

Summary of 2016 Amendments to the Sentencing Guidelines

National Sentencing Resource Counsel Project¹

On April 15, 2016, the Sentencing Commission voted to promulgate amendments to the guidelines. These amendments were submitted to Congress on April 28, 2016. Barring congressional action, they will take effect November 1, 2016. This memorandum contains a summary of the most relevant changes. Please be sure to read the actual language of the [amendments](#) available on the Commission's website.²

Because the amendments will not become effective until November 1, 2016, arguments made before then that are based upon the changes must be in the form of a variance. Although some of the amendments will reduce sentences, the Commission declined to consider whether they should be made retroactive.

I. Immigration (Illegal Reentry and Alien Smuggling)

A. Illegal Reentry (§2L1.2)

The Commission made significant changes to the illegal reentry guideline. Commission data shows that the changes will help some defendants and hurt others, so a careful review of the amendment is critical in every case to determine variance arguments and/or whether to seek to continue a sentencing until after the effective date. There is no shortcut to a side-by-side comparison of how the current and new guidelines will affect any particular defendant.

Some things about the new guideline stay the same as the current one: (1) the base offense level remains at 8; and (2) the guideline remains focused on increasing the offense level based on what a defendant has done in the past (*in addition* to criminal history). But almost everything else changes with the amendment to §2L1.2.

Summary of Changes

Enhancements are no longer based exclusively on the nature of a pre-deportation conviction. Now enhancements are based on three separate categories of prior convictions that apply cumulatively: (1) prior illegal reentry offenses (felonies and 2 or more misdemeanors); *and* (2) prior offenses other than illegal reentry (felonies and 3 or more misdemeanors) that

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² A reader-friendly version of the amendments is available here: http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160415_RF_Prelim.pdf.

occurred before the defendant was ordered removed from the United States for the first time; for felonies, the increase in offense level is based on the length of sentence imposed; for misdemeanors, the increase is based on the type of offense (categorical); *and* (3) prior offenses other than illegal reentry (felonies and 3 or more misdemeanors) that occurred after the defendant's first order of removal or deportation; for felonies, the increase in offense level is based on the length of sentence imposed; for misdemeanors, the increase is based on the type of offense (categorical). The prior offenses in each of these three categories only count for enhancement purposes if they also count under the criminal history rules in §4A1.1(a), (b), and (c), which means, for example, that some prior convictions will be too old to count against defendants for purposes of the new enhancements. The commentary to the new guideline, however, makes clear that not all of Chapter 4 applies to this guideline. It specifies that in cases where sentences for an illegal reentry offense and another felony were imposed at the same time and treated as a single sentence for purposes of calculating the criminal history score, both the illegal reentry conviction and the felony conviction count for purposes of the enhancements in §2L1.2 if each independently would receive criminal history points.

To calculate the new guideline range, the following information is required:

- Any prior **felony** convictions for **illegal reentry** offense?
 - Do they qualify for criminal history points under §4A1.1(a), (b), or (c)?
- Two or more convictions for **misdemeanors** under **§ 1325**?
 - Do they qualify for criminal history points under §4A1.1(a), (b), or (c)?
 - Were the sentences for the misdemeanor offenses counted separately under §4A1.2(a)(2)?
- Date of first final order of exclusion, deportation, or removal (regardless of whether the order was in response to a conviction)?
- Any **felony** convictions *before* the first order of exclusion, deportation, or removal?
 - If so, how long was the sentence imposed, including any term of imprisonment given upon revocation of probation, parole, or supervised release?
 - Did the felony conviction qualify for criminal history points under §4A1.1(a), (b), or (c)?
 - If more than one felony conviction, were the sentences counted separately under §4A1.2(a)(2)?
- Three or more convictions for **misdemeanors** *before* the first order of exclusion, deportation, or removal that meet the definition for “drug trafficking offense” or the *new* definition of “crime of violence”?
 - Do they qualify for criminal history points under §4A1.1(a), (b), or (c)?
 - Were the sentences for the misdemeanor offenses counted separately under §4A1.2(a)(2)?

- Any **felony** convictions *after* the first order of exclusion, deportation, or removal?
 - If so, how long was the sentence imposed, including any term of imprisonment given upon revocation of probation, parole, or supervised release?
 - Did the felony conviction qualify for criminal history points under §4A1.1(a), (b), or (c)?
 - If more than one felony conviction, were the sentences counted separately under §4A1.2(a)(2)?
- Three or more convictions for **misdemeanors** *after* the first order of exclusion, deportation, or removal that meet the definition for “drug trafficking offense” or the *new* definition of “crime of violence”?
 - Do they qualify for criminal history points under §4A1.1(a), (b), or (c)?
 - Were the sentences for the misdemeanor offenses counted separately under §4A1.2(a)(2)?

Details of Changes

1. New enhancements for prior illegal reentry offenses, §2L1.2(b)(1)

Prior convictions for illegal reentry offenses (8 U.S.C. § 1253 or § 1326 or a second or subsequent conviction under 8 U.S.C. § 1325(a)) now count *separately and in addition to* other prior convictions (addressed in §2L1.2(b)(2) & (b)(3)) to increase the offense level (as well as the criminal history score).

Apply the greater:

+4 if defendant committed instant offense after sustaining a conviction for a **felony** that is an illegal reentry offense, and the prior felony illegal reentry offense receives criminal history points under §4A1.1(a), (b), or (c).

OR

+2 if defendant committed instant offense after sustaining **two or more** convictions for **misdemeanors** under 8 U.S.C. § 1325(a), and the prior § 1325 misdemeanors receive criminal history points under §4A1.1(a), (b), or (c), *and* are counted separately under §4A1.2(a)(2).

2. Changes to enhancements for pre-deportation/removal convictions (other than illegal reentry), §2L1.2(b)(2)

While the idea of enhancements based on pre-deportation/removal convictions is familiar, the amendment still brings big changes to this area. Now, for prior pre-deportation/removal **felony** offenses, instead of using the categorical approach to enhance on the basis of the type of prior offense, the guideline looks only to the length of sentence imposed for the felony conviction.

For prior pre-deportation/removal **misdemeanor** offenses, however, the categorical approach is alive and well and the guideline continues to provide for enhancements based on the type of prior misdemeanor, rather than the length of the sentence imposed on the misdemeanor.

This category of enhancements applies *in addition* to the prior illegal reentry offenses discussed above *and* the category of offenses discussed below.

Apply the greater:

+10 if before the defendant was ordered deported or removed from the United States *for the first time*, the defendant sustained a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was **five years** or more; or

+8 if before the defendant was ordered deported or removed from the United States *for the first time*, the defendant sustained a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was **two years** or more; or

+6 if before the defendant was ordered deported or removed from the United States *for the first time*, the defendant sustained a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed **exceeded one year and one month**; or

+4 if before the defendant was ordered deported or removed from the United States *for the first time*, the defendant sustained a conviction for **any other felony offense** (other than an illegal reentry offense) ; or

+2 if before the defendant was ordered deported or removed from the United States *for the first time*, the defendant sustained **three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses**.

3. New enhancement for convictions that occurred after the defendant's first order of deportation/removal (other than illegal reentry), §2L1.2(b)(3)

The third category of prior convictions is for those that occurred *after* the defendant's first order of deportation or removal. Again, it is critical to note that this category of enhancements applies *in addition* to the enhancements for prior illegal reentry offenses, and the enhancements for convictions that occurred before the first deportation/removal order. The tiered enhancements for post-first order of deportation/removal track those for the pre-first order of deportation/removal.

Apply the greater:

+10 if at any time after the defendant was ordered deported or removed from the United States *for the first time*, the defendant sustained a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was **five years** or more; or

+8 if at any time after the defendant was ordered deported or removed from the United States *for the first time*, the defendant sustained a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was **two years** or more; or

+6 if at any time after the defendant was ordered deported or removed from the United States *for the first time*, the defendant sustained a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed **exceeded one year and one month**; or

+4 if at any time after the defendant was ordered deported or removed from the United States *for the first time*, the defendant sustained a conviction for **any other felony offense** (other than an illegal reentry offense) ; or

+2 if at any time after the defendant was ordered deported or removed from the United States *for the first time*, the defendant sustained **three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses**.

4. Interaction between the enhancements in §2L1.2 and the criminal history rules

For all three categories of enhancements discussed above, the prior convictions count against a defendant for enhancement purposes only if the priors receive criminal history points under §4A1.1(a), (b), and (c). This means, for example, that if a prior conviction in any of these categories is over 10 or 15 years old, it may not count against the defendant for purposes of this enhancement.³

The amendment adds a special rule about the situation where a prior sentence for a **felony illegal reentry** offense was imposed at the same time as **another prior felony** offense. Under the special §2L1.2 rule, even if those two priors count as a single sentence for purposes of calculating the criminal history score, they are to be treated separately for purposes of applying the enhancements and the illegal reentry offense is to be used in determining the enhancement under the new (b)(1) if it independently would have received criminal history

³ See §2L1.2, comment., (n.3); §4A1.2(e) (discussing applicable time period for counting prior sentences).

points, and the other felony is to be used in determining the enhancement under the new (b)(3) if it independently would have received criminal history points.⁴

For **misdemeanor** § 1325 illegal reentry convictions, however, the commentary to the new guideline instructs that they should not be counted for purposes of the enhancement under (b)(1) unless they are counted separately under §4A1.2(a)(2).⁵

The term “sentence imposed” – used to determine the extent of the enhancement under the new (b)(2) and (b)(3) for prior felony convictions pre- and post-deportation/removal – is defined to mean the same thing as “sentence of imprisonment” as it is defined in §4A1.2(b) & §4A1.2, comment. (n.2) (sentence of incarceration and portion of sentence not suspended), and “includes any term of imprisonment given upon revocation of probation, parole, or supervised release.”

5. First order of deportation or removal

The application of the enhancements in (b)(2) and (b)(3) is tied to when a defendant was “ordered deported or ordered removed from the United States for the first time.” The commentary to the amended guideline defines “ordered deported or ordered removed from the United States” to mean “if the defendant was ordered deported or ordered removed from the United States based on a final order of exclusion, deportation, or removal, regardless of whether the order was in response to a conviction.” The commentary defines “for the first time” to mean “the first time the defendant was ever the subject of such an order.”⁶

6. Other important definitions

Offenses committed before the age of 18. Under all three categories of enhancements, prior convictions do not count if the offense was committed before the defendant was 18-years-old

⁴ See §2L1.2, comment. (n.4).

⁵ See id.

⁶ Defenders informed the Commission that the terms “‘first deportation or first order of removal’ are confusing and determining the dates of those events would not be as easy as one might think.” For a longer discussion of this issue see *Statement of Marjorie Meyers* Before the U.S. Sentencing Comm’n, Washington, D.C., at 29-33 (Mar. 16, 2016), http://www.usc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160316/20160316_Meyers.pdf.

“unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.”⁷

“**Crime of violence.**” For misdemeanor enhancements under (b)(2) and (b)(3), the commentary to the new guideline⁸ defines “crime of violence” in a manner that tracks the recent amendment (effective Aug. 1, 2016) to the crime of violence definition in §4B1.2.⁹ This means, among other things, that the residual clause is gone.

7. Invited Departures

The amended version of §2L1.2 keeps the current invited departures for (1) time served in state custody¹⁰ and (2) cultural assimilation.¹¹ The amended guideline also retains the departure based on the seriousness of a prior offense, but changes the examples to specify that a departure may be warranted where “(A) the length of sentence imposed does not reflect the seriousness of the prior offense; (B) the prior conviction is too remote to receive criminal history points (*see* §4A1.2(e)); or (C) the time actually served was substantially less than then length of the sentence imposed for the prior offense.”¹²

B. Alien Smuggling, §2L1.1

The Commission’s amendments to §2L1.1 make changes in two primary areas: (1) the enhancement for smuggling unaccompanied minors at §2L1.1(b)(4), and (2) application of the enhancements at §2L1.1(b)(6) & (b)(7) for bodily injury in cases involving sexual abuse.

Unaccompanied minors. The Commission made 4 changes. First, the enhancement is now a 4-level increase rather than a 2-level increase.¹³ Second, in the only glimmer of good news with the amendment, the definition of “unaccompanied” is narrowed by excluding those who are accompanied not only by the minor’s parents and grandparents (as the guideline currently provides) but also those who are accompanied by any of the minor’s “adult relative[s]” or by

⁷ *See* §2L1.2, comment. (n.1(B)).

⁸⁸ *Id.* at comment. (n.2).

⁹ A reader-friendly version of this amendment is available here: http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160121_RF.pdf.

¹⁰ *See* §2L1.2, comment. (n.6).

¹¹ *See id.* at comment. (n.7).

¹² *Id.* at comment. (n.5).

¹³ *See* §2L1.1(b)(4).

the minor’s “legal guardian.”¹⁴ Third, moving back to bad news, the definition of “minor” is expanded to include anyone under the age of 18, whereas the current definition includes only those under the age of 16.¹⁵ Finally, the enhancement is now offense-based rather than defendant-based, by providing “[i]f the offense involved...” rather than “[i]f the defendant smuggled....”¹⁶

Criminal sexual abuse. The Commission added a note in the commentary specifying that “serious bodily injury” – a basis for enhancements in §2L1.1(b)(6) & (b)(7) – is “deemed to have occurred if the offense involved conduct constituting criminal sexual abuse.”¹⁷

II. Child Pornography

The changes to the child pornography guidelines this year affect two general areas: (1) cases involving infants and toddlers under §2G2.1 and §2G2.2; and (2) distribution enhancements under §2G2.1, §2G2.2, and §2G3.1.

Infants and Toddlers. The amendment adds a new alternative basis for a 4-level enhancement in §2G2.1(b)(4) and §2G2.2(b)(4) related to the involvement of infants or toddlers in the offense. This new enhancement for images involving infants or toddlers is an *alternative*, and should not be applied cumulatively, to the enhancement for sadistic or masochistic conduct. In addition, the commentary in both §2G2.1 and §2G2.2 is amended to direct that the vulnerable victim adjustment at §3A1.1(b) should **not** be applied if the infant/toddler enhancement applies.¹⁸

Distribution. The Commission amended §2G2.1, §2G2.2, and §2G3.1 to address the distribution enhancements. The 2-level enhancement in each of these guidelines that used to apply whenever the “offense involved distribution,” now only applies when a “defendant knowingly engaged in distribution.”¹⁹ The commentary to these guidelines indicates that these distribution enhancements will apply “if the defendant committed, aided, abetted, counseled,

¹⁴ *Id.*

¹⁵ *Id.* at comment (n.1).

¹⁶ §2L1.1(b)(4).

¹⁷ See §2L1.1, comment. (n.4).

¹⁸ See §2G2.1, comment. (n.4); §2G2.2, comment. (n.4).

¹⁹ See §2G2.1(b)(3), §2G2.2(b)(3)(F), §2G3.1(b)(1)(F).

commanded, induced, procured, or willfully cause the distribution, or conspired to distribute, and did so knowingly.”²⁰

In addition, the 5-level enhancement that used to apply under §2G2.2(b)(3)(B) and §2G3.1(b)(1)(3) if the offense involved distribution “for the receipt, or expectation of receipt, of a thing of value,” but not for pecuniary gain, now applies only if “the defendant distributed in exchange for any valuable consideration,” but not for pecuniary gain. The new commentary to these guidelines defines this new language to mean “the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other obscene material, preferential access to obscene material, or access to a child.”²¹

III. Animal Fighting

The Commission amended §2E3.1 to address animal fighting. First, the Commission increased the base offense level at §2E3.1(a) for most animal fighting ventures from 10 to 16. Only those defendants convicted under 7 U.S.C. § 2156(a)(2)(B) remain at level 10. The Commission also amended the upward departure provision to acknowledge that the new base offense levels reflect that “an animal fighting venture involves one or more violent fights between animals and that a defeated animal often is severely injured in the fight, dies as a result of the fight, or is killed afterward.” It provides for an upward departure when the guideline “substantially understates the seriousness of the offense,” and provides examples such as if “(A) the offense involved extraordinary cruelty to an animal beyond the violence inherent in such a venture (such as by killing an animal in a way that prolongs the suffering of the animal); or (B) the offense involved animal fighting on an exceptional scale (such as an offense involving an unusually large number of animals).”²²

²⁰ §2G2.1, comment. (n.3); §2G2.2, comment. (n.2); §2G3.1, comment. (n.2)

²¹ §2G2.2, comment. (n.1); §2G3.1, comment. (n.1).

²² §2E3.1, comment. (n.2).

IV. Conditions of Probation and Supervised Release²³

The Commission made several amendments to the mandatory, standard and special conditions of probation and supervised release at §5B1.3 and §5D1.3.

Mandatory.

- The condition that the defendant shall adhere to any payment schedule established by the court is now a mandatory condition (and the standard condition regarding adhering to a schedule for special assessments has been deleted).²⁴
- Simplified sex offender registration condition, which requires compliance with the Sex Offender Registration and Notification Act.²⁵

Standard.

- Changes in language regarding reporting to probation officer, which gives probation officer more discretion on reporting requirements.²⁶
- Adds knowledge requirement to condition regarding leaving the jurisdiction.²⁷
- “Answer truthfully” now specifies that “a defendant’s legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer’s question shall not be considered a violation of this condition.”²⁸
- “Following instructions” now specifies that this applies to instructions “related to the conditions of supervision.”²⁹

²³ Many of these conditions were changed in response to case law in the Seventh Circuit. Some of the new language is still subject to challenge. *See Statement of Marianne Mariano* Before the U.S. Sentencing Comm’n, Washington, D.C. (Feb. 17, 2016) <http://www.uscourts.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/FPD.pdf>.

²⁴ *See* §§5B1.3(a)(6) & 5D1.3(a)(6).

²⁵ *See* §§5B1.3(a)(9) & 5D1.3(a)(7).

²⁶ *See* §§5B1.3(c)(1) & (2) & 5D1.3(c)(1) & (2).

²⁷ *See* §§5B1.3(c)(1) & 5D1.3(c)(3).

²⁸ §§5B1.3(c)(4) & comment. (n.1); 5D1.3(c)(4) & comment. (n.1).

²⁹ §§5B1.3(c)(13) & 5D1.3(c)(13).

- Changes regarding residence condition, requiring defendant live at a place approved by the probation officer, and providing more specific direction on notice regarding any changes in residence and with whom defendant lives; includes a 72-hour grace period to notify if 10-days advance notice was not possible because of unanticipated circumstances.³⁰
- Revises employment condition to require the defendant work full time (at least 30 hours per week), or seek to do so unless excused by probation officer. It also provides more specific direction on notice regarding any changes in employment and includes a 72-hour grace period to notify if 10-days advance notice was not possible because of unanticipated circumstances.³¹
- Revises the condition regarding visits from a probation officer and in specifying what a probation officer can take, deletes the word “contraband” and replaces it with “items prohibited by the conditions of the defendant’s supervision.”³²
- Amends the condition regarding association with individuals involved in crime in a few ways including adding a mens rea requirement that the defendant “knows” the person he is communication/interacting with is engaged in criminal activity or convicted of a felony.³³
- Makes minor “stylistic” or “clerical” changes to the condition that the defendant notify the probation officer after being arrested or questioned.³⁴
- Adds the prohibition against possessing a firearm or other dangerous weapon to the list of standard conditions (previously on the list of special conditions), and revises it to specify the defendant shall not “own possess, or have access to” firearms, ammunition, destructive devices or dangerous weapons, and also provides a definition for “dangerous weapon.”³⁵

³⁰ §§5B1.3(c)(5) & 5D1.3(c)(5).

³¹ §§5B1.3(c)(7) & 5D1.3(c)(7).

³² §§5B1.3(c)(6) & 5D1.3(c)(6).

³³ §§5B1.3(c)(8) & 5D1.3(c)(8).

³⁴ §§5B1.3(c)(9) & 5D1.3(c)(9).

³⁵ §§5B1.3(c)(10) & 5D1.3(c)(10) (dangerous weapon is considered to be “anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers”).

- Amends the condition regarding acting as an informant to prohibit the defendant from acting or making an agreement to act “as a confidential human source or informant” without permission from the court.³⁶
- Amends the condition regarding the duty to notify another person or organization of any risk that the defendant may pose (removing the reference to “risks occasioned by the defendant’s criminal record or personal history or characteristics”).³⁷

Special.

- Moves the condition addressing support of dependents from the list of standard conditions to the list of special conditions and revises the language regarding government orders of child support or support for a caregiver.³⁸
- Removes the alcohol and controlled substances condition from the list of standard conditions and adds a prohibition on the use or possession of alcohol to the list of special conditions.³⁹
- The condition of supervised release that a defendant with unpaid restitution, fines, or special assessments notify the probation officer of any material change in economic circumstances is moved from the list of standard conditions to the list of special conditions.⁴⁰

V. Compassionate Release

The Commission made significant amendments to the policy statement regarding compassionate release at §1B1.13, that should be reviewed carefully by those involved in representing someone seeking compassionate release. In addition to expanding the criteria for what qualifies as an “extraordinary and compelling reason” for a sentence reduction, the Commission specifically “encourages” the Director of the Bureau of Prisons to file a motion for a reduction “if the defendant meets any of the circumstances set forth” by the Commission, commenting that the “court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction), after considering the factors set forth in 18 U.S.C. §3553(a) and the criteria set forth in this policy statement, such as the defendant’s

³⁶ §§5B1.3(c)(11) & 5D1.3(c)(11).

³⁷ USSC, Reasons for Amendment; §§5B1.3(c)(12) & 5D1.3(c)(12).

³⁸ §§5B1.3(d)(1) & 5D1.3(d)(1).

³⁹ §§5B1.3(d)(4) & 5D1.3(d)(4).

⁴⁰ §5D1.3(d)(8).

medical condition, the defendant’s family circumstances, and whether the defendant is a danger to the safety of any other person or to the community.”⁴¹

VI. Miscellaneous

A. USA FREEDOM Act of 2015

The Commission referenced new offenses at 18 U.S.C. § 2280a, 18 U.S.C. § 2281a, and 18 U.S.C. § 2332i to multiple guidelines.

B. Firearms as nonmailable items (18 U.S.C. § 1715)

The Commission amended §2K2.1(a)(4)(8) to provide that the 6-level base offense level applies to defendants convicted under 18 U.S.C. § 1715.

C. Technical amendment to §2T1.6

The Commission deleted a reference regarding the frequency of prosecution from the commentary to §2T1.6, and deleted similar language from other commentary in 2T.

⁴¹ §1B1.13, comment. (n.4).