Public Comment

Proposed Amendments

1992

UNITED STATES SENTENCING COMMISSION
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March 24, 1992

MEMORANDUM:

TO: Chairman Wilkins
Commissioners

FROM: Phyllis J. Newton
Staff Director

SUBJECT: Synopsis of Public Comment

Appended for your review is a synopsis of public comment on several of the major issues under consideration during this amendment cycle. The comment in arranged in the following order:

- Child Sex Offenses (amendments #4(A)(B))
- Environmental (amendment #10)
- Tax (amendment #13)
- Relevant Conduct/Role/Drugs (amendments #1(A)(B), 17-20)
- Acceptance of Responsibility (amendment #23)
- Criminal History (amendments #24-28)
- Alternatives (amendment #29)

Attachment

PUBLIC COMMENT

Proposed Amendments 4A & 4B (Child Sex Offenses)

1. Justice Department -- Favors amendments because they foster a real-offense approach to sentencing. Pointed out a technical problem in name of guideline. [Peter Hoffman has made correction.]

2. Federal Public and Community Defenders -- Suggest that Commission make a further study of the cases before using cross-references. The changes in the guideline will affect primarily native Americans. The working group report does not indicate to what extent the cases were the result of plea agreements. The cross-references will result in fewer pleas or in pleas to other offenses which do not have cross-references in the guideline. [A review of the cases indicated that most cases were disposed of as guilty pleas.]

3. American Bar Association -- Amendment leaves issue of consent for adjudication at sentencing. Merely lowers standards of proof and represents a dangerous precedent.

3/23/92

MEMORANDUM

TO: Commissioners

THROUGH: John Steer, General Counsel; Phyllis Newton, Staff Director

FROM: Nolan E. Clark

SUBJECT: Summary & Analysis of Comments re Proposed Amendment #10

Ten separate comments from persons and organizations were filed with regard to proposed amendment #10, which would prevent double counting when subsections (b)(1) and (b)(4) in §§2Q1.2 and 1.3 both apply. The proposed amendment is supported by the American Bar Association Section of Criminal Justice, The National Association of Criminal Defense Lawyers Sentencing and Post Conviction Committee, Chevron USA Inc. and its employees (and other persons who asked not to be identified), Washington Legal Foundation, Frederic N. Smalkin, United States District Judge, District of Maryland, Professor Jeffrey G. Miller, Center for Environmental Legal Studies, Pace University School of Law, and probation officers in the Eastern District of Missouri. The proposed amendment was opposed by the Environmental Subcommittee of the Attorney General's Advisory Committee, the United States Environmental Protection Agency, and the U.S. Department of Justice. The filed comments raise or discuss a number of issues, which are discussed below.

I. Does the Proposed Amendment Merely Clarify the "Original Intent"?

The most basic issue presented by the filed comments is whether the proposed amendment merely clarifies the original intent of the Commission. This position has been espoused by the comment filed by Mayer, Brown & Platt on behalf of Chevron USA and others. In their view: "The proposal would correct improper and unintended interpretations of the guidelines."

While the Commission's original intent is not clear, language in §2Q1.2 does provide some support for the conclusion that the Commission did not intend both subsection (b)(1) and (b)(4) to apply in the same case. In drafting the two subsections, the Commission used different and non-overlapping wording: subsection (b)(1) refers to "a discharge, release, or emission"; subsection (b)(4) refers to "transportation, treatment, storage, or disposal." Although the terms are not defined in the guidelines, the use of non-overlapping wording suggests that the Commission may have intended disposal to refer only to an offense that did not result in a "discharge, release, or emission." If that was the intent, double counting was not intended and the proposed amendment would

merely clarify the Commission's original intent.

II. Does the Application of Both Subsections Result in Inappropriate "Double Counting"?

Whatever the Commission's original intent, the question remains whether applying both specific offense characteristics in a single case results in inappropriate double counting. This question is addressed by most of the comments, but there is considerable confusion regarding the nature of double counting and when double counting is inappropriate.

The EPA seems to agree that there may be some double counting, but argues that the proposed amendment is broader than needed to prevent improper double counting:

> Should the Commission chose (sic) to proceed with amendments at this time, the Agency submits that the Commission's purpose of correcting possible double counting could be more precisely accomplished merely by deleting the words "or in violation of a permit" from (b)(4). The perception of double counting arises because the offense of violating a condition of a permit, as found in RCRA and the CWA, presumably is covered in the base offense level and yet serves also as the basis for an increase in the offense level under (b)(4). The focus of (b)(4) should be on whether the offense occurred outside the regulatory scheme. A violation of a permit condition usually constitutes a less serious disregard for the public welfare than totally circumventing the permitting process.

With all due respects to the EPA, I submit that the perception of double counting also arises when an increase is made for the "discharge" of a substance without having a permit and then a second increase is made for failing to have a permit to "dispose" of the substance. At base, the EPA's argument relies upon their perception regarding the relative seriousness of violating a permit and failing to obtain a permit and has nothing to do with the presence or absence of double counting.

Several commentators (Justice Dept; ABA; NACDL; Chevron; Washington Legal Foundation; Prof. Miller; Advisory Committee) address the question whether there is double counting between the base offense level and the specific offense characteristic in subdivision (b)(4). This question is basically irrelevant because, whether of not such double counting exists, it does not provide the premise for the proposed amendment.[1] Rather, the basis for the

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[1] The Department of Justice mistakenly presumes that this form of possible double counting is the basis for the proposed amendment. In their words: "The argument is made that if an

proposed amendment is inappropriate double counting when enhancements are made under both subdivisions (b)(1) and (b)(4). Nevertheless, because of the importance of the conceptual issue (i.e., identifying double counting), I will briefly discuss the question of double counting between the base offense level and the specific offense characteristic in (b)(4).

All of the comments discussing the issue, except those by the Attorney General's Advisory Committee and the U.S. Department of Justice, argue that there is double counting between the base offense level and subdivision (b)(4). True, in many cases no offense exists unless the activity is in violation of a permit or is done without a permit. In such cases, the failure to obtain a permit triggers both the base offense level and subdivision (b)(4). This, however, is not double counting for purposes of guideline analysis. As the Attorney General's Advisory Committee correctly points out, the base offense level is "the threshold level" and "is not exclusively tied to the elements of a specific crime." The base offense level is intended to cover recordkeeping, reporting, tampering, and falsification cases (other than "simple recordkeeping or reporting violations"). The Commission intended a punishment above that of the base offense for (1) a discharge of a pollutant or (2) transporting, treating, storing, or disposing of a pollutant without a permit or in violation of a permit.

The relevant issue of double counting is whether the potential overlap between subdivisions (b)(1) and (b)(4) constitutes inappropriate double counting. Virtually all of the commentators agree that this is double counting. The basic argument is that double counting results when the same behavior triggers two separate specific offense characteristics.

The Department of Justice takes a contrary position and seems to argue either that double counting either does not result or does not count unless there is a complete overlap between the two subdivisions:

> The fact that (b)(1) and (b)(4) do not apply together in every case is significant in judging whether they constitute improper double-counting. Where two or more related characteristics do not apply to every violation covered by a guideline that situation does not constitute impermissible double-counting.

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essential element of an offense is also included as an offense characteristic enhancement, it is double counted since as an element of the offense, it is already accounted for as part of the base level offense." Because of this misperception, the comments of the Department of Justice are, for the most part, beside the mark.

The Department does not distinguish between application of the guidelines by the courts, where complete overlap may be necessary before a court will refuse to apply two separate characteristics, and overlap that would cause the Commission to amend the guideline to preclude double counting.

The Attorney General's Advisory Committee also argues that there is no double counting:

> Specific Offense Characteristic 2Q1.2(b)(4) addresses an entirely separate and distinct harm, namely the absence of a required permit or violation of a permit condition. The permit requirement is not an element in all of the regulatory offenses that are part of the Base Offense Level. This specific offense characteristic addresses an aggravating factor and regulatory concern that is different and distinct from the actual release or discharge of a contaminant into the environment that is addressed in 2Q1.2(b)(1).

Part of the Advisory Committee's argument is simply irrelevant. The argument that "[t]he permit requirement is not an element in all of the regulatory offenses that are part of the Base Offense Level" is beside the point in the context of the issue of double counting when subdivisions (b)(1) and (b)(4) both apply. The other part of the Advisory Committee's argument is that subdivision (b)(4) "addresses an aggravating factor and regulatory concern that is different and distinct from the actual release or discharge of a contaminant ...." More accurately, this should have been framed as an argument that although double counting was involved, such double counting was not inappropriate because each specific offense characteristic looks at a different aspect of the same conduct and addresses separate societal concerns: (1) not harming the environment; and (2) following procedural requirements. Accordingly, I turn to the issue of when double counting is inappropriate.

The comments suggest two bases for analyzing whether the double counting is inappropriate when subdivisions (b)(1) and (b)(4) both apply: (1) how serious is the added affront of failing to obtain a permit?; and (2) how serious is conduct that violates a permit requirement relative to conduct that does not violate a permit requirement?

The comment filed by Judge Smalkin relates to the first question. His analysis is as follows:

> ... Amendment 10, certainly is warranted from my personal experience in sentencing a pollution case. Although the cumulation in present sections 2Q1.2 and 1.3(b)(1) and (4) can be justified on the basis that acting in violation of a permit or not obtaining a permit is a separate affront to the sovereignty of the government from simply dumping pollutants,

the current scheme does allow too much double-counting.

Judge Smalkin recognizes that the two subdivisions address separate societal concerns, but seems to conclude that although not following procedural requirements is a separate affront, that isolated affront may not warrant an increase when an increase has been made under subsection (b)(1), certainly not a four-level increase.

In assessing how much, if any, additional punishment should be imposed for the affront of not obtaining a permit to discharge a hazardous product, some help is provided by breaking the resulting offense level into components. In effect:

- a base of six levels is assigned because of the affront to the government of violating an environmental statute;
- two additional levels are assigned because of the incremental risk when the pollutant is a hazardous or toxic substance;
- four levels are assigned because of harm likely to arise because the pollutant is discharged into the environment;
- two additional levels are assigned when those discharges are continuous or repetitive.

The question at issue is whether four more levels should be added when the affront to the government in violating the law involved the affront of failing to obtain permission from the government.

Judge Smalkin appears to make a direct assessment of the appropriate additional weight to be given to the affront to the government of violating a permit requirement, in the context of the punishment already imposed. An alternative approach is provided by the second question: how serious is conduct that violates a permit requirement relative to conduct that does not violate a permit requirement? Providing an additional increase for not having a permit might be appropriate if discharges that violate permit requirements are, as a general rule, significantly more serious than discharges that do not violate permit requirements.

The most extensive analysis relative to the second question is that provided by the comment of Professor Miller. Professor Miller argues that "an offense flowing from the lack or violation of a permit is not necessarily more serious than an offense not involving a permit." In support of this argument, he gives the following two examples:

> The Clean Water Act, 33 U.S.C. §§1251 et seq., (CWA) for instance, forbids industrial discharges directly into our nation's water, except in compliance with a federal or state

permit, but allows discharges indirectly into these waters without a permit, through publicly owned sewage treatment plants. Notwithstanding this permitting disparity, the CWA imposes similar technology based pollution treatment requirements on both direct and indirect discharges. Section 2Q1.2(b)(4) would enhance a penalty for a minor violation of a direct discharge permit but not for a serious violation of indirect discharge requirements. Some, but not all, of the latter might receive compensating enhancements for disruption of a public utility (the public sewage treatment plant), under Section 2Q1.2(b)(3).

Similarly, the Resource Conservation and Recovery Act, 42 U.S.C. §§6901 et seq. (RCRA), at §6925(a), forbids disposal of hazardous wastes at a facility lacking a permit or in violation of a permit. Excluded from wastes governed by RCRA are polychlorinated biphenyls (PCBs), which are regulated under the Toxic Substances Control Act, 5 U.S.C. §§2601 et seq. (TSCA) at §2605(a). See the exclusion in RCRA for PCB disposal at §6925(a). Regulations under TSCA forbid disposal of PCBs at a facility lacking EPA approval or in violation of the terms of the approval, but do not require a permit, 40 CFR §§761.70(d) and .75(c). Thus offenses involving the disposal of chemical wastes will ordinarily be subject to the permit enhancement of §2Q1.2(b)(4), unless the chemical wastes are PCBs. This is anomalous because Congress regarded PCB disposal to be serious enough to treat it in a separate statute.

In effect, Professor Miller argues that since discharges that do not violate permit requirements are frequently more serious than discharges that do violate permit requirements, it is perverse to increase the offense level for discharges that violate permit requirements.[2] Professor Miller recognizes, however, that part of

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[2] Professor Miller points out another problem that can arise from the subdivision (b)(4) increase for failure to have a permit in a discharge case -- the problem of inconsistency of application. Professor Miller argues as follows:

> ... Section 2Q1.2(b)(4) should be deleted entirely or modified substantially because it is fatally ambiguous. For instance, what does "permit" mean? The TSCA/PCB problem described above might be alleviated if "permit" includes government approvals not specifically denominated as permits. Does it? The CWA/indirect discharge problem described above might be alleviated if "permit" includes a permit issued to the indirect discharger by the sewage treatment plant. Does it? If so, what if the sewage treatment plant regulated indirect dischargers by contract or ordinance rather than by permit? While the broad readings suggested could alleviate

the added seriousness of the non-permit cases might in some cases be picked up by other specific offense characteristics.

Empirical evidence sheds light on the issue whether the more serious indirect discharge violations (for which permits are not required) are, under the guidelines, receiving more or less punishment than the less serious direct discharges (for which permits are required). Violations of the pretreatment regulations are among the most serious indirect discharge cases sentenced under

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apparent gaps in the enhancement, they go too far. They would enhance the sentence for a federal offense if it happened to violate the terms of a municipal permit of a type not contemplated by the federal statute violated. These are but some of the ambiguities in the enhancement that need to be cured if it is retained at all. Incident[al]ly, although Section 2Q1.2 (b)(4) refers to transportation of hazardous substances without or in violation of a permit, no federal permit is required for §2Q1.2. RCRA comes closest, it establishes requirements for transporters of hazardous waste, but doesn't require them to secure permits, 42 U.S.C. §6923.

The empirical evidence provides some support for Professor Miller's argument regarding ambiguity. In several cases, courts (without apparent complaint from the government) have applied either subdivision (b)(4) or (b)(1) but not both, even though it appeared that both should apply. This inconsistency of application could be a deliberate attempt to evade the guidelines. More likely, the inconsistency is probably, in large part, a result of the ambiguity of the guidelines.

Even if Professor Miller's argument regarding ambiguity of subdivision (b)(4) is well-taken, it does not necessarily follow that deletion of that subdivision is appropriate in this amendment cycle. Although some double counting results from subsection (b)(4), in many cases there is no double counting because the improper disposal does not result in the discharge, release, or emission of a pollutant into the environment. This frequently occurs in cases that involve improper disposal of hazardous wastes. Hazardous wastes are often stored in barrels. In some cases, these barrels are improperly disposed, by dumping them on vacant land, by burying them, or even by disposing of them by the side of the road. Such an improper disposal violates the permit requirement and results in an enhancement under subdivision (b)(4), but no increase is made under subdivision (b)(1) because there has been no discharge, release, or emission. If subdivision (b)(4) were deleted, the appropriate guideline level in such improper disposal cases would usually be 8 because these cases generally do not have high cleanup costs if the barrels are detected before there has been any leakage. An offense level of this magnitude does not seem adequate, either as punishment or as a deterrent.

the environmental guidelines. These violations often involve metal finishers who repeatedly dump toxic metals in the sewage system. The average sentence in pretreatment regulation cases has been 6.8 months. Decidedly less serious are the direct discharge cases that involve filling of small plots of wetland. Under the guidelines, some of the longest sentences have been for dredging or filling of wetlands. The average sentence has been 16.6 months. Thus, in part due to the double counting in the wetland cases, the sentences have been substantially greater than in the more serious pretreatment regulation cases.

Further, an examination of pre-guideline cases suggests that violations in cases in which no permit was required were often more serious than those in which permits were required. I have examined summaries relating to 167 individuals who were sentenced in pre-guideline environmental cases. Of these 167 individuals, seven served more than one year of imprisonment. If these seven individuals had been sentenced under the guidelines, five would have been sentenced under §§2Q1.2 or 2Q1.3.[3] And of these five individuals, only one would have qualified for the enhancement under subdivision (b)(4). Of the other four, two violated the pretreatment regulations; one violated regulations dealing with PCB disposal; and one violated regulations dealing with asbestos disposal. Thus, the preponderance of the most serious pre-guideline environmental cases involved discharges of pollutants, but did not involve the violation of a permit or the failure to obtain a permit.

In sum, the available empirical evidence does not support a hypothesis that discharge cases involving permit violations are generally more serious than discharge cases that do not involve permit violations. This cuts against a separate increase for failure to obtain a permit in cases in which an increase has already been made for the discharge. Thus, the comments and the available empirical evidence provide little or no support for the argument that the double counting arising from applying both subdivisions (b)(1) and (b)(4) is appropriate.

III. If §2Q1.2 is Changed, Should §2Q1.3 Also Be Changed?

A third issue addressed by the comments is whether adoption of Proposed Amendment #10 should trigger a corresponding change to §2Q1.3. On this issue, the comments are unanimous. These two guideline sections are generally parallel and if a change is made to one, a comparable change should be made to the other.

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[3] Of the other two individuals, one would have been sentenced under §2Q1.1 (Knowing Endangerment) and one would have been sentenced under §2F1.1 (Fraud and Deceit).

IV. Should the Base Offense Level Be Increased?

A fourth issue raised by Proposed Amendment #10 is whether the base offense levels in §§2Q1.2 and 1.3 should be increased to offset an reduction in offense levels from the elimination of double counting between subdivisions (b)(1) and (b)(4). On this issue, only the EPA supports an increase in the base offense level.

Perhaps typical of the comments is the position stated by Mayer, Brown & Platt on behalf of Chevron USA and others:

> The [Federal Register] notice did not set forth any bases for an increase in the [base] offense level. An increase in the offense levels under Section 2Q1.2(b)(1) is not justified. ... To increase the level, there would have to be a finding that the guidelines underpenalize criminal behavior. There is no basis for such a conclusion.

Professor Miller sets forth an additional reason why the base offense level should not be increased. He argues that since the basic problem "with the guidelines is that they do not differentiate serious from innocuous violations," base offense levels "should not be changed, and certainly not increased, without a thorough overhaul of the guidelines."

In contrast to the other comments, the EPA argues for a four-level increase in the base offense levels. The argument is that: "adoption of the Commission's amendment without a corresponding four-level increase in the offense levels for (b)(1) will have the effect of lowering the available range for imprisonment from twelve to twenty months for the large majority of defendants prosecuted for environmental offenses."

Although we cannot be certain of the future effects of an amendment, we can analyze the probable effect that the amendment would have made if it had been applied in past cases. To analyze the probable effect of Proposed Amendment #10, I have looked at the 49 guideline cases that were studied by the staff environmental working group last year. In only 21 of these 49 cases (well less than 50%) did the probation officer or court conclude that both subdivisions (b)(1) and (b)(4) applied. For 7 of these defendants, Proposed Amendment #10, if it had been applicable, would have required a shorter sentence.[4] For those seven cases, the

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[4] Proposed Amendment #10 would not have changed the sentence in the other 14 cases. In one case, the minimum guideline sentence exceeded the statutory maximum. In two cases, the sentence was controlled by racketeering counts. Most significantly, in 11 of the 21 cases the court departed downward. The number of levels by which the courts departed downwards were as follows: 14, 10, 10, 10, 8, 6, 6, 4, 4, 4, 3.

following table shows the type of offense, the sentence imposed, and the maximum guideline sentence if Proposed Amendment #10 had been in effect.

Type of Offense	Sentence Imposed	Maximum under Amendment
filling wetland	21 mos.	16 mos.
filling wetland	21 mos.	12 mos.
filling wetland	27 mos.	12 mos.
sewage discharge	21 mos.	10 mos.
sewage discharge	33 mos.	24 mos.
hazardous waste discharge	40 mos.	30 mos.
hazardous waste discharge	41 mos.	27 mos.

In evaluating whether the maximum sentences under the proposed amendment would have been adequate in these seven cases, the Commission may want to compare these sentences with (1) pre-guidelines practice and (2) average sentences imposed under the guidelines in cases involving the disposal of hazardous pollutants.

Under pre-guideline practice, individuals were not sentenced to imprisonment for the release or potential release of a pollutant unless that pollutant was toxic or hazardous. By comparison, in five of the seven cases that would have been impacted by Proposed Amendment #10, the pollutant was neither hazardous nor toxic. Accordingly, the 10 to 24 month sentences that would have been permitted under Proposed Amendment #10 in those five cases would have been considerably higher than past practice.

Additional information is needed to compare pre-guidelines practice with the maximum sentences that would have been permitted by Proposed Amendment #10 in the two guideline hazardous waste discharge cases that would have been impacted by that amendment. One of these two guideline cases involved an employee in a metal-finishing business who disposed of hazardous materials in a pit, stored waste water with high concentration of chromic acid in barrels over two years, and failed to notify the EPA of the organization's hazardous waste activities. The other involved a person who illegally transported 16 55-gallon drums of methyl ethyl ketone and disposed of the drums at an unapproved disposal site. Under past practice, the time served by similar defendants was 8 to 13 months. Thus, the 27 and 30 month sentences that would have been permitted under Proposed Amendment #10 would have substantially exceeded the highest of past practice.

I turn to the second basis of comparison, i.e., the average

sentence imposed under the guidelines in cases involving the disposal of hazardous pollutants. Under the guidelines, seven defendants were sentenced in cases that involved individuals who contracted to dispose of the hazardous waste generated by others; their average sentence was 14 months. Six defendants violated pretreatment regulations; their average sentence was 6.8 months. Five defendants were sentenced for intentional improper disposal of hazardous wastes that they generated (other than pretreatment cases); their average sentence was 14.6 months. The over-all average sentence in these 18 cases was 11.8 months. By comparison, the 27 and 30 month sentences permitted under Proposed Amendment #10 in the two hazardous waste disposal cases that would have been impacted by the guidelines would have been more than twice the average under the guidelines. Similarly, in four of the five non-hazardous discharge cases that would have been impacted by the proposed amendment, the maximum sentences permitted under the amendment would have exceed the average guideline sentence in hazardous disposal cases.

The significant difference between the sentences imposed in these two hazardous waste disposal cases that would have been impacted by the guidelines and the average sentence imposed in similar cases reflects the fact that of the 18 cases being compared, the two cases with sentences of 40 and 41 months were the ones with the longest sentences. These sentences were disproportionately higher than those imposed in most other similar cases. Similarly, the 21 and 27 month sentences in the wetland cases were disproportionately higher than the sentences imposed in other guideline wetland cases. In the other two cases, the sentences were 6 and 8 months.

Thus, as compared with past practice and with average sentences under the guidelines, it is hard to argue that the permissible sentences under the proposed amendment would be inadequate. At a minimum, no case has been made for increasing the base offense level that would be imposed in <u>all</u> cases in order to offset a reduction of the sentence in some of the cases in which subdivisions (b)(1) and (b)(4) both apply.

3/19/92

MEMORANDUM

TO: Commissioners

THROUGH: John Steer, General Counsel; Phyllis Newton, Staff Director

FROM: Nolan E. Clark NEC

SUBJECT: Summary & Analysis of Comments re Proposed Amendment #13

Relatively few comments were filed relative to the proposed amendment #13. The proposed amendment was supported by the U.S. Department of Justice and by the Presentence Unit of the United States Probation Service, Western District of New York. The U.S. Sentencing Guidelines Committee of the Criminal Justice Section or the American Bar Association "recommends that no new or drastic amendments to the tax guidelines occur."

The reasons given by the U.S. Department of Justice in support of the proposed amendment were as follows:

> The Department supports proposed amendment 13, a series of amendments which will dramatically impact sentencing in criminal tax cases by consolidating the tax guidelines and ensuring that the amount of loss calculations are the same for all guidelines in the chapter. Tax loss computations should be simpler and more uniform under the new approach, and use of the "applicable tax rate," rather than the 28% (or 34% for corporations) will give a closer approximation of "tax loss" should tax rates changes [change]. In addition, the specific inclusion of new guideline §2T1.1(a)(2) (providing an alternative level of 6 where the offense is not tax-loss driven) should be helpful in such cases.

A number of factors underlie the Department's comments. First, tax loss is now calculated differently under various tax guidelines. This can lead to complications when it is unclear which guideline should apply, as well as undercutting the perceived rationality of the guidelines. Second, in cases with a divergence between the general definition of "tax loss" in §2T1.1 and the specific definition of "tax loss" in §2T1.3, courts are uncertain which should apply. See, e.g., United States v. Schmidt, 935 F.2d 1440, 14551 (1991):

> The choice before us is thus between punishing a crime whose gravity is represented by the actual loss of tax revenue to the IRS and one whose gravity is represented by the full extent of participation in a tax evasion scheme regardless of the tax consequences to the government. A fair reading of

Section 2T1.3(a) supports only the former.

Third, the current guidelines provide little guidance regarding how "tax loss" should be calculated; by contrast the proposed amendment provides rules for various types of cases, all in the form of rebuttable presumptions.

The support from the probation officers in the Western District of New York is based upon the combination of §§2T1.1, 1.2, and 1.3, which increases the base offense level for failing to file a return from 5 to 6. The probation officers state:

> ... currently you end up with a lower guideline score for willfully failing to file than you do for an evasion. This difference makes little sense.

The ABA has two specific complaints about the proposed amendment:

> ... these guidelines raise issues of proportionality by treating misdemeanor and felony offenses on identical levels. They also create "rebuttable presumptions" which subject the guidelines to constitutional attack or otherwise may be ill-advised.

The argument of proportionality assumes that punishment should differ because on the classification of the offense, rather than the harm caused by the offense. While this approach shaped the original tax guidelines, it is an approach that is substantially different from most of the other guidelines. The constitutionality argument, in my opinion, has no merit.

PUBLIC COMMENT ON RELEVANT CONDUCT: DRUG ROLE AMENDMENTS[1] [2]

The following is a summary of the public comments regarding Amendments 1(A), 1(B), 16(A), 16(B), 17(A), 17(B), 18(A), 18(B), 19, and 20.

AMENDMENT 1(A)- PUBLIC COMMENT SUMMARY

Amendment 1(A) amends the text of §1B1.3 (Relevant Conduct) and the accompanying Commentary in order to deal more specifically with jointly undertaken criminal activity. The Amendment also provides more illustrations in the Commentary to §1B1.3 to more clearly define "relevant conduct."

The majority of respondents supported the amendment as an improvement in clarification.

Department of Justice- Although the **Justice Department** generally supports the amendment, it expressed several reservations.

First, it is concerned that defining "jointly undertaken activity" in terms of direct benefit to the defendant, as in Application Note 1, is too narrow a standard. For example, "the defendant's employer or organization may gain from the offense. In savings and loan fraud many executives have engaged in large scale fraudulent transactions designed to deceive federal regulators into believing that their institutions were solvent when they were not." Additionally, antitrust conspiracies and drug cartels have similar characteristics in that individual actors may benefit only indirectly from their participation in a jointly undertaken crime, while their organization or co-conspirators receive the direct benefit. In short, the **Justice Department** strongly opposes the direct benefit concept.

Second, the **Justice Department** recommends that illustration g in Application Note 1 be revised because it believes that a street level drug dealer who knows of other dealers in the area who share a common supply should be sentenced as being jointly engaged with other dealers if there is other evidence of joint activity. It recommends that the second sentence be revised to read:

> The defendant is not accountable for the quantities of drugs sold by the other street level drug dealers if they merely shared a common source of supply and there is no other evidence of joint activity.

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[1] This summary was prepared by Noell Tin.

[2] I welcome any comments or suggestions. My extension is 8539.

Third, it recommends deleting the remainder of the illustration because they are concerned that it suggests that the sharing of resources and profits is the only scenario in street-level drug dealing that qualifies as jointly undertaken criminal activity.

Fourth, the **Justice Department** suggests, "to include in the commentary an indication that while the changes are meant to clarify the scope of relevant conduct, they are not intended to provide a windfall to the leaders and organizers of an illegal activity. The latter may direct others in ongoing criminal activity but not actually jointly undertake any direct participation in any particular criminal act." It also recommends adding an additional note to address the issue of gang-related activities.

Defense Attorneys- The **Federal Defenders**, the **American College of Trial Lawyers**, and the **American Bar Association** all endorsed the amendment without reservation. The **National Association of Criminal Defense Lawyers** supported the Amendment, but also recommended that in drug offenses, "those individuals (such as off-loaders or mules) who are involved in a drug offense should not be imputed with the scope of conduct of the defendant who imported the drug. It is unlikely that an off-loader, or mule, per se, would have the knowledge necessary to understand the scope of the conduct of the co-defendant's (organizers) involvement nor the quantity of drugs intended to be disposed of in relationship to that conduct. . . . Therefore, imputing liability to an off-loader as to the quantity of drugs, off loaded at the time of the off loading activity, places the individual in a position to receive a penalty far in excess of their involvement." Nevertheless, the majority of comments indicated that defense attorneys generally support the amendment.

Judges- No judges gave unqualified support. 2 judges opposed the amendment, and 2 agreed with the spirit of the amendment and proposed modifications. Although 1(A) largely tracks the **Judicial Conference**'s proposed amendment, they expressed limited support. While they agreed that limiting "relevant conduct" was a positive step, they also found that the definition was too vague because: (1) Aiding and abetting "trumps" other limitations (as in the first illustration in the Application Notes), and (2) the phrases "foreseeable", "in furtherance of", and "jointly undertaken" were too ambiguous and needed to be consolidated and simplified. (A group of 8th Circuit judges stated that they took no position, "other than to recommend that the guidelines be amended to state that conduct for which a defendant has been acquitted or conduct included in a dismissed count not be considered in fixing the offense level.") Judge Smalkin (D. Md.) opposed all of Amendment 1 on the grounds that, "absent evidence that the current language has created insurmountable problems it ought to be left alone." Judge Kazen (D. Tx.) opposed the amendment because he saw no distinction between a conspirator and an aider and abettor, although the proposed amendment does not appear to change current law or practice. He wrote, "It seems unrealistic to suggest that if one is labeled a conspirator, he can limit his liability to what he reasonably understood to be the scope of the conspiracy but if he is labeled an aider and abettor, he is liable for the entire operation no matter how small his role or limited his knowledge."

Judge Nesbitt acknowledged that the amendment has merit, but wrote that its terms ("reasonably foreseeable" and "personally aware") need greater definition and more explanatory examples.

Probation Officers- 7 of 9 probation officers support the amendment without reservation. Beth A. Ault (E. D. Va.) also supports the amendment, but he believes that the words, "counseled, commanded, induced, or procured" need to be clarified. Ronald F. Ketcham (E. D. N.Y.) found the amendment's language too ambiguous. He requested clarification of the words "fairly imputed" and "benefits" to help define "relevant conduct." Except for these reservations, the probation officers supported the amendment.

Overall, the majority of comments were in favor of 1(A). The vast majority of respondents supported the amendment in principle, and most suggestions were expressed in favor of greater clarity.

AMENDMENT 1(B)- PUBLIC COMMENT SUMMARY

Amendment 1(B) modifies the Application Notes to §1B1.3 to clarify the terms "common scheme or plan" and "same course of conduct".

Department of Justice- The **Justice Department** generally favors the amendment, but it also expressed concerns. It opposes the 120 day limit for defining "same course of conduct" because it can envision sophisticated offenders who would conduct their affairs to fall outside of the guideline. It also recommends changing the application note to address conduct that preceded the statute of limitations period. It suggests that the commentary should read as follows:

> Conduct that is part of the same course of conduct or common scheme or plan as the offense of conviction is relevant for purposes of sentencing under §1B1.3(a)(2) even though it occurred prior to the statute of limitations period for the offense of conviction.

Defense Attorneys- The **Federal Defenders**, the **American College of Trial Lawyers**, and the **American Bar Association** supported the amendment as an improvement in differentiating between "common scheme or plan" and "same course of conduct."

Probation- 4 of 5 probation officers responding supported the amendment without reservation. Kevin Lyons (W. D. N.Y.) expressed support, but felt the 120 day limit was underinclusive because certain defendants (mid-level drug conspirators and major importers) may spend more than 120 days between receiving drug shipments.

Judges- The **Judicial Conference** called the 120 limitation "troublesome", and believes the amendment will be of limited utility because its language is still too vague. They suggest that, "The scope of relevant conduct for defendants should be limited . . . But there should be some commentary that makes it clear- directly and explicitly- that such limitation is the purpose of the amendment." Judge Nesbitt (S.D. Fla.) also did not approve of the 120 day qualifier. She believes that the concluding statement, "offenses may still be considered part of a common scheme or plan even if they fall outside of these time frames" makes the 120 day limit unnecessary.

Aside from Nesbitt's and the Judicial Conference's reservations about vagueness and the 120 day time period for "same course of conduct" determination, the majority of comments supported 1(B).

AMENDMENT 16(A)- PUBLIC COMMENT SUMMARY

This amendment clarifies §3B1.2 (Role in the Offense) by moving existing language from the Introductory Commentary of Chapter Three, Part B, to the Commentary in §3B1.2. It modifies the Introductory Commentary to state that, "a defendant who has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct" is ordinarily not entitled to a reduction for mitigating role. The amendment's purpose is to clarify a situation in which a defendant is not ordinarily eligible for a reduction under §3B1.2 (Mitigating Role).

Department of Justice- The **Justice Department** did not comment on this section.

Defense Attorneys- Defense attorneys did not comment on this section.

Probation- All five probation officers responding here supported the amendment.

Judges- Judge Kazen supported the amendment without comment. Judge Nesbitt found that it created no significant change because the amendment's language was already in the Commentary.

AMENDMENT 16(B)-PUBLIC COMMENT SUMMARY

This amendment inserts an additional note in the Commentary to §3B1.1 and §3B1.2 to clarify that a defendant who otherwise merits a mitigating role, and who supervises a limited number of participants of equal or lesser roles, is not subject to an aggravating role enhancement. Instead, such circumstances may be considered in determining whether a mitigating role reduction is appropriate under §.3B1.2.

Department of Justice- The **Justice Department** opposes this amendment because (1) the amendments to change the definition of role in the offense may generate much litigation without reducing unwarranted disparity, and (2) a manager of others should neither generally qualify for a reduction nor be barred from the increases provided. It believes that even a person with low level responsibility is more culpable than a defendant who acts alone. The **Justice Department** prefers the current guideline, which it believes allows the judge to determine to what extent an offloader qualifies for an enhancement or reduction without specific direction.

Defense Attorneys- The **Federal Defenders** supported the amendment "as consistent with appropriate guideline application principles." The **National Association of Criminal Defense Lawyers** also support the amendment.

Probation- 4 of 7 probation officers enthusiastically supported the amendment. Katherine Zimmerman (D. Or.) and Dae Lynn Hollis found it unnecessary because the definition for application of a mitigating role reduction is adequately addressed in the guidelines and should not be changed. Carl Hays (E. D. Ky.) suggested that the amendment still appears to be vague and that it, "probably should be stated as a factor under which one would receive no mitigating or aggravating adjustment."

Judges- Judge Kazen agreed with the amendment, but Judge Nesbitt opposed because she believes that "individuals who have any kind of supervisory role should not receive deductions under the mitigating section of the guidelines."

Overall, a majority of respondents supported the amendment.

AMENDMENT 17(A)- PUBLIC COMMENT SUMMARY

This amendment modifies the text of §3B1.1 (Aggravating Role) and Note 1 of the Application Notes to §3B1.1. It also deletes Note 2 and §3B1.4 (untitled). The amendment's purpose is to clarify the definition of "participant" to include the defendant and other persons whether or not they are criminally responsible.

Department of Justice- The **Justice Department** opposes the amendment. It disagrees with defining aggravating role as, "a manager or supervisor of at least four other participants in a criminal activity." It believes that the current guideline does not require direct supervision, because it only requires that the defendant is a manager or supervisor (of an unspecified number of participants), and that the activity must have involved four others. Thus, "under the proposed revision it may be more difficult to prove that a defendant's activity warrants a three-level enhancement than it is under the current guideline." It also opposes deleting the phrase "otherwise extensive" because it sees no justification for the change. Finally, the **Justice Department** opposes the proposed addition of language to application Note 1 because it is, "inappropriate in cases in which the defendant asks the undercover agent to obtain others to assist in the offense or where it is necessary to bring in others by virtue of the function requested by the defendant of the undercover agent."

Defense attorneys- The **Federal Defenders** and the **National Association of Criminal Defense Lawyers** oppose the majority of the amendment. They only agree with the clarifying changes to the text of §3B1.1, that is, changing "five or more participants" to read "at least four other participants", deleting "follows" in favor of "follows (Apply the greatest)", and deleting "other than described in (a) or (b)" and inserting in lieu thereof "that involved at least one other participant." The **Federal Defenders** oppose the inclusion of undercover officers on two grounds. First, they believe that the Commission embraced the opposite position last year.[3] Second, they feel that the amendment is inappropriate because (1) there is no criminal threat from law enforcement schemes and (2) there is the potential for Guidelines manipulation by the police (by increasing the number of undercover participants to warrant a higher sentence), who are now being trained in guidelines application.

The **National Association of Criminal Defense Lawyers** is also against counting undercover agents as participants because they agree that there is potential for abuse of the Guidelines. They feel that there is no way to distinguish between introduction and recruitment, and that a defendant could be charged as participating with undercover agents that were recruited by persons other than the defendant. They also oppose changing the

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[3] United States v. Carroll, 893 F.2d 502 (6th Cir. 1990). See U.S.S.G. App. C., amend. 414. See also United States v. Bierley, 922 F.2d 1061, 1065 (3d Cir. 1990); United States v. Fells, 920 F.2d 1179, 1182 (4th Cir. 1990), cert. denied, 111 S.Ct. 2831 (1991); United States v. Scott, 757 F.Supp. 972, 977-78 (E.D. Wis. 1991).

language "5 or more" to "greater than 4" because they feel the subsection "is restrictive enough as it is and should not be reduced any further to aggravate the sentences that are often in the highest and most severe range of the guidelines." Last, they oppose counting unindicted individuals as participants because they feel that inclusion of girlfriends and wives as participants has been used to artificially aggravate the offense severity rating. In short, the **National Association of Criminal Defense Lawyers** strongly opposes 17(A).

Probation- 6 of the 7 probation officers support the purpose of the amendment. 3 officers expressed unqualified support for the amendment as proposed. Jack Saylor (D. S.D.) supports the amendment, but believes that the counting of undercover officers has potential for abuse, and "must be monitored closely." Carl Hays suggests deleting the words "otherwise extensive." He also believes that undercover agents should not be counted as participants. John Babi (W.D.N.Y.)suggests adding an extra sanction for an extensive sophisticated offense. Last, Nancy Reims (C.D. Ca.) opposes the amendment on the grounds that there are too many amendments already.

There were also concerns about vagueness. John Babi didn't know if the amendment broadened the offense, and Carl Hays wrote that he was unsure about the number of people a defendant had to lead in order to be receive an aggravating role adjustment.

Judges- Judges Kazen and Nesbitt both supported the amendment without comment.

AMENDMENT 17 (B)- PUBLIC COMMENT SUMMARY

This amendment modifies Application Note 1 in the Commentary to §3B1.1 to read that the Aggravating Role Adjustment applies only when the offense is committed by more than one participant. Of those commenting, support for the amendment was unanimous.

Department of Justice- The **Justice Department** did not comment on this amendment.

Defense Attorneys- The **Federal Defenders** and the **National Association of Criminal Defense Lawyers** supported the amendment as "obvious."

Probation- Jack Saylor and Jerry Denzlinger (S.D. Tex.) agreed with the amendment.

Judges- Judges Kazen and Nesbitt also supported the amendment without comment.

AMENDMENT 18(A)- PUBLIC COMMENT SUMMARY

Amendment 18(A) would revise the text of and Commentary to §3B1.2. The amendment more clearly specifies the factors that the court should consider when determining whether a defendant receives a mitigating role adjustment. The amendment also clarifies that couriers and mules by virtue of the function they play in a criminal activity are neither presumed to be eligible or ineligible for a mitigating role reduction. The response to the amendment as a whole was controversial. The comments to the text amendments are as follows:

Department of Justice- The **Justice Department** also opposes this amendment because it believes that the current guideline, which allows for a three level decrease for roles between minor and minimal, best accounts for the fact that, "roles are not clear-cut in many cases." It also believes that the amendment would provide significantly more favorable treatment to many defendants. For example, "...proposed Note 7 would practically guarantee a role reduction for drug transporters."

Defense Attorneys- The **Federal Defenders** support the revisions to the text of §3B1.2 because they believe that §3B1.2(a) and §3B1.2(b) define contiguous sets, so there is no in-between in which to fall. The **National Association of Criminal Defense Lawyers** recommend that, "§3B1.2(a) should be increased to 5 levels and §3B1.2(b) should be increased by 4 levels. They believe that this, "brings more balance to individuals who cannot provide as much cooperation as an individual in a higher position within a drug organization." The **New York Council of Defense Lawyers**, however, opposes the amendment because they, " ...believe that the court should continue to have the option to sentence defendants between the two levels, so that defendants who have different levels of culpability are sentenced to appropriately different sentences." The **American Bar Association** and the **American College of Trial Lawyers** oppose the amendment because they do not "understand the justification for the proposed amendment."

Probation- No probation officers opposed changing the text of §3B1.2.

Judges- Judge Nesbitt agreed with changing the text.

NOTE 1

Note 1 refers to §3B1.1 for the definition of "participant." No comments were made regarding Note 1.

NOTE 2

Note 2 states that,"No mitigating role adjustment under this section shall be applied to a defendant who, in connection with the offense, threatened the use of force, possessed

a dangerous weapon, or caused another person to threaten the use of force or possess a dangerous weapon."

Department of Justice- The **Justice Department** did not comment on any of the notes.

Defense Lawyers- The **Federal Defenders** and the **National Association of Criminal Defense Lawyers** oppose the note because they believe that nobody should be automatically disqualified for a minimal role.

Probation- Kevin Lyons believes the amendment double counts because weapons are already sanctioned with upward adjustments.

Judges- Judge Nesbitt did not object to the amendment.

NOTE 3

Note 3 provides 2 options for assigning a minimal role to a defendant. It applies to a defendant who is either (1) "plainly among the least culpable defendants in the criminal activity" or (2) "plainly among the least culpable defendants when compared to all other participants who typically participate in the particular type of criminal activity."

Defense Attorneys- The **Federal Defenders** and the **National Association of Criminal Defense Lawyers** believe that the defendant's culpability should be assessed relative to other members of his own activity, not the typical defendant's. The **American Bar Association** disagrees, stating, "The assessment of mitigating role should be in the context of the typical defendant. A mandate of the Sentencing Reform Act was to eliminate unwarranted disparity in all federal courts, not simply disparity between co-defendants."

Probation- 5 probation officers believe that a defendant's culpability should be compared to other members of his own activity. Carl Hays only supports the note if, "individuals who typically participate" can be defined.

Judges- Judge Kazen believes that mitigation should not necessarily be limited to other defendants in the case.

NOTE 4

Note 4 defines the terms "no proprietary interest" and "no significant decision making authority" for drug trafficking offenses, and lists factors that a court should consider in applying those terms.

Defense Attorneys- The **Federal Defenders** oppose the amendment because they feel that it is inappropriate to make any particular factor dispositive when defining minimal role. The **National Association of Criminal Defense Lawyers** recommend that minimal role be

clarified as follows:

(A) Performed unskilled or unsophisticated tasks (off-loading, mule, minimal supervisory control over other off-loaders, boat-crew, lookouts, etc.).

(B) No (substantial) proprietary interest in criminal activity.

They agree with the remainder of this subsection as "excellent guidance."

Probation- Carl Hays supported Note 4 without comment.

Judges- No judges commented specifically on the amendment, but Judge Kazen is concerned, "that participant not only includes a person who may not have been convicted but also one who may not have even been charged and identified. The point is that we often see individuals who, as in the examples, off-loaded a vehicle or permitted use of a residence or who were truly mules in the classic sense and yet there are no co-defendants charged or convicted. They should nevertheless be entitled to adjustment for a mitigating role."

NOTES 5, 6, AND 7

Notes 5, 6 and 7 further define mitigating role. Only Judge Nesbitt specifically addressed Note 5, stating that, "The principle reason for my objection in the definition of minor role is that it allows defendants with supervisory or decision making authority to receive a mitigating role adjustment." There were no other comments addressed to the final notes.

AMENDMENT 18(B)- PUBLIC COMMENT SUMMARY

This amendment adds an additional note to the Application Notes for §3B1.2 (Mitigating Role). The amendment provides expressly that a court may depart below the applicable guideline range when it finds that a defendant's minimal participation exists to a degree not adequately taken into consideration by the Sentencing Commission.

Department of Justice- The **Justice Department** opposes the proposed commentary on downward departure for minimal participants. It is concerned that the amendment could result in disparate treatment for similarly situated defendants.

Defense Attorneys- The **Federal Defenders**, the **American Bar Association**, and the **New York Council of Defense Lawyers** support the amendment as codifying a right that exists now. See 18 U.S.C. §3553(b). Although not addressing the amendment specifically, the **National Association of Criminal Defense Lawyers** recommend incorporating the term "extraordinary" mitigating role as a reason for downward departure. See United States v. Restrepo, 936 F.2d 61 (2nd Cir. 1991). The **American Bar Association** also suggests substituting the word "is" for "may be."

Probation- A majority of probation officers agreed with 18(B). John Babi, Carl Hays, and Katherine Zimmerman supported the amendment. Kevin Lyons, however, believed that the amendment needs more explanatory language and examples. Jack Saylor disagreed with the amendment on the grounds that the current guideline appears adequate.

Judges- Judge Nesbitt felt that the amendment was unnecessary because, "The court already is able under the §5K2.0 policy statement the discretion that this amendment would allow under §3B1.2."

AMENDMENT 19- PUBLIC COMMENT SUMMARY

This amendment presents three options for amending §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses). The amendment limits the offense level to which a minor or minimal participant in drug cases is exposed.

Option 1: Amends §2D1.1 to provide a role adjustment with the cap being determined by the type of controlled substance involved.

Option 2: Is similar but calls for a cap without regard to the type of controlled substance involved.

Option 3: Provides a cap but only for minimal role, and like Option 2 calls for a single reduction without regard to the controlled substance involved.

Department of Justice- The **Justice Department** opposes caps as an artificial limit on a defendant's sentence. It believes that even low-level participants, including couriers, "should be held responsible at the very least for the quantity of drugs he or she possesses or deals in directly." It also believes that many of the proposed caps would be overridden by applicable mandatory minimum sentences. If the Commission does adopt a cap, however, the **Justice Department** recommends as follows: "...the Commission...should at the very least assure that the limitations adopted provide guideline sentences no lower than the 10 year mandatory minimum level provided by statute for large-quantity offenses when such offenses involve substances subject to mandatory minimum provisions. The Commission should also assure that a defendant's sentence is not limited to a level that does not reflect the full extent of his personal involvement in the offense. In addition, the limitations should apply only to minimal participants who are in Criminal History Category I."

Defense Attorneys- The **Federal Defenders** support Option 1, and oppose Options 2 and 3. They oppose Option 3 because they, " . . . see no reason to treat drug offenses differently from other offenses by eliminating the minor role adjustment in drug cases." They prefer Option 1 over Option 2 because it, "...is more consistent with the way in which the offense level is determined under §2D1.1." The American Bar Association declined to comment on the appropriateness of a particular offense level cap, but endorses caps in general. No other defense attorneys commented.

Probation- 7 of 8 probation officers oppose the amendment in any form. John Babi found the amendment to be too vague, stating, "While Option One under Amendment 19 had some reception, the main concern was how to decide which cap you choose. Based on the abuse of discretion that could occur under this option, there is some concern." Gregory Hunt, Dae Lynn Hollis, and Carl Hays believe that role adjustments are best dealt with in Chapter 3. Hollis also believed that a cap makes mitigating adjustments useless.

Zimmerman is concerned that all options would lead to manipulation of the pleading process. Jerry Denzlinger opposed the amendment because (1) it would promote "numerous guideline disputes", and (2) it would not make any significant difference in the sentence because of statutory minimums that would "trump" the cap approach. Barbara Roembke only supported caps where the defendant was both a first time offender and a minor participant.

Judges- The judges reached no consensus. The **Judicial Conference** supports Option 3 and recommends: (1) only adopting caps for minimal participants and (2) setting the cap at 16 because it is the lowest level proposed. They would prefer, however, a cap of 14 to allow for alternative sentencing (which would be possible with the Acceptance of Responsibility adjustment) for first time offenders. Judge Nesbitt opposed the amendment because she felt that setting a cap is, "...inappropriate and (the goal) can be better served by expanding the levels both for aggravating and mitigating roles." Likewise, Judge Kazen strongly opposed the amendment because he felt that," This problem should be handled by a more realistic evaluation of the defendant's conduct in the first instance." Judge Smalkin supported Option 2 as the simplest approach to differentiating between conspirators in proportion to their real culpability.

AMENDMENT 20- PUBLIC COMMENT SUMMARY

Amendment 20 sets forth three options for dealing with renting or managing a drug establishment.

Option 1- Deletes §2D1.8 and amend the statutory Provisions Note to §2D1.1 to indicate that guideline covers offenses under 21 U.S.C. §856.

Option 2- Amends §2D1.8 to call for the use of (1) the offense level from §2D1.1 applicable to the underlying drug offense, or (2) if the defendant's role was only to rent or allow use of the premises, four levels less than the offense level from §2D1.1 but in no event more than 16.

Option 3- Amends §2D1.8 to require the use of the offense level from §2D1.1 or 16, whichever is greater.

Department of Justice- The **Justice Department** did not comment on this amendment.

Defense Attorneys- The **Federal Defenders** support Option 2, cautioning that, " ...it should be recognized that the Section 856 offense is often used for plea agreement purposes and that all of the proposed changes, to differing extents, would inhibit such plea agreements." They support Option 2 as reducing the unfairness of inconsistent sentencing under the current guideline without completely rendering 21 U.S.C. §856 useless for plea agreement purposes. The **American Bar Association** also supports Option 2 as the option most likely to result in treating similarly situated offenders similarly.

Probation- Hays, Saylor, and Roembke supported Option 3 without comment, and Denzlinger and Reims support Option 2 as the best way to account for varying levels of participation.

Judges- Judges made no comment on this amendment.

PUBLIC COMMENT ON AMENDMENT 23- ACCEPTANCE OF RESPONSIBILITY[1]

Amendment 23 presents four options for revising the acceptance of responsibility guideline, §3E1.1, which directs the sentencing court to reduce the defendant's offense level by two levels "if the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct."

Option 1: Amends §3E1.1 to read that the defendant must accept responsibility for the offense of conviction and relevant conduct.

Option 2: Amends §3E1.1 to increase the adjustment for acceptance of responsibility to three levels where the offense level "determined above is 30 or more.

Option 3: Amends §3E1.1 to provide a two-level reduction if the defendant pleads guilty or truthfully admits involvement in the offense of conviction before an adjudication of guilt. This option would also amend §3E1.1 to authorize a reduction of an additional level if the defendant takes additional steps, such as voluntary paying of restitution before adjudication of guilt.

Option 4: Amends §3E1.1 to provide a three level reduction if the defendant "clearly demonstrates a recognition and affirmative acceptance of his responsibility in a timely manner;" a two level reduction if the defendants pleads guilty before the government opens its case; and a one level reduction if the defendant pleads guilty after the government opens its case.

Department of Justice- The **Justice Department** opposes the amendment because they feel that there is not sufficient basis for revising the guideline. They oppose Option 2 because they feel that granting greater benefit to defendants who commit the most serious offenses is contrary to the guideline system and threatens the purpose of the entire system of enhancements and reductions.

Likewise, the **Justice Department** opposes Options 3 & 4 for three reasons. First, they disagree with the acceptance of responsibility for nolo pleas, because the distinguishing feature of nolo pleas (as opposed to guilty pleas) is that the defendant who enters one declines to accept responsibility for the offense. Second, they oppose a three-level reduction, because it will have the effect (particularly in white collar cases) of simply increasing the commonly granted two-level reduction to a three-level reduction. Third, they oppose rewarding a defendant who goes to trial. Instead, they suggest that the defendant enter, or at least seek to enter, a conditional guilty plea under Rule 11, Federal Rules of Criminal Procedure. The **Justice Department** also objects to Option 4 because a three-level reduction for defendants who proceed to trial would discourage guilty pleas.

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[1] This summary was prepared by Noell Tin. Comments and suggestions are welcome.

If any changes are made, the **Justice Department** believes that they should be limited to commentary changes discussing the effect of conditional pleas as a means for a defendant to preserve legal issues. They also support addressing issue of acceptance of responsibility for relevant or related conduct.

Defense Attorneys- Options 3 and 4 drew the most support from defense attorneys, although there was little unanimity. The **American Bar Association** supports a combination of Options 3 and 4, because they support (1) not limiting an acceptance of responsibility reduction to two levels, (2) consideration of multiple factors when determining the amount of reduction. In short, the **American Bar Association** supports a two-level reduction for all defendants who enter a guilty plea before trial, and larger deductions where the court is satisfied that other signs of genuine remorse are present. The **New York Council of Defense Lawyers** also endorses Options 3 and 4, because those options track the recommendations of the **Judicial Conference**. (They support Option 2 as preferable to the current version of §3E1.1, but they prefer Options 3 and 4.) They also strongly oppose Option 1, because they believe that requiring a defendant to accept responsibility for related conduct may force the defendant to accept responsibility for conduct that would automatically increase his offense level and more than offset the two-level reduction.

The **American College of Trial Lawyers** generally supports the amendments to this section, particularly the amendment to subsection (d), which authorizes an additional one level reduction for defendants who take affirmative steps to show acceptance of responsibility.

The **National Association of Criminal Defense Lawyers** generally believes that the reductions for acceptance of responsibility should be greater. They recommend that, "A list of factors can be used to determine the weight of the acceptance of responsibility credit to be given. This would put the acceptance of responsibility Section into providing a 1, 2, 3, or 4 level reduction, dependent upon the magnitude of the defendant's conduct subsequent to entering a plea of guilty. It would allow individuals who go to trial to protect their due process rights to be given some consideration for acceptance of responsibility after the jury verdict has been determined, and they then decide to show remorse and contrition for their conduct. (They add that the Commission has suggested a 1 point value for this consideration.)

The **Federal Defenders** support a modified version of Option 2. They agree with the option's two-tier approach (above or below an offense level of 30), but recommend that the second tier should begin at a lower offense level. They believe that the second tier (3 level reduction) should begin when the guideline range authorizes a sentence in excess of five years. (A level 30 offense authorizes a sentence of at least seven years and three months.)

Judges- The **Judicial Conference** did not support any option specifically. With regard to Option 1 they point out that there is a split in the circuits as to the constitutionality of requiring the defendant to accept responsibility for conduct beyond the offense of conviction.

They recommend that this problem could be eliminated if the guideline were amended to only require acceptance only for the acceptance of conviction. As to the rest of the amendment, the **Judicial Conference** recommends as follows: "The reduction for pleading guilty should be increased above the current two levels, especially for crimes at higher basic offense levels. At least a three level reduction should be allowed, but not required, for a guilty plea. The addition of a separate one-level reduction for other convincing demonstrations of acceptance of responsibility, such as assistance in the recovery of fruits of the offense, etc, would be useful.

Other judges responded as follows. 8th Circuit judges Arnold, McMillian, Gibson, Lay, Bright, and Heaney support amendment 23. They do not, however, support any particular option. Instead, they prefer an option which would permit a sentencing judge to give a one- to three-level reduction for acceptance of responsibility, depending on the circumstances of the case.

Judge Kazen (S. D. Tex.) supports a combination of Options 3 and 4. He would give a 2-level reduction for a guilty plea sometime after commencement of trial. He would then give a separate one-level reduction for a complete and truthful admission of all relevant conduct and the other specified types of cooperation. He strongly opposes Option 2 as being "totally arbitrary and capricious." Judge Smalkin (D. Md.) supports Option 3 because he feels that it, "appropriately encourages offenders to accept their responsibility, while mirroring the reality that acceptance of responsibility can and should have more manifestations than simply pleading guilty."

Probation- Probation officers did not reach a consensus, but option 3 drew the most support. Jack Saylor (D. S.D.) supports Option 3 because he believes that it would resolve the constitutional split between the circuits. Barbara Roembke (S. D. In.) also supports Option 3, but recommends that she, "...would recommend the defendant receive one point for pleading guilty and two points for further demonstration of acceptance, instead of the other way around." Dae Lynn Hollis proposes her own option, which is similar to Option 3, except that she believes that, "a one point reduction should be awarded to the offender who pleads guilty and an additional two level reduction be given to the offender who provided substantial assistance to the authorities, admits relevant conduct, voluntary payment of restitution, etc." She believes that this option provides greater incentive for a defendant to cooperate.

Katherine Zimmerman (D. Or.) supports only requiring a defendant to plead guilty to the offense of conviction. She opposes Options 2, 3, and 4 as arbitrary and complicated. Carl Hays (E. D. Ky) supports Options 1 and 4. He prefers Option 4 to Option 3 because he feels that it would encourage more guilty pleas. John Babi (W. D. N.Y.) supports Option 3, but he did not elaborate.

PUBLIC COMMENT SUMMARY- CRIMINAL HISTORY AMENDMENTS[1]

The following is a summary of the public comments on Amendments 24-28, relating to criminal history.

AMENDMENT 24- PUBLIC COMMENT SUMMARY

Amendment 24 would revise §4A1.1 to narrow the related case doctrine. Opposition to this amendment was virtually unanimous.

Department of Justice- The **Justice Department** did not comment on this amendment.

Judges- Judge Kazen (S.D. Tex.) opposes the amendment because,"The practical cost of requiring probation officers to check old records in order to determine how much time a defendant actually served in prison greatly outweighs the value of that addition."

Defense Attorneys- The **Federal Defenders** oppose the amendment because they feel that there is no data to support the amendment, and they have not seen any other showing of the need for change.

Probation- John Babi (W. D. N.Y.) opposes the amendment, because different states impose different periods of incarceration for the same basic offense. He fears that the amendment would lead to disparity in sentencing. Katherine Zimmerman (D. Or.) opposes the amendment since she feels that the current guideline range is adequate. Barbara Roembke (S. D. In.) recommends adding one additional point for sentences of imprisonment exceeding one year and one month in which the defendant actually served five or more years of imprisonment.

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[1] This memorandum was prepared by Noell Tin. Comments and suggestions are welcome.

AMENDMENT 25(A)- PUBLIC COMMENT SUMMARY

Amendment 25(A) sets forth two options for modifying subdivisions (f) and (j) of §4A1.2, the guideline that sets forth definitions and instructions for computing criminal history scores.

Option 1- Would revise subdivision (f) by deleting the reference to juvenile court and referring instead to offenses committed before the defendant's eighteenth birthday. It would also amend subdivision (j) to require the court to count a sentence that has been set aside for reasons other than legal defect or innocence, unless the sentence was a juvenile sentence.

Option 2- Would revise subdivision (f) to provide that a diversionary disposition is either: (1) counted if the instant offense was begun before the defendant had complied with all of the conditions of the diversionary disposition, or (2), as an alternative, not counted at all. Option 2 sets forth three alternatives for amending the guideline to deal with an adult sentence that has been set aside for reasons other than legal defect or innocence- (1) count the sentence if it contains a term of imprisonment of 60 days or more, (2) count the sentence if it contains a term of imprisonment of more than one year and one month, or (3) count the sentence if the defendant began the instant offense before the prior sentence was set aside. For juvenile sentences, Option 2 provides two alternatives- set aside sentences are not counted, or set aside sentences are not counted unless the instant offense was begun before the prior sentence was set aside.

Those commenting reached no consensus on this amendment.

Department of Justice- The **Justice Department** did not comment on this amendment.

Judges- The **Eighth Circuit** opposes Option 1, because they feel that it will further limit the discretion of the district courts. They did not comment on the other options. Judge Kazen, on the other hand, strongly prefers Option 1 over Option 2, because it would consume less time for the probation officer to prepare the pre-sentence report.

Defense Attorneys- The **Federal Defenders** support Option 2 since they feel that it provides a bright line rule that brings greater fairness to the guideline. They also feel that it provides maximum deference to state-law policies in that it will enable the counting of serious offenses where the conviction has been set aside or pardoned for reasons other than innocence or legal defect.

Probation- John Babi strongly supports this amendment. Katherine Zimmerman, however, opposes all of Amendment 25 because she feels that the current guideline range is sufficient.

AMENDMENT 25(B)- PUBLIC COMMENT SUMMARY

Amendment 25(B) sets forth two options for amending §4A1.2(e), which sets forth rules for determining whether a prior conviction is stale, that is, falls outside the applicable time period.

Option 1- Would retain the present periods (15 years for adult sentences of 13 months or more and 10 years for other offenses.), but extend them by excluding any period of time when a defendant was continuously imprisoned (with options specifying what that period of time should be).

Option 2- Would call for the same extension and also revise the applicable time period to 12 years for all adult convictions.

Department of Justice- The **Justice Department** did not comment on either option specifically, but they support the elimination of the decay factor as applied to career offenders. See, Letter of October 3, 1991, from Deputy Assistant Attorney General Paul L. Maloney.

Judges- Judge Kazen opposes the amendment because he believes that it is "more problematic than useful."

Defense Attorneys- The **Federal Defenders** oppose both options, since they feel that there is no evidence that these proposals respond to a real problem.

AMENDMENT 26(A)- PUBLIC COMMENT SUMMARY

Amendment 26 proposes several revisions to the policy statement on criminal history departures (§4A1.3). That policy statement indicates that a departure may be appropriate if the defendant's criminal history category "does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes."

Amendment 26(A) sets forth two options for amending §4A1.3 to address criminal history based departures for defendants in criminal history category VI.

Option 1- Would amend the policy statement to recommend that the sentencing court determine the extent of a criminal history departure from category VI by extrapolation.

Option 2- Would amend the policy statement to recommend that the sentencing court consider the nature of the prior offenses and, if a departure is warranted, that the court move down the sentencing table one level at a time to find the appropriate sentence.

Support for Option 2 was unanimous.

Department of Justice- The **Justice Department** did not comment on this amendment.

Judges- The **Judicial Conference** and Judge Kazen favor the departure approach taken in Option 2. They also favor this approach over adding a new criminal History Category VII to the Guideline table, as described in Amendment 28, part (B). Eighth circuit judges Arnold, McMillian, Gibson, Lay, Bright, and Heaney support the amendment because it gives the sentencing court more authority to consider the nature rather than the number of prior offenses when considering whether to depart from the guidelines.

Defense Attorneys- Defense attorneys supported Option 2. The **American Bar Association** supports Option 2 as useful guidance because the disparity in sentencing at this level can be significant. The **Federal Defenders** do not strongly support either option, but they support Option 2 if the Commission adopts either proposal. They oppose Option One because they feel that, "The policy statement as amended by option 1 would call for extrapolation but would not explain how the court is to extrapolate. The policy statement would also direct the court, with regard to cases involving "unusually serious criminal history, or unusually high numbers of criminal history points," to extrapolate and then depart farther. Such a direction makes no sense if the extrapolation technique is the way in which to determine the appropriate extent of a departure." In short, the **Federal Defenders** find Option 1 to be a "vague and confusing policy statement." They believe that Option 2 is better drafted than Option 1, and although they question the need for a revision in the first place, they recommend Option 2 if the Commission wants to go forward.

Probation- Probation Officers unanimously supported Option 2. Barbara Roembke (S. D.

In.) supports Option 2, (particularly parts B and C) because she thinks they address areas which should be given consideration in determining the criminal history category. Nancy Reims (C. D. Ca.) supports Option 2 as more practical and avoiding the necessity of explaining the structure of the sentencing table to arrive at a Category VII. Dae Lynn Hollis also supports Option 2, because she believes that the court should be able to depart upward to the point to adequately reflect the seriousness of the offender's past criminal conduct.

AMENDMENT 26(B)- PUBLIC COMMENT SUMMARY

Amendment 26(B) revises §4A1.3 concerning the likelihood that the defendant will commit further crimes. The amendment clarifies that a departure under §4A1.3 may be warranted when the criminal history category does not adequately address either the likelihood of new offenses being committed by the defendant, or the type of risk posed by the defendant.

A majority of those responding supported the amendment.

Department of Justice- The **Justice Department** did not comment on this amendment.

Judges- Judges unanimously supported the amendment. The **Judicial Conference** strongly supports the amendment because it reflects their concern that the Guidelines do not give enough flexibility to depart upwards based on offender dangerousness. The **Eighth Circuit** and Judge Kazen also support the amendment.

Defense Attorneys- The **Federal Defenders** oppose the amendment, because they feel that the policy statement needs the extensive changes that Amendment 26(B) would make, and they do not believe that those changes will improve the policy statement. The **American Bar Association** supports this amendment for the reasons stated in the 1990 recommendations of the **Judicial Conference.**

Probation- Nancy Reims supports the amendment and also recommends that, "**Judicial Conference** recommendation 6 would be a helpful clarification." Dae Lynn Hollis, however, disagrees with departures due to the inadequacy of the Criminal History Category based on the degree of risk or type of risk, because she feels that whether the degree of risk is physical or financial, both provide for their own degree of harm to the community.

AMENDMENT 26(C)- PUBLIC COMMENT SUMMARY

Amendment 26(C) adds language to the policy statement stating that a criminal history departure is "not warranted" for the career offender and armed career criminal guidelines.

The majority of comments disagreed with 26(C).

Department of Justice- The **Justice Department** strongly supports this amendment, because they feel that several courts of appeals have undermined the career offender guideline by ruling that a sentencing court may depart from the guideline range where the court determines that Category VI overstates the defendant's criminal history.

Judges- Judge Kazen opposes the amendment because he has, "experienced cases where the Career Criminal Category grossly overstated the person's real criminal history."

Defense Attorneys- The **Federal Defenders** oppose the amendment because they find the language "misleading and inaccurate." They also believe that the proposed guideline exceeds the Commission's statutory authority since they claim that the Commission cannot, as a matter of law, preclude a departure if there is a factor in the case that the commission did not adequately consider when formulating the Guidelines. They also believe that the amendment will overturn existing case law. See, United States v. Brown, 903 F.2d 540, 545 (8th Cir. 1990). The **American Bar Association** agrees that this amendment exceeds the Commission's statutory authority.

Probation- Nancy Reims (C. D. Ca.) opposes the amendment because she feels that "to preclude any means of legitimately departing would only lead to manipulation of the guidelines." Dae Lynn Hollis supports the amendment.

AMENDMENT 27(A)- PUBLIC COMMENT SUMMARY

Amendment 27(A) sets forth two options to amend the commentary to §4B1.1 to clarify the meaning of the term "offense statutory maximum."

Option 1- Would amend application Note 1 to indicate that the term refers to the maximum prison term before enhancement by a sentencing enhancement statute applied because the defendant has a prior conviction.

Option 2- Would amend that application note to indicate that the term refers to the maximum prison term after enhancement by such a statute.

Defense attorneys supported Option 1, while the **Justice Department** and probation officers generally supported Option 2.

Department of Justice- "To the extent there is a need for clarification," the **Justice Department** supports Option 2. They strongly oppose Option One, because they feel that the maximum term of imprisonment authorized must be the level authorized for the defendant being sentenced, not another defendant with a different criminal background.

Judges- The **Eighth Circuit** and Judge Kazen supported the amendment without comment.

Defense Attorneys- Defense lawyers supported Option 1. The **Federal Defenders** support Option 1 and oppose Option 2. They oppose Option 2 because they believe that it will encourage double counting by using the same prior convictions to enhance the statutory maximum and to increase substantially both the offense level and the criminal history category. The **National Association of Criminal Defense Lawyers** also supports Option 1 because it,"keeps from having the enhancement of the statutory maximum used in determining the offense level." They also recommend that the Commission incorporate into its commentaries, concerning career offender terms, definitions, and application notes, factors dealing with the court's downward departure power when the career offender enhancement penalties or the prior record overemphasizes the severity of the upgraded base offense level. See, United States v. Lawrence, 916 F.2d 553 (9th Cir. 1990).

Probation- Jerry Denzlinger (E. D. Va.), Carl Hays, and Barbara Roembke support Option 2. John Babi (W.D.N.Y.) supported amendment 27 in its entirety. Katherine Zimmerman (D. Or.) supported the purpose of the amendment, but did not understand Option 1. She opposed the rest of Amendment 27 as unworkable. Nancy Reims opposes the amendment because she feels that the current guideline is adequate.

AMENDMENT 27(B)- PUBLIC COMMENT SUMMARY

This amendment would revise the definition of the term "prior felony conviction" in Application Note 3 to §4B1.2. The amendment prevents the counting of relatively less serious crimes of violence by requiring that the statutory maximum for the offense be greater than two years.

Department of Justice- The **Justice Department** opposes the amendment, stating, "While we do not have strong policy objections to this proposal, we are concerned that it would violate the applicable statutory provision. A felony for purposes of Title 18, United States Code, is an offense punishable by more than one year of imprisonment. See, 18 U.S.C. §3559(a)(5).

Judges- The **Eighth Circuit** and Judge Kazen supported the amendment without comment.

Defense Attorneys- The **Federal Defenders** support the amendment because they feel that the current amendment includes nonserious offenses that should not be counted.

Probation- Nancy Reims and Jerry Denzlinger supported the amendment without comment. Michael Fisher (W. D. Tex.) also generally supports revising the definition of "career offender", but he is concerned that sentencing of street-level dealers under the career offender guideline is more severe than Congress intended. He acknowledges that street dealers are a menace to society, but he also believes that their careers in crime are a result of drug addiction and a poor socio-economic upbringing. He recommends that career offender guidelines would be more appropriate for the violent offender or the upper echelon drug distributor. Carl Hays (E.D. Ky) recommends that the definition of prior felony conviction remain unchanged.

AMENDMENT 27(C)- PUBLIC COMMENT SUMMARY

Amendment 27(C) would revise §4B1.2(3), which provides that the date when the judgment of conviction is entered is the date of conviction for purposes of the career offender guideline.

Department of Justice- The **Justice Department** did not comment on this amendment.

Judges- No judges commented on this amendment.

Defense Attorneys- The **Federal Defenders** oppose the amendment because they feel that it will unnecessarily contribute to prison overcrowding.

Probation- Nancy Reims and Jerry Denzlinger supported the amendment without elaboration. Carl Hays feels that the date should be the date of sentence.

AMENDMENT 27(D)- PUBLIC COMMENT SUMMARY

This amendment asks for comments on whether "lesser crimes of violence" should receive special treatment under the career offender guideline.

Department of Justice- The **Justice Department** opposes the amendment because they feel that such offenses should not be excluded as predicate offenses. They also feel that modifying the career offender provision to provide lower sentences for offenders convicted of such crimes is problematic because many of the sentences now provided are "near" the statutory maximum, rather than "at" it. In other words, lowering sentences would result in sentences less than "near" the statutory maximum, particularly after the reduction for acceptance of responsibility.

Judges- No judges commented on the amendment.

Defense Attorneys- The **Federal Defenders** support special treatment for "lesser" crimes of violence, recommending, "For example, the Commission could amend §4B1.2 to require that the defendant receive a term of imprisonment of more than a year and a month for the offense to qualify as a crime of violence." They would also recommend a similar requirement in the definition of "controlled substance offense."

Probation- Only Nancy Reims expressed support. Carl Hays does not think it is necessary to develop a category of "lesser" crimes. Barbara Roembke opposes the amendment because she believes that crimes of violence cannot be qualified. William Thorne (E. D. Ms.) and Jerry Denzlinger also oppose the amendment.

AMENDMENT 27(E)- PUBLIC COMMENT SUMMARY

This amendment seeks comments on whether the career offender guideline should be revised to provide that prior offenses that could have been consolidated for trial under Rule 8 of the Federal Rules of Criminal Procedure will be treated as one conviction.

Department of Justice- The **Justice Department** opposes this amendment as an artificial limitation on the career offender guideline.

Judges- No judges commented on this amendment.

Defense Attorneys- The **Federal Defenders** recommend adding the following new subdivision to §4B1.2:

(4) For purposes of this guideline, treat felony convictions not separated by an intervening arrest that result in concurrent, consecutive, or overlapping sentences as one prior felony conviction.

Probation- Carl Hays and William Thorne think the guideline should remain unchanged. Jerry Denzlinger and Nancy Reims recommend that separate indictments should be treated as separate convictions unless there was no intervening arrest and they were a string of the same type of criminal conduct.

AMENDMENT 27(F)- PUBLIC COMMENT SUMMARY

This amendment requests comment on whether the career offender guideline should be modified to require that all convictions occur sequentially, that is, that conduct resulting in conviction for the second prior offense occur after the conviction for the first prior offense.

Department of Justice- The **Justice Department** opposes this amendment because they believe that this amendment would provide a windfall to defendants who commit several criminal acts before they are sentenced and is inconsistent with the career offender statutory provision.

Judges- No judges commented on this amendment.

Defense Attorneys- The **Federal Defenders** believe that the career offender guideline should require sequential convictions in the same way that sentence enhancement statutes do.

Probation- Only Jerry Denzlinger supports the amendment. Carl Hays does not think the guideline should be changed, and he does not think there should be any requirement for a "strictly consecutive sequence." Nancy Reims is concerned that, "If guidelines require sentencing on the predicate priors for career offender classification, there could be three separate criminal acts with convictions, but one prior sentencing might purposefully be delayed to avoid career offender status. In the example given of rape and robbery in the same criminal activity, wouldn't they be treated as only one prior conviction anyway if they occurred on the same occasion?"

AMENDMENT 28(A)- PUBLIC COMMENT SUMMARY

This amendment requests comment on whether to establish a new Category 0 criminal history for offenders for whom Category I criminal history may be an inaccurate measure of the likelihood of recidivism.

Comments to 28(A) were mixed.

Department of Justice- The **Justice Department** strongly opposes the creation of a Criminal History Category 0. They believe that it would potentially revise the guidelines in a substantial way and alter the Commission's previous judgments about appropriate sentencing levels for all crimes. In particular, they feel that it would undermine sentencing of white collar defendants, who are unlikely to have a prior criminal history.

Judges- The **Eighth Circuit** opposes the amendment because they feel that a better approach is permit district courts to depart downward when the danger of recidivism is low and upward when the danger is high. Judge Kazen believes that the amendment would be "far more trouble than it's worth." Judge Maxwell (N. D. W.Va.) supports the amendment without comment.

Defense Attorneys- The **Washington Legal Foundation** supports the addition of a category 0, and the **Federal Defenders** support any amendment that will help to alleviate prison overcrowding. The **New York Council of Defense Lawyers** favors the creation of a Criminal History Category of 0, but opposes the amendment in its current form. They feel that the amendment as proposed would have a disparate impact on racial minorities and should be viewed with extreme caution. They write that empirical data demonstrate that inner-city youth are more susceptible to arrest or charges later found to be without substance than are white defendants. They recommend that to be denied the benefit of category 0, the defendant should have a prior arrest that, at a minimum, resulted in some accountability, even if less than a crime (e.g., a conviction of a violation, or an offense). The **American Bar Association** does not support the amendment because of their concern that a Category 0 would unfairly benefit white collar offenders. They also worry about the potential for abuse. For example, "is a prior arrest of a peaceful demonstrator a basis to deny zero category treatment?"

Probation- John Babi, Katherine Zimmerman and Barbara Roembke oppose the amendment because they feel the current guideline range is adequate. Christopher Buckman (W. D. Ms.) suggests that the amendment define Category 0 as an offender that does not have any convictions under the guidelines §4A1.1(a), (b), or (c) or §4A1.2(c)(1) regardless of the applicable time period (except in the case of juvenile adjudications). He believes that this will allow the current Sentencing Table to remain intact while giving defendants who have no criminal history a reduction in their offense level and sentencing range.

AMENDMENT 28(B)- PUBLIC COMMENT SUMMARY

This amendment seeks comment on the appropriate method of sentencing defendants with high numbers of criminal history points. It also provides three options for sentencing such defendants.

Option 1- Category VI with a 3-point spread. Category VI would include defendants with 13-15 points, and a new category VII would include cases with 16 or more points.

Option 2- Category VI with a 7-point spread. Category VI would include defendants with 13-19 points, and a new category VII would include defendants with 16-18 points.

Option 3- Category VI and Category VII each with 3 point spreads. Category VI would include defendants with 13-15 points, and a new Category VII would include defendants with 16-18 points.

Department of Justice- The **Justice Department**, "strongly believe(s) that this new criminal history category is needed to provide adequate sentences for the most serious recidivists." The Justice Department favors Option 3, because they feel that it is necessary for the Commission explicitly to eliminate the factor of "lack of youthful guidance" as a basis for departure in order to maintain the integrity of the guidelines system and ensure uniformity in sentencing. They also believe that "history of family violence" and other similar factors would have the same effect and should not be considered as a basis for downward departure.

Judges- The **Eighth Circuit** opposes the amendment because they feel that allowing judges to depart upward or downward depending on the danger of recidivism is a better approach. Judge Kazen opposes the amendment, because he feels that it should be handled as per Option 2 under Amendment 26(A). He is also concerned about the temptation to keep adding categories. Instead, he suggests leaving the categories where they are and handling the remaining cases by departure.

Defense Attorneys- The **American Bar Association** opposes the amendment because, "...this proposal is not supported by the data collected by the working group and should be shelved for that reason alone."

Probation- Barbara Roembke supports Option 3.

PUBLIC COMMENT — ALTERNATIVES TO INCARCERATION

Comment of Judges

Judge Vincent L. Broderick & Judge Mark L. Wolf, Judicial Conference of the United States

Urges adoption of Options 1, 2, and 3. Believes there should be greater flexibility at the low end of the guidelines with particular reference to first offenders. Does not believe changes would compromise structure of guidelines as originally drafted. Opposes the adoption of an offense-by-offense approach, under which certain types of offenders, such as white collar offenders, would be excluded from eligibility for alternatives.

Judge Frederic N. Smalkin, U.S. District Court, District of Maryland

Believes that Option 6 of Amendment 29 gives the greatest flexibility in fully implementing the Congressional mandate that first offenders generally should not be sentenced to incarceration unless they have committed an offense so serious as to warrant that treatment in lieu of other, less costly, and more effective treatment.

Judge Gerald W. Heaney, U.S. Court of Appeals, Eighth Circuit

On behalf of six Eighth Circuit judges, supports Amendment 29 which gives district courts greater flexibility. Prefers Option 6, which expands the availability of probation and provides for split sentences. Does not believe this amendment would compromise the guidelines, but would more carefully carry out the intent of the Sentencing Reform Act of 1984.

Chief Judge Robert E. Maxwell, U.S. District Court, Northern District of West Virginia

Believes adoption of Options 1-5 of Amendment 29, which provide for the expanded availability of non-prison sentencing options, would "alleviate some of the problems mounting in this and many other Districts." Does not believe that these proposed amendments would compromise purpose of sentencing guidelines. Sees an offense-by-offense approach to be unnecessary. In favor of including as many alternatives as possible in menu available to judge.

Chief Judge Julian Abele Cook, Jr., U.S. District Court, Eastern District of Michigan

Supports the amendments proposed by the Judicial Conference of the United States. Believes Commission should give greater consideration to those amendments which increase the discretion of the sentencing judge because that discretion has been shifted to the prosecutor in many cases under guideline sentencing.

Chief Judge James A. Redden, U.S. District Court, District of Oregon

Writes to express agreement with comments (described below) made by Katherine Zimmerman, Deputy Chief Probation Officer.

Comment of Department of Justice

Robert H. Edmunds, Jr., U.S. Attorney, Middle District of North Carolina

Strongly opposes adoption of alternative sentencing options listed in Amendment 29. Believes the amendments would compromise the fair and appropriate sentences achieved through implementation of the guidelines. Believes such approach is inconsistent with Sentencing Reform Act's purpose of reducing unwarranted sentencing disparity. Believes that a number of the options would produce guidelines that violate the statutory requirement that the maximum of an imprisonment range not exceed the minimum by more than the greater of 25 percent or six months. Notes under-utilization of current options. Believes that, if any options are put into effect, certain offenders should be excluded from eligibility.

Comment of Probation Officers

Christopher R. Buckman, Western District of Missouri

Supports split sentences for wider spectrum of offenses. Recommends that eligibility be expanded to those who have minimum guideline range of up to 24 months and no criminal history.

Jack R. Saylor, Chief Probation/Pretrial Officer, District of South Dakota

Prefers Options 1, 2, and 3. Believes certain white collar offenders should not be eligible for straight probation or probation with a fine and/or restitution.

Western District of New York

Prefers Option 6 of Amendment 29 because it allows expanded use of numerous alternatives to incarceration which will result in less overall prison time for low-level defendants and because it provides judges with greater discretion. Regarding Option 4, it was felt that defendants with in the higher criminal history categories should not receive the same benefit as defendants in criminal history categories I or II.

William R. Thorne, Eastern District of Missouri

Believes that Judicial Conference proposals do not compromise structure of guidelines. Opposes an offense-by-offense approach to eligibility issue. Does not believe there is a need to expand alternatives available because this would unduly complicate the sentencing process and most programs are already available through Bureau of Prisons or the Probation Office.

Carl C. Hays, II, Eastern District of Kentucky

Believes options do not compromise guidelines as originally drafted. Favors an offense by offense approach to expanded alternatives, removing white collar offenders from consideration. Sees no need for additional alternative programs.

Barbara J. Roembke, Southern District of Indiana

Favors Option 1 of Amendment 29. Does not feel proposals compromise structure of guidelines. Feels Commission should not adopt offense-by-offense approach; better to keep it simple. Not in favor of expanding available sentencing options.

Dae Lynn Hollis

Believes proposals compromise structure of guidelines and will cause an increase in sentencing disparities. Believes proposals inconsistent with philosophies of deterrence, just punishment, incapacitation and rehabilitation. Is not in favor of an offense-by-offense approach to the alternatives. Opposed to expansion of additional programs because of the difficulty in monitoring them.

Nancy Reims, Deputy Chief Probation Officer, Central District of California

Recommends adoption of Options 1, 2, 3, and 5. Options 4 and 6 are not recommended in order to avoid the expansion of straight probation for those with both higher offense levels and criminal history categories. Believes options do not compromise guidelines' structure. Believes offense-by-offense approach risks too many sentencing distinctions that are essentially based upon offenders characteristics (e.g., white collar offenders). Believes alternatives need to be perceived as reasonably comparable to imprisonment.

Michael C. Fisher, Western District of Texas

Encourages expansion of availability of non-prison options. Specifically mentions Option 1 of Amendment 29 which modifies the requirement that defendants must serve at least one-half of the minimum guideline range in prison under the split sentence provision.

Katherine Zimmerman, Deputy Chief Probation Officer, District of Oregon

Supports Option 6, which enlarges the sentencing alternatives available for the less serious offenders. Does not feel this option significantly compromises original structure of the guidelines, but offers additional flexibility. Doesn't believe it necessary to exclude certain offenses from consideration for alternatives. Urges Commission to reject use of complex formulas for equating alternatives with prison.

Comments of Defense Bar

Steve Salky, American Bar Association

Supports increased flexibility in sentencing options. Urges adoption of Options 2, 3, and 5 of Amendment 29 without limitation as to their application by offense. Believes that, even if white collar offenders may benefit more than blue collar offenders, most offenders will still serve some limited period of imprisonment under these amendments.

New York Council of Defense Lawyers

Recommends the adoption of Option 6 of Amendment 29, which incorporates 1, 4, and 5. Believes that this combination of options would not compromise the structure

or purpose of the guidelines and would give sentencing judges flexibility without inviting undue disparity in the sentences imposed. Favors the adoption of additional alternatives (i.e., residential incarceration, day reporting centers, public service work, and boot camps). Does not believe white collar offenders should be excluded from potential alternatives. Formulated its positions, in part, by surveying New York District Court judges.

American College of Trial Lawyers

Supports recommendations made by Judicial Conference. Favors redefining the split sentence to require at least a month of imprisonment, but not 50 percent of the minimum term. Believes extended prison time could induce the offenders to new criminal lifestyles and would tax an already crowded prison system. Also favors removing requirements for a term of imprisonment in cells with minimum terms of seven to ten months. Does not believe that proposed amendments compromise the guidelines or that expansion of probation should exclude white collar offenders.

National Association of Criminal Defense Lawyers

Encourages the Commission to support the use of alternative programs such as intensive supervision, public service, boot camps, day reporting centers, halfway house programs, and maximum 90 day custody programs for certain qualified youthful first offenders. Recommends taking one step further the proposed requirement redefining the split to a minimum of one month in prison. Suggests the court be allowed the option of sentencing an offender to 0 - 1 months in prison as part of the "split," thus giving the court complete discretion.

Henriette D. Hoffman, Federal Public and Community Defenders

Supports Options 1, 2, and 5, and Option 3 with modifications. Suggests that Option 3 be modified to expand Zone A to offense level 9, Category I. Further recommends that, in order to address a cliff problem, Option 3 should be modified to reduce the guideline ranges for Category I offenders at additional offense levels. Believes guidelines are overly harsh for Category I offenders and that the federal prison system is seriously overcrowded.

William F. Byrne, Attorney

Recommends Option 6 to provide court with needed flexibility in dealing with non-sentencing options. Favors additional sentencing options in order for the court to fashion an appropriate penalty.

Comments of Prisoner Organizations

Citizens United for the Rehabilitation of Errants

Favors any enlargement of the number of defendants eligible for alternatives to imprisonment; suggests the minimum term for eligibility should be one year. Believes probation with confinement conditions should be available to those previously eligible for split sentences. Believes split sentences should be available to guideline ranges "up to 24 months."

Summary

Recognizing the pitfalls in equating each submission of public comment (one letter may represent one individual or it may represent an entire agency), a short summary is presented below.

Preferred Option	No. of Respondents
Option 1	3
Options 1,2,3 combined	2
Options 1,2,3,5 combined	2
Options 1-5 combined	1
Options 2,3,5 combined	1
Option 6	7
General/partial support	6
Opposed to any option	2
TOTAL	24

Thirteen submissions directly commented on whether the proposals compromised the structure of the guidelines. Out of these 13, two respondents indicated 'yes' and 11 indicated 'no.'

Fourteen submissions directly commented on whether there should be an offense-by-offense approach under which certain types of offenders would be excluded from eligibility for alternatives. Of these 14, 11 respondents indicated 'no' and three respondents indicated 'yes.'

Nine submissions directly commented on whether there should be an expansion in the menu of alternatives; five said 'no' and four said 'yes.'

U.S. Department of Justice

Washington, D.C. 20530

MARCH 16, 1992

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

This is in response to the publication by the Sentencing Commission of proposed amendments to the sentencing guidelines. At the public hearing on the proposed amendments, we testified and submitted a written statement on a number of important issues. However, our statement did not address all areas of concern. The following addresses other areas of significant concern to the Department.

Amendment 1(A) §1B1.3. Relevant Conduct

Amendment 1(A) more clearly defines relevant conduct and moves language regarding jointly undertaken activity from the commentary to the guideline. We generally support the proposed revision of the guideline in that we believe it will add clarity to the provision. However, the proposed commentary changes are problematic in several respects.

First, the Commission proposes to provide new guidance on what constitutes jointly undertaken activity. The proposal states that the court may consider any explicit or implicit agreement. However, it then indicates by way of example that a factor to be considered in determining what qualifies as jointly undertaken criminal activity is whether the defendant "benefited directly, or expected to benefit directly, from the conduct of others that occurred prior, contemporaneous, or subsequent to the defendant's joining the criminal activity ...." Application Note 1. This concept of direct benefit appears in several other places in the proposed commentary and is the only explicit example provided of a relevant conduct factor to be considered in reaching a determination concerning the scope of jointly undertaken activity.

We are concerned that the proposed language will frequently make the scope of jointly undertaken criminal activity turn on too narrow a standard -- whether there has been direct benefit to the defendant. Courts may construe the direct benefit language

to require monetary gain to the defendant. However, benefits may accrue to the defendant in indirect ways. For example, the defendant's employer or organization may gain from the offense. In savings and loan fraud many executives have engaged in large-scale fraudulent transactions designed to deceive federal regulators into believing that their institutions were solvent when they were not. The benefit of the unlawful activity may be indirect to the organization in the form of averting regulatory action, rather than direct in the form of profits either to the organization or the defendant. A further example of indirect benefits can be seen in antitrust conspiracies where unlawful conduct by an individual defendant may benefit his or her organization or employer through increased profits and the individual only indirectly through continued employment. The same is true of drug cartels, in which a low-level participant may benefit the drug conspiracy through his jointly undertaken criminal activity to make illegal sales and himself only indirectly through continued participation in an ongoing organization or protection from competitors not involved in the defendant's organization. We urge deletion of the direct benefit concept from the commentary.

We also recommend that illustration g in Application Note 1 be revised because it currently indicates that a street-level drug dealer who knows of other dealers in the area who share a common source of supply with him is not engaged in a jointly undertaken criminal activity with them. It may be true in some circumstances that such a street-level dealer is not jointly engaged with other dealers, but this is not necessarily the case. We recommend that the second sentence be revised to read:

> The defendant is not accountable for the quantities of drugs sold by the other street-level drug dealers if they merely shared a common source of supply and there is no other evidence of joint activity.

The remainder of the illustration should be deleted because it may suggest that sharing of resources and profits is the only scenario in street-level drug dealing that qualifies as jointly undertaken activity. We think it is preferable to delete these examples than to attempt to give a more complete list because the courts may read too much intent into the failure of the illustration to include a particular scenario.

In addition, it would be helpful to include in the commentary an indication that while the changes are meant to clarify the scope of relevant conduct, they are not intended to provide a windfall to the leaders or organizers of an illegal activity. The latter may direct others in ongoing criminal activity but not actually jointly undertake any direct participation in any particular criminal act. It would appear that this type of criminal involvement should be covered by

proposed §1B1.3(a)(1)(A), rather than (B), which discusses jointly undertaken criminal activity. However, this application to the leader or organizer of a criminal activity should be clarified.

Another useful addition to the commentary would be an example related to unlawful gang-related activities. Such an example could foster appropriate uniformity in sentencing in gang-related crimes.

Amendment 1(B) §1B1.3. Relevant Conduct

This amendment adds an application note to describe "common scheme or plan" and "same course of conduct." While we generally favor the amendment, there are several problems. First, we believe it would be ill-advised to include a specific time period, such as the 120 days included in the proposal, as applicable to the term "same course of conduct." The proposed language recognizes the difficulty with any specific time period and states that the 120-day period is only a general and not absolute standard. Nevertheless, we can envision conduct by sophisticated offenders aimed at avoiding the consequences of treatment under the specified time period as well as unnecessary disputes over the exact timing of the conduct.

Finally, we also recommend amendment of the application note to address conduct that preceded the statute of limitations period. Because the issue is not now clear, the commentary should state: "Conduct that is part of the same course of conduct or common scheme or plan as the offense of conviction is relevant for purposes of sentencing under §1B1.3(a)(2) even though it occurred prior to the statute of limitations period for the offense of conviction."

Amendment 2(B) §1B1.8. Use of Certain Information

The proposed amendment would provide that when a defendant agrees to cooperate with the government by providing information about his own unlawful activities and as part of the agreement the government agrees that self-incriminating information provided will not be used against him, then the information shall not be used in determining the applicable guideline range. Currently, a defendant must provide information about the unlawful activities of others to receive the benefit of this provision.

We object to the proposed amendment. In most cases it will encourage pleas only from defendants who fear that the government eventually will learn of their other criminal conduct from coconspirators or others. Such persons would seek to escape punishment by confessing early and would have little incentive to provide information about the unlawful activities of others. We

see no reason to reward a defendant by excluding incriminating evidence in the guideline calculation simply because he tells the government what he has done. The acceptance of responsibility guideline addresses this concern.

Amendment 3 §1B1.12. Juveniles

Amendment 3 adds a new policy statement regarding persons sentenced under the Federal Juvenile Delinquency Act. It provides that the guidelines do not apply but that they may be used as a starting point in sentencing the juvenile. It further provides that sentences for juveniles that are above the range that would apply to an adult should be justified by specific reasons but that sentences below the range "may be appropriate."

As written, the policy statement seems to be an invitation to sentence juveniles at lower than the guideline sentence that would apply to an adult offender convicted of the same offense. The justification seems to be the offender's youth. However, many juveniles are close to adult age when they commit offenses, and others engage in conduct that constitutes a serious offense when committed by an adult. We believe that the policy statement should take a more neutral approach and provide that the guidelines should be used as a starting point but that a sentence above or below the range that would apply to an adult may be appropriate in a particular case. The policy statement should encourage justification for sentencing outside the range in either direction.

Amendment 4(A) §2A3.2. Criminal Sexual Abuse of a Minor; §2A3.4. Abusive Sexual Contact

The proposed amendments add cross references to the guidelines for criminal sexual abuse of a minor and abusive sexual contact. The proposed cross references would require application of the guidelines for more serious sexual abuse offenses if the offense involved such conduct. We favor the proposed amendments since they foster a real-offense approach to sentencing. However, there is a technical problem with current guideline §2A3.1 and the proposed amendments that should be corrected.

Under current statutes there is no longer a federal offense described as "assault with intent to commit criminal sexual abuse." The conduct described by this phrase is now encompassed within the crime of aggravated sexual abuse under 18 U.S.C. §2241(a) and the crime of sexual abuse under 18 U.S.C. §2242(1). Both of these statutes include sexual abuse accomplished by force or threat and attempts to commit sexual abuse by force or threat. In recognition of this, the offense under 18 U.S.C. §113(b) of "assault with intent to commit any felony" now specifically

excludes felonies under chapter 109A, which are the sexual abuse felonies set forth in 18 U.S.C. §§2241 and 2242.

For this reason we suggest that the title to guideline §2A3.1 be revised to omit the phrase "assault with intent to commit criminal sexual abuse." A title such as "**Criminal Sexual Abuse and Aggravated Criminal Sexual Abuse or Attempt to Commit Such Acts**" would include the same conduct, more accurately reflect the current statutes, and be parallel to the titles for §§2A3.2 and 2A3.3. We also suggest that the now obsolete phrase "assault with intent to commit criminal sexual abuse" be omitted from the text of the proposed guideline amendments where it appears.

Chg title to 3:1

Amendment 5 §2B1.1; 2F1.1. Fraud, Theft and Embezzlement

Proposed amendment 5 would change the larceny and fraud tables, guideline §2B1.1 and §2F1.1, by eliminating the specific offense characteristic of "more than minimal planning" and building the two-level increase into the loss tables. The proposal also provides three alternative loss tables. The Commission also requests comment on conforming changes to other "loss tables," specifically noting the tax loss table in guideline §2T4.1.

We strongly oppose the elimination of the two-level upward adjustment for fraud offenses for "more than minimal planning." The Department prosecutes many fraud cases sentenced under guideline §2F1.1 in which there is no dollar loss associated with the crime. These cases arise under 18 U.S.C. §1028, for example, involving false identification documents. In other cases, such as antitrust or fraud charging mislabeling or other types of misrepresentation, it is impossible to assign a figure for economic loss.

Losses are extremely difficult to document and are thus unaccounted for in many cases due to defendants' successful efforts to hide the scope of illegal activity. Losses are frequently underestimated in odometer and food and drug fraud cases, for example, because of the effort required to quantify them. These characteristics are shared by many fraudulent schemes which involve poor records and an obscure paper trail but include many victims.

In addition, the Department often prosecutes individuals involved in financial or other fraud schemes and property crimes which simply do not result in large monetary losses but which, by virtue of the defendants' involvement in repeated transactions over an extended period to time, would fall within the definition of "more than minimal planning." Particularly if a defendant is caught early in a fraud scheme before substantial losses are amassed, it may be impossible to establish a significant loss

from the fraud, but eminently feasible to show the extent of "planning".

Moreover, as a conceptual matter, we agree with the background to guideline §2B1.1 that "[p]lanning and repeated acts are indicative of an intention and potential to do considerable harm. Also, planning is often related to increased difficulties of detection and proof." These factors often occur in public corruption cases, and warrant application of a specific offense characteristic apart from the dollar value of the money involved in the scheme. Simply stated, complex schemes to defraud often warrant harsher treatment than simple ones. The flexibility in application that may result from this additional characteristic is desirable in allowing the government and the court to distinguish between complex and simple schemes that often require different sentences even if similar amounts of loss are involved. The extent of planning of a fraudulent scheme is an excellent measure of a defendant's culpability. Thus, we urge that the "more than minimal planning" specific offense characteristic be retained.

In our experience the "more than minimal planning" adjustment has not been difficult to apply in practice. If "more than minimal planning" is not always applied uniformly by the courts, we recommend clarifying commentary and more examples, rather than elimination of the enhancement.

Although the Commission's proposed loss tables purport to take into account the elimination of the two-level increase for "more than minimal planning," a careful review of the tables shows that they do not fully incorporate this adjustment, particularly at the lower and middle sections of the table. At most, the new tables seem to be approximately one level higher than the current tables in mid-range loss amounts. This effectively represents a one-level reduction over current guideline calculations. Many cases, such as food and drug and odometer fraud, for example, which typically involve losses less than $20,000 and which in the past have virtually always received increases for "more than minimal planning," would lose one offense level under the structure of the new loss tables. The lower end of the loss table is also often implicated in corruption cases where the dollar amount may not be large or readily determinable. Such cases warrant increased sentences, not the decreases that apparently would result from the proposed amendment.

The tables also appear to contain a slower increase in levels in the moderate range of frauds -- $200,000 to $3,000,000. In our view, these proposed tables fail to punish fraud adequately in the moderate range, the most common sort of fraud.

The Department opposes adoption of any of the three "alternative" loss tables. The first loss table set out in the proposed amendment appears to build the two-level increase into the table as quickly as possible, while the three alternative tables do not seem to raise offense levels at all, despite the elimination of the "more than minimal planning" adjustment. Thus, these alternatives require greater losses than the first proposed loss table to reach similar offense levels, an undesirable result.

Moreover, we strongly favor the one-level increase tables as opposed to the broader two-level increase alternative. By broadening the range of the loss between offense levels and providing that the offense levels increase in increments of two, the two-level table reduces the impact of the table on many of those defendants at the lower end of the table. In our experience there has been only limited litigation over the difference between one loss level and the next. To the contrary, by increasing the amount of the loss by two offense levels at a time, alternative table three could result in an <u>increase</u> in litigation over precise dollar amounts.

A large number of the Department's tax cases fall at the lower end of the tax loss table. Thus, any change in the larceny and fraud tables which might impact on the tax loss table and reduce the impact at the lower end of the scale would adversely affect our criminal tax enforcement effort. Accordingly, we strongly urge the adoption of tables with one-level rather than two-level increments for tax as well as for fraud offenses.

With respect to the Commission's request for comments on comparable changes to other loss tables (and, specifically, the §2T4.1 tax table), we urge that if the larceny and fraud tables are increased, the tax table also be increased. There is no reason why tax and other comparable offenses should be treated any less seriously than larceny and fraud offenses.

<u>Amendment 9 §2N2.1. Food and Drugs</u>

The Commission has proposed two options for amending the food and drug guideline. The first converts an instruction currently in an application note to a cross reference regarding offenses committed in furtherance of other offenses. The second option expands the current guideline, which currently provides a base offense level of 6 and no specific offense characteristics. The second option provides enhancements for prior convictions under the Federal Food, Drug and Cosmetic Act, violations of a judicial or administrative order, and public health risks. In addition, it includes the cross reference in Option 1.

We urge the Commission to adopt Option 2 with the modification recommended below. A major purpose of the Federal

Food, Drug and Cosmetic Act is to protect the public health by insuring pure foods and drugs. Although violations of the Act may cause a risk of injury or illness, the current guideline, §2N2.1, fails to recognize this risk. The creation of a public health risk by a violation of a statute aimed at preserving the public health should not require the government to argue for an upward departure; this factor should be built into the guideline. Without a specific offense characteristic recognizing the health risk created by the improper distribution of medical drugs, foods, or biological products, the guideline fails to assure a sentence that would serve the punishment, deterrence, and other purposes of sentencing.

The proposed guideline also recognizes that defendants with prior food and drug convictions should receive an enhanced sentence, as should those who violate a judicial or administrative order. We believe this feature is necessary because the Federal Food, Drug and Cosmetic Act (FFDCA) treats second offenses that would otherwise be misdemeanors as felonies. However, a defendant with a prior misdemeanor conviction under the FFDCA is unlikely to score above criminal history Category I. Thus, the enhancement for prior FFDCA convictions would not result in double counting, except in rare cases.

While we urge the Commission to adopt Option 2, we recommend a modification in the proposed cross reference (which is identical in both options). It arguably would change existing law in a manner adverse to the effective prosecution of FFDCA offenses. The Commission indicates that the cross reference was added in an effort to make the language of guideline §2N2.1 conform to that of other guidelines; it does not appear that an adverse impact on cases involving fraud was intended.

The FFDCA distinguishes between misdemeanors and felonies on the basis of intent rather than on the basis of other acts associated with the offense. Violations committed with "intent to defraud or mislead" are felonies under 21 U.S.C. §333(a)(2). The same violations committed with less than this level of intent are misdemeanors under the FFDCA. The current food and drug guideline is only intended to apply to regulatory misdemeanors. Felony cases require application of other relevant guidelines. Application Note 2 to §2N2.1 currently accomplishes this result by providing as follows:

> If the offense involved theft, fraud, bribery, revealing trade secrets, or destruction of property, apply the guideline applicable to the underlying conduct, rather than this guideline.

Because intent to defraud or mislead is an element of a felony violation, numerous courts have held that the fraud guideline, §2F1.1, applies to food and drug felony cases. In

upholding the use of the fraud tables for FFDCA felonies, two courts of appeals have specifically relied on the commentary of §2N2.1 cited above. United States v. Cambra, 933 F.2d 752, 755 (9th Cir. 1991); United States v. Arlen, 947 F.2d 139, 146-47 (5th Cir. 1991).

The new amendments (in both options) propose replacing the cited commentary with the following language:

> If the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline, apply that other offense guideline if the resulting offense level is greater than that determined above.

This new language would arguably require proof that the violation being sentenced was committed in furtherance of a separate and distinct fraud in order for the fraud guideline to apply. Under this interpretation of the new language, the fraudulent intent constituting an element of the violation being sentenced would not be sufficient for the fraud guideline to apply. The effect of this new language would, therefore, be to add an onerous burden for the government, because the fraud guideline may be held to apply only if the government proved involvement in a collateral fraud. The proposed cross reference to §2N2.1 would arguably take away the favorable court decisions cited above.

To avoid what appears to be an unintended result in converting an instruction in commentary to a cross reference in the food and drug guideline, we propose the following cross reference:

> If the offense involved fraud, apply §2F1.1 if the resulting offense level is greater than that determined above. If the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline, apply that other offense guideline if the resulting offense level is greater than that determined above.

Such a change would preserve for guideline purposes the present reference to fraud as an element of a food and drug felony offense.

Amendment 10 §2Q1.2. Mishandling of Hazardous or Toxic Substances
Amendment 11 §2Q2.1. Fish, Wildlife, and Plants

Enclosed are detailed comments prepared by our Environment and Natural Resources Division regarding Amendments 10 and 11.

Amendment 12 §2S1.3; §2S1.4. Money Laundering and Monetary Transaction Reporting

Amendment 12 would significantly change the treatment of violations of 26 U.S.C. §6050I, which requires persons engaged in a trade or business who receive $10,000 or more in cash in one transaction (or a series of related transactions) to report the receipt of those funds by filing form 8300 with the Internal Revenue Service. Sentencing for the willful failure to file a form 8300 (26 U.S.C. §7203) would be transferred from guideline §2S1.3 to §2S1.4 and the filing of a false form 8300 (26 U.S.C. §7206(1)) transferred from guideline §2T1.3 to §2S1.4. These changes create a number of problems which raise serious concerns. In our view, the better approach would be to sentence these violations under guideline §2S1.3. Set forth below is our proposed guideline language for your consideration.

Upon reflection, we question the premise underlying the proposal that "[c]ertain violations of 26 U.S.C. §7203 and 7206 are more closely comparable to violations covered by §2S1.4 . . . than to the guidelines presently referenced to these violations." Rather, we believe that violations relating to form 8300 are more similar to currency transaction report (CTR) violations (reporting requirements for financial institutions under 31 U.S.C. §5313, now sentenced under guideline §2S1.3) than to currency and monetary instrument report (CMIR) violations (covered under §2S1.4). The CTR and form 8300 provisions are complementary: a financial institution engaging in a cash transaction greater than $10,000 must file a CTR; a trade or business receiving more than $10,000 in cash must file a form 8300. In both cases it is a criminal offense to structure or to attempt to structure a transaction for the purpose of evading the reporting requirements. CMIR requirements, in contrast, are imposed on a person (as opposed to a financial institution or a business) who transports more than $10,000 in cash into or out of the United States, and there are no structuring provisions with respect to CMIR violations.

We strongly support raising the base offense level for the willful failure to file a form 8300 from 5 to 9, as proposed. The present base offense level of 5 in guideline §2S1.3 for willful failure to file a form 8300 is much too low to properly reflect the provisions of the Anti-Drug Abuse Act of 1988 (Pub. L. 100-690), which increased the maximum term of imprisonment for failure to file a form 8300 to five years (26 U.S.C. §7203). (Other violations of 26 U.S.C. §7203 are punishable by not more than one year in prison.) As presently drafted, willful failure to file a form 8300, without more, is sentenced at the same level under guideline §2S1.3 as any other willful violation of 26 U.S.C. §7203 is under guideline §2T1.2 when there is no tax loss. Thus, whatever approach the

Commission decides to adopt, it is critical that the base offense level be raised to at least 9.

We also support raising the offense level for filing a false form 8300 from 6 to 9, as proposed. It is important, in our view, that failure to file form 8300 and filing a false form 8300 be assigned a higher offense level than under the current guidelines. While the filing of false forms 8300 is a problem, the failure to file forms 8300 is as large a law enforcement problem.

The proposed amendment would also result in a decrease in the offense level for willful failure to file a form 8300 from 13 to 9 if the defendant structured transactions to evade reporting requirements. The base offense level is 13 under guideline §2S1.3 if the defendant structured. There is no similar provision in guideline §2S1.4. Because 26 U.S.C. §6050I explicitly includes structuring as one of the activities prohibited by the section, we do not believe this provision can be eliminated.

Our proposal below would include both the willful failure to file form 8300 and the filing of a false form 8300 in guideline §2S1.3. It provides a base offense level of 9 for both offenses, consistent with the Commission's proposal in amendment 12. This amendment would also retain the base offense level of 13 presently found in guideline §2S1.3 if the defendant structured transactions to evade reporting requirements.

§2S1.3 Failure to Report Monetary Transactions; Willful Failure to File Form 8300; Filing False Form 8300; Structuring Transactions to Evade Reporting Requirements

(a) Base Offense Level:

(1) 13, if the defendant:

(A) structured transactions to evade reporting requirements; or

(B) knowingly filed, or caused another to file, a report (other than a Form 8300) containing materially false statements; or

(2) 9, if the defendant either failed to file a Form 8300 or filed a false Form 8300; or

(3) 5, otherwise.

In order to avoid confusion, we suggest that language be included in the commentary to make clear that offenses under the structuring provision in section 6050I(f)(1) are to be sentenced at offense level 13.

We recognize that the above proposal allows certain inconsistencies in the treatment of CTR's and Forms 8300 to remain. Since the Commission did not propose guideline amendments in a manner that would permit correction of all inconsistencies this amendment cycle, we recommend that the Commission address these further inconsistencies next year.

Amendments 13 and 14 §2T1.1-4. Tax Offenses

The Department supports proposed amendment 13, a series of amendments which will dramatically impact sentencing in criminal tax cases by consolidating the tax guidelines and ensuring that the amount of loss calculations are the same for all guidelines in the chapter. Tax loss computations should be simpler and more uniform under the new approach, and use of the "applicable tax rate," rather than the 28% (or 34% for corporations) will give a closer approximation of "tax loss" should tax rates changes. In addition, the specific inclusion of new guideline §2T1.1(a)(2) (providing an alternative level of 6 where the offense is not tax-loss driven) should be helpful in such cases.

As a related change to the above proposal, we suggest that the Commission renumber the tax guidelines to eliminate the gaps that will ensue from the deletion of guidelines §2T1.2, §2T1.3 and §2T1.5.

While the proposed change to guideline §2T1.4, involving the creation of one two-level specific offense characteristic by combining guideline §§2T1.4(b)(1) and (b)(2), will adversely impact on a small number of our tax cases, we do not object to it. The Commission's proposal is careful to continue to limit the inapplicability of the §3B1.3 (Abuse of Position of Trust or Use of Special Skill) adjustment to only the second prong of the proposed specific offense characteristic (two-level adjustment if the defendant was in the business of preparing or assisting in the preparation of tax returns), thus continuing the availability of such an adjustment when the defendant committed the offense as part of a pattern or scheme from which he derived a substantial portion of his income, as is the case under the current guidelines.

The proposed changes in guideline §2T1.9 are designed to clarify the conditions under which the specific offense characteristics of guideline §2T1.9 are applicable and to clarify the relationship between the loss calculation under guideline §2T1.4 and §2T1.9. We have no objections to these proposals, but believe that some other changes are necessary.

First, we recommend that the Commission delete the phrase "as applicable" from guideline §2T1.9(a)(1). That phrase has caused confusion as sentencing courts have struggled to determine whether guideline §2T1.1 (Tax Evasion) or §2T1.4 (Aiding, Assisting, Counseling, or Advising Tax Fraud) applies. In some situations, the view has been expressed that neither guideline applies and use of a base offense level of 10 is appropriate.

In fact, use of the phrase "as applicable" is inappropriate as neither of the offenses covered by guideline §2T1.1 (26 U.S.C. §7201) and §2T1.4 (26 U.S.C. §7206(2)) is applicable to the type of conspiracy covered by guideline §2T1.9. That guideline covers conspiracies to defraud the United States by impeding and impairing the Internal Revenue Service. The object of such a conspiracy is not the violation of a particular statutory provision, such as 26 U.S.C. §7201 or §7206(2). (Indeed, if the object of a conspiracy is to violate a particular provision of the Internal Revenue Code, the sentence would appear to be more properly imposed under §2X1.1.) Consequently, to direct a court to determine whether guideline §2T1.1 or §2T1.4 applies is to require it to engage in a hopeless exercise. The most a sentencing court should be directed to do is to select the guideline (§2T1.1 or §2T1.4) for the underlying offense which most nearly approximates the harm which would have resulted had the conspirators succeeded in impeding and impairing the Internal Revenue Service. Language should be added to the Commentary to guideline §2T1.9 to guide the sentencing court in this regard. The deletion of "as applicable" and the insertion of additional commentary language will make clear that a court is not required to find that either guideline §2T1.1 or §2T4.1 applies in order to refer to those guidelines in calculating the base offense level under guideline §2T1.9.

We also suggest that the phrase "fraudulent tax <u>schemes</u>" be added to proposed Application Note 4 after "the marketing of fraudulent tax shelters." Not all fraudulent tax schemes are tax shelters, and in our view "schemes" is a broader and more appropriate term.

The Department considers proposed amendment 14, the enhancement for tax offenses related to illegal narcotics activity, an important priority and urges its enactment in this amendment cycle. We note that if the Commission adopts proposed amendment 13, which would combine several of the tax guidelines and eliminate guideline §2T1.2, §2T1.3 and §2T1.5, this drug amendment would have to be made only to guideline §2T1.1(b)(1) and §2T1.4(b)(1).

<u>Amendment 15 §3A1.4. Terrorism</u>

Amendment 15 would provide a Chapter Three enhancement of three levels for any felony, whether committed within or outside

the United States, that involves or is intended to promote international terrorism. We strongly support this provision and urge the Commission to amend the guidelines to increase the penalties for terrorist actions. Such actions involve, for example, explosives, kidnapping, and weapons offenses, passport violations, murder, and robbery. This change in the guidelines is needed because the current "terrorism" departure, §5K2.15, does not require the courts to take terrorism into account in sentencing.

Amendment 16(B) §3B1.1. Aggravating Role; §3B1.2. Mitigating Role

A number of changes are proposed regarding role in the offense. Our major concern is that many of the changes proposed may create more problems than they solve. Because the proposals try to provide a great deal of guidance on relatively minor points, they will generate much litigation and may not achieve the purpose of reducing unwarranted disparity. In short, we believe that the Commission may be trying to achieve too much in these proposals and that this is an area in which judicial interpretation of broader standards is appropriate.

An example of the attempt to provide too much direction is the proposed language specifying that an enhancement for role in the offense should not apply if the defendant, who otherwise would merit a mitigating role reduction, exercised limited supervision over a limited number of participants. For example, an offloader of a single shipment who supervised other offloaders should not receive an enhancement for aggravating role, according to the proposal. The amendments also provide that a minor role adjustment would be appropriate for a person who qualifies for a minimal role adjustment but for his supervision of other participants.

We oppose this amendment. A manager of others should neither generally qualify for a reduction nor be barred from the increases provided. The suggestion that the offloader would otherwise be a minimal participant assumes that specific categories of offenders by "job description" should dictate applicability of the adjustments for role in the offense. However, the nature of the task performed is only one factor to be considered in our view. If the defendant supervises others, he is not "otherwise" a minimal participant, regardless of the tasks he performs. A drug organization can only operate with a hierarchy. A person with leadership responsibility in the hierarchy, even low-level leadership, is more culpable than a lone player, not less culpable, as the proposal indicates.

The current guideline allows the judge to determine to what extent an offloader qualifies for an enhancement or a reduction without specific direction. We believe that the provision should

continue to operate as it now does and that appropriate arguments will be made to the courts to help guide their application of the relevant adjustments.

Amendment 17(A) §3B1.1. Aggravating Role

Amendment 17(A), concerning aggravating role in the offense, may bring about unintended results. For example, the proposal provides that for a three-level increase the defendant must have been a "manager or supervisor of at least four other participants in a criminal activity." The current guideline provides that the defendant must have been a manager or supervisor and the activity must have involved four others. Direct supervision of four others is not currently required. Thus, under the proposed revision it may be more difficult to prove that a defendant's activity warrants a three-level enhancement than it is under the current guideline. Even the proposed four-level increase for organizers or leaders does not require supervision of a specified number of other participants, but rather organization of the criminal activity that involved four others. The reason for the change in language in the three-level enhancement is not clear.

Another problem is that the proposal deletes language that currently makes the enhancement applicable if the criminal activity was "otherwise extensive," regardless of the number of participants. We oppose this change. There are many circumstances in which a defendant recruits only a few people but operates through a larger network of unknowing participants, such as in the fraud example in current Application Note 2. The impact of this change would be particularly great in white-collar offenses in which the defendant uses the unknowing services of others. We see no reason to delete the current "otherwise extensive" language, and no reason is offered. We assume that it reflects an attempt to provide clear-cut rules in this area, and we believe that the attempt is flawed. Judges can identify "otherwise extensive" criminal activities and should be allowed to do so.

We also oppose the proposed addition of language to Application Note 1 providing that if an undercover agent is recruited by a defendant to participate in illegal activity, and that agent brings in additional undercover agents, only the first would be counted as a participant. This addition is inappropriate in cases in which the defendant asks the undercover agent to obtain others to assist in the offense or where it is necessary to bring in others by virtue of the function requested by the defendant of the undercover agent.

Amendment 18 §3B1.2. Mitigating Role

Amendment 18 would delete the current three-level decrease for roles between minor and minimal. We urge the Commission to

retain this feature because of the need to recognize that roles are not clear-cut in many cases.

In addition, Amendment 18 would provide significantly more favorable treatment to many defendants. For example, proposed note 7 would practically guarantee a role reduction for drug transporters. We believe such persons are critical to drug operations and the ultimate success of their distribution activities. No built-in reduction should be guaranteed for them. Moreover, the proposed commentary in Amendment 18(B) on the appropriateness of downward departure for minimal participants is also unwise. It will invite a great degree of disparity for similarly situated defendants. The guidelines provide an appropriate reduction for minimal participants. An invitation to depart downward will erode the guidelines in this area.

The Commission has asked whether a defendant who otherwise merits a mitigating role adjustment should be prevented from receiving it where he has not been held responsible for a greater quantity of controlled substances than that in which he actually trafficked. We strongly urge the Commission to adopt a rule against mitigating role adjustments in such a case. Some courts grant a role reduction while others do not in the case of a courier whose relevant conduct is the quantity of drugs he is actually carrying because no greater amount can be proven (despite the belief that the defendant is part of an organization). Attached is a proposal that would clarify how such a rule would operate. We believe that this change recognizes that a role reduction should not be possible when the measure of the defendant's involvement in the offense is not increased by the conduct of others. That is, he is not a minor or minimal participant as to his own conduct. Such a defendant should be treated like an individual who is not part of an organization and be held responsible for what he transports without mitigation for role in the offense.

Amendment 19 §2D1.1. Limitations on Sentence for Drug Defendants Who are Minor or Minimal Participants

Amendment 19 proposes several alternative limitations on the sentences applicable to minor or minimal participants in controlled substance offenses. We strongly oppose the creation of these artificial limitations on sentence. We understand that the concern is that low-level participants, including couriers, are viewed by some as receiving excessive sentences. As explained above, however, we strongly believe that a defendant should be held responsible at the very least for the quantity of drugs he or she possesses or deals in directly. With the limitations proposed, a courier may receive a sentence that would reflect only a portion of the quantity he or she transports. Thus, the guidelines would create an incentive for minor or minimal participants to deal in, or facilitate dealing in, large

quantities of controlled substances not reflected in the sentence. In addition, the proposals would decrease the incentive for low-level participants to provide substantial assistance in the investigation or prosecution of others. At a time when drug trafficking and associated violent crime threaten the well being of our nation, such a sentencing result would be extremely ill-advised.

Moreover, a number of the "caps" proposed would produce initial offense levels that would be overridden by applicable mandatory minimum sentences. As a result, offenders involved in drug offenses of very different magnitudes would receive the same sentence -- namely, the mandatory minimum. This scheme would thwart the goal of proportionality in sentencing and create additional tension between currently applicable mandatory minimum provisions and the guidelines.

If, despite our objections, the Commission decides to adopt some form of limitation as proposed, it should at the very least assure that the limitations adopted provide guideline sentences no lower than the 10-year mandatory minimum level provided by statute for large-quantity offenses when such offenses involve substances subject to mandatory minimum provisions. The Commission should also assure that a defendant's sentence is not limited to a level that does not reflect the full extent of his personal involvement in the offense. In addition, the limitations should apply only to minimal participants who are in Criminal History Category I.

Amendment 22 Chapter Three, Part D. Multiple Counts

The Commission has solicited comment on amendment of the multiple count rules. We believe several amendments are needed.

The multiple count rules present problems in their failure to increase the sentence for certain harms that result in conviction. This failure has become an increasing problem in cases in which counts are grouped because one count embodies conduct that is treated as a specific offense characteristic in the guideline applicable to another of the counts. Guideline §3D1.2(c). The problem arises when counts are grouped under this rule but the count that has such a specific offense characteristic carries a lower offense level than the offense level applicable to the group of closely related counts.

For example, the tax evasion guideline, §2T1.1(b)(1), includes a specific offense characteristic that provides that if the defendant failed to report or to correctly identify the source of income exceeding $10,000 from criminal activity, a two-level increase results. Assuming there were also a count of conviction for drug offenses, the grouping rule cited above would operate to group the tax evasion and drug counts. The offense

level for the count of conviction relating to the drug offenses is likely to exceed the offense level for the tax evasion count. Therefore, the offense level for the group of closely related counts would be that for the drug offense, and the tax evasion count would drop out of the guideline calculation. The grouping rule in effect nullifies the tax evasion count for sentencing purposes, and a defendant convicted of both drug and tax offenses is sentenced no more severely than a defendant convicted of a drug offense alone.

The basis for the grouping of the two counts was that the tax evasion offense level was increased because of the illegal drug activity. This grouping rule protects against double counting when the offense guideline including the specific offense characteristic relating to another count of conviction is the highest offense level of the group of closely related counts. However, by operating to prevent double counting in some circumstances, it prevents the counting of an offense at all in other circumstances. Defendants who commit two distinct offenses should be punished more severely than those who commit only one.

The adoption of Amendment 14, which would provide greater enhancements than currently available for illegal drug activity or money laundering, will serve to alleviate the problem of disappearing impact for tax offenses in many narcotics/tax prosecutions. However, it will not eliminate it in all such cases, and will have no added effect on other offenses. Moreover, if Amendment 14 is not adopted, the problem will remain in most, if not all, cases in which tax and drug offenses are grouped.

We recommend an amendment of guideline §3D1.4 to provide that where offenses are grouped under §3D1.2(c) (because one offense is treated as a specific offense characteristic of another offense), the combined offense level should be increased by the number of offense levels assigned to the specific offense characteristic to the extent the latter is not reflected in the offense level for the group of closely related counts.

Another problem under the guidelines results from the operation of the guideline relating to the determination of the combined offense level, §3D1.4. This guideline instructs the user to disregard any group of closely related counts that is nine or more levels less serious than the group with the highest offense level. Thus, when counts of conviction include serious offenses and significantly less serious ones, the lesser ones do not contribute toward the sentence. A tax count and a drug count (not grouped under the grouping rule discussed above under the current guidelines because the amount of income produced from the drug activity did not exceed $10,000) would produce a sentencing range identical to a drug count alone if the offense levels for the two offenses were nine or more levels apart. Similarly, a

drug count and a theft count relating to a relatively small theft would result in a sentencing range no different from the range that would result from the drug count alone if the two offense were nine or more levels apart. The guidelines should not, in effect, encourage criminal activity by failing to punish it even if it is less serious than the major count of conviction. The less serious offense may carry a substantial offense level and should affect the sentencing range.

To address this problem, we recommend that the Commission amend guideline §3D1.4 by deleting subsection (c) and by amending subsection (b) to read as follows:

> Count as one-half Unit any Group that is 5 or more levels less serious than the Group with the highest offense level.

This amendment would assure that all groups of closely related counts of conviction contribute toward the sentence. Groups that are 9 or more levels less serious than the group with the highest offense level would count toward the combined offense level to the same extent that groups that are 5 to 8 levels less serious now count -- that is by one-half unit.

Another problem with the multiple count rules is the absence of grouping rules for fines where one of the counts of conviction carries a fine not established by guideline §5E1.2 -- such as an antitrust offense -- and another count has a fine established by guideline §5E1.2. -- such as a fraud offense. The antitrust guideline, §2R1.1, sets fines as a percent of the volume of commerce, not as a function of offense level, for both individuals and organizations. The multiple count rules in Chapter Three only address how to group offense levels, not how to group fines when the fines for some counts or groups are based on offense levels and the fines for others are not. This issue has arisen in cases involving individual defendants but will also arise in cases involving organizations.

For example, when an antitrust and fraud count are grouped together, as typically occurs when bid-rigging and mail fraud counts based on the rigged bids are charged in the same indictment, the guidelines provide that the offense level for the group is the offense level for the most serious of the counts. However, the guidelines provide no direction on whether to impose a fine according to the offense that has the highest offense level, or the highest fine provided by any count to be grouped. We believe that the Commission should direct the latter result in this situation.

Amendment 23 §3E1.1. Acceptance of Responsibility

The Commission has proposed a number of changes to the guideline on acceptance of responsibility. Our general view is that there is not a sufficient basis for rewriting the guideline.

We oppose Option 2, which would provide a three-level reduction for defendants whose offense level is 30 or greater. This approach would grant a greater benefit to defendants convicted of the most serious offenses. The guideline system establishes proportional increases and reductions. If offenders at high offense levels need a greater percentage reduction than those at low offense levels, the integrity of the entire system of enhancements and reductions is called into question. We believe this proposed change would be an unwise step for the Commission to take.

We also oppose Option 3. First, we disagree with the proposal to provide an explicit downward adjustment for acceptance of responsibility for a nolo plea. The distinguishing feature of a nolo pleas is that the defendant who enters one declines to accept responsibility for the offense. We believe it is important to encourage guilty pleas, rather than nolo pleas, and providing a reduction for the former but not the latter will foster this result. We also oppose the proposed three-level reduction. It will have the effect in many cases, particularly in white collar offenses, of simply increasing the commonly granted two-level adjustment for acceptance of responsibility to a three-level adjustment. Finally, we oppose rewarding a defendant who goes to trial to preserve legal issues. Such a defendant should enter, or at least seek to enter, a conditional plea under Rule 11, Federal Rules of Criminal Procedure. Moreover, proposed Application Note 2 would allow an acceptance-of-responsibility reduction for a defendant who challenges the government on an issue that directly addresses determining "factual guilt" (i.e., absence of intent) as an example of a reason for proceeding to trial unrelated to determining guilt. Such a defendant does not warrant the reduction for acceptance of responsibility any more than one who proceeds to trial with the intent of showing that he was not the perpetrator of the crime.

We also oppose Option 4 on many of the same grounds noted above with regard to Option 3. In addition, we object to it because it allows a three-level reduction for defendants who proceed to trial. This reduction would fail to encourage guilty pleas.

If any changes are made, we believe they should be limited to commentary changes discussing the effect of conditional pleas as a means for a defendant to preserve legal issues. In addition, addressing the issue of acceptance of responsibility

for relevant or related conduct is also an appropriate modification.

Amendment 27 §§4B1.1 and 4B1.2. Career Offenders

Amendment 27 proposes a number of changes to the career offender guidelines that would substantially erode their effect. We oppose these revisions. The career offender guidelines are mandated by the Sentencing Reform Act, which requires the Commission to assure that the guidelines specify a term of imprisonment at or near the maximum term authorized for any defendant 18 years or older convicted of a felony crime of violence or controlled substance felony who has previously been convicted of two or more such prior felonies. 28 U.S.C. §994(h). In some cases the results are harsh, but the present guideline accurately reflects the will of Congress that persons who fit this description be subject to a sentence at or near the highest sentence allowed by law. We believe that the career offender provision serves not only the punishment and incapacitation purposes of sentencing, but also the goal of general deterrence.

Most of the proposals in Amendment 27 seek to avoid the requirements of the career offender statute cited above. For example, under Amendment 27(A), Option 1, the maximum term of imprisonment to which the defendant should be subject to sentencing under the career offender provision would be artificially reduced. The proposed amendment directs that the statutory maximum for purposes of the career offender provision is the maximum term authorized for the offense of conviction before the maximum has been increased by a sentencing enhancement statute applied because the defendant has one or more prior convictions. We strenuously oppose this proposal since the maximum term of imprisonment authorized must be the level authorized for the defendant being sentenced, not another defendant with a different criminal background. To the extent there is a need for clarification, we recommend adoption of Option 2.

We also oppose Amendments 27(B), (D), (E), and (F). Amendment (B) would count a prior offense under the career offender provisions if it was punishable by imprisonment for more than two years. While we do not have strong policy objections to this proposal, we are concerned that it would violate the applicable statutory provision. A felony for purposes of title 18, United States Code, is an offense punishable by more than one year of imprisonment. See 18 U.S.C. §3559(a)(5). This provision was enacted as part of the Sentencing Reform Act, along with the career offender provision, cited above. We believe that when Congress used the term "felony" in the career offender provision, 28 U.S.C. §994(h), it meant an offense punishable by more than one year of imprisonment (at least for any federal offense).

We also oppose Amendment (D), which seeks comment on whether the Commission should identify certain categories of crimes of violence that would be considered "lesser" crimes of violence for purposes of the career offender guideline. Such offenses should not be excluded as predicate offenses. Moreover, modifying the career offender provision to provide lower sentences for offenders convicted of such crimes is problematic because many of the sentences now provided are "near" the statutory maximum, rather than "at" it. That is, lowering sentences would result in sentences less than "near" the statutory maximum, particularly after the reduction for acceptance of responsibility. Lowering these sentences for a lesser category of persons who qualify as career offenders could seriously undermine the applicable statute.

Amendment (E) would allow courts to count two prior felony convictions as only one for purposes of the career offender guideline if, although not consolidated for trial or sentencing, they could have been consolidated for trial as joinable offenses. Similar but unconnected offenses may be joined under Rule 8, Federal Rules of Criminal Procedure. Thus, for example, an offender convicted of two separate bank robberies would have these count as only one prior conviction under the proposed amendment. However, such a defendant is precisely the type Congress included in the career offender provision, which is aimed at those with two or more prior convictions. The Commission should reject this proposed artificial limitation on the career offender guideline.

Amendment (F) would count prior convictions only if they resulted in conviction and sentencing prior to the next qualifying offense under the career offender guideline. This treatment of prior offenses would provide a windfall to defendants who commit several criminal acts before they are sentenced and is inconsistent with the career offender statutory provision.

Amendment 28(A) Chapter Five Part A. Criminal History Category Zero

We strongly oppose the creation of a criminal history Category Zero. It would potentially revise the guidelines in a substantial way and alter the Commission's previous judgments about appropriate sentencing levels for all crimes. With respect to white collar offenders, who are unlikely to have a prior criminal history, a new Category Zero would seriously undermine the sentences currently available and send an unfortunate message to would-be offenders that their criminal activity will be tolerated to a greater extent than it has been under the guidelines.

Amendment 30 §5E1.2. Fines for Individual Defendants

Amendment 30 would delete the current provision authorizing a fine up to the statutory maximum when the applicable statute authorizes a fine greater than $250,000 or a fine for each day of violation. In place of the statutory maximum for such offenses, the proposed amendment would substitute specified dollar amounts.

We strongly oppose this amendment. Where applicable statutes authorize fines higher than $250,0000 or fines for each day of violation, Congress seems to have expressed the view that fines take on a special importance as a sentencing tool. The current guideline reflects the intent of Congress that fines be available in substantial amounts for such offenses as certain environmental violations, bank fraud, major fraud against the United States, and certain controlled substance offenses. We have not been aware of any particular problems that exist with the current guideline structure in this regard. Moreover, the Commission has provided no explanation of how it chose the maximum guideline fine levels proposed for these and other offenses. In our view the current guidelines correctly treat these offenses as unusual ones in which Congress has deemed high fines appropriate and in which judges should have discretion to impose a fine, above a minimum set forth, based on factors particular to the case. The Commission has provided guidance on what factors should influence this discretion in guideline §5E1.2(d) and (e). Finally, reducing the currently available statutory maximum to an arbitrary dollar level sends a negative message to the public with regard to especially serious offenses.

Amendment 33 Chapter Five Part H. Specific Offender Characteristics

The Commission has proposed a number of revisions to policy statements. We opposed the proposal regarding "lack of youthful guidance" and "history of family violence" in our statement before the Commission at the public hearing. We also oppose the other proposed amendments.

The first change is to permit ordinarily irrelevant offender characteristics to be considered for departure purposes if such factors, "alone or in combination, are present to an unusual degree and are important to the sentencing purposes in the particular case." We strongly oppose this amendment, which could seriously erode the guidelines by inviting departures for almost any offender characteristic. If such a policy statement were in place, a determination by the Commission that it had adequately considered a particular factor and that departure on the basis of this factor is inappropriate would have no meaning. In short, the amendment invites the return of unwarranted disparity in sentencing.

We oppose proposal (B) for several reasons. First, it allows departures for "young and naive" defendants and in our view could cause many of the same problems that departures based on "lack of youthful guidance" would cause. Many offenders are young and naive but, nevertheless, know and understand the basic prohibitions provided in the criminal law. Moreover, the suggestion that home confinement may be the appropriate punishment for such young defendants is misguided. These defendants are precisely the ones who may require a traditional form of punishment because of the failure of the home environment to prevent their unlawful conduct.

Finally, proposal (D) asks whether the Commission should authorize downward departures where a court finds that the defendant's advanced age (e.g., 60 or older) has reduced the defendant's risk of recidivism, provided the defendant serves a substantial portion of his sentence, is not a major drug trafficker, and has no current or past history of violent offenses. Incapacitation and recidivism are not the only sentencing considerations. Reducing a sentence on the basis of a supposed reduced risk of recidivism overlooks the punishment and general deterrence purposes of sentencing articulated in the Sentencing Reform Act. For example, in many white collar cases a major goal of sentencing is general deterrence. We believe that fear of imprisonment is a significant deterrent for many white collar offenders, regardless of age, who may otherwise consider unlawful activity. In addition, many antitrust defendants are over age 60 and have participated in ongoing offenses for years, along with other generations of individuals. The older offenders are often the most culpable of the co-defendants prosecuted. The goals of punishment, deterrence, and incapacitation are critical for such offenders. Finally, leaders of drug cartels may learn of the benefits of employing older persons for lesser roles, just as they have exploited children. The proposed exclusion for "major drug traffickers" would not apply to such low-level drug participants.

Amendment 35(C) Chapter Six. Sentencing Procedures and Plea Agreements

The Commission has asked for comment on whether it should amend the guidelines to provide that conduct on which a defendant is acquitted but which has been established by a preponderance of the evidence may be used in (1) determining the offense level, (2) selecting a sentence within the guideline range, and (3) as a basis for upward departure. We recommend in favor of an amendment authorizing all such uses. The fact of acquittal should not by itself exclude consideration of the conduct in question. A jury's finding that the government did not prove the existence of a fact beyond a reasonable doubt should not bar the government from proving that fact under the lower preponderance standard at sentencing. Most courts of appeals have held that

judges at sentencing may rely on evidence of a defendant's conduct relating to charges on which the defendant was acquitted at trial. United States v. Mocciola, 891 F.2d 13, 16-17 (1st Cir. 1989); United States v. Rodriquez-Gonzalez, 899 F.2d 177, 180-182 (2d Cir.), cert. denied, 111 S. Ct. 127 (1990); United States v. Ryan, 866 F.2d 604, 608-609 (3d Cir. 1989); United States v. Isom, 886 F.2d 736 (4th Cir. 1989); United States v. Juarez-Ortega, 866 F.2d 747, 749 (5th Cir. 1989); United States v. Duncan, 918 F.2d 647, 652 (6th Cir. 1990), cert. denied, 111 S. Ct. 2055 (1991); United Stats v. Fonner, 920 F.2d 1330, 1332-1333 (7th Cir. 1990); United States v. Dawn, 897 F.2d 1444, 1449-1450 (8th Cir.), cert. denied, 111 S. Ct. 389 (1990); United States v. Averi, 922 F.2d 765 (11th Cir,. 1991); but see United States v. Brady, 928 F.2d 844 (1991). Of course, if the acquitted conduct relates to a separate offense that is excluded from consideration under relevant conduct because the offense in question is sentenced on an offense-of-conviction, rather than a real-offense basis (such as robbery), the acquitted conduct should generally not increase the sentence.

Amendment 37 §1B1.5. Interpretation of References to Other Offense Guidelines

Guideline §1B1.5 provides that a sentencing guideline's reference to another guideline refers to the entire guideline, including the base offense level plus all applicable specific offense characteristics and cross references. The Commission has asked for comment on whether the commentary to this provision should be amended to clarify how the guidelines are to be applied when a Chapter Two offense guideline references another guideline.

Guideline §1B1.5 does not describe how the commentary pertaining to the initial Chapter Two guideline is to be treated even though failure to follow an interpretation in guideline commentary could constitute an incorrect application of the guideline subject to appeal. For example, guidelines §2E5.2 (theft from an employee benefit plan) and §2E5.4 (theft from a labor union) simply cross reference and apply guideline §2B1.1 for larceny and theft generally. The application notes for the former guidelines expressly direct that the Chapter Three upward adjustment for abuse of position of trust "will apply" if the defendant is a fiduciary of a benefit plan and "would apply" if the defendant is a union officer. However, no such explicit direction is given in the guideline or commentary for §2B1.1 (larceny generally), to which §§2E5.2 and 2E5.4 refer. The initial guideline commentary's direction clearly should be given effect. Yet, the commentary notes for §1B1.5 direct simply that Chapter Three adjustments are "to be determined in respect to that other [i.e., the cross referenced] offense guideline." §1B1.5, Application Note 2. Consequently, we recommend an amendment which provides that the commentary in the initial

guideline also should be followed unless clearly inconsistent with the scheme of the cross-referenced guideline.

We appreciate your consideration of these important matters and would be pleased to offer our assistance to the Commission in its efforts to address our concerns.

Sincerely,

Paul L. Maloney
Senior Counsel for Policy
Criminal Division

Enclosures

Proposed amendment to § 3B1.2:

§ 3B1.2(c) No mitigating role adjustment under this section shall be applied to a defendant whose offense level is determined in part by reference to the drug quantity table in § 2D1.1 or the chemical quantity table in § 2D.11 where the relevant conduct for the drug or chemical amounts consists only of the drugs or chemicals in the defendant's actual possession.

Commentary

1. This section applies only when a defendant is convicted of an offense for which the drug quantity table in § 2D1.1 or the chemical quantity table in § 2D1.11 is applicable and the relevant conduct consists exclusively of the amount of drugs or chemicals in the defendant's actual possession. Because the actual possession of drugs or chemicals is essential to drug or chemical trafficking, no mitigating adjustment is available to the defendant when the relevant conduct of the drug or chemical amounts consists of only the drugs or chemicals in the defendant's actual possession. This provision prevents a mitigating adjustment for a courier or mule when the only drug or chemical amounts which can be proved are the amounts in the actual possession of the defendant, regardless of the number of other participants.

2. This provision should not result in a mitigating adjustment for other participants simply because actual possession of drugs or chemicals is limited to one person. For example, if two persons agree to carry drugs or chemicals between cities; but, at the time of arrest, only one of the persons is in actual possession of drugs or chemicals, the defendant in constructive possession is not entitled to a mitigating adjustment. Similarly, when one person provides the money to purchase drugs or chemicals intended for later distribution, that person is not entitled to a mitigating role adjustment simply because the drugs or chemicals are discovered in the actual possession of another person. In the examples, each defendant is equally culpable and neither deserves a mitigating adjustment.

3. When the relevant conduct for the drug or chemical amounts consists of drug or chemical amounts greater than the amount in the defendant's actual possession, a mitigating role is possible. In no event, however, may a defendant receive a mitigating adjustment which lowers the offense level below that applicable for the amount of drugs or chemicals in the defendant's actual possession

Reason for Amendment: This amendment clarifies that a courier or mule cannot receive a mitigating adjustment when the amount of drugs or chemicals within the scope of relevant conduct is only the amount of drugs or chemicals in the defendant's actual possession.

COMMENTS OF THE ENVIRONMENT & NATURAL RESOURCES DIVISION

I. Proposed Amendment 10: Section 2Q1.2 Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification

Proposal: Section 2Q1.2(b) is amended by inserting the following at the end: "Do not apply this adjustment if an adjustment from (b)(1) applies."

RECOMMENDATION: Reject the proposed amendment and analyze this issue in an overall review of environmental guidelines 2Q1.2 and 2Q1.3.

The proposed amendment is intended to address concerns about "double-counting" in Part 2Q1.2 of the Sentencing Guidelines, which governs most environmental crimes involving hazardous substances. The term "double-counting" is used in this context to refer to the use of an element of an offense as a specific offense characteristic. The argument is made that if an essential element of an offense is also included as an offense characteristic enhancement, it is double counted since as an element of the offense, it is already accounted for as part of the base level offense. We find this argument flawed in several respects. First, the methodology complained of here, called "double-counting," occurs throughout the sentencing guidelines.[1] Unless the Commission intends to eliminate this methodology throughout the guidelines, addressing it only in the context of environmental crimes has no apparent justification. Second, "double-counting" does not occur in every offense under Part 2Q1.2. The proposed amendment erroneously presumes that every violation involving a release into the environment also involves a permit violation. To the contrary, a significant number of environmental crimes involving releases into the environment do not also involve permit violations.[2]

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[1] For example, the use of false information to obtain explosives is covered by guideline 2K1.3, but the use of false information is also a specific offense characteristic for that guideline. Criminal sexual abuse under 18 U.S.C. § 2241 requires use of force or threat of force, yet those factors constitute a specific offense characteristics under § 2A3.1(b)(1).

[2] In Parts 2Q1.2 and 2Q1.3 the Commission has covered a broad array of environmental crimes. Some of these crimes involve actual releases, but not permits; some involve permits, but not releases; some include both factors; and some involve neither. The following violations are examples of each category:

1. The knowing discharge of a flammable pollutant into a sewer system in violation of the Clean Water Act, Act, 33 U.S.C. §§ 1317(d) and 1319(c)(2)(A), would

(continued...)

There are other concerns with this proposal as well. First, the proposed amendment provides an approach that is at best inartful: it would lower offense levels in many cases where "double-counting" may be absent; it would retain higher offense levels in many cases where "double-counting" may be present. We therefore recommend that the Commission reject the proposed amendment, and suggest that the advisory group chaired by Commissioners Nagle and Gelacak consider the various arguments concerning double-counting as part of their review of the guidelines governing environmental crimes.

Second, if the Commission were to adopt the proposed amendment, adjusted offense levels in cases involving release of hazardous pollutants would decrease because the (b)(4) permit enhancement would no longer apply -- unless the Commission offset that decrease by raising the (b)(1) enhancement for release of

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[2](...continued)
constitute a release not requiring a permit. Offense characteristic (b)(1) would apply; (b)(4) would not.

2. The knowing storage of hazardous wastes without a permit in violation of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d)(2), would not involve a release. Offense characteristic (b)(4) would apply; (b)(1) would not.

3. The knowing removal of asbestos during demolition without wetting it first would be a violation of the Clean Air Act, 42 U.S.C. § 7413(c)(1), even though it would involve neither a permit nor a release. Neither (b)(1) nor (b)(4) would apply.

4. The knowing disposal of a hazardous waste in violation of the Resource Conservation and Recovery Act would involve a permit violation. Both (b)(1) and (b)(4) would apply.

All of these violations are felonies. Other examples could easily be drawn from each of the four categories. More environmental prosecutions fall into the fourth category, but that reflects the fact that releases without permits or in violation of permits are viewed as more serious and, therefore, higher priority cases. The fact that (b)(1) and (b)(4) do not apply together in every case is significant in judging whether they constitute improper double-counting. Where two or more related characteristics do not apply to every violation covered by a guideline that situation does not constitute impermissible double-counting. See United States v. Goolsby, 908 F.2d 861, 864 (11th Cir. 1990).

hazardous pollutants. Likewise, if the Commission were to adopt the proposed amendment, adjusted offense levels in cases involving release of hazardous pollutants would be lower than adjusted offense levels in cases involving ordinary pollutants -- unless the amendments were duplicated in Part 2Q1.3. As a result, the Commission would need to adopt at least four amendments, not just one, to eliminate the permit enhancement in discharge cases without lowering adjusted offense levels and upsetting the overall balance of Part 2Q. These issues demand the review and analysis that only can occur as part of a thorough and informed review of Part 2Q.

Third, even from the perspective of whether it eliminates so called "double-counting" in the guidelines, the amendment is flawed, because it does not address all instances where "double-counting" may occur. Specifically, it eliminates only the permit enhancement in release cases. The possibility of "double-counting" would still exist where defendants commit permitting violations that do not involve a release into the environment. At the same time, the proposed amendment assumes that permit enhancement would never be appropriate in release cases. But a defendant who fails to obtain a permit so as to try to avoid all regulation may be more culpable than a defendant who exceeds a permit requirement. Likewise, a defendant who knowingly exceeds a permit requirement may be more culpable than a defendant without such knowledge. The proposed amendment therefore, reduces the penalty for some environmental violations, but serves no interest well in the debate over double-counting.

The proposed amendment would prohibit application of Section 2Q1.2(b)(4) (violation of a permit or failure to have a permit) whenever Section 2Q1.2(b)(1) (actual release of a contaminant to the environment) applies. In addition to seeking comment on the proposed amendment, the Commission has requested public comment as to whether (1) the enhancements under Section 2Q1.2(b)(1) should be greater and (2) any amendments to Section 2Q1.2 should be duplicated in Section 2Q1.3 (which governs most environmental crimes involving non-hazardous pollutants).

We urge that the Commission reject the proposed amendment to Part 2Q1.2 of the Sentencing Guidelines. We recommend that the advisory group chaired by Commissioners Nagle and Gelacak address this matter during its review of the environmental sentencing guidelines. We believe that analysis will demonstrate that the concerns about "double-counting" are unfounded, and that the proposed amendment is not an improvement. We look forward to working with the Commission as it undertakes the important task of reevaluating environmental guidelines 2Q1.2 and 2Q1.3.

II. <u>Proposed Amendment 11: Section 2Q2.1 Specially Protected Fish, Wildlife, and Plants; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife and Plants</u>

1. Proposed Amendment to Section 2Q2.1(b)(1)

Proposal: Section 2Q2.1(b)(1) is amended by deleting "involved a commercial purpose" and inserting in lieu thereof "was (A) committed for pecuniary gain or (B) involved a pattern of similar violations."

Additional Issue for Comment - Number 2: When the specific offense characteristic in section 2Q2.1(b)(1) is applicable, should the magnitude of the increase in levels be greater? If so, should there be a three-level or a four-level increase?

RECOMMENDATION: Section 2Q2.1(b)(1) is amended by inserting "pecuniary gain or" immediately after "involved."

Our recommendation retains the existing language in Section 2Q2.1(b)(1), yet sweeps up a portion of the proposal as well. By doing so, we seek to avoid the under-inclusion that has plagued this specific offense characteristic. By combining both pecuniary gain and commercial purpose in one subsection, we hope to avoid any narrow interpretations of this specific offense characteristic that miss the mark.

We have not included here proposed subsection (b)(1)(B), "a pattern of similar violations." As discussed, infra, we recommend adoption of "more than minimal planning" as a new specific offense characteristic in subsection (b)(4) and recommend that this phrase be incorporated there.

By combining the phrases "commercial purpose" and "pecuniary gain" into one specific offense characteristic, offenses properly covered by it will include both sport hunters who use the services of paid guides to hunt big game animals illegally or those who illegally kill or injure wildlife found depredating domestic animals or crops. Both are recurring problems. Like other offenses now falling within this specific offense characteristic, these, too, are driven by the pursuit of gain or profit, and thus, properly should be subject to this aggravating factor.

We are not recommending any additional offense level increases for this characteristic in place of the current two-level increase. Any increase now may unduly weight this characteristic. The other proposals, if adopted, provide more balance. This is not to say, however, that this characteristic is unimportant. In fact, most offenses occur within the ambit of "commercial purpose" and are driven by the desire for pecuniary gain. Live wildlife and wildlife products are becoming increasingly scarce and correspondingly more valuable. Sophisticated networks of illegal international trade exist today that were nonexistent ten years ago. For instance, black or

grizzly bears are poached routinely now to supply gall bladders to foreign dealers who pay exorbitant prices for them. Similarly, aviculturists and bird fanciers have created a huge demand for parrots and macaws that is satisfied by clandestine worldwide smuggling schemes.

It is not surprising then, that the primary law enforcement agency enforcing federal wildlife statutes (and most of the offenses covered by Section 2Q2.1), the U.S. Fish and Wildlife Service, states that one of its primary objectives is "to uncover major commercial activities involving illegal trade of protected wildlife and wildlife products." U.S. Fish and Wildlife Service, Division of Law Enforcement, FY 1988 Annual Report, p. 1. The U.S. Fish and Wildlife Service ("Service") further states that "the Service considers the most serious violations to be large-scale commercialization of wildlife." FY 1988 Annual Report at 2. Next, the Service finds that "another serious category of wildlife violations is the illegal importation of wildlife into the United States for commercial purposes." Ibid.

Congress, too, has recognized the harm caused by a commercial activity, and uses it as one means to distinguish felony from misdemeanor offenses. See, e.g., Lacey Act Amendments of 1981 ("Lacey Act"), 16 U.S.C. 3373(d)(1)(B); Migratory Bird Treaty Act, 16 U.S.C. 707(b).

2. Proposed Amendment to Section 2Q2.1(b)(2).

Proposal: Section 2Q2.1(b)(2) is amended by inserting "(A)" immediately before "involved" and by inserting "or (B) otherwise created a significant risk of infestation or disease transmission potentially harmful to humans, fish, wildlife, or plants" immediately following "law."

RECOMMENDATION: Adopt the proposed amendment published by the Commission.

We find this amendment well-founded. It complements the quarantine provision and closes any loopholes that may exist. For instance, offenses involving contaminated products, like shellfish harvested from contaminated beds that cause various diseases in humans now would be included. Formerly, since no quarantine was required for such shellfish products, someone who intentionally harvested and later sold shellfish from contaminated beds was never subject to any aggravating sentencing factors based upon the risk of harm. As proposed, that omission would be rectified.

3. Proposed Amendment to Section 2Q2.1(b)(3)(B).

Proposal: Section 2Q2.1(b)(3)(B) is amended by deleting "a quantity of fish, wildlife, or plants that was substantial in

relation either to the overall population of the species or to a discrete subpopulation" and inserting in lieu thereof "(i) marine mammals that are listed as depleted under the Marine Mammal Protection Act (as set forth in 50 CFR 216.15), (ii) fish, wildlife, or plants that are listed as endangered or threatened by the Endangered Species Act (as set forth in 50 CFR part 17, or (iii) fish, wildlife, or plants that are listed as endangered in appendix I to the Convention on International Trade in Endangered Species of Wild Fauna or Flora (as set forth in 50 CFR part 23)".

RECOMMENDATION: Section 2Q2.1(b)(3)(B) is amended by deleting "a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to discrete subpopulation" and inserting in lieu thereof "any of the following types or amounts of fish, wildlife, or plants: species listed as endangered or threatened by the Endangered Species Act; species listed as Appendix I to the convention on International Trade in Endangered Species of Wild Fauna or Flora; depleted stocks of marine mammals; or a quantity of fish, wildlife, or plants that was significant in relation to the overall population of the species, to any subspecies, or to a distinct population segment."

This amendment involves a revision of an existing specific offense characteristic in Section 2Q2.1 that is troublesome. Section 2Q2.1(b)(3)(B) now states: "If the offense involved a quantity of fish, wildlife, or plants that was substantial either to the overall population of the species or to a discrete subpopulation, increase by 4 levels."

We believe the language in the original version of the guidelines was intended to include any offense involving fish, wildlife, or plants listed as endangered or threatened under the Endangered Species Act (as set forth in 50 CFR Parts 17, 222, or 227) or as "Appendix I" under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (the international treaty equivalent of an endangered listing implemented through the Endangered Species Act) (as set forth in 50 CFR Part 23), and offenses involving substantial quantities of other fish, wildlife, or plant species. While these were the broad categories sought to be included, neither the language of the specific offense characteristic nor the Commentary conveyed this message.

As a consequence, this specific offense characteristic has been narrowly interpreted and rarely applied. Prosecutors are reluctant to seek enhancement under this provision for offenses involving endangered, threatened, or Appendix I animals or plants, and the courts have followed suit. The gravamen of the provision as it is now written is that the offense must involve either a substantial number of animals, even when those animals

are endangered or threatened species, or the loss of a significant member of a nearly extirpated population. Therefore, population dynamics are important (often requiring the proof of expert witnesses) and the characteristic itself has been infrequently applied at sentencing. We know of only a handful of instances where it was used. One court applied it to a violation of the Endangered Species Act involving the unlawful killing of a grizzly bear in Wyoming, an area with a remnant population of grizzly bears. See United States v. Brad A. Baxendale, Nathan P. Sponsel and Keith M. Grant, No. CR 89-054-K (D. Wyo. Oct. 10, 1989). Another court did so only where the offense involved two New Mexico ridged-nosed rattlesnakes, a threatened species, illegally collected from a total worldwide population of 54. See United States v. William Frank Meyers, No. CR 5-89133-PVT (N.D. Cal., Nov. 1988) and United States v. John Jeffrey Boundy, No. 89-20104 RFP (N.D. Cal. Jan. 18, 1989). Finally, the enhancement has applied to the unlawful possession of a sexually mature female Kemp's Ridley sea turtle by a group of shrimp fishermen. See United States v. Hung Van Tran, Duc Quang Nguyen and Binh Van Nguyen, 765 F. Supp. 356, 358 (S.D. Tex. May 17, 1991), appeals docketed, Nos. 91-2605, 2606, 2572 (5th Cir. 1991).

This four level enhancement, however, has not been uniformly applied even when the same or similar animal species were involved. For instance, it was not sought where a defendant was convicted of illegally collecting over 100 green and loggerhead sea turtle eggs from nests on the beach at Jupiter Island, Florida because the experts available would not conclude that this number was "substantial" (but would have found it "significant"). See United States v. James Edward Bivens, Case No. 88-14016-CR-PAINE (S.D. Fla., Aug. 21, 1989).

Now, virtually all violations of the Endangered Species Act that do not involve a commercial purpose, particularly those where endangered or threatened animals are killed illegally, are offenses for which the guidelines provide no enhancement. This interpretation misses the mark and cannot be the one intended for that specific offense characteristic. Our recommended revision permits the sentencing court to rely in many instances on administrative determination already made under conservation statutes about the conditions of a particular species rather than reduce the sentencing hearing to a battle of expert opinions about population dynamics.

Furthermore, the term "substantial" itself should be replaced. We urge that the term "significant" be used as a substitute. The new term permits the specific offense characteristic to be applied where the offense involves less than a "substantial" quantity, but nonetheless is properly characterized as "significant." As now used, the term "substantial" denotes the relationship of the quantity involved in the offense to a known population. Unfortunately, not all

wildlife populations are quantified and experts often are unable to state an opinion when such information is unavailable.

The term "significant," as used in § 2Q2.1(b)(3)(B), would include a quantity that is likely to make a difference to the ability of a species or a subpopulation of a species to sustain itself at or near maximum sustainable quantities. Thus, a quantity may be significant either because it is a substantial portion of the overall population or discrete subpopulation (i.e., formerly described as "substantial") or because the individual animals involved were qualitatively important to the species' ability to sustain itself. For example, killing one or two adult males or females of a given species may be significant even though a quantitatively "substantial" proportion of the total population or discrete subpopulation is not involved.

Finally, arguments for enhancement of offenses involving endangered, threatened, or Appendix I species are equally compelling for depleted stocks of marine mammals protected by the Marine Mammal Protection Act. See 16 U.S.C. 1362(1), 1372(b), and 50 C.F.R. Parts 18 or 216. Offenses involving animals from such depleted stocks should be eligible for enhancement as well under this provision.

Our recommendation incorporates minor editorial changes into the proposal by deleting citations to the Code of Federal Regulations and rewording the description of the subsection's coverage. The citations to the Code of Federal Regulations were incomplete, potentially confusing or restrictive, and therefore troublesome. The Commentary itself identifies the source statutory provisions and should be sufficient.

4. Proposed Amendment to Section 2Q2.1(b).

Additional Issue for Comment - Number 1: Should an additional specific offense characteristic be added, providing for a two-level increase if the offense involved more than minimal planning? If so, should the increase be an alternative to, or in addition to, the increase for the specific offense characteristic in section 2Q2.1(b)(1)?

RECOMMENDATION: Section 2Q2.1(b) is amended by inserting the following as paragraph (b)(4).

> **(4) If the offense involves more than minimal planning or a pattern of similar violations, increase by 2 levels.**

We recommend that the Commission add "more than minimal planning" as part of another specific offense characteristic, a recommendation that draws upon a number of other guidelines for inspiration. Such a 2-level enhancement for more than minimal

planning appears in guidelines found in Chapter 2, Parts B (Offenses Involving Property) and F (Offenses Involving Fraud and Deceit). This enhancement recognizes that beyond the actual amount of loss, the severity of the offense requires us to look at whether or not the crime was an isolated one of opportunity or was sophisticated or repetitive. As you know, the term "more than minimal planning" is defined in the Commentary to Section 1B1.1. Of course, the adjustments found in Chapter 3 of the guidelines, such as defendant's aggravating or mitigating role in the offense are unaffected and would remain as separate adjustments following a determination of whether or not a specific offense characteristic, such as "more than minimal planning," applies to the offense.

As the Commentary to Section 2F1.1, the fraud and deceit guideline, states:

> The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm. A complex scheme or repeated incidents . . . are indicative of an intention and potential to do considerable harm. In pre-guidelines practice, this factor had a significant impact, especially in [offenses] involving small losses. Accordingly, the guideline specifies a 2-level enhancement when this factor is present.

This commentary is equally applicable to offenses under Section 2Q2.1. Therefore, the guideline found there also needs to distinguish, for instance, between the opportunistic one-time smuggler who stashes contraband wildlife items in a bag before crossing the border and the ring of sophisticated wildlife traffickers who smuggle their live contraband wildlife into the U.S. through a worldwide network.

Similarly, the hunter who shoots an eagle because he happens to see it while hunting ducks and the profiteer who slaughters an eagle to supply the black market with a carcass, feathers and talons (worth less than $2,000) engage in a qualitatively different crime. Section 2Q2.1 as now promulgated (unlike Section 2F1.1) fails to draw that distinction and treats each of these offenders alike.

We also recommend moving the phrase "pattern of similar violation" from paragraph (b)(1) to paragraph (b)(4). As you know, there are proposals to delete "more than minimal planning" as a specific offense characteristic elsewhere. See 57 Fed. Reg. 90, 94. While we support its inclusion here, if the phrase should be deleted from the guideline vernacular, then a "pattern of similar violations" standing alone can act as a substitute. While we would prefer the combination of the two, since the terms

are not mutually inclusive, our proposal provides the Commission with the flexibility to deal with the "more than minimal planning" specific offense characteristic without undermining Section 2Q2.1.

5. Proposed Revisions to Commentary

Proposal: The Commentary to section 2Q2.1 is amended by inserting in the appropriate place the following:

> "Application Notes:
>
> 1. An offense 'committed for pecuniary gain' includes market transactions, barter transactions,and activities designed to increase gross revenue or reduce losses (e.g., when a farmer destroys migratory birds to prevent their consumption of cereal grains).
>
> 2. For purposes of subsection (b)(2), the quarantine requirements include those set forth in 9 CFR part 92, and 7 CFR chapter III.
>
> 3. For purposes of subsection (b)(3)(A), 'market value' may be determined from any reliable information available."

RECOMMENDATION: The Commentary to Section 2Q2.1 is amended by inserting in the appropriate place the following:

> **The term "commercial purpose" in Section 2Q2.1(b)(1) includes, but is not limited to: all activities involving the actual or intended purchase or sale of fish, wildlife, or plants; all activities involving the actual or intended take, receipt, acquisition, possession, transportation, or transfer of fish, wildlife, or plants in the pursuit of gain or profit; and all conduct facilitating such activities. Museums, zoological parks, and scientific or educational institutions open to the general public for a fee or donation, whether or not established, maintained, or operated as a governmental service or privately endowed and organized are included.**
>
> **The term "pecuniary gain" includes market transactions, barter transactions, and activities designed to increase gross revenue**

or reduce losses (e.g., when a farmer destroys migratory birds to prevent their consumption of cereal grains).

If the Commission adopts our recommendation to include both commercial purpose and pecuniary gain in subsection (b)(1), then both terms should be defined in the Commentary. We recommend adoption of the proposed definition of "pecuniary gain" and offer an equally broad definition of "commercial purpose."

RECOMMENDATION: The Commentary to Section 2Q2.1 is amended by inserting in the appropriate place the following:

> **The federal quarantine laws and regulations to which paragraph (b)(2) applies are set forth, inter alia, in Title 9, Code of Federal Regulations, Part 92 and Title 7, Code of Federal Regulations, Chapter III. State quarantine laws are applicable as well.**

Our recommendation adopts much of the proposed language, but further specifies that quarantine laws need not necessarily be federal ones. State quarantine laws also qualify for considerations as well. Since the statutory provisions cited do not include quarantine laws per se, a brief description of the applicable quarantine laws referred to in Section 2Q2.1(b)(2) also should avoid any confusion about the kinds of quarantine laws incorporated here.

RECOMMENDATION: The Commentary to Section 2Q2.1 is amended by inserting in the appropriate place the following:

> **"Market value" may be determined at sentencing from any reliable information available and is not limited to the fair market value or bargained for price of the fish, wildlife, or plants. It may include replacement of restitution costs, or acquisition and preservation (i.e., mounting) costs and requires a case-by-case determination. So-called "contingent valuation methods" measuring aesthetic or non-use loss, however, are inappropriate to measure market value.**

We agree that there is a need to address "market value" determination in the Commentary, but find the proposal falls far short of exploring the intricacies presented by that phrase.

Both the courts and prosecutors alike often become exasperated when they try to determine "market value" under the

guidelines. For example, in United States v. Asper, 753 F. Supp. 1260, 753 F. Supp. 1289 (M.D. Penn.)(Dec. 13, 1990), aff'd 941 F.2d 1203 (3rd Cir. 1991), a two-week sentencing hearing was required to establish the applicable guideline sentencing range, including a determination of the market value of mounted wildlife trophies under Section 2Q2.1. We hope that our proposed commentary to the guideline will avoid the need for a lengthy sentencing hearing to determine market value.

Neither Section 2Q2.1 of the sentencing guidelines, not its accompanying commentary, defines the term "market value." However, Section 2Q2.1(b)(3)(A) specifically references Section 2F1.1 (Fraud and Deceit) to determine the appropriate level for adjustment of the offense level. Paragraph 7 of the commentary to Section 2F1.1 references yet another guideline, Section 2B1.1 (for the definition of value). Paragraph 2 of the commentary to this Section 2B1.1 provides in part:

> "Loss" means the value of the property taken, damaged, or destroyed. Ordinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim . . . . (emphasis added)

Similarly, Paragraph 8 of the commentary to Section 2F1.1 indicates that the amount of the loss need not be exact or precise, "The district court need only make a reasonable estimate of the range of loss given the available information." Paragraph 8 of the commentary to Section 2F1.1 concludes by stating, "The offender's gross gain from committing the fraud is an alternative estimate that ordinarily will understate the loss."

In United States v. Wilson, 900 F.2d 1350 (9th Cir. 1990), the Ninth Circuit held that where market value is difficult to ascertain, a district court may use any reasonable method to measure the loss under Section 2F1.1 and is not limited to a strict market valuation of loss:

> A strict market approach measures only the gain to the defendant while virtually ignoring the harm suffered by the victim. See United States v. Verkwitt, 619 F.2d 649, 658 (7th Cir. 1980) . . . . In light of these considerations and the Guidelines' provision for other methods of valuation, we reject a strict market valuation approach under the Guidelines and reiterate that "where goods

> have no readily ascertainable market value, any reasonable method may be employed to ascribe an equivalent monetary value to the items." Drebin, 557 F.2d at 1331 (quoting United States v. Lester, 282 F.2d 750, 755 (3rd Cir. 1960), cert. denied, 364 U.S. 937, 81 S.Ct. 385, 5 L.Ed.2d 368 (1961)).

900 F.2d at 1356. (emphasis added). Accord, United States v. Pennington, 940 F.2d 670 (9th Cir. 1991) (court not bound by price paid by wildlife enforcement agent for eagles; court may use any reasonable method to measure the loss). See also United States v. Pemberton, 904 F.2d 515 (9th Cir. 1990) (rejecting defendant's argument that appropriate measure of value of stolen drawings he illegally possessed was what drawings were worth to him - zero).

Thus, the commentaries to sections 2B1.1. and 2F1.1 of the Guidelines and Wilson, Pemberton and Pennington point to the conclusion that the district court is not bound by the bargained for price or the value to the defendant in determining the amount of the loss or market value. The district court should be free to determine the amount of the loss or market value from any reliable information. The court should have considerable latitude to consider such values as liquidated damages, replacement costs, restitution, or other civil monetary values established by the states under various conservation laws. Also, guided hunts for trophy or other game animals themselves raise a host of unique valuation issues and the court should be free to consider the defendant's guide fees, license fees, transportation, lodging, shipping and taxidermy costs when determining market value.

Market value, however, cannot be determined using aesthetic loss. These values, often expressed as contingent or non-use values, would ask the court to determine value without resort to some quantifiable measure. Mere diminution in the aesthetic value of the environment is insufficient for determining market value.

Proposal: The commentary to section 2Q2.1 captioned "Background" is amended by deleting "involved a commercial purpose" and inserting in lieu thereof "was committed for pecuniary gain," and by deleting "species exceeded $2,000 or the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the population of the species or to a discrete subpopulation of the species" and inserting in lieu thereof "fish, wildlife, or plants exceeded $2,000, or involved certain endangered, threatened, or depleted species."

RECOMMENDATION: The Commentary to Section 2Q2.1 captioned "Background" is amended by inserting "pecuniary gain or"

immediately following "involved" and immediately before "a commercial purpose" and by inserting "or where the offense involved more than minimal planning or a pattern of similar violations "immediately following "as required by law" and by deleting "species exceeded $2,000 or the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the population of the species or to a discrete subpopulation of the species" and inserting in lieu thereof "fish, wildlife, or plants exceeded $2,000, or involved certain endangered, threatened, protected, or depleted species".

The proposal and our recommendation are nearly identical. Our recommendation, however, captures the broader coverage we propose for subsection (b)(1) and a new subsection (b)(4).

III. Issue for Comment 22: Chapter Three, Part D -- Multiple Counts

RECOMMENDATION: Section 3D1.2 is amended by inserting "Section 2Q2.1" in the appropriate place on the list found in Section 3D1.2(d).

Under Section 3D1.2(d), when the offense is one that requires grouping of multiple counts, then all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction are used to determine a defendant's relevant conduct. Section 1B1.3(a)(2). Under Section 3D1.2(d), counts are grouped together, "when the offense level is determined largely on the basis of the total amount of harm or loss . . . or some other measure of aggregate harm . . . ." (Emphasis added). Section 2Q2.1 is neither specifically included nor excluded from the operation of that subsection; therefore, "a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level." Section 3D1.2(d).

Section 2Q2.1 should be listed as offense for grouping under Section 3D1.2(d) because the offense level is in fact largely determined by some measure of aggregate harm. Section 2Q2.1 is modeled after Section 2F1.1., an offense specifically listed for grouping under Section 3D1.2(d). Both have a base level of six (6) and derive additional offense levels through a specific offense characteristic based upon monetary amounts. See Sections 2F1.1(a), (b)(1), 2Q2.1(a), and (b)(3)(A). The only difference between these two specific offense characteristics is that one focuses upon "loss" and the other upon "market value." Id.

Unfortunately, this interpretation is not uniformly shared at sentencing when the guidelines are applied. When significant "market values" are involved, then a correspondingly significant portion of the total offense level results from that specific offense characteristic and, the offense level is then "largely determined" by the aggregate harm or loss. Conversely, this analysis has been used with low market values near or at the threshold levels for additional offense levels to claim that the offense level is no longer determined largely on the basis of aggregate market value; since the basis offense level itself comprises more than half of the total offense level. This ambiguity can be eliminated simply by stating that Section 3D1.2(d) applies to Section 2Q2.1.

Such an interpretation will insure nationwide uniformity and comport with most recent interpretations of relevant conduct. As the Fifth Circuit has noted:

> One of the clear purposes of § 1B1.3 of the guidelines is to include different transactions that are relevant to the charged conduct, particularly if they are part of a "common scheme or plan." United States v. Woolford, 896 F.2d 99, 104 (5th Cir. 1990). To accord with this purpose, we have consistently interpreted relevant conduct broadly. See, e.g., United States v. Paulk, 917 F.2d 897, 883-94 (5th Cir. 1990); United States v. Mourning, supra, 914 F.2d at 706.

United States v. Smallwood, 920 F.2d 1231, 1237 (5th Cir.), reh'g denied en banc, 927 F.2d 602 (5th Cir. 1991).

The Fifth Circuit also recently cited with approval several other circuit court opinions describing the interplay between the sections focusing on relevant conduct:

> For a general explanation of the interplay between sections 1B1.3(a) and 3D1.2(d), see United States v. Blanco, 888 F.2d 907, 909-11 (1st Cir. 1989). See also United States v. White, 888 F.2d 490, 497 (7th Cir. 1989) ("Putting § 1B1.3(a)(2) together with § 3D1.2(d) produces the conclusion that when the Guidelines provide tables that cumulate the amount sold or stolen, any acts that "were part of the same course of conduct or common scheme or plan as the offense of conviction" should be included in the computation of the amount on which the offense level depends, whether or not the

> defendant was convicted of selling or stealing these additional amounts.").

United States v. Ponce, 917 F.2d 841, 843 n.1 (5th Cir. 1990), cert. denied, ____ U.S. ____ (1991).

A summary of our recommendations for Section 2Q2.1 is attached along with a "redlined" copy of Section 2Q2.1 with our proposed changes. Enclosures 1 and 2.

Enclosures

ENCLOSURE 1

RECOMMENDATION: Section 2Q2.1(b)(1) is amended by inserting "pecuniary gain or" immediately after "involved."

RECOMMENDATION: Section 2Q2.1(b)(2) is amended by inserting "(A)" immediately before "involved" and by inserting "or (B) otherwise created a significant risk of infestation or disease transmission potentially harmful to humans, fish, wildlife, or plants" immediately following "law."

RECOMMENDATION: Section 2Q2.1(b)(3)(B) is amended by deleting "a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to discrete subpopulation" and inserting in lieu thereof "any of the following types of amounts of fish, wildlife, or plants: species listed as endangered or threatened by the Endangered Species Act; species listed as Appendix I to the convention on International Trade in Endangered Species of Wild Fauna or Flora; depleted stocks of marine mammals; or a quantity of fish, wildlife, or plants that was significant in relation to the overall population of the species, to any subspecies, or to a distinct population segment."

RECOMMENDATION: Section 2Q2.1(b) is amended by inserting the following as paragraph (b)(4).

> (4) If the offense involves more than minimal planning or a pattern of similar violations, increase by 2 levels.

RECOMMENDATION: The Commentary to Section 2Q2.1 is amended by inserting in the appropriate place the following:

> The term "commercial purpose" in Section 2Q2.1(b)(1) includes, but is not limited to: all activities involving the actual or intended purchase or sale of fish, wildlife, or plants; all activities involving the actual or intended take, receipt, acquisition, possession, transportation, or transfer of fish, wildlife, or plants in the pursuit of gain or profit; and all conduct facilitating such activities. Museums, zoological parks, and scientific or educational institutions open to the general public for a fee or donation, whether or not established, maintained, or

operated as a governmental service or privately endowed and organized are included.

The term "pecuniary gain" includes market transactions, barter transactions, and activities designed to increase gross revenue or reduce losses (e.g., when a farmer destroys migratory birds to prevent their consumption of cereal grains).

RECOMMENDATION: The Commentary to Section 2Q2.1 is amended by inserting in the appropriate place the following:

The federal quarantine laws and regulations to which paragraph (b)(2) applies are set forth, inter alia, in Title 9, Code of Federal Regulations, Part 92 and Title 7, Code of Federal Regulations, Chapter III. State quarantine laws are applicable as well.

RECOMMENDATION: The Commentary to Section 2Q2.1 is amended by inserting in the appropriate place the following:

"Market value" may be determined at sentencing from any reliable information available and is not limited to merely the fair market value or bargained for price of the fish, wildlife, or plants. It may include replacement of restitution costs, or acquisition and preservation (i.e., mounting) costs and requires a case-by-case determination. So-called "contingent valuation methods" measuring aesthetic or non-use loss, however, are inappropriate to measure market value.

RECOMMENDATION: The Commentary to Section 2Q2.1 captioned "Background" is amended by inserting "pecuniary gain or" immediately following "involved" and immediately before "a commercial purpose" and by inserting "or where the offense involved more than minimal planning or a pattern of similar violations "immediately following "as required by law" and by deleting "species exceeded $2,000 or the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the population of the species or to a discrete

subpopulation of the species" and inserting in lieu thereof "fish, wildlife, or plants exceeded $2,000, or involved certain endangered, threatened, protected, or depleted species".

RECOMMENDATION: Section 3D1.2 is amended by inserting "Section 2Q2.1" in the appropriate place on the list found in Section 3D1.2(d).

ENCLOSURE 2

2. CONSERVATION AND WILDLIFE

§ 2Q2.1. Specially Protected Fish, Wildlife, and Plants; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the offense involved *pecuniary gain or* a commercial purpose, increase by 2 levels.

(2) If the offense *(A)* involved fish, wildlife, or plants that were not quarantined as required by law, *or (B) otherwise created a significant risk of infestation or disease transmission potentially harmful to humans, fish, wildlife, or plants,* increase by 2 levels.

(3) (If more than one applies, use the greater):

(A) If the market value of the fish, wildlife, or plants exceeded $2,000 increase the offense level by the corresponding number of levels from the table in § 2F1.1. (Fraud and Deceit); or

(B) If the offense involved [a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to a discrete subpopulation] *any of the following types or amounts of fish, wildlife, or plants: species listed as endangered or threatened by the Endangered Species Act; species listed as Appendix I to the Convention on International Trade in Endangered Species of Wild Fauna or Flora; depleted stocks of marine mammals; or a quantity of fish, wildlife, or plants that was significant in relation to the overall population of the species, to any subspecies, or to a distinct population segment,* increase by 4 levels.

(4) *If the offense involved more than minimal planning or a pattern of similar violations, increase by 2 levels.*

Commentary

Statutory Provisions: 16 U.S.C. §§ 668(a), 707(b), 1174(a), 1338(a), 1375(b), 1540(b), 3373(d); 18 U.S.C. § 545. For additional statutory provision(s); see Appendix A (Statutory Index).

Background: This section applies to violations of the Endangered Species Act, the Bald Eagle Protection Act, the Migratory Bird Treaty Act, the Marine Mammal Protection Act, the Wild Free-Roaming Horses and Burros Act, the Fur Seal Act, the Lacey Act, and to violations of 18 U.S.C. § 545 where the smuggling activity involved fish, wildlife, or plants. Enhancements are provided where the offense involved *pecuniary gain* a commercial purpose, where the fish, wildlife, or plants were not quarantined as required by law, *or where the offense involved more than minimal planning or a pattern of similar violations.* An additional enhancement is provided where the market value of the [species exceeded $2,000 or the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the population of the species or to a discrete subpopulation of the species] *fish, wildlife, or plants exceeded $2,000, or involved certain endangered, threatened, protected, or depleted species.*

For purposes of subsection (b)(1), the term "commercial purpose" all activities involving the actual or intended purchase or sale of fish, wildlife, or plants; all activities involving the actual or intended take, receipt, acquisition, possession, transportation, or transfer of fish, wildlife, or plants in the pursuit of gain or profit; and all conduct facilitating such activities. Museums, zoological parks, and scientific or educational institutions open to the general public for a fee or donation, whether or not established, maintained, or operated as a governmental service or privately endowed and organized are included. The term "pecuniary gain" includes market transactions, barter transactions, and activities designed to increase gross revenue or reduce losses (e.g., when a farmer destroys migratory birds to prevent their consumption of cereal gains).

The federal quarantine laws and regulations to which paragraph (b)(2) applies are set forth, inter alia, in Title 9, Code of Federal Regulations, Part 92 and Title 7, Code of Federal Regulations, Chapter III. State quarantine laws are applicable as well.

"Market value" may be determined at sentencing from any reliable information available and is not limited to merely the

fair market value or bargained for price of the fish, wildlife, or plants. It may include replacement or restitution costs, or acquisition and preservation (i.e., mounting) costs and requires a case-by-case determination. So-called "contingent valuation methods" measuring a aesthetic or non-use loss, however, are not appropriate methods to measure market value.

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April 15, 1992

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Attention: Public Information Office

Dear Members:

I am a sole practitioner with about 25 percent of my work concentrated in federal criminal defense. I am writing regarding what I see as an emergency presented by the Sentencing Guidelines. Although I draw on experiences and comments of judges, probation officers, prosecuting attorneys, and other defense attorneys, these opinions are mine alone.

I offer these thoughts with high regard for what obviously has been a tremendous commitment of time and energy on your part.

As you probably know, it was with considerable uneasiness that practitioners received the first draft of the Sentencing Guidelines that went into effect on November 1, 1987. It is with horror, however, that we are left to receive the dizzying number of amendments to the Guidelines, now totalling 434. Many of these separate amendments carry on for paragraphs and even pages of small print. Some of the amendments actually include separate amendments to dozens of separate Guidelines.

These amendments have been spread out over six separate effective dates. The 1987 West edition of the Guidelines was in about 300 pages. The 1991 edition covers over 800 pages. With each new edition, the West publisher now routinely, and correctly, warns that all prior editions of the Federal Sentencing Guidelines Manual "should be retained . . . in the event there is a need to refer to the text of a specific Guideline, Commentary, or Policy Statement at a particular point in time."

For our further direction, you suggest a doctrine of "selective retroactivity" for usually, but not always, applying the Guidelines in effect on the date of sentencing, not the date of the offense. (Even more mind-stimulating is the place where that doctrine is announced. It seems to be found in the answer to Question Number 71 of your list of "One Hundred Questions Most Frequently Asked

About the Sentencing Guidelines." With all due respect, this looks like a David Letterman Top Ten List run riot.)

Most of the separate Guidelines by this time have been amended. The most important of them seem to have been amended at least twice, often three or four times.

I wish to put aside for the moment substantive objections to the entire concept of the Guidelines. Surely you have heard them all, and obviously they are not a deterrent to this large-scale experiment in reflex penology.

I have a more limited suggestion, but one that I think is absolutely critical.

Stop. You must stop.

I am not recommending that you do anything or that you undo anything. You must simply stop.

I harbor no harsh thought about the members of the Commission or any of their support staff. Quite the opposite. I am personally struck that this pace of amendments could only be indulged by well-intentioned persons whose humility over past mistakes has regrettably caused them to embark on an endless mission to fix what very possibly is not fixable.

I am sure that you are mindful of the concerns for settledness in the sentencing law, thus that you would not have enacted 434 amendments unless you thought they were of genuine substantial importance in correcting <u>serious</u> earlier errors.

There are those more judgmental souls (people genetically disqualified to be good criminal defense attorneys) who would accuse you of runaway hubris.

But whether motivated by extreme humility or extreme hubris, much is said about how fine an idea the original Guidelines were if they have required hundreds of amendments, in thousands of important distinct parts, covering hundreds of pages of small print in a bare four years.

Indeed, if achieving predictability and avoiding disparity are the chief goals, it is especially hard to understand this pace of change.

I am not here complaining about the fact that we have departed from a system where defendants and their lawyers (and often prosecutors) went into sentencing hearings armed with realistic and sincere

programs to turn a person's life around, only to have embarked on a system that sees defendants, their lawyers, and their prosecutors enter sentencing hearings armed only with pocket calculators and bromo seltzers. Perhaps those criticisms are mistaken. Perhaps the fact that modern-day federal sentencing has virtually nothing to do with 95 percent of the significant information about the person being sentenced is appropriate, or at least it's the way Congress may have wanted it.

What I am talking about here is a crisis in the day-to-day adjudicative process. I am reminded of David Mellinkoff's observation in The Language of the Law of an insurance policyholder trying to figure out where he stands.

> By the time he has found his way to the end of an insurance policy, the alert and unusual householder (layman or attorney) cannot know what he is covered for--because there is more in his policy than he can read and retain even if he understood every word as he read it. The reading has left him--nay, made him--ignorant.

Your hard work has made us ignorant.

Not all of us practicing federal criminal law are brilliant. Approximately half of us graduated in the bottom half of our law school classes.

I would venture that the majority of us practice without large litigation budgets, much if any research assistance, regular access to legislative history, or even computerized research. Regardless of our resources, we are practicing under a flood of case law and amendments to the statutory law that are also burying us. (The Guidelines directly contribute to these explosions as well as evidenced by Appendix I to West's 1991 Guidelines edition showing over 5,000 case law treatments of the Guidelines since 1987.)

And for us, sentencing is not the only consideration. There is often the matter of defending the charge. The same penological aggressiveness that has brought about the Guidelines, endless mandatory minimum sentencing, bills to punish by death killers of federal egg inspectors, and what can fairly be called a federal infatuation with incarceration can, if unopposed, take innocent victims. Some of our clients are indeed innocent, and many are at the very least seriously over-charged.

We are called upon often to study thousands of pages of exhibits in a single case, wrestle with niggardly rules of discovery that were