to a cross reference for the new offense of bribery with the intent to commit an act of terrorism under 18 U.S.C. § 226. The PAG believes that § 2C1.1 is an appropriate guideline for 18 U.S.C. § 226 because it provides the same starting point for all bribery offenses. If the Commission chooses to adopt the enhancement, the PAG asks it to provide clear guidance that § 3A1.4 does not apply because it accounts for the same offense characteristic.

2. Amendment No. 2: Sex Offenses

U.S. Department of Justice (DOJ)
Benton J. Campbell, Acting Deputy Assistant Attorney General and Chief of Staff

With respect to the first Issue for Comment, the DOJ believes that the best approach for how to incorporate mandatory minimum sentences is the first approach listed, which sets the base offense level at the guideline range in excess of the mandatory minimum (*i.e.*, a 10 year mandatory minimum base offense level would be 32, or 121-151 months for a criminal history category I offender). The DOJ believes this is the best approach because, it argues, in passing the mandatory minimum penalty, Congress has set that penalty as the absolute minimum, applicable to the least egregious violation of the statute at issue. Applicable specific offense characteristics and criminal history category adjustments reflect aggravated violations and thus, in the DOJ's opinion, it would not be appropriate to have them considered in reaching a guideline range that encompasses the mandatory minimum.

§2A3.5 Failure to Register as a Sex Offender

The DOJ believes it appropriate to amend the specific offense characteristic for an offense against a minor to track the directive, and therefore the language should be changed to "committed an offense against a minor."

Additionally, the DOJ argues the proposed guideline should reflect the ten year statutory maximum by providing a guideline sentence encompassing the maximum for an aggravated offense, such that an offender in criminal history category III required to register for a Tier III offense who committed an offense against a minor while not registered would face a guideline range encompassing 120 months before acceptance of responsibility. Therefore, the DOJ reasons the specific offense characteristic for committing an offense against a minor should be level 12, for a total offense level of 28. Further, the DOJ prefers the specific offense characteristic for committing a sex offense against someone other than a minor be 8 levels while in failure to register status. With respect to the Issue for Comment #2, the DOJ recommends the proposed floor be set at 28.

Option 1 ("Committed" or "Convicted of")

The DOJ recommends the Commission adopt Option 1 applying the enhancements in cases where the defendant committed the specified offenses while unregistered (tracking the Adam Walsh Act directive). In its view, Option 2 would unnecessarily limit the enhancement to cases where the offender had been convicted of a specified offense while unregistered, whereas Congress indicated the enhancement should be based on the offender's commission - not conviction - of the offense while unregistered.

§2A3.5(b)(2) - Voluntary Attempt to Correct a Failure to Register

The DOJ suggests the Commission recognize the affirmative defense at 18 U.S.C. § 2250(b),

which, in its opinion, would prevent the vast majority of cases where offenders voluntarily attempted to comply with registration requirements from reaching the sentencing phase. In its view, the base offense level is an appropriate range for a case where the offender commits the offense and later attempts to correct his failure to register. The DOJ recommends a 2 level decrease for voluntarily attempting to correct a failure to register.

With respect to Issue for Comment #3, the DOJ does not believe it necessary for the specific offense characteristic to cover circumstances where it was impossible for the defendant to register, because, it argues, such circumstances would be covered by the affirmative defense. The DOJ further states that because of sound prosecutorial discretion, it is unlikely a case would be prosecuted where an offender was prevented from registering due to uncontrollable circumstances, debilitating illness, or severe mental impairment. Additionally, the DOJ recommends that the specific offense characteristic should not apply to offenders who commit qualifying offenses because it would be unjust to provide a reduction to offenders who victimized others while unregistered.

§2A3.6 Aggravated Offenses Relating to Registration as a Sex Offender

The DOJ opines the proposed §2A3.6 is appropriate for offenses under 18 U.S.C. § 2260A because the statutory penalty for that offense is set at 10 years in addition and consecutive to the penalty for the underlying offense. However, it argues, it is not appropriate for offenses under 18 U.S.C. § 2250(c) because the statutory penalty has a broad range between 5 and 30 years in addition and consecutive to the underlying 18 U.S.C. § 2250(a) offense. In its view, the proposal ignores Congress's decision to set a minimum and maximum term for a Section 2250(c) offense. The DOJ, therefore, recommends the following proposed guideline for §2A3.6:

> §2A3.6. Aggravated Offenses Relating to Registration as a Sex Offender
>
> (a) If the defendant was convicted under 18 U.S.C. § 2260A, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.
>
> (b) If the defendant was convicted under 18 U.S.C. § 2250(c):
>
> (1) Base Offense Level: 25
>
> (2) Specific Offense Characteristics:
>
> (i) If the offense that gave rise to the requirement to register was a (A) Tier II offense, increase by 2 levels; or (B) Tier III offense, increase by 4 levels.
>
> (ii) If the offender committed a crime of violence against a minor while not registered, increase by 6 levels; if the minor sustained

bodily injury as a result, increase by 9 levels; if the minor sustained serious bodily injury as a result, increase by 12 levels.

(iii) If the offender committed a sex offense against someone other than a minor while not registered, increase by 10 levels.

(iv) If the offender committed a sex offense against a minor while not registered, increase by 12 levels.

The DOJ explains the specific offense characteristics would provide for up to level 41 to encompass the statutory maximum in aggravated cases. The DOJ's proposed guideline has incorporated similar enhancements to those found at 2A2.2(b)(3). The DOJ acknowledges the proposed specific offense characteristics are similar to those under §2A3.5, but believes any possible double-counting concerns are minimized because Congress specified the penalty for a Section 2250(c) offense is in addition and consecutive to the underlying penalty for the Section 2250(a) offense.

In response to the FPD's proposal that it is appropriate to have a guideline providing a range at the statutory minimum by citing §§2B1.6 and 2K2.4, the DOJ asserts that unlike the statutes in those guidelines, which generally specify explicit terms of imprisonment, Section 2250(c) provides a range of imprisonment.

§2A3.3 Criminal Sexual Abuse of a Ward

The DOJ recommends the base offense level be increased to 20 to recognize that the maximum penalty for this offense has been increased from 5 to 15 years.

§2A3.4 Abusive Sexual Contact

The DOJ supports raising the floor for sexual contact offenses against children under 12 from level 20 to level 22. Additionally, regarding Issue for Comment #4, the DOJ believes the new Section 2244(a)(5) is already covered by §2A3.4.

§2G1.1 Promoting a Commercial Sex Act or Prohibited Sexual Conduct Other than a Minor

The DOJ notes that the proposal would establish a base offense level of 34 or 36 for offenses under 18 U.S.C. § 1591 offenses not involving minors and states that while level 36 for a criminal history category I offender (188-235 months) is higher than the new mandatory minimum penalty of 15 years, it believes level 36 is appropriate given the inherent gravity of these crimes, where force, fraud, or coercion is used to cause persons to engage in commercial sex acts.

§2G1.3 Promoting a Commercial Sex Act or Prohibited Sexual Conduct Minor; Transportation; Travel; Sex Trafficking of Children

For the proposed base offense level of either 34 or 36 for offenses under 18 U.S.C. § 1591(b)(1) at the proposed §2A3.5(a)(1), the DOJ believes that while level 36 for a criminal history category I offender (188-235 months) is higher than the new mandatory minimum penalty of 15 years, level 36 is appropriate given the inherent gravity of these crimes, where offenders cause children under 14 to engage in commercial sex acts.

Additionally, for the proposed base offense level of either 30 or 32 for offenses under 18 U.S.C. § 1591(b)(2) involving minors between 14 and 18 at the proposed §2A3.5(a)(2), the DOJ recommends a base offense level 32 because in its view, although level 32 is higher than the mandatory minimum of 10 years, level 32 is appropriate given the inherent gravity of these crimes, where offenders cause children between 14 and 18 to engage in commercial sex acts.

Similarly, for the proposed base offense level of either 28 or 30 for offenses under 18 U.S.C. §§ 2422(b) and 2423(a) at the proposed §2A3.5(a)(3), the DOJ states that because those offenses now carry the same 10 year mandatory minimum as 18 U.S.C. § 1591(b)(2) offenses where the victim is between 14 and 18 years of age, offenses under those statutes should all have the same base offense level 32 and not the proposed level 28 or 30.

Regarding the proposed revision for the age of the victim at §2G1.3(b)(5) in Issue for Comment #8, the DOJ believes the proposed amendment's increases to relevant base offense levels should not be a reason to decrease the impact of this specific offense characteristic; it recommends keeping the current 8 level increase. The DOJ believes this is appropriate because while certain of the offenses include enhanced penalties based on the age of the victim, none of these enhanced penalties apply to cases where the victim is under 12 years of age.

§2G2.5 RecordkeepingOffenses

The DOJ recommends adding a specific offense characteristic in §2G2.5 that would apply to a defendant who tried to frustrate enforcement of 18 U.S.C. §§ 2257 or 2257A by refusing to permit an inspection, to prevent that defendant from being eligible for intermittent confinement, home detention, or community confinement. Accordingly, the DOJ recommends that the following specific offense characteristic be added, and existing § 2G2.5(b) be renumbered.

(b) Specific Offense Characteristic

If the offense involved the refusal or attempted refusal to permit the Attorney General or his or her designee to conduct an inspection pursuant to 18 U.S.C. § 2257(c) or 2257A(c), increase by 6 levels.

With respect to Issue for Comment #5, the DOJ recommends a 6 level enhancement for cases where offenders refuse to permit inspections under applicable provisions of 18 U.S.C. §§ 2257 and 2257A. The DOJ also believes it would be appropriate to provide in an application note that

when warranted, in cases where the 6 level enhancement does not adequately account for the offenders' misconduct, an upward departure as well as application of §3C1.1 may be appropriate.

§2G2.6 Child Exploitation Enterprises

The DOJ recommends a base offense level 37 because that offense level encompasses the 20 year mandatory minimum for these offenses for a criminal history category I offender. However, with respect to Issue for Comment #6, because it recommends generally that the best approach for addressing mandatory minimums is to set the base offense level at the guideline range in excess of the statutory minimum, it believes level 39 (262-327 months for a criminal history category I offender) would be more appropriate. Further, the DOJ states it does not believe a separate specific offense characteristic for 18 U.S.C. § 1591 offenses is necessary.

Additionally, the DOJ supports the revised proposal's inclusion of a specific offense characteristic adding 2 levels for use of a computer or interactive computer service.

In response to the Defenders' suggestion that a decrease for conduct limited to possession or receipt of child pornography without the intent to traffic or distribute that material would be appropriate, the DOJ argues that those who receive and possess child pornography contribute to the demand, causing other offenders to sexually exploit children to supply that demand. Additionally, the DOJ opines these offenders harm the victims depicted, even if they themselves were not involved in the child sexual abuse depicted. The DOJ also asserts that often these offenders' receipt and possession of child pornography drives them to sexually abuse children. Finally, the DOJ comments that it anticipates violations of this new offense may involve offenders who receive and possess child pornography produced or distributed by other members of the child exploitation enterprise involved in the offense, often at the request of those who receive and possess it. In these cases, the DOJ argues, there is an even more direct causal link between these offenders' conduct and the sexual exploitation of the victim. In its strong opinion, therefore, it would be inappropriate to afford these offenders a sentence reduction.

§2G3.1 Importing, Mailing, or Transporting Obscene Matter

The DOJ comments that because the statutory maximum for relevant offenses under 18 U.S.C. § 2252B is 10 years and under 18 U.S.C. § 2252C is 20 years, it would be appropriate to have a 4 level enhancement for the deceit of a minor.

§2J1.2 Obstruction of Justice

The DOJ states that because the 8 year statutory maximum for offenses under 18 U.S.C. § 1001 is the same as false statements in the terrorism context, the specific offense characteristic at §2J1.2(b)(1)(C) should add the same 12 level enhancement as §2J1.2(b)(1)(B).

§4B1.5 Repeat and Dangerous Sex Offenders Against Minors

The DOJ supports changing the definition of "minor" in this guideline to include undercover

agents posing as minors, and including 18 U.S.C. § 1591 offenses as covered sex crimes.

§§5B1.3, 5D1.2 and 5D1.3 Conditions of Probation and Supervised Release

The DOJ supports adding compliance with the sex offender registration requirements as a mandatory condition of probation and supervised release for sex offenders, and it similarly supports adding consent to search as a recommended condition of probation and supervised release in sex offense cases. Similarly, the DOJ supports expanding the definition of "sex offense" to include chapter 109B offenses and Section 1591 offenses, and expanding the definition of "minor" to include undercover agents posing as minors.

Criminal Law Committee (CLC) of the Judicial Conference, dated March 16, 2007

Incorporation of Mandatory Minimum Terms of Imprisonment created or increased by the Adam Walsh Child Protection Act of 2006

The Criminal Law Committee (CLC) recommends Option Four as the preferred method to employ when promulgating guidelines to be used in conjunction with mandatory minimum terms of imprisonment. The CLC believes that the Commission should use its expert opinion to set the base offense level, irrespective of the mandatory minimums provided by statute, and it further urges the Commission review each base offense level affected by the Walsh Act to ensure that the levels adequately reflect the seriousness of the offenses. Noting its long history of opposition to mandatory minimums, the CLC indicates that it cannot support Options One or Two because they do not allow the Commission to make an independent and expert assessment of an appropriate sentence. The CLC similarly refuses to support Option Three because, in the words of a former CLC Committee Chair, "the goal of proportionality should not become a one-way ratchet for increasing sentences."

Even though the Commission must consider the fact that Congress raised mandatory minimum sentences as a factor in determining base offense levels, the Commission should also look to the Sentencing Reform Act's principles of parity, proportionality, and parsimony. Thus, the Commission should not feel obligated to follow the approach taken with the guidelines promulgated after the PROTECT Act. Additionally, the CLC calls to mind a problem that arises in relation to the mandatory minimum offenses covered by §2D1.1, where the Commission had set the base offense level, as determined by the drug quantity table, so that the resulting offense level meets or exceeds the mandatory minimum. In these drug cases, courts are left with little guidance on what the appropriate sentence should be in those cases where §5K1.1 or §5C1.2 apply. The CLC concludes that the system of sentencing guidelines, developed and promulgated by an expert Commission, should remain the foundation of punishment in the federal system. Accordingly, if a resulting guideline is less than any potentially applicable mandatory minimum sentence, §5G1.1(b) should be utilized, as described in Option Four.

Practitioners' Advisory Group (PAG)
David Debold & Todd Bussert, Co-Chairs

§2A3.5/18 U.S.C.§ 2250

The PAG supports Option 1's establishment of base offense levels tied to the tier of the offense that gave rise to the need to register. The PAG also supports a four-level reduction where a defendant voluntarily attempted to correct the failure to register. The PAG suggests that the scope of conduct constituting an attempt to register be construed broadly.

The PAG opposes the other specific offense characteristics set forth in §2A3.5(b)(1) or (b)(2) of Option 2. The PAG feels that the proposed §2A3.5 needlessly opens the floodgates of "relevant conduct," because it includes uncharged or acquitted conduct and expands the definition of "minor" beyond that intended by Congress.

With respect to a prosecution under 18 U.S.C. § 2250 that would satisfy the proposed enhancement, the PAG prefers that a two-level adjustment be implemented under Chapter Three for "sex offenses" and "offenses against minors."

With respect to Issue for Comment 2, the PAG opposes extending the enhancement to other than sex offenses. The PAG notes that Congress did not intend to include non-sexual offenses, and an expansion of the enhancement would produce incongruous results.

New Offenses and Increased Penalties

The PAG supports that Commission's approach under Option 4, which proposes that the Commission make no change to base offense levels and allow §5G1.1(b) to operate. The PAG feels that allowing §5G1.1(b) to operate will allow the Commission time to study and review if offense level increases are needed. The PAG does not support Option 1 or Option 2 because it finds that anchoring offense levels to statutory mandatory minimums, in the absence of a congressional mandate, drives guideline sentences too high. The PAG will consider Option 3 because it finds historically that offense levels once adopted are seldom reduced.

The PAG does not see a need to raise the base offense level for §2A3.3. Notwithstanding the increase in the statutory maximum under 18 U.S.C. § 2243(b) from one to 15 years' imprisonment, the PAG finds that Commission data has shown that courts have sentenced within the prescribed guideline range in each of the 11 cases to which this guideline has applied in the past three years. The PAG also opposes the definition of "minor" proposed in Application Note 1. J. Sands 3/6/07 Ltr. At 16-17.

With respect to §2A3.4 and Issue for Comment 4, in the absence of congressional directive or support, the PAG opposes the proposed increase in minimum offense levels where the victim has not yet attained the age of 12 years.