Michael Gannon, Immigration Inspector
Immigration and Naturalization Service
Los Angeles District
700 East Carson St., Unit 6
Long Beach, CA 90807

Mr. Gannon opposes proposed Amendment 18. He believes that effectively lowering the sentence for illegal reentry will result in fewer prosecutions and destroy the deterrent effect of the statute. He states that the US Attorney's office for the Eastern District of New York will not prosecute any crimes that carry a base offense level below 24. In addition, many aliens convicted of crimes in the US get reduced sentences or are released early on the condition that they be deported. Mr. Gannon argues that these problems reduce the deterrent effect of the current guideline. He believes the current guidelines offer an appropriate punishment, and are a successful deterrent and should be left intact.

William T. Malone
124 Udall Road
West Islip, NY 11795

Mr. Malone is a senior inspector employed by the INS.

Mr. Malone opposes proposed Amendment 18. He submitted the same letter as Mr. Gannon (summarized above).

William Jones
4405 Hornbeam Drive
Rockville, MD 20853

Mr. Jones is a career INS officer. During his career, he served as a deportation officer, a criminal investigator, and a supervisory detention and deportation officer.

Mr. Jones opposes proposed Amendment 18. He states that deported aliens are notified of the consequences of returning to the United States and that this notification serves as a deterrent in many cases. He believes that a reduction in the sentencing guidelines will eliminate any deterrent presently keeping the most dangerous illegal alien group, the aggravated felons, from returning to the United States.

Jennifer Duey
334 Bunker Hill Circle
Aurora, IL 60504

Ms. Duey is a special agent with the INS.

Ms. Duey believes that the reduction in sentences for illegal re-entry for an aggravated felon will fail to deter the behavior and may even encourage it. She believes that the problem is exacerbated by the treatment these defendants receive from the U.S. Attorney's and State's Attorney's offices. Any deterrent effect is further limited by giving defendants time served, shortened sentences, or early release so that they can be deported to their country of origin.

Edward Tomlinson
2908 Coldspring Way #321
Crofton, Md 21114

Mr. Tomlinson was an employee of the Department of Justice and was assigned to the Organized Crime Drug Enforcement Task Force (OCDETF).

Mr. Tomlinson strongly opposes lowering any of the sentencing guidelines relating to aggravated felon re-entrants. These guidelines serve as a strong deterrent to the most violent of alien criminals seeking to re-enter the United States. As it is, many of these criminals did not serve an appropriate sentence for the prior crime because they received an early release on the condition that they be deported. Mr. Tomlinson believes that it is imperative that after criminal conviction, society should not send the message that it will tolerate the convict's illegal return to this society without severe penalty for the offense.

Proposed Amendment 19 – Nuclear, Biological, and Chemical Weapons

Department of Justice
Criminal Division
Michael Horowitz, Ex-Officio Commissioner

DOJ strongly urges the Commission to adopt Amendment 19.

Importation and Exportation Offenses. The proposed amendments of §§2M5.1 and 2M5.2 respond to the National Defense Authorization Act for Fiscal Year 1997, which urged the Commission to provide increased penalties for offenses relating to importation, exportation, and attempted importation or exportation of nuclear, biological, or chemical weapons or related materials or technologies under specified provisions of law. The proposed amendments increase offense levels by four levels for these offenses and would recognize the seriousness of the unlawful importation and exportation of nuclear, biological, and chemical weapons and related items.

Amendment of §2M6.1. The proposed amendment to §2M6.1 incorporates offenses relating to biological weapons, 18 U.S.C. § 175, and those relating to chemical weapons, 18 U.S.C. § 229. These are relatively new statutes for which there is no applicable guideline. A guideline is needed to assure appropriate sentences for these serious offenses.

DOJ states that the proposed amendment to §2M6.1 appropriately addresses deficiencies in the current guidelines and, as a general matter, DOJ finds it very satisfactory.

DOJ states that threats involving nuclear, biological, chemical, and radiological (NBCR) materials are fundamentally different from other threat cases and merit individualized treatment under the guidelines. In DOJ's view, NBCR threats should not be treated under the generic guideline for threats, §2A6.1, which "includes a particularly wide range of conduct" (see Application Note 1 to that guideline), and whose base offense levels reflect that range. Unlike some of the offenses captured under §2A6.1, such as harassing telephone calls or threats to injure property or reputation, NBCR threats typically involve a threat of death or serious physical injury and unique psychological harm to victims. Further, unlike other threats, such as threats involving conventional explosives, the harm associated with a threat relating to NBCR is not dispelled by removing oneself from the targeted location.

While DOJ believes that threat offenses should be treated separately from §2A1.6, the differentiation in the proposed guideline between threat offenses and other conduct could be expanded somewhat, to a level 18 or 20, where there is no evidence of intent or ability to complete the threatened offense.

Regarding the issue for comment on whether attempts, conspiracies and solicitations should be

expressly covered by the proposed guideline or by §2X1.1, DOJ strongly urges the Commission to treat these offenses under the proposed guideline.

DOJ notes that the proposed guideline has bracketed the provisions relating to particularly dangerous materials. DOJ states that there should be additional punishment for offenses involving these most lethal substances. If the Commission is inclined to delete this provision, DOJ would favor the base offense level of 30 for all NBCR offenses.

DOJ suggests the deletion of Application Note 5 which exempts those who act in aid of a foreign terrorist organization from the upward adjustment under the terrorism enhancement, §3A1.4. This precludes the automatic application of Criminal History Category VI to such offenders.

Department of Justice
Statement of Robert S. Mueller, III
Acting Deputy Attorney General

Mr. Mueller states that this is an excellent amendment, and urges the Commission to adopt it.

Proposed Amendment 20 – Money Laundering

Department of Justice
Criminal Division
Michael Horowitz, Ex-Officio Commissioner

DOJ states that it asked the Commission to delay consideration of this amendment until the next amendment cycle so that the new Administration could be confident that the amendment assures adequate punishment and deterrence. Any change in this area occurs against a backdrop of existing money laundering guidelines that are relatively straightforward, easy to apply, and consistent with the purposes of the money laundering statutes.

DOJ states that the Commission has not studied the effect on the money laundering amendments or proposed amendments in the white collar crime package and the flexibility proposals in Amendments 13 and 14. In short, while the money laundering proposal would tie the offense level to that of the underlying crime in most cases, the underlying offense level itself and the sentencing table are the subject of possible changes that could significantly alter the sentencing outcome. DOJ states that if the Commission decides to move forward with an amendment to the money laundering guidelines despite its request for delay, there are several key provisions that require adjustment to address DOJ's concerns.

Retention of Current Offense Levels for Drug Money Launderers. DOJ states that those who launder proceeds derived from drug and other serious offenses identified in proposed §2S1.1(b)(1) should not receive a sentence below current guideline levels. DOJ regards this as essential both for first- and third-party money launderers. The proposed decrease in offense levels could send an unfortunate message that drug money launderers are less culpable than they were previously thought to be.

As to third party money launderers, DOJ suggests the following enhancements:

6 levels for drug/serious crime proceeds;
5 levels for being in the business of money laundering;
4 levels for promotion;
4 levels for concealment;
3 levels for evasion of reporting requirements;
2 levels for evasion of tax laws; or attempting, aiding or abetting, or conspiring to commit any offense referred to in subsection (b)(2)(subsection (b)(2)(D));
1 level for offenses greater than $10,000 where proposed subsection (a)(1) applies and (b)(2) does not.

DOJ states that any lower levels would fail to capture the seriousness of the harm to society generated by the use of criminal proceeds to promote further unlawful activity or to conceal the

proceeds of unlawful activity.

Specific Offense Characteristics. DOJ is concerned about some of the specific offense characteristics in the proposed amendment. It is imperative that if a defendant is convicted of an offense involving an aggravated form of money laundering—i.e., under 18 U.S.C. § 1956—an enhancement under the proposed guideline must apply, except in the rare case of an offense that involves only the receipt and deposit of proceeds of specified unlawful activity. Section 1956 carries a 20-year maximum prison term, while the statute for the less aggravated form of money laundering carries only a 10-year maximum term of imprisonment, 18 U.S.C. § 1957. However, as drafted, the proposed amendment would not assure that a money launderer convicted of promoting specified unlawful activity or concealing the proceeds of it would receive an enhancement. Under the proposal only "sophisticated concealment" and conduct that "significantly" or "materially" promoted further criminal conduct would result in an enhancement. DOJ states that these qualifiers should not be used, and the language of the proposed amendment should assure that an enhancement applies to a person convicted of an offense under section 1956.

DOJ also objects to the reduced sentence under proposed §2S1.1(b)(4) for defendants convicted under 18 U.S.C. § 1957 who did not commit the underlying offense and who did not receive any of the listed enhancements. This reduction is unnecessary since, by virtue of not being subject to the proposed enhancements, those who meet these criteria would receive proportional sentences based on the value of the laundered funds. By contrast, if the Commission adopted the proposed reduction in sentence for these section 1957 violators, a significant cliff would result between offenders who receive an enhancement and those who do not.

Guideline for Violations of 18 U.S.C. § 1960. Previously DOJ strongly recommended that the Commission assign violations of this statute to §2S1.3 (structuring and reporting offenses) rather than §2T2.2 (regulatory offenses). Violations of section 1960 are similar to structuring offenses and warrant treatment under §2S1.3, which not only has a higher base offense level than §2T2.2, but differentiates on the basis of the value of the funds and other factors, such as the defendant's knowledge or belief that the funds were proceeds of unlawful activity or were intended to promote such activity. Given the combination of an offense level of four in §2T2.2 and the absence of specific offense characteristics, that guideline fails to recognize that money transmitters can facilitate the efforts of organized criminals and money launderers.

Commentary. Several issues reflected in the proposed commentary are also important considerations for the Commission. Proposed Application Note 3(C) concerns the value of the funds and addresses the concern that in some third-party cases the value of the laundered funds may exceed the value of the loss that determines the sentence for the underlying offense. Option 1 provides for the possibility of a downward departure in such a case; Option 2 limits the value of the funds for the money laundering guideline to the loss amount under the fraud guideline if it is less than the actual value of the laundered funds; and Option 3 takes no position. DOJ understands that this type of case represents a small minority of money laundering

prosecutions. Therefore, DOJ recommends that the Commission adopt Option 3, particularly in light of the complexity of the other options and the confusion either would create.

DOJ states that as written, proposed Application Note 4 would make it very unlikely that the government could establish that a defendant was in the money laundering business. The note would require multiple sting operations over an extended period of time and cause many to go uncounted as being in the business of money laundering. The most meaningful consideration in identifying a person in the business of money laundering is that he had multiple sources of funds. DOJ suggests that the Commission should not complicate the definition with a great many factors.

Technical Amendments. DOJ recommends a technical amendment to prevent confusion is deletion of the words "because the defendant did not commit the underlying offense" from proposed subsections (b)(1)(A), (b)(2)(A), and (b)(4). These words are unnecessary since each provision in question specifically states that subsection (a)(2) must apply in order for the provision which follows this reference to apply. The words DOJ recommends deleting may suggest that the applicability of the above-listed provisions is limited to cases in which the defendant actually committed the underlying offense, as opposed to those in which he otherwise would be accountable for it under §1B1.3(a)(1)(A).

Department of Justice
Statement of Robert S. Mueller, III
Acting Deputy Attorney General

The DOJ is extremely concerned about many of the proposed changes to the money laundering guidelines. Acting Deputy Attorney General Mueller states that some of the changes being proposed would lower sentences for even the most serious forms of money laundering.

The DOJ does agree with the Commission that prosecutors should not be using the threat of money laundering charges in order to induce guilty pleas in lower-level fraud cases. Accordingly, DOJ has been supportive of the Commission's efforts to reduce the impact of the money laundering guidelines for that category of first-party money launderers. However the Commission's proposed amendment not only makes those appropriate changes, but also results in lower sentences for some first-party and third-party drug money launderers. DOJ will strenuously oppose any proposal that would reduce penalties for individuals who launder drug proceeds.

Department of the Treasury
Internal Revenue Service
Charles O. Rosotti, Commissioner of Internal Revenue
Washington, D.C. 20224

The IRS supports this amendment because enhancing the guidelines for violations of 18 U.S.C. § 1956(a)(1)(A)(ii) by one or two levels will assist the Service in combating the tax gap by reinforcing the message that tax crimes are serious.

The IRS also attached a chart comparing base offense levels under §2T4.1 for proposed Options 1 and 2 and the current tax Loss Table:

Loss	2T4.1 – Current	2T4.1 – Option 1	2T4.1 – Option 2
$10,000.00	10	10	8
$10,001.00	10	10	10
$13,500.00	10	12	10
$13,501.00	11	12	10
$23,500.00	11	12	10
$23,501.00	12	12	10
$40,000.00	12	14	12
$40,001.00	13	14	12
$70,000.00	13	14	12
$70,001.00	14	14	14
$120,000.00	14	16	14

Department of the Treasury
James F. Sloan, Acting Under Secretary (Enforcement)
Washington, DC

Treasury supports, in principle, holding a money launderer accountable for the underlying offense committed, but has serious reservations about proposed changes to the guidelines that would decrease the seriousness of money laundering offenses.

Treasury supports a minimum base offense level of 13 for money laundering offenses. This level

represents a compromise between the Commission's desire to reduce the perceived disparity between money laundering and the underlying offense but still recognizes the seriousness of money laundering as a crime.

Treasury supports the types of enhancements proposed in (b)(1) and (b)(2). Treasury believes that a six-level enhancement is appropriate for the offenses detailed in (b)(1)(i, ii, and iii). Treasury also supports enhancements for those convicted under (b)(2)(A, B, C, and D). However, it believes that the court should have the option of imposing one or more of the enhancements instead of applying only the greatest as called for in the proposed (b)(2).

Treasury believes that a 4-level enhancement, or higher, is appropriate for an individual engaged in the business of laundering funds. Treasury has no objection to the "totality of the circumstances" test proposed in Application Note 4(A) but does not endorse the "Factors to consider" language in Application Note 4(B) as it is currently written. Specifically, Treasury recommends that the words "regularly [routinely]" be struck from 4(b)(i); the phrase "during an extended period of time" be struck from 4(B)(ii); and that the words "a substantial amount of" be struck from 4(B)(iii).

Treasury also recommends that a 3-level enhancement apply in (b)(2)(B) if the laundered funds promoted further criminal conduct. It does not support modifying the word "promotion" with the adjectives "significant" or "material" as proposed in Application Note 5.

Treasury supports a 3-level enhancement for concealment in (b)(2)(C) to reflect the fact that investigating and prosecuting complex money laundering cases involves a substantial investment of government resources. Treasury believes that the proposed enhancement should apply to any level of concealment, not just cases involving "sophisticated" concealment.

Treasury supports the two-level enhancement for (b)(2)(D) because these activities undermine the regulatory structure of the anti-money laundering laws, and providing an enhancement for tax evasion offenses reinforces the message that tax crimes are serious.

Finally, Treasury does not support the proposed two-level downward departure in (b)(4)

Referencing 18 U.S.C. § 1960 Offenses to §2S1.3: Treasury supports referencing these offenses to §2S1.3. While violations of § 1960 might appear regulatory in nature, these offenses are more akin to the conduct level involved in structuring and should be punished at that section's higher offense level. Congress intended to increase the pressure on money services businesses that operate at the fringe of legality, and to tighten control over underground money movement mechanisms. If the §2S1.3 guidelines were applied to these offenses, the potentially higher sentences for offenders would track the congressional intent to combat illegal activities by some money services businesses.

Probation Officers Advisory Group
Ellen S. Moore, Chairman
U.S. Probation Office
P.O. Box 1736
Macon, GA 31202

The consensus of POAG is that relevant conduct should be limited to the defendant's accountability under §1B1.3(a)(1)(A), instead of expanded to include defendants who are otherwise accountable for the underlying offense under §1B1.3(a)(1)(B). The expansion would more than likely include "third party cases," blurring the distinction between the two groups.

POAG is of the opinion that concealment is inherent in the offense. Therefore, an enhancement should only be applicable if the offense used "sophisticated means." An enhancement treated as a Specific Offense Characteristic for tax issues would be appropriate because tax issues are not necessarily part of every money laundering case. POAG believes that the underlying offense appropriately address the seriousness of the amount of laundered funds. Should an aggravating or mitigating factor be present that was not accounted for in the computation, the court has the option of departing.

POAG is of the opinion that application of §(b)(2)(A) should be expanded so a defendant is held accountable for being a direct and third-party money launderer.

Practitioners' Advisory Group
Jim Felman & Barry Boss, Co-Chairs
c/o Asbill, Junkin, Moffitt & Boss, Chartered
1615 New Hampshire Avenue, NW
Washington, DC 20009

The PAG has long supported reforming this area of the guidelines. It believes that the existing guidelines grossly over-punish offenders and are used for plea leverage in many cases. Although they were designed for use against drug king-pins and organized criminals, they are actually used against garden variety criminals. The PAG believes that they are desperately in need of repair.

The PAG reiterates that, from the defense perspective, Amendment 20 is not perfect; but concedes that it is a vast improvement over the existing guideline. The PAG expresses disappointment that DOJ still opposes the amendment, but hopes that the Commission will amend these guidelines, bringing added rationality to sentencing in money laundering cases.

New York Council of Defense Lawyers
711 Fifth Avenue
New York, NY 10022

The NYCDL generally approves of the approach which would divide defendants into two categories: those who committed underlying offenses from which the laundered funds were derived; and other offenders. NYCDL notes, however, that the proposed amendments do not require a conviction on the underlying offense for the generally higher base offense level for direct money laundering to apply. Conceivably, in instances where proof is insufficient to convict beyond a reasonable doubt of the underlying offense, but sufficient to prove this offense by a preponderance of the evidence, a sentencing court could still sentence a defendant as a "direct" money launderer. Further, the application notes provide no guidance on how the sentencing court is to determine whether the defendant has "committed the underlying offense." NYCDL believes that to ameliorate potential *Apprendi* and due process concerns, an acquittal of the underlying offense should preclude sentencing under the guidelines for direct money laundering.

NYCDL is also concerned that certain Specific Offense Characteristics, contained in the proposed amendments, may also implicate *Apprendi* issues or unduly complicate sentencing proceedings. NYCDL notes that proposed upward adjustment (2)(D) avoids this potential issue by requiring that the defendant first be convicted of certain provisions of 18 U.S.C. § 1956.

NYCDL states that proposed section (2)(C) is probably undesirable because most money laundering involves some form of concealment. The adjustment will invite mini-trials concerning whether the concealment was sophisticated enough to qualify for the adjustment. Additionally, a direct money launderer whose base offense involved fraud or theft may already be subject to an upward adjustment for sophisticated means; thus, the proposed amendment risks double counting. For these reasons, NYCDL would disapprove even more forcefully an expansion of the enhancement to cover all forms of concealment, even where the concealment was not "sophisticated."

NYCDL takes no position on the proposed upward adjustment for those "in the business of laundering funds" because professional money launderers will often be subject to higher guideline sentences than other offenders, without need for a further adjustment. While NYCDL takes no position on the need for an upward departure, it is unaware of any reason to exempt direct money launderers from its scope.

The Commission sought comment on a potential enhancement of1- level that would apply to direct money launderers who launder at least $10,000 in funds but are not subject to any other enhancements. Regarding this issue for comment, NYCDL questions the need for reintroducing a feature of the money laundering guidelines that the amendments otherwise corrected – the possibility that money laundering could be punished more severely than underlying criminal conduct.

NYCDL approves of the proposed two-level decrease for certain offenders convicted solely of violating 18 U.S.C. § 1957.

NYCDL opposes the amendment referencing convictions under 18 U.S.C. § 1960 to §2S1.3. This amendment would subject less serious offenders to appreciably more serious penalties, determined in part by the amount of funds involved. NYCDL states that there is no apparent need for this dramatic change because prosecutions of this type are infrequent.

Of the thee options which address the rare case where a third party money launderer may be subject to a greater penalty than a direct money launderer, the NYCDL prefers Option 2. The next favored option is 3. Option 1 seems contrary to the intent of punishing direct money launderers more severely than third party offenders.

In sum, while NYCDL endorses the proposed division of offenders into direct and third party money launderers, NYCDL suggests reconsideration of certain proposed enhancements, the use of the structuring guidelines to punish mere unlicenced money transmission and the adoption of Option 2 to deal with situations where a third party money launderer may face greater penalties than a defendant responsible for the underlying offense.

National Association of Criminal Defense Lawyers
Martin G. Weinberg, Chair
Samuel J. Buffone, Vice Chair
1025 Connecticut Avenue, NW, Suite 901
Washington, DC 20036

The National Association of Criminal Defense Lawyers (NACDL) endorses the proposed §2S1.1 to tie the base offense level to the underlying criminal conduct which was the source of the funds. The NACDL believes this proposal will decrease anomalous applications and coercive plea bargaining practices. Although the NACDL also believes several features of the proposal should be changed, they strongly support an amendment which follows the basic proposed structure. Additionally, the NACDL urges the Commission to reject the position of the Department of Justice to refrain from acting on a money laundering amendment to allow the Department to examine the proposal and provide alternative proposals. Because the current guidelines produce unnecessarily harsh sentences, the guidelines should not be allowed to continue in their current form. Relatedly, the NACDL requests that if consideration of the money laundering amendment is deferred, consideration of the Economic Crime Package should also be deferred because of the close relationship between the two.

Regarding whether to expand §2S1.1(a)(1) to include offenders who would otherwise be accountable under §1B1.3(a)(1)(B), the NACDL believes this inclusion would expand the reach of this section beyond the limits intended by the drafters of the amendment. The NACDL cites Application Note Two in §1B1.3, stating that "jointly undertaking criminal activity"

encompasses a range of conduct beyond that normally encompassed within the concept of direct responsibility for criminal activity, which underlies the concept of direct money laundering.

The NACDL supports an addition to proposed Application Note Three regarding the value of laundered funds for certain defendants. NACDL believes that a provision should be included which deals with the situation where the amount of laundered funds derived from the fraud transaction could be greater than the fraud loss itself, regardless of whether Option 1 or Option 2 is adopted. Stating that a failure to adopt one of these options would lead to anomalous application of the guideline, the NACDL also believes in that case, money laundering will become a more significant offense than the underlying offense.

The NACDL states that in proposed Application Note Four, subparagraph (B), the definition of "engaging in the business" is inherently vague and may lead to disparate applications of the guideline. Their belief is that use of this standard would lead to potential duplicative counting for the elements of criminal history and relevant conduct.

Further, the NACDL believes that proposed Application Note Five should include the bracketed language to limit the reach of the promotional enhancement.

With respect to the proposed §2S1.1(b)(2)(B), the NACDL opposes a promotional Specific Offense Characteristic, stating that the proposed guideline would expand the reach of promotional money laundering. However, if this Specific Offense Characteristic is included, the NACDL favors the addition of the bracketed language to require such activities significantly promote further criminal conduct.

Further, the NACDL suggests that the language in both §2S1.1(b)(2)(C) and Application Note Six should include language indicating that the conduct was intended to conceal. This is necessary since several of the examples of sophisticated concealment in Application Note Six could be regular course of business transactions unrelated to any intent to conceal a transaction, and the sophisticated concealment adjustment should be limited to only that intentional conduct.

The NACDL opposes including the Specific Offense Characteristic in §(b)(2)(D) because the list of subsections in § 1956 includes most of the major subsections contained in that statute, and it sees no rationale for increasing a sentence for the large majority of cases that will be prosecuted under the money laundering statutes through this proposed Specific Offense Characteristic.

The NACDL supports a 2-level downward departure as in proposed §(b)(4).

Finally, the NACDL believes the proposed amendments will effectively eliminate the circuit conflict because of the coupling of direct money laundering to the underlying offense. However, cases that will not be sentenced under the amended guideline prior to its adoption or because of ex post facto problems should be addressed.

Jefferson M. Gray, Member
Arent Fox Kintner Plotkin & Kahn, PLLC
1050 Connecticut Avenue, NW
Washington, DC 20036-5339

Mr. Gray is currently a white collar criminal defense attorney and a former federal prosecutor.

Mr. Gray supports proposed Amendment 20 because it eliminates the money laundering table in §2S1.1, and instead bases the offense level for money laundering offenses primarily on the underlying offense. He believes that this change is needed to correct certain anomalies that have crept into the interpretation of this guideline over the years. These anomalies have led to inconsistent, inequitable, and unpredictable results in the area of money laundering.

Mr. Gray also supports the amendment because it will remedy a circuit split on the question of whether fraud and money laundering should be "grouped" under §3D1.2(d). One problem with the grouping is that some prosecutors, believing the fraud tables are too lenient, use the money laundering statute as a way of circumventing the penalty structure that would otherwise apply in fraud cases under §2F1.1.

Mr. Gray thinks that it is very important that any additional enhancement for "promotion" money laundering require a showing to the court that the laundered funds "significantly" or "materially" promoted further criminal conduct. He states that many prosecutors do not clearly understand the difference between "promotion" or "reinvestment" and "concealment" money laundering, or prefer to charge both in order to increase the pressure on defendants to plead guilty ("promotion" money laundering leads to a higher base offense level). It is also difficult for juries to distinguish between the different kinds of money laundering. Therefore, an additional enhancement for "promotion" should be supported by a specific showing that the funds were used in such a manner.

Weston W. Marsh, Partner
Freeborn & Peters
311 South Wacker Drive
Suite 3000
Chicago, IL 60606

Freeborn & Peters (F&P) recommends that the application of (a)(1) of proposed §2S1.1 not be expanded to include defendants who are otherwise accountable for the underlying offense under §1B1.3(a)(1)(B). F&P believes that involvement by a defendant under §1B1.3(a)(1)(B) is substantially less than under §1B1.3(a)(1)(A).

F&P recommends that the enhancement referred to in (b), Specific Offense Characteristics (2)(C) not be expanded to include all forms of concealment. It believes that sophisticated concealment

should be a sufficient basis for concealment.

Regarding application of subsection (a)(2)(C), Value of Funds, F&P recommends Option 2 because it would more fairly and accurately assess the punishment of the crime than would the methods set forth in the other amendments.

F&P also recommends that the provisions of §2S1.1 be made retroactive to previously sentenced defendants, as were the previous amendments under §1B1.10. Only a limited number of cases would be affected and an equalization of sentencing would be achieved in those cases.

Terence L. Lynam,
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
Robert S. Strauss Building
1333 New Hampshire Avenue, N.W.
Washington, D.C. 200364

Mr. Lynam suggests that this amendment should be applied retroactively. Defendants who received enhanced base offense levels due to the separate grouping of the money laundering offense should be allowed to benefit from the change.

Proposed Amendment 21 – Miscellaneous New Legislation and Technical Amendments

[No public comment submitted for this amendment.]

INDEX TO PUBLIC COMMENT 2000 AMENDMENTS

March 10, 2000

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500 South
Washington, DC 20002-8002
Attention: Public Information – Public Comment

Re: N.E.T. Act Directive, Proposed Amendments to § 2B5.3- Supplemental Comments

Dear Commissioners:

On behalf of U.S. copyright-based industries, the undersigned would like to thank the Commission for the opportunity to file supplemental comments on the proposals to amend the U.S. sentencing guidelines to implement the No Electronic Theft (NET) Act (Pub. L. 105-147) and hereby submit the following comments in response to the Federal Register Notice published on February 11, 2000.

At the outset, the signatories to this letter the Business Software Alliance (BSA), the Interactive Digital Software Association (IDSA), the Software & Information Industry Association (SIIA), the Motion Picture Association of America (MPAA) and the Recording Industry Association of America (RIAA) ("the industries") refer the Commission back to the comments we filed previously with the Commission on January 26, 2000 and reaffirm the substantive positions stated in that letter. It is our understanding that the options originally noted for public comment have been superceded by the options contained in a paper dated February 21, 2000 ("February 21st paper") provided by the Commission staff to us and, therefore, it is with this understanding that we submit the following comments.

We strongly support proposed Option 4 with modifications.

The undersigned industries join in support of Option 4 as proposed by the Commission in the February 21st paper with the following modifications:

a. Amending Application Note 5(iii) to apply when the offense involves substantial harm to the market of the infringed item;

b. Removing the word, "usually," from the Determination of Retail Value in Application Note 2;

c. Adding a specific offense characteristic increase where the offense involves the conscious or reckless risk of serious bodily injury; and

d. Eliminating or modifying specific offense characteristic (b)(2).

We believe that Option 4 provides the most balanced, appropriate, effective, and efficient approach in meeting the Congressional directive to implement the NET Act and that our suggested modifications further ensure that the resulting guidelines satisfy the relevant objectives.

We support Option 4 (base offense level 8) and the inclusion of specific offense characteristics (b)(1) and (b)(3) as proposed in Option 4. We believe that each of these factors should be expressed as a specific offense characteristic rather than a potential basis for departure.

a. Option 4 Application Note 5(iii) should be amended to apply when the offense involves substantial harm to the market of the infringed item.

We strongly support an amendment to Option 4 - Application Note 5(iii) clarifying that an upward departure is warranted when the offense involves substantial harm to the market of the infringed item.[1] This Application Note presently provides that an upward departure may be warranted when: "The offense involved substantial harm to the reputation of the copyright or the trademark owner." We believe that the Commission should incorporate the following italicized language into Note 5 (iii):

> **The offense involved substantial harm to the reputation of the copyright or trademark owner *or to the market for the infringed work.***

As drafted in the February 21st paper, Note 5 overlooks the relatedbu t separate and distinct harm to the intellectual property owner that results from unauthorized reproduction, distribution, performance or display of a copyrighted work prior to the time that the owner is prepared to commercially release that product into the open market. This harm was acknowledged and appropriately addressed in the original draft proposal under Option 3, Application Note 3 ("Pre-Release Infringement").

Without this change, the Application Note addresses only the damage done to the reputation of the copyright or trademark owner and ignores the potential loss of market that results from pre-released infringing items. The availability of infringing product prior to the commercial release of a work can cause significant lost sales and damage to the market. More often than not, the pre-released infringing item is a reproduction of a work in progress that is not ready for market.

For example, there have been instances where an editor's cut[2] of a motion picture has been pirated and distributed prior to release of the actual motion picture. While such a pre-release might cause damage to the reputation of the copyright owner/motion picture studio, it will most certainly cause damage to the market for the motion picture itself. In effect, such a pre-release

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[1] It should be noted that there is no Application Note 5(ii) and therefore this provision appears to be misidentified.

[2] The editor's cut of a motion picture is one which, unlike the final product, includes the scenes presented as they were filmed rather than the order they are intended to be shown in the final product, scenes that eventually end up on the cutting room floor, film editor's notes, and no musical score.

could prevent attendance at the movie because it has already been seen and/or through bad word of mouth on the street because of the prior viewing.

Therefore, we believe that the Commission should incorporate the suggested italicized language above to Option 4 Application Note 5 (iii).

b. The "Determination of Retail Value" in Option 4 Application Note 2 should be amended by removing the word, "usually."

We strongly object to the inclusion of the word, "usually," in the Determination of Retail Value in Option 4 Application Note 2. We are concerned that insertion of the word "usually" could unintentionally mislead some courts to believe that they can substitute other benchmarks in lieu of the retail price standard, when in fact we believe that the Commission inserted the word "usually" only to enable the courts to use alternative benchmarks when a retail price standard is not available. Consequently, we believe that a clarification or deletion of the word is in order.

If, however, insertion of the word "usually" by the Commission was intended to allow for alternative methodologies for determining the retail value of infringing and infringed items, we would object to inclusion of that word. The effect of including such language runs counter to the Congressional objective and could undermine the notions of uniformity and certainty in the sentencing process by opening every case to an unguided argument over whether it should be the exception to the rule.

c. Option 4 should add a specific offense characteristic increase where the offense involves the conscious or reckless risk of serious bodily injury.

We support an amendment to Option 4 that adds a specific offense characteristic increasing the offense level where the offense involves conscious or reckless risk of serious bodily injury. We believe that this amendment would provide at least an initial means of address the increasing presence of organized crime elements in this area. We suggest amending Option 4 by including the following italicized language as an additional specific offense characteristic:

> ***(b)(4) If the offense involved the conscious or reckless risk of serious bodily injury, increase by [2].***

This proposed language is consistent with our support of specific offense characteristic (b)(6) in prior Option 3 in our January 26, 2000 letter. Moreover, we note that Option 2, specific offense characteristic (b)(5), in the February 21st paper contains similar language.

d. Option 4 should be adopted without specific offense characteristic (b)(2).

We object, however, to specific offense characteristic (b)(2) in Option 4. Regarding (b)(2)(A) and (b)(2)(B), we believe that it is unnecessary and potentially counter-productive to include a downward adjustment for offenses committed without a commercial purpose or financial gain or in which the infringing articles are being sold far below the retail price of the infringed item. In the first instance, we note that the harm to the victim is not mitigated by the fact that the

defendant failed to profit from the offense. In the second instance, we believe that defendants should not be rewarded for discounting their wares (and in many cases increasing their sales as a result).

Regarding (b)(2)(C), we believe that the quality or performance of an infringing item is not substantially inferior to the quality or performance of an infringed item where the infringing item is a digital or electronic reproduction. We believe that the language in (b)(2)(C) does not account for the technological identity between digitally or electronically reproduced items and their originals.

While we object to (b)(2)(C) in its current form, we believe that the Commission could make a workable administration of this specific offense characteristic consistent with the NET Act by adding an Application Note 6 to Option 4 with the following italicized language:

> *6. Determination of the Quality or Performance of an Infringing Item.- For purposes of subsection (b)(2)(C), the quality or performance of an infringing item is not substantially inferior to the quality or performance of the infringed item if the infringing item is a digital or electronic reproduction.*

We would also support Option 3 if amended.

While we strongly support Option 4, we believe that Option 3 is also viable with the same changes noted in the preceding section. We believe that newly proposed Option 4 is preferable to Option 3 because it would be easier for the courts and prosecutors to apply and it also appears to have the support of the trademark-based industries. If, however, the Commission, should opt for Option 3 in lieu of Option 4, we would urge the Commission to also adopt the language we proposed above.

We oppose Options 1 and 2.

For the reasons stated in our previous letter, we oppose options 1 and 2. In Option 1, we especially oppose the inclusion of the downward departure in Application Note 5(B). We believe that the inclusion of such language is antithetical to the Commission's objective and contrary to the very essence of federal sentencing guidelines. It would completely undermine the notions of uniformity and certainty in the sentencing process and mark an unprecedented return to the unfettered discretion that existed prior to The Sentencing Reform Act of 1984.

We continue to oppose Option 2 largely because we believe a sentencing system based on the price charged by the defendant vis-à-vis the infringed-upon item would perversely reward the pirate who prices his/her goods the lowest. In addition, we believe that the potential benefits of implementing the Option 2 guidelines are clearly outweighed by the likelihood of a sentencing process that would be unduly complicated by the process of calculating "greatly discounted merchandise."

Request to testify at the March 23rd Hearing

According to the Federal Register Notice of February 11th, we understand that the Commission will hold a hearing on March 23rd to solicit public comment on the proposed amendments to the sentencing guidelines. We, the undersigned organizations, hereby notify the Commission of our intent to testify at this hearing.

Summary

We commend the Commission on the significant effort it has taken to address the concerns of the interested parties. In comparing the various options, we believe that all would be an improvement over existing law. Of these options, we believe Option 4 strikes the best balance between competing interests and best effects the purposes behind the legislative directives underlying these amendments.

Should the Commission have any questions or concerns about the statements made in this letter, we would be pleased to discuss them with the Commission at your convenience. We look forward to testifying at the upcoming hearing.

Thank you once again for the opportunity to voice our views on the proposals to amend the U.S. sentencing guidelines.

Very truly yours,

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March 10, 2000

The Honorable Diana E. Murphy
Chair, United States Sentencing Commission
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Washington, D.C. 20002-8002

Dear Judge Murphy:

I am writing on behalf of the Committee on Criminal Law of the Judicial Conference of the United States, in response to the issues and proposed amendments published for comment for the guideline amendment cycle for the year 2000. We know that there are numerous significant issues before the Commission this year, and we appreciate this opportunity to provide our input. We have reviewed the proposed amendments primarily with a view toward whether any of them present particular obstacles to judicial administration. We are submitting a few comments on the legislative codifications, but we have applied most of our efforts toward commenting on the five circuit conflicts on which the Commission has sought comment for this amendment cycle.

I. Temporary Telemarketing Amendments

The telemarketing amendments passed pursuant to the Commission's emergency authority merit the Commission's adoption as permanent amendments at this time. These amendments represent the codification of legislative directives and

provisions, as well as important enhancements for some of the kinds of white collar offenses which are likely to harm the greatest numbers of victims. There were no serious objections raised to their passage in 1998, nor are we aware of any problems having been raised in the interim. ***The Committee unanimously asks the Commission to enact these amendments as permanent amendments.***

II. Methamphetamine Amendments

The Committee unanimously favors Option 1 of the two options proposed for implementing these legislative penalty changes. Option 1 includes the current definitions for methamphetamine and alters the drug quantity table to make it consistent with the increased statutory penalties. The current definitions reflected in Option 1 should be retained as they give the Court a full range of options in the case where lab reports that contain purity of the methamphetamine are available. Option 2 also alters the drug tables and changes the definitions by removing methamphetamine actual and introducing a new term, "presumptive purity". This approach would place all methamphetamine other than pure methamphetamine at the same level of purity, and would reduce the quantity of substance by employing the presumptive purity. As a result, we believe Option 2 would result in increased confusion and litigation.

III. Identity Theft Amendments

These amendments involve numerous issues that could benefit from further analysis. However, in comparing the two options published for comment, ***all but one of the Committee members favor Option 1's proposed guideline***, as it appears to be more easily applied than that of Option 2.

IV. Resolution of Circuit Splits

Our Committee has repeatedly urged the Commission to resolve as many circuit conflicts as it can, in order to avoid unnecessary litigation, to avoid ambiguity, and to eliminate unwarranted disparity in application of the guidelines. It is particularly important for the Commission to act where the issue that is generating litigation, uncertainty and disparity in application involves the courts' attempts to discern the Commission's intent in using certain terminology or procedures involved in guideline computation. Accordingly, in Braxton v. United States, 500 U.S. 344 (1991), the Supreme Court indicated that it expects the Commission to resolve conflicts among the circuits on the application and interpretation of the guidelines.

The Committee has been pleased that the Commission has resolved several such conflicts each year, and we appreciate the Commission's intention to resolve five circuit conflicts this year, despite its heavy agenda. After this year, we hope the

Commission will make every effort possible to resolve even more conflicts than it has in the past. There are a great number of litigation-generating circuit conflicts in existence regarding guideline application - several dozen are indicated in Commission staff materials. Indeed, one of the major reasons the Committee has supported the Commission's efforts to reform the definition of "loss" is that many of the changes are partly designed to resolve the more than eleven analytically distinct circuit conflicts involved only with the "loss" concept. (See Bowman, "Coping with "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines," 51 *Vanderbilt Law Review* 461, 464, n.3 (1998)). The Committee intends to resume its customary submission to the Commission of the "top ten" circuit conflicts for resolution in future amendment cycles, in order to provide some assistance to the Commission in this endeavor.

On the five conflicts published for comment this amendment cycle, the Committee submits the following comments, based on a poll of its members, in order to provide as much guidance as possible to the Commission. We note that some of these are among the more difficult circuit conflicts, and thus among the more deserving of the Commission's attention. We hope that the Commission will resolve each and every one of them this year, whether it resolves them in the way we suggest or not, to save future district and circuit courts from continuing to wrestle with trying to determine the Commission's intended interpretation of its terms and procedures.

A. Aberrant behavior departures:

Whether, for purposes of downward departure from the guideline range, a "single act of aberrant behavior," U.S.S.G. Ch. 1, Pt. A, § 4(d), includes multiple acts occurring over a period of time?

The majority of the Committee believes that the majority view of the circuits is correct in requiring a spontaneous and thoughtless act. It is the Committee's position that for this departure to apply, there must be some element of abnormal or exceptional behavior; "[a] single act of aberrant behavior ... generally contemplates a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning because an act which occurs suddenly and is not the result of a continued reflective process is one for which the defendant may be arguably less accountable." United States v. Carey, 895 F.2d 318, 326 & n.4 (7th Cir. 1990). Six other circuits (the Third, Fourth, Fifth, Eighth, Eleventh, and D.C.) have joined in the Seventh Circuit's test. The Fourth Circuit confines the term "single act" to its literal meaning, rather than interpreting the phrase to encompass "a series of actions calculated to further criminal misconduct." United States v. Glick, 946 F.2d 335, 338.

The majority of the Committee believes that the totality of the circumstances approach is too vague, and so broad that it potentially allows

departures in far too many cases. (See United States v. Withrow, 85 F.3d 527, 531 (11th Cir. 1996), observing that "there exists a wide spectrum of factual circumstances under which each court has found aberrant conduct warranting departure to exist.") In fact, in some cases the district court appears to have been motivated by sympathy for the defendant, while couching the justification for the departure in terms of aberration. See United States v. Takai, 941 F.2d 738 (9th Cir. 1991); United States v. Pena, 930 F.2d 1486 (10th Cir. 1991).

Of equal importance is the fact that too broad a standard will fail to give courts protection to *not* depart in cases which would semantically fit the standard but not be meritorious of a departure. Many refusals to depart are reversed in the case law, where the appellate court believes the court may not have applied the right standard. If the standard is vague and overly broad, it would be very difficult to defend a court's decision *not* to depart using that standard. For example, if totality of the circumstances is used, the defendant might win a reversal by simply showing that the crime was unusual for the defendant in the context of his or her otherwise law-abiding life - which describes many if not most white collar offenders.

The Committee proposes the following language to describe the new Chapter 5 departure:

> *If the conduct comprising the offense of conviction, including its relevant conduct, represents a single act of aberrant behavior by the defendant, the court may decrease the sentence below the applicable guideline range. In addition, because the Sentencing Commission designed the guidelines to produce an appropriate sentence for a first offender, aberrant behavior means something more than merely a first offense. Aberrant behavior is a spontaneous and seemingly thoughtless act rather than one which was the result of planning or deliberation. This is so because an act that occurs suddenly and is not the result of a continuous reflective process is one for which the defendant arguably may be held less accountable.*[1]

In addition, the Committee makes the following recommendations:

1. ***The Committee unanimously recommends*** that the Commission eliminate the suggested departure language from Chapter One of the Guidelines Manual and move it to Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

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[1]Excerpt of March 9, 1998, comments submitted by the Committee on Criminal Law to the Sentencing Commission.

2. ***The Committee unanimously urges*** the Commission to include in whatever description of this departure it decides upon, the statement that the Commission expects such departures to be rare, and to be used only in extraordinary cases.

3. In response to the Commission's request for comment on an alternative, "factors," approach, ***the Committee unanimously submits the following suggestions:***

a) A "factor" approach, such as that in Zecevic v. United States Parole Commission, 163 F.3d 731 (2d Cir. 1998), is substantially the "totality of the circumstances" approach, which the majority of the Committee finds much too broad;

b) Any factors listed should make it clear that substantially more than first offender status is needed (merely saying first offender is not enough would allow (or even mandate) departures whenever any other factor is added, such as a good employment history, to first offender status);

c) Accordingly, characteristics common among first offenders are not likely to be appropriate factors (including, for example, expressions of shock on the part of friends and relatives);

d) Consistent with the meaning of "a single act of aberrant behavior," the factors should require the presence of circumstances so unusual as to lead an otherwise law-abiding citizen to commit an offense;

e) While the Committee recommends the Commission resolve the conflict by adopting the narrower, "spontaneity" test with language similar to that proposed above, if the Commission were determined to define the departure by using a list of factors, it should take care that the factors keep the definition narrow, focusing on the special circumstances surrounding the offense, such as lack of planning or reflection, spontaneity, lack of numerous acts, short period of time over which the offense is committed, heat of passion or extreme pressure, and the defendant's efforts to mitigate the crime.

f) The Committee suggests that whether the defendant derived any pecuniary gain from the offense is not a good "factor" for determining aberration. For example, all courts agree that Russell, infra, is an appropriate case for the departure, but Russell was motivated by pecuniary gain.

4. In addition to defining the departure as recommended, and moving it to

Chapter Five, ***the Committee unanimously recommends*** that the Commission carefully choose an example to add to the commentary, in order to provide further guidance and clarification of the departure standard. For example, courts on both sides of the circuit split cite United States v. Russell, 870 F.2d 18 (1st Cir. 1989),[2] as an illustration of aberrant behavior.

5. The Commission has asked for comment on whether this departure, however defined, should be precluded for certain offenses, such as crimes of violence. ***The Committee unanimously suggests*** that there is no inconsistency in a defendant engaging in aberrant conduct that involves violence. However, as a matter of policy, the Commission may want to exclude conduct that involves violence from qualifying for this downward departure.

B. Drug sales in protected locations:

Whether the enhanced penalties in § 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals) apply only when the defendant is convicted of an offense referenced to that guideline, or, alternatively, whenever the defendant's relevant conduct included drug sales in a protected location or to a protected individual?

Given the structure of the guidelines, as detailed in §§ 1B1.1 and 1B1.2, the Committee unanimously believes that the position adopted by the Fourth, Fifth, and Eleventh Circuits on this issue is the legally correct one under the guidelines as currently written. However, ***the Committee recommends a change in order to reflect the minority view's result.***

The guidelines as currently written do not allow for § 2D1.2 enhancements unless the defendant is convicted of an offense referenced to that guideline. See, e.g., United States v. Saavedra, 148 F.3d 1311, 1313-16 (11th Cir. 1998) (explaining sentencing methodology under the guidelines).

Under the methodology provided by the guidelines, a court begins by determining which guideline section covers the offense of conviction. Appendix A contains a statutory index that "specifies the guideline section or sections ordinarily applicable to the statute of conviction." U.S.S.G. App. A, Introduction. Drug offenses

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[2]Russell was a driver of a Wells Fargo armored truck with no previous criminal history. The bank mistakenly gave Russell's partner an extra money bag containing $80,000. The men decided to keep the money, but then a week later, they admitted what they had done, and Russell returned all the money that he had kept and cooperated fully with the investigation.

involving protected locations or protected individuals are codified in 21 U.S.C. §§ 859, 860, 861, and Appendix A correlates these statutes to § 2D1.2. Distribution and possession with intent to distribute is codified in 21 U.S.C. § 841, which Appendix A correlates to § 2D1.1. Conspiracy correlates to both § 2D1.1 and § 2D1.2, reflecting the fact that conspiracy may involve several substantive offenses. The cases involved in this circuit split involve defendants who were convicted of distribution, possession with intent to distribute, and/or conspiracy to distribute or possess, but not of one of the offenses involving protected locations or individuals.

The Introduction to Appendix A allows for the possibility that the guideline section may be inappropriate "in an atypical case." According to the Introduction, an atypical case is one in which the particular conduct involved makes the indicated section inappropriate. There is nothing inappropriate, however, about choosing § 2D1.1 as the guideline section for a drug offense. Thus, when a defendant has been convicted of a § 841 offense and/or conspiracy to possess, but has not been convicted of an offense involving a protected location or individual, the court should select § 2D1.1 as the guideline section, under the current guideline methodology.

Once a court has determined the appropriate guideline section, it then selects the proper base offense level from among those contained in that guideline. "There is no provision in the guidelines for borrowing base offense levels from other offense guidelines." Saavedra, 148 F.3d at 1316. If a defendant is not prosecuted under one of the statutes involving protected locations or individuals, therefore, there is no provision for an enhancement based on those factors, as those factors appear only in § 2D1.2. The fact that a defendant sold drugs to a protected individual, for example, would certainly be considered relevant conduct; however, the problem is that § 2D1.1 does not contain this factor as a specific offense characteristic. To try to get around this problem, the Sixth and Eighth Circuits have used the concept of relevant conduct to justify applying the § 2D1.2 enhancements to convictions under § 841 (which correspond to § 2D1.1).

Although the Committee believes the result reached by the Sixth and Eighth Circuits is based on an incorrect application of the guidelines, it also believes that the result is a desirable one. Thus, the Committee recommends that the guidelines be amended in a way that will allow the correct result to be reached by proper application of the guidelines. Specifically, the Committee recommends, as suggested in the Commission's Revised Proposed Issue for Comment: Circuit Conflicts (pp. 3-4), that "the Commission ... delete § 2D1.2 and add an enhancement to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) ... for the real offense conduct of making drug sales in protected locations or involving protected individuals." It also suggests that the language in the Introduction to Appendix A be strengthened to closely track the language of § 1B1.2.

Also, the Committee recommends that the commentary contain an encouraged downward departure for those situations where the enhancement literally applies, but there was no harm of the kind which the enhancement is intended to address - such as, for example, where the sale of drugs took place between adults in a bar that by happenstance was located within 1,000 feet of a school, closed for the summer vacation - and thus there was no likelihood of exposing protected individuals.

C. Bankruptcy frauds:

Whether the fraud guideline enhancement for "violation of any judicial or administrative order, injunction, decree, or process," § 2F1.1(b)(4)(B),[3] applies to falsely completing bankruptcy schedules and forms?

A majority of courts of appeals have upheld the enhancement, holding that concealing assets in a bankruptcy case either violates a judicial order or violates judicial process. A minority of circuits has held that the enhancement does not apply to bankruptcy fraud cases, as neither an order nor process has been violated in the sense intended by the Guidelines.

The Committee unanimously agrees with the minority of circuits that, as a textual matter, the guidelines do not support the application of the § 2F1.1(b)(4)(B) enhancement to bankruptcy fraud. In particular, the commentary to § 2F1.1 strongly suggests that the Commission had in mind that the enhancement apply when the defendant has violated an order directed at him personally.

The strongest arguments advanced by those courts in favor of applying the enhancement to bankruptcy fraud are policy arguments, not textual arguments. However, these arguments are persuasive and the Committee is sympathetic to the argument that bankruptcy fraud is more severe than "the most pedestrian federal fraud offense" and should be sentenced more severely. United States v. Saacks, 131 F.3d 540, 543 (5th Cir. 1997).

Therefore, the Committee recommends that the Commission amend the guidelines to explicitly allow for enhanced penalties for bankruptcy fraud. Specifically, § 2F1.1(b)(4) could be amended by adding the following text after *"(B) violation ... not addressed elsewhere in the guidelines":*

or (C) filing of fraudulent schedules, forms, or accounts with bankruptcy and probate courts."

Additionally, application note 1 would need to be modified ("both" changed to

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[3]Section 2F1.1(b)(4)(B) was formerly § 2F1.1(b)(3)(B).

"all"), and an explanatory comment could be added to the fourth paragraph of the background section.

D. § 5K2.0 -- Post-sentencing rehabilitation departure:

Whether sentencing courts may consider post-sentencing rehabilitation, while in prison or on probation, as a basis for downward departure at resentencing following an appeal?

"Post-offense" rehabilitation refers to rehabilitation efforts in which the defendant engages after his arrest but prior to sentencing. "Post-sentencing" rehabilitation refers to rehabilitation efforts made between the time of the defendant's original sentencing and resentencing. There is no circuit split regarding whether post-offense rehabilitation can be the basis for a departure; all courts that have addressed the issue in light of Koon allow such a departure - but only if the rehabilitation efforts are exceptional. See, e.g., United States v. Brock, 108 F.3d 31, 35 (4th Cir. 1997). The Committee believes this is a correct result and any amendment to the guidelines should affirm it.

There is, however, a circuit split on the issue of whether a downward departure is available for post-sentencing rehabilitation. The majority view is that the guidelines, as currently written, allow for a departure at resentencing based on rehabilitation efforts that occurred after the original sentencing. Those courts that have allowed the downward departure at resentencing (in published opinions) have all required that the rehabilitation factor be present to such an extent as to take the case out of the heartland, reasoning by analogy to the post-offense situation. See, e.g., United States v. Rhodes, 145 F.3d 1375, 1378-82 (D.C. Cir. 1998).

The minority view, represented by the Eighth Circuit, holds that post-sentencing rehabilitation may not justify a departure at resentencing, and that Koon is not controlling, since the Supreme Court did not consider resentencing in Koon. See United States v. Sims, 174 F.3d 911, 912 (8th Cir. 1999); see also Rhodes, 145 F.3d at 1384 (Silberman, J., dissenting). Moreover, the Eighth Circuit concluded that a rule allowing for a departure at resentencing based on post-sentencing rehabilitation would result in unwarranted disparity, because resentencing would be a fortuitous event benefitting only some defendants; would reinstate a parole system; and would interfere with the Bureau of Prisons' authority to award good-time credits. See Sims, 174 F.3d at 912-13; Rhodes, 145 F.3d at 1384 (Silberman, J., dissenting). But see Rhodes, 145 F.3d at 1379-80 (responding to these concerns).

The Committee unanimously endorses the position of the Eighth Circuit as the correct one, and recommends that the guidelines be amended to prohibit a downward departure for post-sentencing rehabilitation, for several reasons. First, allowing a departure on the basis of post-sentencing rehabilitation would inject a large

degree of inequity into the system. Due to an error committed by the government or the court that resulted in a remand for resentencing, some defendants would benefit from their efforts at rehabilitation while others, whose efforts may have been more substantial, could not benefit simply because they chose not to appeal or appealed and had their sentences affirmed. See Rhodes, 145 F.3d at 1384 (Silberman, J., dissenting) ("Only those prisoners who are lucky enough to have a sentencing judge who commits legal error can benefit from their postconviction conduct.").

Second, Congress has set out by statute the maximum reduction to which a defendant is entitled each year for his good conduct. See 18 U.S.C. § 3624(b). In light of such clear congressional intent, any additional reduction by way of downward departures at resentencing would be inappropriate.

Finally, prohibiting downward departure for post-sentence rehabilitation is consistent with the principles of the Sentencing Commission's policy statement 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) and the position the Committee on Criminal Law has previously taken, with regard to the sentence modification procedures under that policy statement. In 1994, at the strong urging of the Committee, the Commission amended and simplified that policy statement to provide that, when an eligible defendant is considered for a possible reduction in prison term as a result of a defendant-beneficial guideline amendment that the Commission has indicated is retroactive under that policy statement, only the beneficial amendment is to be retroactively applied. *All other guideline application decisions remain the same as when the defendant was initially sentenced.* See U.S.S.G. § 1B1.10; id. comment. (n.2); id. comment. (backg'd) (fourth unnumbered paragraph). Thus, in a proceeding under 18 U.S.C. § 3582(c)(2), it would be contrary to this amended policy statement for the court to consider rehabilitative steps by the defendant taken after the initial sentencing, but not also consider other aspects of the original guideline computation that may have changed. Moreover, allowing such a consideration would be contrary to the law of limited resentencings in some circuits.

Accordingly, ***the Committee unanimously recommends*** the addition of language in Chapter 5, Part K, Subpart 2 (Other Grounds for Departure), stating that *post-offense* rehabilitation may be the basis for a downward departure, if the efforts at rehabilitation are exceptional, but that *post-sentencing* rehabilitation may not form the basis for a downward departure, no matter how exceptional.

E. Dismissed/uncharged conduct pursuant to a plea agreement:

Whether a court can base an upward departure on conduct that was dismissed or uncharged as part of a plea agreement in the case?

The majority of circuits that have addressed the issue has held that, under the

guidelines as currently written, the sentencing court may base an upward departure on conduct underlying counts that were dismissed or uncharged pursuant to a plea agreement. See, e.g., United States v. Barber, 119 F.2d 276, 283-84 (4th Cir. 1997) (en banc); United States v. Baird, 109 F.3d 856, 862-70 (3d Cir. 1997).

The Committee unanimously believes that the majority position is the correct result, and the guidelines should be amended to affirm it. See Baird, 109 F.3d at 869-70 (discussing policy justifications for allowing upward departures based on dismissed or uncharged conduct). The Committee recommends the addition of language to the commentary for § 5K2.0 indicating that the court may consider any conduct as a basis for departure, without regard to whether or not it is charged or dismissed, or the subject of plea negotiations, so long as the conduct otherwise is appropriate for departure, such as the following:

> *"The court may consider as a basis for an upward departure, any additional conduct, supported by a preponderance standard, whether uncharged, dismissed in plea negotiations, or acquitted, which was not otherwise considered in determining the total offense level for the offense of conviction."*

The suggested language includes acquitted as well as dismissed or uncharged conduct, thereby making the provision inclusive and complete, and providing the maximum amount of guidance to the courts.

The following Guideline Manual excerpts are offered, in support of the above suggested language:

a) The background commentary under U.S.S.G. §1B1.4 states that, "a court is not precluded from considering information that the guidelines do not take into account....In addition, information that does not enter into the determination of the applicable guideline sentencing range may be considered in determining whether and to what extent to depart from the guidelines."

b) The commentary under U.S.S.G. §6A1.3 sets forth the following: "any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy."

c) The closing commentary for U.S.S.G. §6A1.3 states, "The Commission believes that the use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." and

d) U.S.S.G. §6B1.2 states, "Provided, that a plea agreement that includes the

dismissal of a charge or a plea agreement not to pursue a potential charge shall not preclude the conduct underlying such charge from being considered under the provisions of §1B1.3 in connection with the count(s) of which the defendant is convicted."

Resolving the circuit conflict in this manner extends these principles to the consideration of departures.

The Commission has sought comment as well on whether the same criteria should be used for departures as is used for relevant conduct. ***The Committee opposes the use of the same criteria for both***, based on cases the members have experienced in which departures were warranted for conduct that would not be part of the relevant conduct of the offense, according to the rules set out at U.S.S.G. §1B1.3. For example, in the case of a defendant who is convicted of travel with intent to engage in a sexual act with a minor in violation of 18 U.S.C. § 2423(b), the applicable guideline would probably be § 2A3.2. This guideline establishes a base offense level of 15. The guideline does not include a specific offense characteristic for prior sexual abuse or exploitation of a minor by the defendant.

Thus, in a case in which the defendant had previously engaged in such conduct with a child that did not result in a criminal prosecution because the parents of the child refused to report it, or asked that the defendant not be prosecuted to avoid embarrassment to the child, the conduct would neither be relevant conduct nor reflected in the defendant's criminal history category. It would, however, provide a possible basis for departure under § 4A1.3(e) as "prior similar adult criminal conduct not resulting in a criminal conviction."

In addition, the Committee believes that any rule equating the consideration of conduct for departures and for relevant conduct would be inconsistent with long established sentencing law, as well as guideline (§1B1.4) and statutory (18 U.S.C. § 3661) provisions. Section 3661 is codified at U.S.S.G. §1B1.4, which states the longstanding jurisprudential principle that, "In determining the sentence to impose within the guideline range, or *whether a departure from the guidelines is warranted,* the court may consider, *without limitation*, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661." (emphasis added).

V. Conclusion

The Committee appreciates the opportunity to respond, on behalf of the federal judiciary, on these matters. We support the Commission in its efforts to implement the numerous legislative provisions pending, and to resolve these five circuit conflicts this

amendment cycle. We would be happy to respond to any specific questions on which the Commission might decide our input would be helpful on these or any other matters before the Commission.

Sincerely,

William W. Wilkins, Jr.
Chair, Committee on Criminal Law

cc: Members, United States Sentencing Commission
Members, Committee on Criminal Law

U.S. Department of Justice

Criminal Division

Assistant Attorney General

Washington, DC 20530-0001

MAR 10 2000

Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Murphy:

The Department of Justice submits the following comments regarding the proposed amendments to the federal sentencing guidelines published for comment in the Federal Register in December, 1999, and in January and February, 2000. These comments concern: Amendment 4, offenses relating to methamphetamine; Amendment 6, implementation of the Wireless Telephone Protection Act; Amendment 7, offenses relating to firearms; Amendment 8, circuit conflicts other than the one addressing aberrant behavior; and Amendment 9, the technical amendment package. We submitted written comments on the proposed amendments affecting trademark and copyright infringement, published in response to the No Electronic Theft Act, in January. We plan to address this issue and other amendment topics that are not discussed in the present letter at the public hearing to be held on March 23.

AMENDMENT 4 - OFFENSES RELATING TO METHAMPHETAMINE

The Commission has proposed two options for sentencing methamphetamine offenses. The first would reduce the quantities of methamphetamine-actual to half of what they are currently in guideline § 2D1.1. As a result, the new quantities for methamphetamine-actual would be consistent with the statutory quantities at offense levels pegged to the mandatory minimum prison terms. For example, 50 grams of methamphetamine-actual would result in an offense level of 32 (121-151 months of imprisonment for a first offender), just as 50 grams would trigger a mandatory minimum term of imprisonment of 10 years, 21 U.S.C. § 841(b)(1)(A)(viii). The second option would eliminate the distinction between methamphetamine-actual and methamphetamine-mixture and provide sentences for methamphetamine

offenses on the basis of the weight of pure methamphetamine, including the amount of pure methamphetamine within a mixture. This option would also create a presumptive purity level where purity is not known.

We favor Option 1 since it is consistent with the statutory scheme.[1] It establishes a 10-to-1 quantity ratio of methamphetamine in mixture versus actual form. Under the current guideline scheme the applicable mandatory minimum sentence trumps the guideline sentence for certain offenders with mandatory minimum quantities of methamphetamine-actual and causes dissimilar offenders to be sentenced similarly.

Option 2 is problematic in several respects. It would result in trumping of the guideline sentence by the mandatory minimum penalty, but in low-purity cases. More importantly, it is at odds with the statute's dual sentencing structure for methamphetamine offenses. A great many cases are now sentenced on the basis of methamphetamine-mixture, and the effect of eliminating this sentencing approach in the guidelines is unknown. Such cases involving less than 10 percent purity could result in reduced sentences under Option 2. Cases involving unknown purity would also be a problem. Because of practical difficulties, including the use of State laboratories which do not perform purity analyses in some cases and the existence of delays in obtaining analyses in others, offenses involving unknown purity will continue to be present in the federal system. Under Option 2 a presumed purity level would then apply. This application could result in increased sentences, depending upon the level of purity presumed. Moreover, the amendment would generate a great deal of litigation surrounding this presumption, including challenges to the Commission's authority to provide a presumption on purity at all and attempts to overcome the presumed purity level itself in specific cases.

The Commission has also asked whether it should increase the penalties for chemicals used to manufacture methamphetamine by changing the drug equivalency for phenylacetone /P_2P in the drug trafficking guideline, § 2D1.1, and the chemical quantity table, § 2D1.11. Increased guideline penalties for offenses involving

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[1] We recognize Option 1 would treat "ice" in the same manner as methamphetamine-actual, as the current guideline does, even though "ice" may be just 80 percent pure, see § 2D1.1, and Notes to Drug Quantity Table, Note (C). However, "ice" was the subject of an earlier statutory directive requiring enhanced penalties. Pub. L. No. 101-647, § 2701.

methamphetamine-related chemicals are needed, and we would be pleased to work with the Commission to try to develop appropriate levels of increase.

AMENDMENT 6 - IMPLEMENTATION OF THE WIRELESS TELEPHONE PROTECTION ACT

Amendment 6 provides two options for amending the fraud guideline, § 2F1.1, to address the Wireless Telephone Protection Act, Pub. L. No. 105-172, and offenses related to cellular cloning. The Act eliminated the element of intent to defraud in connection with using, producing, possessing, or trafficking in telephone cloning equipment. In addition, it directed the Sentencing Commission to "review and amend the Federal sentencing guidelines and the policy statements of the Commission, if appropriate, to provide an appropriate penalty for offenses involving the cloning of wireless telephones ...." Pub. L. No. 105-172, § 2(e). The Act also set forth particular criteria for the Commission's consideration, including consideration of the extent to which the value of loss caused by the offenses is an adequate measure for establishing penalties under the guidelines.

Amendment of the guidelines is necessary because the currently applicable guideline, § 2F1.1, does not adequately recognize harms associated with many cloning-related offenses. The current guideline is driven to a great extent by loss, which is often difficult to assess in this context.

There are at least three categories of harms not adequately addressed by the guidelines. First, offenses involving the use, production, trafficking, or possession of equipment used to make cloned phones are under-sentenced because there may not be any provable loss associated with these offenses, but the potential loss linked to such equipment and the cloned phones it can produce may be great. Second, offenses that involve the distribution of cloned phones are similarly under-sentenced because there may not be any loss (in terms of unauthorized cellular phone use) associated with the distribution of the phones alone, as distinct from their use. Finally, the use of a cloned phone to facilitate another offense, such as drug trafficking, should be recognized when a defendant is sentenced for the cloning-related conduct. Thus, it is important for the guidelines to address cloning equipment, the distribution of cloned phones, and the use of cloned phones to facilitate other offenses.

At the outset we point out that we prefer Option 2, which is broader in scope than Option 1 and deals with "device-making equipment." That is, our concerns discussed above extend to access devices and device-making equipment, as well as to cloned phones and cloning equipment. While both options published for comment partially address our first two concerns, neither addresses the full range of equipment offenses to which it should apply. Each includes only the use or possession of the equipment in question. By contrast, the statutory provision relevant to cloning equipment covers use, production, trafficking, having custody or control, and possession of such equipment, 18 U.S.C. § 1029(a)(9); the statutory provision relating to device-making equipment covers all but the first of these forms of conduct, 18 U.S.C. § 1029(a)(4). Since an offense may involve production that is interrupted before any equipment is actually possessed or may involve trafficking over the internet where the offender is purely an intermediary who does not use or possess the equipment, we recommend that the full range of offenses be added, including production and trafficking.

As to our second concern, while both options address the harm caused by the distribution of cloned phones, these options provide only a flat increase, such as two levels, that would treat all distribution offenses alike. An offender who distributed 250 cloned phones would receive the same sentence as one who distributed only five, despite the fact that the first would have caused a much greater level of potential loss. The Commission has asked whether a minimum dollar amount should apply in this context. We believe it should and recommend that a minimum dollar amount that reflects the average loss associated with a cloned phone be assigned to each phone involved in an offense and to each electronic serial number/mobile identification number pair. If the Commission adopts the broader formulation in Option 2, a variety of access devices and counterfeit access devices should carry a minimum dollar amount, but not necessarily the same amount for all devices since average loss may vary depending upon the device.

The third concern we mentioned above is that in the case of a defendant convicted of a cloning or access device offense, the guidelines should provide an enhancement for the use of a cloned phone or access device to facilitate another offense. A person who uses a cloned phone or counterfeit access device to facilitate drug trafficking commits a more serious violation than one who uses a cloned phone simply to obtain free cellular service, other things being equal. We believe such an enhancement would be most appropriate in the fraud guideline.

AMENDMENT 7 - OFFENSES RELATING TO FIREARMS

The Commission has proposed several amendments regarding firearms offenses in order to address amendments to the firearms use statute, 18 U.S.C. § 924(c). Among other things, the statutory amendments transformed mandatory fixed sentences into mandatory minimum sentences carrying a maximum of life imprisonment. Pub. L. No. 105-386. Part A of the firearms guideline amendments redefines the term "brandished" in the application instructions of the guidelines, § 1B1.1, Application Note 1(c), generally to conform with the statutory definition. Part B amends guideline § 2K2.4 to provide that the guideline sentence is the minimum term required by statute and to encourage upward departure for various factors. Part C provides an instruction not to apply a weapon enhancement to an underlying offense, including any relevant conduct for which the defendant is accountable. Part D excludes violations of 18 U.S.C. § 924(c) from the career offender guideline for purposes of the instant offense of conviction. Part E contains technical amendments.

Our concerns are with Part D, which addresses the career offender issue. Under §§ 4B1.1 and 4B1.2 a defendant is a career offender if he was at least 18 years old at the time of the instant offense of conviction, such offense was a crime of violence or controlled substance trafficking offense, and the defendant has at least two prior felony convictions for such offenses. By statute, the Commission is required to assure that the guidelines specify a sentence at or near the maximum term authorized for such offenders. 28 U.S.C. § 994(h). Part D would amend the career offender definition, § 4B1.2, to exclude a violation of section 924(c) as an instant offense for purposes of the career offender guideline. Specifically, the amendment provides that if the instant offense of conviction is a conviction under section 924(c) or if it includes convictions of both an underlying offense and section 924(c), the career offender guideline would not apply to the count under section 924(c). Convictions under section 924(c), however, would count as prior offenses for career offender purposes.

We object to the proposed exclusion of section 924(c) violations from the career offender guideline. First, we see no principle by which the offense can be excluded for purposes of the instant offense of conviction if it is included as a prior offense. The statutory directive speaks in terms of a "crime of violence" for both the instant offense and prior offenses and makes no distinction in the treatment of these two categories. Violations of section 924(c) have been included as instant offenses for career offender purposes in the past. See § 4B1.2,

Application Note 1. The amendment of section 924(c) does nothing to reduce the likelihood that a violation of this provision constitutes a crime of violence for purposes of the statutory directive pertaining to career offenders.

The driving force behind the proposed exclusion of a violation of this provision as an instant offense under the career offender guideline may be the fact that section 924(c) was amended to create a statutory maximum term of life imprisonment, instead of the fixed mandatory terms that existed in the past. However, the fact that this provision creates a significant sentencing enhancement under the career offender guideline is not a basis to exclude it as an instant offense. In United States v. LaBonte, 520 U.S. 751 (1997), the Supreme Court struck down the Commission's decision not to use an enhanced statutory maximum penalty for repeat drug offenders sentenced under the career offender guideline as inconsistent with the statutory directive on the subject. Likewise, excluding a section 924(c) offense as an instant offense from the career offender guideline, while including it as a prior offense, has the same effect as simply choosing to ignore the maximum penalty available and is inconsistent with the statutory directive.

Nor do we think the Commission could solve this problem by excluding section 924(c) offenses entirely from the career offender guideline, both as prior and instant offenses, given the statutory directive. Section 924(c) prohibits a crime of violence to which the statutory directive on career offenders necessarily applies. To convict a defendant of an offense under this provision, the government must show that during and in relation to a crime of violence or drug trafficking crime that may be prosecuted in federal court, a person used or carried a firearm, or possessed a firearm in furtherance of such a crime. The term "crime of violence," while not defined in the career offender statute, is defined in section 924(c) to mean a felony offense that:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

A similar definition of "crime of violence" applies generally to title 18, United States Code, 18 U.S.C. § 16. Using or carrying

a firearm to commit a crime of violence as defined or a drug trafficking crime, or possessing it in furtherance of such a crime, would certainly meet the second prong of the above definition because of the substantial risk the presence of a firearm creates. Moreover, a violation of section 924(c) establishes the commission of an underlying offense that is a drug-trafficking crime or crime of violence, which also generally qualifies as a predicate for career offender purposes.

It is noteworthy that the statute requiring mandatory life imprisonment for a "three-strikes" convicted felon specifies that firearms possession in violation of section 924(c) and "firearms use" qualify as a "serious violent felony." 18 U.S.C. § 3559(c)(2)(F). It would be anomalous for this conduct to count as a serious violent felony for purposes of a statute mandating life imprisonment for repeat offenders but for it not to count as a predicate offense for purposes of the guidelines provision on career offenders.

Treating a violation of section 924(c) as a career offender predicate (both as a prior and current offense) also makes sense when viewed in light of the statutory changes to this section. When Congress amended the statute, it substantially increased the maximum penalty available for this offense to life imprisonment. Thus, Congress signaled that a life sentence was appropriate for some violators of section 924(c). A career offender is just such a violator because he or she has shown a propensity for committing violent or drug trafficking offenses twice in the past and a willingness to engage in this type of criminal activity again-this time with the aid of a firearm. Of course, a career offender does not have to receive a life sentence, given the applicable range of 30 years to life and the possibility of a reduction of three levels for acceptance of responsibility. Moreover, there is also a possibility of downward departure for appropriate cases. Thus, we believe that treating a section 924(c) offense as a predicate for the career offender guideline strikes the right balance from the standpoint of punishment, deterrence, and protection of the public on the one hand and fairness on the other.

The Commission has asked how to craft an amendment that would count a violation of section 924(c) as an instant offense under the career offender guideline. The starting point is that the Commission must follow all the relevant statutory directives and sentencing requirements of applicable statutes. Section 924(c) requires that, notwithstanding any other provision of law, "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of

imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." 18 U.S.C. § 924(c)(1)(D)(ii). The career offender statute requires that the guidelines specify a sentence "at or near the maximum term authorized" for qualifying defendants. In LaBonte the Supreme Court construed the phrase "maximum term authorized" as "requiring the 'highest' or 'greatest' sentence allowed by statute." 520 U.S. at 758. The Court also stated that the phrase "refers to applicable statutes that would affect the district court's calculation of the prison term." Id., fn. 4.

We believe the above requirements are satisfied as long as a career offender convicted of a section 924(c) offense has his or her sentence determined on the basis of the statutory maximum for section 924(c), which is life imprisonment, and as long as the sentence for the section 924(c) offense runs consecutively to the sentence for any other count. We find nothing in section 924(c) that requires the term of imprisonment determined under the career offender statute to apply entirely to the count of conviction under section 924(c). Thus, the Commission would be free to assign part of the career offender sentence to the underlying offense of conviction and part to section 924(c), but the underlying offense should carry the guideline sentence that would apply in the absence of a career offender sentence and both parts of the sentence should meet applicable mandatory minimum requirements.

AMENDMENT 8 - CIRCUIT CONFLICTS

(B) Drug Offenses Occurring Near Protected Locations-Appendix A

Part B concerns a circuit split regarding whether enhanced penalties under guideline § 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals) apply only when a defendant is convicted of an offense referenced to this guideline or whether these enhanced penalties apply on the basis of the defendant's relevant conduct. We recommend that the Commission amend the statutory index, Appendix A, to clearly establish that the Appendix controls the selection of the applicable guideline for the offense of conviction and that the sentencing court is not free to choose a guideline other than one listed. In so doing, the Commission would clarify that the enhanced penalties in guideline § 2D1.2 for drug offenses near protected locations or involving underage or pregnant individuals apply only when the defendant is

convicted of an offense referenced to that guideline. Such an amendment of the statutory index would also have the effect of preventing the courts in other contexts from choosing a guideline not listed for the offense of conviction because the court believes that the case is atypical or outside the heartland. See United States v. Smith, 186 F.3d 290 (3d Cir. 1999). Any such allegations should be raised in a motion to depart from the guideline range determined using the referenced offense guideline, not in the initial selection of the guideline. Clarifying the operation of the statutory index in this manner will assure that the current sentencing system remains one built on both the offense of conviction and real-offense sentencing concepts.

We recommend that the first paragraph of the Introduction to Appendix A be amended as follows:

> This index specifies the guideline section or sections ~~ordinarily~~most applicable to the statute of conviction. If only one guideline section is referenced for the particular statute, use that guideline. If more than one guideline section is referenced for the particular statute, use the ~~guideline most appropriate for the nature of the offense conduct charged in the count of which the defendant was convicted. If, in an atypical case, the guideline section indicated for the statute of conviction is inappropriate because of the particular conduct involved, use the guideline section~~referenced guideline section most applicable to the nature of the offense conduct charged in the count of which the defendant was convicted. *Provided*, however, in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense. (See §1B1.2(a).)

This amendment makes clear that courts must apply the offense guideline referenced for the statute of conviction listed in the Statutory Index (or, if more than one offense guideline is referenced, the most applicable of the referenced offense guidelines) unless the case falls within the limited "stipulation" exception set forth in § 1B1.2(a). The Commission may also want to make conforming amendments to the commentary to guideline § 1B1.2, and we would recommend amending the first

paragraph of Application Note 1 following that section in accordance with the following:

> 1. This section provides the basic rules for determining the guidelines applicable to the offense conduct under Chapter Two (Offense Conduct). As a general rule, the court ~~is to~~must use the guideline section from Chapter Two most applicable to the offense of conviction~~. T~~, as set forth in the Statutory Index (Appendix A). The Statutory Index provides a listing ~~to assist in this determination~~for each of the indexed statutes of the guideline section(s) most applicable to that offense of conviction. When a particular statute proscribes only a single type of criminal conduct, ~~the offense of conviction and the conduct proscribed by the statute will coincide, and~~ there will be only one offense guideline referenced, and the court must apply that guideline section. When a particular statute proscribes a variety of conduct that might constitute the subject of different offense guidelines, there will be more than one offense guideline listed, and the court ~~will~~must determine which of the listed guideline section~~s~~ applies based upon the nature of the offense conduct charged in the count of which the defendant was convicted.

(C) Bankruptcy Fraud

Part (C) concerns the fraud guideline enhancement for "violation of any judicial or administrative order, injunction, decree or process" and seeks comment on whether the enhancement should apply in bankruptcy fraud cases. We support a two-level sentencing enhancement in § 2F1.1 of the guidelines for fraudulent conduct that involves falsely completing bankruptcy schedules or forms or otherwise misusing bankruptcy or other judicial proceedings. In a host of different contexts, federal sentencing policy recognizes the additional harm and seriousness of otherwise criminal conduct that misuses or disrupts government functions generally and judicial processes specifically. Whether relating to obstruction of justice directly (see, § 3C1.1, which provides a two-level enhancement for obstructing justice during the investigation, prosecution, or sentencing of an offense), or indirectly in contexts such as stalking (see, § 2A6.2, which provides a two-level enhancement for violating a court order in the course of a stalking offense) or theft (see, § 2B1.3, which provides a minimum offense level for mail theft, because "[t]heft of undelivered mail interferes with a governmental function"), the sentencing guidelines provide appropriate sentencing