

New Guideline Amendments

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Friday, June 12, 2009 10:00 a.m. – 11:30 a.m.

Discussion Outline

- Amendment process
- Proposed amendments for 2009

Amendment Process

28 U.S.C. § 994(o)

- The Commission shall periodically review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section

28 U.S.C. § 994(o) (cont.)

- The Commission considers input received from “authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system,” including
 - United States Probation System
 - Bureau of Prisons
 - Judicial Conference of the United States
 - Criminal Division of the United States Department of Justice
 - Federal Public Defenders

28 U.S.C. § 994(p)

No later than May 1 of each year, the Commission shall submit guideline amendments to Congress for review

If Congress does not affirmatively modify or disapprove the amendments within 180 days, the amendments automatically take effect

Proposed Amendments for 2009

Effective 11/1/09

(Barring any Congressional action to
the contrary)

Proposed Amendments

- Identity theft
- Online pharmacies
- Submersible vessels
- Harboring of aliens for prostitution
- Court security
- Influencing a minor
- Commission of offense while on release
- Counterfeiting and bleached notes
- Miscellaneous and technical

Identity Theft

§§2B1.1, 2H3.1, 3B1.3

Identity Theft Restitution and Enforcement Act of 2008

Title II, Pub. L. 110-326

- Directive to the Commission to review the guidelines applicable to persons convicted of offenses under sections 1028, 1028A, 1030, 2511, and 2701 of title 18, U.S. Code . . . in order to reflect the intent of Congress that such penalties be increased in comparison to those currently provided

Identity Theft Restitution and Enforcement Act (cont.)

Title II, Pub. L. 110-326

- Directive also provided 13 factors for the Commission to consider in order to create an effective deterrent to computer crime and the theft or misuse of personally identifiable data, including:
 - The privacy rights of individuals;
 - Proprietary information

New: §2B1.1(b)(15)

- If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or
- (B) the offense involved the unauthorized public dissemination of personal information, increase by **2** levels

18 U.S.C § 1030

- Addresses fraud and related activity in connection with computers

“Personal Information”

§2B1.1, Application Note 1

- “Personal information”
 - Sensitive or private information involving an identifiable victim, including:
 - Medical records
 - Wills
 - Diaries
 - Private correspondence, including e-mail
 - Financial records
 - Photographs of a sensitive or private nature; or
 - Similar information

§2B1.1(b)(2)

- (Apply the greatest) If the offense --
 - (A)(i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by **2** levels;
 - (B) involved 50 or more victims, increase by **4** levels; or
 - (C) involved 250 or more victims, increase by **6** levels

Definition of “Victim”

§2B1.1, Application Note 1

- Any person who sustained any part of the actual loss determined under subsection (b)(1);
- Any individual who sustained bodily injury as a result of the offense

New: Definition of “Victim” in Means of Identification Cases

§2B1.1, Application Note 4(E)

- For purposes of subsection (b)(2), in a case involving means of identification, “victim” means:
 - (i) Any victim as defined in Application Note 1; **OR**
 - (ii) Any individual whose means of identification was used unlawfully or without authority

“Means of Identification”

§2B1.1, Application Note 1

- “Means of identification”
 - Has the meaning given the term in 18 U.S.C. § 1028(d)(7), except that the means of identification shall be of an actual (*i.e.*, not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)

New: “Proprietary Information”

§2B1.1, Application Note 3(C)

- Estimation of Loss” amended to add this factor for the court’s consideration:
 - “In the case of proprietary information (*e.g.*, trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.”

§2H3.1“Interception of Communications”

- Definitions of: “means of identification” and “personal information” added to Application Note 4
- Upward departure language in Application Note 5 amended to include offenses involving “personal information or means of identification” of a substantial number of individuals

§3B1.3 “Abuse of Trust”

- Application note 2(B) clarified to include a defendant who exceeds or abuses the authority of his or her position in order to obtain, transfer, or issue unlawfully, or use without authority, any means of identification

Online Pharmacies

§§2D1.1, 2D3.1

Ryan Haight Online Pharmacy Consumer Protection Act of 2008

Pub. L. 110-465

- Created 2 new offenses:
 - 21 U.S.C. § 841(h) (Offenses Involving Dispensing of Controlled Substances by Means of the Internet); stat max varies depending upon controlled substance being distributed
 - 21 U.S.C. § 843(c)(2)(A) (Prohibiting the Use of the Internet to Advertise for Sale of a Controlled Substance); stat max of 4 years

Ryan Haight Online Pharmacy Consumer Protection Act (cont.)

Pub. L. 110-465

- Added a sentencing enhancement for Schedule III controlled substances where “death or serious bodily injury results from the use of such substance”

New: §2D1.1(a)(3)

Base Offense Level

- **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substances and that the defendant committed the offense after one or more prior convictions for a similar offense

New: §2D1.1(a)(4)

Base Offense Level

- **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance

Ryan Haight Online Pharmacy Consumer Protection Act (cont.)

Pub. L. 110-465

- Increased stat maxes for:
 - all Schedule III controlled substances from 5 to 10 years
 - all Schedule IV controlled substances from 3 to 5 years
 - Schedule V controlled substances from 2 to 4 years if the offense is committed after a prior drug conviction

New: Offenses Involving Schedule III Hydrocodone

§2D1.1

- Raised maximum base offense level for Schedule III hydrocodone from level 20 to level 30
- Added to drug quantity table

Submersible Vessels

§§2D1.1, 2X7.2

Drug Trafficking Vessel Interdiction Act of 2008

Pub. L. 100-407

- Created a new offense:
 - 18 U.S.C. § 2285 (Operation of submersible vessel or semi-submersible vessel without nationality);
stat max of 15 years

Drug Trafficking Vessel Interdiction Act (cont.)

Pub. L. 100-407

- Directive to the Commission to promulgate or amend the guidelines to provide penalties for persons convicted of offenses under 18 U.S.C. § 2285 while considering various factors, including:
 - Reflect serious nature of offense
 - Account for aggravating and mitigating circumstances, including:
 - use, and/or repeated use of submersible vessel;
 - failure to heave when directed by law enforcement;
 - ensure reasonable consistency with other relevant directives and guidelines

New §2D1.1(b)(2)(B)

§2D1.1

- Scope of SOC (b)(2) expanded by adding new subdivision:
 - If the defendant unlawfully imported or exported a controlled substance under circumstances in which . . . (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used..... increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**

New Guideline §2X7.2

“Submersible and Semi-Submersible Vessels”

- Base offense level: 26
- (b)(1) (Apply the greatest) If the offense involved:
 - (A) a failure to heave to when directed by law enforcement officers, increase by 2 levels;
 - (B) an attempt to sink the vessel, increase by 4 levels;
 - (C) the sinking of the vessel, increase by 8 levels

New §2X7.2 (cont.)

Application Note 1

- Upward departure provisions:
 - The defendant engaged in a pattern of activity involving use of a submersible vessel or semi-submersible vessel described in 18 U.S.C. § 2285 to facilitate other felonies
 - The offense involved the use of the vessel as part of an ongoing criminal organization or enterprise

Alien Harboring in Furtherance of Prostitution

§§2L1.1, 2B1.1, 2H4.1

William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008

Pub. L. 110-457

- Directive: “review and if appropriate, amend the sentencing guidelines . . . applicable to persons convicted of alien harboring to ensure conformity with the guidelines applicable to persons convicted of promoting a commercial sex act if:
 - The harboring was committed in furtherance of prostitution; and
 - The defendant is to be sentenced as an organizer, leader, manager, or supervisor of the criminal activity”³⁶

New §2L1.1(b)(8)(B)

Specific Offense Characteristic

- If (i) the defendant was convicted of alien harboring, (ii) the alien harboring was for the purpose of prostitution, and (iii) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by **2** levels, but if the alien engaging in prostitution had not attained the age of 18 years, increase by **6** levels

William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (cont.)

Pub. L. 110-457

- Created two new offenses:
 - 18 U.S.C. § 1351 (Fraud in foreign labor contracting) – Referred to §2B1.1
 - 18 U.S.C. § 1593A (Benefitting financially from peonage, slavery, and trafficking in persons) – Referred to §2H4.1

New §2H4.1(a)(2)(B)

Peonage, Involuntary Servitude, and Slave Trade

- New BOL (a)(2)(B): **18** if the defendant was convicted of an offense under 18 U.S.C. § 1593A based on an act in violation of 18 U.S.C. § 1592

§2H4.1 (cont.)

Application Note 4

- New downward departure:
 - In a case in which the defendant was convicted under 18 U.S.C. §§ 1589(b) or 1593A, a downward departure may be warranted if the defendant benefitted from participating in a venture described in those sections without knowing that (*i.e.*, in reckless disregard of the fact that) the venture had engaged in the criminal activity described in those sections

Court Security

§2A6.1

Court Security Improvement Act of 2007

Pub. L. 110-177

- Directive: review certain threats made in violation of section 115 of title 18, U.S. Code that occur over the Internet, taking into consideration:
 - The number of threats made;
 - The number of intended recipients; and
 - Whether the senders of the threats were acting alone or as part of a larger group

New §2A6.1(b)(5)

- If the defendant (A) is convicted under 18 U.S.C. §§ 115, (B) made a public threatening communication, and (C) knew or should have known that the public threatening communication created a substantial risk of inciting others to violate 18 U.S.C. § 115; increase by **2** levels

Court Security (cont.)

- Expanded range of guidelines to which offenses under 18 U.S.C. § 1513 are referenced in Appendix A
 - Already referenced to §2J1.2; now additional references to §§2A1.1, 2A1.2, 2A1.3, 2A2.1, 2A2.2, 2A2.3, 2B1.1

Influencing a Minor

§§2A3.2, 2G1.3

Influencing a Minor

- Addresses a circuit conflict regarding the undue influence enhancement at §2A3.2(b)(2)(B)(ii) and §2G1.3

Influencing a Minor (cont.)

- Three circuits (6th, 7th, and 11th) have expressed differing views on two different policy questions regarding the application of the undue influence enhancement
 - First, whether the undue influence enhancement can apply in a case involving attempted sexual contact
 - Second, whether the undue influence enhancement can apply in a case in which the only “minor” involved is a law enforcement officer

§§2A3.2 and 2G1.3

- Application notes amended to address these two questions
- Regarding attempted sexual contact: “The voluntariness of the minor’s behavior may be compromised without prohibited sexual contact occurring”
- Regarding undercover law enforcement officers: undue influence enhancement does NOT apply in a case in which the only “minor” (as defined in the guideline) involved in the offense is an undercover law enforcement officer

Commission of Offense While on Release

§3C1.3

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

- 2nd and 7th circuits held that a sentencing court cannot apportion to the underlying offense more than the maximum of the guideline range absent the 3-level enhancement at §3C1.3
- Amendment clarifies that the court determine that applicable guideline range as in any other case.
 - Determine an appropriate “total punishment” from within the applicable guideline range and then divide the total sentence between the underlying offense and the § 3147 enhancement as appropriate

§3C1.3: Commission of Offense While on Release (cont.)

Application Note 1

- New example added:
 - If the applicable adjusted guideline range is 30-37 months and the court determines a “total punishment” of 30 months is appropriate, a sentence of 24 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement

Counterfeiting and “Bleached Notes”

§2B5.1

Counterfeiting and “Bleached Notes”

- “Bleached notes” are genuine US currency stripped of their original images through the use of solvents or other chemicals and then reprinted to appear to be notes of higher denomination than intended by the Department of the Treasury
- Circuits have resolved differently the question of whether offenses involving bleached notes should be sentenced under §2B5.1 or §2B1.1

§2B5.1 (Counterfeiting)

- Offenses involving bleached notes are to be sentenced under §2B5.1
- Amended definition of “counterfeit” to more closely parallel relevant counterfeiting statutes
- (b)(2)(B) amended to cover a case in which the defendant controlled or possessed genuine US currency paper from which the ink or other distinctive counterfeit deterrent has been completely or partially removed

Miscellaneous and Technical Amendments

Miscellaneous and Technical

- Appendix A amended to provide guideline citations for various new offenses
- Chapter Five, Parts B and D, amended to reflect amendments made by the Judicial Administration and Technical Amendments Act of 2008 (Pub. L. 110-406) to the probation and supervised release statutes

Miscellaneous and Technical (cont.)

- Amended child porn guidelines so that the term “distribution” includes “transmission” and “material” includes any visual depiction

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