

STATEMENT

OF

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BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

PROPOSED SENTENCING GUIDELINE AMENDMENTS

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We appreciate the opportunity to appear before you to discuss proposed amendments to the sentencing guidelines published for comment in the Federal Register in December, 1999, and January and February, 2000. Our comments will focus on Amendment 1, implementation of the No Electronic Theft Act; Amendment 2, re-promulgation of the temporary, emergency telemarketing fraud amendments as permanent amendments; Amendment 3, implementation of the Sexual Predators Act; Amendment 5, implementation of the Identity Theft and Assumption Deterrence Act; and Amendment 8, the circuit conflict involving aberrant behavior. We addressed the other proposed amendments in a letter dated March 10 to the Sentencing Commission.

AMENDMENT 1 - IMPLEMENTATION OF THE NO ELECTRONIC THEFT ACT

The Sentencing Commission published a notice last December seeking comment on three options for temporary, emergency amendments to the guideline on criminal infringement of copyrights and trademarks, § 2B5.3, 64 Federal Register 72129. The Department of Justice submitted formal comments in response to these proposals in January. As we have indicated, we appreciate the Commission's longstanding efforts to draft an amendment that will carry out the directive in the "No Electronic Theft Act of 1997," ("NET Act"), Pub. L. 105-147. Under the Act the Commission must ensure that the applicable sentencing guideline range is sufficiently stringent to deter crimes against intellectual property and that the guidelines provide for consideration of the retail value and quantity of the items with respect to which such offenses are committed.

The difficult challenge the Commission faces is to promulgate a guideline amendment that captures the loss caused by criminal trademark and copyright violations, but to do so in a way that is both consistent with the NET Act directives and relatively simple to apply. We addressed this challenge in our prior comments on the three options published by the Commission.

To summarize our earlier comments, while the three options published in the Federal Register provide varying degrees of improvement over the current guidelines, we favor Option 2 over the other two options suggested. Option 2 directs the sentencing court to compare the retail prices of the infringing items with the retail prices of the infringed-upon items. This comparison serves as a proxy for the difficult task of determining whether and to what extent the sale of an infringing item displaced the sale of an infringed-upon item. Displaced sales are a key component of loss but one that is practically impossible to calculate without the use of a proxy. Under Option 2 if the court determines that the price of an infringing item is less than 10% of the price of the infringed-upon item (or another percentage the Commission chooses to reflect the likelihood of displaced sales), then the court applies a downward adjustment.

Option 2 best satisfies the aims of the sentencing guidelines to provide a fair sentencing scheme, uniform sentencing in similar circumstances, and appropriately tailored sentences for the criminal conduct involved. Finally, it provides the clearest guidance to prosecutors, probation officers, defense counsel and the courts, compared to the other published options.

Like Option 2, Option 1 would establish a sentencing enhancement based on the value of the legitimate items for all copyright and trademark cases. However, Option 1 provides that the court may depart down (or up) if the pecuniary harm inflicted by the violation is substantially overstated (or understated), as the case may be. Although Option 1 appears on its face to be easy to apply, in practice it will provide scarce guidance to the courts and entail the risk of great sentencing disparity through the frequent use of departures from the applicable guideline range.

Option 3 is different from the other two published options and bases the sentence on the "infringement amount," which is the retail value of either the infringed item or the infringing item, depending upon the nature of the offense and the proof available. It provides a higher base offense level than the other published options, as well as several enhancements for specific offense characteristics. While this option provides several improvements over the status quo and Option 1, it is very complex and could require a sentencing mini-trial in many otherwise clear-cut cases. One of the biggest decisions facing the sentencing court under Option 3 would be whether to base the sentence on the price of the legitimate item or the counterfeit. In this respect the "quality and performance" of the counterfeit, as compared to the legitimate, item would be an issue that could consume much court time at sentencing. Moreover, Option 3 would likely unnecessarily limit the use of the infringed-upon value as a measure of harm, contrary to the spirit of the NET Act directive.

The Commission staff has recently offered a new proposal, Option 4, which is similar to Option 2 but adds a new component. Like Option 2, Option 4 would allow a decrease of 2 levels if the offense were committed for other than a commercial purpose or if it involved greatly discounted merchandise. The new component present in Option 4, however, is also to allow this reduction where the "quality or performance of the infringing item was substantially inferior to the quality or performance of the infringed item" Option 4 also differs from Option 2 by starting with base offense level 8, rather than level 6, and by omitting a specific offense characteristic for offenses that involve a reasonably foreseeable risk to public health or safety.

Option 4 is a clear improvement over the status quo and over Options 1 and 3. However, the possible reduction in offense level where the quality or performance of the counterfeit item is

substantially inferior to that of the legitimate item will produce many of the same litigation problems as Option 3. Option 4 makes a reduction in offense level available on alternative bases - price differential or quality disparity between the legitimate and counterfeit items. Because the price differential in most cases will be easier to determine than the quality disparity between the items, a defendant will likely raise quality grounds for a reduction in sentence only where the price of the counterfeit is substantial enough that, taken alone, a basis for sentence reduction would not exist. In such a case under Option 4, the parties would be forced into difficult positions. The defendant would seek to prove that his or her own infringing item was of poor quality and to show that the victim's item was of high quality. The prosecutor, on the other hand, would be left to extol the high quality of the defendant's infringing item and to denigrate the quality of the victim's infringed-upon item. One can hardly expect victims to assist prosecutors in this aspect of the sentencing process, and the prospect that a prosecutor may need to attack the quality and performance of the infringed-upon product may dissuade victims from coming forward in the first instance.

Option 4 would, thus, have the perverse effect of rewarding defendants who sell high-priced copies that are substantially inferior to the legitimate item, even where the copies may otherwise likely result in lost sales of the legitimate item - e.g., where the consumer is duped. Such a reward to defendants is inconsistent with the fact that the harm to the legitimate manufacturer's reputation is increased in such cases.

Aside from producing the undesirable results outlined, Option 4 would also generate unneeded litigation. Defendants will argue aspects of comparative quality that could mire sentencing courts in fact-intensive details relating to this issue, including the manufacturing methods used and historic customer satisfaction, among other areas of inquiry - whether or not the copy was likely to displace sales of the legitimate item.

For purposes of the sentencing guidelines, the price differential between the legitimate and counterfeit items remains the best indicator of whether a counterfeit item displaced the sale of a legitimate item. A counterfeit with a very low price, relative to that of the legitimate item, would not likely displace a sale of the latter. By contrast, a higher-priced copy would be more likely to do so. Since consumers are often unaware of the inferior quality of a counterfeit and may, indeed, believe they are purchasing the legitimate item, comparative quality should not enter into the equation. Although price differential is not a perfect model, it functions well as an estimator of displaced sales without burdening the court, prosecutors, defense counsel, and others with difficult factual inquiries that threaten to overwhelm the sentencing process. We suggest that if

the Commission adopts Option 4, it eliminate the comparative quality provision.

The second problem with Option 4 is its failure to include a specific offense characteristic for offenses that involve a reasonably foreseeable risk to public health or safety. A defendant who sells counterfeit airplane parts that pose such a risk commits a more serious offense than one who sells counterfeit T-shirts. Unlike Option 2, which provides a 2-level increase, Option 4 treats a similar factor (the conscious or reckless risk of serious bodily injury) simply as a basis for upward departure. This treatment is inadequate since it does not compel a judge to provide an adjustment. By contrast, the fraud guideline provides a 2-level increase and a floor of level 13 for offenses that involve the conscious or reckless risk of serious bodily injury. United States Sentencing Commission, Guidelines Manual § 2F1.1(b)(6) (1999). Thus, we recommend that if the Commission adopts Option 4, it include an enhancement for risk as proposed in Option 2.

In short, we urge the Commission to adopt emergency and permanent amendments for trademark and copyright violations along the lines described so that the resulting penalties will be sufficient to deter these crimes.

AMENDMENT 2 - REPROMULGATION OF TEMPORARY, EMERGENCY TELEMARKETING FRAUD AMENDMENT

Before addressing the specifics of the proposal on telemarketing fraud, we urge the Commission to take a comprehensive approach to addressing white collar crime in general in the next amendment cycle. While it is true that the Commission is considering amendments that will affect several types of white collar offenses, including identity theft and cellular cloning, there are other offenses that will be unaffected by these more narrowly focused amendments. Thus, revision of the loss table in the fraud, theft, and tax guidelines to increase sentences based on high dollar losses should be a high priority for the Commission. In addition, the Commission should make necessary revisions to the definition of "loss" in order to resolve a number of troublesome issues. The Department would be pleased to offer its assistance in this important endeavor.

The Commission has proposed repromulgating as a permanent amendment the emergency telemarketing fraud amendments contained in Amendment 587, effective November 1, 1998. These amendments were promulgated in response to the Telemarketing Fraud Prevention Act of 1998, Pub. L. No. 105-184. The emergency amendments broadened the "sophisticated concealment" enhancement that had been adopted earlier in 1998 in the fraud guideline, § 2F1.1, to cover "sophisticated means" involved in an offense.

These amendments also increased the enhancement in the vulnerable victim guideline, § 3A1.1, for offenses that impact a large number of vulnerable victims.

We urge the Commission to make the emergency telemarketing fraud amendments permanent. They are an important part of the Commission's efforts to improve sentences for white collar crimes, along with its work in such other areas as identity theft and trademark and copyright infringement. The temporary amendments focus on important enhancements needed in sentencing those who use sophisticated means to commit their offenses or who aim their crimes against a large number of vulnerable victims. Along with the permanent amendment adopted in 1998 providing an enhancement for offenses committed through mass marketing, see § 2F1.1(b)(3) and Amendment 577, the emergency amendments send a message that telemarketing and other mass marketing fraud will result in substantial penalties.

We also urge the Commission to make conforming changes to the tax guidelines, §§ 2T1.1, 2T1.4, and 2T3.1, with respect to the enhancement for "sophisticated means." As indicated, the Commission adopted two sets of fraud amendments in 1998. The original one, adopted before enactment of the Telemarketing Fraud Prevention Act, provided an enhancement for "sophisticated concealment" in the fraud guideline. Amendment 577. In that amendment the Commission also substituted "sophisticated concealment" in the tax guidelines for "sophisticated means . . . used to impede discovery of the existence or extent of the offense" (or similar language). In amending the language in the tax guidelines, the Commission indicated its "primary purpose . . . to conform the language of the current enhancement for 'sophisticated means' in the tax guidelines to the essentially equivalent language of the new sophisticated concealment enhancement provided in the fraud guideline." Id. The Commission now seeks to make permanent an amendment to substitute a broad form of "sophisticated means" for "sophisticated concealment" in the fraud guideline, but does not seek a conforming amendment to the tax guidelines. This new action almost insures that a court will construe "sophisticated concealment" in the tax guidelines more narrowly than "sophisticated means" in the fraud guideline. We continue to believe that the two guidelines should be equivalent and agree with the Commission's original intent to conform the tax and fraud guidelines with respect to sophisticated offenses.

Moreover, unlike the fraud guideline's sophisticated means enhancement, the tax guidelines' sophisticated concealment provision does not provide for a floor level of 12. We can discern no reason why fraud cases should be treated as more serious than tax offenses where a certain level of sophistication is involved. The Commission should make a corresponding amendment to the tax guidelines not only to provide the broader

"sophisticated means" language in tax offenses in place of "sophisticated concealment" but also to establish a floor offense level of 12 when the requisite level of sophistication is present in tax cases.

AMENDMENT 3 - IMPLEMENTATION OF THE SEXUAL PREDATORS ACT

(A) Prohibiting Transfer of Obscene Materials to a Minor

This proposed amendment and the issues for comment address the new offense, at 18 U.S.C. § 1470, of transferring obscene material to a minor. We support the published, proposed amendment, which would reference section 1470 violations to § 2G3.1 of the guidelines. We believe it is appropriate to include, as the published proposed amendment does, a specific offense characteristic providing a penalty increase for distributing obscene material for the receipt or expectation of receipt of some non-pecuniary thing of value. Further, we support the published, proposed specific offense characteristic for distributing obscene material to a minor, which itself includes an additional penalty increase when such distribution was intended to facilitate prohibited sexual activity with a minor. Because obscenity distribution cases can be large scale and can include significant profits, we do not at this time support eliminating the reference to the fraud table for cases involving distribution of obscene material for pecuniary gain.

(B) Prohibiting Transmittal of Identifying Information About a Minor for Criminal Sexual Purposes

This issue for comment addresses the new offense, at 18 U.S.C. § 2425, of prohibiting the knowing transmittal, by mail or facility of interstate commerce, of identifying information about a minor for criminal sexual purposes. We believe that it is appropriate to reference this new offense to § 2G1.1 of the guidelines. Further, we think the Commission should consider whether the existing enhancements in § 2G1.1 are sufficient for violations of the new offense that result in a minor actually being solicited or worse when prohibited sexual activity actually occurs.

(C) Clarification of the Term "Item" in the Enhancement in § 2G2.4 for Possession of 10 or More Items of Child Pornography

The proposed amendment and issue for comment address how to define an "item of child pornography" for purposes of the enhancement in § 2G2.4(b)(2) and how such items ought be quantified for purposes of the enhancement. We believe the sentencing enhancements at § 2G2.4(b)(2) relating to a large amount of child pornography ought to be based on the number of "images or visual depictions" of child pornography rather than the number of computer files, books, or magazines. We believe

the seriousness of the offense is better measured by the number of images involved in the offense because the number of images correlates with the amount of victimization resulting from the offense. For example, a case involving a single computer file containing images of hundreds of children is far graver, we believe, than one involving three computer files each containing a single image. This is true because in the former, many more children are victimized by the crime. It is the number of images that reflects the harm done by the offense, not the number of computer files within which the images are stored.¹ As a result, we believe the number of images or visual depictions ought to be the basis for the enhancement.

(D) Directives Relating to Distribution of Pornography for Pecuniary and Non-Pecuniary Interests

The proposed amendment and issue for comment address the statutory directive to clarify that distribution of pornography applies to the distribution of pornography for both monetary remuneration and non-pecuniary interests. The Commission proposes to retain the current enhancement in guideline § 2G2.2 relating to distribution for pecuniary gain but to add an alternative enhancement for distribution "for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" We would broaden this new enhancement to apply to any distribution of child pornography, whether or not there was an expectation of receiving something in return.

Any distribution of child pornography substantially magnifies the seriousness of the offense by increasing the victimization of the child involved. Guideline § 2G2.2 covers not only trafficking in child pornography but receipt in violation of 18 U.S.C. § 2252(a)(2). Since the same guideline section covers both receipt and trafficking offenses, the section should distinguish the lesser harm of receipt from the greater one of furthering the sexual exploitation of the child victim by virtue of the distribution of his or her image to others. While there is certainly a difference between marketing child pornography as a business and distributing pornography for other purposes, the seriousness of distributing pornography regardless of the purpose warrants some adjustment. We would agree, however, that distribution for pecuniary gain warrants a greater increase than other distribution but that this should be reflected on the basis of enhancements for the retail value of the material.

¹It should be noted that recently Congress amended Chapter 110 of title 18, United States Code, to include "images of child pornography" (see 18 U.S.C. § 2552A).

(E) Directive to Provide Enhancements for Use of a Computer and the Misrepresentation of the Defendant's Identity

The proposed amendments and issues for comment would implement the two statutory directives to provide an enhancement when the offense involved the use of a computer and an enhancement when the offense involved the misrepresentation of a person's identity. We believe, first, that the computer enhancement ought to be triggered only when a computer is used to facilitate an offense involving a minor victim, and second, that the two enhancements ought to be separate, cumulative enhancements - at least in some of the relevant guidelines, including § 2A3.2 (statutory rape) - rather than a single enhancement.

In congressional hearings leading up to the passage of the Act, witnesses testified how computers have greatly facilitated sex offenses involving children by making it significantly easier for offenders to initiate communication and then develop an ongoing relationship with the child victim. Whether the offense involves misrepresentation or not, the use of the computer reduces the need for face-to-face contact between the adult and the child. Separately, misrepresenting oneself to facilitate a sex crime is insidious and makes the sexual act more likely to occur. This is so whether or not a computer is used in the offense. In face-to-face contacts, defendants have misrepresented themselves, for example, as professional photographers and have lured children to engage in sexual activity and the production of child pornography. As a result, we believe the two enhancements (for computer use and misrepresentation) should be separate and cumulative, at least in some of the relevant guidelines. Further, we think the Commission ought to seriously consider providing a similar misrepresentation enhancement in §§ 2G2.1 and 2G2.2. See United States v. Hatney, 80 F.3d 458 (11th Cir. 1996).

(F) and (G) Enhancements for Chapter 117 Offenses and for Sex Offenses Involving a Pattern of Abusive or Exploitative Activity

These issues for comment address numerous matters involving the congressional directive regarding Chapter 117 offenses generally and the directive to add enhancements for a pattern of abusive or exploitative activity. As the Commission indicated when it voted to publish these issues, the matters involved here are complex and will, to a significant extent, require additional study and consideration. However, we believe there is one pressing concern that can and should be addressed in the current amendment cycle.

As we have indicated in Commission meetings, as expressed by witnesses in congressional hearings, and as detailed in the

Commission's own report on the Sexual Predators Act, the most pressing concern surrounding sentencing policy for child sex crimes involves sentencing policy for those convicted of violations of 18 U.S.C. § 2423 (transportation of a minor with intent to engage in illegal sexual activity and travel with intent to engage in a sexual act with a juvenile) and other similar offenses. Predators are increasingly using the Internet to contact, engage, and ultimately to have sex with children. Because current sentencing policy treats such offenses in the same way as traditional statutory rape cases, the resulting sentences, we believe, are wholly inadequate. Such Internet cases and section 2423 cases generally are substantially more insidious and threatening than the heartland of traditional statutory rape cases and as such demand prompt action by the Commission.

We have worked with the Commission staff over the last several weeks to develop some concrete proposals on how to address this pressing problem. We look forward to continuing this work through the remainder of the amendment cycle. For now, we believe generally that the Commission can address the problem by adding several enhancements to § 2A3.2 of the guidelines (statutory rape). The enhancements we are considering are in addition to the separate enhancements we believe are appropriate for defendants who use a computer to facilitate the crime or who misrepresent themselves. These additional enhancements would likely address offenses that involve coercion (as that term is defined in § 2G1.1) but not force or threat of force as well as offenses where there is a large age differential between the defendant and the victim.

We would expect that consideration of the other aspects of parts (F) and (G), including the implementation of the directive for enhancements for engaging in a pattern of abusive or exploitative conduct, will be addressed as a top priority in the next amendment cycle.

AMENDMENT 5 - IMPLEMENTATION OF THE IDENTITY THEFT AND ASSUMPTION DETERRENCE ACT

Amendment 5 presents two options for implementing the Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318. The Act directed the Commission to "provide an appropriate penalty for each offense under section 1028 of title 18, United States Code." *Id.*, § 4(a). The Act also directed the Commission to consider various factors, including the extent to which the number of victims involved in the offense, "including harm to reputation, inconvenience, and other difficulties resulting from the offense," and the "number of means of identification, identification documents, or false identification documents" involved in the offense, are "an

adequate measure for establishing penalties under the Federal sentencing guidelines." Id., § 4(b)(1) and (2).

We favor Option 2 because it addresses two areas in which we believe the sentencing guidelines are deficient: (1) harm to an individual's reputation or credit standing and related difficulties; and (2) the potential harms associated with producing multiple identification documents, false identification documents, or means of identification. Neither of these harms is reflected by the loss table in the fraud guideline, § 2F1.1, and both were directly addressed by Congress in its directive to the Commission.

Victims of identity theft and fraud often suffer harm to reputation or credit standing and inconvenience when, for example, the offender obtains identifying information and uses it to obtain goods or services in the victim's name, whether or not the victim ultimately suffers direct monetary loss. In some cases the victim does not know that his identity has been used by someone else for an extended period of time, until the victim begins receiving bills resulting from the offender's purchases. Such a victim may face great inconvenience in convincing creditors that he was not the person who rented an apartment or arranged for a telephone line. In the meantime bills begin to accumulate, and the victim's credit standing suffers while he or she attempts to correct the situation and restore his or her reputation. Option 2 addresses these harms with a 2-level increase and floor of 10 or 12, except where the harms of this nature are only minimal. It also recognizes that in extreme cases an upward departure from the applicable guideline range would be warranted, such as where an individual's identity is completely taken over by another or where the type of harm identified in Option 2 occurs to a significant number of individuals.

Option 2 also addresses the problem of those who manufacture or transfer identification documents, false identification documents, or means of identification. Such persons who traffic in these documents and means of identification may not themselves use their false documents or means of identification to purchase goods and services in the name of the person whose identity is stolen. Thus, these producers and traffickers would not be subject to an increased offense level on the basis of the loss table in the fraud guideline. However, the potential harm they create can be great since each false document or means of identification can be misused by those who obtain it. Option 2 provides a 2-level increase to capture this harm.

We believe Option 2 would be improved by inserting the word "unlawful" before "production or transfer" to clarify that only the unlawful production or transfer of six or more identification documents, false identification documents, or means of

identification qualify for the enhancement. It would also make sense to include unlawful possession in this provision.

Option 1 has a somewhat different focus from Option 2. The former provides for a 2-level increase and a floor (ranging from level 10 to 13) where the offense involved the use of an individual victim's identifying information to obtain or make an "unauthorized identification means" of that victim or where the offense involved the possession of five or more "unauthorized identification means." We believe that this option presents an important concept but is problematic in its complexity and its likely failure to capture harm to reputation in some cases.

The concept that we find important is the enhancement for the use of identifying information to obtain or make further means of identification without authorization - that is, to breed other means of identification. For example, a person who obtains some else's social security number and uses it to acquire a credit card in that person's name creates serious harm to the individual whose name and social security number were used. The latter may not become aware of the offense for some time and, thus, would be unable to prevent the use of the credit card. However, we do not believe that this concept alone always captures the harm the offense causes to the individual victim's reputation or credit standing or the inconvenience he or she must endure in order to correct the situation. For example, a person who uses a stolen credit card or multiple credit cards to make purchases, but who does not breed documents, can quickly build up debt for the credit card owner and affect his or her credit standing.

We believe the best approach would be to graft the "breeder document" concept of Option 1 onto Option 2 as an alternative basis for the enhancement relating to harm to reputation. Thus, a 2-level enhancement or the applicable floor would apply if either the offense involved the breeding of means of identification or if it caused harm to reputation or credit standing or the related harms outlined in Option 2.

While we would recommend melding Options 1 and 2 together, Option 1 as drafted is overly complex. For example, the term "unauthorized identification means" incorporates within it the new term "identifying information," which itself is defined to mean "means of identification" as that term is used in the identity fraud and theft statute, 18 U.S.C. § 1028(d)(3). Thus, we recommend that a simplified version of the concept in Option 1 be developed for purposes of combining it with Option 2.

We also believe that, whichever option is adopted, the floor offense level should be level 12. Such an offense level reflects the seriousness of identity fraud and theft and the resulting harms to individuals. Moreover, given the level 12 floor

applicable to frauds that involve sophisticated means, § 2F1.1(b)(5), an equal floor for identity theft assures that it is treated at least as seriously as sophisticated frauds generally.

AMENDMENT 8 - CIRCUIT CONFLICT CONCERNING ABERRANT BEHAVIOR

The first of the circuit conflicts on which the Commission has sought comment addresses aberrant behavior. The current Chapter One language sets forth a basis for departure by stating that the Commission has not dealt with "the single acts of aberrant behavior that still may justify probation at higher offense levels through departures." While some courts have interpreted this language narrowly, United States v. Marcello, 13 F.3d 752 (3d Cir. 1994), others have taken an expansive view that considers the "totality of the circumstances," United States v. Grandmason, 77 F.3d 555 (1st Cir. 1996).

We urge the Commission to clarify that an aberrant-behavior departure basis should have narrow scope. We recognize the appropriateness of departure for a small class of offenders whose criminal conduct is truly an aberration - i.e., those who have engaged in a single act of aberrant behavior, rather than a pattern of illegal conduct. If the Commission is silent or adopts an expansive view of aberrant behavior, some courts will thwart the guidelines by granting departures despite multiple, illegal acts by defendants for whom crime has become a pattern. This practice could constitute a serious threat to the guidelines system, particularly in the case of offenders in Criminal History Category I. We are also concerned that a broad basis for departure could erode recent improvements in the guidelines and several under consideration that affect white collar offenses, where many defendants could claim that their criminal acts were aberrational, even where such acts were multiple in nature and occurred over an extended period of time.

We urge the Commission to adopt an amendment in this area that reflects the view of a majority of the circuits. Such an amendment should read as follows:

If the offense consisted of a single act of aberrant behavior, a downward departure may be warranted. A "single act of aberrant behavior" means one act that was spontaneous and involved little or no thought, rather than one that was the result of planning or deliberation; it does not mean a course of criminal conduct composed of multiple acts. A departure on this basis [ordinarily] is not warranted if the defendant has any criminal history points.

The formulation of the Criminal Law Committee submitted to the Commission on March 10 would be another reasonable approach,

except that we would delete the word "seemingly" from the phrase "spontaneous and seemingly thoughtless act" since "seemingly" is confusing.

In short, we urge the Commission to preserve the guideline system through promulgating a narrow departure basis for aberrant behavior.

The Department would be pleased to assist the Commission in developing and refining guideline amendments for promulgation by May 1. I would be pleased to answer any questions you may have.