Public Comment

Proposed Amendments

2006

Proposed Amendments to the Sentencing Guidelines

January 25, 2006

This compilation contains unofficial text of proposed amendments to the sentencing guidelines and is provided only for the convenience of the user in the preparation of public comment. Official text of the proposed amendments can be found on the Commission's website at www.ussc.gov and will appear in a future edition of the Federal Register.

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2006 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

A. PROPOSED EMERGENCY AMENDMENT

1. STEROIDS

Synopsis of Proposed Amendment: *This proposed amendment implements the directive in the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. 109–76, which requires the Commission, under emergency amendment authority, to implement section 3 of the Anabolic Steroid Control Act of 2004, Pub. L. 108–358 (the "ASC Act"). The ASC Act directs the Commission to "review the Federal sentencing guidelines with respect to offenses involving anabolic steroids" and "consider amending the...guidelines to provide for increased penalties with respect to offenses involving anabolic steroids in a manner that reflects the seriousness of such offenses and the need to deter anabolic steroid trafficking and use...." The Commission must promulgate an amendment not later than 180 days after the date of enactment of the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, which creates a promulgation deadline of March 27, 2006.*

The proposed amendment implements the directives by increasing the penalties for offenses involving anabolic steroids. It does so by changing the manner in which anabolic steroids are treated under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). Currently, one unit of an anabolic steroid "means a 10 cc vial of an injectable steroid or fifty tablets." The proposed amendment presents two options for increasing penalties. Option One bases the offense level in an anabolic steroid offense on the "actual" quantity of steroid involved in the offense and provides that one unit of an anabolic steroid means [25][50][100] mg of an anabolic steroid, regardless of the form involved in the offense (e.g., patch, cream, tablet, liquid). At 25 mg, sentencing penalties would be increased approximately 6-8 levels above current offense levels, and would closely approximate a 1:1 ratio with other Schedule III substances. At 50 mg, sentencing penalties would be increased approximately 4-6 levels above current offense levels, and at 100 mg, sentencing penalties would be increased approximately 2-4 levels above current offense levels. This option also includes a rebuttable presumption that the label, shipping manifest, or other similar documentation accurately reflects the purity of the steroid. Option Two eliminates the sentencing distinction between anabolic steroids and other Schedule III substances. Accordingly, if an anabolic steroid is in a pill, tablet, capsule, or liquid form, the court would sentence as it would in any other case involving a Schedule III substance. For anabolic steroids in other forms, the proposed amendment instructs the court that [1 unit means 25 mg and that] the court may determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense.

The proposed amendment also provide new enhancements designed to capture aggravating harms involved in anabolic steroid cases. First, the proposed amendment amends §2D1.1 to provide an increase of two levels if the offense involved the distribution of a masking agent. A masking agent is a product added to, or taken with, an anabolic steroid to prevent the detection of the anabolic steroid in an individual's body. Second, the proposed amendment amends §2D1.1 to provide an increase of two levels if the defendant distributed an anabolic steroid to a professional, college, or high school athlete. Third, the proposed amendment presents two options for increasing penalties for coaches who distribute anabolic steroids to their athletes. Option One provides, as an alternative to the proposed enhancement for distribution to an athlete, a two-level increase in §2D1.1 if the defendant used the defendant's position as a coach of athletic activity to influence an athlete to use an anabolic steroid. Option Two

amends Application Note 2 of §3B1.3 (Abuse of Position of Trust or Use of Special Skill) to include a coach who uses his or her position to influence an athlete to use an anabolic steroid in the list of special circumstances to which the two level adjustment in §3B1.3 shall apply.

Two issues for comment follow the proposed amendment. The first pertains to whether the Commission, when it repromulgates the proposed amendment as a permanent amendment, should expand the scope of the enhancements to cover all controlled substances, not just anabolic steroids. The second issues pertains to whether the penalties for steroid offenses should be based on quantities typical of offenses involving mid- and high-level dealers.

Proposed Amendment:

§2D1.1 **Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

* * *

(b) Specific Offense Characteristics

* * *

(6) If the offense involved the distribution of (A) an anabolic steroid; and (B) a masking agent, increase by **2** levels.

(7) If the defendant distributed an anabolic steroid to a professional, college, or high school athlete;[Option 1(for coach): or (B) the defendant used the defendant's position as a coach of an athletic activity to influence a professional, college, or high school athlete to use an anabolic steroid,] increase by **2** levels.]

~~(6)~~(8) * * *

~~(7)~~(9) * * *

(c) DRUG QUANTITY TABLE

* * *

*Notes to Drug Quantity Table:

[Option 1 (for steroids): * * *

(G) In the case of anabolic steroids, one "unit" means [25][50][100] mg of an anabolic steroid, regardless of the form (e.g., patch, topical cream, tablet, liquid). [There shall be a rebuttable presumption that the label, shipping manifest, or other similar documentation describing the type and purity of the anabolic steroid accurately reflects the purity of that steroid.]~~means a 10 cc vial of an injectable steroid or fifty tablets. All vials of injectable steroids are to be converted on the~~

~~basis of their volume to the equivalent number of 10 cc vials (e.g., one 50 cc vial is to be counted as five 10 cc vials).~~]

* * *

[Option 2 (for steroids):

(F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances ~~(except anabolic steroids)~~, Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one "unit" means 0.5 ml. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (e.g., patch, topical cream, aerosol), [(A) one "unit means [25] mg; and (B)] the court may determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense.

~~(G) In the case of anabolic steroids, one "unit" means a 10 cc vial of an injectable steroid or fifty tablets. All vials of injectable steroids are to be converted on the basis of their volume to the equivalent number of 10 cc vials (e.g., one 50 cc vial is to be counted as five 10 cc vials).~~]

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Commentary

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Application Notes:

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19. *Hazardous or Toxic Substances.—Subsection ~~(b)(6)(A)~~ (b)(8)(A) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b); or 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material).*

* * *

20. *Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine.—*

(A) Factors to Consider.—In determining, for purposes of subsection ~~(b)(6)(B)~~ (b)(8)(B) or (C), whether the offense created a substantial risk of harm to human life or the environment, the court shall include consideration of the following factors:

* * *

(B) Definitions.—For purposes of subsection ~~(b)(6)(C)~~(b)(8)(C):

* * *

21. *Applicability of Subsection ~~(b)(7)~~(b)(9).—The applicability of subsection ~~(b)(7)~~(b)(9) shall be*

determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection ~~(b)(7)~~(b)(9) applies.

* * *

24. *Application of Subsection (b)(6).—For purposes of subsection (b)(6), "masking agent" means a product added to, or taken with, an anabolic steroid that prevents the detection of the anabolic steroid in an individual's body.*

25. *Application of Subsection (b)(7).—For purposes of subsection (b)(7):*

"Athlete" means an individual who participates in an athletic activity conducted by (A) an intercollegiate athletic association or interscholastic athletic association; (B) a professional athletic association; or (C) an amateur athletic organization.

"Athletic activity" means an activity that (A) has officially designated coaches; (B) conducts regularly scheduled practices or workouts that are supervised by coaches; and (C) has established schedules for competitive events or exhibitions.

"College or high school athlete" means an athlete who is a student at an institution of higher learning (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. § 1001) or at a secondary school (as defined in section 9101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. § 7801).

"Professional athlete" means an individual who competes in a major professional league.

Background: * * *

Subsection ~~(b)(6)(A)~~(b)(8)(A) implements the instruction to the Commission in section 303 of Public Law 103–237.

Subsections ~~(b)(6)(B)~~(b)(8)(B) and (C) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106–310.

* * *

[Option 2 (for coaches):

§3B1.3. Abuse of Position of Trust or Use of Special Skill

* * *

Commentary

Application Notes:

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2. *Application of Adjustment in Certain Circumstances.—Notwithstanding Application Note 1, or any other provision of this guideline, an adjustment under this guideline shall apply to the following:*

(A) Postal Service Employee.—An employee of the United States Postal Service who engages in the theft or destruction of undelivered United States mail.

(B) Offenses Involving "Means of Identification".—A defendant who exceeds or abuses the authority of his or her position in order to obtain unlawfully, or use without authority, any means of identification. "Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7). The following are examples to which this subdivision would apply: (i) an employee of a state motor vehicle department who exceeds or abuses the authority of his or her position by knowingly issuing a driver's license based on false, incomplete, or misleading information; (ii) a hospital orderly who exceeds or abuses the authority of his or her position by obtaining or misusing patient identification information from a patient chart; and (iii) a volunteer at a charitable organization who exceeds or abuses the authority of his or her position by obtaining or misusing identification information from a donor's file.

(C) Coach of Athletic Activity.—A defendant who uses the defendant's position as a coach of an athletic activity to influence a professional, college, or high school athlete to use an anabolic steroid.

For purposes of this guideline:

(i) "Athlete" means an individual who participates in an athletic activity conducted by (I) an intercollegiate athletic association or interscholastic athletic association; (II) a professional athletic association; or (III) an amateur athletic organization.

(ii) "Athletic activity" means an activity that (I) has officially designated coaches; (II) conducts regularly scheduled practices or workouts that are supervised by coaches; and (III) has established schedules for competitive events or exhibitions.

(iii) "College, or high school athlete" means an athlete who is a student at an institution of higher learning (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. § 1001) or at a secondary school (as defined in section 9101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. § 7801).

(iv) "Professional athlete" means an individual who competes in a major professional league.]

Issues for Comment:

(1) The Commission requests comment regarding whether, when the Commission re-promulgates the emergency amendment as a permanent amendment, it should expand the proposed enhancements in §2D1.1(b)(6) (pertaining to masking agents) and in §2D1.1(b)(7) (pertaining to distribution of

a steroid to an athlete) to cover offenses involving any controlled substance. Specifically, the proposed amendment defines "masking agent" as "a product added to, or taken with, an anabolic steroid to prevent the detection of the anabolic steroid in an individual's body." However, masking agents also can be taken to prevent the detection of other controlled substances. The Commission requests comment regarding whether it should expand the definition of masking agent, and thus application of the enhancement, in a manner that covers all controlled substances, not just anabolic steroids. Similarly, there are controlled substances other than anabolic steroids that enhance an individual's performance. The Commission requests comment regarding whether the proposed enhancement pertaining to distribution to an athlete should be expanded to cover offenses involving all types of controlled substances.

(2) *The Commission requests comment regarding whether penalties for steroid offenses should be based on quantities typical of offenses involving mid- and high-level dealers. For more serious drug types (e.g., heroin, cocaine, marihuana), the Drug Quantity Table in §2D1.1(c) provides an offense level of 26 for quantities typical of mid-level dealers and an offense level of 32 for quantities typical of high-level dealers. These levels also correspond to the statutory mandatory minimum penalties for mid- and high-level dealers. Although there are no statutory mandatory minimum penalties establishing thresholds for steroid offenses, the Commission has been informed that a steroids dealer who provides the equivalent of one complete cycle to 10 customers is considered to be a mid-level dealer, and a dealer who provides the equivalent of one complete cycle to 30 customers is considered to be a high-level dealer. Currently, offense levels in the Drug Quantity Table for anabolic steroids and other Schedule III substances begin at level 6 and are "capped" at level 20. Should the Commission provide a penalty structure within this range that targets offenses involving mid- and high-level steroid dealers, and if so, what offense levels should correspond to a mid-level dealer and to a high-level dealer?*

B. PROPOSED NON-EMERGENCY AMENDMENTS

1. IMMIGRATION

Synopsis of Proposed Amendment: *This four part proposed amendment addresses issues involving immigration offenses. These issues were identified through review of HelpLine calls to the Commission, feedback from training seminars, receipt of public comment, and information staff gathered from an immigration roundtable discussion. Part One of the proposed amendment addresses issues relating to offenses sentenced under §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). Part Two is a proposal to amend §2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law) and §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport). Part Three addresses issues relating to offenses sentenced under §2L1.2 (Unlawfully Entering or Remaining in the United States). Part Four presents issues for comment regarding the proposed amendment.*

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

This part of the proposed amendment covers offenses sentenced under §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien).

A. National Security Concerns

Currently, §2L1.1(a)(1) provides a base offense level of level 23 if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony. Title 8, United States Code, section 1327, provides a statutory maximum term of imprisonment of 10 years for cases involving aiding or assisting certain aliens who pose a heightened risk to the safety of the citizens of the United States. However, §2L1.1(a)(1) only applies to a limited subgroup of those convicted under § 1327. This proposal provides three options to increase punishment for those defendants who assist "inadmissible aliens" in illegally entering the United States. All options retain the current base offense level of 23 for a defendant who has a conviction under 8 U.S.C. § 1327 in a case in which the violation involved an alien "who previously was deported after a conviction for an aggravated felony." Option One provides a base offense level of 25 for a defendant who is convicted of 8 U.S.C. § 1327 involving an alien who is inadmissable because of "security or related grounds", as defined in 8 U.S.C. 1182(a)(3). Option Two provides a specific offense characteristic with an increase of [2 - 6] levels for defendants who smuggle, transport, or harbor an alien who was inadmissible under 8 U.S.C. § 1182(a)(3). This option is relevant conduct based.

B. Number of Aliens

The proposed amendment provides two options to amend §2L1.1(b)(2) regarding the number of aliens involved in the offense. The first option maintains the current structure of the table, which provides a three-level increase for offenses involving six to 24 aliens, a six-level increase for offenses involving 25 to 99 aliens, and a nine-level increase for offenses involving 100 or more aliens. Option One amends the table to provide a nine-level increase for offenses

involving 100 to 199 aliens, a [12]-level increase for offenses involving 200 to 299 aliens, and a [15]-level increase for offenses involving 300 or more aliens. Option Two, in part mirrors Option One by providing the same increases at the top end of the table for offenses involving 100 or more aliens. However, Option Two also provides smaller categories at the low end of the table. Offenses involving six to [15] aliens would receive an increase of three levels, [16 to 49] aliens would receive an increase of [six] levels, and [50 to 99] aliens would receive an increase of [nine] levels.

C. Endangerment of Minors

The proposed amendment presents two options and an issue for comment to address offenses in which an alien minor was smuggled, harbored, or transported. Option One provides a [2][4][6] level increase if the defendant smuggled, transported, or harbored a minor unaccompanied by the minor's parent. Option two provides a graduated increase, based upon the age of the minor smuggled, harbored, or transported. A four-level increase is provided for a defendant who smuggles a minor under the age of 12 who is unaccompanied by his or her parent. A two-level increase is provided for a defendant who smuggles a minor unaccompanied by his or her parent who has attained the age of 12 years, but has not attained the age of 16 years.

D. Offenses Involving Death

The amendment proposes several changes to the guideline in cases in which death occurred. First, the proposed amendment removes the increase of eight levels "if death resulted" from the current specific offense characteristic addressing bodily injury and places this increase in a stand alone specific offense characteristic. This new specific offense characteristic would provide an increase of [10] levels. Providing a separate specific offense characteristic for death allows for cumulative enhancements in a case in which both bodily injury and death occur. Additionally, the cross reference at §2L1.1(c)(1) is expanded to cover deaths other than murder, if the resulting offense level is greater than the offense level determined under §2L1.1.

E. Abducting Aliens, or Holding Aliens for Ransom

A [four]-level increase and a minimum offense level of [23] is proposed for cases in which an alien was kidnapped, abducted, or unlawfully restrained, or if a ransom demand was made. This proposed amendment addresses the concern about cases in which the unlawful aliens are coerced, with or without the use of physical force, or even with direct threats, into remaining in "safe houses" for long periods of time through coercion, implied threat, or deception. This is done so that the smugglers can get more money from the families of the aliens or so they will provide inexpensive labor. Currently, this conduct is not covered by §3A1.3 (Restraint of Victim) because that guideline only covers "physical restraint". The extent of the increase (four levels) is consistent with a similar enhancement in subsection (b)(7)(B) of §2A4.1 (Kidnapping, Abduction, Unlawful Restraint) and the minimum offense level of 23 is consistent with §2A4.2 (Demanding or Receiving Ransom Money), which provides a base offense level of 23 for such offenses.

2. §§2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; etc.) and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; etc.)

This part of the proposed amendment covers offenses sentenced under §§2L2.1

(Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; etc.) and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; etc.)

A. Number of Documents

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

B. Fraudulently Obtaining or Using United States Passports or Foreign Passports

The proposed amendment provides a new specific offense characteristic at §2L2.1(b)(5)(A) that provides a four-level increase in a case in which the defendant fraudulently used or obtained a United States passport. The same specific offense characteristic was added to §2L2.2, effective November 1, 2004. Addition of this specific offense characteristic promotes proportionality between the document fraud guidelines, §§2L2.1 and 2L2.2. In addition, the proposed amendment also provides, at §2L2.1(b)(1)(B) and §2L2.2(b)(3)(B), a two-level increase if the defendant fraudulently obtained or used a foreign passport.

3. §2L1.2 (Unlawfully Entering or Remaining in the United States)

This part of the proposed amendment addresses issues relating to offenses sentenced under §2L1.2 (Unlawfully Entering or Remaining in the United States).

A. Alternative Approaches to Sentencing Under §2L1.2

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

The first, second, and third options amend the structure of §2L1.2 by using the definition of aggravated felony in combination with the length of the sentence imposed for that prior felony conviction. Option one provides a 16-level increase for an aggravated felony in which the

sentence of imprisonment imposed exceeded 13 months; a 12-level increase for an aggravated felony in which the sentence of imprisonment imposed was less than 13 months; and an eight-level increase for all other aggravated felonies. Option two provides a 16-level increase for an aggravated felony in which the sentence of imprisonment imposed exceeded two years; a 12-level increase for an aggravated felony in which the sentence of imprisonment imposed was at least one year, but less than two years; and an 8 level increase for all other aggravated felonies. Option three, mirroring the criminal history guidelines, provides a 16-level increase for an aggravated felony in which the sentence imposed exceeded 13 months; a 12-level increase for an aggravated felony in which the sentence imposed was at least 60 days but did not exceed 13 months; and an 8 level increase for all other aggravated felonies.

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

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

4. Issues for Comment

Part 4 of the proposed amendment sets forth multiple issues for comment regarding the immigration guidelines and the proposed amendment.

Proposed Amendment:

Part 1: §2L1.1

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

(a) Base Offense Level:

[Option 1 (for national security):

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

~~(1)~~(2) **23**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony; or

~~(2)~~(3) **[12][14]**, otherwise.

* * *

(b) Specific Offense Characteristics

* * *

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

[Option 1 (number of aliens):

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

[Option 2 (number of aliens):

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

* * *

[Option 2 (for national security):

(3) If the defendant smuggled, transported, or harbored an alien who was inadmissible under 8 U.S.C. § 1182(a)(3), increase by **[2][4][6]** levels.]

[Option 1 (minors):

(4) If the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent, increase by **[2][4][6]** levels.]

[Option 2 (minors):

(4) If (A) the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent; and (B) the minor (i) had not attained the age of 12 years, increase by **[4]** levels; or (ii) had attained the age of 12 years but had not attained the age of 16 years, increase by **[2]** levels.]

~~(3)~~(5) * * *

~~(4)~~(6) * * *

~~(5)~~(7) * * *

~~(6)~~(8) If any person ~~died or~~ sustained bodily injury, increase the offense level

according to the seriousness of the injury:

~~Death or~~ Degree of Injury		Increase in Level
(~~1~~A)	Bodily Injury	add **2** levels
(~~2~~B)	Serious Bodily Injury	add **4** levels
(~~3~~C)	Permanent or Life-Threatening Bodily Injury	add **6** levels.
~~(4)~~	~~Death~~	~~add 8 levels.~~

(9) If the offense resulted in the death of any person, increase by **[10]** levels.

(10) If an alien was kidnapped, abducted, or unlawfully restrained, or if a ransom demand was made, increase by **[4]** levels. If the resulting offense level is less than level **[23]**, increase to level **[23]**.

(c) Cross Reference

(1) If death resulted~~any person was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the special maritime and territorial jurisdiction of the United States~~, apply the appropriate ~~murder~~ homicide guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined above.

Commentary

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

Application Notes:

* * *

[Option 1 (national security):

2. *Application of Subsection (a)(1).— Subsection (a)(1) applies in cases in which the defendant is convicted under 18 U.S.C. § 1327 of knowingly smuggling certain aliens inadmissible under 8 U.S.C. 1182(a)(3). Section 1327 requires that the defendant know that the alien is ineligible to be admitted into the United States, however, it does not require that the defendant have specific knowledge as to why the defendant is ineligible for admission.*]

~~2.~~3. * * *

~~3.~~4. * * *

~~4.~~5. *Application of Subsection (b)(2).—If the offense involved substantially more than ~~100~~300 aliens, an upward departure may be warranted.*

~~5.~~6. *Prior Convictions Under Subsection (b)(3).—Prior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*

~~6.~~7. * * *]

Part 2: §§2L2.1 and 2L2.2

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

* * *

(b) Specific Offense Characteristic

* * *

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

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

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

* * *

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

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Commentary

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Application Notes:

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

§2L2.2. Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport

* * *

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

* * *

Part 3: §2L1.2

[Option 1:

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

* * *

(b) Specific Offense Characteristic

(1) Apply the Greatest:

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

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

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

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

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

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

Commentary

* * *

Application Notes:

1. Application of Subsection (b)(1).—

* * *

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

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

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

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

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

~~*(ii) "Child pornography offense" means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260, or (II) an offense under state or local law*~~

~~*consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*~~

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

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

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

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

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

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

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

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

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

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

(viiiv) ~~"Sentence imposed"~~ "Sentence of imprisonment" has the meaning given ~~the~~ that term ~~"sentence of imprisonment"~~ in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes

any term of imprisonment given upon revocation of probation, parole, or supervised release.

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

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

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

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

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

~~*4.*~~2. *Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):*

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

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

~~*5.*~~3. *Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.*

~~*6.*~~4. *Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).*]

[Option 2:

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

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

(b) Specific Offense Characteristic

(1) Apply the Greatest:

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

(A) a conviction for an aggravated felony ~~that is (i) a drug trafficking offense~~ for which the sentence imposed exceeded ~~13 months~~ 2 years~~; (ii) a crime of violence ; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense~~, increase by **16** levels;

(B) a conviction for an aggravated felony ~~a drug trafficking offense~~ for which the sentence imposed was at least 12 months but did not exceed 2 years ~~13 months or less~~, increase by **12** levels;

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

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

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

Commentary

(Commentary amendments similar to Option 1)]

* * *

[Option 3

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

* * *

(b) Specific Offense Characteristic

(1) Apply the Greatest:

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

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

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

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

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

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

* * *

Commentary

(Commentary amendments similar to Option 1)]

* * *

[Option 4

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

* * *

(b) Specific Offense Characteristic

(1) Apply the Greatest:

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

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

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

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

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

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

Commentary

* * *

Application Notes:

1. Application of Subsection (b)(1).—

* * *

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

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

(ii) "Child pornography offense" ~~means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260, or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.~~is an offense described in 8 U.S.C. § 1101(a)(43)(I).

(iii) "Crime of violence" ~~means any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.~~has the meaning given that term in 18 U.S.C. § 16.

(iv) "Drug trafficking offense" ~~means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.~~has the meaning given that term in 18 U.S.C. § 924(c).

(v) "Firearms offense" is an offense described in 8 U.S.C. §§ 1101(a)(43)(C) and (E). ~~means any of the following:~~

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

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

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

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

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

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

(vi) "Human trafficking offense" ~~means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.~~ is an offense described in 8 U.S.C. § 1101(a)(43)(K).

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

(viii) ~~"Terrorism offense" means any offense involving, or intending to promote, a "Federal crime of~~ terrorism", as that term is defined in 18 U.S.C. § 2332b(g)(5). "National security or terrorism offense" is an offense described in 8 U.S.C. § 1101(a)(43)(L).]

* * *

[Option 5:

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

(a) Base Offense Level: ~~8~~ **[16] [20] [24]**

(b) Specific Offense Characteristic

[(1) If the defendant ~~previously was deported, or unlawfully remained in the United States, after~~ does not have a prior conviction for a felony, decrease by **[8][6][4]** levels.]

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

~~by 16 levels;~~

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

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

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

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

Commentary

* * *

Application Notes:

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

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

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

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

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

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

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

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

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

~~*of the United States.*~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~5~~2. * * *

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

Part 4.

Issues for Comment:

(1) The proposed amendment to §2L1.1 provides options for addressing defendants who smuggle, transport, or harbor any alien who is inadmissible under 8 U.S.C. § 1182(a)(3). Certain sections of 8 U.S.C. § 1182(a)(3), however, are very broad, such as subsection (a)(3)(A)(iii) (pertaining to inadmissibility due to an intent to commit "any other unlawful activity"), or are unrelated to the national security risks associated with terrorism, such as subsections (a)(3)(D) (pertaining to membership in a totalitarian party) and (a)(3)(E) (pertaining to participants in Nazi persecutions). The Commission requests comment regarding whether it should more specifically identify, for purposes of either a heightened base offense level or a specific offense characteristic, the subsections of 8 U.S.C. § 1182(a)(3) that pertain to terrorism or to other national security provisions. For example, should either a heightened base offense level or a specific offense characteristic be limited to 8 U.S.C. §§ 1182(a)(3)(A)(i) (pertaining to espionage or sabotage), (a)(3)(A)(iii) (pertaining to overthrow of the United States Government), (a)(3)(B) (pertaining to terrorist activities), and (a)(3)(F) (pertaining to association with terrorist organizations)?

Additionally, the Commission requests comment regarding whether §2L1.1 should provide a heightened base offense level if the defendant were convicted under 8 U.S.C. § 1327 (Aiding or assisting certain aliens to enter) and a specific offense characteristic that would apply cumulatively if the defendant smuggled, transported, or harbored an alien the defendant knew to be inadmissible under 8 U.S.C. § 1182(a)(3).

(2) *The proposed amendment provides new specific offense characteristics that are defendant-based (i.e., the defendant's liability is limited to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused) rather than offense-based (i.e., expanded relevant conduct). See proposed amendment, §2L1.1(b)(3) (pertaining to smuggling inadmissible aliens) and (b)(4) (pertaining to smuggling a minor unaccompanied by the minor's parent). The Commission requests comment regarding whether these specific offense characteristics should be offense based rather than defendant based. Alternatively, should the proposed enhancement in §2L1.1(b)(10) (pertaining to kidnapping an alien) be defendant-based rather than offense-based, as it is currently proposed?*

(3) *The proposed amendment to §2L1.1 includes an enhancement for a defendant who smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent. The Commission requests comment regarding whether such conduct is better addressed in the context of §3A1.1 (Hate Crime Motivation or Vulnerable Victim).*

(4) *The Commission requests comment regarding whether it should increase the base offense levels in §§2L2.1 and 2L2.2.*

(5) *Currently, §2L2.2 provides an increase of four levels if the defendant fraudulent obtained or used a United States passport. The proposed amendment would add this enhancement to §2L2.1 and also provide an enhancement of two levels in both §§2L2.1 and 2L2.2 if the defendant fraudulently obtained or used a foreign passport. As an alternative to the proposed amendment, the Commission requests comment regarding whether it should provide a [four-level] enhancement in both §§2L2.1 and 2L2.2 regardless of whether the passport was issued by the United States or a foreign country. Additionally, the Commission requests comment regarding whether other types of documents should be included in the enhancement. If so, what types of documents should be included? For example, should the proposed 2-level enhancement also apply in the case of a defendant who fraudulently obtains or used a driver's license?*

Additionally, the Commission requests comment regarding whether it should provide an application note in §§2L2.1 and 2L2.2 that instructs the court not to apply §2L2.1(b)(2), proposed §2L2.1(b)(5), or §2L2.2(b)(3) if the documents are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny. The guidelines currently provide such an application note in §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States).

(6) *The Commission requests comment regarding whether the prior convictions used to increase a defendant's offense level under §2L1.2 should be subject to the rules of criminal history found at §4A1.2. For example, if a prior conviction is too old to be counted for the purposes of criminal history, should that prior conviction also be too old to count for the purposes of §2L1.2? Alternatively, should such a conviction be the basis for a reduction?*

(7) *Prior to May 1997, the table for number of aliens in §2L1.1(b)(2) provided increases of two level*

increments. In May 1997, in response to a directive to increase the enhancement in §2L1.1(b)(2) by at least 50 percent (see section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208), the Commission amended the table to provide increases of three level increments. At that time, the Commission also similarly amended the table in §2L2.1 pertaining to the number of documents. The Commission requests comment regarding whether it should amend these tables to provide increases of two level increments. Any such change would be done in a manner that complies with the directive in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

(8) *As an alternative to Option 5 for amending §2L1.2, the Commission requests comment regarding whether it should provide a guideline that is in essence an inversion of the current structure of §2L1.2. Currently, §2L1.2 provides increases based on the type of prior conviction. Should the Commission consider multiple reductions based on the type of prior conviction?*

2. FIREARMS

Synopsis of Proposed Amendment: *This proposed amendment addresses various issues pertaining to the firearms guideline, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), and to other firearm provisions in the guidelines.*

First, the proposed amendment addresses offenses involving a weapon described in 18 U.S.C. § 921(a)(30), which expired on September 13, 2004. Although possession of such a weapon is no longer covered by 18 U.S.C. § 921, possession of certain weapons, particularly by a prohibited person, may still be considered an aggravating factor warranting an increase in the base offense level. The proposed amendment presents two options for providing increases for possession of weapons previously covered by 18 U.S.C. § 921(a)(30). Currently, §2K2.1 has four base offense level provisions that are triggered by the offense involving such a weapon. Under Option One, each of the four base offense level provisions would be based on whether "the offense involved a firearm that is a high-capacity, semiautomatic firearm." "High-capacity, semiautomatic firearm" would be defined as "a semiautomatic firearm that has a magazine capacity of more than [15] cartridges." Option Two would provide an upward departure if the offense involved a high-capacity semiautomatic firearm. The proposed amendment also presents an issue for comment regarding this definition and whether any similar changes should be made to §5K2.17 (High-capacity, Semiautomatic Firearms).

Second, the proposed amendment provides a [2-][4-]level enhancement in §2K2.1 if the defendant engaged in the trafficking of [2-24] firearms, and a [6-][8-] level enhancement if the defendant engaged in the trafficking of [25 or more] firearms. Although there is no definition of trafficking in the firearm statutes, the proposed amendment borrows from the statutory definition of "traffic" found in other sections of the United States Code (see, e.g., 18 U.S.C. §§ 1028(d)(12), and 2318). The proposed amendment, however, modifies the statutory definition in two ways. The first modification pertains to consideration and two options are presented. Option One would result in application of the enhancement whenever a firearm was transferred as consideration for anything of value. (This option would be consistent with the statutory definitions of "traffic".) Option Two would result in application of the enhancement only if the transfer was made for pecuniary gain. The second modification is to include ongoing schemes to transport or transfer firearms to another individual, even if nothing of value was exchanged The proposed amendment also presents an issue for comment regarding the proposed definition of "trafficking".

Third, the proposed amendment modifies §2K2.1(b)(4) to increase the penalties for offenses involving altered or obliterated serial numbers. Under the proposed amendment, a 2-level enhancement would continue to apply to offenses involving a stolen firearm. However, the proposed amendment would provide a 4-level enhancement for offenses involving altered or obliterated serial numbers. The 4-level increase reflects the difficulty in tracing firearms with altered or obliterated serial numbers. The proposed amendment also makes slight technical changes to the corresponding application note.

Fourth, the proposed amendment addresses a circuit conflict pertaining to application of §§2K2.1(b)(5) and (c)(1), specifically with respect to the meaning of use of a firearm "in connection with" another offense in the context of burglary and drug offenses. The majority of circuits have adopted a standard consistent with Smith v. United States, 508 U.S. 223 (1993), in which the Supreme Court determined the scope of "in relation to" as that term is used in 18 U.S.C. § 924(c). The proposed amendment accordingly provides that §§2K2.1(b)(5) and (c)(1) apply if the firearm facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, the courts are

split as to how this standard then applies with respect to burglary and drug offenses. For ease of presentation, the proposed amendment presents options in terms of whether the presence of a firearm by mere coincidence during the course of a burglary or drug offense "facilitated or had the potential of facilitating" another offense. Option One provides that the mere presence of a firearm during the course of burglary or a drug offense is sufficient because the firearm emboldens the defendant. Option Two states that the mere presence of a firearm is not sufficient except in a drug offense. Accordingly, the enhancement in §2K2.1(b)(5), or the cross reference in §2K2.1(c)(1) would not apply in the case of a defendant who takes a firearm during a burglary, but it would apply in a drug offense because the mere presence of a firearm in a drug offense increases the risk of violence. Option Three provides that the mere presence is not enough to trigger either §2K2.1(b)(5) or §2K2.1(c)(1). (Please note that the proposed definitions of "another felony offense" and "another offense", as well as the upward departure note, are not new - the proposed language is a technical reworking of current Application Notes 4, 11, and 15.)

Fifth, the proposed amendment modifies §5K2.11 (Lesser Harms) to prohibit a downward departure in any case in which a defendant is convicted under 18 U.S.C. § 922(g).

Finally, the proposed amendment addresses the circuit conflict regarding whether pointing or waving a firearm at a specific person constitutes "brandishing" or "otherwise using". The proposed amendment presents three options. Option One combines brandished and otherwise used with respect to firearms under the theory that the same risk of harm, and the same fear, exists whether a firearm is generally waved about or specifically pointed at a particular individual. Under this approach, otherwise using and brandishing with respect to a firearm would result in the same sentencing increase in §§2B3.1 (Robbery) and 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage). However, the proposed amendment would maintain the distinction between otherwise using or brandishing with respect to other dangerous weapons. Additionally, this option provides that generally waving a firearm would constitute otherwise used. Following this option, the proposed amendment presents an issue for comment regarding whether the Commission, if it adopts this approach, should make similar changes to other guidelines that have an enhancement for brandishing and otherwise using a firearm. Option Two presents the majority and minority circuit court views. The majority view holds that generally waiving or pointing a firearm constitutes brandishing but pointing a firearm at a specific individual to make an explicit or implicit threat, or as a means of forcing compliance, constitutes otherwise used. The minority view holds that pointing a firearm, even if it is pointed at a specific person, is brandishing. In the non-firearms context, otherwise used necessarily includes the most extreme thing that can be done with a weapon (i.e., using it to injure or attempt to injure a victim). Accordingly, these courts hold a firearm must similarly be used to injure or attempt to injure a victim in order to constitute otherwise used, and to hold otherwise would be to obliterate the guidelines' definition of otherwise used.

Proposed Amendment:

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(A) § 921(a)(30)

[Option One:

(a) Base Offense Level (Apply the Greatest):

(1) **26**, if (A) the offense involved a firearm that is a high-capacity, semiautomatic firearm, or that is described in 26 U.S.C. § 5845(a) ~~or 18 U.S.C. § 921(a)(30),~~; and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

* * *

(3) **22**, if (A) the offense involved a firearm that is a high-capacity, semiautomatic firearm, or that is described in 26 U.S.C. § 5845(a) ~~or 18 U.S.C. § 921(a)(30),~~; and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) **20**, if --

* * *

(B) the offense involved a firearm that is a high-capacity, semiautomatic firearm, or that is described in 26 U.S.C. § 5845(a) ~~or 18 U.S.C. § 921(a)(30)~~; and the defendant (i) was a prohibited person at the time the defendant committed the instant offense; or (ii) is convicted under 18 U.S.C. § 922(d);

(5) **18**, if the offense involved a firearm that is a high-capacity, semiautomatic firearm, or that is described in 26 U.S.C. § 5845(a) ~~or 18 U.S.C. § 921(a)(30);~~]

* * *

Commentary

* * *

Application Notes:

1. Definitions.— For purposes of this guideline:

* * *

"Firearm" has the meaning given that term in 18 U.S.C. § 921(a)(3).

"High-capacity, semiautomatic firearm" means a semiautomatic firearm that has a magazine capacity of more than [15] cartridges.]

* * *

[Option Two:

(a) Base Offense Level (Apply the Greatest):

(1) **26**, if (A) the offense involved a firearm described in 26 U.S.C. § 5845(a) ~~or 18 U.S.C. § 921(a)(30),~~; and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

* * *

(3) **22**, if (A) the offense involved a firearm described in 26 U.S.C. § 5845(a) ~~or 18 U.S.C. § 921(a)(30),~~; and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) **20**, if --

* * *

(B) the offense involved a firearm described in 26 U.S.C. § 5845(a) ~~or 18 U.S.C. § 921(a)(30)~~; and the defendant (i) was a prohibited person at the time the defendant committed the instant offense; or (ii) is convicted under 18 U.S.C. § 922(d);

(5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a) ~~or 18 U.S.C. § 921(a)(30)~~;

* * *

Commentary

* * *

~~13~~.11. *Upward Departure Provision.—An upward departure may be warranted in any of the following circumstances: ~~(1)~~(A) the offense involved a high-capacity, semiautomatic firearm; (B) the number of firearms substantially exceeded 200; ~~(2)~~(C) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p); ~~(3)~~(D) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or ~~(4)~~(E) the offense posed a substantial risk of death or bodily injury to multiple individuals (see Application Note 8). For purposes of this guideline, "high-capacity, semiautomatic firearm" means a semiautomatic firearm that has a magazine capacity of more than [15] cartridges.*

Issue for Comment: *The proposed amendment uses as a basis for providing enhanced base offense levels or, alternatively, for an upward departure. The Commission requests comment regarding whether there is an alternative definition that it should consider. Additionally, are there other categories of firearms or types of firearms that should form the basis for either an enhanced base offense level or for an upward departure? Finally, should the Commission make similar changes to the definition of "high-capacity, semiautomatic firearm" in §5K2.17 (High-Capacity, Semiautomatic Firearms) ?*

(B) Trafficking SOC

* * *

(b) Specific Offense Characteristics

(7) If the defendant engaged in the trafficking of (A) [[2]-24] firearms, increase by [**2**][**4**] levels; or (B) [25 or more] firearms, increase by [**6**][**8**] levels.

Commentary

* * *

Application Notes:

* * *

13. Application of Subsection (b)(7).—

(A) Definition of "Trafficking".—For purposes of subsection (b)(7), "trafficking" means transporting, transferring, or otherwise disposing of, [firearms][a firearm] to another individual, (i) [as consideration for anything of value][for pecuniary gain]; or (ii) as part of an ongoing unlawful scheme, even if nothing of value was exchanged.

(B) Use of the Term "Defendant".—Consistent with §1B1.3 (Relevant Conduct), the term "defendant" limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

Issue for Comment: *The Commission requests comment regarding whether the definition of trafficking should be restricted to offenses in which the defendant knew, had reason to believe, or was wilfully blind to the fact, that the transfer would be to an individual whose possession or receipt would be unlawful. Additionally, should the definition include receiving firearms from another individual.*

(C) Stolen and Altered or Obliterated Serial Numbers

(b) Specific Offense Characteristics

* * *

(4) (Apply the greater):

(A) If any firearm was stolen, increase by **2** levels; or

(B) If any firearm had an altered or obliterated serial number, increase by ~~2~~ **4** levels.

* * *

Commentary

* * *

Application Notes:

* * *

~~9.~~8. *Application of Subsection (b)(4).—*

(A) *Interaction with Subsection (a)(7).—If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the adjustment in subsection (b)(4)(A) ~~unless the offense involved a firearm with an altered or obliterated serial number~~. This is because the base offense level takes into account that the firearm or ammunition was stolen. However, it the offense involved a firearm with an altered or obliterated serial number, apply subsection (b)(4)(B).*

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the adjustment in subsection (b)(4)(B) ~~unless the offense involved a stolen firearm or stolen ammunition~~. This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, it the offense involved a stolen firearm or stolen ammunition, apply subsection (b)(4)(A).

(B) *Knowledge or Reason to Believe.— ~~The enhancement under subsection(b)(4) for a stolen firearm or a firearm with an altered or obliterated serial number~~ Subsection (b)(4) applies regardless of whether ~~or not~~ the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.*

* * *

D. "In connection with" in Burglary and Drug Offenses

Commentary

* * *

Application Notes:

* * *

~~4. "Felony offense," as used in subsection (b)(5), means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained.~~

~~5.~~4. * * *

~~6.~~5. * * *

~~7.~~6. * * *

~~8.~~7. * * *

~~9.~~8. * * *

~~10.~~9. * * *

~~11. Under subsection (c)(1), the offense level for the underlying offense (which may be a federal, state, or local offense) is to be determined under §2X1.1 (Attempt, Solicitation, or Conspiracy) or, if death results, under the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide).~~

~~12.~~10. * * *

~~13.~~11. * * *

~~14.~~12. * * *

~~15. As used in subsections (b)(5) and (c)(1), "another felony offense" and "another offense" refer to offenses other than explosives or firearms possession or trafficking offenses. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.~~

13. * * *

14. "In Connection With".—

(A) In General.—Subsections (b)(5) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively.

[Option One (mere coincidence enough because emboldens defendant):

(B) "Mere Concidence".—Subsection (b)(5) and (c)(1) apply in a case in which the firearm is present by mere coincidence because the firearm has the potential of facilitating another felony offense, or another offense, respectively. For example, subsections (b)(5) and (c)(1) would apply in a case in which a defendant who, during the course of a burglary, finds and takes the firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary. Similarly, in a case involving a drug offense, the mere presence of a firearm is sufficient for application of subsections (b)(5) and (c)(1).]

[Option Two (mere coincidence not enough except in drug cases):

(B) "Mere Coincidence".—Except as provided in subdivision (C), application of subsection (b)(5) or (c)(1) requires that the firearm be present by more than mere coincidence. For example, neither subsection (b)(5) nor subsection (c)(1) would apply in a case in which a defendant who, during the course of a burglary, finds and merely takes the firearm, without engaging in any other conduct with that firearm during the course of the

burglary. However, if the defendant subsequently engages in conduct that is separate and distinct from the initial taking of the firearm, subsection (b)(5) or subsection (c)(1) would apply.

(C) Application in Drug Cases.—In a case involving a drug offense, the mere presence of a firearm is sufficient for application of subsections (b)(5) and (c)(1) because of the increased risk of violence when a firearm is present during a drug offense. For example, subsections (b)(5) and (c)(1) would apply in the case of a defendant who, in the course of a drug trafficking offense, keeps a firearm in close proximity to the drugs, to drug-manufacturing materials, or to drug paraphernalia.]

[Option Three (mere coincidence not enough):

(B) "Mere Concidence".—Application of subsection (b)(5) or (c)(1) requires that the firearm be present by more than mere coincidence. For example, neither subsection (b)(5) nor subsection (c)(1) would apply in a case in which a defendant who, during the course of a burglary, finds and merely takes the firearm, without engaging in any other conduct with that firearm during the course of the burglary. Similarly, in a case involving a drug offense, the mere presence of a firearm is not sufficient for purposes of applying subsection (b)(5) or (c)(1); there must be some indication that the firearm was used or possessed to protect the defendant engaged in the drug offense or to protect the drugs from theft.]

(Please Note: Subdivisions (C) and (D) to be used with Options One, Two, and Three)

(C) Definitions.—

"Another felony offense", for purposes of subsection (b)(5), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

"Another offense", for purposes of subsection (c)(1), means any federal, state, or local offense other than the explosive or firearms possession or trafficking offense.

(D) Upward Departure Provision.—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.

(E) Lesser Harms and Felon in Possession

§5K2.11. Lesser Harms (Policy Statement)

Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for

example, in the case of a mercy killing. Where the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted. For example, providing defense secrets to a hostile power should receive no lesser punishment simply because the defendant believed that the government's policies were misdirected.

In other instances, conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, where a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program, a reduced sentence might be warranted. However, lesser harms is not an appropriate basis for a downward departure in any case in which a defendant is convicted under 18 U.S.C. § 922(g), even if the possession of a firearm were brief or existed because the defendant was disposing, or attempting to dispose of, a firearm.

(F) "Brandished" or "Otherwise Used"

[Option 1 (Combining Brandished and Otherwise Used plus modified majority view):

§1B1.1. Application Instructions

* * *

Commentary

* * *

Application Notes:

1. The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):

* * *

(C) "Brandished" with reference to a dangerous weapon (including a firearm) means that all or part of the weapon was displayed or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present.

* * *

(I) "Otherwise used" with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon. For example, using a firearm or a bat to hit a victim would constitute "otherwise used". Additionally, with respect to a firearm, generally pointing or waving a firearm in a threatening manner constitutes "otherwise used".

* * *

§2B3.1. **Robbery**

* * *

(b) Specific Offense Characteristics

* * *

(2) (A) If a firearm was discharged, increase by **7** levels; (B) if a firearm was brandished or otherwise used, increase by **6** levels; (C) if a firearm was ~~brandished or~~ possessed, increase by **5** levels; (D) if a dangerous weapon was otherwise used, increase by **4** levels; (E) if a dangerous weapon was brandished or possessed, increase by **3** levels; or (F) if a threat of death was made, increase by **2** levels.

§2B3.2. **Extortion by Force or Threat of Injury or Serious Damage**

* * *

(b) Specific Offense Characteristics

* * *

(3) (A)(i) If a firearm was discharged, increase by **7** levels; (ii) if a firearm was brandished or otherwise used, increase by **6** levels; (iii) if a firearm was ~~brandished or~~ possessed, increase by **5** levels; (iv) if a dangerous weapon was otherwise used, increase by **4** levels; or (v) if a dangerous weapon was brandished or possessed, increase by **3** levels; or]

* * *

[Option 2 (presenting majority and minority views):

§1B1.1. **Application Instructions**

Commentary

Application Notes:

1. *The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):*

[Option 2A (majority view): * * *

(C) "Brandished" with reference to a dangerous weapon (including a firearm) means (i) ~~that~~ all or part of the weapon was displayed; (ii) a weapon was generally pointed or waved in

a threatening manner; or (iii) the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. ~~Accordingly, although~~ Although the dangerous weapon does not have to be directly visible, the weapon must be present.

* * *

(I) "Otherwise used" with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon. Pointing a firearm at a specific individual, or group of individuals, to make an explicit or implicit threat, or as a means of forcing compliance, constitutes "otherwise used."]

[Option 2B (minority View):

(I) "Otherwise used" with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon. Use of a dangerous weapon (including a firearm) to injure or attempt to injure a victim would constitute "otherwise used". For example, using a firearm or a bat to hit a victim would constitute "otherwise used" but pointing a firearm at a specific individual would not constitute "otherwise used".]

Issue for Comment: *The proposed amendment provides an option for consolidating the enhancements for otherwise used and brandishing with respect to a case involving a firearm. The Commission requests comment regarding whether, if it adopts this approach in §§2B3.1 (Robbery) and 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), it should also adopt this approach in §§2A2.2 (Aggravated Assault) and 2E2.1 (Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means).*

3. STEROIDS

Synopsis of Proposed Amendment: *This proposed amendment would repromulgate the proposed temporary, emergency amendment set forth in Part A of this Notice as a permanent amendment. The proposed amendment implements the directive in the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. 109–76, which requires the Commission, under emergency amendment authority, to implement section 3 of the Anabolic Steroid Control Act of 2004, Pub. L. 108–358 (the "ASC Act"). The ASC Act directs the Commission to "review the Federal sentencing guidelines with respect to offenses involving anabolic steroids" and "consider amending the...guidelines to provide for increased penalties with respect to offenses involving anabolic steroids in a manner that reflects the seriousness of such offenses and the need to deter anabolic steroid trafficking and use...."*

The proposed amendment implements the directives by increasing the penalties for offenses involving anabolic steroids. It does so by changing the manner in which anabolic steroids are treated under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). Currently, one unit of an anabolic steroid "means a 10 cc vial of an injectable steroid or fifty tablets." The proposed amendment presents two options for increasing penalties. Option One bases the offense level in an anabolic steroid offense on the "actual" quantity of steroid involved in the offense and provides that one unit of an anabolic steroid means [25][50][100] mg of an anabolic steroid, regardless of the form involved in the offense (e.g., patch, cream, tablet, liquid). At 25 mg, sentencing penalties would be increased approximately 6-8 levels above current offense levels, and would closely approximate a 1:1 ratio with other Schedule III substances. At 50 mg, sentencing penalties would be increased approximately 4-6 levels above current offense levels, and at 100 mg, sentencing penalties would be increased approximately 2-4 levels above current offense levels. This option also includes a rebuttable presumption that the label, shipping manifest, or other similar documentation accurately reflects the purity of the steroid. Option Two eliminates the sentencing distinction between anabolic steroids and other Schedule III substances. Accordingly, if an anabolic steroid is in a pill, tablet, capsule, or liquid form, the court would sentence as it would in any other case involving a Schedule III substance. For anabolic steroids in other forms, the proposed amendment instructs the court that [1 unit means 25 mg and that] the court may determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense.

The proposed amendment also provide new enhancements designed to capture aggravating harms involved in anabolic steroid cases. First, the proposed amendment amends §2D1.1 to provide an increase of two levels if the offense involved the distribution of a masking agent. A masking agent is a product added to, or taken with, an anabolic steroid to prevent the detection of the anabolic steroid in an individual's body. Second, the proposed amendment amends §2D1.1 to provide an increase of two levels if the defendant distributed an anabolic steroid to a professional, college, or high school athlete. Third, the proposed amendment presents two options for increasing penalties for coaches who distribute anabolic steroids to their athletes. Option One provides, as an alternative to the proposed enhancement for distribution to an athlete, a two-level increase in §2D1.1 if the defendant used the defendant's position as a coach of athletic activity to influence an athlete to use an anabolic steroid. Option Two amends Application Note 2 of §3B1.3 (Abuse of Position of Trust or Use of Special Skill) to include a coach who uses his or her position to influence an athlete to use an anabolic steroid in the list of special circumstances to which the two level adjustment in §3B1.3 shall apply.

Three issues for comment follow the proposed amendment. The first pertains to whether the Commission, when it repromulgates the proposed amendment as a permanent amendment, should expand the scope of the enhancements to cover all controlled substances, not just anabolic steroids. The second

issues pertains to whether the penalties for steroid offenses should be based on quantities typical of offenses involving mid- and high-level dealers. The third issue pertains to whether the Commission should amend the guidelines to address offenses involving human growth hormone (HGH) and if so, how.

Proposed Amendment:

§2D1.1 **Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

* * *

(b) Specific Offense Characteristics

* * *

(6) If the offense involved the distribution of (A) an anabolic steroid; and (B) a masking agent, increase by **2** levels.

(7) If the defendant distributed an anabolic steroid to a professional, college, or high school athlete:[Option 1(for coach): or (B) the defendant used the defendant's position as a coach of an athletic activity to influence a professional, college, or high school athlete to use an anabolic steroid.] increase by **2** levels.]

~~(6)~~(8) * * *

~~(7)~~(9) * * *

(c) DRUG QUANTITY TABLE

* * *

*Notes to Drug Quantity Table:

[Option 1 (for steroids): * * *

(G) In the case of anabolic steroids, one "unit" means [25][50][100] mg of an anabolic steroid, regardless of the form (e.g., patch, topical cream, tablet, liquid). [There shall be a rebuttable presumption that the label, shipping manifest, or other similar documentation describing the type and purity of the anabolic steroid accurately reflects the purity of that steroid.]~~means a 10 cc vial of an injectable steroid or fifty tablets. All vials of injectable steroids are to be converted on the basis of their volume to the equivalent number of 10 cc vials (e.g., one 50 cc vial is to be counted as five 10 cc vials).~~]

* * *

[Option 2 (for steroids):

(F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances ~~(except anabolic steroids)~~, Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one "unit" means 0.5 ml. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (*e.g.* patch, topical cream, aerosol), [(A) one "unit means [25] mg; and (B)] the court may determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense.

~~(G) In the case of anabolic steroids, one "unit" means a 10 cc vial of an injectable steroid or fifty tablets. All vials of injectable steroids are to be converted on the basis of their volume to the equivalent number of 10 cc vials (e.g., one 50 cc vial is to be counted as five 10 cc vials).~~]

* * *

Commentary

* * *

Application Notes:

* * *

19. *Hazardous or Toxic Substances.—Subsection ~~(b)(6)(A)~~ (b)(8)(A) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b); or 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material).*

* * *

20. *Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine.—*

(A) Factors to Consider.—In determining, for purposes of subsection ~~(b)(6)(B)~~ (b)(8)(B) or (C), whether the offense created a substantial risk of harm to human life or the environment, the court shall include consideration of the following factors:

* * *

(B) Definitions.—For purposes of subsection ~~(b)(6)(C)~~(b)(8)(C):

* * *

21. *Applicability of Subsection ~~(b)(7)~~(b)(9).—The applicability of subsection ~~(b)(7)~~(b)(9) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection ~~(b)(7)~~(b)(9) applies.*

* * *

24. *Application of Subsection (b)(6).—For purposes of subsection (b)(6), "masking agent" means a product added to, or taken with, an anabolic steroid that prevents the detection of the anabolic steroid in an individual's body.*

25. *Application of Subsection (b)(7).—For purposes of subsection (b)(7):*

"Athlete" means an individual who participates in an athletic activity conducted by (A) an intercollegiate athletic association or interscholastic athletic association; (B) a professional athletic association; or (C) an amateur athletic organization.

"Athletic activity" means an activity that (A) has officially designated coaches; (B) conducts regularly scheduled practices or workouts that are supervised by coaches; and (C) has established schedules for competitive events or exhibitions.

"College or high school athlete" means an athlete who is a student at an institution of higher learning (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. § 1001) or at a secondary school (as defined in section 9101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. § 7801).

"Professional athlete" means an individual who competes in a major professional league.

Background: * * *

Subsection ~~(b)(6)(A)~~(b)(8)(A) implements the instruction to the Commission in section 303 of Public Law 103–237.

Subsections ~~(b)(6)(B)~~(b)(8)(B) and (C) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106–310.

* * *

[Option 2 (for coaches):

§3B1.3. Abuse of Position of Trust or Use of Special Skill

* * *

Commentary

Application Notes:

* * *

2. *Application of Adjustment in Certain Circumstances.—Notwithstanding Application Note 1, or any other provision of this guideline, an adjustment under this guideline shall apply to the following:*

(A) *Postal Service Employee.—An employee of the United States Postal Service who engages in the theft or destruction of undelivered United States mail.*

(B) *Offenses Involving "Means of Identification".—A defendant who exceeds or abuses the authority of his or her position in order to obtain unlawfully, or use without authority, any means of identification. "Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7). The following are examples to which this subdivision would apply: (i) an employee of a state motor vehicle department who exceeds or abuses the authority of his or her position by knowingly issuing a driver's license based on false, incomplete, or misleading information; (ii) a hospital orderly who exceeds or abuses the authority of his or her position by obtaining or misusing patient identification information from a patient chart; and (iii) a volunteer at a charitable organization who exceeds or abuses the authority of his or her position by obtaining or misusing identification information from a donor's file.*

(C) *Coach of Athletic Activity.—A defendant who uses the defendant's position as a coach of an athletic activity to influence a professional, college, or high school athlete to use an anabolic steroid.*

For purposes of this guideline:

(i) *"Athlete" means an individual who participates in an athletic activity conducted by (I) an intercollegiate athletic association or interscholastic athletic association; (II) a professional athletic association; or (III) an amateur athletic organization.*

(ii) *"Athletic activity" means an activity that (I) has officially designated coaches; (II) conducts regularly scheduled practices or workouts that are supervised by coaches; and (III) has established schedules for competitive events or exhibitions.*

(iii) *"College, or high school athlete" means an athlete who is a student at an institution of higher learning (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. § 1001) or at a secondary school (as defined in section 9101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. § 7801).*

(iv) *"Professional athlete" means an individual who competes in a major professional league.*]

Issues for Comment:

(1) *The Commission requests comment regarding whether, when the Commission re-promulgates the emergency amendment as a permanent amendment, it should expand the proposed enhancements in §2D1.1(b)(6) (pertaining to masking agents) and in §2D1.1(b)(7) (pertaining to distribution of a steroid to an athlete) to cover offenses involving any controlled substance. Specifically, the proposed amendment defines "masking agent" as "a product added to, or taken with, an anabolic steroid to prevent the detection of the anabolic steroid in an individual's body." However, masking agents also can be taken to prevent the detection of other controlled substances. The Commission requests comment regarding whether it should expand the definition of masking*

agent, and thus application of the enhancement, in a manner that covers all controlled substances, not just anabolic steroids. Similarly, there are controlled substances other than anabolic steroids that enhance an individual's performance. The Commission requests comment regarding whether the proposed enhancement pertaining to distribution to an athlete should be expanded to cover offenses involving all types of controlled substances.

(2) *The Commission requests comment regarding whether penalties for steroid offenses should be based on quantities typical of offenses involving mid- and high-level dealers. For more serious drug types (e.g., heroin, cocaine, marihuana), the Drug Quantity Table in §2D1.1(c) provides an offense level of 26 for quantities typical of mid-level dealers and an offense level of 32 for quantities typical of high-level dealers. These levels also correspond to the statutory mandatory minimum penalties for mid- and high-level dealers. Although there are no statutory mandatory minimum penalties establishing thresholds for steroid offenses, the Commission has been informed that a steroids dealer who provides the equivalent of one complete cycle to 10 customers is considered to be a mid-level dealer, and a dealer who provides the equivalent of one complete cycle to 30 customers is considered to be a high-level dealer. Currently, offense levels in the Drug Quantity Table for anabolic steroids and other Schedule III substances begin at level 6 and are "capped" at level 20. Should the Commission provide a penalty structure within this range that targets offenses involving mid- and high-level steroid dealers, and if so, what offense levels should correspond to a mid-level dealer and to a high-level dealer?*

(3) *Application Note 4 of §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) states that "[t]he Commission has not promulgated a guideline for violations of 21 U.S.C. § 333(e) (offenses involving human growth hormone)." The Commission requests comment regarding whether it should specifically address offenses involving the distribution of human growth hormone (HGH), and if so, how.*

4. INTELLECTUAL PROPERTY (FECA)

Synopsis of Proposed Amendment: *This proposed amendment proposes to re-promulgate as a permanent amendment the temporary, emergency amendment that implemented the directive in section 105 of the Family Entertainment and Copyright Act of 2005, Pub. L. 109–9. The emergency amendment became effective on October 24, 2005.*

The directive instructs the Commission to "review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of intellectual property rights crimes..."

"In carrying out [the directive], the Commission shall—

(1) take all appropriate measures to ensure that the Federal sentencing guidelines and policy statements...are sufficiently stringent to deter, and adequately reflect the nature of, intellectual property rights crimes;

(2) determine whether to provide a sentencing enhancement for those convicted of the offenses [involving intellectual property rights], if the conduct involves the display, performance, publication, reproduction, or distribution of a copyrighted work before it has been authorized by the copyright owner, whether in the media format used by the infringing party or in any other media format;

(3) determine whether the scope of 'uploading' set forth in application note 3 of section 2B5.3 of the Federal sentencing guidelines is adequate to address the loss attributable to people who, without authorization, broadly distribute copyrighted works over the Internet; and

(4) determine whether the sentencing guideline and policy statements applicable to the offenses [involving intellectual property rights] adequately reflect any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed."

Pre-Release Works

The proposed amendment provides a separate two-level enhancement if the offense involved a pre-release work. The enhancement and the corresponding definition use language directly from 17 U.S.C. § 506(a) (criminal infringement). The amendment adds language to Application Note 2 that explains that in cases involving pre-release works, the infringement amount should be determined by using the retail value of the infringed item, rather than any premium price attributed to the infringing item because of its pre-release status. The proposed amendment addresses concerns that distribution of an item before it is legally available to the consumer is more serious conduct than distribution of other infringing items and involves a harm not addressed by the current guideline.

Uploading

The concern underlying the uploading directive pertains to offenses in which the copyrighted work is transferred through file sharing, particularly peer-to-peer models. The Department of Justice has explained that Application Note 3, which expands on the definition of "uploading", may be read to exclude peer-to-peer activity from application of the current enhancement in §2B5.3(b)(2) for offenses that involve the manufacture, importation, or uploading of infringing items. In particular, the concern pertains to the third sentence, which reads, "For example, this subsection applies in the case of illegally uploading copyrighted software to an Internet site, but it does not apply in the case of downloading or installing that software on a hard drive on the defendant's personal computer." The proposed amendment builds on the current definition of "uploading" to include making an infringing item available on the Internet by storing an infringing item as an openly shared file (i.e., a file that is stored on a peer-to-peer network). The proposed amendment also clarifies that uploading does not include merely

downloading or installing infringing items on a hard drive of the defendant's computer unless the infringing item is an openly shared file. By clarifying the definition of uploading in this manner, Application Note 3, which is a restatement of the uploading definition, is no longer necessary and the proposed amendment deletes the application note from the guideline.

Indeterminate Number

The proposed amendment addresses the final directive by amending Application Note 2, which sets forth the rules for determining the infringement amount. The proposed note provides that the court may make a reasonable estimate of the infringement amount using any relevant information including financial records in cases in which the court cannot determine the number of infringing items. The Commission's empirical analysis of cases sentenced under this guideline suggests that courts often determine the infringement amount in this manner. This proposed amendment simply codifies into the guideline the practice currently employed by the courts.

New Offense

Finally, the proposed amendment provides a reference in Appendix A (Statutory Index) for the new offense at 18 U.S.C. § 2319B. This offense is proposed to be referenced to §2B5.3.

Proposed Amendment:

§2B5.3. Criminal Infringement of Copyright or Trademark

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

(b) Specific Offense Characteristics

* * *

(2) If the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution, increase by **2** levels.

(~~2~~3) If the offense involved the manufacture, importation, or uploading of infringing items, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12.**

(~~3~~)(4) * * *

(~~4~~)(5) * * *

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

"Uploading" means making an infringing item available on the Internet or a similar electronic

bulletin board with the intent to enable other persons to (A) download or otherwise copy the infringing item;; or (B) have access to the infringing item, including by storing the infringing item as an openly shared file. "Uploading" does not include merely downloading or installing an infringing item on a hard drive on a defendant's personal computer unless the infringing item is an openly shared file.

"Work being prepared for commercial distribution" has the meaning given that term in 17 U.S.C. § 506(a)(3).

2. *Determination of Infringement Amount.—This note applies to the determination of the infringement amount for purposes of subsection (b)(1).*

(A) Use of Retail Value of Infringed Item.—The infringement amount is the retail value of the infringed item, multiplied by the number of infringing items, in a case involving any of the following:

* * *

(vi) The offense involves the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution. In a case involving such an offense, the "retail value of the infringed item" is the value of that item upon its initial commercial distribution.

* * *

(E) Indeterminate Number of Infringing Items.—In a case in which the court cannot determine the number of infringing items, the court need only make a reasonable estimate of the infringement amount using any relevant information, including financial records.

* * *

~~*3. Uploading.—With respect to uploading, subsection (b)(2) applies only to uploading with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item. For example, this subsection applies in the case of illegally uploading copyrighted software to an Internet site, but it does not apply in the case of downloading or installing that software on a hard drive on the defendant's personal computer.*~~

~~*4.*~~*3.* * * *

~~*5.*~~*4.* * * *

* * *

Appendix A (Statutory Index)

18 U.S.C. § 2319A	2B5.3
18 U.S.C. § 2319B	2B5.3

5. TERRORISM/OBSTRUCTION OF JUSTICE

Synopsis of Proposed Amendment: *This proposed amendment re-promulgates as a permanent amendment the temporary, emergency amendment that responded to section 6703 of the Intelligence Reform and Terrorism Prevention Act of 2004 (the "Act"), Pub. L. 108–458. That amendment became effective on October 24, 2005.*

The Act directed the Commission "to provide for an increased offense level for an offense under sections 1001(a) and 1505 of title 18, United States Code, if the offense involves international or domestic terrorism, as defined in section 2331 of such title." The Act also increased the penalties for offenses under 18 U.S.C. § 1001 (false statements) and 1505 (obstruction of proceedings before departments, agencies, and committees of the United States) from not more than 5 years to not more than 8 years if the offense involves international or domestic terrorism. The Commission was subsequently directed by the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005 Pub. L. 109–76 to promulgate an amendment under emergency amendment authority not later than November 27, 2005. See Supplement to Appendix C (Amendment 676).

The proposed amendment provides a 12-level enhancement in §2J1.2 (Obstruction of Justice) if the defendant is convicted under 18 U.S.C. § 1001 or § 1505 and the enhanced statutory sentencing provision pertaining to international or domestic terrorism applies. The proposed amendment also provides an application note that instructs the court not to apply the new enhancement if an adjustment under §3A1.4 (Terrorism) applies.

Proposed Amendment:

§2J1.2. **Obstruction of Justice**

(a) Base Offense Level: **14**

(b) Specific Offense Characteristics

(1) (Apply the greater):

(A) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by **8** levels.

(B) If (i) defendant was convicted under 18 U.S.C. § 1001 or § 1505; and (ii) the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable, increase by **12** levels.

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1001 when the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable, 1503, 1505-1513, 1516, 1519. For

additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *Definitions.—For purposes of this guideline:*

   "Domestic terrorism" has the meaning given that term in 18 U.S.C. § 2331(5).

   "International terrorism" has the meaning given that term in 18 U.S.C. § 2331(1).

   "Records, documents, or tangible objects" includes (A) records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and (B) wire or electronic communications.

   "Substantial interference with the administration of justice" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.

2. *Chapter Three Adjustments.—*

   (A) ~~*Nonapplicability of*~~ *Inapplicability of Chapter Three, Part C.—For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation, prosecution, or sentencing of the obstruction of justice count.*

   (B) Interaction with Terrorism Adjustment.—If §3A1.4 (Terrorism) applies, do not apply subsection (b)(1)(B).

* * *

Appendix A (Statutory Index)

18 U.S.C. § 1001	2B1.1, 2J1.2 when the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable

6. IMPLEMENTATION OF TRANSPORTATION ACT

Synopsis of Proposed Amendment: *This proposed amendment implements a number of provisions of the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users, Pub. L. No. 109-59 (hereinafter the "Transportation Act"). Specifically:*

(A) *Section 3042 of the Transportation Act amends the definition of "mass transportation" in 18 U.S.C. § 1993 so that it now refers to "public transportation" and expands the definition to include the control of mass transportation vehicles.*

The proposed amendment responds to section 3042 by revising §§[2A1.4 (Involuntary Manslaughter)], 2A5.2 (Interference with Flight Crew Member of Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or Ferry) and 2K1.4 (Arson; Property Damage by Use of Explosives) so that the guideline term definition of "mass transportation" mirrors the statutory change to "public transportation". It also proposes to amend the heading of Chapter Two, Part A, Subpart 5 to reflect the revised terminology and proposes to amend the heading of §2A5.2 to include the control of mass transportation vehicle, in conformance with the amendments to 18 U.S.C. § 1993 made by section 3042.

(B) *Section 4102 of the Transportation Act amends 49 U.S.C. § 31310 to provide increased penalties for out-of-service violations and false records related to commercial vehicle safety. The Transportation Act creates a new criminal penalty of up to one year imprisonment for employers who knowingly and willfully allow or require employees to violate "out-of-service" orders ("OOS orders"). The Secretary of Transportation's statutory authority for issuing OOS orders is predicated upon a finding that a regulatory violation "poses an imminent hazard to safety." The term "imminent hazard" is defined as "any condition...likely to result in serious injury or death. . . ." Previously, the statute imposed only a maximum fine of $10,000 for knowingly requiring or allowing an employee to operate an out of service commercial motor vehicle.*

According to the Senate's report language on this provision, it is increasingly more difficult for enforcement officers to monitor out of service vehicles, particularly when the orders cover entire fleets of commercial motor vehicles. As such, "Many OOS orders are violated." Congress intends the new penalty provisions - including increased fines for violating OOS orders - to deter such violations in the future.

In response, the proposed amendment references the new criminal provision at 49 U.S.C. § 31310 to a new guideline already proposed for Class A misdemeanors. (See proposed amendment relating to the implementation of miscellaneous enacted legislation.)

(C) *Section 4210 of the Transportation Act creates a new section at 49 U.S.C. § 14915 covering penalties for failure to give up possession of household goods. Failure to give up household goods is defined as "the knowing and willful failure, in violation of a contract, to deliver to, or unload at, the destination of a shipment of household goods that is subject to jurisdiction under subchapter I or III of chapter 135 of this title, for which charges have been estimated by the motor carrier providing transportation of such goods, and for which the shipper has tendered a payment described in clause (i), (ii), or (iii) of section 13707(b)(3)(A).". The criminal penalty for failure to give up possession of*

household goods is a term of imprisonment of up to two years.

The proposed amendment refers this new offense to §2B1.1, the guideline covering fraud, theft, and property destruction.

(D) The proposed amendment provides an issue for comment regarding whether the Commission should amend the guidelines to implement section 7121 of the Transportation Act, which pertains to the transportation of hazardous waste, and if so how.

Proposed Amendment:

(A) Implementation of Section 3042 of Transportation Act

§2A1.4 Involuntary Manslaughter

* * *

Commentary

* * *

Application Note:

1. Definitions.—For purposes of this guidelines:

* * *

"Means of transportation" includes a motor vehicle (including an automobile or a boat) and a ~~mass~~public transportation vehicle. "~~Mass~~"Public transportation" has the meaning given that term in 18 U.S.C. § 1993(c)(5).

5. AIR PIRACY AND OFFENSES AGAINST PUBLIC ~~MASS~~ TRANSPORTATION

* * *

§2A5.2. Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, Control, or Maintenance of ~~Mass~~Public Transportation Vehicle or Ferry

(a) Base Offense Level (Apply the greatest):

(1) **30**, if the offense involved intentionally endangering the safety of: (A) an airport or an aircraft; or (B) a ~~mass~~public transportation facility, a ~~mass~~public transportation vehicle, or a ferry;

(2) **18**, if the offense involved recklessly endangering the safety of: (A) an airport or an aircraft; or (B) a ~~mass~~public transportation facility, a

~~mass~~public transportation vehicle, or a ferry;

* * *

Commentary

* * *

Application Note:

1. Definitions.—For purposes of this guideline:

* * *

"~~Mass~~Public transportation" has the meaning given that term in 18 U.S.C. § 1993(c)(5).

* * *

§2K1.4. Arson; Property Damage by Use of Explosives

* * *

(a) Base Offense Level (Apply the Greatest):

(1) **24**, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense, and that risk was created knowingly; or (B) involved the destruction or attempted destruction of a dwelling, an airport, an aircraft, a ~~mass~~public transportation facility, a ~~mass~~public transportation vehicle, a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use;

(2) **20**, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than (i) a dwelling, or (ii) an airport, an aircraft, a ~~mass~~public transportation facility, a ~~mass~~public transportation vehicle, a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; or (C) endangered (i) a dwelling, (ii) a structure other than a dwelling, or (iii) an airport, an aircraft, a ~~mass~~public transportation facility, a ~~mass~~public transportation vehicle, a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; or

* * *

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

"~~Mass~~Public transportation" has the meaning given that term in 18 U.S.C. § 1993(c)(5).

* * *

(B) Implementation of Section 4102 of Transportation Act

[Note: This amendment proposes to add a statutory provision (in red-line) to the guideline proposed for Class A Misdemeanors in Proposed Amendment 9 (Miscellaneous Laws), Part E.]

§2X5.2. Class A Misdemeanors (Not Covered by another Specific Offense Guideline)

(a) Base Offense Level: **6**

(b) Specific Offense Characteristic:

(1) If the defendant committed the instant offense of conviction subsequent to sustaining a conviction under the same provision of law as the instant offense of conviction, increase by **2** levels.

Commentary

Statutory Provisions: 7 U.S.C. § 2156; 18 U.S.C. §§ 1365(f), 1801; 42 U.S.C. § 14133; 49 U.S.C. § 31310(i)(2)(D).

Application Note:

1. In General.—This guideline applies to Class A misdemeanors that are specifically referenced in Appendix A (Statutory Index) to this guideline. This guideline also applies to Class A misdemeanors that have not been referenced in Appendix A to another specific offense guideline in Chapter Two. Do not apply this guideline to a Class A misdemeanor that has been referenced in the Statutory Index to a guideline other than this one.

APPENDIX A - STATUTORY INDEX

* * *

49 U.S.C. § 30170	2B1.1
49 U.S.C. § 31310(i)(2)(D)	2X5.2

* * *

(C) Implementation of Section 4210 of the Transportation Act

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer

Obligations of the United States

* * *

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4)-(5), 1031, 1037, 1341-1344, 1348, 1350, 1361, 1363, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992, 1993(a)(1), (a)(4), 2113(b), 2312-2317, 2332b(a)(1), 2701; 19 U.S.C. § 2401f; 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 14915, 30170, 46317(a), 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

APPENDIX A - STATUTORY INDEX

* * *

49 U.S.C. § 14912	2B1.1
49 U.S.C. § 14915	2B1.1

* * *

Issue for Comment: *The Commission requests comment on how it should implement provisions of the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users, Pub. L. No. 109-59 (hereinafter the "Transportation Act") relating to the transportation of hazardous materials. Specifically, the Commission requests comment regarding whether, and if so how, the Commission should amend the guidelines to implement section 7121 of the Transportation Act.*

Section 7121 of the Transportation Act amends 49 U.S.C. § 5124, which criminalizes knowing or willful violations of chapter 51 of title 49, United States Code, regarding the transportation of hazardous materials, in two ways. First, it defines "knowing," "willful," and "reckless" violations of the Hazardous Materials Act. Second, it provides a new ten year maximum for aggravated felonies in which a defendant knowingly or willfully violated the hazardous materials act (or its accompanying regulations), a release of hazardous materials occurs, and such a release results in death or serious bodily injury. Section 7127 of the Transportation Act added section 5124 to the provisions set forth in 18 U.S.C. § 3663 that allow the Department of Justice to seek restitution.

Offenses under 49 U.S.C. §5124 currently are referenced to §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce). The Commission amended §2Q1.2 in 2004 to provide for a 2-level increase for offenses involving the unlawful transportation of hazardous materials. This enhancement is to apply whenever a defendant is convicted under 49 U.S.C. § 5124 or 49 U.S.C. § 46312 and is intended to capture the increased risk of harm associated with these types of offenses. Is this enhancement adequate to account for the seriousness of conduct involving the unlawful transportation of hazardous materials and/or the increased risk of harm associated with these offenses, particularly for offenses involving the knowing, willful, and/or reckless transportation of hazardous materials?

7. IMPLEMENTATION OF THE INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT OF 2004

Synopsis of Proposed Amendment: *This proposed amendment implements a number of provisions of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108–458. Specifically:*

(A) Section 5401 of the Act adds a new subsection (a)(4) to 8 U.S.C. § 1324 that increases the otherwise applicable penalties by up to ten years for bringing aliens into the United States if (A) the conduct is part of an ongoing commercial organization or enterprise; (B) aliens were transported in groups of 10 or more; and (C)(1) aliens were transported in a manner that endangered their lives; or (2) the aliens presented a life-threatening health risk to people in the United States.

Criminal penalties for violations of 8 U.S.C. § 1324 include fines and terms of imprisonment ranging from 1 year for knowingly bringing in an alien who does not have permission to enter the country, 8 U.S.C. § 1324(a)(2)(A), up to life if a death occurs during a violation, 8 U.S.C. § 1324(a)(1)(B)(iv). Offenses under 18 U.S.C. § 1324 are referenced to §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien).

In response to the new offense, the proposed amendment provides three options. Option One amends §2L1.1 by adding a specific offense characteristic to account for offenses of conviction under 8 U.S.C. § 1324(a)(4). Option Two amends §2L1.1 by adding a specific offense characteristic to account for offenses that involve an ongoing commercial organization or enterprise. Option Three provides an upward departure for such conduct.

(B) Section 6702 of the Act creates a new offense at 18 U.S.C. § 1038 (False Information and Hoaxes), which provides as follows:

(1) In General - Whoever engages in any conduct with intent to convey false or misleading information under circumstances where such information may reasonably be believed and where such information may indicate that an activity has taken, is taking, or will take place that would constitute a violation of chapter 2, 10, 11B, 39, 40, 44, 111, or 113B of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284) or section 46502, the second sentence of section 46504, section 46505(b)(3) or (c), section 46506 if homicide or attempted homicide is involved, or section 60123(b) of title 49, shall --

> *(A) be fined under this title or imprisoned not more than 5 years, or both;*
> *(B) if serious bodily injury results, be fined under this title or imprisoned not more than 20 years, or both; and*
> *(C) if death results, be fined under this title or imprisoned for any number of years up to life or both.*

(2) Armed Forces - Any person who makes a false statement, with intent to convey false or misleading information, about the death, injury, capture, or disappearance of a member of the Armed Forces of the United States during a war or armed conflict in which the United States is engaged -

(A) shall be fined under this title or imprisoned not more than 5 years, or both;
(B) if serious bodily injury results, shall be fined under this title or imprisoned not more than 20 years, or both; and
(C) if death results, shall be fined under this title or imprisoned for any number of years or for life or both.

The proposed amendment references the new offense to §2A6.1 (Threatening or Harassing Communications) and adds a cross reference to §2M6.1 (Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy) if the conduct supports a threat to use a weapon of mass destruction.

(C) Section 6803 creates a new offense at 18 U.S.C. § 832, relating to participation in nuclear, and weapons of mass destruction, threats to the United States. The new offense reads in part as follows:

(a) Whoever, within the United States or subject to the jurisdiction of the United States, willfully participates in or knowingly provides material support or resources (as defined in section 2339A) to a nuclear weapons program or other weapons of mass destruction program of a foreign terrorist power, or attempts or conspires to do so, shall be imprisoned for not more than 20 years.

(b) There is extraterritorial Federal jurisdiction over an offense under this section.

(c) Whoever without lawful authority develops, possesses, or attempts or conspires to develop or possess a radiological weapon, or threatens to use or uses a radiological weapon against any person within the United States, or a national of the United States while such national is outside of the United States or against any property that is owned, leased, funded, or used by the United States, whether that property is within or outside of the United States, shall be imprisoned for any term of years or for life.

Section 6803 also adds this new offense to the list of predicate offenses at 18 U.S.C. § 2332b(g)(5)(B)(i) and amends §§ 57(b) and 92 of the Atomic Energy Act of 1954 (42 U.S.C. § 2077(b)) to cover the participation of an individual in the development of special nuclear material.

The proposed amendment references 18 U.S.C. § 832 to §2M6.1.

(D) Section 6903 of the Act creates a new offense at 18 U.S.C. § 2332g (Missile Systems Designed to Destroy Aircraft) prohibiting the production or transfer of missile systems designed to destroy aircraft. Specifically, § 2332g reads in part:

(a) Unlawful Conduct
(1) In general. Except as provided in paragraph (3), it shall be unlawful for

any person to knowingly produce, construct, otherwise acquire, transfer directly or indirectly, receive, possess, import, export, or use or possess and threaten to use—

(A) an explosive or incendiary rocket or missile that is guided by any system designed to enable the rocket or missile to—

(i) seek or proceed toward energy radiated or reflected from an aircraft or toward an image locating an aircraft; or

(ii) otherwise direct or guide the rocket or missile an aircraft;

(B) any device designed or intended to launch or guide a rocket or missile described in subparagraph (A); or

(C) any part or combination of parts designed or redesigned for use in assembling or fabricating a rocket, missile, or device described in subparagraph (A) or (B).

The new offense conduct provides for different criminal penalties. First, any individual who "violates, attempts, or conspires to violate, subsection (a)," the criminal penalties range from a fine of no more than two million dollars along with a statutory minimum term of imprisonment of 25 years to life. See 18 U.S.C. § 2332g(c)(1). Second, any person who in the course of a violation of subsection (a) who "uses, attempts or conspires to use, or possesses or threatens to use," any item(s) described in subsection (a) will be fined no more than two million dollars in addition to receiving a statutory minimum sentence of 30 years to life. See 18 U.S.C. § 2332g(c)(2). Finally, if the death of another person results from a violation of subsection (a), the offender will be fined no more than two million dollars and will be given a sentence of life imprisonment. See 18 U.S.C. § 2332g(c)(3).

The proposed amendment references 18 U.S.C. § 2332g to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) because the types of weapon described in the offense would seem to be covered as destructive devices under 26 U.S.C. § 5845(a).

(E) Section 6905 of the Act creates a new offense at 18 U.S.C. § 2332h prohibiting the production, transfer, receipt, possession, or threat to use, any radiological dispersal device. Section 2332h reads in part as follows:

(a) Unlawful Conduct

(1) In general. Except as provided in paragraph (2), it shall be unlawful for any person to knowingly produce, construct, otherwise acquire, transfer directly or indirectly, receive, possess, import, export, or use, or possess and threaten to use—

(A) any weapon that is designed or intended to release radiation or radioactivity at a level dangerous to human life; or

(B) any device or other object that is capable of and designed or intended to endanger human life through the release of radiation or radioactivity.

The new offense conduct provides for different criminal penalties. First, any individual who "violates, attempts, or conspires to violate, subsection (a)," the criminal penalties range from a fine of no more than two million dollars along with a statutory minimum

term of imprisonment of 25 years to life. See 18 U.S.C. § 2332h(c)(1). Second, any person who in the course of a violation of subsection (a) who "uses, attempts or conspires to use, or possesses or threatens to use," any item(s) described in subsection (a) will be fined no more than two million dollars in addition to receiving a statutory minimum sentence of 30 years to life. See 18 U.S.C. § 2332h(c)(2). Finally, if the death of another person results from a violation of subsection (a), the offender will be fined no more than two million dollars and will be given a sentence of life imprisonment. See 18 U.S.C. § 2332h(c)(3).

The proposed amendment references 18 U.S.C. § 2332h to §2M6.1 because of the nature of the offense. Section 2M6.1 covers conduct dealing with the production of certain types of nuclear, biological or chemical weapons or other weapons of mass destruction, including weapons of mass destruction that, as defined in 18 U.S.C. § 2332a, are designed to release radiation or radioactivity at levels dangerous to human life.

(F) Section 6906 of the Act creates a new offense prohibiting the production, acquisition, transfer, or possession of, or the threat to use, the variola virus. Specifically, 18 U.S.C. § 175c (Variola Virus), reads, in part:

(a) Unlawful Conduct

(1) In general. Except as provided in paragraph (2), it shall be unlawful for any person to knowingly produce, engineer, synthesize, acquire, transfer directly or indirectly, receive, possess, import, export, or use, or possess and threaten to use, variola virus.

The new offense conduct provides for different criminal penalties. First, any individual who "violates, attempts, or conspires to violate, subsection (a)," the criminal penalties range from a fine of no more than two million dollars along with a statutory minimum term of imprisonment of 25 years to life. See 18 U.S.C. § 175c(c)(1). Second, any person who in the course of a violation of subsection (a) who "uses, attempts or conspires to use, or possesses or threatens to use," any item(s) described in subsection (a) will be fined no more than two million dollars in addition to receiving a statutory minimum sentence of 30 years to life. See 18 U.S.C. § 175c(c)(2). Finally, if the death of another person results from a violation of subsection (a), the offender will be fined no more than two million dollars and will be given a sentence of life imprisonment. See 18 U.S.C. § 175c(c)(3).

The proposed amendment references 18 U.S.C. §175c to §2M6.1. The variola virus may be used as a biological agent or toxin and, therefore, should be covered under this guideline.

(G) The proposed amendment provides an issue for comment regarding whether the Commission should define the term "ongoing commercial organization" and if so, how.

Proposed Amendment:

(A) Implementation of Section 5401 of the Act

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

* * *

(b) Specific Offense Characteristics

* * *

(7) If [Option One: the defendant was convicted under 8 U.S.C. § 1324(a)(4)][Option Two: the offense was part of an ongoing commercial organization or enterprise], increase by [2] levels.

Commentary

* * *

Application Notes:

[Option Three: * * *

7. Offenses Involving Ongoing Commercial Organizations or Enterprises.—If [the defendant was convicted under 8 U.S.C. § 1324(a)(4)][the offense involved an ongoing commercial organization or enterprise], an upward departure may be warranted.]

* * *

(B) Implementation of Section 6702 of the Act

6. THREATENING OR HARASSING COMMUNICATIONS, HOAXES, STALKING, AND DOMESTIC VIOLENCE

§2A6.1. Threatening or Harassing Communications; Hoaxes

* * *

(c) Cross Reference

(1) If the offense involved any conduct evidencing an intent to carry out a threat to use a weapon of mass destruction, as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D), apply §2M6.1 (Weapons of Mass Destruction), if the resulting offense level is greater than that determined under this guideline.

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(c), 35(b), 871, 876, 877, 878(a), 879, 1038, 1993(a)(7), (8), 2332b(a)(2); 47 U.S.C. § 223(a)(1)(C)-(E); 49 U.S.C. § 46507. For additional statutory provision(s), see Appendix A (Statutory Index).

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APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 1037	2B1.1
18 U.S.C. § 1038	2A6.1

* * *

(C) Implementation of Section 6803 of the Act

§2M6.1. Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 175, 175b, 229, 831, 832. 842(p)(2) (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)), 1993(a)(2), (3), (b), 2332a (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)); 42 U.S.C. §§ 2077(b), 2122, 2131. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

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* * *

18 U.S.C. § 831	2M6.1
18 U.S.C. § 832	2M6.1

* * *

(D) Implementation of Section 6903 of the Act

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)-(p), (r)-(w), (x)(1), 924(a), (b), (e)-(i), (k)-(o), 2332g; 26 U.S.C. § 5861(a)-(l). For additional statutory provisions, see Appendix A (Statutory Index).

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* * *

18 U.S.C. § 2332f	2K1.4, 2M6.1
18 U.S.C. § 2332g	2K2.1

* * *

(E) Implementation of Section 6905 of the Act

§2M6.1. **Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy**

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 175, 175b, 229, 831, 842(p)(2) (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)), 1993(a)(2), (3), (b), 2332a (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)), 2332h; 42 U.S.C. §§ 2077(b), 2122, 2131. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

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* * *

18 U.S.C. § 2332h	2M6.1
18 U.S.C. § 2339	2X2.1, 2X3.1

* * *

(F) Implementation of Section 6906 of the Act

§2M6.1. **Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy**

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 175, 175b, 175c, 229, 831, 842(p)(2) (only with respect to weapons of

mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)), 1993(a)(2), (3), (b), 2332a (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)); 42 U.S.C. §§ 2077(b), 2122, 2131. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

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* * *

18 U.S.C. § 175b	2M6.1
18 U.S.C. § 175c	2M6.1

* * *

(G) Issue for Comment

Issue for Comment: *Section 5401 of the Intelligence Reform and Terrorism Prevention Act of 2004 added a new subsection (a)(4) to 8 U.S.C. § 1324 that increases the otherwise applicable penalties by up to 10 years if, among other things, the conduct is part of an ongoing commercial organization. However, the Act did not provide a definition of the term "ongoing commercial organization." If the Commission were to promulgate one of the proposed options that relies on this term as a basis for a sentencing increase (either by application of a specific offense characteristic or as an upward departure), should the Commission define the term "ongoing commercial organization" and if so, how?*

8. FALSE DOMAIN NAMES & CAN-SPAM

Synopsis of Proposed Amendment: *This proposed amendment (A) implements the directive to the Commission in section 204(b) of the Intellectual Property Protection and Courts Administration Act of 2004; and (B) implements the new offense in section 5(d) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act") (15 U.S.C. § 7704(d)).*

False Registration of Domain Name

Section 204(b) of the Intellectual Property Protection and Courts Administration Act of 2004 directs the Commission—

> *to ensure that the applicable guideline range for a defendant convicted of any felony offense carried out online that may be facilitated through the use of a domain name registered with materially false contact information is sufficiently stringent to deter commission of such acts... In carrying out this [directive], the Sentencing Commission shall provide sentencing enhancements for anyone convicted of any felony offense furthered through knowingly providing or knowingly causing to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name use in connection with the offense.*

The proposed amendment implements this directive by providing a new guideline in Chapter Three (Adjustments) for cases in which a statutory enhancement under 18 U.S.C. § 3559(f)(1) applies. Section 3559(f)(1), created by section 204(a) of the Intellectual Property Protection and Courts Administration Act of 2004, doubles the statutory maximum term of imprisonment, or increases the maximum sentence by seven years, whichever is less, if a defendant who is convicted of a felony offense knowingly falsely registered a domain name and used that domain name in the course of the offense. Basing the adjustment in the new guideline on application of the statutory enhancement in 18 U.S.C. § 3559(f)(1) satisfies the directive.

CAN-SPAM

Section 5(d)(1) of the CAN-SPAM Act prohibits the transmission of commercial electronic messages that contain "sexually oriented material" unless such messages include certain marks, notices, and information. Specifically, the statute requires that the sender of a commercial email message containing sexually oriented material:

(a) include in the subject heading of the email the "marks and notices" prescribed by the Federal Trade Commission; and

(b) include in the message initially viewable to the recipient (i) the FTC's marks and notices; (ii) clear and conspicuous identification that the message is an advertisement or solicitation; (iii) clear notice of the recipient's option to decline to receive further messages from the sender; and (iv) the sender's valid physical postal address.

The sender of a commercial email message that contains sexually oriented material within the meaning of the statute is exempted from these notice and labeling requirements only "if the recipient has given prior affirmative consent to the receipt of the message." Otherwise, a sender who "knowingly" transmits sexually oriented commercial messages email without including the required marks and

information shall be fined under title 18, United States Code, or imprisoned not more than 5 years, or both.

The proposed amendment references the new offense, found at 15 U.S.C. § 7704(d), to §2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials). Currently, §2G2.5 applies to violations of 18 U.S.C. § 2257, which requires producers of sexually explicit materials to maintain detailed records regarding their production activities and to make such records available for inspection by the Attorney General in accordance with applicable regulations. Although offenses under 15 U.S.C. § 7704(d) do not involve the recording and reporting functions at issue in cases currently sentenced under §2G2.5, section 7704(d) offenses are essentially regulatory in nature and in this manner are similar to other offenses sentenced under §2G2.5. In addition to the statutory reference changes, the proposed amendment also expands the heading of §2G2.5 specifically to cover offenses under 15 U.S.C. § 7704(d).

Proposed Amendment:

(A) False Registration of Domain Name

PART C - OBSTRUCTION AND RELATED ADJUSTMENTS

* * *

§3C1.3. False Registration of Domain Name

If a statutory enhancement under 18 U.S.C. § 3559(f)(1) applies, increase by [**1**][**2**][**3**][**4**] levels.

Commentary

Background: This adjustment implements the directive to the Commission in section 204(b) of Pub. L. 108–482.

(B) CAN-SPAM

§2G2.5. Recordkeeping Offenses Involving the Production of Sexually Explicit Materials; Failure to Provide Required Marks in Commercial Electronic Email

* * *

Commentary

Statutory Provisions: 15 U.S.C. § 7704(d); 18 U.S.C. § 2257.

* * *

APPENDIX A

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15 U.S.C. § 6821 2B1.1
15 U.S.C. § 7704(d) 2G2.5

9. MISCELLANEOUS LAWS

Synopsis of Proposed Amendment: *This proposed amendments implements miscellaneous enacted laws*

as follows:

(A) The Veterans' Memorial Preservation and Recognition Act of 2003, section 2, created a new offense at 18 U.S.C. § 1369 that prohibits the destruction of Veterans' Memorials, with a ten-year statutory maximum. Previously, in response to the Veteran's Cemetery Protection Act of 1997, the Commission added a two-level enhancement at §2B1.1(b)(6) for vandalizing a National Cemetery.

The proposed amendment refers the new offense to both §§2B1.1 (Theft, Property Destruction, and Fraud) and 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources). Reference to both guidelines mirrors the treatment of other offenses involving property damage to veterans' memorials. The proposed amendment also provides an increase of [2][4][6] levels in §§2B1.1 and 2B1.5 if the offense involved a veterans' memorial.

(B) The Plant Protection Act of 2002 increased penalties under 7 U.S.C. § 7734, for knowingly importing or exporting plant, plant products, biological control organisms, and like products for distribution or sale. The statutory maximum for the first offense is five years, and for subsequent offenses, ten years.

Appendix A (Statutory Index) currently references 7 U.S.C. § 7734 to §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product), which has a base offense level of 6. The proposed amendment provides two options in response to the increased penalties. Option One increases the base offense level in consideration of the increased statutory penalties. Option Two provides an upward departure provision within the guideline. This option recommends an upward departure because of the expected infrequency of plant protection offenses and because it provides the court with a viable tool to account for the harm involved during the commission of these offenses on a case-by-case basis.

(C) The Clean Diamond Trade Act of 2003 created a new offense at 19 U.S.C. § 3901, related to the import and export of rough diamonds or any transaction by a United States citizen anywhere, or any transaction that occurs in whole or in part within the United States. The new offense prohibits an import or export of rough diamonds that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in the Act. The statutory maximum is ten years.

This offense involves importing "conflict" diamonds into the United States for profits used towards the overthrow or subverting of legitimate governments in Sierra Leone, Angola, Liberia, and the Democratic Republic of Congo. The diamonds, referred to as "blood diamonds" or "conflict diamonds," are imported or exported without being controlled by a process known as the Kimberley Process Certification Scheme, which legitimizes the quality and original source of the diamond. The violation occurs when the diamonds are imported/exported without first being certified through this process or when a United States citizen enters into a transaction involving these diamonds without the proper certification. The profits from the sale of these rough diamonds are used to fund rebel and military activities in the countries mentioned earlier.

The proposed amendment references the new offense to §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property). The proposed amendment also revises introductory commentary more specifically to indicate that uncertified diamonds are contraband covered by §2T3.1 even if other types of contraband are covered by other, more specific guidelines.

(D) The Unborn Victims of Violence Act of 2004 ("Laci & Conner" Law) created a new offense at 18 U.S.C. § 1841 for causing a death or serious bodily injury to a child in utero while engaging in conduct violative of any one of several enumerated offenses. Under 18 U.S.C. § 1841(a)(1) and (a)(2)(A), the statutory maximum for the conduct that "caused the death of, or bodily injury to a child in utero shall be the penalty provided under Federal law for that conduct had that injury or death occurred to the unborn child's mother." Otherwise, under 18 U.S.C. § 1841(a)(2)(C), if the person engaging in the conduct intentionally kills or attempts to kill the unborn child that person shall be punished under sections 18 U.S.C. §§ 1111, 1112, and 1113 for intentionally killing or attempting to kill a human being.

The proposed amendment references 18 U.S.C. § 1841(a)(2)(C) to the guidelines designated in Appendix A for 18 U.S.C. §§ 1111, 1112, and 1113.

The proposed amendment references 18 U.S.C. § 1841(a)(1) to §2X5.1 (Other Offenses). Reference is made to §2X5.1 because, under 18 U.S.C. § 1841(a)(2)(A), the punishment for the offender is determined by the penalty for the conduct which caused the death or injury to a child in utero had that injury or death occurred to the unborn child's mother. For example, if the offender committed aggravated sexual abuse against the unborn child's mother and it caused the death of a child in utero, the punishment for the offender would be the same as the penalty for aggravated sexual abuse, not the penalty for first or second degree murder. There are approximately 65 other statutes listed under 18 U.S.C. § 1841(b) that require a similar approach. Properly designating guidelines for these offenses would be challenging, and perhaps confusing.

In order to permit the courts to determine the most analogous guideline on a case-by-case basis, a special instruction is provided in §2X5.1 that the most analogous guideline for these offenses is the guideline that covers the underlying offense conduct.

(E) The Farm Security and Rural Investment Act of 2002, created a new offense at 7 U.S.C. § 2156 that prohibits the interstate movement of animals for animal fighting, with a one year statutory maximum.

The Social Security Administration Act created a new offense under 42 U.S.C. § 1129(a) for prohibiting corrupt or forcible interference with the administration of the Social Security Administration Act. The statutory maximum is one year if the offense was committed only by threats of force, otherwise the statutory maximum is three years.

The Consumer Product Protection Act of 2002 created a new offense under 18 U.S.C. § 1365(f) for prohibiting the illegal tampering with a consumer product with a statutory maximum of one year for the first offense, and three years for subsequent offenses.

The Justice for All Act of 2004 created a new offense under 42 U.S.C. § 14133 for prohibiting the misuse or unauthorized disclosure of DNA analyses. The maximum penalty is one year.

The Video Voyeurism Prevention Act of 2004 created a new offense under 18 U.S.C. § 1801 for prohibiting the knowing capture of an image of an individual's "private area" without that individual's consent, under circumstances in which the individual has a reasonable expectation of privacy. The statutory maximum for this offense is one year.

To address these Class A misdemeanors offenses, the proposed amendment creates a new guideline at §2X5.2 (Class A Misdemeanors) that covers all Class A misdemeanors not otherwise provided for in a more specific Chapter Two guideline. The amendment assigns a base offense level of 6 for such offenses, which is the offense level typically applicable to Class A misdemeanor and regulatory offenses. A specific offense characteristic is provided for repeated violations.

Proposed Amendment:

(A) The Veterans' Memorial Preservation and Recognition Act of 2003

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

(b) Specific Offense Characteristics

* * *

(6) If the offense involved theft of, damage to, or destruction of, property from a national cemetery or veterans' memorial, increase by **[2]** [4]**[6]**levels.

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4)-(5), 1031, 1037, 1341-1344, 1348, 1350, 1361, 1363, 1369, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992, 1993(a)(1), (a)(4), 2113(b), 2312-2317, 2332b(a)(1), 2701; 19 U.S.C. § 2401f; 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 30170,

46317(a), 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

"Trade secret" has the meaning given that term in 18 U.S.C. § 1839(3).

"Veterans' memorial" means any structure, plaque, statue, or other monument described in 18 U.S.C. § 1369(a).

* * *

§2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources

* * *

(b) Specific Offense Characteristics

* * *

(2) If the offense involved a cultural heritage resource from, or that, prior to the offense, was on, in, or in the custody of (A) the national park system; (B) a National Historic Landmark; (C) a national monument or national memorial; (D) a national marine sanctuary; (E) a national cemetery or veterans' memorial; (F) a museum; or (G) the World Heritage List, increase by [2][4][6] levels

* * *

Commentary

Statutory Provisions: 16 U.S.C. §§ 470ee, 668(a), 707(b); 18 U.S.C. §§ 541-546, 641, 661-662, 666, 668, 1152-1153, 1163, 1168, 1170, 1361, 1369, 2232, 2314-2315.

Application Notes:

* * *

3. Enhancement in Subsection (b)(2).—For purposes of subsection (b)(2):

(A) "Museum" has the meaning given that term in 18 U.S.C. § 668(a)(1) except that the museum may be situated outside the United States.

(B) "National cemetery" ~~has~~and "veterans' memorial" have the meaning given ~~that term~~those terms in Application Note 1 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

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* * *

18 U.S.C. § 1366	2B1.1
18 U.S.C. § 1369	2B1.1, 2B1.5

* * *

(B) The Plant Protection Act of 2002

§2N2.1. Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product

(a) Base Offense Level:

[Option One:

(1) [**8**][**10**], if the defendant was convicted under 7 U.S.C. § 7734; or

(2) **6**, otherwise.]

* * *

Commentary

* * *

Application Notes:

* * *

[Option Two:

3. Upward Departure Provisions.—The following are circumstances under which an upward departure may be warranted:

(A) ~~If d~~Death or bodily injury, extreme psychological injury, property damage or monetary loss resulted~~, an upward departure may be warranted~~. See Chapter Five, Part K (Departures).

(B) The defendant was convicted under 7 U.S.C. § 7734.]

* * *

(C) The Clean Diamond Trade Act of 2003

3. CUSTOMS TAXES

Introductory Commentary

This Subpart deals with violations of 18 U.S.C. §§ 496, 541-545, 547, 548, 550, 551, 1915 and 19 U.S.C. §§ 283, 1436, 1464, 1465, 1586(e), 1708(b), and 3901, and is designed to address violations involving revenue collection or trade regulation. It is intended to deal with some types of contraband, such as certain uncertified diamonds, but is not intended to deal with the importation of other types of contraband, such as drugs, or other items such as obscene material, firearms or pelts of endangered species, the importation of which is prohibited or restricted for non-economic reasons. Other, more specific criminal statutes apply to most of these offenses. Importation of contraband or stolen goods not specifically covered by this Subpart would be a reason for referring to another, more specific guideline, if applicable, or for departing upward if there is not another more specific applicable guideline.

§2T3.1. Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 496, 541-545, 547, 548, 550, 551, 1915; 19 U.S.C. §§ 283, 1436, 1464, 1465, 1586(e), 1708(b), 3901. For additional statutory provision(s), see Appendix A (Statutory Index).

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APPENDIX A - STATUTORY INDEX

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19 U.S.C. § 2401f	2B1.1
19 U.S.C. § 3901	2T3.1

* * *

(D) The Unborn Victims of Violence Act of 2004

§2A1.1. First Degree Murder

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1111, 1841(a)(2)(C), 2113(e), 2118(c)(2), 2332b(a)(1), 2340A; 21

U.S.C. § 848(e). For additional statutory provision(s), see Appendix A (Statutory Index).

§2A1.2. Second Degree Murder

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1111, 1841(a)(2)(C), 2332b(a)(1), 2340A. For additional statutory provision(s), see Appendix A (Statutory Index).

§2A1.3. Voluntary Manslaughter

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1112, 1841(a)(2)(C), 2332b(a)(1). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2A1.4. Involuntary Manslaughter

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1112, 1841(a)(2)(C), 2332b(a)(1). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2A2.1. Assault with Intent to Commit Murder; Attempted Murder

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 113(a)(1), 351(c), 1113, 1116(a), 1751(c), 1841(a)(2)(C), 1993(a)(6). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2A2.2. Aggravated Assault

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 112, 113(a)(2), (3), (6), 114, 115(a), (b)(1), 351(e), 1751(e), 1841(a)(2)(C). 1993(a)(6), 2332b(a)(1), 2340A. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2X5.1. Other Offenses

If the offense is a felony or Class A misdemeanor for which no guideline expressly has been promulgated, apply the most analogous offense guideline. If there is not a sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553~~(b)~~ shall control, except that any guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline shall remain applicable.

If the defendant is convicted under 18 U.S.C. § 1841(a)(1), apply the guideline that covers the conduct the defendant is convicted of having engaged in, as that conduct is described in 18 U.S.C. § 1841(a)(1) and listed in 18 U.S.C. § 1841(b).

Commentary

Statutory Provision: 18 U.S.C. § 1841(a)(1).

Application Notes:

1. *In General.—Guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline include: §5B1.3 (Conditions of Probation); §5D1.1 (Imposition of a Term of Supervised Release); §5D1.2 (Term of Supervised Release); §5D1.3 (Conditions of Supervised Release); §5E1.1 (Restitution); §5E1.3 (Special Assessments); §5E1.4 (Forfeiture); Chapter Five, Part F (Sentencing Options); §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment); Chapter Five, Part H (Specific Offender Characteristics); Chapter Five, Part J (Relief from Disability); Chapter Five, Part K (Departures); Chapter Six, Part A (Sentencing Procedures); Chapter Six, Part B (Plea Agreements).*

2. *Convictions under 18 U.S.C. § 1841(a)(1).—*

   (A) In General.—If the defendant is convicted under 18 U.S.C. § 1841(a)(1), the Chapter Two offense guideline that applies is the guideline that covers the conduct the defendant is convicted of having engaged in, i.e., the conduct of which the defendant is convicted

that violates a specific provision listed in 18 U.S.C. § 1841(b) and that results in the death of or bodily injury to a child in utero at the time of the offense of conviction.

(B) *Upward Departure Provision.—For offenses under 18 U.S.C. § 1841(a)(1), an upward departure may be warranted if the offense level under the applicable guideline does not provide an adequate sentence to account for the death of or serious bodily injury to the child in utero.*

Background: Many offenses, especially assimilative crimes, are not listed in the Statutory Index or in any of the lists of Statutory Provisions that follow each offense guideline. Nonetheless, the specific guidelines that have been promulgated cover the type of criminal behavior that most such offenses proscribe. The court is required to determine if there is a sufficiently analogous offense guideline, and, if so, to apply the guideline that is most analogous. Where there is no sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553(b) control. ~~That statute provides in relevant part as follows: "In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in [18 U.S.C. § 3553] subsection (a)(2).~~ In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission."

* * *

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 1832	2B1.1
18 U.S.C. § 1841(a)(1)	2X5.1
18 U.S.C. § 1841(a)(2)(C)	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2

* * *

(E) Guideline for Class A Misdemeanors

5. ALL OTHER FELONY OFFENSES AND CLASS A MISDEMEANORS

§2X5.1. Other Felony Offenses

If the offense is a felony ~~or Class A misdemeanor~~ for which no guideline expressly has been promulgated, apply the most analogous offense guideline. If there is not a sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553~~(b)~~ shall control, except that any guidelines and policy statements that can be applied meaningfully in the

absence of a Chapter Two offense guideline shall remain applicable.

If the offense is a Class A misdemeanor that has not been referenced in Appendix A (Statutory Index) to a specific offense guideline, apply §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)).

* * *

§2X5.2. **Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)**

(a) Base Offense Level: **6**

(b) Specific Offense Characteristic:

(1) If the defendant committed the instant offense of conviction subsequent to sustaining a conviction under the same provision of law as the instant offense of conviction, increase by **2** levels.

Commentary

Statutory Provisions: 7 U.S.C. § 2156; 18 U.S.C. §§ 1365(f), 1801; 42 U.S.C. §§ 1129(a), 14133.

Application Note:

1. *In General.—This guideline applies to Class A misdemeanors that are specifically referenced in Appendix A (Statutory Index) to this guideline. This guideline also applies to Class A misdemeanors that have not been referenced in Appendix A to another specific offense guideline in Chapter Two. Do not apply this guideline to a Class A misdemeanor that has been referenced in the Statutory Index to a guideline other than this one.*

APPENDIX A - STATUTORY INDEX

* * *

7 U.S.C. § 2024(c)	2B1.1
7 U.S.C. § 2156	2X5.2

* * *

18 U.S.C. § 1121	2A1.1, 2A1.2
18 U.S.C. § 1129(a)	2X5.2

		* * *
18 U.S.C. § 1365(e)	2N1.1	
18 U.S.C. § 1365(f)	2X5.2	
		* * *
18 U.S.C. § 1792	2P1.3	
18 U.S.C. § 1801	2X5.2	
		* * *
42 U.S.C. § 9603(d)	2Q1.2	
42 U.S.C. § 14133	2X5.2	
		* * *

Issue for Comment: *The Commission requests comment regarding whether it should reference to proposed §2X5.2 any other Class A misdemeanor offense currently referenced in Appendix A to a guideline that does not provide a higher offense level than proposed §2X5.2. Are there additional Class A misdemeanor offenses not currently referenced in Appendix A that should be included in Appendix A and referenced to proposed §2X5.2?*

10. APPLICATION ISSUES

Synopsis of Proposed Amendment: *This proposed amendment addresses several issues of guideline application identified through inquiries made on the Commission's Helpline and at guideline seminars. The proposed amendment would make the following changes:*

(A) Modifies the cross reference in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to allow the court to apply §2A1.2 (Second Degree Murder) for cases in which the conduct involved is second degree murder. Currently the cross reference only allows the court to apply §2A1.1(First Degree Murder) even if the conduct does not constitute first degree murder. The proposed amendment also adds language that the cross reference to §2A1.1 or §2A1.2 should be applied if the offense level is greater than that determined under §2D1.1.

(B) Adds to Chapter Three a new guideline, §3C1.3 (Offenses Committed While on Release), which provides a three-level adjustment in cases in which the statutory sentencing enhancement at 18 U.S.C. § 3147 (Penalty for an offense committed while on release) applies. Currently, §2J1.7 (Commission of an Offense While on Release) corresponds to the statutory enhancement at 18 U.S.C. § 3147 and provides for a three-level enhancement that is added to the offense level for the offense the defendant committed while on release. However, despite its reference in Appendix A (Statutory Index), 18 U.S.C. § 3147 is not a statute of conviction, so there is no basis for requiring application of Appendix A. Accordingly, §2J1.7 may be overlooked. Creating a Chapter Three adjustment for 18 U.S.C. § 3147 cases is consistent with other adjustments currently in Chapter Three, all of which also apply to a broad range of offenses. The proposed amendment also eliminates commentary regarding a notice requirement. The majority of circuit courts have found that there is no notice requirement in order for 18 U.S.C. § 3147 to apply.

(C) Deletes from the Drug Quantity Table in §2D1.1 language that indicates the court should apply "the equivalent amount of Schedule I or II Opiates" (in the line referenced to Heroin), "the equivalent amount of Schedule I or II Stimulants" (in the line referenced to Cocaine), and "the equivalent amount of Schedule I or II Hallucinogens" (in the line referenced to LSD). Although Application Note 10 sets forth the marihuana equivalencies for substances not specifically referenced in the Drug Quantity Table, some guideline users erroneously calculate the base offense level without converting the controlled substance to its marihuana equivalency. For example, instead of converting 10 KG of morphine (an opiate) to 5000 KG of marihuana and determining the base offense level on that marihuana equivalency (resulting in a BOL of 34), some guideline users are determining the base offense level on the 10 KG of morphine (resulting in a BOL of 36). The proposed amendment would delete the problematic language and also clarify in Application Note 10 that, for cases involving a substance not specifically referenced in the Drug Quantity Table, the court is to determine the base offense level using the marihuana equivalency for that controlled substance.

Proposed Amendment:

(A) Cross Reference to Murder Guidelines:

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

(d) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guidelines.

* * *

(B) §2J1.7 (Commission of Offense While on Release)

§1B1.1 Application Instructions

* * *

Commentary

Application Notes:

* * *

~~*6. In the case of a defendant subject to a sentence enhancement under 18 U.S.C. § 3147 (Penalty for an Offense Committed While on Release), see §2J1.7 (Commission of Offense While on Release).*~~

~~7.~~6. * * *

~~**§2J1.7. Commission of Offense While on Release**~~

~~If an enhancement under 18 U.S.C. § 3147 applies, add 3 levels to the offense level for the offense committed while on release as if this section were a specific offense characteristic contained in the offense guideline for the offense committed while on release.~~

~~*Commentary*~~

~~*Statutory Provision: 18 U.S.C. § 3147.*~~

~~*Application Notes:*~~

~~*1. Because 18 U.S.C. § 3147 is an enhancement provision, rather than an offense, this section provides a specific offense characteristic to increase the offense level for the offense committed while on release.*~~

~~*2. Under 18 U.S.C. § 3147, a sentence of imprisonment must be imposed in addition to the sentence for the underlying offense, and the sentence of imprisonment imposed under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment. Therefore, the court, in order to comply with the statute, should divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement. The court will have to ensure that the "total punishment" (i.e., the sentence for the offense committed while on release plus the sentence enhancement under 18 U.S.C. § 3147) is in accord with the guideline range for the offense committed while on release, as adjusted by the enhancement in this section. For example, if the applicable adjusted guideline range is 30-37 months and the court determines "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement.*~~

~~*Background: An enhancement under 18 U.S.C. § 3147 may be imposed only after sufficient notice to the defendant by the government or the court, and applies only in the case of a conviction for a federal offense that is committed while on release on another federal charge.*~~

~~*Legislative history indicates that the mandatory nature of the penalties required by 18 U.S.C. § 3147 was to be eliminated upon the implementation of the sentencing guidelines. "Section 213(h) [renumbered as §200(g) in the Crime Control Act of 1984] amends the new provision in title I of this Act relating to consecutive enhanced penalties for committing an offense on release (new 18 U.S.C. § 3147) by eliminating the mandatory nature of the penalties in favor of utilizing sentencing guidelines." (Senate Report 98-225 at 186). Not all of the phraseology relating to the requirement of a mandatory sentence, however, was actually deleted from the statute. Consequently, it appears that the court is required to impose a consecutive sentence of imprisonment under this provision, but there is no requirement as to any minimum term. This guideline is drafted to enable the court to determine and implement a combined "total punishment" consistent with the overall structure of the guidelines, while at the same time complying with the statutory requirement. Guideline provisions that prohibit the grouping of counts of conviction requiring consecutive sentences (e.g., the introductory paragraph of §3D1.2, §5G1.2(a)) do not apply to this section because 18 U.S.C. § 3147 is an enhancement, not a count of conviction.*~~

PART C - OBSTRUCTION AND RELATED ADJUSTMENTS

* * *

§3C1.3. **Commission of Offense While on Release**

If a statutory sentencing enhancement under 18 U.S.C. § 3147 applies, increase the offense level by **3** levels.

Commentary

Application Note:

1. *Under 18 U.S.C. § 3147, a sentence of imprisonment must be imposed in addition to the sentence for the underlying offense, and the sentence of imprisonment imposed under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment. Therefore, the court, in order to comply with the statute, should divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement. The court will have to ensure that the "total punishment" (i.e., the sentence for the offense committed while on release plus the sentence enhancement under 18 U.S.C. § 3147) is in accord with the guideline range for the offense committed while on release, as adjusted by the enhancement in this section. For example, if the applicable adjusted guideline range is 30-37 months and the court determines "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement.*

Background: This guideline enables the court to determine and implement a combined "total punishment" consistent with the overall structure of the guidelines, while at the same time complying with the statutory requirement.

(C) "or Equivalent Amount"

§2D1.1 **Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

* * *

(c) DRUG QUANTITY TABLE

Section 2D1.1(c) (Drug Quantity Table) is amended by striking "(or the equivalent amount of other

Schedule I or II Opiates)" each place it appears; by striking "(or the equivalent amount of other Schedule I or II Stimulants)" each place it appears; and by striking "(or the equivalent amount of other Schedule I or II Hallucinogens)" each place it appears.

Commentary

* * *

Application Notes:

* * *

10. *The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences. The statute, however, provides direction only for the more common controlled substances, i.e., heroin, cocaine, PCP, methamphetamine, fentanyl, LSD and marihuana. ~~The Drug Equivalency Tables set forth below provide conversion factors for other substances, which the Drug Quantity Table refers to as "equivalents" of these drugs~~. In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:*

    (A) use the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana;

    (B) find the equivalent quantity of marihuana in the Drug Quantity Table; and

    (C) use the offense level that corresponds to the equivalent quantity of marihuana as the base offense level for the controlled substance involved in the offense.

    (See also Application Note 5.) ***For example,*** *in the Drug Equivalency Tables,* ***one gram of a substance containing oxymorphone, a Schedule I opiate,*** ~~*is to be treated as the equivalent of*~~ *converts to an equivalent quantity of* ***five kilograms of marihuana*** ~~*in applying the Drug Quantity Table*~~*. In a case involving 100 g of oxymorphone, the equivalent quantity of marihuana would be 5000 KG, which corresponds to a base offense level of 28 in the Drug Quantity Table.*

* * *

11. §3C1.1 (OBSTRUCTION OF ADMINISTRATION OF JUSTICE) CIRCUIT CONFLICTS

Synopsis of Proposed Amendment: *This proposed amendment addresses a circuit conflict regarding whether pre-investigative conduct can form the basis of an adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice). The First, Seventh, Tenth, and District of Columbia Circuits have concluded that pre-investigation conduct can be used to support an obstruction adjustment. See United States v. McGovern, 329 F.3d 247, 252 (1st Cir. 2003)(holding that the submission of false run sheets to Medicare and Medicaid representatives qualified for the enhancement even though the administrative audits were not part of a criminal investigation because there was a "close connection between the obstructive conduct and the offense of conviction"); United States v. Snyder, 189 F.3d 640, 649 (7th Cir. 1999)(holding that adjustment was appropriate in case in which defendant made pre-investigation threat to victim and did not withdraw his threat after the investigation began, thus obstructing justice during the course of the investigation); United States v. Mills, 194 F.3d 1108, 1115 (10th Cir. 1999)(holding that destruction of tape that occurred before an investigation began warranted application of the enhancement for obstruction of justice because the defendant knew an investigation would be conducted and understood the importance of the tape in that investigation); United States v. Barry, 938 F.2d 1327, 1333-34 (D.C. Cir. 1991)("Given the commentary and the case law interpreting §3C1.1, we conclude that the enhancement applies if the defendant attempted to obstruct justice in respect to the investigation or prosecution of the offense of conviction, even if the obstruction occurred before the police or prosecutors began investigating or prosecuting the specific offense of conviction."). The Fourth, Sixth, and Eighth Circuits have held that pre-investigation conduct cannot support application of the obstruction of justice adjustment. See United States v. Self, 132 F.3d 1039 (4th Cir. 1997)(conduct occurring before any investigation begins is not encompassed within obstruction of justice provision of Sentencing Guidelines); United States v. Baggett, 342 F.3d 536, 542 (6th Cir. 2003) (holding that the obstruction of justice enhancement could not be justified on the basis of the threats that the defendant made to the victim prior to the investigation, prosecution, or sentencing of the offense); United States v. Stolba, 357 F.3d 850, 852-53 (8th Cir. 2004)(holding that an obstruction adjustment is not available when destruction of documents occurred before an official investigation had commenced); see also United States v. Clayton, 172 F.3d 347, 355 (5th Cir. 1999)(holding that defendant's threats to witnesses warrant the enhancement under §3C1.1, but stating in dicta that the guideline "specifically limits applicable conduct to that which occurs during an investigation....").*

The proposed amendment would permit application of §3C1.1 to pre-investigative conduct if that conduct was intended to prevent or hinder the investigation, prosecution, or sentencing of the instant offense of conviction. Consistent with current application of the adjustment, the pre-investigative conduct also must relate to the offense of conviction and all relevant conduct or to a closely related offense.

The proposed amendment also addresses two other circuit conflicts by amending Application Note 4(b) to include "perjury in the course of a civil proceeding (if the perjury pertains to conduct comprising the offense of conviction)" and "false statements on a financial affidavit in order to obtain court appointed counsel" as examples of conduct to which §3C1.1 normally would apply.

Proposed Amendment:

§3C1.1. Obstructing or Impeding the Administration of Justice

If—

(~~A~~1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice;

(2) the conduct or attempted conduct described in subdivision (1) occurred (A) prior to the investigation of the instant offense of conviction, and was intended to prevent or hinder the investigation, prosecution, or sentencing of the instant offense of conviction; or (B) during the course of the investigation, prosecution, or sentencing of the instant offense of conviction;: and

(~~B~~3) the ~~obstructive~~ conduct or attempted conduct described in subdivision (1) related to (~~i~~A) the defendant's offense of conviction and any relevant conduct; or (~~ii~~B) a closely related offense,

increase ~~the offense level~~ by **2** levels.

Commentary

Application Notes:

1. ~~*This adjustment applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related to (i) the defendant's offense of conviction and any relevant conduct, or (ii) an otherwise closely related case, such as that of a co-defendant.*~~

   In General.—Subdivision (3) makes clear that, in order for an adjustment under this section to apply, the obstructive or attempted obstructive conduct must be related to the defendant's offense of conviction and any relevant conduct, or to an otherwise closely related case, such as the case of a co-defendant.

2. *Limitations on Applicability of Adjustment.*—* * *

3. *Covered Conduct Generally.*— * * *

4. *Examples of Covered Conduct.*—***The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:***

* * *

(b) *committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding pertaining to conduct constituting the offense of conviction;*

* * *

(j) *failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. § 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. § 853(p);*

(k) *threatening the victim of the offense in order to prevent the victim from reporting the conduct constituting the offense of conviction;*

(l) *making false statements on a financial affidavit in order to obtain court-appointed counsel.*

This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.

5. *Examples of Conduct Not Covered.*— * * *

6. *"Material" Evidence Defined.*— * * *

7. *Inapplicability of Adjustment in Certain Circumstances.*—

* * *

8. *Grouping.*— * * *

9. *Accountability for §1B1.3(a)(1)(A) Conduct.*—

* * *

12. CHAPTER EIGHT - PRIVILEGE WAIVER

Issue for Comment: *The Commission has been asked to reconsider a portion of its 2004 amendments to Chapter Eight, the Organizational Sentencing Guidelines, namely, a single sentence of commentary at §8C2.5(g). Section 8C2.5 provides for the calculation of the culpability score for defendant organizations, and subsection (g) provides for graduated decreases in the culpability score if a defendant organization has self-reported, cooperated with the authorities, and accepted responsibility. In 2004, the Commission added the following sentence to the commentary:*

> *Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) [Self-Reporting, Cooperation, and Acceptance of Responsibility] unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.*

In the Reason for Amendment (see Supplement to Appendix C (Amendment 673)), the Commission stated that it expects such waivers will be required on a limited basis, consistent with statements of the Department of Justice in the United States Attorneys' Bulletin, November 2003, Volume 51, Number 6, pp. 1 and 8.

In light of requests to modify or remove this language submitted to the Commission in the past year, the Commission listed as one of its priorities for the current amendment cycle, the "review and possible amendment" of the waiver language in Application Note 12. At its public meeting on November 15, 2005, the Commission heard testimony from five representatives on behalf of various organizations (the American Bar Association, the Association of Corporate Counsel, National Association of Manufacturers, the Chemistry Council, the Chamber of Commerce, the National Association of Criminal Defense Lawyers, and former officials of the Department of Justice) about what they perceived as the unintended but potentially deleterious effects on the criminal justice process of this commentary language.

Accordingly, the Commission solicits comment on the following: (1) whether this commentary language is having unintended consequences; (2) if so, how specifically has it adversely affected the application of the sentencing guidelines and the administration of justice; (3) whether this commentary language should be deleted or amended; and (4) if it should be amended, in what manner.

13. CRIME VICTIMS' RIGHTS

Synopsis of Proposed Amendment: *As part of the Justice for All Act of 2004, Pub. L. 108–405, Congress provided crime victims various rights during the criminal justice process. These rights are set forth at 18 U.S.C. § 3771. Included is the "right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." 18 U.S.C. § 3771(a)(4). This proposed amendment amends Chapter Six (Sentencing Procedures and Plea Agreements) to provide a policy statement regarding crime victims' rights.*

Proposed Amendment:

CHAPTER SIX - SENTENCING PROCEDURES, ~~AND~~ PLEA AGREEMENTS, AND CRIME VICTIMS' RIGHTS

* * *

§6A1.5. Crime Victims' Rights (Policy Statement)

In any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. § 3771 and in any other provision of Federal law pertaining to the treatment of crime victims.

Commentary

Application Note:

1. *Definition.—For purposes of this policy statement, "crime victim" has the meaning given that term in 18 U.S.C. § 3771(e).*

14. REDUCTIONS IN TERM OF IMPRISONMENT BASED ON BUREAU OF PRISONS MOTION

Synopsis of Proposed Amendment: *This proposed amendment implements the directive in 28 U.S.C. § 994(t) that the Commission "in promulgating general policy statements regarding the sentence modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."*

The proposed amendment provides a new policy statement at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). The policy statement restates the statutory bases for a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A). In addition, the policy statement provides that in all cases there must be a determination made by the court that the defendant no longer is a danger to the community. Proposed Application Note 1 has two purposes. First, it provides a rebuttable presumption with respect to a Bureau of Prisons motion for a reduction based on extraordinary and compelling reasons. Second, as stated in 28 U.S.C. § 994(t), the Note states that rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason warranting a reduction.

Proposed Amendment:

§1B1.13. **Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons (Policy Statement)**

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment if, after considering the factors set forth in 18 U.S.C. § 3553(a), the court determines that—

(1) (A) an extraordinary and compelling reason warrants the reduction; or

(B) the defendant is (i) at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) the reduction is consistent with this policy statement.

Commentary

Application Notes:

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

   (A) *Extraordinary and Compelling Reasons.—A determination made by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such for purposes of subdivision (1)(A).*

   (B) *Rehabilitation of the Defendant.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of subdivision (1)(A).*

2. *Application of Subdivision (2).—Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.*

Background: This policy statement implements 28 U.S.C. § 994(t).

Issue for Comment: *The Commission requests comment regarding:*

(1) Whether the provisions of subdivision (1)(B) should be expanded to cover defendants who are at least 70 years old and have served at least 30 years in prison pursuant to a sentence imposed under any statute provided that the sentence imposed for offense(s) for which the defendant is imprisoned was not life imprisonment.

(2) If the Commission does so expand subdivision (1)(B) as described in paragraph (1), should certain offenses be excluded from application of subdivision (1)(B), such as terrorism offenses or sexual offenses involving minors.

Index To Public Comment
April 4, 2006

Amendment No. 10 - Application Issues

Amendment No. 11 - 3C1.1 Obstruction of Justice

Amendment No. 12 - Chapter Eight - Privilege Waivers

Amendment No. 13 - Crime Victims' Rights Act

Amendment No. 14 - Reduction in Terms of Imprisonment

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NUMBER OF PAGES SENT (INCLUDING COVER PAGE):

SPECIAL INSTRUCTIONS:

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530-0001*

March 28, 2006

The Honorable Ricardo H. Hinojosa
Chair, U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Hinojosa:

On behalf of the Department of Justice, I am pleased to submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register in January 2006. Thank you for addressing these important issues. In addition, the Department commends the valuable work the Commission and its staff have done over the course of this amendment cycle to assess the impact of *United States v. Booker*, including the monthly updates and the one-year report. We look forward to continuing to work with you to ensure a fair sentencing system that serves the interests of justice and the American people.

IMMIGRATION

Starting with the immigration roundtable held in September 2005, the Commission has taken an in-depth look at the current immigration guidelines and identified the biggest problems they pose. There was a consensus that the sentencing of re-entry cases needs to be simplified by reducing the number of complex determinations associated with prior convictions. In addition, the guidelines need to recognize the risk factors and aggravating factors that have been increasingly associated with alien smuggling and passport fraud. The Commission's proposals in these areas, particularly those addressing alien smuggling, are an important step toward addressing these issues. We do, however, have some recommendations, noted below, to improve the proposals further.

Amendments to Section 2L1.1

The Department believes the current alien smuggling guidelines under Section 2L1.1 result in sentences that rely too heavily on the number of aliens transported, and do not take into account many of the risk factors and potential dangers posed by these offenses, such as the

growing numbers of children unaccompanied by parents or relatives being smuggled across the borders under extremely dangerous and inhumane conditions. These dangerous conditions have resulted in well-publicized tragedies where those being transported have been seriously injured or killed. Yet often, in sentencing the responsible offenders under the guidelines, only the most serious injury or the death of one person is taken into account while additional deaths or injuries have no impact on the sentencing range. In other cases, aliens being smuggled have been restrained in "safe houses" through fear or intimidation, but the facts do not constitute extortion or other similar offenses. The guidelines have no enhancement for such conduct. The Department supports the Commission's effort to address many of these concerns in the proposed amendments.

With regard to offenders who smuggle aliens into this country whose entry is forbidden because they are aggravated felons or because they pose other security risks, we believe such offenders should receive a higher base offense level even in cases where there is no conviction under 8 U.S.C. § 1327. Rather, as is in Section 2K2.1 when certain dangerous firearms are involved, higher base offense levels should apply regardless of the offense of conviction.

Although Option 1 of the proposal provides a base offense level of 25 for any defendant convicted under 8 U.S.C. § 1327 and Option 2 provides a specific offense characteristic for defendants who smuggle, harbor, or transport inadmissible aliens under 8 U.S.C. § 1182(a)(3), we do not see the two as mutually exclusive and support adoption of both of these options. We would also recommend including aggravated felons in the second option. Moreover, the Department feels very strongly that the standard needs to be "strict liability" in order to provide some incentive for smugglers to identify the people they are helping to move illegally across our border, rather than attempting to benefit from conscious ignorance of the background of the individuals they are bringing into the United States.

The Commission's proposals also include amendments changing the table of number of aliens involved in the offense; adding an offense characteristic for kidnapping, abducting or unlawfully restraining; taking into account deaths and bodily injuries that occur during transport; and addressing the transportation of minors. The Department fully supports these proposed amendments and believes they are necessary responses to the increased violence and danger we have seen in these cases and would result in sentences that serve the purposes of sentencing and reflect the threat alien smuggling poses to the United States.

Passport Fraud

The Department believes the proposed amendments to the guidelines pertaining to passport fraud offenses are a step in the right direction. However, we recommend a number of modifications.

The current document fraud table in Section 2L2.1 has three tiers for the number of documents involved in the offense, the highest of which applies to cases with "100 or more"

documents. Cases involving more than 100 documents are addressed by an invited departure in Application Note 5. This construct is problematic because the Department now regularly prosecutes cases that involve documents numbering in the high hundreds and low thousands. Application Note 5 does not provide sufficient guidance to deal with such large figures. As such, courts have struggled to fashion appropriate departures in these cases. While the proposed amendment to Section 2L2.1 would increase the top level from 100 to 300 documents, we suggest that the Commission add an additional tier or tiers to the table to capture a larger number of cases sentenced under this guideline and to give some sense of an appropriate departure in Application Note 5 for those cases that exceed the highest figure in the table.

In addition, document fraud involving non-immigration documents does not have a table. Rather, the relevant guideline – Section 2B1.1 – is driven by pecuniary loss, which is a largely meaningless calculation in document fraud cases. Accordingly, the Department recommends the sentencing guideline for document fraud cases (which are prosecuted mainly under 18 U.S.C. § 1028) be based on an identical table to the table we propose for Section 2L2.1. As a result, sentences would be based on the number of documents rather than their pecuniary value.

Amendments to Section 2L1.2

With the staggering number of unlawful re-entry cases now being prosecuted, we believe an important goal of this amendment cycle should be to ensure that the guidelines account for the risk factors and aggravating circumstances presented by criminal aliens who return to the United States after being deported. By accounting for such risks and aggravating circumstances, the guidelines will increase deterrence and target those cases where longer sentences and incapacitation are most appropriate. At the same time, we are keenly aware of the burdens the large numbers of these cases place on all elements of the criminal justice system and the need for sensible reform that simplifies application of Section 2L1.2 in a fair manner in order to relieve the litigation burden on participants in the sentencing process.

Under the current Section 2L1.2, the specific offense characteristics require duplicate and sometimes conflicting analysis when first determining the statutory maximum penalty and then determining which, if any, of the specific offense characteristics apply. Indeed, the "categorical" analysis has led to counter-intuitive, if not arbitrary, results in some cases. The result is that truly dangerous aliens avoid appropriate punishment on seemingly technical grounds.

The categorical analysis of qualifying convictions is performed according to the Supreme Court's decisions in *Taylor v. United States*, 495 U.S. 595 (1990), and *Shepard v. United States*, 125 S. Ct. 1254, 1261 (2005). Under these decisions, a conviction qualifies as an aggravated felony or triggers a specific offense characteristic only (1) if the statute of conviction fits within the definition of the qualifying offense (for instance, the "modern generic" definition of "burglary"), or (2) if the statute of conviction contains offenses that fall within the definition and others that do not, and limited judicial records establish that the conviction was for an offense

that fits within the definition. This analysis is cumbersome, and obtaining the necessary records is a time-consuming process for prosecutors, defense attorneys and probation officers.

In addition, this categorical analysis has sparked a seemingly endless wave of litigation in the trial and appellate courts. Eliminating the need for this analysis would greatly reduce the workload for participants in the sentencing process and improve the efficiency and reliability of sentencing determinations. As such, the Department favors moving towards a system in which the length of the prior sentences is the guiding factor. Such a system could still include enhancements for prior convictions for certain serious offenses such as murder, rape, kidnaping or terrorism. Defendants who believe their sentences were unduly harsh in the underlying case and therefore trigger too stiff an enhancement could move for downward departures and rely on the reports and other records in the underlying case to support their requests, similar to current practice.

Of the options presented by the Commission to address the categorical approach, the Department favors Option 1, with one modification. This option requires an aggravated felony conviction to trigger the enhancements in subsections (b)(1)(A), (B) & (C) of Section 2L1.2. As the *Interim Staff Report* notes, this would result in only one categorical analysis being performed, but would not do away with that analysis entirely.

However, as proposed, this option may create an unduly narrow class of cases subject to the enhancement in subsection (b)(1)(B) through the use of the term "aggravated felony" in that subsection. Many of the crimes included as "aggravated felonies" in 8 U.S.C. § 1101(a)(43), including crimes of violence, and theft and burglary offenses, require an imposed sentence of at least 12 months of imprisonment in order to qualify. As a result, a requirement that a conviction must be an aggravated felony to trigger the enhancement in subsection (b)(1)(B) means only defendants who received a sentence between 12 and 13 months of imprisonment would be subject to that specific offense characteristic. We suggest that this is not a large enough class of repeat criminals to justify a special guideline enhancement. Instead, the Department recommends dropping the word "aggravated" from subsection (b)(1)(B), which would result in enhancements ranging from four levels, for those defendants convicted of three or more misdemeanors or ordinary felonies with a sentence of probation; to 16 levels, for defendants convicted of aggravated felonies with sentences of imprisonment exceeding 13 months.

Federal Defenders' Proposal

The Department is aware that the Commission has received and is considering a proposal drafted by federal defenders to amend Section 2L1.2 . We believe this proposal would significantly weaken the guideline by reducing the maximum total offense level for all offenders other than convicted terrorists to level 16. This would be counterproductive in that it would remove the deterrent and incapacitating effect that is present in the existing guideline. Moreover, the proposal would raise the burden on the government to establish multiple aggravated felony convictions, only to trigger a *lower* maximum enhancement for aggravated felonies. In addition,

the proposal would retain the requirement of performing different categorical analyses to determine whether a conviction qualifies both as an aggravated felony and as a qualifying offense under the incorporated guideline definitions. Weakening the guideline in this fashion would be contrary to the intention of Congress, as expressed in its increase to the penalties in § 1326 as part of the Violent Crime Control and Law Enforcement Act of 1994, and in its directive to the Commission in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to increase the base offense level in Section 2L1.2. It is also bad policy.

Subsection (b)(1) of the federal defenders' proposal would entitle a defendant to a reduction in the base offense level if the defendant returned or remained to visit immediate family for such purposes as securing medical treatment or humanitarian care or if the family member is in extremis. Likewise, the proposal would entitle a defendant to a reduced offense level if the defendant returned to or remained in the United States because of "cultural assimilation." These are matters best left to Congress in the first instance. At present, the immigration laws make no provision for aggravated felons to return to the United States under any circumstances. Building a reduction into the Sentencing Guidelines for these purposes would contradict the expressed intent of Congress. Moreover, captioning these reductions in the form of entitlements is inappropriate. In truly extraordinary cases, where the guidelines do not fully take into account the facts and circumstances of a particular defendant's situation, courts have – and always have had – the flexibility to fashion an appropriate departure from the guideline range.

Recognizing that some aliens will re-enter after deportation regardless of the penalty imposed actually militates against the approach supported by the federal defenders. Law enforcement at the border is difficult enough as it is without having to apprehend such aliens more often because they are receiving less time in prison each time they are caught. Similarly, such an amendment will encourage rather than discourage illegal re-entry at a time when such a policy is inconsistent with the policies of the President, laws enacted by Congress and the will of the American people.

Issues for Comment

As for the remaining issues for comment, the Department believes that expressly requiring terms of imprisonment to trigger the enhancements in subsections (b)(1)(A) and (b)(1)(B) would adequately address the issue of drug trafficking offenses resulting in sentences of probation. Likewise, the proposals adequately address the application of Section 2L1.2 to felony simple possession convictions involving large quantities of narcotics that clearly would be intended for distribution. Adopting a separate category for such offenses would be very difficult to apply in practice due to the restrictions imposed in the *Taylor* and *Shepard* decisions. Placing imprisonment thresholds on the enhancements in subsections (b)(1)(A) and (b)(1)(B) provides a fair and objective method for ensuring that less-serious offenders will be much less likely to face those enhancements based purely on a personal-use drug conviction.

With regard to criminal history calculations, we believe the present system of imposing adjustments under Section 2L1.2 for all convictions regardless of date is consistent with the scheme adopted by Congress in 8 U.S.C. § 1326 and expressed elsewhere in the immigration statutes. Simply put, Congress has made it clear that individuals convicted of aggravated felonies are barred from returning without express consent for the remainder of their lives. The penalties in 8 U.S.C. § 1326 are not time-dependent, and neither should the penalties imposed under Section 2L1.2.

The age of a conviction remains a factor in determining whether the conviction adds to a defendant's criminal history score, which ameliorates the effect of so-called "double-counting." Addressing the prior conviction as part of the offense-level calculation as well as the criminal history score is appropriate because the defendant's prior conviction is an element of the offense. This scheme is consistent with the structure of other guidelines, such as the firearms guideline in Section 2K2.1, that provide offense level enhancements for prior convictions without barring consideration of those convictions to add to a defendant's criminal history score. We believe the current structure is appropriate and need not be amended.

FIREARMS TRAFFICKING

Definition of Firearms Trafficking

The Commission's proposal defines firearms "trafficking" as a simple firearm transfer that meets certain conditions. The proposal seeks comment on whether it should apply to a single firearm or to more than one firearm. On this question, the Department favors having the enhancement apply only where the offense and any relevant conduct involve more than one firearm. The unlawful transfer of more than one firearm demonstrates that the defendant knew he or she was participating in a scheme that is part of the unlawful market in guns. Transfer of a single firearm typically will not reflect conscious participation in a scheme and does not justify a significant increase in the length of imprisonment.

The Department is concerned, however, about the proposal being overly broad in some respects and under-inclusive in one respect. The proposal requires only a showing of an ongoing unlawful scheme when nothing of value was exchanged; showing an unlawful scheme, however, is not required when the transfer is for something of value. The proposal also does not require any showing that the defendant knew, had reason to believe, or was wilfully blind to the fact that the transfer would be to a person whose possession or receipt would be unlawful or who intended to use or dispose of the firearm unlawfully.

Under the Commission's proposed definition, proving the existence of a "trafficking" offense may be simpler, but the Department notes that the definition leaves the potential for covering conduct that is broader than what is regarded as the genuine gun-trafficking problem. For example, under the Commission's proposed definition, a prohibited person with an old felony conviction who has a gun

collection (itself prohibited by law) and sells two guns to a non-prohibited friend or relative would be considered a gun trafficker. Also, a person regularly selling firearms who is found to be dealing without a license would automatically be considered a gun trafficker, without any showing that he knew he was selling, had reason to believe he was selling, or was wilfully blind to the fact that he was selling the guns to prohibited persons. The Department does not think that the definition should result in all dealing-without-a-license cases being considered "gun trafficking" cases. The Department likewise does not believe that any transfer of firearms by a prohibited person for value should automatically be considered firearms "trafficking."

On the other hand, the Commission's proposed definition is under-inclusive in that it covers only the transfer and not the receipt of a firearm, even when the recipient is part of a gun-trafficking scheme. A person who receives a firearm as part of a trafficking scheme but who has not yet had an opportunity himself to transfer the firearm in furtherance of the scheme should also be covered by the definition ultimately adopted by the Commission.

If the conduct covered by the trafficking definition is better tailored to the core trafficking conduct involving unlawful schemes to divert firearms from lawful commerce to facilitate the acquisition of firearms by prohibited persons or others for unlawful purposes, then the Department believes a substantial increase in the penalty is justified. With respect to the Commission's request for comment on whether pecuniary gain is necessary for a defendant to qualify as a gun trafficker under the proposed enhancement, the Department supports a definition that includes transfers for anything of value, including drugs. The Department also supports the provision proposed by the Commission clarifying that the trafficking enhancement applies to illegal transfers that are part of an unlawful scheme, even if nothing of value was exchanged.

The Department is aware that the federal defenders have proposed a definition of trafficking that requires the defendant to have been "engaged in the business of trafficking" by engaging in "the regular and repetitive acquisition and transport, transfer or disposition of firearms" with the predominant objective in doing so for "livelihood or profit" or criminal purposes or terrorism. We strongly believe that this definition is too narrow, essentially limiting firearms trafficking enhancements to cases where it can be proved that the defendant was unlawfully dealing in firearms without a license, as it borrows the terminology used in defining the latter offense. This ignores the reality that the vast majority of trafficking takes place through transactions involving small numbers of guns. The definition we propose takes this fact into account and more appropriately covers the core trafficking conduct.

The federal defenders have also suggested that there is "a serious double counting problem" with the Commission's proposal. We disagree. The Department notes that the enhancements suggested presuppose that the additional enhancements based on the number of guns involved under subsection (b)(1) would be applicable. Yet we do not oppose having a separate table of enhancements for firearms trafficking. If, however, the Commission decides not to have the (b)(1) enhancement apply to the enhancements for trafficking schemes, then the separate table for trafficking enhancements should be increased to approximate the cumulative enhancement under the Department's current proposal. Because trafficked firearms frequently are recovered from crime scenes, we believe that the

enhancements for unlawful firearms trafficking schemes should be significantly higher than those for comparable numbers of firearms involved in a simple unlawful possession case.

Proposed Firearms Trafficking Enhancements

The Commission's proposed enhancement for firearm trafficking breaks the enhancement into two categories: 2 to 24 firearms and 25 or more firearms. Because most trafficking takes place through transactions involving small numbers of firearms, the Department believes that there should be additional incremental increases between 2 and 25 firearms. For example, increases could be made for cases involving 2 to 7 firearms; 8 to 15 firearms; 16 to 24 firearms; and 25 or more firearms, or for some formulation akin to the existing enhancements in the Guidelines. The Department believes the enhancement should be four levels for the lowest increment, with an additional two-level increase for each additional increment, with the highest increment having a 10-level enhancement. Together with the existing table of enhancements in Section 2K2.1 for the number of firearms involved in the offense, these new enhancements will provide an appropriate increase in punishment for offenses involving a gun-trafficking scheme that meets the criteria set forth in the definition provided above.

In light of the proposed enhancements for firearms trafficking, the Commission should consider whether the application note under Section 2K2.1 regarding upward departures should be amended to provide that an upward departure may be warranted when, in the case of an offense involving firearms trafficking, the number of trafficked firearms substantially exceeded 25.

Stolen and Altered or Obliterated Serial Numbers

The Department strongly supports the Commission's proposal to increase the enhancement from two levels to four levels for offenses involving a firearm that had an altered or obliterated serial number. Because the intentional obliteration or alteration of a serial number can be intended only to make it more difficult for law enforcement to trace the firearm through a licensed seller to the firearm retail buyer, serial number alteration or obliteration is a clear indicator of firearms trafficking or an intent to otherwise use the firearm unlawfully. We believe the higher enhancement better reflects the culpability of this conduct.

Enhancement for Use of High-Capacity Semiautomatic Firearms

The Department also supports the Commission's proposal to create an upward departure based on an offender's possession of a high-capacity semiautomatic firearm. While the possession of large-capacity ammunition-feeding devices and semiautomatic assault weapons is no longer prohibited, the potential for harm created by the possession of a high-capacity semiautomatic firearm by those who would misuse them or otherwise illegally possess them is significant.

A provision allowing for an upward departure will afford the sentencing judge the opportunity to consider the characteristic of the weapon and the offense on a case-by-case basis without requiring the judge to do so as part of the offense-level calculation. The Department favors this upward-

departure approach over the offense-level approach in light of the fact that possession of such firearms is no longer illegal *per se*. We also believe that the Commission's proposed definition adequately covers the types of firearms of greatest concern, specifically those capable of rendering significant harm through the rapid discharge of large numbers of rounds without a need to reload.

"Lesser Harms"

The Department supports the proposed amendment to Section 5K2.11 regarding "Lesser Harms." The amendment would prohibit the use of the section in felon-in-possession cases. The Department believes this proposed change most accurately captures the purpose behind the Lesser Harms provision. Section 5K2.11 allows a sentencing judge to depart when a defendant commits a crime that did not cause or threaten the harm sought to be prevented by the law at issue. Applying Section 5K2.11 in felon-in-possession cases directly contravenes the fundamental purpose for the statutory prohibition, namely to prevent persons who have demonstrated an inability to conform their conduct to the requirements of the law from having control of lethal weapons. The harm is the fact that the felon is in possession of a firearm; it is irrelevant what the felon's intentions are with respect to that firearm. There is no "lesser harm" in a felon-in-possession case. The application of Section 5K2.11 therefore should be prohibited in felon-in-possession cases.

"In Connection With"

The Commission proposes to remedy a split among the Courts of Appeals in applying the "in connection with" requirement for possessing a firearm in burglary and drug cases. The Department supports the objective of remedying the split among the circuits, but questions whether the proposal will accomplish that objective. The Department is still studying the three options outlined by the Commission and has no specific comment to offer with respect to any of them. The Department does note a potential drafting error, because subsequent to redesignation, it appears that the Application Note should be "13" rather than "14."

Clarification of "Brandishing" and "Otherwise Used"

The Department supports the Commission's proposal to elevate the offense level for "brandishing" a firearm during the commission of another offense to the same level currently applied for "otherwise using" a firearm during the offense. The proposal is consistent with the definition of "brandishing" set out in 18 U.S.C. § 924(c) and appropriately elevates the offense level to the same applied for "otherwise used." The higher enhancement for "brandishing" to make it consistent with the enhancement for "otherwise using" better reflects the culpability of the conduct than the present guideline. Indeed, the Department believes that the proposal should be extended to other Guidelines addressing "brandishing" and "otherwise using" a firearm during the commission of an offense.

ATTORNEY-CLIENT PRIVILEGE

Two years ago, after a lengthy, careful, and deliberative process, and based on the recommendation of an *ad hoc* committee which included some of the leading organizational and white collar crime practitioners, the Commission amended Note 12 to Section 8C2.5, which applies to the sentencing of business organizations and provides for a reduction in sentence for cooperation. Specifically, the section as amended states that waivers of privilege are *not* a prerequisite to securing a reduction in sentence for cooperation, except where necessary to provide timely and thorough disclosure of all known pertinent information. The Commission is now being petitioned to eliminate or amend this provision by those who originally sought its inclusion.

Although the Department did not seek or support the provision, we believe the alternatives proposed by the interest groups petitioning the Commission would be counterproductive to legitimate and important law enforcement efforts, and as such, we urge you not to revisit this recent amendment. Chapter 8 of the guidelines is intended to promote greater compliance, self-examination, and cooperation with law enforcement. In some cases, voluntarily sharing privileged material is a necessary part of that regime. It is important to note that the language at issue applies only in cases in which the corporation has already admitted wrongdoing and been convicted of a federal offense. Corporations willing to cooperate, by sharing privileged materials if necessary, should get credit for doing so, just as individual defendants may have their sentences reduced for providing substantial assistance to the government.

The current commentary recognizes that waiver is not necessary for cooperation, except in certain circumstances. The proposed amendments, on the other hand, would provide that non-disclosure may *never* be considered in determining whether a corporation has been cooperative. Hence, a corporation could claim full credit for cooperation with an investigation – a fact it would no doubt tout in the press – without having disclosed proof certain of its guilt. Such conduct would undermine, rather than further, the Commission's efforts to develop greater transparency and ethical conduct by corporate management, and would further undermine the public's trust in our markets and business leaders. Accordingly, the Department respectfully submits that the guidelines should not be amended to sanction such an outcome.

POLICY STATEMENT ON REDUCTION IN SENTENCE

The proposed policy statement deviates from the statutory language in material ways, and the Department urges the Commission to track the statutory language more closely in order to avoid an interpretation of the policy statement that differs from the plain language of the statute. First, the first unnumbered portion of this section omits the following statutory language after the phrase, "the court may reduce a term of imprisonment":

. . . (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment).

This is important language that gives courts significant discretion to review the previously-imposed conditions of supervised release and, in appropriate cases, extend the term or modify the conditions of release. Additionally, the statutory language "to the extent that they are applicable" is omitted following "set forth in 18 U.S.C. § 3553(a)." This language is useful, instructive, and necessary for completeness. By omitting it in the policy statement, the Commission inadvertently would suggest that the sentencing court must consider *all* of the factors set forth in 3553(a), even those that might not be applicable in a particular case.

Proposed Section 1B1.13(1)(A) changes the statutory language from "extraordinary and compelling reasons," to "extraordinary and compelling reason." It is not clear why this was changed from plural to singular, and it may be a typographical error. However, this could be a potential source of confusion and should, therefore, track the statutory language precisely.

The Department also notes that the policy statement purports to expand § 3582(c)(1)(A)(ii) – which was expressly intended by Congress to be a safety valve for prisoners sentenced under the 1994 "Three Strikes" law, *see* House Report 103-463 (March 25, 1994) – to convictions for any other offense. It is unclear what authority the Commission relies upon in attempting to expand the coverage of the statute through the guidelines. In any event, in the absence of clear Congressional authority, the Department does not anticipate authorizing a motion for a reduction in sentence in a case that fits within the Commission's expansion of the statute.

In addition to the question of the Commission's authority to expand § 3582(c)(1)(A)(ii), the Department believes that this section of the policy statement will not have any measurable impact, either as Congress drafted it or as the Commission proposes expanding it, because of the extremely small pool of inmates who will (eventually) meet the highly restrictive criteria. Only about 1.2% of the federal inmate population is 66 years of age or older. Furthermore, the majority of inmates in the custody of the Bureau of Prisons who are advanced in age (55 years or older), entered Bureau custody after committing their offenses at an advanced age. For example, generally, inmates in Bureau custody ages 55 to 64 committed their offenses in the year prior to their 55th birthday; inmates 65-69 committed their offenses within the two years prior to their 65th birthday; and inmates 70 or older committed their offenses within the four years prior to their 70th birthday. As a result, few if any elderly inmates will ever satisfy the 30 year service requirement. The Department, therefore, simply questions the utility of this proposal.

Thank you for this opportunity to provide the Commission with the views, comments, and suggestions of the Department of Justice. We look forward to continuing to work with the Commission to improve the federal sentencing guidelines.

Sincerely,

Michael J. Elston
Senior Counsel to the Assistant Attorney General

PROBATION OFFICERS ADVISORY GROUP
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February 9, 2006

The Honorable Ricardo H. Hinojosa, Chair
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Dear Judge Hinojosa:

The Probation Officers Advisory Group (POAG) met in Washington, D.C. on February 7 and 8, 2006 to discuss and formulate recommendations to the United States Sentencing Commission. We are submitting comments relating to several issues which were published for comment in January 2006.

IMMIGRATION:

Part One: USSG § 2L1.1:

National Security Concerns:

POAG recommends Option One under National Security Concerns as it would require the government to make the charging decision at the time of indictment, rather than a probation officer attempting to make the determination on facts which may not be readily available and difficult to obtain.

Number of Aliens:

As to the number of aliens proposal, POAG identified no application issues but recommends Option Two due to the specificity of the table.

Endangerment of Minors:

POAG recommends Option One which makes no distinction relative to the age of the illegal minor as

information to establish the age of an illegal minor would be difficult, if not impossible to obtain.

Offenses Involving Death:

POAG discussed whether this proposal captures multiple harms to a large number of victims. If there is more than one death, the harm can be addressed in USSG §5K2.1 which lists an encouraged upward departure for multiple deaths. However, if multiple victims suffer bodily injury, serious bodily injury, or permanent or life- threatening bodily injury, is it the intent of the Commission to treat cases involving one victim in the same manner as cases involving multiple victims? Perhaps a special instruction should be included explaining how this enhancement would apply in a case involving multiple victims with a variety of injuries. POAG does agree with the proposal in the cross reference to apply the appropriate homicide guideline, rather than solely directing application of the murder guideline.

Abducting Aliens, or Holding Aliens for Ransom:

The group agrees with the proposed change at USSG §2L1.1(b)(10) addressing concerns that sometimes aliens are coerced without the use of physical force which is unaccounted for in the current guideline system. Based on our discussion, the group believes this is a separate harm from the "typical" smuggling case. The proposed increase appears consistent with the application in USSG §2A4.1 and the minimum base offense level in USSG §2A4.2.

Part Two: USSG § 2L2.1:

Fraudulently Obtaining or Using United States Passports or Foreign Passports:

POAG would not recommend the inclusion of documents other than passports for the proposed enhancements at USSG §§2L2.1 and 2L2.2. Identity documents relating to naturalization, citizenship, resident status, and passports provide the basis for the offense of conviction and are therefore addressed in the base offense level. It is unclear why identity documents such as drivers' licenses and Social Security cards should receive a further increase. In the past, we were told an increase for U.S. passports was needed because they were "the gold standard" in identity documents. This factor does not seem to apply with respect to other identity documents. In addition, the ease in obtaining other identification documents varies from state to state. If the Commission chooses to provide for this increase, then an application note is requested addressing a potential double counting issue.

The group would also suggest adding an application note similar to the note in USSG §2B5.1 instructing the court not to apply the increase if the documents are obviously counterfeit.

Alternative Approaches to Sentencing Under USSG §2L1.2:

The members recommend Option One in the Alternative Approaches to Sentencing Under §2L1.2. The group has experienced no difficulty in determining whether a sentence of imprisonment exceeded thirteen months. However, officers have struggled when trying to interpret a time-served sentence less than thirteen months. Obtaining verification from local jails to corroborate the amount of time spent in detention is difficult to accomplish in a timely fashion. Option One alleviates this application problem. Furthermore, Option One appears to simplify application of this guideline as the

analysis to be made is limited to a determination of aggravated felony and the sentence of imprisonment imposed resulting in a more consistent application of the guideline.

FIREARMS:

POAG appreciates the attempt to resolve the issue surrounding the Sunset Provision for weapons described in 18 U.S.C. § 921(a)(30). Based on our discussion, courts are handling this issue in a variety of manners, whether applying it and granting a downward departure and/or variance, or not applying it and giving an upward departure and/or variance, resulting in disparity in sentences imposed nationally. POAG's preference is Option One as the upward departure method would not resolve the disparity issue. POAG does recommend the definition of "high-capacity semiautomatic firearm" be consistent between USSG §2K2.1 and §5K2.17.

There was great concern that the definition of trafficking as written was overly broad and could apply to low level "straw purchasers," some of whom may commit this offense under duress. For example, the girlfriend of a weapons trafficker who is a victim of domestic violence buys the weapon(s) and does not receive any monetary gain or receives a small amount of drugs for her participation. The convicted felon then turns around and sells the weapon on the street for a substantial amount of money. Yet, under the proposed definition, if the government cannot prove that the convicted felon sold the weapon on the street, the girlfriend would receive a higher sentence. We recognize that putting any firearm on the street has the potential for serious harm, however, this proposal may result in sentencing disparity.

If the Commission chooses to use the number of firearms in conjunction with the trafficking enhancement, the group perceives a potential double counting issue between USSG §§ 2K2.1(b)(1) and (b)(7). POAG requests an application note be provided giving direction as to whether this is "permissible double counting."

POAG believes the majority of the investigations completed by group members involve the exchange of guns for drugs. As such, we recommend the trafficking definition include "as consideration for anything of value" rather than inserting the pecuniary gain clause.

The group sees no application issues in raising the enhancement for an altered or obliterated serial number, however, members recommend also capturing illegally manufactured guns with no serial numbers.

As the "in connection with" issue has produced ongoing application issues, POAG recommends resolution of this circuit conflict. There does appear to be an inconsistency among all three of the proposed options and the gun enhancement in USSG §2D1.1. In Options One and Two, the mere presence of the firearm would justify the application in USSG §2K2.1, however, the standard in USSG §2D1.1(b)(1) provides a provision that the adjustment should be applied if the weapon was present unless it was clearly improbable that the weapon was connected with the offense. Option Three presents an additional application problem for defendants convicted of both drug and firearm offenses. It appears mere presence of the weapon is not enough to trigger this enhancement in USSG §2K2.1which would then appear to be inconsistent with the application provision at USSG §2D1.1. This could also produce disparity in charge bargaining if the defendant is not eligible to receive this enhancement in both guidelines.

POAG does not think it necessary to add language prohibiting downward departures in USSG §5K2.11 for cases involving a conviction under 18 U.S.C. § 922(g). In some instances where this departure has been applied, it appeared to be appropriate given the circumstances of the offense and the characteristics of the defendant. Therefore, the group recommends this policy statement be left to the Court's discretion based upon the specific facts of each case.

Officers have difficulty determining the distinction between the terms "brandishing" and "otherwise used." In reviewing the proposed changes, the majority view in Option 2(A) appears to resolve many of our concerns, however, the group recognizes there may be some inconsistency between this option and the definition of brandishing in 18 U.S.C.§ 924(c).

STEROIDS:

Although Option One provides for a more precise measure of the actual amount of steroids, the drug analysis could prove problematic due to the many different forms of steroids available and whether the DEA or state laboratories are equipped to make a qualitative analysis. Currently, probation officers have difficulty in obtaining laboratory results in routine drug cases. We would therefore expect greater difficulty in obtaining reports in this specialized area. POAG believes steroids should be punished as other schedule III controlled substances. Based on our discussion it appears defendants abusing steroids should be treated in a similar fashion as those defendants who abuse other schedule III controlled substances as the groups share many similar characteristics. As such, POAG recommends Option Two.

Regarding masking agents, POAG agrees an enhancement is warranted, however, the current definition of a masking agent appears somewhat limited.

POAG recommends adoption of Option One regarding coaches of athletic activities for the following reasons. It is felt many times Chapter Three adjustments are overlooked by the new or inexperienced practitioner, whereas Chapter Two specific offense characteristics generally are not. As such, it appears this increase would be applied in a more uniform manner in Chapter Two. Secondly, the group recognizes the current proposal is for a two-level increase, however, in our discussions, POAG believes there is a large distinction between the coach who provides the substance to a professional athlete versus a college or high school athlete. It is recommended that a larger increase be applied to a coach for a college or high school athlete to reflect the greater degree of vulnerability of the athlete, and the greater degree of influence a coach has over those young athletes. Recognizing this is not a current issue for comment, we suggest at a future time, the Commission revisit this issue as to whether a distinction should be made between these two groups in Chapter Two.

When the Commission re-promulgates this emergency amendment as permanent, POAG agrees the proposed enhancements pertaining to masking agents and distribution of a steroid to an athlete should be expanded to involve any controlled substance as we see no distinction between steroids and other controlled substances.

As to Issue for Comment Two, in this type of quantity-based penalty structure, this change appears consistent. While we realize there is precedent for the language "mid-level" to "high-level" dealers in Amendment 621 regarding MDMA, some members of POAG initially confused the language with a

possible Chapter Three role adjustment. POAG takes no position on what offense levels should be established.

MISCELLANEOUS LAWS:

The proposed new guideline at USSG §2X5.2 would greatly benefit those districts with numerous Class A misdemeanor offenses not referenced elsewhere. We would not recommend consolidating all misdemeanor offenses under this new guideline as it could result in charge bargaining practices by the parties.

The suggested language at USSG §2X5.1 is confusing and appears circular. The members felt the example in the synopsis more clearly explained the application principals than the guideline as written. However, problems appear to exist for multiple offenses. For example, if the indictment alleged the death or bodily injury to a child in utero was caused by an assault during the commission of a robbery, which guideline should the officer apply? Would the assault guideline, the robbery guideline or the higher of the two apply?

APPLICATION ISSUES:

POAG agrees with all the recommended changes in this section, many of which have been outlined as problematic in our past position papers. We appreciate the Commission's proposals to address these issues.

USSG §3C1.1 - CIRCUIT CONFLICT RE: OBSTRUCTION OF ADMINISTRATION OF JUSTICE:

The suggested change for pre-investigative conduct appears to unnecessarily complicate the application of this guideline and could capture unintended behavior, potentially punishing defendants on a broader scope than a relevant conduct standard. This recommended change in all likelihood will result in lengthier sentencing hearings to respond to additional objections.

POAG agrees with the proposal to include "perjury in the course of a civil proceeding," as members have previously applied an Obstruction of Justice enhancement for this conduct. However, we do not recommend inclusion of "false statement on a financial affidavit" as we do not see a clear connection between this conduct and its relationship to the offense of conviction.

Closing

We trust you will find our comments and suggestions beneficial during your discussion and appreciate the opportunity to provide our perspective on guideline sentencing issues. As always, should you have any questions or need clarification, please do not hesitate to contact us.

Sincerely,

Cathy A. Battistelli
Chair

United States
Sentencing Commission

Practitioners' Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

March 15, 2006

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

Re: Comment on Omnibus Proposals for 2006 Amendment Cycle

Dear Judge Hinojosa:

The Practitioners' Advisory Group ("PAG") submits the following comments to the Commission's January 25, 2006 notice, pursuant to 71 FR 4782-4804, proposing various sentencing guideline amendments for the 2006 amendment cycle. As always, PAG appreciates the opportunity to formally participate in this process.[1]

1. Proposed Amendments to Immigration Guidelines

PAG submits that the Commission's proposed amendments to the immigration guidelines are not appropriate at this time, but rather, should await any Congressional action. In the alternative, we address these proposed amendments and provide you with our comments.

a. Interim Staff Report Fails To Provide a Compelling Basis For Immigration Guideline Amendments at this Time

The Interim Staff Report recommends across-the-board increases in the severity of immigration sentences, based primarily upon its perception that immigration reform is a high Congressional priority. The Interim Report cites an increase in illegal immigration, as well as an alleged increase in violence associated with it, as underlying Congressional interest in additional immigration reform measures. This Report, however, is deficient in several important ways.

[1] PAG wishes to thank its members Pat Mullin, Mary Price, Tim Hoover, David Debold, Barry Boss, Amy Baron-Evans, Anne Blanchard, Margy Love, Richard Crane, and Steve Jacobson, who made various contributions to this submission, as well as members Lyle Yurko and Tom Dawson, who made significant contributions to PAG's February 23, 2006 comment on the Commission's proposed emergency steroids amendments, referenced herein.

First, the Report repeatedly references H.R. 4437 which, among other things, would make illegal presence in the United States a federal crime by increasing the statutory maximum sentences from six months to one year and a day. The House measure would also increase the severity of penalties for other immigration-related offenses. At this juncture, however, this House Bill has not yet received Senate approval. The Senate Judiciary Committee only began its markup of a separate immigration bill this month, and no Senate vote will occur on any bill until March 27 at the earliest; even if a Senate bill passes, it would still need to be reconciled with H.R. 4437 in conference. The Senate bills under consideration appear to include Senator (and Judiciary Chair) Arlen Specter's proposal that sentencing enhancements be based not on an "aggravated felony," but on the length of the sentence for the prior conviction; moreover, under his bill, prior convictions would need to be charged in the indictment and proved beyond a reasonable doubt. These provisions would differ markedly from the Commission's proposals.

It makes no sense for the Commission to rely upon incomplete, unenacted legislation, passed in the House but awaiting Senate review and amendment, as a basis for ratcheting up immigration sentences. Rather, the Commission should utilize its expertise in crafting amendments to existing immigration guidelines only after Congress speaks again on this issue. The immigration issues in Congress are complex, and the potential tradeoffs palpable. The Commission should not endeavor to read the tea leaves, but instead should await a final word from Congress that might (or might not) then trigger the Commission's involvement.

The Interim Staff Report also fails to proffer meaningful evidence that violence is routinely associated with violation of immigration offenses. There is, in fact, only one reference in the Report to immigration-related violence – a segment of a television program aired January 5, 2006 on CNN. One would have expected the Interim Staff Report to contain far more compelling evidence of immigration-related violence before advancing its position that such violence is an underlying basis for increasing the severity of immigration-related sentences.

Perhaps most significant is the history of increased immigration sentences since the inception of the guidelines. Since 1987, there have been 25 separate amendments to the immigration guidelines. *See* U.S.S.G. § 2L1.1 (Amendments 35, 36, 37, 192, 335, 375, 450, 543, 561); U.S.S.G. § 2L1.2 (Amendments 38, 193, 375, 523, 562, 632, 637, 658); U.S.S.G. § 2L2.1 (Amendments 195, 450, 481, 524, 544, 563); U.S.S.G. § 2L2.2 (Amendments 39, 196, 450, 481, 524, 544, 563, 671). Many of these amendments have increased the severity of sentences meted out for immigration crimes.

For example, re-entry cases under § 2L1.2 were originally set at a base offense level 6. In year 1988, without explanation, the re-entry's base offense level was raised to level 8. In 1989, the following year, yet another amendment was imposed that distinguished between illegal re-entry and illegal re-entry after deportation for a prior felony. A specific offense characteristic was created that imposed a 4-level increase for a

defendant who had previously been deported after a felony conviction for a crime other than an immigration offense.

In 1991, the concept of aggravated felonies was introduced into the immigration guideline scheme, with a 16-level increase for defendants previously deported as aggravated felons. In 1995, yet another amendment was passed which granted further potential for increased sentences for re-entry offenses. Thus, within an 8-year span, there had been 4 separate amendments that each increased the severity of sentences for re-entry cases – often substantially. The guidelines for other immigration offenses, including smuggling and document offenses, also have reflected similar guideline increases.

PAG does not believe that the purposes of sentencing under 18 U.S.C. § 3553(a) were advanced through these increased immigration guidelines. Between years 1987 and 1993, the federal courts saw somewhere between 1,000 and 2,000 immigration cases annually. Since then, the rate of immigration cases in the federal courts has exploded. In year 2003, 15,066 immigration convictions represented 21.9% of all guideline cases. In year 2004, the percentage of immigration cases rose further to 22.5% of all federal sentences. According to the Interim Staff Report at page 2, Post-Booker 2005 data (January 12, 2005 through November 1, 2005) indicates that 23.1% of all guideline cases sentences were immigration offenses.

Though arguments can be made that increased enforcement and fast-track programs account for a substantial increase in immigration sentences, the reality is that the increased severity of the immigration guidelines has failed to result in deterrence to criminal conduct, nor has it protected the public from further crimes as contemplated by Congress in enacting 18 U.S.C. § 3553(a)'s sentencing purposes.

PAG therefore believes that the Interim Staff Report provides no compelling basis for an increase in the severity of immigration sentences as contemplated in many of the proposed amendments. The Report's reliance upon H.R. 4437 is misplaced; it also fails to provide any significant evidence of increased violence and immigration offenses. The Report further ignores the 25 amendments to the guideline amendments enacted during the past 19 years that have already had the cumulative impact of significantly increasing immigration sentences.

PAG submits that the Commission should await final Congressional action on the immigration laws before unilaterally considering additional changes to these guidelines.

b. Specifically-Proposed Immigration Guideline Amendments

Should the Commission decide nevertheless to proceed with consideration of the proposed immigration amendments, we request that the following comments be considered:

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

A. National Security Concerns

The Commission proposes two options for a proposed amendment that would increase sentences for defendants convicted under 8 U.S.C. § 1327. Option 1 would provide a base offense level of 25 where the crime involved an alien who was inadmissible because of "security or related grounds," as defined in 8 U.S.C. § 1182(a)(3). Option 2 would provide a specific offense characteristic with an increase somewhere between 2-6 levels for smuggling, transporting, or harboring an alien who was inadmissible because of security or related grounds, was convicted under 8 U.S.C. § 1327, or some other statute.

We are concerned, among other things, by the very broad sweep of both options. First, we note that § 1182(a)(3) encompasses, among other persons, aliens whom the Attorney General "knows, or has reason to believe" seek to enter the United States to engage in some form of security-related activity. Implementation of these guidelines would grant enormous discretion to the Justice Department in determining which aliens may be subject to significantly increased penalties. For example, Option 2 could result in an 87-108 month guideline level for a defendant suspected of smuggling, transporting, or harboring a suspected security risk.

Also, Option 2's 2-6 level increase may be triggered solely upon relevant conduct and not require that the crime of conviction involve a security risk. Given that fact, PAG believes a heightened standard of proof such as a "beyond a reasonable doubt" standard should be utilized in determining whether an increased level is appropriate. It should be noted that the guidelines contemplate such a higher standard in addressing hate crimes or vulnerable victim enhancements under § 3A1.1. A similar, higher standard of proof should be applied here as well.

B. Number Of Aliens

The Commission's proposal also has two options to amend § 2L1.1(b)(2) concerning the number of aliens involved in an immigration offense. Option 1 maintains the current table under § 2L1.1, which provides a 3-level enhancement for offenses involving 6-24 aliens, a 6-level enhancement for offenses involving 25-99 aliens, and a 9-level enhancement for 100 or more aliens. Option 1's proposal, which further has an additional 3-level increase for offenses involving 200-299 aliens and an additional 6-level increase for offenses involving 300 or more aliens, has no support in the available data. As noted at page 7 of the Interim Report, only 1.4% of all year 2005 post-*Booker* cases involved 100 or more aliens. In egregious cases, a judge can always depart upward from the applicable guideline range. There is therefore no reason then to codify the unusual, additional punishments as is being proposed in this option.

Nor does the Interim Report provide justification for an additional 3-level increase at the lower end of the table as contained in Option 2. There has already been at least a 50% increase in sentencing based on the number of aliens, which was adopted in 1997. No good reason is presented to again increase these sentences. Moreover, as noted at page 8 in the Report, relevant conduct allows a court to include not only the number of aliens smuggled during the offense of conviction but also those smuggled during other smuggling operations related to a common scheme or plan. Any concerns regarding an ongoing course of conduct, then, can be met through application of the § 1B1.3 relevant conduct provisions and does not require the proposed additional 3-level increase at the lower end of the table.

C. Endangerment Of Minors

The proposed amendment also presents two options and an issue for comment relating to the smuggling of alien minors. Option 1 provides a potential 6-level increase for the smuggling of a minor unaccompanied by a parent. Option 2 provides a graduated increase based upon the age of the alien minor, with an additional 4-level increase for minors under the age of 12 and a 2-level increase where an unaccompanied minor has attained age 12 but not yet attained age 16.

We submit that the Interim Report fails to provide compelling reasons for a guideline increase for unaccompanied minors. The provisions of § 3A1.1(b) already provide a guideline increase where vulnerable victims are involved. Smuggled unaccompanied minors, where appropriate, would provide a basis for such increased sentences under § 3A1.1(b). Moreover, Judges may upwardly depart outside the applicable guideline range in egregious cases. Therefore, this amendment is unnecessary.

D. Offenses Involving Death

PAG also finds no justification for the proposed amendment's additional 2-level increase through a new specific offense characteristic under U.S.S.G. § 2L1.1(9), with cumulative enhancements where both bodily injury and death occur as well as a cross-reference to § 2L1.1(c)(1) which cover deaths other than murder. As noted at page 12 of the Interim Report, only slightly over 1% of all § 2L1.1 cases involve an increase for an offense involving death. A better course of action would be to maintain the current 8-level increase for death under § 2L1.1(6)(4) and permit judges to upwardly depart from the applicable guideline range for egregious cases. If the Commission considers adopting this proposal despite our objection, the new guideline at least should be modified to make clear that any separate sentencing enhancements for bodily injury and death can only be applied where two separate victims exist; otherwise, this would be improper double-counting.

E. Abducting Aliens, Or Holding Aliens For Ransom

A new specific offense characteristic is proposed where an alien is kidnapped, abducted, or unlawfully restrained for a period of time. In this proposed amendment, there is a 4-level increase in the base offense level with a minimum level of 23. It must be noted, however, that this course of conduct is presently criminalized under 18 U.S.C. § 1203, which imposes sanctions up to life imprisonment and, where appropriate, death for hostage-taking. The applicable guidelines for such an offense are found under § 2A4.1.

Therefore, the almost 7½% of all instances involving hostage-taking, cited in a 2005 Immigration Coding Project, are already subject to prosecution under 18 U.S.C. § 1203, with severe potential sanctions. The proposed amendment to § 2L1.1 to cover alien hostage-taking would be duplicative of existing law and is therefore unnecessary.

§ 2L2.1 (Trafficking In A Document Related To Naturalization, Citizenship, Or Legal Resident Status, Or A United States Passport; Et Cetera) and § 2L2.2 (Fraudulently Acquiring Documents Related To Naturalization, Citizenship, Or Legal Resident Status For Own Use; Et Cetera)

A. Number of Documents

The proposed amendment to § 2L2.1 provides two options to amend the specific offense characteristic involving the number of documents and passports involved in the offense. Employing the same model as set forth in the proposed amendment to § 2L1.1, these options create additional increased levels at, respectively, the higher or lower end of the table.

The Interim Report provides no basis for the proposed increase in sentences based upon the number of documents, but rather reiterates at page 15 that document guideline sentencing was first initiated in 1992 to include a specific offense, and was the subject of increased sentencing in 1997. The Interim Report fails to recite any data or other sound reason that supports the proposed increase in severity of punishment based upon the number of documents involved. This amendment should not be approved.

B. Fraudulently Obtaining Or Using U.S. Passports Or Foreign Passports

While we do not dispute the symmetry argument raised by the Commission that the 4-level increase in § 2L2.1(b)(3) (defendant knew that passport and visa was to be used to facilitate the commission of a felony offense other than an offense involving violation of immigration laws) should also encompass fraudulent use of a United States passport to facilitate an immigration crime, there is no compelling justification for the proposed two-level increase where a foreign passport is used. We further concur with the Federal and Community Defender's proposal that a downward adjustment for obviously counterfeit documents be added if this proposal is enacted over our objections, since the

bearer's ability to evade detection or cross international borders will not be significantly enhanced by use of such a document.

§ 2L1.2 (Unlawfully Entering Or Remaining In The United States)

The Commission presents five separate options modifying the current illegal re-entry guideline. Four of these options require the continued use of a 16-level enhancement under § 2L1.2(b)(1)(a), implemented in November 2001.

According to the Interim Report, 49.3% of all "unlawfully entry" or "unlawfully remaining in the U.S." cases were subjected to a 20-year statutory maximum penalty, as their removal was subsequent to a conviction for commission of an "aggravated felony". Of those cases, the majority received the 16-level increase provided under the guidelines.

The initial issue the Commission should address is whether implementing a threefold level increase (eight levels to 24 levels) is warranted in these cases. We find that the proposal set forth by the Federal and Community Defenders, which is similar to the structure of the firearms guideline, presents a more appropriate means of enhancement based upon the nature and number of prior felony convictions.

We are further concerned that the proposed use of the statutory definition of "aggravated felony" in Options 1, 2, and 3 would create the distinct possibility that persons with only a misdemeanor conviction could see their sentences drastically increase, after being deemed an aggravated felon under 8 U.S.C. § 1101(a)(43)(G). A defendant may then be subject to a potential 8-12 level enhancement. In our experience, one of the most difficult (if not impossible) tasks we have ever faced in our practice is to try to rationally explain to any person, much less an immigrant with broken English, how a misdemeanant with no felony restrictions can nevertheless be classified as not only a felon, but also an aggravated felon. In 2001, the Commission at least ameliorated some of the effects of overbroad "aggravated felony" classifications by reducing this enhancement for certain individuals who were deemed aggravated felons under the statute, while reserving the 16-level enhancement for the most serious offenses. Nothing has changed in the past five years. The facts and general principles of proportionality do not warrant drastically increasing the sentences of misdemeanants and other individuals convicted of non-violent offenses.

We further oppose Option 1's reliance upon 18 U.S.C. § 924 for the definition of "drug trafficking offense". While the Interim Report at pages 27-28 reflects the Commission's desire to tie all immigration drug trafficking offenses to the statutory definition, including those cases in which an individual pleads guilty to possession of a controlled substance where the amount involved would reflect trafficking rather than simple possession, there is a growing circuit split over application of the statutory term "drug trafficking," which already impacts upon the guideline application of this statute. In fact, the Solicitor General has urged the Supreme Court to resolve the matter in *Lopez*

v. Gonzalez, No. 05-527 (U.S. Jan. 24, 2006), which addresses this issue. We urge the Commission to defer further action on this issue pending Supreme Court consideration.

As to Option 5 (which creates a significantly higher base offense level and then provides for a possible reduction based on the nature of the prior conviction), we believe that a troubling precedent would be set if this option is adopted, as the burden would lie upon a defendant to justify a reduction by establishing facts relative to a prior conviction. This proposal, even if it could pass constitutional muster (which we doubt), would be unwise. Even beyond the fact that these defendants are likely to have limited English language skills and even more limited understanding of the American legal system that may hinder their ability to find and prove facts about prior convictions, there are the practical limits stemming from even competent and diligent defendant's counsel's inability to run NCIC criminal history checks, or to obtain copies of former prosecutors' or agents' case files – limits that federal prosecutors and their agents would not face, at least to the same degree. Prosecutors have always had this burden of proving prior convictions – and they will continue to have the burden where prior convictions are an element of the offense – including under 8 U.S.C. § 1326(b). The government already has systems in place to allow it to conduct research and meet this long-established burden; defendants' counsel (especially appointed counsel) have few or none. In sum, PAG believes it makes no sense to suddenly shift this burden only in this singular context of immigration sentencing enhancements. Rather, the government should continue to shoulder this burden of proving prior convictions justify higher sentences.

In sum, for all the reasons stated herein, we request that the Commission postpone any further action on these proposed immigration amendments until Congress has affirmatively acted on this issue, and clarified the issues the Commission should consider. Congress, if it does soon enact new immigration legislation, should not then be presented with additional (or even contrary) submissions from the Commission that would then need to be considered anew by Congress before the October 31, 2006 deadline.

2. Proposed Amendments to Firearms Guidelines

a. Introduction

PAG offers the following comments on certain of the proposed amendments to the Guidelines covering firearm offenses. For those proposals on which we do not comment, we join in the positions outlined by the Federal Public and Community Defenders in their March 9, 2006 letter to the Commission.

b. Special Offense Characteristics for Trafficking in Firearms

PAG adopts the comments on this set of proposed amendments made by the Defenders. *See* March 9, 2006 Letter from Jon Sands to the Honorable Ricardo H. Hinojosa, as well as the alternative proposed by the defenders. We share the Defenders' concern about the dissonance between the Commission's proposed language defining

trafficking and that contained in 18 U.S.C. § 921(a)(21)(A-F)&(a)(22) and readily appreciate the risk to defendants whom Congress would not consider traffickers but who would be treated as such by the Guidelines' elastic definition.

c. Stolen and Altered or Obliterated Serial Numbers

The proposed amendment to U.S.S.G. § 2K2.1(b)(4) should be rejected. Whether or not the amendment is adopted, § 2K2.1(b)(4) should be amended to require that the enhancement should apply only if the defendant had knowledge either that the firearm was stolen or that it had an altered or obliterated serial number.

The existing 2-level enhancement for possessing a firearm that is either stolen or has an obliterated serial number is already a strict liability provision, and results in double-counting. The effect is to increase punishment even though, in almost all firearms offenses, the fact that the firearm is stolen or has an obliterated serial number has nothing to do with the offense of conviction, and likely did not make the firearms possession more dangerous or conceal any other crime. That is the obvious effect of current Application Note 8, which provides that the aggravating enhancement applies even where the defendant does not know and has no reason to believe that the firearm was stolen, or that the serial number was altered or obliterated. Absent such knowledge, PAG believes that a felon who possesses a weapon that he does not know is stolen commits no more serious an offense than a felon who possesses a weapon that has not been stolen. Thus, § 2K2.1(b)(4) already works an enhancement without any clear purpose or connection to increased culpability.

With an already shaky basis for the enhancement as it presently exists, the proposed amendment would raise the number of levels for having an altered or obliterated serial number to 4, from 2. There is no plausible justification for raising the enhancement and putting it on par with the large, 4-level specific offense characteristics that actually have some value in appropriately measuring the increased seriousness of the offense, such as § 2K2.1(b)(5). And the only justification offered – that "[t]he 3-level increase reflects the difficulty in tracing firearms with altered or obliterated serial numbers" – is insufficient to support the four-level increase, for several reasons.

First, this "difficulty" in tracing altered firearms appears to be the reason for the current two-level enhancement. It does not justify any particular number of levels for an enhancement beyond a 2-level enhancement, and certainly does not justify a 4-level enhancement, the type typically reserved for particularly aggravating specific offense characteristics.

Second, this "difficulty" does not have any relationship with the federal crime of being a felon-in-possession, or federal gun possession crimes generally, since knowing the serial number does not in any way make proving the offense more difficult or allow an offender to escape detection. A person or felon standing on a street corner with a gun in his waistband is guilty of the offense of possessing a firearm with an obliterated serial

number or being a felon in possession, period.

Third, it is subject to debate whether this "difficulty" even exists. In our experience, the "tracing" of firearms recovered by law enforcement is not a normal or even usual part of federal firearms prosecutions, either by federal authorities or state and local police that make street arrests that are later adopted for federal prosecution. The most that will happen is that the firearm's serial number is entered into an agency database to discover where and when it was manufactured, sold and the like. But rarely is there ever any additional investigation to determine whether the firearm was illegally sold or transferred at a previous point. It simply does not occur. At the same, time, federal law enforcement has a series of tools at its disposal to discover the actual serial number or path the weapon traveled to reach the defendant's hand, clothes or car. These include a cooperation reduction, laboratory work to "recover" the serial number, and old-fashioned investigation techniques (such as the use of informants, witness interviews).

While the Commission should reject the proposed amendment, whatever it does it should add a knowledge requirement to the specific offense characteristic. A knowledge requirement, even under the softer "knew or had reason to believe" standard, will ensure that the purported increased harm from having a firearm with either of these characteristics is applied only where that harm actually bears on the federal offense by the possessor's knowledge of the characteristic at issue.

d. "In connection with" in Burglary and Drug Offenses

The Commission should adopt Option Three, because it is the only option that is consistent with the standard in the clear majority of circuits. This majority-endorsed standard does not permit application of the enhancement (and does not allow an 18 U.S.C. § 924(c) charge to be sustained) where the possession of the firearm is merely coincidental to another felony – even where the other felony is a drug offense. Also, Option Three is the option that accurately reflects the holdings of a clear majority of circuits that a § 2K2.1(b)(5) enhancement cannot be applied in the case of a contemporaneous burglary where firearms are stolen but not otherwise used.

As the Commission's synopsis to the Amendment recognizes, an unquestioned majority of circuits have adopted the standard for applying the enhancement from *Smith v. United States*, 508 U.S. 223 (1993), and interpret the "in connection with" language in U.S.S.G. § 2K2.1(b)(5) consistently with the "in relation to" language in 18 U.S.C. § 924(c). *See, e.g., United States v. Spurgeon*, 117 F.3d 641 (2d Cir. 1997) (per curiam); *United States v. Wyatt*, 102 F.3d 241, 247 (7th Cir. 1996); *United States v. Nale*, 101 F.3d 1000, 1003-04 (4th Cir. 1996); *United States v. Thompson*, 32 F.3d 1 (1st Cir. 1994); *United States v. Routon*, 25 F.3d 815 (9th Cir. 1994); *United States v. Gomez-Arrellano*, 5 F.3d 464 (10th Cir. 1993). This is a rigorous standard that provides:

> So long as the government proves by a preponderance of the evidence that the firearm served some purpose with respect to the felonious conduct, section 2K2.1(b)(5)'s 'in connection with' requirement is satisfied; conversely, where the firearm's presence is merely coincidental to that conduct, the requirement is not met.

Sprugeon, 117 F.3d at 644 (quoting *Wyatt*, 102 F.3d at 247).

The majority of the circuits that have decided the issue also will decline to apply the enhancement when firearms are possessed as the result of a burglary, but are not otherwise used. *United States v. Blount*, 337 F.3d 404, 407-410 (4th Cir. 2003); *United States v. Fenton*, 309 F.3d 825, 826 (3d Cir. 2002); *United States v. Szakacs*, 212 F.3d 344 (7th Cir. 2000); *United States v. McDonald*, 165 F.3d 1032 (6th Cir. 1999); *United States v. Sanders*, 162 F.3d 396 (6th Cir. 1998); *see also United States v. Lloyd*, 361 F.3d 197, 201-204 (3d Cir. 2004).[2]

Adopting Option One or Option Two would not clarify current U.S.S.G. § 2K2.1(b)(5), but instead would effectively override almost every circuit that has ruled on the applicable standard, and the application of that standard to the burglary context. Options One and Two would overrule the correct standard and replace it with a loose, automatic standard that would apply the enhancement even if the possession of the firearm was coincidental – in all cases under Option One, and in all drug cases under Option Two. Put another way, the appropriate standard under the case law would be eviscerated by Option One and Option Two, not as a matter of resolving any circuit split, but simply by watering down the Guideline to make the enhancement a strict liability provision, regardless of whether the offense conduct justified any increased punishment. These options therefore should be rejected – especially for the stiff 4-level enhancement that this specific offense characteristic provides.

Finally, the apparent purpose of the original Guideline enhancement was to enhance a sentence where there was an increased danger or other criminal conduct that was facilitated by gun possession. As the majority of courts have recognized, there is no "other criminal conduct" when a burglary occurs and guns, not used, often unloaded and not even held in hand, are taken away. Moreover, the offense is not made more

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[2] In the Third, Fourth, Sixth and Seventh Circuits, the Guideline as presently written is not applied in the case of a burglary when firearms are taken because the firearms are not possessed in connection with another felony offense (the Fourth Circuit), or the burglary is not "another felony offense" for purposes of U.S.S.G. § 2K2.1(b)(5) (the Third, Sixth and Seventh Circuits). And in the minority of circuits that would allow the enhancement to be applied, at least one of those circuits (the Fifth) allows the enhancement based on its minority-view standard of "in connection with" that is different than almost every other circuit. *United States v. Blount*, 337 F.3d 404, 407-410 (4th Cir. 2003); *United States v. Kenney*, 283 F.3d 934 (8th Cir. 2002); *United States v. Armstead*, 114 F.3d 504 (5th Cir. 1997); *see also United States v. Hedger*, 354 F.3d 792 (8th Cir. 2004); *United States v. English*, 329 F.3d 615 (8th Cir. 2003).

dangerous when guns are possessed in this fashion. Option Three accounts for this; it allows the enhancement to be applied when there is actual additional criminal conduct beyond the burglary, and an upward departure is always available when there is no other felony offense or use of the firearm, but the sentencing judge believes an enhanced sentence is required. As the Fourth Circuit, in interpreting current § 2K2.1(b)(5), has explained, the purpose of the enhancement is to provide increased punishment where the offense was made "more dangerous by the presence of the firearm . . . ." *Blount*, 337 F.3d at 406. With that said, the *Blount* court ruled that the enhancement could not be applied in the garden variety burglary context. That common sense, majority interpretation, shared by then-Judge Alito (authored the *Lloyd* opinion), Chief Judge Wilkins (authored the *Blount* opinion) and Judge Easterbrook (joined in the *Szakacs* opinion), and grounded in the appropriate standard for applying the "in connection with" language, should not be disturbed.

In maintaining the clear majority standard, and following the lead of a majority of circuits have ruled on this precise issue, the subdivision (C) language should be amended to reflect that a burglary as discussed in Option Three is not "another felony offense." This will maintain the current circuit majority interpretation of "another felony offense" in the current Guideline.

e. Lesser Harms and Felon in Possession

Without explanation, the Commission proposes to bar departures based on lesser harms under U.S.S.G. § 5K2.11 to anyone convicted under 18 U.S.C. § 922(g), which prohibits felons from possessing firearms. PAG opposes this blanket prohibition because the scope is unprecedented, the change is unwarranted (stemming neither from a circuit split nor from any obvious need to resolve a situation that the courts are not already equipped to handle), and the offense-specific prohibition is so random and inexplicable that it suggests the action may be motivated by concerns other than those that should inform guideline amendments.

First, the scope of this prohibition is unprecedented. The Commission has from time to time defined classes of departures as prohibited or discouraged, sometimes because they were placed off-limits by the Sentencing Reform Act itself.[3] These restrictions apply to all cases where a departure might otherwise be entertained. However unwise such blanket prohibitions may be, they apply, with "majestic equality," to thieves, drug dealers and fraudsters alike.[4] PAG is aware of no situation, however, in

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[3] See e.g., U.S.S.G. §§ 5H1.4, Drug or Alcohol Dependence; 5H1.10, Race, Sex, National Origin, Creed, Religion and Socio-Economic Status; 5H1.12, Lack of Guidance as Youth and Similar Circumstances.

[4] "The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." Anatole France, *The Red Lily*, Chap. 7, available at: http://education.yahoo.com/reference/quotations/quote/33040 (last visited March 12, 2006).

which the Commission has forbidden a departure for one class of offenses but retained it for all others.[5] And we can discern no reason to do so here.

The Commission's restraint in this respect is consistent with its general approach to departure policy. Congress provided for departures from the guidelines where the court finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); *see also* §5K2.0. According to the Commission, it adopted its departure policy for two reasons:

> First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. . . . Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice.[6]

These observations obtain in felon-in-possession cases just as in other cases for which the Commission would not forbid lesser harms departures. The vigorous departure case law confirms the Commission's first observation that the guidelines cannot be expected to account for the range of human conduct and condition.[7] The scarcity of lesser harms departures also bear out the Commissions prediction. Despite what must be the rather tantalizing prospect that a court can account for lesser harms at sentencing that could not be credited at conviction, the departure is extremely rarely invoked. Between 2000 and 2003 lesser harms departures comprised fewer than 1 percent of all departures.[8] While it is impossible to determine from available data, PAG is confident from our experience that felon-in-possession cases comprise a very small subclass of these already-infrequent "Lesser Harms" departures.

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[5] Of course, Congress in the Protect Act limited the application of certain departures in certain offenses involving crimes against children, *see United States v. Van Leer*, 270 F. Supp. 2d 1318, 1321-22 & n.20 (D. Utah 2003), citing PROTECT Act, Pub. L. No. 108-21 § 401, 117 Stat. 650, 667 (discussing the "Feeney Amendment" limitations on downward departures), much as it has enacted mandatory minimum sentences that limit departures for certain offenses. The Commission, however, has never declared departures off-limits for any particular offense category, and has long criticized Congress' enactment of mandatory minimums as inconsistent with a rational Guidelines system.

[6] United States Sentencing Commission, *Departures*, at 15 (April, 2003).

[7] *Id.* at 11-113, discussing treatment of cases that illustrate various grounds for departure.

[8] According to the Sentencing Commission's Sourcebooks for the identified years: in 2003 lesser harms departures accounted for only 46 or 0.8% of the 5950 other-than-government initiated departures granted; in 2002, 34 or 0.3% of the 10,995 departures, in 2001 23 or 0.2% of the 11,044 departures; and in 2000, they were 24 or 0.2% of the 10,288 departures. Lesser harms departures never exceeded 1%, even after the Commission began isolating judicial from government-sponsored departures in 2003.

The Commission's history of restraint in establishing "forbidden" departures is therefore appropriate, and borne out by this history of judicial restraint. The recently-proposed offense-specific prohibition, by contrast, is surprising and ill-considered in light of Congress' and the Commission's concern to ensure that the breadth of the human condition not be lost forever at sentencing by overly rigid guidelines. The Commission cannot and should not take the unprecedented step of declaring that, with felon-in-possession cases only, the penalties it is establishing "encompass[] the vast range of human conduct potentially relevant to a sentencing decision."

Second, there is simply no need to forbid "lesser harms" departures in felon-in-possession cases. The Commission carefully monitors developments in guideline sentencing and occasionally proposes amendments to clarify existing guidelines, respond to congressional directives, or resolve circuit conflicts. For example, the Commission seeks to resolve two circuit conflicts in the firearms section of the current set of proposals. *See* Proposed Amendment to the Sentencing Guidelines, at 27-28 (January 25, 2006). In contrast, the lesser harms departure needs no clarification, as it is relatively uncomplicated. Congress has not directed the Commission to eliminate this departure in § 922(g) cases, and there is no significant Circuit split developing in this area. In fact, the majority of the Courts of Appeals that have encountered lesser harms departures in § 922(g) cases have either ruled they are available or ruled in such a way that it can be inferred the court accepts the propriety of the departure's use in at least some 922(g) contexts.[9]

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[9] A number of courts have explicitly recognized the authority to depart for lesser harms in § 922(g) cases, while others have implied in their rulings that the departure authority was available to judges. *See, e.g., United States v. Bunnell*, 280 F.3d 46, 50 (1st Cir. 2001) (rejecting appeal based on failure to grant § 5K2.11 departure in § 922(g) case by holding that lower court did not misunderstand its authority to depart on this ground); *United States v. Clark*, 128 F.3d 122, 123 (2d Cir. 1997) (remanding case because of doubt that sentencing judge appreciated his available authority to depart for lesser harms in § 922(g) case); *United States v. Cutright*, 2000 WL 166345, at *3-4 (4th Cir., Nov. 6, 2000)(collecting cases and rejecting district court lesser harms departure in § 922(g) because not adequately supported); *United States v. Washington*, 1998 WL 13533, at *1 (4th Cir., Jun. 15, 1998)(holding that the sentencing court was aware of, but properly declined to exercise, its authority to depart based on lesser harms in § 922(g) case); *United States v. Williams*, 432 F.3d 621, 623-24 (6th Cir. 2005) (holding that departure from § 922(g) sentence for, *inter alia*, lesser harms, reasonable based on court's consideration of appropriate factors); *United States v. Peterson*, 37 Fed. Appx. 789, 792 (7th Cir. 2002) (rejecting appellant's contention that district court's failure to depart for lesser harms was because court thought it was powerless to do so in gun case); *United States v. Dubuse*, 289 F.3d 1072, 1075-76 (8th Cir. 2002) (finding that district court understood it had authority to depart for lesser harms in § 922(g) case); *United States v. Wentz*, 46 Fed. Appx. 461, 461 (9th Cir. 2002) (finding that district court was aware of authority to depart for lesser harms but nonetheless declined to do so); *United States v. Styles*, 139 Fed. Appx. 249, 253 (11th Cir. 2005) (clarifying that court had authority to depart downward under § 5K2.11 and remanding so that court could consider downward departure in § 922(g) case); *but see United States v. Riley*, 376 F.3d 1160 (D.C. Cir. 2004) (rejecting downward departure under § 5K2.11, even though defendant had no unlawful purpose because statute does not distinguish between unlawful possession and purpose).

Indeed, there are important reasons to retain the departure. The Sentencing Guidelines routinely permit departures when statutes have been violated, and allow lesser harms departures when the violation does not "threaten the harm or evil sought to be prevented by the statute." *United States v. Lewis*, 249 F.3d 793, 796 (8th Cir. 2001). "[T]he guidelines authorize reasonable departure for an act that is technically unlawful, yet not committed for an unlawful purpose." *Id.* at 797 (discussing departure in context of § 922(a)(6) false statements case). While not widespread, a number of courts have at least considered and occasionally found grounds to depart because the weapons' possession, while criminal conduct, merited a lower sentence. Other conceivable examples abound. For example, suppose a defendant who had attained a prior conviction, perhaps even on felony tax charges, at age 20 or 25, is later is found in his home at age 75, passively possessing in his closet a firearm that his grandchildren bought him for self-protection after his neighborhood became less safe. This would be a felon-in-possession, but does the Commission really want to make a "lesser harms" departure off-limits in this situation and all others? Retaining the possibility of a departure makes good sense, particularly in light of its limited current use in only the most deserving cases. The Courts of Appeals have proven adept at evaluating these few cases and should be permitted to continue its management of this area.

Finally, PAG must note that the Commission has chosen to present this proposal without any type of explanation, suggesting that it might be prompted by complaints about recent use of this infrequently-used departure. Whatever the reason behind the proposed amendment, the defense bar and the courts deserve some explanation from the Commission about why it feels the change may be necessary, and also deserve an opportunity to respond to that specific rationale. Particularly striking in this regard is that the Commission would forbid the departure even in a class of cases where the defendant has come into possession of a weapon and is acting in haste to dispose of it. For example, in *United States v. Hancock*, 95 F. Supp. 280 (E.D. Pa. 2000), the Court granted a § 5K2.11 departure when it found that the defendant had found a gun by chance and fired two times into the ground to empty the gun of ammunition and then quickly threw the gun away. The defendant possessed the gun for only a short time and then only to determine if it was loaded and to remove its harm. This seems the right result in such a case where the possession of the weapon by the former felon is only for the purpose of disarming it. Tellingly, the Government did not appeal the *Hancock* departure. We can think of no reason to deny such considerations of a departure to other defendants whom the court determines did what they could as quickly as possible to dispose of a weapon.

For these reasons, we strongly urge that the Commission not amend the guidelines to forbid the use of the Lesser Harms departure at U.S.S.G. § 5K2.11 for otherwise deserving defendants convicted of being felons in possession under 18 U.S.C. § 922(g). If the Commission continues to feel this amendment is warranted, the public should be given a meaningful opportunity to evaluate the specific reasons behind the proposed change, and consideration of this change should be deferred to the next amendment cycle.

3-5. Proposals to Make Permanent Emergency Amendments on Steroids, Intellectual Propery (FECA), & Terrorism/Obstruction of Justice

On these proposed amendments, PAG calls the Commission's attention to the comments previously submitted by PAG and others in response to the Commission's requests for input on the emergency amendments. In particular, PAG references its February 23, 2006 letter on Anabolic Steroids, and a letter on Intellectual Property/FECA submitted by PAG member and University of Richmond Law Professor James Gibson on August 2, 2005, as well as letters submitted by the Federal and Community Defenders.

6. Proposed Amendments Implementing the Transportation Act

The Commission has proposed certain amendments designed to implement Pub. L. 109-59 (the "Transportation Act"), and also issued a related request for comment.

In its proposed amendments, the Commission plans to implement Section 4210 of the Transportation Act, and its new criminal offense for a knowing failure to deliver household goods, by simply adding a cross-reference to U.S.S.G. § 2B1.1. PAG agrees that § 2B1.1 is a catch-all for this type of offense. But we are troubled at the notion that this new Class E felony, established by Congress with a two-year maximum, will be lumped in with far more serious offenses. Under this guideline, the statutory maximum might be reached so easily that the normal incentives to plead guilty in an effort to get an acceptance of responsibility adjustment would prove meaningless.

We note that U.S.S.G. § 2B1.1 was amended to establish a higher base offense level of 7 for offenses with statutory maximums of 20 years or more. The mirror-image should be established for low-end offenses. We ask that a new base offense level of 5 be established for offenses that carry a statutory maximum of less than five years.

On the issue for comment, the Commission's acknowledges that its 2004 amendment to 2Q1.2 was intended to capture the increase in harm associated with offenses involving transportation of hazardous materials. That 2-level increase means that an Offense Level 26 will ordinarily be applied in this situation, and that defendants with a Criminal History Category of VI already will be in a 120-150 month range before any Chapter 3 adjustments. Although the Transportation Act increased the statutory maximum in 49 U.S.C. § 5124 to ten years, these existing guideline numbers are already entirely consistent with a 10-year statutory maximum. Congress did not direct the Commission to revisit this guideline, and no further adjustment is necessary here.

7. Proposed Amendments Implementing the Intelligence Reform and Terrorism Prevention Act of 2004

PAG submits a few comments on these proposed amendments. First, the Commission suggests three options for implementing § 5401 of the Act. Section 5401 increases maximum penalties by up to 10 years if a defendant meets three elements: (1)