



Proposed Amendments to the Sentencing Guidelines

January 24, 2008

This compilation contains unofficial text of proposed amendments to the sentencing guidelines, policy statements, and commentary, and to the Commission's Rules of Practice and Procedure, 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 the January 28, 2008 edition of the Federal Register.

INDEX

AMENDMENT	PAGE NO.
1. Repromulgation of the Emergency Disaster Fraud Amendment.....	1
2. Honest Leadership and Open Government Act of 2007.....	5
3. Miscellaneous Food and Drug Offenses.....	6
4. Animal Fighting Prohibition Enforcement Act of 2007.....	11
5. Technical Amendment.....	13
6. Criminal History.....	17
7. Immigration.....	18
8. Court Security Improvement Act of 2007.....	28
9. Rules of Practice and Procedure.....	29

2008 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

1. Repromulgation of the Emergency Disaster Fraud Amendment

The following proposed amendment was promulgated as a temporary, emergency amendment with an effective date of February 6, 2008. The Commission has proposed to repromulgate this temporary, emergency amendment as a permanent amendment to be submitted to the Congress on May 1, 2008 with an effective date of November 1, 2008

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.

Proposed Amendment:

§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

- (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.

* * *

Commentary

* * *

Application Notes:

3.

* * *

- (III) Offenses Under 18 U.S.C. § 1030.—*In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.*

- (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.

* * *

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.

156. * * *

167. * * *

178. * * *

189. * * *

1920. * * *

Background: * * *

Subsection (b)(14) implements the directive in section 225(b) of Public Law 107–296. The minimum offense level of level 24 provided in subsection (b)(14)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.

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

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 1039 2H3.1

18 U.S.C. § 1040 2B1.1

18 U.S.C. § 1071 2X3.1

* * *

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?*

2. Honest Leadership and Open Government Act of 2007

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).

§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

* * *

Commentary

Statutory Provisions: 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3; 18 U.S.C. §§ 201(b)(1), (2), 226, 227, 371 (if conspiracy to defraud by interference with governmental functions), 872, 1341 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1342 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1343 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1951. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 226	2C1.1
18 U.S.C. § 227	2C1.1
18 U.S.C. § 228	2J1.1

* * *

3. Miscellaneous Food and Drug Offenses

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.

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 defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance or human growth hormone through mass-marketing by means of an interactive computer service, increase by **2** levels.

* * *

Commentary

Statutory Provisions: 21 U.S.C. §§ 333(e)(1), 841(a), (b)(1)-(3), (7), (g), 860a, 865, 960(a), (b); 49 U.S.C. § 46317(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

* * *

10. Use of Drug Equivalency Tables.—

* * *

(E) Drug Equivalency Tables.—

* * *

Schedule III Substances (except ketamine)***

1 unit of a Schedule III Substance = 1 gm of marihuana

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

[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.]

Ketamine

1 unit of ketamine = 1 gm of marihuana

Schedule IV Substances (except flunitrazepam)*****

1 unit of a Schedule IV Substance (except Flunitrazepam)= 0.0625 gm of marihuana

******Provided*, that the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 4.99 kilograms of marihuana.

Schedule V Substances*****

1 unit of a Schedule V Substance = 0.00625 gm of marihuana

******Provided*, that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana.

List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)*****

1 gm of Ephedrine = 10 kg of marihuana
1 gm of Phenylpropanolamine = 10 kg of marihuana
1 gm of Pseudoephedrine = 10 kg of marihuana

******Provided*, that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

* * *

§2D1.2. Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy

* * *

Commentary

Statutory Provisions: 21 U.S.C. §§ 333(e)(2), 859 (formerly 21 U.S.C. § 845), 860 (formerly 21 U.S.C. § 845a), 861 (formerly 21 U.S.C. § 845b).

* * *

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

- (a) Base Offense Level: **6**
- (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.**
- (b)(c) Cross References

Application Notes:

* * *

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

- (A) *The offense created a substantial risk of bodily injury or death, ~~Death~~ or bodily injury, extreme psychological injury, property damage, or monetary loss resulted from the offense. See Chapter Five, Part K (Departures).*

* * *

4. ~~*The Commission has not promulgated a guideline for violations of 21 U.S.C. § 333(e) (offenses involving human growth hormones).*~~ *Offenses involving anabolic steroids are covered by Chapter Two, Part D (Offenses Involving Drugs and Narco-Terrorism). In the case of an offense involving a substance purported to be an anabolic steroid, but not containing any active ingredient, apply §2B1.1 (Theft, Property Destruction, and Fraud) with "loss" measured by the amount paid, or to be paid, by the victim for such substance.*

* * *

Appendix A (Statutory Index)

21 U.S.C. § 333(b) 2N2.1
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?*

4. Animal Fighting Prohibition Enforcement Act of 2007

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.

§2E3.1. Gambling Offenses; Animal Fighting Offenses

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

- (1) 12**, if the offense was (A) engaging in a gambling business; (B) transmission of wagering information; or (C) committed as part of, or to facilitate, a commercial gambling operation; or
- (2) [8][10]**, if the offense involved an animal fighting venture; or
- (23) 6**, otherwise.

Commentary

Statutory Provisions: 7 U.S.C. § 2156; 15 U.S.C. §§ 1172-1175; 18 U.S.C. §§ 1082, 1301-1304, 1306, 1511, 1953, 1955; 31 U.S.C. § 5363. For additional statutory provision(s), see Appendix A (Statutory Index).

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

7 U.S.C. § 2156 ~~2X5.22E3.1~~

5. Technical Amendment

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 3559.

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 21st 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.

Proposed Amendment

§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

* * *

- (11) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

* * *

§2E4.1. Unlawful Conduct Relating to Contraband Cigarettes and Smokeless Tobacco

* * *

Commentary

* * *

Application Note:

- 1. "Tax evaded" refers to state and local excise taxes.

Background: The conduct covered by this section generally involves evasion of state and local excise taxes. At least 10,000 cigarettes must be involved. Because this offense is basically a tax matter, it is graded by use of the tax table in §2T4.1.

§2X7.1. Border Tunnels and Subterranean Passages

(a) Base Offense Level:

- (1) If the defendant was convicted under 18 U.S.C. § 5545(c), 4 plus the

offense level applicable to the underlying smuggling offense. If the resulting offense level is less than level **16**, increase to level **16**.

- (2) **16**, if the defendant was convicted under 18 U.S.C. § 5545(a); or
- (3) **8**, if the defendant was convicted under 18 U.S.C. § 5545(b).

Commentary

Statutory Provision: 18 U.S.C. § 5545.

* * *

Appendix A (Statutory Index)

* * *

18 U.S.C. § 554 (Smuggling goods from the United States)	2B1.5, 2M5.2, 2Q2.1
18 U.S.C. § 5545 (Border tunnels and passages)	2X7.1

§3C1.4. False Registration of Domain Name

If a statutory enhancement under 18 U.S.C. § 3559(fg)(1) applies, increase by **2** levels.

* * *

Appendix A (Statutory Index)

* * *

18 U.S.C. § 1511	2E3.1, 2J1.2
18 U.S.C. § 1512(a)	2A1.1, 2A1.2, 2A1.3, 2A2.1, 2A2.2, 2A2.3, 2J1.2
18 U.S.C. § 1512(b)	2A1.2, 2A2.2 , 2J1.2
18 U.S.C. § 1512(c)	
18 U.S.C. § 1512(d)	

Appendix A (Statutory Index)

* * *

18 U.S.C. § 1091	2H1.3 2H1.1
------------------	------------------------

* * *

6. Criminal History

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.*

Proposed Amendment:

§4A1.2. Definitions and Instructions for Computing Criminal History

(a) Prior Sentence

* * *

For purposes of applying §4A1.1(a), (b), and (c), if prior sentences are counted as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

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".

* * *

Commentary

Application Notes:

* * *

3. Multiple Prior Sentences Upward Departure Provision.—Counting multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant’s criminal history and the danger that the defendant presents to the public. In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were counted as a single sentence because either the sentences resulted from offenses contained in the same charging instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single set of points may not adequately reflect the seriousness of the defendant’s criminal history or the frequency with which the defendant has committed crimes.

* * *

7. Immigration

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.

Option 1

§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—

[Sub-option 1(A)(Crime of Violence):

- (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;
- (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

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. 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.

[Sub-option A (Crime of Violence):

- (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. "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):

- (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~~ 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):

- (iv) "Drug trafficking offense" means an offense under federal, state, or local law that ~~prohibits the manufacture, import, export, distribution, or dispensing,~~ [transportation,] or offer to sell 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.

[Sub-option B (Drug Trafficking Offenses):

- (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.~~ means a "drug trafficking crime" as defined in 18 U.S.C. § 924(c).
- (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. 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 counted as a single sentence pursuant to subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History).
 5. 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. 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).

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?

8. Court Security Improvement Act of 2007

Issues 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?*

9. Commission's Rules of Practice and Procedure

Synopsis of Proposed Amendment: *This proposed amendment modifies the Commission's Rules of Practice and Procedure pertaining to retroactivity consideration. Currently, Rule 4.1 (Promulgation of Amendments) provides that "in those cases in which the Commission considers an amendment for retroactive application to previously sentenced, imprisoned defendants, it shall decide whether to make the amendment retroactive at the same meeting at which it decides to promulgate the amendment." Deciding whether to make an amendment retroactive at the same meeting at which the amendment is promulgated, however, often is impracticable. A complete retroactivity analysis typically cannot be prepared until the Commission has decided to promulgate a specific amendment option, which may not occur until the meeting at which the amendment is promulgated. Similarly, the public often cannot provide fully informed comment on possible retroactivity until the Commission has narrowed its consideration of a proposed amendment to a specific option, again a decision which may not occur until the meeting at which the amendment is promulgated. As a result, the proposed amendment deletes the requirement in Rule 4.1 that the retroactivity decision be made at the same meeting as promulgation of an amendment.*

The proposed amendment also amends Rule 4.1 to more clearly set forth the Commission's statutory requirement to consider retroactivity under 28 U.S.C. § 994(u).

The proposed amendment also modifies the process by which the Commission instructs staff to prepare a retroactivity impact analysis. Currently, Rule 2.2 (Voting Rules for Action by the Commission) provides that "[t]he decision to instruct staff to prepare a retroactivity impact analysis for a proposed amendment shall require the affirmative vote of at least three members at a public meeting." The proposed amendment would delete this requirement by amending Rule 4.1 to provide that "[p]rior to final action on the retroactive application of an amendment, staff shall prepare and the Commission shall review a retroactivity impact analysis of the amendment". The proposed amendment therefore, deletes the procedural requirement that the Commission instruct staff to prepare a retroactivity analysis and instead requires that such an analysis be prepared prior to final action on retroactivity.

Finally, one issue for comment follows the proposed amendment.

Rule 2.2 – Voting Rules for Action by the Commission

Except as otherwise provided in these rules or by law, action by the Commission requires the affirmative vote of a majority of the members at a public meeting at which a quorum is present. A quorum shall consist of a majority of the members then serving. Members shall be deemed "present" and may participate and vote in meetings from remote locations by electronic means, including telephone, satellite, and video conference devices.

Promulgation of guidelines, policy statements, official commentary, and amendments thereto shall require the affirmative vote of at least four members at a public meeting. See 28 U.S.C. § 994(a).

Publication for comment of proposed amendments to guidelines, policy statements, or official commentary shall require the affirmative vote of at least three members at a public meeting.

~~The decision to instruct staff to prepare a retroactivity impact analysis for a proposed amendment shall require the affirmative vote of at least three members at a public meeting.~~

Action on miscellaneous matters may be taken without a meeting based on the affirmative vote, by written or oral communication, of a majority of the members then serving. Such matters include the approval of budget requests, legal briefs, staff reports, analyses of legislation, administrative and personnel issues,

notices regarding Commission amendment priorities, technical and clerical amendments to these rules, and decisions to hold a nonpublic meeting.

A motion to reconsider Commission action may be made only by a commissioner on the prevailing side of the vote for which reconsideration is sought, or who did not vote on the matter. Four votes are necessary to reconsider a Commission vote on any question on which a four-vote majority is required.

Rule 4.1 – Promulgation of Amendments

The Commission may promulgate and submit to Congress amendments to the guidelines after the beginning of a regular session of Congress and not later than May 1 of that year. Amendments shall be accompanied by an explanation or statement of reasons for the amendments. Unless otherwise specified, or unless Congress legislates to the contrary, amendments submitted for review shall take effect on the first day of November of the year in which submitted. 28 U.S.C. § 994(p). At other times, pursuant to special statutory enactment, the Commission may promulgate amendments to accomplish identified congressional objectives.

Amendments to policy statements and commentary may be promulgated and put into effect at any time. However, to the extent practicable, the Commission shall endeavor to include amendments to policy statements and commentary in any submission of guideline amendments to Congress and put them into effect on the same November 1 date as any guideline amendments issued in the same year. Generally, promulgated amendments will be given prospective application only. ~~However, in those cases in which the Commission considers an amendment for retroactive application to previously sentenced, imprisoned defendants, it shall decide whether to make the amendment retroactive at the same meeting at which it decides to promulgate the amendment. Prior to final Commission action on the retroactive application of an amendment, the Commission shall review the retroactivity impact analysis prepared pursuant to Rule 2.2, supra.~~ The Commission shall, however, consider whether to give retroactive application to an amendment that reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses. See 28 U.S.C. § 994(u). Prior to final action on the retroactive application of an amendment, staff shall prepare and the Commission shall review a retroactivity impact analysis of the amendment.

Issue for Comment

Should the Commission amend the Commission’s Rules of Practice and Procedure to provide a specified time frame governing final action with respect to retroactive application of an amendment pursuant to 28 U.S.C. § 994(u), and, if so, what should the time frame be? For example, should the rules provide a time frame that begins at the date of promulgation or the effective date of the amendment? Should the time frame specify a certain period of days by which final action should be taken, or should the time frame be more general in nature?