

**UNITED STATES SENTENCING COMMISSION**

**Sentencing Guidelines for United States Courts**

**AGENCY:** United States Sentencing Commission

**ACTION:** Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments. Notice of public hearing.

**SUMMARY:** Pursuant to section 994(a), (o), and (p) of title 28, United States Code, the United States Sentencing Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also provides multiple issues for comment, some of which are contained within proposed amendments.

The specific proposed amendments and issues for comment in this notice are as follows:

- (1) proposed amendment to §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) and Appendix A repromulgating a temporary, emergency amendment implementing section 5 of the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, Pub. L. 110–179, and related issues for comment; (2) a proposed amendment to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions) and Appendix A implementing the Honest Leadership and Open Government Act of 2007, Pub. L. 110–81; (3) A proposed amendment to §§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy), 2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product), and Appendix A regarding offenses involving human growth hormone (hGH) and offenses involving violations of certain food and drug safety laws, and related issues for comment; (4) a proposed amendment to §2E3.1 (Gambling Offenses) and Appendix A implementing the Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. 110–22; (5) a proposed amendment making various technical amendments to the guidelines; (6) a proposed amendment to §4A1.2 (Definitions and Instructions for Computing Criminal History); (7) a proposed amendment to §2L1.2 (Unlawfully Entering or Remaining in the United States) and a related issue for comment; and (8) issues for comment regarding a directive and two new offenses created by the Court Security Improvement Act of 2007, Pub. L. 110–177.

**DATES:** (1) Proposed Amendments.—Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than March 28, 2008.

(2) Public Hearing.—The Commission will be scheduling a public hearing on its proposed amendments. Further information regarding the public hearing, including requirements for testifying and providing written testimony, as well as the date of the hearing, will be provided by the Commission on its website at [www.ussc.gov](http://www.ussc.gov).

**ADDRESS:** Public comment should be sent to: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs.

**FOR FURTHER INFORMATION CONTACT:** Michael Courlander, Public Affairs Officer, Telephone: (202) 502-4590.

**SUPPLEMENTARY INFORMATION:** The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and submits guideline amendments to the Congress not later than the first day of May of each year pursuant to 28 U.S.C. § 994(p).

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

The Commission also requests public comment regarding whether the Commission should specify for retroactive application to previously sentenced defendants any of the proposed amendments published in this notice. The Commission requests comment regarding which, if any, of the proposed amendments that may result in a lower guideline range should be made retroactive to previously sentenced defendants pursuant to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range).

Additional information pertaining to the proposed amendments described in this notice

may be accessed through the Commission's website at [www.ussc.gov](http://www.ussc.gov).

**AUTHORITY:** 28 U.S.C. § 994(a), (o), (p), (x); USSC Rules of Practice and Procedure, Rule 4.4.

Ricardo H. Hinojosa,

Chair

### **Repromulgation of the Emergency Disaster Fraud Amendment**

1. Synopsis of Proposed Amendment: This proposed amendment repromulgates the temporary emergency amendment, effective February 6, 2008, that responded to the directive in section 5 of the "Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007," Pub. L. 110–179 (the "Act"). The directive, which required the Commission to promulgate an amendment under emergency amendment authority by February 6, 2008, provides that the Commission forthwith shall—  
  
promulgate sentencing guidelines or amend existing sentencing guidelines to provide for increased penalties for persons convicted of fraud or theft offenses in connection with a major disaster declaration under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5170) or an emergency declaration under section

501 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5191); and

(2) submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives an explanation of actions taken by the Commission pursuant to paragraph (1) and any additional policy recommendations the Commission may have for combating offenses described in that paragraph . . .

Section 5(b) of the Act further requires the Commission to –

- (1) ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses described in subsection (a) and the need for aggressive and appropriate law enforcement action to prevent such offenses;
- (2) assure reasonable consistency with other relevant directives and with other guidelines;
- (3) account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the sentencing guidelines currently provide sentencing enhancements;
- (4) make any necessary conforming changes to the sentencing guidelines; and
- (5) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

The emergency amendment created a new two-level enhancement in §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) if the offense involved fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a declaration of a major disaster or an emergency, and added a corresponding application note.

The emergency amendment added a new subdivision (IV) to Application Note 3(A)(v) of §2B1.1 providing that in disaster fraud cases, "reasonably foreseeable pecuniary harm includes the administrative costs to any federal, state, or local government entity or any commercial or not-for-profit entity of recovering the benefit from any recipient thereof who obtained the benefit through fraud or was otherwise ineligible for the benefit that were reasonably foreseeable."

The emergency amendment also provided a reference to §2B1.1 in Appendix A (Statutory Index) for the new offense at 18 U.S.C. § 1040, which criminalizes the commission of a fraud in connection with major disaster or emergency benefits, and is punishable by a maximum term of imprisonment of thirty years.

The proposed amendment would repromulgate the emergency amendment as a permanent amendment to §2B1.1.

Several issues for comment follow the proposed amendment.

Section 2B1.1(b) is amended by adding at the end the following:

"(16) If the offense involved fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a declaration of a major disaster or an emergency, increase by 2 levels."

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 3 by inserting after the paragraph that begins "(III) Offenses Under 18 U.S.C. § 1030.—" the following:

"(IV) Disaster Fraud Cases.—In a case in which subsection (b)(16) applies, reasonably foreseeable pecuniary harm includes the administrative costs to any federal, state, or local government entity or any commercial or not-for-profit entity of recovering the benefit from any recipient thereof who obtained the benefit through fraud or was otherwise ineligible for the benefit that were reasonably foreseeable."

The Commentary to §2B1.1 captioned "Application Notes" is amended by redesignating Notes 15 through 19 as Notes 16 through 20, respectively; and by inserting after Note 14



the following:

"15. Application of Subsection (b)(16).—For purposes of this subsection:

‘Emergency’ has the meaning given that term in 42 U.S.C. § 5122.

‘Major disaster’ has the meaning given that term in 42 U.S.C. § 5122.".

The Commentary to §2B1.1 captioned "Background" is amended by adding at the end the following:

"Subsection (b)(16) implements the directive in section 5 of Public Law 110–179.".

Appendix A (Statutory Index) is amended by inserting after the line reference to 18 U.S.C. § 1039 the following:

"18 U.S.C. § 1040 2B1.1".

### **Issues for comment**

1. Should the proposed amendment repromulgating the emergency amendment, effective February 6, 2008, that responded to the directive in section 5 of the "Emergency and

Disaster Assistance Fraud Penalty Enhancement Act of 2007," Pub. L. 110–179 (the "Act"), include a minimum offense level in the specific offense characteristic? If so, what would be the appropriate level for the minimum offense level?

2. Should the proposed amendment repromulgating the emergency amendment expand the scope of the enhancement to cover fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid "in connection with any procurement of property or services related to any emergency or major disaster declaration as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States"? Such conduct was criminalized by the new offense at 18 U.S.C. § 1040 created by the Act, but was not specifically included within the scope of the directive granting emergency amendment authority to the Commission.
3. Are there any aggravating or mitigating circumstances existing in disaster fraud cases that might justify additional amendments to the guidelines?

### **Honest Leadership and Open Government Act of 2007**

2. Synopsis of Proposed Amendment: This proposed amendment implements the Honest Leadership and Open Government Act of 2007, Pub. L. 110–81 (the "Act"). The Act creates a new offense at 18 U.S.C. § 227 (Wrongfully influencing a private entity's employment decisions by a member of Congress), which provides: "Whoever, being a

Senator or Representative in, or a Delegate or Resident Commissioner to, the Congress or an employee of either House of Congress, with the intent to influence, solely on the basis of partisan political affiliation, an employment decision or employment practice of any private entity – (1) takes or withholds, or offers or threatens to take or withhold, an official act, or (2) influences, or offers or threatens to influence, the official act of another, shall be fined under this title or imprisoned for not more than 15 years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States".

The proposed amendment amends Appendix A to reference offenses under 18 U.S.C. § 227 to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).

The Commentary to §2C1.1 captioned "Statutory Provisions" is amended by inserting "227," after "226,".

Appendix A (Statutory Index) is amended by inserting after line reference to 18 U.S.C. § 226 the following:

"18 U.S.C. § 227      2C1.1".

## Miscellaneous Food and Drug Offenses

3. Synopsis of Proposed Amendment: This proposed amendment addresses offenses involving human growth hormone (hGH) and offenses involving violations of certain food and drug safety laws.

First, the proposed amendment creates guideline penalties for offenses involving the illegal distribution of hGH by amending §§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy), 2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product), and Appendix A (Statutory Index). Specifically, the proposed amendment adds references to §§2D1.1 and 2D1.2 in Appendix A for violations of 21 U.S.C. §§333(e)(1) and (e)(2), respectively; amends the specific offense characteristic at §2D1.1(b)(6) to include hGH offenses; and deletes language in the commentary to §2N2.1 stating that the Commission has not established a guideline for hGH offenses. In addition, there are issues for comment regarding hGH offenses.

Second, the proposed amendment addresses how violations of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 et seq.) (the “FDCA”) and the Prescription Drug Marketing Act of 1987, Pub. L. 100–293, (the “PDMA”) are treated under §2N2.1.

Specifically, the proposed amendment adds a specific offense characteristic at §2N2.1 that applies if the defendant committed any part of the instant offense after sustaining a conviction of an offense under 21 U.S.C. § 331. Because PDMA offenses at 21 U.S.C. §§ 353 and 381 are incorporated into the FDCA at 21 U.S.C. § 331 the proposed specific offense characteristic also is applicable to a second or subsequent violation of the PDMA. The proposed amendment also amends the commentary to §2N2.1 to include substantial risk of bodily harm or death as a basis for an upward departure. In addition, there is an issue for comment regarding violations of the FDCA and PDMA.

Section 2D1.1(b)(6) is amended by inserting "or human growth hormone" after "substance".

The Commentary to §2D1.1 captioned "Statutory Provisions" is amended by inserting "333(e)(1)," after "21 U.S.C. §§".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the section captioned "(E) Drug Equivalency Tables" by inserting after the subdivision captioned "Schedule III Substances (except ketamine)\*\*\*\*" the following:

"Human Growth Hormone\*\*\*\*"

1 unit of Human Grown Hormone = 1 gm of marihuana

\*\*\*\*Provided, that the combined equivalent weight of all human growth hormone units, Schedule III substances, Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 59.99 kilograms of marihuana."

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "(E) Drug Equivalency Tables" in the subdivision captioned "Schedule IV Substances (except flunitrazepam)" by inserting an additional asterisk after "\*\*\*\*\*" in both instances.

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "(E) Drug Equivalency Tables" in the subdivision captioned "Schedule V Substances" by inserting an additional asterisk after "\*\*\*\*\*" in both instances.

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "(E) Drug Equivalency Tables" in the subdivision captioned "List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)" by inserting an additional asterisk after "\*\*\*\*\*" in both instances.

The Commentary to §2D1.2 captioned "Statutory Provisions" is amended by inserting "333(e)(2)," after "21 U.S.C. §§".

Section 2N2.1 is amended by redesignating subsection (b) as subsection (c) and inserting after subsection (a) the following new subsection:

"(b) Specific Offense Characteristic

- (1) If the defendant committed any part of the instant offense after sustaining a conviction of an offense under 21 U.S.C. § 331, increase by [2]-[7] levels."

The Commentary to §2N2.1 captioned "Application Notes" is amended in Note 3 by striking "Death" and inserting "The offense created a substantial risk of bodily injury or death,"; and by inserting "from the offense" after "resulted".

The Commentary to §2N2.1 captioned "Application Notes" is amended in Note 4 by striking the first sentence.

Appendix A (Statutory Index) is amended by inserting after line reference to 21 U.S.C. § 333(b) the following:

"21 U.S.C. § 333(e)(1)	2D1.1
21 U.S.C. § 333(e)(2)	2D1.2".

### **Issues for Comment**

1. The Commission requests comment regarding how human growth hormone (hGH)

should be quantified under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)). Human growth hormone typically is distributed in vials of varying sizes. The vials may specify the amount of hGH they contain in International Units (IU) or milligrams (mg). For certain controlled substances (including some Schedule I and II depressants, Schedule III, Schedule IV, and Schedule V controlled substances) the base offense level is determined based on the number of “units” involved in the offense. A “unit” is defined generally as “one pill, capsule or tablet” or, if in liquid form (other than GHB), one “unit” means 0.5 ml. See Note F of the Drug Quantity Table in §2D1.1(c).

2. The existing definition of “unit” applies to trafficking in steroids, which is a Schedule III controlled substance with a penalty scheme similar to distribution offenses involving human growth hormone (hGH). The Commission requests comment regarding the harmfulness of hGH offenses relative to steroid offenses. Are hGH trafficking offenses more harmful, less harmful, or of approximately equal harm? Based on that comparison, what quantity of vials, IU, or mg of hGH should be used to determine a “unit” for purposes of calculating the base offense level (e.g., one vial, 3 IUs, 1 mg)?
3. The Commission requests comment regarding whether a maximum base offense level should apply in §2D1.1 for an offense involving the distribution of human growth hormone (hGH). For certain types of controlled substances, the marijuana equivalencies in the Drug Equivalency Table in §2D1.1(c) are “capped” at specified amounts. For



example, anabolic steroids and other Schedule III controlled substances, which also have a statutory maximum of 5 years' imprisonment, are subject to a maximum base offense level of 20. Should the Commission similarly provide a maximum base offense level for offenses involving the distribution of hGH and, if so, what maximum base offense level should apply?

4. The Commission requests comment regarding whether it should expand the scope of the enhancements in §2D1.1(b)(6) (pertaining to masking agents) and §2D1.1(b)(7) (pertaining to distribution of a steroid to an athlete) to include hGH. Also, should the Commission amend the commentary to §2D1.1 in Application Note 8 to cover offenses involving human growth hormone (hGH)? Specifically, the enhancement at §2D1.1(b)(6) 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." Masking agents also can be taken to prevent the detection of other controlled substances, including hGH. Should the Commission expand the definition of masking agent, and thus application of the enhancement, in a manner that covers hGH? Human growth hormone also may be used to enhance an individual's performance. Should the Commission expand the scope of the enhancement at §2D1.1(b)(7) pertaining to distribution to an athlete to cover offenses involving hGH? Application Note 8 instructs the court on how to apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill) in a case in which a coach used his or her position to influence an athlete to use an anabolic steroid. Similarly, a coach may use his or her position to influence an athlete to use hGH. Should

the Commission modify Application Note 8 to include cases involving hGH?

5. The Commission requests comment regarding whether §2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) adequately addresses the numerous statutes referenced to that guideline. The statutes referenced to §2N2.1 prohibit conduct ranging from regulatory offenses with a statutory maximum penalty of 1 year imprisonment (e.g., 21 U.S.C. § 642 (Recordkeeping requirements [for meat processors])) to violations of the Prescription Drug Marketing Act of 1987 that carry a statutory maximum penalty of 10 years imprisonment. Should the Commission provide alternative base offense levels, specific offense characteristics identifying aggravating factors warranting an enhanced sentence, or some combination of these to more adequately address these offenses? If so, what should be the offense levels associated with alternative base offense levels and/or specific offense characteristics?

#### **Animal Fighting Prohibition Enforcement Act of 2007**

4. Synopsis of Proposed Amendment: This proposed amendment implements the Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. 110–22 (the "Act"). The Act amends the Animal Welfare Act, 7 U.S.C. § 2156, to increase penalties for existing offenses and to create a new offense. Specifically, the Act increases penalties for criminal violations of 7 U.S.C. § 2156 from a maximum term of one year of

imprisonment to a maximum term of not more than three years of imprisonment. The penalties are now set forth in section 49 of title 18, United States Code. In addition, the Act created a new offense at 7 U.S.C. § 2156(e) which makes it unlawful to "sell, buy, transport, or deliver in interstate or foreign commerce a knife, a gaff, or any other sharp instrument attached, or designed or intended to be attached, to the leg of a bird for use in an animal fighting venture." The term "animal fighting venture", an element of each criminal offense in 7 U.S.C. § 2156, is defined at subsection (g) as " . . . any event which involves a fight between at least two animals and is conducted for purposes of sport, wagering, or entertainment . . .".

The proposed amendment deletes the reference of 7 U.S.C. § 2156 to §2X5.2 (Class A Misdemeanors) in Appendix A because violations of 7 U.S.C. § 2156 are now felony offenses. The proposed amendment references offenses under 7 U.S.C. § 2156 to §2E3.1 (Gambling Offenses).

The proposed amendment also creates a new alternative base offense level at §2E3.1(b)(2) that provides a base offense level of [8][10] if the offense involved an "animal fighting venture", which is defined in proposed Application Note 1 as having the meaning given that term in 7 U.S.C. § 2156(g). Additionally, the proposed amendment adds an instruction to apply the greatest applicable base offense level at §2E3.1(a) because an offense involving an animal fighting venture may also involve conduct covered by subsection (a)(1).

The proposed amendment also provides an upward departure provision if an animal fighting offense involves extraordinary cruelty to an animal.

Finally, the proposed amendment expands the title of §2E3.1 to include animal fighting offenses.

Section 2E3.1 is amended in the heading by adding at the end "; Animal Fighting Offenses".

Section 2E3.1(a) is amended by inserting "(Apply the Greatest)" after "Level:"; by redesignating subdivision (2) as subdivision (3); and by inserting after subdivision (1) the following:

"(2) [8][10], if the offense involved an animal fighting venture; or".

The Commentary to §2E3.1 captioned "Statutory Provisions" is amended by inserting "7 U.S.C. § 2156;" before "15 U.S.C. §§".

The Commentary to §2E3.1 is amended by adding at the end the following:

"Application Notes:

1. 'Animal fighting venture' has the meaning given that term in 7 U.S.C. § 2156(g).
2. In the case of an animal fighting offense that involves extraordinary cruelty to an animal, an upward departure may be warranted."

Appendix A (Statutory Index) is amended in the line reference to 7 U.S.C. § 2156 by striking "2X5.2" and inserting "2E3.1".

#### **Technical Amendment**

5. Synopsis of Proposed Amendment: This proposed amendment makes technical corrections to various guidelines.

First, the proposed amendment modifies §2B1.1(b)(11) to correct a clerical error.

Second, the proposed amendment addresses section 121 of the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109–177, (the "USA PATRIOT Act"). The USA PATRIOT Act changed the definition of "contraband cigarette" in subsection (2) of 21 U.S.C. § 2341 (Trafficking in Contraband Cigarettes and Smokeless Tobacco) to include the failure to pay local cigarette taxes. Prior to the USA PATRIOT Act, the definition covered only the failure to pay state cigarette taxes. Section 121 of the PATRIOT Act also reduced the number of contraband cigarettes necessary to violate

the substantive offenses set forth in 18 U.S.C. §§ 2342 (Unlawful acts) and 2344 (Penalties) from 60,000 to 10,000.

Violations involving contraband cigarettes are referenced to §2E4.1 (Unlawful Conduct Relating to Contraband Cigarettes and Smokeless Tobacco) in Appendix A (Statutory Index). The Commission amended the background commentary at §2E4.1 to reflect the change in the number of contraband cigarettes and expanded the headings of Chapter Two, Part E, Subpart 4 and §2E4.1 to include smokeless tobacco. See Amendment 700, USSG App. C. However, the amendment to §2E4.1 did not reflect the statutory inclusion of failure to pay local cigarette taxes in 21 U.S.C. § 2341.

The proposed amendment amends §2E4.1 to incorporate the statutory language regarding failure to pay local cigarette taxes. Currently, Application Note 1 at §2E4.1 provides that the "tax evaded" refers to state excise tax. The proposed amendment expands the meaning of "tax evaded" at Application Note 1 to include local excise taxes. The proposed amendment also amends the background commentary at §2E4.1 to include local excise taxes.

Third, the proposed amendment implements the technical corrections made by Pub. L. 110–161.

Fourth, the proposed amendment corrects a statutory reference included in §3C1.4 (False

Registration of Domain Name), which provides a two-level adjustment for a case in which a particular statutory enhancement applies. At the time of promulgation of this guideline, the referenced statutory enhancement was at 18 U.S.C. § 3559(f)(1). See Amendment 689, USSG App. C. The Adam Walsh Child Protection and Safety Act of 2006 (the "Adam Walsh Act"), Pub. L. 109–248, amended 18 U.S.C. § 3559 by redesignating subsection (f) as subsection (g) and inserting a new subsection (f). This proposed amendment changes the statutory reference in §3C1.4 to reflect the redesignation of subsection (f) to subsection (g) of section 3359.

Fifth, the proposed amendment addresses statutory changes to 18 U.S.C. § 1512. In 2002, Congress amended 18 U.S.C. § 1512(a) and (b) (Tampering with a witness, victim, or an informant) as part of the 21<sup>st</sup> Century Department of Justice Appropriations Authorization Act (the "Act"), Pub. L. 107–273. Section 3001 of the Act moved the elements of "physical force" and "threat of physical force" from 18 U.S.C. § 1512(b) into subsection (a). Thus, section 1512(b) now punishes only intimidation, threats, corrupt persuasion, misleading conduct, and attempts. The Act also added at 18 U.S.C. § 1512(a)(3)(C) a ten-year statutory maximum penalty in the case of "the threat of physical force against any person". In order to reflect the statutory changes, the proposed amendment modifies the statutory index by deleting the references in Appendix A to §§2A1.2 (Second Degree Murder) and 2A2.2 (Aggravated Assault) for 18 U.S.C. § 1512(b), and adding those guidelines as references for 18 U.S.C. § 1512(a). The proposed amendment also adds a reference to §2J1.2 (Obstruction of Justice) for 18

U.S.C. § 1512(a) to reflect the broad range of obstructive conduct now covered in that section, including the threat of physical force against a witness.

Sixth, the proposed amendment refers offenses under 18 U.S.C. § 1091 to §2H1.1 (Offenses Involving Individual Rights) in Appendix A. Appendix A currently refers offenses under 18 U.S.C. § 1091 (Genocide) to §2H1.3 (Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination; Damage to Religious Real Property), but this guideline no longer exists. Amendment 521, which became effective November 1, 1995, consolidated §§2H1.2 (Conspiracy to Interfere with Civil Rights), 2H1.3, 2H1.4 (Interference with Civil Rights Under Color of Law) and 2H1.5 (Other Deprivations of Rights or Benefits in Furtherance of Discrimination) into §2H1.1. This proposed amendment would make a conforming change to Appendix A.

Section 2B1.1(b)(11) is amended by inserting "resulting" before "offense level".

The Commentary to §2E4.1 captioned "Application Notes" is amended in Note 1 by inserting "and local" before "excise" and by striking "tax" and inserting "taxes".

The Commentary to §2E4.1 captioned "Background" is amended by inserting "and local" before "excise".

Section 2X7.1(a) is amended by striking "554" and inserting "555" each place it appears.



The Commentary to §2X7.1 captioned "Statutory Provision" is amended by striking "554" and inserting "555".

Appendix A (Statutory Index) is amended by striking both references to 18 U.S.C. §554 and inserting the following:

"18 U.S.C. § 554      2B1.5, 2M5.2, 2Q2.1

18 U.S.C. § 555      2X7.1".

Section 3C1.4 is amended by striking "(f)" and inserting "(g)".

Appendix A (Statutory Index) is amended in the line reference to 18 U.S.C. §1512(a) by inserting ", 2A2.2, 2A2.3, 2J1.2" after "2A2.1".

Appendix A (Statutory Index) is amended in the line reference to 18 U.S.C. §1512(b) by striking "2A1.2, 2A2.2,".

Appendix A (Statutory Index) is amended in the line reference to 18 U.S.C. §1091 by striking "2H1.3" and inserting "2H1.1".

## **CRIMINAL HISTORY**

6. Synopsis of Proposed Amendment: The proposed amendment modifies §4A1.2(a) to

clarify the meaning of the term “arrest” as used in determining whether an intervening arrest causes two prior sentences to be counted separately or as a single sentence. First, the proposed amendment provides that an intervening arrest includes an attempted service of an arrest warrant where the defendant escapes the arrest or the service of the arrest warrant. Second, the proposed amendment provides that the issuance of a summons or complaint does not constitute an arrest.

Section 4A1.2(a)(2) is amended by adding at the end the following:

"An ‘arrest’ includes an attempted service of an arrest warrant where the defendant escapes the arrest or the service of the arrest warrant. The issuance of a summons or a complaint does not constitute an ‘arrest’."

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 3 by striking "Upward Departure Provision" and inserting "Multiple Prior Sentences".

## **IMMIGRATION**

7. Synopsis of Proposed Amendment: The following proposed amendment addresses issues related to §2L1.2 (Unlawfully Entering or Remaining in the United States).

Option 1 addresses discrete application issues identified through comment to the Commission as well as through an analysis of applicable circuit case law. Specifically,

Option 1 addresses issues related to the definitions of “crime of violence” and “drug trafficking offense.”

Within Option 1, sub-option A (Crime of Violence) provides new language in §2L1.2(b)(1)(A)(iii) and (b)(1)(B) to provide a graduated enhancement of 16 or 12 levels for "an offense that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense." Specific offense characteristic (b)(1)(A)(iii) provides an increase of 16 levels if the sentence imposed for such conviction exceeded 13 months. Specific offense characteristic (b)(1)(B) provides an increase of 12 levels if the sentence imposed for such conviction was 13 months or less. Sub-option A (Crime of Violence) also adds a definition to Application Note 1(B)(iii) for “forcible sex offenses.”

Sub-option B (Crime of Violence) deletes the definition of “crime of violence” in Application Note 1(B)(iii) and defines “crime of violence” as “an offense described in 8 U.S.C. § 1101(a)(43)(A) and (F), except an offense against the property of another.” The aggravated felony definition at 8 U.S.C. § 1101(a)(43)(A) includes convictions for murder, rape and sexual abuse of a minor, and 8 U.S.C. § 1101(a)(43)(F) refers to the definition of “crime of violence” found at 18 U.S.C. § 16. The definition of “crime of violence” at 18 U.S.C. § 16 is “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that

physical force against the person or property of another may be used in the course of committing the offense.” Option B limits the scope of 8 U.S.C. § 1101(a)(43)(F) to exclude "an offense against the property of another" for purposes of the enhancement.

Option 1 provides two sub-options regarding the definition of “drug trafficking offense” in Application Note 1(B)(iv). Sub-option A (Drug Trafficking Offenses) amends the definition of “drug trafficking offense” in Application Note 1(B)(iv) by adding the terms “[transportation,] or offer to sell” to the definition. Sub-option B (Drug Trafficking Offenses) amends the definition of “drug trafficking offense” by deleting the current definition in Application Note 1(B)(iv) and referring to the aggravated felony definition of “drug trafficking crime” as defined in 18 U.S.C. § 924(c).

Option 1 also provides a new departure provision that “in a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for a drug possession [Sub-option A (Drug Trafficking Offenses): or transportation] [Sub-option B (Drug Trafficking Offenses): , transportation, or offer to sell] offense involving a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted.”

Option 1 also provides a new downward departure provision for cases in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43).

Option 2 provides a base offense level of [12] [14] [16] and four specific offense characteristics. Subsection (b)(1) provides an increase of [4] [6] levels if the defendant previously was deported or unlawfully remained in the United States after a conviction for which the sentence imposed exceeded 24 months. Subsection (b)(2) provides an increase of 4 levels, and a minimum offense level of 24, if the defendant previously was deported or unlawfully remained in the United States after a conviction for a national security or terrorism offense, or an offense of murder, rape, or sexual abuse of a minor as described in 8 U.S.C. § 1101(a)(43)(A). Subsection (b)(3) provides an increase of [4] [6] levels if the offender sustained a conviction for another felony offense subsequent to illegally reentering the United States. This enhancement does not apply to convictions for reentry (8 U.S.C. §§ 1325 or 1326) as Application Note 3 defines “another felony offense” as “any federal, state, or local offense, punishable by imprisonment for a term exceeding one year, other than a conviction under 8 U.S.C. §§ 1325 or 1326.” Finally, subsection (b)(4) provides a decrease of [4] [6] [8] levels if the defendant does not have any prior felony convictions.

Two departure considerations are also provided in Application Note 4. First, a departure may be warranted in “a case in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction.” Second, “an upward departure may be warranted in a case in which the defendant has been removed multiple times prior to committing the instant offense.”

Option 3 provides a base offense level 8. The specific offense characteristics include a 20 level increase for a prior felony conviction for a national security or terrorism offense under §2L1.2(b)(1)(A). A prior felony conviction for murder, rape, child pornography, or child sexual abuse offense results in a 16 level increase under §2L1.2(b)(1)(B)(i). The option also has bracketed two enumerated offenses that result in a 16 level increase under §2L1.2(b)(1)(B)(i), kidnapping and human trafficking offenses. Additionally, a prior felony conviction resulting in a sentence of 48 months, or two prior felony convictions each resulting in a sentence of imprisonment exceeding [12][13] months, results in a 16 level increase under §2L1.2(b)(1)(B)(ii) and (iii). If the prior felony conviction resulted in a sentence less than 48 months but more than 24 months, an increase of 12 levels applies under §2L1.2(b)(1)(C). A prior felony conviction resulting in a sentence of imprisonment exceeding [12] [13] months results in an 8 level increase under §2L1.2(b)(1)(D). Finally, under §2L1.2(b)(1)(E) any prior felony conviction, regardless of the sentence imposed, or any three prior convictions, each resulting in a sentence of imprisonment of at least 60 days, results in a 4 level increase.

This proposed amendment also includes an issue for comment.

[Sub-option 1(A)(Crime of Violence): Section 2L1.2(b) is amended by striking subdivisions (A) and (B) and inserting the following:

"(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) an offense that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense, for which the sentence imposed exceeded 13 months; (iv) a firearms offense; (v) a child pornography offense; (vi) a national security or terrorism offense; (vii) a human trafficking offense; or (viii) an alien smuggling offense, increase by 16 levels;

- (B) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed was 13 months or less; or (ii) an offense that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense, for which the sentence imposed was 13 months or less, increase by 12 levels;"

[Sub-option A (Crime of Violence): The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 1 in the paragraph that begins "(iii) 'Crime of violence' means" by adding at the end the following:

"'Forcible sex offense' includes any sex offense in which consent to the conduct was not given, or was not given voluntarily and/or competently.".]

[Sub-option B (Crime of Violence): The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 1 by striking the paragraph that begins "(iii) 'Crime of

violence' means" and inserting the following:

"(iii) 'Crime of violence' means an offense described in 8 U.S.C. § 1101(a)(43)(A) or (F), except an offense against the property of another.".]

[Sub-option A (Drug Trafficking Offenses): The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 1 in the paragraph that begins (iv) 'Drug trafficking offense' means" by striking "or dispensing" and inserting "dispensing, [transportation,] or offer to sell".

[Sub-option B (Drug Trafficking Offenses): The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 1 by striking the paragraph that begins (iv) 'Drug trafficking offense' means" and inserting the following:

"(iv) 'Drug trafficking offense' means a 'drug trafficking crime' as defined in 18 U.S.C. § 924(c).".

The Commentary to §2L1.2 captioned "Application Notes" is amended by adding at the end the following:

"7. Departure Considerations.—



(A) In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for a drug possession [Sub-option A (Drug Trafficking Offenses): or transportation] [Sub-option B (Drug Trafficking Offenses): , transportation, or offer to sell] offense involving a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted.

[(B) In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted.".]

[Option 2: Chapter Two, Part L, Subpart One, is amended by striking §2L1.2 and its accompanying commentary and inserting the following:

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

(a) Base Offense Level: [12] [14] [16]

(b) Specific Offense Characteristics

(1) If the defendant previously was deported, or unlawfully remained in the United States, after a conviction for a

felony for which the sentence imposed exceeded 24 months, increase by [4 ][6] levels.

- (2) If the defendant previously was deported, or unlawfully remained in the United States after a conviction for a felony that is (A) a national security or terrorism offense; or (B) an offense described in 8 U.S.C. § 1101(a)(43)(A); increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.
- (3) If the defendant has sustained a conviction for another felony offense that was committed subsequent to illegally reentering the United States, increase by [4][6] levels.
- (4) If the defendant does not have any prior felony convictions, decrease the offense level by [4][6][8] levels.

#### Commentary

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

Application Notes:

1. Definition.— For purposes of this guideline, ‘felony’ means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.
2. Computation of Criminal History Points.—A conviction taken into account under subsection (b) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).
3. Application of Subsection (b)(3).—

‘Another felony offense’ means any federal, state, or local offense, punishable by imprisonment for a term exceeding one year, other than a conviction under 8 U.S.C. §§ 1325 or 1326.

[Option A: For purposes of applying subsection (b)(3), do not consider any conviction taken into account under subsection (b)(1) or (b)(2).][Option B: A prior conviction taken into account under subsection (b)(1) or (b)(2) is not excluded from consideration under subsection (b)(3).]

4. Departure Considerations.

- (A) In a case in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction, a departure may be warranted.
  
- (B) In a case in which the defendant has been removed multiple times prior to committing the instant offense, an upward departure may be warranted."

[Option 3: Chapter Two, Part L, Subpart One, is amended by striking §2L1.2 and its accompanying commentary and inserting the following:

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

- (a) Base Offense Level: 8
  
- (b) Specific Offense Characteristic
  - (1) (Apply the Greatest):

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

- (A) a prior felony conviction for a national security offense or terrorism offense, increase by 20 levels;
- (B) (i) a prior felony conviction for murder, rape, [kidnapping,][a human trafficking offense,] a child pornography offense, or an offense of child sexual abuse; (ii) a prior felony conviction resulting in a sentence of imprisonment of at least 48 months; or (iii) two prior felony convictions each resulting in a sentence of imprisonment exceeding [12][13] months, increase by 16 levels;
- (C) a prior felony conviction resulting in a sentence of imprisonment of at least 24 months, increase by 12 levels;
- (D) a prior felony conviction resulting in a sentence of imprisonment exceeding [12][13] months, increase by 8 levels;
- (E) a prior felony conviction not covered by

subdivisions (A) through (D), or any three prior convictions each resulting in a sentence of imprisonment of at least 60 days, increase by 4 levels.

### Commentary

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

### Application Notes:

1. Application of Subsection (b)(1).—

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

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

the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

- (iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.
- (iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was 18 years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

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

- (i) "Child pornography offense" means an offense (I) described in 18 U.S.C. §§ 2251, 2251A, 2252, 2252A, or 2260; or (II) 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 or territorial jurisdiction of the United States.
- (ii) "Felony" means any federal, state, or local offense punishable by

imprisonment for a term exceeding 12 months.

- [(iii) "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.]
  
- (iv) "Murder" means an offense (I) covered by §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder); or (II) under state or local law consisting of conduct that would have been an offense under 18 U.S.C. § 1111 if the offense had taken place within the territorial or maritime jurisdiction of the United States.
  
- (v) "National security offense" means an offense covered by Chapter Two, Part M (Offenses Involving National Defense and Weapons of Mass Destruction).
  
- (vi) "Offense of child sexual abuse" means an offense in which the victim had not attained the age of 18 years and that is any of the following: (I) an offense described in 18 U.S.C. § 2242; (II) a



forcible sex offense; or (III) sexual abuse of a minor, except that this term does not include statutory rape.

(vii) "Sentence of imprisonment" has the meaning given that term in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment imposed 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. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiracy to commit, and attempting to commit such offenses.
3. Multiple Prior Sentences.—Sentences of imprisonment are counted separately or as a single sentence as provided by §4A1.2.
4. Interaction with Chapter Four.—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).".

**Issue for Comment**

1. Should any of the specific offense characteristics and departure provisions in one option be adopted by the Commission as part of another option? If so, which provisions should be incorporated into which option?

**COURT SECURITY IMPROVEMENT ACT OF 2007**

8. **Issue for Comment**

1. The Commission requests comment regarding two new offenses created by the Court Security Improvement Act of 2007, Pub. L. 110–177. Specifically, the Commission requests comment regarding whether the Commission should amend Appendix A (Statutory Index) to refer these new provisions to existing guidelines, and if so, to what guideline(s) should each new offense be referenced?

The new provision at 18 U.S.C. § 1521 prohibits the filing of, attempts, or conspiracies to file, any false lien or encumbrance against the real or personal

property of officers or employees of the United States Government, on account of that individual's performance of official duties. The offense is punishable by a maximum term of 10 years of imprisonment. Are there existing guidelines that would be appropriate to cover violations of the new provision at 18 U.S.C. § 1521? For example, should violations of 18 U.S.C. § 1521 be referenced to §2J1.2 (Obstruction of Justice), or alternatively or additionally to §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)? What, if any, specific offense characteristics should be added? Should an application note be added instructing courts to apply §3A1.2 (Official Victim)?

The new provision at 18 U.S.C. § 119 prohibits the public disclosure of restricted personal information about a federal officer or employee, witness, juror, or the immediate family member of such persons, with the intent to threaten or facilitate a crime of violence against such person. The offense is punishable by a maximum term of 5 years of imprisonment. Are there existing guidelines that would be appropriate to cover violations of the new provision at 18 U.S.C. § 119 (Protection of individuals performing certain official duties)? For example, should the new provision be referenced to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected

Information); or alternatively or additionally to the assault guidelines in Chapter Two, Part A (Offenses Against the Person)? What, if any, specific offense characteristics should be added? Should an application note be added instructing courts to apply §3A1.2 (Official Victim)?

2. Section 209 of the Act directs the Commission to “review the Sentencing Guidelines as they apply to threats punishable under section 115 of title 18, United States Code, that occur over the Internet, and determine whether and by how much that circumstance should aggravate the punishment pursuant to section 994 of title 28, United States Code. In conducting the study, the Commission shall take into consideration the number of such threats made, the intended number of recipients of such threats, and whether the initial senders of such threats were acting in an individual capacity or as part of a larger group.” How should the Commission respond to the directive? What are the aggravating circumstances in such offenses, and how should the Commission address those circumstances?