

## **REVISED PROPOSED AMENDMENT: STALKING AND DOMESTIC VIOLENCE (Proposed Amendment 6 of User Friendly, Volume Two)**

**Synopsis of Revised Proposed Amendment:** *This proposed amendment addresses section 1107 of the Victims of Trafficking and Violence Protection Act of 2000 (the "Act"), Pub. L 106–386. That section amends 18 U.S.C. §§ 2261, 2261A, and 2262 to broaden the reach of these statutes to include international travel to stalk, commit domestic violence, or violate a protective order. Section 2261A also is amended to broaden the category of persons protected by this statute to include intimate partners of the person. The Act also amends section 2261A to provide a new offense at section 2262A(2) that prohibits the use of the mail or any facility of interstate or foreign commerce to commit a stalking offense. Several technical changes were also made to these statutes.*

*The Act also includes a directive to the Commission to amend the federal sentencing guidelines to reflect the changes made to 18 U.S.C. § 2261 with specific consideration to be given to the following factors:*

- (i) whether the Federal Sentencing Guidelines relating to stalking offenses should be modified in light of the amendment made by this subsection; and*
- (ii) whether any changes the Commission may make to the Federal Sentencing Guidelines pursuant to clause (i) should also be made with respect to offenses under chapter 110A of title 18, United States Code (stalking and domestic violence offenses).*

*For several reasons, the revised proposed amendment treats the new stalking by mail offense the same under the guidelines as other stalking offenses and covers it under §2A6.2 (Stalking or Domestic Violence). First, the statutory penalties for stalking by mail are the same as the statutory penalties for other stalking offenses. Second, although there was some consideration to referring this new offense to §2A6.1 (Threatening or Harassing Communications), stalking by mail offenses differ significantly from threatening communications in that stalking by mail offenses require the defendant's intent to kill, or injure a person, or place a person in reasonable fear of death or serious bodily injury. Third, referencing stalking by mail offenses to §2A6.1, could possibly result in these offenses receiving higher penalties than other stalking offenses. For example, a defendant who writes a threatening letter, violates a protective order and engages in some conduct evidencing an intent to carry out such threat, receives an offense level of level 20 under §2A6.1. A defendant who commits a stalking offense, violates a protective order, and actually commits bodily injury on the person who is the subject of the protection order, receives an offense level of level 18 under §2A6.2. Arguably, the second defendant should receive punishment, equal to, or perhaps greater than that received by the first defendant.*

*Because of the concern with regard to the proportionality in sentencing stalking and domestic violence offenses vis-a-vis other crimes, such as threatening or harassing communications, this revised amendment proposes to increase the base offense level in §2A6.2 from level 14 to level 18. Setting the base offense level at level 18 for stalking and domestic violence crimes ensures that these offenses are sentenced at or above the offense levels for offenses involving threatening and harassing communications.*

*The proposed amendment also conforms the definition of "stalking" in Application Note 1 of §2A6.2 to the statutory changes made by the Act. Additionally, the proposed amendment modifies the language of the cross reference in §2A6.2 to clarify application of the cross reference. This change is consistent with the proposed amendment to Application Note 3 of §1B1.5 (Interpretation of References to Other Offense Guidelines), which also clarifies generally the operation of cross references.*

*A review of the 16 cases sentenced under §2A6.2 in fiscal years 1998 and 1999 indicated that there is some confusion as to whether a cross reference can and should be applied to conduct that is not within federal jurisdiction (e.g., conduct in violation of state or local law) as is often the case in stalking and domestic violence offenses. The new cross reference provision and the new application note in §1B1.5 make clear that, unless otherwise specified, cross references in Chapter Two are to be determined consistent with the provisions of §1B1.3 (Relevant Conduct). Therefore, in a case in which the guideline includes a reference to use another guideline if the conduct involved another offense, the other offense includes conduct that may be a state or local offense or conduct that occurred under circumstances that would constitute a federal offense had the conduct taken place within the territorial or maritime jurisdiction of the United States.*

## **Proposed Amendment**

### **§2A6.2.      Stalking or Domestic Violence**

(a)      Base Offense Level: ~~14~~**18**

\*   \*   \*

(c)      Cross Reference

- (1)      If the offense involved ~~conduct covered by another offense guideline~~ the commission of another criminal offense, apply the offense guideline from Chapter Two, Part A (Offenses Against the Person) most applicable to that other criminal offense, ~~apply that offense guideline~~ if the resulting offense level is greater than that determined above.

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Commentary

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Application Notes:

1. For purposes of this guideline—

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"Stalking" means (A) traveling with the intent to kill, injure, ~~or~~ harass or intimidate another person and, in the course of, or as a result of, such travel, placing the person in reasonable fear of death or serious bodily injury to ~~the~~that person, ~~or~~ the person's immediate family-, including that person's spouse or intimate partner; or (B) using the mail or any facility of interstate or foreign commerce to engage in a course of conduct that places that person in reasonable fear of the death of, or serious bodily injury to, any of the persons described in subdivision (A) of this note. See 18 U.S.C. § 2261A. "Immediate family" has the meaning set forth in 18 U.S.C. § 115(c)(2). "Course of conduct" and "spouse or intimate partner" have the meaning given those terms in 18 U.S.C. § 2266(2) and (7), respectively.

Conforming Amendment to §1B1.5:

**§1B1.5. Interpretation of References to Other Offense Guidelines**

\* \* \*

Commentary

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Application Notes:

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3. A reference may direct that, if the conduct involved another offense, the offense guideline for such other offense is to be applied. Consistent with the provisions of §1B1.3 (Relevant Conduct), such other offense includes conduct that may be a state or local offense or conduct that occurred under circumstances that would constitute a federal offense had the conduct taken place within the territorial or maritime jurisdiction of the United States. Where there is more than one such other offense, the most serious such offense (or group of closely related offenses in the case of offenses that would be grouped together under §3D1.2(d)) is to be used. For example, if a defendant convicted of possession of a firearm by a felon, to which §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) applies, is found to have possessed that firearm during commission of a series of offenses, the cross reference at §2K2.1(c) is applied to the offense resulting in the greatest offense level.