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March 30, 2007

Honorable Ricardo H. Hinojosa  
Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002-8002

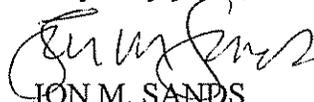
***Re: Unlawfully Entering or Remaining in the United States***

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders to propose an Option 9 for §2L1.2. Since we proposed Option 8, H.R. 1645 was introduced in the House. Its penalty structure is identical to that in S. 2611, passed by the Senate last year. If Congress passes an immigration bill, it appears there will not be compromise on the penalty structure. As explained in our letter dated March 29, 2007 at pp. 2-4, the penalty structure in the pending legislation is less severe and less complex than DOJ's Option 7. It is also less severe than our Option 8.

If the Commission amends §2L1.2 before Congress enacts legislation, the guideline should at least be consistent with the legislation that is pending. We therefore offer Option 9.

Very truly yours,



**JON M. SANDS  
Federal Public Defender  
Chair, Federal Defender Sentencing Guidelines  
Committee**

**AMY BARON-EVANS  
ANNE BLANCHARD  
SARA E. NOONAN  
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Sentencing Resource Counsel**

cc: Hon. Ruben Castillo  
Hon. William K. Sessions III  
Commissioner John R. Steer  
Commissioner Michael E. Horowitz  
Commissioner Beryl A. Howell  
Commissioner Dabney Friedrich  
Commissioner *Ex Officio* Edward F. Reilly, Jr.  
Commissioner *Ex Officio* Benton J. Campbell  
Martin Richey, Visiting Assistant Federal Public Defender  
Judith Sheon, Staff Director  
Ken Cohen, General Counsel

**Option 9:**

**§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) (i) a prior felony conviction resulting in a sentence of imprisonment of at least 60 months; or (ii) three prior felony convictions each resulting in a sentence of imprisonment exceeding one year and one month, increase by **16** levels;
- (B) a prior felony conviction resulting in a sentence of imprisonment of at least 30 months, increase by **12** levels;
- (C) a prior felony conviction resulting in a sentence of imprisonment exceeding one year and one month, increase by **8** levels;
- (D) a prior felony conviction not covered by subdivisions (A) through (C) 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 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) *"Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding 12 months.*
- (ii) *"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.*

2. Related Cases.—*Sentences of imprisonment are counted separately if they are for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2.*

3. 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).*