



U.S. Department of Justice

Criminal Division

Office of Assistant Attorney General

Washington, D.C. 20530

March 14, 2016

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Chief Judge Saris:

On behalf of the U.S. Department of Justice, we submit the following views, comments and suggestions regarding the proposed amendments to the federal sentencing guidelines and issues for comment on illegal immigration offenses, animal fighting, child pornography circuit conflicts, social security fraud and the Bipartisan Budget Act of 2015, national security offenses and the USA Freedom Act of 2015, a technical amendment to 2T1.6 (Failing to Account for and Pay Over Tax) and firearms as nonmailable, as published in the Federal Register on January 15, 2016.¹ This letter compliments the letter we sent to you on February 12th of this year regarding the Compassionate Release Program and conditions of supervision. We thank the members of the Commission, and the staff, for being responsive to the sentencing priorities of the Department of Justice and to the needs and responsibilities more generally of the Executive Branch. We look forward to working with you during the remainder of the amendment year on all of the proposed amendments, and in the years to come.

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¹ U.S. SENTENCING COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, Fed. 81 Reg. 10 (Jan 15, 2016), http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160113_RFP_Combined.pdf.

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U.S. DEPARTMENT OF JUSTICE VIEWS ON PROPOSED AMENDMENTS TO THE
FEDERAL SENTENCING GUIDELINES AND ISSUES FOR COMMENT PUBLISHED IN
THE FEDERAL REGISTER ON JANUARY 15, 2016.

I. Illegal Immigration Offenses

A. § 2L1.1 (Alien Smuggling, Transporting, Harboring)

The Department of Justice agrees with and supports the proposal in Option 1 to raise the Base Offense Level for USSG §2L1.1, Smuggling, Transporting, or Harboring an Unlawful Alien, from level 12 to level 16. The Department opposes the proposal in Option 2, which would establish the base offense level at 16 only if the defendant acted as part of an ongoing commercial organization. As explained more fully below, alien smugglers are part of an ongoing commercial organization as a standard practice. **The Department does not support the proposed revision to §2L1.1(b)(4), providing for a two level increase if the defendant knew or had reason to believe that a minor had been smuggled, transported, or harbored unaccompanied by a parent or grandparent.**

Recent surges in the number of unaccompanied alien children entering the U.S. along the Southwest Border, especially from Central America,² have captured public attention and put alien smuggling in the spotlight. The plight of these children, and tales of their harrowing journeys in the hands of smugglers from El Salvador, Honduras, and other Central American countries, exemplify the risks and dangers that smugglers pose to all of the people they smuggle into the United States across the Southwest Border. This has been of special concern to the Department of Justice.³ For most of these children, the greatest dangers lie in the trip from their home through Mexico to the U.S. border. Once they reach the U.S., the vast majority surrender to the first uniformed officer they see, placing themselves in the administrative process. This means that many of those who smuggle unaccompanied alien children never enter the U.S.

² For Fiscal Year 2011, U.S. Border Patrol reported apprehending 15,949 unaccompanied children along the Southwest Border. During the fiscal year 2014, the number was 68,541. The number dropped to 39,970 during the fiscal year of 2015. *United States Border Patrol, Total Unaccompanied Alien Children Apprehensions by Month FY 2011 to FY 2015*. <https://www.cbp.gov/sites/default/files/documents/BP%20Total%20Monthly%20UACs%20by%20Sector%2C%20FY10-FY15.pdf>. For the fiscal year of 2016, through January 2016, Border Patrol reports a more than 100% increase in unaccompanied alien children (UAC) apprehensions. *Family Unit and Unaccompanied Alien Children Apprehensions FY 16 through January, compared to same time period for FY 15*, <https://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20-%20Jan.pdf>.

³ Letter from Deputy Attorney General Cole to United States Sentencing Commission (October 9, 2014) available upon request.

Consequently, apprehending those smugglers abroad and prosecuting them in U.S. courts poses significant challenges. However, many children and adults undertake journeys fraught with discomfort and danger once they cross our border, effectively captives of those who move them unlawfully in the United States. This guideline's base offense level of 12 does not provide adequate punishment or deterrence for the serious threats and risks inherent in smuggling, transporting, and harboring undocumented aliens. In many cases, smugglers score a total offense level of 10 or lower after adjustments for acceptance of responsibility and credit for waiving material witness depositions. These levels simply do not reflect the seriousness of the conduct or provide any degree of deterrence. Regardless of the level of a smuggling group's organization and sophistication, the risks posed by almost all smugglers warrant a significantly higher base offense level, as proposed in Option 1.

Alien Smuggling is now conducted in ever more desolate, remote, and dangerous areas.

Felony immigration offenses in general, and alien smuggling in particular along the Southwest Border are not new.⁴ But several developments have affected this illegal activity in the last decade and a half, exposing even greater risks and dangers than before. We summarize four such developments below.

First, significant increases in Border Patrol staffing,⁵ increased focus of enforcement on urban areas, the commitment of some state officers to the border,⁶ and other measures,⁷ have made it much more difficult to enter the U.S. and travel unlawfully from the border to interior areas, and have pushed alien smuggling to ever more desolate, remote, and dangerous areas. The risks to aliens' life and limb are significant and serious, and are present in almost every smuggling venture.⁸ Aliens drown in the river and canals crossing into the U.S.; aliens perish

⁴ During the fiscal years of 2007-2015, the Western District of Texas prosecuted a total of 3,570 defendants for § 1324 offenses, and the Southern District of Texas prosecuted 9,621 defendants for § 1324 offenses. Executive Office of U.S. Attorneys, U.S. Department of Justice.

⁵ Border Patrol staffing in the Southwest Border sectors increased from 6,315 agents in FY 1997, to a high of 18,611 agents in FY 2013. Border Patrol Agent Staffing by Fiscal Year. See <http://www.cbp.gov/sites/default/files/documents/BP%20Staffing%20FY1992-FY2015.pdf>.

⁶ In June 2014, the Texas Department of Public Safety began Operation Strong Safety, surging law enforcement officers to patrol the Rio Grande Valley of Texas. <http://www.dps.texas.gov/PublicInformation/documents/operationStrongSafetyRpt.pdf>

⁷ These include the construction of permanent Border Patrol checkpoints on almost all roads leading north from the Mexican border, and a number of technical enhancements in electronic surveillance tools.

⁸ According to Border Patrol statistical reports, deaths in the Southwest Border Sectors spiked from 249 deaths in FY 1999 to 492 in FY 2005. For most of the 2000s, alien deaths annually ranged from the low 300s to the mid-400s. Deaths fell sharply for the first time in FY 2015, to 240 (United States Border Patrol, Southwest Border Sectors, Southwest Border Deaths by Fiscal Year, <http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Sector%20Deaths%20FY19>

during long walks through harsh terrain avoiding Border Patrol checkpoints;⁹ aliens are subjected to physical and sexual abuse while at the mercy of their transporters;¹⁰ aliens are packed into unsafe conveyances;¹¹ and aliens die when drivers try to avoid apprehension.¹² Whether or not the risks become manifest, they are always present. The reckless and dangerous conduct of all who are involved in unlawfully smuggling, transporting, and harboring undocumented immigrants merits more serious punishment than the current guideline provides. While specific offense characteristics address actual outcomes,¹³ the base offense level in this guideline should be increased to punish those who take the risk. The base offense level for this guideline should also be increased to provide some measure of deterrence.

[98%20-%20FY2015.pdf](#)), mirroring the sharp decline in total apprehensions along the Southwest Border from 479,371 in FY 2014, to 331,333 in FY 2015. (UNITED STATES BORDER PATROL, SOUTHWEST BORDER SECTORS, TOTAL ILLEGAL ALIEN APPREHENSIONS BY YEAR, <http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Sector%20Apps%20FY1960%20-%20FY2015.pdf>)

⁹ Aliens can walk for miles and days through hostile terrain, with minimal food and water, until they reach a point north of the fixed Border Patrol checkpoint, where another smuggler will pick them up. This part of the trip is most perilous. Guides do not furnish food or water, aliens become ill, dehydrated, or exhausted, and a number of them die each year during this part of the journey. E.g., *United States v. Luis Carrera-Garcia*, EP-12-CR-2028 (East of El Paso, Border Patrol agents found a severely dehydrated 17-year-old male in the desert north of Interstate 10. He was pronounced dead when he arrived at Culberson County Hospital. Five other aliens found within 15 miles of the boy described their four-day ordeal in the desert—the boy began vomiting the second day; the water ran out the third day; they abandoned him, still conscious, the morning of the fourth day. The foot guide was to be paid \$2000 for each alien when they reached their destination.)

¹⁰ See P.B.S., *Women Crossing the U.S. Border Face Sexual Assault with Little Protection*, <http://www.pbs.org/newshour/updates/facing-risk-rape-migrant-women-prepare-birth-control/> (March 31, 2014); N.P.R., *The Rarely Told Stories of Sexual Assault Against Female Migrants*, <http://www.npr.org/2014/03/23/293449153/the-rarely-told-stories-of-sexual-assault-against-female-migrants> (March 23, 2014).

¹¹ See *United States v. Gonzalo Ruiz-Diaz*, 00-CR-344 (DNM) (2000) (24 illegal aliens were being transported in a Chevy Suburban when one of the tires blew out on Highway 70 between White Sands Missile Range and Alamogordo, NM, killing one alien and seriously injuring several others, i.e., broken bones, broken back); *United States v. Martinez-Ceballos*, 06-CR-846 (DNM) (2006) (9 aliens were being transported in a vehicle near Silver City, NM when the vehicle rolled over, killing two aliens, one of whom was a juvenile); *United States v. Jonathan Rene Martinez*, 13-CR-286 (WDOK) (2013) (14 aliens were being transported in a Chevy Suburban designed to carry 8 passengers, when the driver fell asleep at the wheel, killing one alien and injuring several others on I-40 near Perry, Oklahoma); See also Lee Hockstader and Karin Brulliard, *SFGate, Trapped in scorching trailer -- 18 die / Immigrants abandoned at Texas truck stop*, <http://www.sfgate.com/news/article/Trapped-in-scorching-trailer-18-die-2648170.php> (18 dead among at least 62 people packed into the locked trailer of an 18-wheeler).

¹² *United States v. Javier Silva Morales and Jose Lopez Lozano*, SA-13-CR-152 (WDTX) (the fleeing driver crashed into a cattle tank where four of the 14 aliens drowned in the submerged van).

¹³ U.S.S.G. § 2L1.1(b)(5) – (8).

Mexican drug cartels have become involved with alien smuggling.

Second, it is generally accepted that Mexican drug cartels have become involved with alien smuggling.¹⁴ Because this fact is not currently the subject of a specific offense characteristic the relationship between a smuggling defendant and cartel is not generally reflected in the offense reports or the Presentence Investigation Report. The nature of the involvement and relationship varies and is difficult to characterize in simple or easy to define terms and circumstances.¹⁵ Information developed in some prosecutions suggests that drug cartel members are actively engaged in alien smuggling. Indeed, in a number of recent cases, aliens apprehended carrying loads of marijuana advised they were required to do as a condition of being smuggled.¹⁶ Information from other investigations indicates the cartel's role is less direct and active—one of demanding payments for the privilege of passing through controlled corridors or territory.

In order to evade the court system, alien smugglers increasingly employ juveniles as guides and drivers.

Third, smuggling groups not only transport children, but they employ juveniles as guides and drivers. The federal system is not well suited to handling juvenile offenders¹⁷ and as a result, the prosecution of these juveniles is rare. It seems the smugglers know this because juveniles have become a too-frequent component of alien smuggling. Smugglers in the El Paso Border Patrol Sector regularly employ juveniles to guide groups of aliens across the river and through the fence into Texas and New Mexico.¹⁸ Smugglers in the Del Rio Border Patrol Sector use

¹⁴ See *Drug Cartels Raise the Stakes on Human Smuggling*, Los Angeles Times (March 23, 2009), <http://articles.latimes.com/2009/mar/23/nation/na-human-smuggling23>.

¹⁵ Many of the guides and transporters are more akin to “day laborer” or “at-will” temporary or free-lancing employees; meaning that they work for multiple smuggling organizations. See *Terry Goddard, How to Fix a Broken Border: Disrupting Smuggling at Its Source*, Immigration Policy Center, Feb. 2012 (“Cartels are masters at contracting out. In the United States, cartels don’t work through family or initiated members. Instead, they rely upon subcontractors—businesses which are either set up to serve the smugglers’ needs or formerly legitimate operations that become providers to the cartels. Once a business starts working with the cartels, the criminal-related activity becomes its main customer base. While exclusive, the relationship is handsomely profitable, paying over the going rate for goods and services. This practice has been one, perhaps the only, consistent factor during the years I have worked on cartel-related investigations and prosecutions.”).

¹⁶ See *Migrants Say They're Unwilling Mules for Cartels*, NPR (December 4, 2011) at <http://www.npr.org/2011/12/04/143025654/migrants-say-theyre-unwilling-mules-for-cartels>.

¹⁷ See 18 U.S.C. section 5032, et seq.

¹⁸ Between 2010 and 2015, the U.S. Attorney’s Office for the Western District of Texas prosecuted at least seven juveniles ranging from ages from 14 to 16, for alien smuggling. All had been apprehended smuggling aliens on prior occasions. Similarly, the District of New Mexico has prosecuted juveniles for alien smuggling on a number of occasions. Between 2010 and 2015, the New Mexico U.S. Attorney’s Office prosecuted approximately 31

juveniles as foot guides. A well organized group operating between Laredo and Austin used juveniles as stash-house guards and drivers.¹⁹ Other smuggling organizations utilize other types of drivers and guides in an effort to escape detection.²⁰

Smuggling undocumented aliens poses risks to national security.

Fourth, smuggling undocumented aliens poses risks to national security. Reflecting the concern that terrorists intent on carrying out attacks in the homeland might enter the U.S. in the company of undocumented migrants crossing the U.S. border with Mexico, the Border Patrol has defined its mission as one of protecting national security. The concern is that international terrorists can exploit the same smuggling arrangements used by Mexican and Central American migrants to enter the U.S. without detection. In recent years, law enforcement agents have apprehended aliens from non-traditional countries (so-called “special interest aliens”), and several immigrants with ties to terrorist groups have been prosecuted.²¹

The Commission should increase the base offense level for all smuggling offenses, rather than limit a higher base offense level to defendants shown to be members of an organization.

juveniles ranging from ages 15 to 17, for alien smuggling. In most instances the juveniles had been apprehended at least one time before smuggling aliens before being prosecuted. In one instance an alien juvenile had transported about 55 aliens, was apprehended, and not prosecuted. Several weeks later the same juvenile was found driving a U-Haul truck with more than 100 aliens inside the vehicle. The United States Border Patrol, specifically the Deming and Santa Teresa stations, has informed the U.S. Attorneys Office in New Mexico that alien smuggling organizations routinely use juveniles to guide groups through the desert and to drive vehicles transporting aliens. The District of Arizona has prosecuted 29 juveniles for 1324 smuggling offenses between 2010 and 2015.

¹⁹ *United States v. Fernando Martinez-Magana*, Cause No. SA-12-CR-847 (defendant April Gaitan).

²⁰ Aaron Nelsen, EXPRESS NEWS, Nov. 23, 2013, updated Nov. 26, 2013, <http://www.expressnews.com/news/local/article/Unlikely-ring-of-smugglers-5006301.php> (“In many ways, the unassuming Texas A&M-Corpus Christi frat boy from Cedar Park was ideally suited to smuggling undocumented immigrants. ...During the trial of two co-conspirators ... federal prosecutors depicted a crew of nearly two dozen college-aged men and women...”).

²¹ See, Reid Wilson, *Texas Officials Warn of Immigrants with Terrorist Ties Crossing Southern Border*, THE WASHINGTON POST, Feb. 26, 2015, <https://www.washingtonpost.com/blogs/govbeat/wp/2015/02/26/texas-officials-warn-of-immigrants-with-terrorist-ties-crossing-southern-border/>; Also see, e.g., *United States v. Ahmed Muhammed Dhakane*, Cause No. SA-10-CR-194 (Somali alien entered Texas, member of al-Barakat and Al-Ittihad All-Islami (AIAI) terrorist organizations); *United States v. Deka Abdallah Sheikh and Abdullah Omar Fidse*, Cause No. SA-11-CR-425 (entered U.S. at Hidalgo Port of Entry, lying about connections to terrorist organizations).

The Department requests that the Commission increase the base offense level for all smuggling offenses, rather than limit a higher base offense level to defendants shown to be members of an organization—especially as the Option 2 would define an “ongoing commercial organization.” The nature and degree of risk posed in almost all smuggling ventures that are prosecuted call for a higher base offense level. Defendants who are clearly exceptions to the norm can be addressed in other ways, including adjustments for role in the offense, departures from the Guideline range, and variances.

During each part of the passage, smugglers expose their human cargo to substantial risk of serious harm or death.

Whether an alien smuggler is part of a large commercial organization, acting in concert with a smaller group, or acting alone, the risks and dangers to which they expose smuggled aliens are generally the same. Much of the border with Mexico lies in remote areas of rugged and harsh terrain, unforgiving to the ill-prepared traveler. Most of the year, the temperatures are excessive, the sun is relentless, and water is scarce. The mountains are isolated and difficult to cross; the deserts and chaparrals are vast, hot and dry; the vegetation is thorny and sharp; the vermin are dangerous, if not deadly. The increase in Border Patrol and other law enforcement agents and the construction of fencing in and near the cities on the border has pushed smugglers into ever more remote and dangerous terrain. And whether a smuggling organization is stratified and well-organized, connected to a drug cartel, or small in scale, the manner in which aliens are brought into the country and then transported in violation of law are similar: a guide leads them across the border (the river in Texas) to a staging area (perhaps a stash house); a guide leads them to a vehicle, a transporter leads them on foot, perhaps for days without adequate food and water, through the unforgiving country around interior Border Patrol checkpoints,²² and another transporter picks them up on a remote highway, loads them into an unsafe vehicle and transports them to another stash location²³ where they are held until family members (“respondents”) pay the smugglers their fee.²⁴ Even in urban areas, such as Harlingen and El Paso, Texas, Nogales,

²² This method of travel can be most dangerous. E.g., *United States v. Luis Carrera-Garcia*, EP-12-CR-2028 (WDTX) (East of El Paso, Border Patrol agents found a severely dehydrated 17-year-old male in the desert north of Interstate 10. He was pronounced dead when he arrived at Culberson County Hospital. Five other aliens found within 15 miles of the boy described their four-day ordeal in the desert—the boy began vomiting the second day; the water ran out the third day; they abandoned him, still conscious, the morning of the fourth day. The foot guide was to be paid \$2000 for each alien when they reached their destination.)

²³ This, too, is a very dangerous passage for smuggled aliens. Too frequently, transporters try to avoid law enforcement interdiction, leading state officers on high speed chases. In addition to crashes and rollovers, a recent pursuit ended when the fleeing driver crashed into a cattle tank, where four of 14 aliens drowned in the submerged van. *United States v. Javier Silva Morales and Jose Lopez Lozano*, SA-13-CR-152-XR (WDTX).

²⁴ See <http://www.gao.gov/assets/310/304617.html>.

Arizona, and San Diego, California, danger is ever-present. Smuggled aliens have died and been seriously injured in culverts, canals, storm drains, and trafficker-made tunnels.

During each part of the passage, smugglers expose their human cargo to substantial risk of serious harm or death. While these do not always result, the severity of the potential harm and the callous indifference of those in the smuggling enterprise call for more serious punishment than the current offense level provides.

Undocumented aliens transported unlawfully from the border are not mere “passengers” to the transporters. They are chattel--cargo to be delivered to the next destination for a price. The risk to smugglers is low. Their investments in capital are low. They employ used cars or vehicles owned by others; they rent cheap motels or run-down houses in remote areas for staging; they carry no proceeds while smuggling. They suffer little financial loss if a load is intercepted. Because punishments tend to be low, arrests are unlikely to disrupt operations for long. Unlike other smuggled cargo, such as illegal drugs, which have a value that the smuggler may be held accountable for when lost, there is no financial accountability for human cargo that is lost. Alien smugglers have no investment or stake in their cargo—they owe nothing to anyone if the aliens are apprehended or die. At worst, they might forego some revenue, but often, smuggled aliens pay part of the fee up-front, their families paying the balance upon delivery. It is for this reason, perhaps, that in addition to exposing their cargo to the risks of transit, they subject aliens to physical violence, extortion, and sexual abuse.²⁵ For example, in a recent case from Del Rio, Texas, stash house operators were instructed to injure aliens during phone calls to their families demanding more money.²⁶ The smugglers smashed the hands of two aliens with a hammer and raped another during such calls.²⁷ In another case, smugglers demanding money at gun-point, delivered a two-year-old child to her grandmother; smugglers had separated the child from her mother during transport.²⁸ And related to a recent case in El Paso, a 12-year-old girl smuggled from Ecuador was found hanged after Mexican police placed her in a shelter for migrants.²⁹

²⁵ See <http://www.csmonitor.com/World/Americas/2015/1009/To-stay-or-go-Migrant-women-weigh-risk-of-border-crossing>.

²⁶ *United States v. Rocha*, DR-14-CR-1068 (WDTX); DR-14-CR-724 (WDTX).

²⁷ *Id.*

²⁸ *United States v. Juan Manuel Ruiz, et al.*, DR-13-CR-1249 (WDTX) (The principal smuggler, Juan Manuel Ruiz, was held accountable for smuggling more than 3,000 aliens during the conspiracy, at least one of whom had died.)

²⁹ See Jim Dwyer, *A 12-Year-Old's Trek of Despair Ends in a Noose at the Border*, N.Y. TIMES, Apr. 19, 2014, http://www.nytimes.com/2014/04/20/nyregion/a-12-year-olds-trek-of-despair-ends-in-a-noose-at-the-border.html?_r=0, related to *United States v. Magaly Alemania Malagon Sandoya*, Cause No. EP-15-CR-1603 (WDTX).

By its very nature, alien smuggling along the southwest border requires multiple participants acting in coordination.

By its very nature, alien smuggling along the southwest border requires multiple participants acting in coordination. Undocumented aliens simply cannot navigate by themselves the geographic and law enforcement obstacles along the border. Foot guides, multiple drivers, stash house guards, money handlers, and wire transfers are requisites of almost any smuggling venture. These require substantial coordination and communication. Most smuggling cases begin with an interdiction by Border Patrol or other law enforcement officer of one to three people transporting or harboring some number of undocumented aliens. While it is often difficult to immediately identify the full organization and charge its other members, there is no doubt that the smugglers are organized. Years of experience interdicting smugglers tells us that whenever a group of several undocumented aliens is found surreptitiously traveling away from the border, on foot in the isolated brush or in a vehicle, there is a high probability that they are being transported by members of an organized group.

A recent case brought in San Antonio, Texas, demonstrates how a smuggling group is organized.³⁰ The leader was a member of the Los Zetas cartel, who controlled much of the alien smuggling through Laredo. The investigation focused primarily on the transport group located in the United States. Three main smugglers each supervised a group of drivers, scouts, and guards to operate stash houses along the border and staging locations in houses or motels in San Antonio and Austin. In all, 20 defendants were indicted. Wiretaps revealed that these leaders communicated by phone with the smuggling organization in Mexico to coordinate drivers, scouts, and stash houses to transport groups of aliens from Mexico to San Antonio and Austin. The organization guided aliens on foot through the brush under harsh conditions and then transported groups of up to a dozen aliens in the cargo area of stolen heavy-duty pickups. Those smuggled included minors and aggravated felons. To evade apprehension, drivers engaged in high speed flight at speeds up to 100 mph, eventually careening off roads and through fences. Stash house guards extorted additional payments from aliens and their families which often were made by Western Union and MoneyGram wire transfers. It was determined that the group was responsible for smuggling 100 or more aliens per week, charging a fee of at least 2500 dollars per alien. The case, a rare and significant one in that so many of the organization's members were apprehended, is instructive because the tactics used by the smugglers are typical in most smuggling cases.

As discussed above, Mexican drug cartels are also playing a role in alien smuggling. Undocumented aliens apprehended on foot have reported that they were required to carry a

³⁰ *United States v. Fernando Martinez-Magana, et al.*, SA-12-CR-847-FB (WDTX).

quantity of drugs into the U.S. in exchange for transport.³¹ A smuggler arrested several years ago near El Paso advised that every alien smuggler operating in Ciudad Juárez was required to pay a fee to a hit man (*sicario*) from the Barrio Azteca gang, affiliated with the Juárez Cartel.³² Investigators have also received information that aliens smuggled from territory controlled by the Los Zetas Cartel must pay 500 dollars to the Cartel to cross the river.

The proposed definition of an ongoing commercial organization in Option 2 would inappropriately limit the number of cases in which the higher offense level is appropriate.

Requiring case-specific proof that a defendant was part of an organization of five or more that had as one of its primary purposes smuggling unlawful aliens for profit with knowledge the organization had done so on more than one occasion, as proposed in Option 2, would needlessly and inappropriately limit the number of cases in which the higher offense level is applied, as it is highly impractical, if not impossible to prove the link in all cases. Smuggling cases tend to move quickly on court dockets. Proof of the elements of the offense (8 U.S.C. § 1324) depends heavily on the testimony of the smuggled aliens—to establish their alienage, their unlawful entry, their unlawful transport, and the defendant’s knowledge of the same. The courts limit the amount of time these witnesses may be held, and many are removed, returned, or released within a few months of apprehension.³³ The cases are completed, the witnesses released, and often, the defendants have completed their sentences before investigators can identify the scope and

³¹ *United States v. Victor Alfonso Ramirez-Portillo*, Cause No. DR-15-CR-0818 (WDTX); *United States v. Ricardo Rogelio Paez*, Criminal No. 14-4068 RB, Document Nos. 40 and 59 (DNM) (It should be noted, these cases generally are prosecuted as drug violations, not immigration violations.)

³² Sealed case.

³³ Alien smuggling cases with detained material witnesses progress very quickly. In four of the five Southwest Border districts (California Southern, Arizona, Texas Western, and Texas Southern) there are standing orders or practices that require the deposition of aliens held as material witnesses in smuggling cases. *See Aguilar-Ayala v. Ruiz*, 973 F.2d 411 (5th Cir. 1992) (appeal from the Southern District of Texas, affirming practice of deposing material witnesses); *United States v. Allie*, 978 F.2d 1401 (5th Cir. 1992) (appeal from the Western District of Texas, affirming practice of deposing material witnesses); *Torres-Ruiz v. United States*, 120 F.3d 933 (9th Cir. 1997), granting petition for a writ of mandamus to require district court to schedule aliens videotaped depositions in smuggling case in a case arising out of the Southern District of California); *United States v. Matus-Zayas*, 655 F.3d 1092 (9th Cir. 2010), affirming deposition of material witnesses in an alien smuggling case arising in the District of Arizona). *Compare United States v. Lopez-Cervantes*, 918 F.2d 111 (10th Cir. 1990), holding depositions of illegally transported aliens, material witnesses, should not have been videotaped.). *See, generally*, Simon Azar-Farr, Material Witness Detention in the Federal Courts: A Primer, <http://c.ymcdn.com/sites/www.sanantoniobar.org/resource/collection/A8517B98-12D1-4287-8640-E4709DC69A36/JulyAug09.pdf>. Aliens are detained as material witnesses because one of the elements of the relevant offense is that the alien who was smuggled, harbored, or transported was in fact illegally present in the United States (*i.e.* “That an alien had entered or remained in the United States in violation of the law” from § 2.03 TRANSPORTING ALIENS INTO OR WITHIN THE UNITED STATES, Fifth Circuit Pattern Jury Instructions (Criminal Cases), 2012 Edition).

membership of the organization. The investigation of the Martinez-Magana organization, referenced above, took almost two years to complete and required a substantial commitment of investigative, prosecutorial, and court resources. While the prosecution of 20 defendants had a greater impact on the organization than routine smuggling prosecutions, imposing higher punishment to reflect the organizational nature of the offense should not be limited to comprehensive investigations only.

In sum, for the rare defendant who acts without affiliation, mitigating role adjustments of §3B1.2 and departures and variances are adequate to account for the lesser culpability.

The proposed restriction of the current two level enhancement for unaccompanied children is unjustified, because it is a standard practice for smugglers to move children separate from parents.

The Department does not support the proposed revision to §2L1.1(b)(4), which would limit the existing two level increase for smuggling, transporting, or harboring a minor unaccompanied by a parent or grandparent to only those occasions when the defendant knew or had reason to believe that a minor had been so unaccompanied. As we have discussed above, and further below, the nature of this crime is such that it is *always* reasonably foreseeable there will be unaccompanied children, and it does not make sense, as a policy matter, to require the prosecutor to show that each defendant had specific knowledge. Moreover, such a change in the guidelines might have the unintended consequence of encouraging smuggling rings to become larger and compartmentalized. The surge of unaccompanied children from Central America, who often enter the U.S. in large groups of children or family units, is a recent phenomenon, spurred by current conditions in Honduras, El Salvador, and Guatemala. There is some reason to believe that some smuggling organizations specialize in transporting those children. The typical smuggling organization, however, is not so specialized. It is not uncommon for children to be smuggled to families in the U.S. as part of a group of unrelated adults. Moreover, it is a standard practice for smugglers to move children separate from parents.

The Department supports the proposal to define a minor as an individual who has not attained the age of 18, raising it from 16. This is consistent with the definition of minor in §2A3.1, Application Note 1, and the definition of “juvenile” in 18 U.S.C. § 5031. It is also the age used by U.S. Border Patrol to track the smuggling of unaccompanied children.

In response to the Commission’s proposal to add Application Note 2 to include conduct constituting criminal sexual abuse as “serious bodily injury” for the specific offense characteristic of § 1L1.1(b)(7), the Department suggests that the guideline would be clearer, more easily applied, and encompass the full range of potential sexual exploitation of smuggled aliens, including all minors, with the addition of a separate specific offense characteristic similar to current §2A3.1(b).

In response to the Commission’s request for comment about the proposal to add Application Note 2 to include conduct constituting criminal sexual abuse as “serious bodily injury” for the specific offense characteristic of §1L1.1(b)(7), the Department offers several observations. First, the proposed amendment is not sufficiently broad. The definition of “serious bodily injury” would incorporate conduct that would constitute an offense under 18 U.S.C. § 2241 or § 2242, or any similar offense under state law. This does not reach all sexual acts with minors. Section 2241(c) addresses a sexual act with a person who has not attained the age of 12, or with a person who has not attained the age of 16 that involves force, threat, or rendering the person unconscious or impaired. Under this proposal, a defendant who engages in sex with an unaccompanied 16-year-old minor absent force, threats, or incapacitation does not engage in conduct violating either section,³⁴ and thus, faces no additional punishment. As discussed above, undocumented aliens are subject to a variety of abuses while in the hands of transporters. Children, including those as old as 17, are most vulnerable. **The Department suggests that the guideline would be clearer, more easily applied, and encompass the full range of potential sexual exploitation of smuggled aliens, including all minors, with the addition of a separate specific offense characteristic similar to §2A3.1(b).** A 4 level adjustment should be applied for (a) engaging in conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242; or (b) for engaging in any sex act with a minor being smuggled, transported, or harbored; and if both conditions are present, then the increase should be 6 levels. Additionally, similar to §2A3.1(b), if the victim sustained permanent or life-threatening bodily injury, there should be an increase of additional 4 levels; if the victim sustained serious bodily injury, an increase of additional 2 levels.

The Department supports enhanced punishment for offenses involving the smuggling, transportation, or harboring of six or more unaccompanied minors.

Finally, the Department supports enhanced punishment for offenses involving the smuggling, transportation, or harboring of six or more unaccompanied minors. The Department suggests this should be included as part of the Specific Offense Characteristic of

³⁴ See *United States v. Rice*, 8 Fed. Appx. 214, 217-18 (4th Cir. 2001) (applying §2A3.1, attempted sex with 13-year-old absent threat or attempt to coerce was not conduct constituting violation of 18 U.S.C. § 2241); *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1134 (9th Cir. 2014).

§2L1.1(b)(2), rather than as a suggested basis for departure as proposed. Section (b)(2) already provides adjustments based on the number of aliens transported (more than 5; more than 24; and more than 99). Working from those categories, the Department suggests increasing an additional 1 level if six or more minors were involved; 2 levels if 25 or more minors were involved; and 3 levels if 100 or more were involved.

B. § 2L1.2 (Illegal Reentry)

The Department agrees with the Commission that the current illegal reentry guideline has generated needless litigation and is in need of overhaul. Since the Supreme Court’s 2013 decision in *Descamps*³⁵ and its more recent ruling in *Johnson*,³⁶ federal criminal practitioners have been confronted with greater challenges than ever in determining which immigration defendants are subject to the enhancements prescribed by USSG §2L1.2.³⁷ The problems inherent in understanding and applying the “crime of violence” enhancement,³⁸ along with the “drug trafficking offense”³⁹ and the “aggravated felony” enhancements,⁴⁰ have resulted in vastly divergent results in cases across the country, and have caused a lack of desired uniformity and predictability in sentencing. To make matters worse, the current guideline structure’s reliance on the so-called “categorical approach” to determine whether a predicate offense is a crime of violence saps already scarce resources with its requirement to obtain and analyze myriad state statutes and court documents in order to determine whether a guideline enhancement applies.

The Department agrees that the adoption of a “sentence imposed” paradigm, in place of the categorical approach, best solves the problems created by the categorical approach, and suggests the inclusion of specific discussion of appropriate documents for sentencing courts’ consideration.

The Department agrees with the Commission’s overall approach in the guideline revision. More specifically, we agree that the proposed guideline would be both fairer and easier to apply if based on a “sentence imposed” model for enhancements, rather than the current guideline’s methodology of examining the type of predicate offenses that trigger enhancements. The Department also agrees that enhancements under §2L1.2 should also take into account

³⁵ *Descamps v. United States*, __ U.S. __, 133 S. Ct. 2276 (2013).

³⁶ *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551 (2015).

³⁷ USSG §2L1.2 (2015).

³⁸ USSG §2L1.2(b)(1)(A)(ii).

³⁹ USSG §§ 2L1.2(b)(1)(A)(i), 2L1.2(b)(1)(B) (2015).

⁴⁰ USSG §2L1.2(b)(1)(C) (2015).

convictions which defendants incur after illegally returning to this country – a factor that is sometimes, but not always, considered under the current guideline.

The Commission, the Judiciary, the Department, and the defense bar have worked diligently for many years to devise a fair and appropriate illegal reentry guideline. Section 2L1.2 has been the subject of a number of proposals and roundtable discussions, and the Department has more than once expressed its concern over the application of the guideline, the categorical approach, and the unwarranted sentencing disparities that result from their complexity.⁴¹ The Commission has recognized, and the Department agrees, that the time has come to abandon the current structure of §2L1.2 and replace it with a more workable guideline that both reflects the purpose of the guideline and is simpler to understand and apply.

Section 2L1.2, in its current form, is subject to the “categorical approach.” In determining whether the guideline’s most serious enhancements apply, courts and litigants must parse statutory language, and sometimes certain documentation, to determine whether the defendant’s prior criminal conviction qualifies for an enhancement.⁴²

This approach, as any judge, prosecutor, defender, or probation officer will readily attest, is slow and often torturous, as courts engage in extensive research, often including state court decisions, to interpret the statute of conviction. All too often, the cases are contradictory⁴³ or counterintuitive—circuit precedent is rife with decisions holding that crimes which seem obviously to be “crimes of violence” do not qualify for the guideline’s 16-level enhancement because the underlying state statute could, under different circumstances, be violated without violence.⁴⁴ As one circuit judge put it, the categorical approach “has become over time little

⁴¹ *E.g.*, Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, United States Department of Justice, to Hon. Patti B. Saris, Chair, United States Sentencing Commission (July 29, 2014) at 13, <http://www.justice.gov/sites/default/files/criminal/legacy/2014/08/01/2014/annual-letter-final-072814.pdf>; Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, United States Department of Justice, to Hon. Patti B. Saris, Chair, United States Sentencing Commission (July 11, 2013) at 8, 10, <http://www.justice.gov/criminal/foia/docs/2013annual-letter-final-071113.pdf>; *see also* “Conduct-Based Backup to the Categorical Approach,” Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, United States Department of Justice, to Hon. Patti B. Saris, Chair, United States Sentencing Commission (October 30, 2015), at 11, <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/DOJ.pdf>.

⁴² *See* U.S. SENTENCING COMM’N., *The Categorical Approach: Taylor v. U.S.*, and subsequent cases, 2015 National Training Seminar on the Federal Sentencing Guidelines, http://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2015/categorical_slides.pdf.

⁴³ For example, the Third Circuit has held that New Jersey’s aggravated assault statute is a crime of violence, *United States v. Horton*, 461 F. App’x. 179 (3d Cir. 2012), while the Fifth Circuit has held that it is not, *United States v. Martinez-Flores*, 720 F.3d 293 (5th Cir. 2013).

⁴⁴ *See, e.g., U.S. v. Rosales-Bruno*, 676 F.3d 1017 (11th Cir. 2012) (Prior to 2007, defendant entered the U.S. illegally, and, according to the police report, while out on bond for the domestic battery of the victim, with

more than a mere ruse for removing serious qualifying felonies from the scope of a guidelines ‘crime of violence’ sentencing enhancement.”⁴⁵ This precedential cacophony serves only to muddy the public’s understanding of the federal sentencing system and undermine its confidence in judicial proceedings.⁴⁶

Another undesirable by-product of the confusion surrounding the categorical approach has been the erosion in the uniformity of sentences for immigration offenders. As practitioners continue to grapple with the proper application of §2L1.2’s enhancements, courts impose within-guideline sentences in immigration cases at a discouragingly diminishing rate, and sentences in the various circuits are less uniform than in previous years: in the Commission’s fiscal year 2013 sample of illegal reentry prosecutions, 55.6 percent of sentences were within the guideline range. Although the Commission has not published precise circuit-by-circuit figures for sentences under §2L1.2, a review of immigration sentences overall reveals a wide disparity between circuits. In fiscal year 2014, for instance, courts in the Fifth Circuit sentenced immigration defendants within the guideline range in 55.9 percent of cases. By contrast, only 25.5 percent of immigration defendants in the Ninth Circuit received within-guideline sentences, while Fourth

whom he had a child, punched her and forced her into his vehicle, resulting in a conviction for false imprisonment and battery. Thereafter the defendant was deported, reentered the U.S., and pled guilty to unauthorized reentry after deportation in violation of 8 U.S.C. § 1326(a). The defendant’s sentence, based on an enhancement for a previous crime of violence, was vacated.); *U.S. v. Garcia-Jimenez*, 807 F.3d 1079, 1085-86 (9th Cir. 2015) (Defendant’s previous conviction in New Jersey for aggravated assault for stabbing a man in the chest with a 10-inch knife and threatening to kill him was not a “crime of violence” under §2L1.2 because aggravated assault in New Jersey can result from reckless conduct, or “extreme indifference recklessness”); *U.S. v. Castillo-Marin*, 684 F.3d 914, 925-26 (9th Cir. 2012) (defendant’s previous conviction in New York for assault in the first degree for stabbing another person five times did not qualify as a “crime of violence” under §2L1.2 because the New York statute of conviction could be violated by reckless conduct); *U.S. v. Espinoza-Morales*, 621 F.3d 1141, 1145-47 (9th Cir. 2010) (neither of defendant’s previous convictions for “sexual battery” or “penetration with a foreign object” qualified as a “crime of violence” under §2L1.2 because the California offense of “sexual battery” could apply to restraint that was not physical, and the California offense of “penetration with a foreign object” can be accomplished by means of duress); *U.S. v. Esparza-Herrera*, 557 F.3d 1019, 1025-26 (9th Cir. 2009) (defendant’s previous conviction for aggravated assault in which he tied up and beat the victim for over four hours did not qualify as a “crime of violence” under §2L1.2, because the Arizona statute of conviction encompassed ordinary recklessness); *United States v. Calzada-Ortega*, 551 F. App’x 790 (5th Cir. 2014) (Wisconsin conviction for “substantial battery—intend bodily harm” was not a “crime of violence”); *United States v. Ocampo-Cruz*, 561 F. App’x 361 (5th Cir. 2014) (North Carolina conviction for assault with a deadly weapon inflicting serious injury was not a “crime of violence,” even though the indictment alleged that the defendant willfully assaulted the victim with a motor vehicle, a deadly weapon); *United States v. Parral-Dominguez*, 794 F.3d 440 (4th Cir. Jul. 23, 2015) (North Carolina conviction for discharging a firearm into an occupied building not a “crime of violence”).

⁴⁵ *Parral-Dominguez*, 794 F.3d at 456 (Wilkinson, J., dissenting). The Supreme Court’s opinion in *Descamps* has further complicated the categorical approach by preventing the application of the modified categorical approach to convictions predicated on “non-divisible” statutes.

⁴⁶ The magnitude of this problem is significant. In fiscal year 2014, section 2L1.2 accounted for nearly one-quarter of all federal sentences. United States Sentencing Commission, *2014 Sentencing Source Book*, Table 17.

Circuit defendants received guideline sentences 71.6 percent of the time.⁴⁷ Even accounting for the existence of government-sponsored departures in some cases under early disposition (or “fast track”) programs, the “reasonable uniformity” in sentencing sought by Congress⁴⁸ has become sorely lacking in immigration cases, and the Department is concerned that such differences will become even more magnified in coming years in the absence of decisive action to reform §2L1.2.

The “sentence imposed” paradigm avoids the problems of the categorical approach. Rather than perusing statutory elements of prior convictions to determine whether the underlying crime required the actual, attempted, or threatened use of force against another person, under the Commission’s proposal the sentencing court will look instead to the sentence imposed to determine the seriousness of those prior convictions. This simpler approach will allow sentencing courts and litigants to address the harms against which the immigration statutes are aimed, without the need for the complex analysis required by the categorical approach. The Commission’s proposed guideline will be far simpler to understand and apply than the current guideline, and will provide litigants and the public with comprehensible, predictable, and (most importantly) fair guidance for the sentencing of those convicted of illegal reentry crimes.⁴⁹

Any analysis of underlying documents for sentencing purposes necessarily raises a concern for the reliability of those documents.⁵⁰ Nevertheless, the fact of a prior conviction and

⁴⁷ U.S. SENTENCING COMM’N, Statistical Information Packet, Fiscal Year 2014, Fifth Circuit, at Table 10, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2014/5c14.pdf>; U.S. SENTENCING COMM’N, Statistical Information Packet, Fiscal Year 2014, Ninth Circuit, at Table 10. <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2014/9c14.pdf>; U.S. SENTENCING COMM’N, Statistical Information Packet, Fiscal Year 2014, Fourth Circuit, at Table 10, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2014/4c14.pdf>. A review of earlier years (2012, for example), reveals that Fifth Circuit illegal reentry defendants received within-guideline sentences in 73.8 percent of cases, while 30.6 percent of Ninth Circuit defendants received such sentences. See <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2014/5c12.pdf>; <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2014/9c12.pdf>.

⁴⁸ USSG §1A1.3 (2015); see also 28 U.S.C. § 991(b)(1)(B) (among the Sentencing Commission’s purposes is to avoid “unwarranted disparities among defendants with similar records who have been found guilty of similar criminal conduct”).

⁴⁹ Although not discussed further here, the Department also supports the Commission’s proposal to eliminate the current guideline’s Application Note 8, which describes a basis for departure for a defendant’s time spent in state custody. Given the “sentence imposed” paradigm sought to be adopted in the new guideline, the Department believes elimination of this basis for departure is appropriate.

⁵⁰ See generally *Shepard v. United States*, 544 U.S. 13, 16 (2005) (“We hold...that a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.”); see also *United States v. Dantzler*, 771 F.3d 137, 143-45 (2d Cir. 2014) (sentencing

the length of an imposed sentence can be determined with sufficient reliability through the use of sentencing abstracts, abstracts of judgment, and similar documents. At least one circuit court has so found, in the context of proving the length of a prior sentence.⁵¹ **The Department recommends that the Commission add a reference to §6A1.3 (Resolution of Disputed Factors (Policy Statement)), to clarify that courts may properly consider such documents having sufficient indicia of reliability to determine the fact and length of a prior conviction and sentence.**

In sum, the Commission's proposed revised §2L1.2 offers a well-organized, pragmatic, and eminently achievable method of arriving at a fair sentence for criminal immigration defendants based on the "sentence imposed" model, and the Department endorses that model. Yet, in the interests of justice and fair sentencing, we offer the several additional suggestions for the Commission's consideration, as follows:

- Convictions which result in probated or suspended sentences should not be excluded from receiving enhancements under the new guideline;
- The new guideline should look to all of a defendant's convictions, not just those which receive criminal history points, in determining whether enhancements will apply;
- A base offense level consideration or enhancement should be included for significant numbers of prior deportations.

The Department supports the Commission's proposal to increase the base offense level further for multiple prior illegal reentry convictions

The Department agrees with the Commission that defendants who are convicted of illegal reentry offenses⁵² on multiple prior occasions should receive enhanced punishment, and believes that such offenders should receive enhanced punishment regardless of any other criminal history they may have amassed. The Commission's approach of including prior illegal reentry offenses in the base offense level is a sound one. The Commission's proposal to increase the base offense level further for multiple prior illegal reentry convictions is

court limited to *Shepard* documents in determining whether multiple offenses of conviction were committed on different occasions).

⁵¹ *United States v. Sandoval-Sandoval*, 487 F.3d 1278, 1280 (9th Cir. 2007) ("At sentencing, the district court applied a 16-level enhancement pursuant to U.S.S.G. § 2L1.2(b)(1)(A) in reliance on a factual finding that Defendant had been convicted earlier of "a drug trafficking offense for which the sentence imposed exceeded 13 months." The district court relied on an abstract of judgment issued by the California court of conviction to determine the length of Defendant's prior sentence.")

⁵² As defined in the proposed guideline, an "illegal reentry offense" includes offenses under 8 U.S.C. §§ 1253 and 1326, as well as the felony illegal entry offense criminalized under 8 U.S.C. § 1325(a).

particularly welcome, especially given the Commission's research indicating that 27.2 percent of illegal reentry offenders had previously been convicted of an illegal reentry offense.⁵³ The need for additional punishment for persistent immigration reoffenders is plainly evident, and the Department applauds the Commission's action to address this problem.

The Department endorses the Commission's division of time periods for enhancement purposes.

The Department also agrees with the Commission's desire to divide defendants' criminal history into two time periods, separating those prior convictions that defendants incurred before their first deportation and those they incurred after that time. There is broad agreement that, in the case of illegal reentry offenders, the need to incapacitate offenders and deter future reentries is essential to any comprehensive scheme of federal sentencing in this area. The Commission properly recognizes the discrete dangers posed by criminal aliens. The illegal reentry guideline should punish those aliens who commit crimes prior to their first deportation, and it should also separately punish those aliens who then return to this country illegally and commit additional crimes. The Commission's approach recognizes these distinct societal dangers, and the Department endorses the Commission's approach.

Section 2L1.2, in its current form, provides for only a single enhancement, one which relies on the seriousness of the defendant's criminal record prior to the defendant's most recent deportation. This scheme, while rightly aimed at the defendant's criminal history, is somewhat one-dimensional: it does not account for other harms caused by repeated illegal reentries and subsequent crimes committed by criminal aliens. The Commission's proposed new guideline expands the analysis to address those discrete harms as well, and is carefully tailored to ensure that the most significant sentences are reserved for the most significant offenders.

The Department urges inclusion of probated or suspended sentences, not just those which result in actual incarceration.

The Commission's proposal includes a new application note which would provide that, for purposes of enhancements for prior convictions, only those convictions which also receive criminal history points are to be counted.⁵⁴ By definition elsewhere in the guidelines, however, probated or suspended sentences often do not receive criminal history points.⁵⁵ Yet state and

⁵³ U.S. SENTENCING COMM'N, Public Data Briefing: Proposed 2016 Immigration Amendments, at Slide 17, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160108/immigration_briefing.pdf

⁵⁴ PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, 67.

⁵⁵ See USSG §§ 4A1.2(a)(3), 4A1.2(b)(2), 4A1.2(e) & Cmt. App. N. 2 (2015).

local courts often impose probated or suspended sentences for defendants whom they believe are likely to be deported, as has been acknowledged by a prominent defense attorney in Laredo.⁵⁶ We understand that the Commission is currently conducting a special coding project which also found significant empirical support for this assumption. The Department believes that the new guideline should specifically include probated or suspended sentences in its determination of whether enhancements for prior convictions should apply. Excluding such probated or suspended sentences could thwart the intent of the new guideline by ignoring sentences for significant prior criminal activity.

As the Department has urged to the Sentencing Commission previously, with regard to the then-proposed 2008 guideline amendments,⁵⁷ there is significant concern that state and local courts impose suspended sentences, or even grant deferred prosecution or adjudication, to illegal aliens, knowing that the defendants do not have legal status in this country and are likely to be deported upon completion of their sentences. This expedient resolution can ease problems of overcrowding in state and local prisons, and the accompanying expense for the care of inmates, but does not necessarily reflect the seriousness of the defendant's underlying crime. Inclusion of probated and suspended sentences (and deferred prosecutions or adjudications) in the analysis of a defendant's criminal past will help ensure that the seriousness of a defendant's prior criminal conduct is appropriately accounted for. The Commission's proposal includes an Application Note suggesting a basis for departure for over- or under-representation of a defendant's criminal history,⁵⁸ but **the Department strongly believes that a departure provision is inadequate to address this problem.**

All sentences should be counted for enhancement purposes, not just those which receive criminal history points.

As discussed above, the proposed guideline excludes from enhancement consideration those convictions which do not receive criminal history points. Because offenders' disregard for both our nation's immigration laws and its criminal laws gives rise to their illegal reentry and any subsequent criminal conduct, it is critically important that any new guideline fully address each offender's criminal past.

⁵⁶ "[Undocumented immigrants] are sometimes just given time served. It's a merry go round," and "Some are back in a day or two. It's definitely a problem. It's a race to post bond before ICE can detain them." Eduardo Peña, defense attorney, Laredo, Texas, as quoted in THE TEXAS TRIBUNE, *Deported four times, 'born criminal' now charged with killing his estranged wife*, February 18, 2016, <http://valleycentral.com/news/local/deported-four-times-born-criminal-now-charged-with-killing-his-estranged-wife>.

⁵⁷ See Letter from Kelli H. Ferry, Counselor to the Assistant Attorney General, to Hon. Ricardo H. Hinojosa, Chair, United States Sentencing Commission (Mar. 27, 2008), at 8, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20080300/DOJ_PUBCOM.pdf.

⁵⁸ PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, 68.

The magnitude of certain enhancements in the current guideline is tied in part to the age of the prior conviction – that is, whether the conviction results in the assessment of criminal history points.⁵⁹ The Department recommends simplifying the current guideline structure by eliminating reference to criminal history points in favor of an examination only of the sentence imposed. The enhancements for prior convictions should recognize that the most serious sentences retain relevance even long after their imposition.

Illegal reentry defendants should not receive lighter sentences merely because they managed to avoid detection by immigration officials for a period of time. Defendants who successfully return to this country illegally after deportation and thereafter commit crimes, yet who are not detected by immigration officials, should not escape sentence consequences for their post-deportation criminal conduct.

The Department urges, therefore, that the Commission provide in Application Note 3 that the defendant’s entire criminal history be examined when determining whether the enhancements in proposed §2L1.2(b)(2) will apply. Ignoring a defendant’s full criminal past would disserve the interests of justice and the public, and will result in unjustifiable sentence disparities among similarly dangerous defendants.

The Department suggests the specific consideration of prior deportations.

The Commission’s proposal includes an application note which suggests that courts consider an upward departure in cases where the defendant has been deported from the United States on multiple prior occasions that are not reflected in prior convictions.⁶⁰ The Department agrees that believes that courts should consider increased punishment for defendants in such situations, but suggests that prior deportations are significant enough to be made part of the determination of a defendant’s base offense level, or in the alternative, to be included as a specific offense characteristic.

In fiscal year 2013, illegal reentry defendants had been deported an average of 3.2 times.⁶¹ A substantial percentage (12.2 percent) had been deported six or more times.⁶² For a number of reasons, not every alien who reenters after deportation or removal is prosecuted. First

⁵⁹ *E.g.*, USSG §§ 2L1.2(b)(1)(A), (B) (2015). These provisions call for a 16- or 12-level enhancement, respectively, if a defendant’s prior conviction results in the assessment of criminal history points, but a 12- or eight-level enhancement if it does not.

⁶⁰ PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, 68.

⁶¹ U.S. SENTENCING COMM’N, ILLEGAL REENTRY OFFENSES (Apr. 2015), at 14, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf.

⁶² *Id.* at 14-15 & Figure 9. Offenders who had been deported ten or more times made up 4.6 percent of the defendants prosecuted for illegal reentry, and one defendant had been deported on 73 prior occasions. *Id.* at 14.

and foremost, the number of possible defendants is overwhelming.⁶³ There simply are not enough court, agency, prosecutorial, or detention resources to charge every possible violator. Second, federal prosecutors tend to direct resources against the most dangerous and serious offenders. The number of prior voluntary returns (VRs) and removals may be a factor in deciding whom to prosecute, and at some point, incorrigible returnees will likely be prosecuted. But even before reaching that level, aliens may have a series of administrative or informal expulsions followed by illegal entries that demonstrate their insistence on violating the immigration laws over and over.⁶⁴ In order to properly account for this unlawful conduct, and to serve as some deterrence to aliens who repeatedly enter the country illegally, the Department recommends that the guideline assign specific values based on formal removals.

This end could be accomplished in a number of ways. First, the existence of a significant number of prior deportations could form the basis for a higher base offense level. For example, a defendant who was previously deported four or more times would receive a base offense level of 12, and a defendant who was previously deported eight or more times would receive a base offense level of 14. These base offense levels would, not coincidentally, align with the Commission's proposed graduated base offense levels.

Alternatively, the Commission could add the existence of a significant number of prior

⁶³ During Fiscal Year 2015, the Department of Homeland Security (DHS) administratively arrested 139,368 people from the nation's jails and prisons, accounting for about 59 percent of the total number of persons removed from the U.S. (U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FY 2015 ICE IMMIGRATION REMOVALS, <https://www.ice.gov/removal-statistics>. The 139,368 persons with other crimes removed in 2015 were a subset of the total of 235,143 aliens removed from the United States.) *Id.* See also Morgan Smith and Terri Langford, Federal deportation policy depends on sheriffs, local jails to detain criminal immigrants, TEXAS TRIBUNE, February 16, 2016, <http://valleycentral.com/news/local/federal-deportation-policy-depends-on-sheriffs-local-jails-to-detain-criminal-immigrants>. Data from the Administrative Office of the United States Courts, specifically table "D-3," reveals that in the twelve month period ending June 30, 2015, some type of criminal action was commenced against 78,923 individuals. (UNITED STATES COURTS, Caseload Statistics Data Tables, <http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables>.) Filing criminal immigration charges against an additional 139,000 individuals is not feasible given current resources. The federal judges in the Southwest Border districts already carry significantly higher caseloads than the national average. In the 12 month period ending June 30, 2015, the national average of felony criminal filings per district judge was 104; along the Southwestern Border the average number of felony criminal filings per judge ranged from a low of 311 in the Southern District of California to a high of 634 in New Mexico. UNITED STATES COURTS, Table N/A—U.S. District Courts—Combined Civil and Criminal Federal Court Management Statistics (June 30, 2015), <http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/06/30-3>.

⁶⁴ It is important to keep in mind that not every alien apprehended without documentation is formally removed. For many years, Border Patrol agents voluntarily removed (VRed) Mexican nationals apprehended close to the border. In the Western District of Texas it was not uncommon to encounter aliens who had been VRed six or more times. There simply was not sufficient manpower to process and formally deport each undocumented alien. In contrast, non-Mexican foreign nationals could not simply be returned to Mexico without process, and thus, were much more likely to be removed formally. The number of formal removals is not a perfect proxy, but it is fair to say that they probably under-represent most aliens' true history of illegal entries.

deportations as a specific offense characteristic. For example, regardless of his or her base offense level, a defendant who had been previously deported on more than three occasions would receive a two-level enhancement, while a defendant who had been previously deported more than seven times would receive a four-level enhancement.

Whether adopted as part of the base offense level or as a specific characteristic, the graduated penalties for deportations will further the deterrent effect on those individuals who stubbornly refuse to abide by our nation's immigration laws. The Department therefore urges the Commission to include prior deportations as a part of the guideline itself, rather than as a basis for departure.

The Department recommends a new Specific Offense Characteristic for possession of false identification documents or means of identification.

It is the Department's experience that many immigration offenders possess or use false identification documents or the means of identification of another person to perpetrate their offense. The Commission should consider adding a specific offense characteristic to enable courts to consider defendants' possession or use of such documents or information.

Possession or use of false identification documents or identifying information is an aggravating factor, for three reasons. First, immigration offenders who possess or use false documents or the identifying information of another person are more difficult to detect and apprehend. Second, the use of such documents or identifying information can create ambiguity about a defendant's true identity. Defendants have been known to use this ambiguity during sentencing to claim that their prior convictions, entered under a different name, should not be attributed to them. This scenario can be particularly problematic in the context of §2L1.2, given that prior convictions play the central role in determining the defendant's base offense level, any enhancements, and criminal history category. Third, the possession or use of identifying information of another person can cause real and serious harm to the person whose identity was stolen. While a prosecution for aggravated identify theft pursuant to 18 U.S.C. § 1028A can sometimes be used to address offenders who steal the identities of real people, such a charge is not always viable, because it is not always possible to prove that the defendant actually knew that the identifying information belonged to a real person – an element the Supreme Court has required in prosecutions under § 1028A.⁶⁵ While this lack of knowledge may preclude liability under §1028A, this does not mean that the victim of the identity theft suffers no harm, or that the conduct does not deserve increased punishment.

⁶⁵ See *Flores-Figueroa v. United States*, 556 U.S. 646, 657 (2011).

Because of these aggravating aspects, including the potential or actual deleterious impact on actual victims, the Department suggests the new specific offense characteristic so that sentencing courts can take into account defendants' possession or use of false identification documents or other means of identification. The term "means of identification," and "false identification document" would have the same meaning as defined in 18 U.S.C. § 1028(d). To qualify for the enhancement, it should not be necessary that the defendant have knowledge that the document is fraudulent, or have knowledge that the means of identification actually belongs to a real person.⁶⁶

II. Animal Fighting

The Department of Justice supports increasing the penalties for animal fighting. In May of 2008, Congress amended 18 U.S.C. § 49 (Enforcement of animal fighting prohibitions) to increase the maximum term of imprisonment for animal fighting, a felony, from 3 years to 5 years. This change brought the statutory maximum penalty for violating the animal fighting venture prohibitions in the Animal Welfare Act, 7 U.S.C. § 2156, in line with other violent crimes. In 2014, Congress created two new animal fighting offenses. It is now unlawful to attend an animal fight, and to cause a person under the age of 16 to attend an animal fight.⁶⁷ These new offenses are punishable by up to one and three years in prison, respectively.⁶⁸ Animal fighting crimes are assigned to §2E3.1. As noted by the Commission, §2E3.1 was most recently amended in April of 2008, prior to these legislative amendments.

Revising §2E3.1 is a worthwhile effort because trends point to an increase in both unlawful animal fighting activity and the federal law enforcement response to it. State and national animal control associations estimate that upwards of 40,000 people participate in dog fighting in the United States at a professional level, meaning that dog fighting and its associated gambling are their primary or only source of income.⁶⁹ Specific data on the prevalence of animal cruelty crimes across the country is not currently available, although it will be soon. The Federal Bureau of Investigation announced in 2014 that it would start collecting data on animal cruelty crimes in the National Incident-Based Reporting System. In the meantime, increases in animal fighting activity can be observed anecdotally in the proliferation of online commerce in fighting

⁶⁶ This approach is consistent with the approach taken in other areas of the guidelines, including §2K2.1, which deals with the possession of firearms. See §2K2.1 (2015). Section 2K2.1(b)(4) provides an increase of two levels if the firearm is stolen, and an increase of four levels if the firearm has an obliterated serial number. Application Note 8(B) specifically states that these enhancements apply "regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number."

⁶⁷ 7 U.S.C. §§ 2156(a)(2)(A), (B).

⁶⁸ 18 U.S.C. § 49(b), (c).

⁶⁹ See *United States v. Berry*, No. 09-CR-30101-MJR, 2010 WL 1882057, at *3-4 (S.D. Ill. May 11, 2010).

animals, a surge in the number of dead and injured pit bull-type dogs found on roads and in public areas, and the resurgence of a dog fighting trade journal.

The Department of Justice is working to reverse this trend. Federal prosecutors have charged over 250 defendants with animal fighting crimes in the last seven years. In 2014, U.S. Attorneys' Offices pursued ten dog fighting cases against 49 defendants, marking a significant uptick in federal law enforcement in this area. Additionally, the U.S. Attorneys' Manual was revised in October of 2014 to add animal fighting to the laws enforced by the Environment and Natural Resources Division, enabling a coordinated federal enforcement approach. This initiative serves the Department's traditional law enforcement priorities because animal fighting is closely associated with gang activity, drug and weapons trafficking, and interpersonal violence.

Summary of Department Recommendations

As discussed in further detail below, the Department of Justice supports the proposed changes to the base offense level, and in particular, the higher of the two base offense levels proposed in subsections (a)(1) (16 levels) and (a)(3) (10 levels). The proposed upward departure language for extraordinary cruelty should be maintained. Rather than including an upward departure provision for ventures of extraordinary scale, the Commission should provide that offenses under this section do not group together under the multiple count rules.

The Commission's Proposal and Issues for Comment

The Department supports the proposed changes to the base offense level. The higher of the two base offense levels proposed in subsections (a)(1) (16 levels) and (a)(3) (10 levels) are appropriate because they better reflect the statutory penalties and the violence and cruelty inherent in animal fights. Causing children to attend these events is particularly concerning because it desensitizes them to violence and places them at risk of physical injury or death.

Aside from the issue of "extraordinary cruelty" and "exceptional scale," addressed in proposed Application Note 2 and discussed separately below, the Department is not aware of any aggravating or mitigating circumstances specific to animal fighting that warrant inclusion in §2E3.1. If the Commission adds an enhancement for possessing a dangerous weapon at an animal fighting venture, the Department would support that. With respect to a potential enhancement for being "in the business of" animal fighting, the Department believes that there are other ways to account for the scale of a defendant's animal fighting operation that are more measurable and well-defined. As explained further below, the most straightforward way to scale punishment to the number of animals criminally misused is to specify that offenses under this

section involving individual animals (i.e., possession, exhibition, sale) do not group under the multiple count rules in §3D.

The Commission also seeks comment on whether the factors of “exceptional scale” and of “exceptional cruelty” should be included as upward departure provisions or enhancements. Again here, the Department believes that the concept of scale would be better addressed by specifying that offenses under 7 U.S.C. § 2156 that involve individual animals do not group for purposes of the multiple count rules in §3D, as addressed further below. If so, an upward departure for “exceptional scale” would not be needed.

With respect to “exceptional cruelty,” the Department supports keeping this language in the Application Notes as a basis for upward departure note rather than crafting an enhancement based on it. Unlike scale, which is measurable by the number of animals involved, the level of cruelty inflicted upon animals is more fact-driven and case-specific and does not lend itself to a particular numeric value that could be applied uniformly across all cases. This factor is better left to the discretion of the sentencing judge as a potential upward departure.

Finally, with respect to the operation of the multiple count rules, the Department asks the Commission to specify that the subset of animal fighting offenses involving *individual animals* – exhibiting or sponsoring (i.e., the fights themselves), possessing, selling, purchasing, training, transporting, delivering, or receiving⁷⁰ – and causing an individual under the age of 16 to attend an animal fighting venture⁷¹ do not group for purposes of the multiple count rules in §3D. There are several reasons why such offenses should not group.

First, the statute makes such acts illegal with respect to “an animal” in the singular, i.e., any such animal and every single such animal. This reflects Congressional concern for the individual animals who are harmed by these crimes, whose fate is the primary motivation for the statute in the first place. For example, a person who fights six dogs to the death in six matches against other dogs has committed at least six offenses. These acts warrant weightier punishment than the commission of a single dog fight, which inflicts proportionally less suffering and death.

Similarly, possession of multiple dogs for fighting purposes creates a larger animal welfare problem than does the possession of a single dog for fighting purposes. This is because fighting dogs are maintained in ways specific to their use for fighting purposes that are invariably inhumane.⁷² In particular, such dogs are kept tethered outside on heavy chains to

⁷⁰ 7 U.S.C. §§ 2156(a)(1), (b).

⁷¹ 7 U.S.C. § 2156(a)(2)(B).

⁷² See, e.g., *United States v. Anderson*, 14-cr-100 (M.D. Ala. Mar. 10, 2015), Tr. of Sentencing Proceedings at 74:19-21, 80:25-81:1, 83:9-18 (ECF No. 723) (Court noting that “close to half” of 114 seized dogs were so ill that they “had to be put down or died,” ninety-two were underweight, and one dead female dog in particular had

increase their neck strength and prevent them from reaching other dogs. They are exposed to the elements and not infrequently die of starvation, thirst, or lack of necessary veterinary care. Some animal fighting operations involve just a few animals; others have far more. The most objective way to proportionally punish these different types of ventures is to specify that such offenses do not group.

The statute also makes it an illegal act to bring an “an individual,” in the singular, who is under the age of 16 to an animal fight, i.e., each child. If an adult brings more than one child to an animal fight, each individual child has been exposed to the psychological harm of attending such an event. Thus, this offense also should not group like the offenses involving individual animals.

To most faithfully fulfill the statute’s purpose, offenses involving individual animals – at least exhibition and possession – and individuals under 16 years of age should not group. This concern does not apply to the other acts prohibited in the statute, such as attending an animal fighting venture, conducting commerce in cockfighting knives, or promoting an animal fighting venture.⁷³

III. Child Pornography Circuit Conflicts

A. Offenses Involving Unusually Young and Vulnerable Minors

The Commission proposes adding an application note to U.S.S.G. §§ 2G2.1 and 2G2.2 that clarifies that the vulnerable victim enhancement provided in §3A1.1 can be applied to child pornography offenses involving certain children who are extremely young or small. **The Department supports this proposal.**

Both §2G2.1 and §2G2.2 currently include specific offense characteristics that apply when the victim is under the age of 12. Appellate courts are split as to whether the vulnerable victim enhancement in §3A1.1 could also be applied when the victims were vulnerable due to their age. This proposal resolves the conflicting case law in favor of applying §3A1.1 in cases where the “minor’s extreme youth or small physical size made the minor especially vulnerable compared to most minors under the age of 12, and the defendant knew or should have known” that fact. The proposed application note also underscores that §3A1.1 can apply in any case where the child was vulnerable for reasons unrelated to age.

heartworm, a “body condition score of “thin to very thin,” and an “empty gastrointestinal tract [which] indicated that the dog had not eaten the previous two or three days”).

⁷³ 7 U.S.C. §§ 2156(a)(2)(A), (a)(2)(B), (c), (e).

As the Commission has noted, a significant volume of child pornography depicts infants and toddlers.⁷⁴ These children are especially vulnerable compared to most children under the age of 12 because they cannot communicate, cannot physically protect themselves, and cannot comprehend what is happening to them.⁷⁵ Offenders who exploit that vulnerability should be held accountable for the particular severity of that conduct.

B. Distribution enhancements in child pornography cases

The Commission proposes changes to U.S.S.G. §§ 2G2.1(b)(3), 2G2.2(b)(3)(B), and 2G2.2(b)(3)(F), all of which pertain to the distribution of child pornography. According to the Sentencing Commission, there are “two related issues that typically arise in child pornography cases when the offense involves a peer-to-peer file-sharing program or network. The first issue is when a participant’s use of a peer-to-peer file sharing program or network warrants at minimum a 2-level enhancement under subsection (b)(3)(F). The second issue is when, if at all, the use of a peer-to-peer file sharing program or network warrants a 5-level enhancement under (b)(3)(B) instead.” **The Department opposes the proposed change to §2G2.1.** The Department does not oppose revising § 2G2.2(b)(3) to resolve the identified circuit splits, but opposes the language offered in the Commission’s proposal.

1. “If the defendant distributed.”

We discuss the specifics of the proposed changes to each individual offense characteristic below, and suggest alternative language where appropriate to address the circuit splits. We begin by addressing a common element that is repeated in the Commission’s proposals to change §§ 2G2.1(b)(3), 2G2.2(b)(3)(B), and 2G2.2(b)(3)(F). For all three specific offense characteristics, the Commission proposes to change the phrase “if the offense involved distribution” to “if the defendant knowingly distributed.” Under the pretext of resolving a circuit split arising in the context of peer-to-peer cases, the Commission actually proposes a potentially substantial alteration to the child pornography guidelines. While the Department acknowledges the need to revise some of the distribution enhancements to resolve the current circuit splits, **we oppose the Commission’s phrasing**, which is not necessary to address the identified tension in the case law and which could in practice allow the most serious defendants to avoid being held appropriately accountable for the severity of their conduct.

First, making this change will invite litigation as to the scope of the conduct the court may consider when determining if the specific offense characteristic should apply, particularly in

⁷⁴ See U.S. SENTENCING COMM’N., REPORT TO CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES, December 2012, 85-87, 108, <http://www.ussc.gov/news/congressional-testimony-and-reports/sex-offense-topics/report-congress-federal-child-pornography-offenses> (hereinafter “Commission Report”).

⁷⁵ See *Id.* at 108.

conspiracy cases or cases involving relevant conduct as defined in §1B1.3(a)(1)(B) (jointly undertaken criminal activity). These enhancements currently apply to defendants who conspired to distribute child pornography, or were jointly involved in the distribution of child pornography, even when they may not have committed the distribution personally. By changing the focus of the enhancement from the overall offense to the defendant specifically, it would be an open question, at best, whether the revised enhancement would have the same scope. It makes little sense for the Commission to adopt a change that will increase, rather than resolve, litigation about the applicability of a guideline.

Further, should the courts conclude, over the arguments from the Department, that they cannot consider conspiratorial or other relevant conduct for these specific offense characteristics, this could mean that the enhancements would only apply when the defendant personally committed the act of distribution, or when the defendant was convicted of distributing child pornography. The Department does not concede that these arguments are correct, but does emphasize that if they are adopted, they would result in a sharp restriction in the application of these enhancements to the benefit of some of the most serious offenders, namely, those who participate in a child exploitation community. In its Report, the Commission explicitly acknowledged the danger of child pornography defendants who engage in community behavior.⁷⁶ This was no idle observation. The Commission recommended that the whole guideline be restructured in part to account for this group behavior because it poses such a great threat.⁷⁷

Yet, the proposed amendment could make it harder to apply these specific offense characteristics to these very defendants, as they are more likely to engage in, and be convicted of, conspiratorial behavior. It defies logic that the Commission would take action that could result in a lower sentence for the most serious defendants, or that it would risk such an unintended consequence. For example, it is not certain that the revised distribution enhancement would apply to a defendant who created and administered a bulletin board to account for the trading of child pornography that took place within his group, absent evidence that he himself sent or posted child pornography. Similarly, it is not clear that the distribution enhancement would apply to a defendant who controlled group members' access to different areas of a bulletin board where specific types of child pornography were traded, again absent evidence of the defendant's personal act of distribution. The Commission should not make any changes that would create questions to be litigated, and that would risk that such a narrow interpretation be adopted. The identified circuit splits do not demand that these enhancements be narrowed in this way, to this degree.

⁷⁶ See Commission Report, pp. 92-99.

⁷⁷ See Commission Report, pg. 320 (identifying three categories of offender behavior that should be the primary sentencing factors, one of which is “the degree of an offender’s engagement with other offenders — in particular, in an Internet ‘community’ devoted to child pornography and child sexual exploitation.”).

For all of these reasons, the Department opposes the Commission’s proposal to change the language of §§ 2G2.1(b)(3), 2G2.2(b)(3)(B), and 2G2.2(b)(3)(F) so that they no longer refer to the offense, and instead refer to the defendant.

2. *Production of Child Pornography and Distribution*

Section §2G2.1(b)(3) currently adds two levels to the guideline calculation if a child pornography production “offense involved distribution.” The Commission’s proposal would change the language so that the specific offense characteristic would apply only if the “defendant knowingly distributed.” **The Department opposes this change.**

First, the change is unnecessary. In its request for comment, the Commission does not identify a circuit split concerning the application of §2G2.1(b)(3) nor does it explain its reasoning for the amendment. The entirety of the discussion in the Commission’s materials focuses on the application of §2G2.2(b)(3) in the context of peer-to-peer cases. Nor can there be a concern that this distribution enhancement is over-applied in production cases.⁷⁸ There is simply no reason for the Commission to alter this specific offense characteristic.

Second, this change is unwise. As discussed above, at best, this proposed language could lead to needless litigation to preserve the status quo. At worst, it could result in a more limited application of this critically important enhancement.

Currently, the enhancement applies to defendants who conspired to produce and distribute child pornography, or who caused the distribution without actually committing the distribution personally.⁷⁹ If the Commission’s proposal went into effect, it would inadvertently allow such defendants – who have committed some of the most serious crimes – to argue that the enhancement no longer applies to them absent evidence that they personally distributed the child pornography. This change will likely result in litigation that, if the government won, would preserve the status quo. The Commission should avoid making changes the will only result in pointless litigation.

⁷⁸ See Commission Report, pg. 262 (noting that the distribution enhancement applies in less than half of production cases).

⁷⁹ See *United States v. Odom*, 694 F.3d 544, 547-548 (5th Cir. 2012) (affirming application of distribution enhancement against co-defendant when evidence established that the second defendant showed the child pornography in question to other adults). See also, *United States v. Brown*, 613 Fed.Appx. 58 (2d Cir. 2015) (unpublished) (affirming application of distribution enhancement when defendant conspired to produce child pornography to be given to him). See also Commission Report, pg. 263-265 and n. 54 (discussing the prevalence of “remote” production of child pornography where individual aided and abetted the production by another, and noting that approximately a third of production defendants participate in child pornography communities where self-produced material may be shared).

More importantly, §2G2.1(b)(3) should not be narrowed to exclude conspiracy defendants, and should not be written in a way that makes it vulnerable to such an interpretation by a court. The Commission should not make this unnecessary change to §2G2.1 to the potential benefit of defendants like Odom, Brown, and those involved in child exploitation communities, and at the expense of the victims.

The Department is particularly concerned about the changes to §2G2.1 with respect to defendants who distribute newly created material. It matters a great deal that §2G2.1 applies to the producers who distribute new child pornography—those at the start of the chain. Distribution by a producer of never-before seen child pornography, whether directly or through a conspiracy, is the most egregious form of distribution because otherwise the child’s images would never get into circulation. We know that for many of the victims, the distribution of their images can be the single most acute aggravating factor, as it inflicts a unique and ongoing harm on them. As the Commission has stated, “Child pornography victims are harmed initially during the production of images, and the perpetual nature of child pornography distribution on the Internet causes significant additional harm to victims.”⁸⁰

Because distribution of new child pornography by a producer is such a serious aggravating factor, that specific offense characteristic should be expansive, not narrow. If the Commission nonetheless intends to revise §2G2.1, it should consider crafting the specific offense characteristic so it distinguishes between distribution of newly produced child pornography, and distribution of preexisting child pornography. The former should apply broadly, even in the absence of any evidence of the defendant’s mens rea, while the latter could have a mens rea element consistent with the Department’s proposal for §2G2.2. This would appropriately calibrate the guideline to capture the egregiousness of first generation distribution while also accounting for other acts of knowing distribution.

3. *Mens rea for distribution*

The Commission has identified a fractured approach to the application of the child pornography distribution enhancement provided in §2G2.2(b)(3)(F), particularly in peer-to-peer cases: some circuits hold that the enhancement applies regardless of whether there was evidence the material was distributed knowingly, recklessly, or negligently; other circuits require proof that the distribution was done knowingly or in reckless disregard of the risk of distribution; and still other circuits require some proof of knowledge, and have identified certain facts from which knowledge could be presumed.⁸¹

⁸⁰ See Commission Report, pp. vii, 112-114 (describing the recurrent victimization to child pornography victims through the existence of the images).

⁸¹ PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, 42.

“The Fifth, Tenth, and Eleventh Circuits have each held that the 2-level distribution enhancement applies if the defendant used a file sharing program, regardless of whether he did so purposefully, knowingly, or negligently. See, e.g., United States v. Baker, 742 F.3d 618, 621 (5th Cir. 2014) (the enhancement applies “regardless of the defendant’s mental state”); United States v. Ray, 704 F.3d 1307, 1312 (10th Cir. 2013) (the enhancement “does not require that a defendant know about the distribution capability of the program he is using”); the enhancement “requires no particular state of mind”); United States v. Creel, 783 F.3d 1357, 1360 (11th Cir. 2015) (“No element of mens rea is expressed or implied . . . The definition requires only that the ‘act . . . relates to the transfer of child pornography.’”).

The Second, Fourth, and Fifth Circuits, in contrast, have held that the 2-level distribution enhancement requires a showing that the defendant knew, or at least acted in reckless disregard of, the file sharing properties of the program. See, e.g., United States v. Baldwin, 743 F.3d 357, 361 (2nd Cir. 2015) (requiring knowledge); United States v. Robinson, 714 F.3d 466, 468 (7th Cir. 2013) (knowledge); United States v. Layton, 564 F.3d 330, 335 (4th Cir. 2009) (knowledge or reckless disregard).”⁸²

The Commission indicates its intent to adopt the approach of the Second, Fourth, and Fifth Circuits, which approve the application of the distribution enhancement when there is evidence that the distribution was done knowingly or recklessly. **Although the Department does not oppose the adoption of a *mens rea* element for this enhancement, we oppose the specific language proposed.**

The Commission proposes to amend §2G2.2(b)(3)(F) so it says “if the defendant knowingly distributed” instead of “if the offense involved distribution.” For the reasons set forth above, the Department opposes the removal of the reference to the offense in the specific offense characteristic.

Further, the Commission’s proposal does not clearly accomplish its full goal. The Commission’s request for comment clearly indicates its intent to incorporate the approach of the Fourth Circuit, which holds that the enhancement applies to defendants who either knowingly or recklessly distributed child pornography. Yet the proposal only adds the word “knowingly” to the specific offense characteristic. This will lead to litigation addressing whether the word “knowingly” also includes reckless disregard. Indeed, elsewhere in the guidelines, specific offense characteristics specifically reference both knowing and reckless conduct.⁸³

Particularly in the context of distribution over peer-to-peer networks, which is uniquely dangerous, it is critical that the enhancement apply to both knowing and reckless distribution.

⁸² *Id.*

⁸³ See, e.g., §2H4.1, Cmt. App. n. 4 and §2N2.1, Cmt. App. n. 1. See, also, §2A3.5, Cmt. App. n. 2; §2A6.1(b)(5); §2B1.1, Cmt. App. n. 3(A)(iv) and 3(E); §2X3.1, Cmt. App. n. 1; §2X4.1, Cmt. App. n. 1 (all including language to the effect that “the defendant knew or reasonably should have known”).

There is no limit on how many times an image of child sexual abuse may be distributed over a peer-to-peer network.⁸⁴ Nor is there any no limit on who may receive such material, including other children.⁸⁵ With peer-to-peer programs, child pornography is effectively left in plain sight, available to whomever happens to be on the network. Offenders who use these programs should be held accountable if they recklessly disregard the fact that they are broadly distributing images of child pornography, and inflicting further injury on the victims.

Therefore, in order to fully accomplish the Commission's stated goal of incorporating a knowledge and reckless disregard element into §2G2.2(b)(3)(F), while avoiding unnecessary litigation that could result in an unwarranted restriction in the applicability of this specific offense characteristic, the Commission should instead amend the definition of "distribution" in §2G2.2 Application Note 1 so that it reads as follows (new text in underline):

"Distribution" means any knowing or reckless act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

As an alternative approach, the Commission could instead amend the introductory language of §2G2.2(b)(3) to add the underlined text: "(Apply the greatest) If the offense involved knowing or reckless:".

4. *Distribution for the receipt, or expectation of receipt, of a thing of value.*

Finally, the Commission has identified a circuit split concerning the application of §2G2.2(b)(3)(B) in peer-to-peer cases. Some circuits find the use of peer-to-peer software to be sufficient evidence that this enhancement should apply, while others require proof that the defendant was aware that by making the child pornography available to others he would receive something of value.

The Commission's proposal to resolve this split bears little resemblance to the problem it identified. It narrows the scope of the enhancement in unjustified and unwise ways. **The Department does not oppose revising this enhancement to resolve the circuit split. However, the Department opposes the specific language proposed by the Commission.**

The Commission suggests two changes to §2G2.2(b)(3)(B). First, the enhancement would be revised to read "if the defendant distributed in exchange for any valuable consideration

⁸⁴ See Commission Report, 52.

⁸⁵ *Id.*

...” instead of “distribution for receipt, or expectation of receipt, of a thing of value ...”⁸⁶
Second, it would replace the relevant application note so that it would now read:

*“The defendant distributed in exchange for any valuable consideration” means the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.*⁸⁷

First, as discussed above, by changing the language from “if the offense involved” to “if the defendant” the specific offense characteristic may no longer apply to group, community, and conspiracy defendants even though, as the Commission has acknowledged, they are among the most serious class of defendants.

Second, this proposed change unnecessarily reverses settled precedent as it would no longer be possible for this enhancement to apply in typical peer-to-peer cases at all, even where there was proof that the defendant knew he was receiving a benefit by distributing child pornography. For example, in *United States v. Geiner*,⁸⁸ the Court of Appeals affirmed the application of §2G2.2(b)(3)(B) to a defendant who distributed child pornography over a peer-to-peer network in anticipation of receiving a faster download speed. Significantly, in that case the Court explicitly rejected the argument that the enhancement only applies to cases involving an agreement between individuals.⁸⁹ Such outcomes would no longer be possible if the Commission’s proposal is adopted, as the benefit would not be the result of an agreement between at least two people.

Further, changing the language from “any transaction” to “an agreed exchange with another person ... for the specific purpose of obtaining something of valuable consideration from that other person” arguably precludes the application of this enhancement where there is no direct personal exchange between individuals. If that is so, the revised language potentially eliminates the application of this enhancement in group offender cases. Consider a bulletin board that includes a rule requiring individuals to upload new material in order to obtain access to the rest of the board. A defendant who complied with that rule by posting an image to the board could argue that the enhancement should not apply to him because he never entered an

⁸⁶ PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, 43, 48.

⁸⁷ *Id.*

⁸⁸ 498 F.3d 1104 (10th Cir. 2007).

⁸⁹ See also, *United States v. Burman*, 666 F.3d 1113, 1118-1119 (8th Cir. 2012) (affirming application of §2G2.2(b)(3)(B) when evidence supported inference that defendant distributed child pornography over a peer-to-peer network in exchange for a thing of value).

agreement to do an exchange with another specific person.⁹⁰ Similarly, individuals in that group may distribute images with the implied understanding that doing so will enable the group to thrive by increasing the volume of child pornography available to view and trade, or that their posting will elevate their status within the group or provide them access to more images. This unspoken agreement, which is with the group and not the individual, may not be covered by the change.⁹¹ At best, this issue will have to be litigated. At worst, the enhancement will be interpreted as being this narrow, even though this kind of behavior is exactly what this enhancement, as currently written, is meant to capture.

Finally, requiring proof that the defendant acted, not just knowingly, but with the specific purpose of receiving a benefit, sets the evidentiary burden unnecessarily high. The enhancement should be applied to defendants who know they are receiving a benefit as a result of the distribution.

To resolve the circuit split identified by the Commission without reversing existing precedent, setting an unnecessarily high evidentiary standard, inviting litigation, or potentially narrowing the scope of the enhancement in unwise and unwarranted ways, §2G2.2(b)(3)(B) should be revised as follows (added text in underline):

“Distribution for the knowing receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by 5 levels.”

Combined with the Department’s other suggestion to add “knowing or reckless” either to the definition of “distribution” in Application Note 1 or in the introductory text of §2G2.2(b)(3), this change would indicate that the enhancement should apply to defendants who knowingly or recklessly distributed child pornography, and who were doing so knowing that they would receive, or with the expectation that they would receive, something of value in return. This change will resolve the circuit split by endorsing existing case law that allows this enhancement to be used in peer-to-peer cases when warranted by the facts, and without inviting litigation that could result in an overly restrictive application of this enhancement.

⁹⁰ Cf., *United States v. Cote*, 482 Fed.Appx. 373 (11th Cir. 2011) (unpublished) (“even without an explicit quid pro quo agreement with another distributor of child pornography, a person may engage in such conduct with the reasonable expectation of an exchange.”)

⁹¹ See, *United States v. McGarity*, 669 F.3d 1218, 1261 (11th Cir. 2012) (in a child exploitation enterprise case against a ring of sixteen defendants, the Court of Appeals affirmed the application of §2G2.2(b)(3)(B), noting that the “exchange of child pornography—and *the perceived onus* on its members to participate in the exchange—was central to the workings of the ring”) (emphasis added).

IV. Implementing Sec. 813 of the Bipartisan Budget Act of 2015, “New and Stronger Penalties” for Social Security Fraud

In response to the enactment of the Bipartisan Budget Act of 2015,⁹² the Sentencing Commission has published proposed amendment language regarding Social Security program fraud.⁹³ Section 813 of the Act, titled “New and Stronger Penalties,” raises the maximum penalty from five to 10 years for certain defendants who have perpetrated fraud involving the Federal Old-Age and Survivors Insurance Trust Fund (42 U.S.C. § 408)⁹⁴, involving special benefits for certain World War II veterans (42 U.S.C. § 1011)⁹⁵, and involving Supplemental Security Income for the aged, the blind, and the disabled (42 U.S.C. § 1383a).^{96 97} In addition, the Bipartisan Budget Act added “conspiracy” to these three statutes.⁹⁸ The Commission has proposed amendments which reference the new offenses of conspiracy to §2X1.1 (the guideline for attempt, solicitation and conspiracy).⁹⁹ **The proposed changes are not sufficient and are not consistent with the intent of Congress.**

Section 813(a) of the Act, titled “Conspiracy to Commit Social Security Fraud,” creates the new specifically enumerated offense of conspiracy, and the Commission has appropriately proposed cross referencing the new offense to the guideline for conspiracy.¹⁰⁰

In subsection (b) “Increased Criminal Penalties for Certain Individuals Violating Positions of Trust,” the Act provides for higher maximum penalties for defendants who received a fee or other income for services performed in connection with the fraud, as well as physicians or other health care providers.¹⁰¹ The Act mentions as examples of defendants who receive a fee or other income for services performed in connection with the fraud claimant representatives, translators, and current or former employees of the Social Security Administration.¹⁰²

The enhancement under current USSG §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not capture all categories enumerated in the Act, and the Commission should mention these categories to avoid needless litigation. Arguably, §3B1.3 already addresses many

⁹² Bipartisan Budget Act of 2015, Pub. L. No. 114–74 (Nov. 2, 2015), <https://www.congress.gov/114/plaws/publ74/PLAW-114publ74.pdf>.

⁹³ PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, 3.

⁹⁴ Section 208(a) of the Social Security Act.

⁹⁵ Section 811(a) of the Social Security Act.

⁹⁶ Section 1632(a) of the Social Security Act.

⁹⁷ See Bipartisan Budget Act of 2015, Sec. 813(b).

⁹⁸ Bipartisan Budget Act of 2015, Sec. 813(a).

⁹⁹ PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, 3.

¹⁰⁰ *Id.*

¹⁰¹ Bipartisan Budget Act of 2015, Sec. 813(b).

¹⁰² *Id.*

of the categories of offenders identified in the statute. The guideline provides as examples of persons having a special skill pilots, lawyers, doctors, accountants, chemists and demolition experts. However, §3B1.3 refers to the use of a “special skill,” whereas the statute is broader, and refers to any person who receives a fee or other income for services assisting in perpetrating the fraud.¹⁰³

In addition, the simple fact of receiving a fee is not noted anywhere in §3B1.3, nor is the fact of submitting medical or other evidence in connection with a determination under the relevant program. By not explicitly referencing in §3B1.3 the categories of defendants specifically enumerated in the statute, the Commission is leaving federal prosecutors with a number of uncertainties, which will result in unnecessary litigation. In addition, by not explicitly referencing the enumerated defendants, the Commission is passing up an opportunity to deter would be offenders and notify them in advance that they will be punished more severely for their conduct. Finally, by not referencing the enumerated defendants the Commission is not fulfilling the full intent of Congress in passing the Act.

In addition, if the Commission takes no further action, the raised statutory maximum penalty will generally have an impact only on defendants who have perpetrated at least 9.5 million dollars in loss. Defendants with up to one criminal history point with loss amounts lower than 9.5 million dollars would not receive a recommended sentence greater than five years, and the recommended guideline range will remain unchanged despite the passage of the Act. According to our records, 856 defendants were convicted under either 42 U.S.C. §§ 408 or 1383a during the fiscal years of 2012, 2013, and 2014, and not one had a loss amount greater than 2.5 million dollars.¹⁰⁴ We believe that, in passing the Act, Congress intended for some defendants to receive a higher recommended guideline range. However, under the current proposal, not many defendants – if any – would.

Finally, we note that current §2B1.1(7) includes a two level enhancement for when the defendant was convicted of a Federal health care offense, among other things. The presence of this adjustment begs the question of why the Commission would not add a similar enhancement for violations of Social Security’s programs, which serve millions of Americans. During the

¹⁰³ “[E]xcept that in the case of a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination, such person shall be guilty of a felony and upon conviction thereof shall be fined under title 18, United States Code, or imprisoned for not more than ten years, or both.” Bipartisan Budget Act of 2015, Sec. 813 (b) Increased Criminal Penalties for Certain Individuals Violating Positions of Trust.

¹⁰⁴ These figures include the 2014 case in Puerto Rico involving Samuel Torres-Crespo, which involved approximately 87 defendants and resulted in approximately \$7.5 million in loss to the program. According to the Office of the Inspector General of the Social Security Administration, the defendants were ordered to pay a total of \$2,015,341 in restitution.

fiscal year of 2015, the Social Security Administration provided about 144 billion dollars in Disability Insurance payments to more than 10.8 million citizens and about \$51.5 billion dollars in Supplemental Security Income to about 8.4 million citizens.¹⁰⁵ Given the importance of this safety net for millions of Americans who depend on it, we believe the Commission should make all efforts to safeguard disability payments from fraud and abuse and preserve these funds for deserving, eligible citizens.

V. USA Freedom Act of 2015

The Commission has delineated two issues for comment relating to the USA Freedom Act. First, whether the guidelines should be amended to address the changes made by the USA FREEDOM Act. The Department believes that the expanded definitions contained in 18 U.S.C. § 2280 do not require additional actions by the Sentencing Commission at this time.

Second, the Commission asks whether guidelines covered by the proposed amendment adequately account for the offenses of 18 U.S.C. §§ 2280a, 2281a, and 2332i. The Department believes that the offenses listed in these statutes are among the most serious offenses, and that the penalties associated with those offenses should reflect the extraordinary danger nuclear, biological, and chemical terrorism pose to the health, safety, and national security interests of the United States. It would be appropriate for the Commission to reference these statutes and the applicable guidelines to existing terrorism related offenses, and to do so in the current amendment cycle.

In sum, the Department supports the adoption of the proposed revisions to the guidelines as a result of the passage of the USA Freedom Act.¹⁰⁶

VI. Technical Amendment to §2T1.6

The Department of Justice supports adoption of this amendment. The number of prosecutions under 26 U.S.C. § 7202 has increased significantly since the “infrequently prosecuted” phrase was added to the guidelines. Indeed, the Commission’s data shows that the use of USSG §2T1.6 increased from 3 to 50 from 2002 to 2013. To put those raw numbers in perspective, it should be remembered that the number of criminal tax prosecutions generally is

¹⁰⁵ SOCIAL SECURITY ADMINISTRATION, AGENCY FINANCIAL REPORT FOR FISCAL YEAR 2015, MANAGEMENT DISCUSSION AND ANALYSIS, p. 31 (November 2015), <https://www.ssa.gov/finance/2015/Complete%20MD&A.pdf>.

¹⁰⁶ Pub. Law No. 114-23 (June 2, 2015), <https://www.congress.gov/114/plaws/publ23/PLAW-114publ23.pdf>.

limited.¹⁰⁷ The limited number of tax prosecutions compared to the estimated incidence of tax crimes is why general deterrence occupies such an important role in criminal tax prosecutions.¹⁰⁸

On a raw numerical basis, there are many guideline sections that are used less frequently than §2T1.6. And to the Tax Division's knowledge, the only other guideline for which this pejorative of being "infrequently prosecuted" has been applied is §2T2.2 (Regulatory Offenses), which was reported as being used only one time during the last reporting period.¹⁰⁹

Data provided by Internal Revenue Service, Criminal Investigations, reflects that the number of employment tax cases, which include cases prosecuted under § 7202 as well as some other tax statutes, have increased substantially since 2003:¹¹⁰

	FY 2005	FY 2004	FY 2003
Investigations Initiated	108	113	104
Prosecution Recommendations	101	97	66
Indictments/Informations	82	71	44
Sentenced	52	51	45
Incarceration Rate	90.4%	86.3%	75.6%
Average Months to Serve	30	18	20

	FY 2014	FY 2013	FY 2012
Investigations Initiated	120	140	148
Prosecution Recommendations	92	97	86
Indictments/Informations	78	78	92
Sentenced	88	84	79
Incarceration Rate	73.9%	79.8%	81.0%
Average Months to Serve	17	24	24

The comment that § 7202 is "infrequently prosecuted" should be deleted not only because it is no longer factually accurate, but also because it is sometimes misused by defense counsel to argue that employment tax crimes, in general, are infrequently prosecuted, which, as

¹⁰⁷ See U.S. SENTENCING COMM'N., QUICK FACTS, TAX FRAUD OFFENSES ("In fiscal year 2014, there were 719 tax fraud offenders who accounted for 1.1% of all offenders sentenced under the guidelines").

¹⁰⁸ USSG Ch 2, pt. T, Introductory Cmt.

¹⁰⁹ Cf. U.S. SENTENCING COMM'N., Guideline Application Frequencies for Fiscal Year 2014, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2014/Use_of_SOC_Guideline_Based.pdf.

¹¹⁰ John Colvin, Legislative & Administrative Developments, Civil & Criminal Tax Penalties Committee for The ABA Section Of Taxation May Meeting, May 6, 2006, WL 5328467. INTERNAL REVENUE SERVICE, Statistical Data - Employment Tax Evasion, <https://www.irs.gov/uac/Statistical-Data-Employment-Tax-Evasion> (last visited March 9, 2016).

shown above, is not the case. Notwithstanding, defense counsel have cited the guidelines' statement that § 7202 is "infrequently prosecuted" to argue that their client could not have known that willful nonpayment of employment tax was a crime or that the client deserved sentencing leniency.

In the defendant's opening appellate brief in *United States v. McLain*, the defendant cited the guidelines' statement that § 7202 is infrequently prosecuted, and challenged an upward departure by contending that typically "the government responds to failure to pay withholding taxes by initiating a civil action under 26 U.S.C. § 6672."¹¹¹ In the defendant's sentencing memorandum in *United States v. Blanchard*, the defendant cited the guidelines' statement that § 7202 is infrequently prosecuted, and argued that "[t]ypically, employment tax cases are resolved civilly."¹¹² In the defendant's sentencing memorandum in *United States v. Creamer*, the defendant cited the guidelines' statement that § 7202 is infrequently prosecuted, and argued that the defendant "failed to recognize the inherent criminality of failing to pay Public Action's withholding taxes in a timely manner."¹¹³

In sum, the commentary in § 2T1.6 stating that § 7202 offenses are "infrequently prosecuted" is factually erroneous, unfairly pejorative, and subject to misuse by the defense bar. The Department of Justice requests that the sentence "The offense is a felony that is infrequently prosecuted" be deleted.

VII. 18 U.S.C. § 1715 (Firearms as Nonmailable Items)

The Department of Justice supports establishing a guideline reference, base offense level and appropriate specific offense characteristics for violations of 18 U.S.C. § 1715 (Firearms as Nonmailable, Regulations). In recent years, the United States Attorney Office (USAO) for the Virgin Islands (VI) has brought several cases charging § 1715, which generally precludes the mailing of firearms to individuals. These cases are brought to combat a common method used to bring firearms illegally onto the Islands, by simply mailing them from the mainland United States.

The USAO/VI works closely with the United States Postal Inspection Service, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and the Homeland Security Investigations

¹¹¹ No. 11-3402, 2012 WL 604904 (8th Cir. Feb. 10, 2012). *Cf. United States v. McLain*, 709 F.3d 1198 (8th Cir. 2013) (sustained 48 month sentence).

¹¹² No. 2:05cr80355 (E.D. MI Oct. 27, 2008). *Cf. United States v. Blanchard*, 618 F.3d 562 (6th Cir. 2010) (sustained 22 month sentence).

¹¹³ No. 04-281, 2006 WL 4824501 (N.D. Ill Mar. 21, 2006). *Cf. United States v. Cramer*, 2006 WL 20373326 (N.D. Ill April 4, 2006) (reversing prior ruling that § 7202 counts were time-barred); *United States v. Creamer*, 370 F.Supp. 2d 715 (N.D. Ill. 2005).

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component of the Department of Homeland Security in investigating and prosecuting these offenses. In our experience, most illegal handguns recovered in the Virgin Islands were indeed purchased on the mainland and mailed to the Islands.

The Department thanks the Commission for considering the unique law enforcement challenges faced on the Islands, and for drafting and proposing this amendment.

* * *

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to working with you and the other commissioners to refine the sentencing guidelines, to make them more effective, more efficient, and fair.

Sincerely,



Michelle Morales

Acting Director, Office of Policy and Legislation

cc: Commissioners
Ken Cohen, Staff Director
Kathleen Grilli, General Counsel