

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

Alien smuggling is nefarious on multiple fronts. It undermines border security. It is often linked to transnational criminal organizations. And it inherently exploits those who are vulnerable. That is why 8 U.S.C. § 1324, the primary statute prohibiting alien smuggling, provides punishment “for each alien” smuggled and increased statutory maximums for “any person” who suffers serious bodily injury or is killed or put at risk of death “during” or “resulting” from a smuggling offense.¹ It is also why the Department has urged the Commission to ensure that the guidelines reflect aggravating aspects of these offenses—the number of aliens smuggled, the risks and resulting injuries to those aliens, and sexual assault against them. The Department commends the Commission’s efforts in publishing these proposals which address many of our concerns. We view all of the proposals as working together and support them while offering modifications designed to improve their efficacy.

Specifically, the Department supports the proposed changes to §2L1.1(b)(2), which would add more gradations to the table providing offense level enhancements based on the number of aliens smuggled. As to the changes aimed at addressing conduct creating a risk of injury or death, we generally support moving portions of the commentary into the guideline to clarify that serious bodily injury includes criminal sexual abuse and moving other portions of the commentary into a separate vehicle or vessel enhancement. We are, however, concerned that these changes may have limited effect. Regarding the proposed changes for how the guideline addresses additional injuries or deaths, we are supportive of changes but offer two alternatives, each of which we think would better achieve the Commission’s goals. Finally, we support adding an enhancement for smuggling associated with transnational criminal organizations. We provide preliminary views on each of these issues below, while reserving the right to refine and further explain the Department’s views in our forthcoming comment letter.

A. The Alien Table at §2L1.1(b)(2)

The Commission has proposed adding additional gradations to the alien table at §2L1.1(b)(2) while leaving the starting and ending points for the offense level increases and the number of aliens the same.² The Commission last amended the table in 1997 in response to Congress’ directive in section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) to “increase the sentencing enhancement [in §2L1.1(b)(2)] by at least 50 percent.”³ Currently, the table at §2L1.1(b)(2) has three tiers that add, respectively, three additional levels if the offense involved smuggling 6–24 aliens; six additional levels if the offense involved smuggling 25–99 aliens; and nine additional levels if the offense involved smuggling 100 or more aliens. The Commission’s proposal would break the existing 6–24 tier into three tiers (adding three additional levels for 6–12 aliens, four additional levels for 13–18 aliens, and five additional levels

¹ 8 U.S.C. §§ 1324(a)(1)(B)(i)-(iv).

² Proposed Amendments, at 54.

³ Pub. L. 104–208 (1996). U.S.S.G. App. C, amend. 543 (eff. May 1, 1997); U.S.S.G. App. C, amend. 561 (eff. Nov. 1, 1997) (implementing this directive to increase the previous levels by at least 50 percent).

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for 19–24 aliens) and the existing 25–99 tier into two tiers (six additional levels for 25–99 aliens and seven additional levels for 50–99 aliens).

The Department supports this change. We view the proposed changes as well-informed from the data and consistent with congressional intent to increase sentences based on the number of aliens smuggled. Approximately 41% (1,702) of the 4,178 cases sentenced under §2L1.1 in fiscal year 2024 involved smuggling at least six aliens.⁴ Roughly 82% (1,391) of those cases fell within the 6–24 range.⁵ As the Commission noted in its public data briefing, as the number of aliens smuggled increased and average guideline minimum increased, the average sentence imposed also increased slightly.⁶ At the same time, convictions for smuggling incidents involving 6–24 migrants increased from 855 in fiscal year 2013 to 1,399 in fiscal year 2024.⁷ The additional gradation is needed to meaningfully differentiate among offenders and offense conduct.

B. Risk of Death or Serious Bodily Injury

The existing risk specific offense characteristic currently at §2L1.1(b)(6) provides a two-level enhancement for recklessly or intentionally creating a substantial risk of death or serious bodily injury. The enhancement applies once per offense regardless of the number of aliens endangered. The commentary notes that this risk enhancement applies to a “wide variety of conduct,” including “transporting persons in the trunk or engine compartment of a motor vehicle; carrying substantially more passengers than the rated capacity of a motor vehicle or vessel; harboring persons in a crowded, dangerous, or inhumane condition; or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements.”⁸

The Commission proposes changes to how the alien smuggling guideline addresses conduct creating a risk injury or death in two related ways. The changes move portions of the existing commentary into the guidelines and separate it into two separate risk-based enhancements. First, the Commission proposes moving portions of the existing commentary into a new separate vehicle or vessel specific offense characteristic at (b)(6) (and renumbering other specific offense

⁴ U.S. Sent’g Comm’n, *Public Data Briefing on 2026 Proposed Amendment Regarding Human Smuggling Offenses*, at Slide 5 (“Human Smuggling Data Briefing”), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2026_Human-Smuggling.pdf.

⁵ Human Smuggling Data Briefing, at Slide 5.

⁶ U.S. Sent’g Comm’n, *Public Data Briefing on 2026 Proposed Amendment Regarding Human Smuggling Offenses*, transcript at 2, https://www.uscc.gov/sites/default/files/pdf/research-and-publications/data-briefings/transcript_2026_Human-Smuggling.pdf

⁷ Compare U.S. Sent’g Comm’n, *Use of Guidelines and Specific Offense Characteristics, Guideline Calculation Based, Fiscal Year 2013*, at 54, https://www.uscc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2013/Use_of_Guidelines_and_Specific_Offense_Characteristics_Guideline_Calculation_Based_Revised.pdf; with U.S. Sent’g Comm’n, *Use of Guidelines and Specific Offense Characteristics, Guideline Calculation Based, Fiscal Year 2024*, at 137, https://www.uscc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2024/Ch2_Guideline_FY24.pdf.

⁸ U.S.S.G. §2L1.1 cmt. (n.3).

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characteristics accordingly). The new provision would add a two-level enhancement for “concealing persons in the trunk or engine compartment” or for “carrying substantially more passengers than the rated capacity” of a vehicle or vessel. Second, the Commission proposes amending the existing enhancement for intentionally or recklessly creating a substantial risk of death or serious bodily injury currently at (b)(6) (it would become (b)(7)) to explicitly include criminal sexual abuse, but limiting application to conduct not covered by the firearm enhancement at (b)(5) or the new vehicle or vessel enhancement (at proposed (b)(6)). This existing risk enhancement (currently (b)(6)) would remain limited (as it currently is) to conduct that intentionally or recklessly created a substantial risk of death or serious bodily injury. Both the new vehicle or vessel enhancement and the amended risk enhancement would apply once per offense regardless of the number of aliens endangered, and both could apply only if the two were based on different conduct.

The Department supports these two changes but is concerned that, standing alone, they may have limited effect because they largely incorporate portions of existing commentary into the guideline text. We therefore support the amendments as complements to the changes to the injury table discussed below.

To the extent that the Commission or other stakeholders may be concerned that the two enhancements are duplicative or would lead to overapplication, we do not share that view. The structure of the proposed amendments guards against overapplication. The firearm enhancement (b)(5), the proposed vehicle and vessel enhancement (new (b)(6)), and the existing risk enhancement (new (b)(7)) could all apply to the same offense *only* if premised on *different* conduct. With this limitation, we suspect it would be less common for any two of them to apply, and rarer still for all three to apply in a single offense. For that reason, effective deterrence against the most dangerous smuggling operations would require these changes in combination with the other proposed changes to the guideline (with our suggested modifications).

C. Injury Table

The Commission proposes two options to change how the current injury table operates at §2L1.1(b)(7). Currently, the table at §2L1.1(b)(7) provides one enhancement per offense based on the severity of the most severe injury sustained. Additional injuries or deaths do not currently receive an additional increase and therefore do not meaningfully factor into the guidelines range. To address this concern, the Commission has proposed two options to account for additional injuries and deaths. Neither option would treat each additional injury or death the same as the first injury or death, which limits the application of either option. We offer two alternatives, one of which uses Option One’s structure.

Option One would provide one additional level if “one or two additional people” were injured or died and two additional levels if “three or more people” were injured or died. It also brackets options for making the enhancement offense-based or defendant-based with an intentional or knowing *mens rea*.

Option Two would only provide an additional increase for additional deaths or *permanent or life-threatening* injuries—three offense levels for “one or two additional people” and six offense

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levels for “three or more additional people” who suffered permanent or life-threatening injuries or death. Additional injuries, even if serious bodily injuries, would not garner an additional enhancement and therefore would continue to not meaningfully factor into guidelines range. Option Two brackets the same offense-based or defendant-based language with an intentional or knowing *mens rea*. Additionally, the Commission has proposed adding “criminal sexual conduct” to the bodily injury tier and “including criminal sexual abuse” in the serious bodily injury tier.

We reiterate our preference that each injury and death garner the same additional enhancement as the first injury or death involved in the offense. To effectuate this change, the Commission could replace “any” in existing (b)(7) with “each” so that the table would apply to each injury or death the same way. If the Commission is not inclined to treat each injury or death equally, we think that it should at least provide incremental punishment for each additional injury or death, and not for only additional deaths or permanent or life-threatening injuries. Option Two would only provide an additional offense level increase for additional deaths or permanent or life-threatening injuries, and no increase for additional injuries, serious bodily injuries, or sexual assaults. For that reason, we do not think this option will advance the Commission’s goals.

Instead, we offer two alternatives for the Commission’s consideration, both of which would provide incremental punishment for additional injuries or deaths but include limitations to avoid unwarranted increases. First, the Commission could add one level for each additional person injured, which would be consistent with how the grouping rules treat additional victims of crimes against a person under current §3D1.2(d). That is, the Commission could amend Option One to replace clauses (i) and (ii) with “increase by 1 level for each additional person.” Because the increase would be limited to one-level per additional injury or death, we do not think a *mens rea* is appropriate or necessary.

Alternatively, we recommend that the Commission adopt Option One but use Option Two’s three- and six-levels. In other words, the only change we are recommending under this alternative is that increases should be three- and six-levels instead of the Commission’s proposed one- and two levels. Under Option One, the table would continue to apply to the most severe injury or death. An additional offense level would apply if “one or two additional people” suffered any injury or died. An additional two-levels would apply if “three or more additional people” suffered any injury. Our recommendation is that the offense level increase should instead be three- and six-levels, instead of the Commission’s proposed one- and two-levels. We do not think the addition of a *mens rea* is appropriate or necessary to guard against overapplication or unmitigated increases—the structure of the proposal has a built-in cap. Under ours or the Commission’s formulations, the table would be applied to the most severe injury, and one enhancement would apply to the offense depending on the number of additional injuries or deaths. The maximum possible increase for four or more total injuries or deaths would be the table plus two levels under the Commission’s Option One or six levels under ours.

The Commission also proposes adding criminal sexual contact and criminal sexual abuse to the injury table. We support doing so because data indicate (as discussed further below) that sexual abuse is a grave problem in smuggling offenses, and the guidelines elsewhere recognize that sexual abuse *is* a form of serious bodily injury

D. Sexual Assault Cross Reference

The Commission also proposes adding a cross reference to the criminal sexual abuse guidelines. The Department strongly supports the Commission’s proposal. The existing injury table provides a four-level increase for criminal sexual abuse (as serious bodily injury) if that is the most serious injury involved in the offense. Sexual assault is only meaningfully factored into the guidelines range if it is the *only* or most serious injury involved in the offense. That is, if it is reported and investigated.

Sexual assaults are often underreported and do not always result in visible injuries that would trigger further investigation by law enforcement. Absent a smuggling or other federal hook, there is no federal jurisdiction to address the sexual assault conduct alone. State authorities are often unable to prosecute these cases because the victim does not know where the assault occurred, or even if it occurred within the state’s territory. The very nature of a sexual assault during a smuggling offense makes state or local jurisdiction hard to prove. Much like the existing homicide cross reference, adding the sexual assault cross reference will account for this often overlooked and dangerous conduct and more effectively punish such egregious conduct. The proposed cross reference will provide the court adequate options to sentence defendants perpetrating sexual assaults with sentences consistent with defendants convicted of state sexual assault acts. It would also deter members of smuggling operations who do not directly engage in sexual abuse but who nonetheless profit from the coercive context that has made such abuse endemic throughout the migration journey.⁹ We think that the cross reference is still necessary under any of the above formulations for accounting for additional injuries or deaths. This is especially true for Option Two, which would not meaningfully account for additional sexual abuse in most circumstances.

E. Transnational Criminal Organizations

Finally, the Commission asks in an Issue for Comment how it should treat alien smuggling offenses perpetrated in support of transnational criminal organizations and asks how to define “transnational criminal organization.” We support adding a four-level enhancement with an appropriate floor. As the Commission’s data recognized, approximately one third of cases in fiscal year 2024 involving a transnational criminal organization (32%) involved smuggling more than 100 aliens, and 10% involved the death of at least one alien.¹⁰ The proposed amendment is also consistent with Congress’s judgment in 8 U.S.C. § 1324 that for-profit smuggling offenses carry a statutory minimum penalty of three years with an increase to ten years in the maximum penalty for ongoing commercial organizations engaged in dangerous smuggling activities.

The Department supports a definition of transnational criminal organization that is not limited to a specific list of existing groups, as these organizations are constantly splintering and

⁹ UN Office on Drugs and Crime, *Abused and Neglected: A Gender Perspective on Aggravated Migrant Smuggling Offenses and Response*, 44 (2021), https://www.unodc.org/documents/human-trafficking/2021/Aggravated_SOM_and_Gender.pdf; Medecins Sans Frontiers, *Report: Forced to Flee Central America’s Northern Triangle*, (May 11, 2017) (finding nearly one-third of women surveyed reported having been sexually abused), <https://www.doctorswithoutborders.org/latest/report-forced-flee-central-americas-northern-triangle>.

¹⁰ Human Smuggling Data Briefing, at Slides 30, 31.

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forming new groups. We support using part of the definition contained in part 590 of title 31, Code of Federal Regulations. The guidelines should incorporate the objective elements of this definition, *i.e.*, that the organization is transnational and engages in criminal activity. The more subjective components of the definition that limit the term “significant transnational criminal organization” to those that pose certain risks require policy determinations based on information not typically in evidence in a smuggling case. These elements are therefore not appropriate for inclusion.¹¹

¹¹ The Department does not address at this time other discrete questions posed in the Issue for Comment.