

PROPOSED AMENDMENT: STALKING AND DOMESTIC VIOLENCE

Synopsis of Proposed Amendment: *This proposed amendment addresses section 1107 of the Victims of Trafficking and Violence Act 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 is also amended to broaden the category of persons protected by this statute to include "a spouse or intimate partner" of the person who is subject to the protection order. The Act also amends section 2261A to provide a new offense at section 2262A(2) which 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 offences 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).*

This proposed amendment increases the base offense level in §2A6.2 (Stalking or Domestic Violence) and adds a cross reference to §1B1.5 (Interpretation of References to Other Offense Guidelines).

For several reasons, staff recommends that the new stalking by mail offense be treated the same under the guidelines as other stalking offenses and should be covered 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 merely engages in some conduct evidencing an intent to carry out such threat, receives an offense level of 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 18 under §2A6.2. Arguably, the second defendant should receive punishment, equal to, or perhaps greater than the first defendant. For these reasons, staff recommends referring stalking by mail offenses to §2A6.2.

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 amendment proposes to increase the base offense level in §2A6.2 from level 14 to level [16][18]. Setting the base offense level at level [16] [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.

This amendment also amends application note three to §1B1.5 (Interpretation of References to Other Offense Guidelines) to clarify generally the operation of cross references. A review of the 16 cases sentenced under this guideline in fiscal years 1998 and 1999 indicate 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. This new application note makes 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.

§2A6.2. Stalking or Domestic Violence

(a) Base Offense Level: **14 [16] [18]**

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Commentary

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Application Notes:

1. For purposes of this guideline—

"Bodily injury" and "dangerous weapon" are defined in the Commentary to §1B1.1 (Application Instructions).

"Pattern of activity involving stalking, threatening, harassing, or assaulting the same victim" means any combination of two or more separate instances of stalking, threatening, harassing, or assaulting the same victim, whether or not such conduct resulted in a conviction. For example, a single instance of stalking accompanied by a separate instance of threatening, harassing, or assaulting the same victim constitutes a pattern of activity for purposes of this guideline.

"Stalking" means 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 that person, or the person's immediate family-, spouse, or intimate partner. See 18 U.S.C. § 2261A. "Immediate

family" has the meaning set forth in 18 U.S.C. § 115(c)(2).

Conforming Amendment to §1B1.5:

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

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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.*