enhancements for offenses that may often involve the disruption of government functions.[2]

The intent of the existing enhancements, as well as the generally applicable departure provision in § 5K2.7 for disruption of a governmental function, is to recognize the need to protect the integrity of executive and judicial branch institutions, programs, and processes. We believe this is as important for the bankruptcy court function as it is for the delivery of the mail or other court or government functions. As the Tenth Circuit stated in United States v. Messner, 107 F.3d 1448, 1457 (10th Cir. 1997), "[b]ankruptcy fraud undermines the whole concept of allowing a debtor to obtain protection from creditors, pay debts in accord with the debtor's ability, and thereby obtain a fresh start. When a debtor frustrates those objectives by concealing the very property which is to be utilized to achieve that purpose, the debtor works a fraud on the entirety of the proceedings."

(D) Post-Conviction Rehabilitation

Part (D) concerns post-conviction rehabilitation and seeks comment on whether it should be grounds for departure from the otherwise applicable guideline range. We support an amendment to the sentencing guidelines which would strongly discourage, if not prohibit, departures from the otherwise applicable guideline range for a defendant's post-conviction rehabilitation.

Department of Justice policy is to encourage and support rehabilitative efforts by federal prisoners, including in-prison and post-release efforts to complete education, vocational training, substance abuse treatment, and mental health treatment programs. However, we strongly believe that to be effective and equitable, the incentives for and benefits of participating in such programs must be highly structured. In title 18 of the United States Code, Congress has provided for such a structure of programs, incentives, and benefits which we believe should preempt departures for post-conviction rehabilitation. Specifically, Congress requires that the Bureau of Prisons provide literacy programs (section 3624(f)), General Educational Development programs (section 3624(b)(3)), and substance abuse treatment programs(section 3621(b)). Together with vocational and mental health treatment programs, the Bureau of Prisons

---

[2] Indeed, the Commission has provided a generally applicable invitation to departure when an offense involves the disruption of a governmental function (see, § 5K2.7).

provides many opportunities for rehabilitative efforts. Further, sections 3621 and 3624, together with the rules and regulations of the Bureau of Prisons, provide for structured incentives and benefits for prisoner who successfully participate in such rehabilitative programs. Specifically, a prisoner can get his sentence reduced by one year for participating in a rigorous course of drug treatment and aftercare and by 54 days a year for displaying "exemplary compliance" with prisons rules which includes, by statute, consideration of progress toward earning an educational degree. In addition, a prisoner can serve the last several months of his sentence in a community corrections facility or even home confinement based on a number of factors including whether the prisoner has made rehabilitative efforts.

We think the congressional and Bureau of Prisons structure for addressing post-conviction rehabilitation is the appropriate one and that downward departures significantly interfere with that structure, especially because a prisoner can only receive such a departure if by happenstance he returns to court for re-sentencing. Post-conviction rehabilitation is a factor that has, we believe, already been adequately and properly considered and addressed by Congress, and as such we think it is an inappropriate ground for departure.

As for post-offense, pre-conviction rehabilitative efforts, we believe § 3E1.1 of the guidelines adequately accounts for such efforts (see, note 1). To the extent that the Commission may want to reconsider this issue, we believe it should do so as part of a more comprehensive examination of § 3E1.1.

(E) Upward Departures On The Basis of Dismissed Or Uncharged Conduct

Part (E) concerns the extent to which dismissed or uncharged conduct should be grounds for departure from the otherwise applicable guideline range. We think that the issue is not yet ripe for the promulgation of amendments by the Commission and that it is sufficiently complex that additional study and consideration are warranted before the circuit conflict can be properly resolved. However, if the Commission is inclined to resolve this circuit conflict in this amendment cycle, we think it should be guided by the statutory standard for departures at section 3553(b) of title 18, United States Code,[3] and by the

---

[3]Section 3553(b) of title 18, United States Code, provides in part, "[t]he court shall impose a sentence of the kind and within the range, referred to in subsection (a)(4) unless the

requirement of section 3661 of title 18, United States Code, that there be no limitation placed on the information the sentencing court may receive and consider for the purpose of imposing an appropriate sentence. While the section 3553 standard for departures certainly requires that this circuit conflict be resolved with reference to the relevant conduct rules at § 1B1.3 of the guidelines, we think it would be inappropriate and a misreading of sections 3553 and 3661 to prohibit departures with respect to all conduct that is not otherwise a part of relevant conduct. There may be some category of conduct outside of the contours of relevant conduct that should, in general, be excluded as a grounds for departure.

Additional Circuit Conflicts

We are aware of several additional circuit conflicts that the Commission has not yet considered and that we urge it to consider in the future. Two affect the tax area and an additional one concerns aggravated assault. We will provide more detail concerning these conflicts when the Commission begins consideration of issues for the next amendment cycle, but we continue to urge the Commission to address circuit conflicts on a regular basis.

AMENDMENT 9 - TECHNICAL AMENDMENTS PACKAGE

We support the proposed technical and conforming amendment package. We believe, however, that in Part (C), additional commentary should be added to the proposed commentary changes in §§ 2D1.11 and 2D1.12 that would indicate that an unlawful discharge, emission, or release into the environment includes, among other things, a discharge into any sewer system. In several recent prosecutions, questions have been raised whether the enhancement for discharging hazardous substances into the environment is triggered when a defendant flushed the hazardous substances into a sewer system. We think the guidelines should reflect the reality that hazardous materials flushed into a sewer system are volatilized into the air, transported with treatment sludge, passed through any treatment plant, and then discharged into water. As such we believe that discharging hazardous materials through a sewer system is discharging into the

---

court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

environment. A conforming amendment to the already existing enhancement in § 2D1.1 would be appropriate as well, we believe.

CONCLUSION

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to working further with you and the other commissioners on these and other important matter of sentencing and corrections policy.

Sincerely,

James K. Robinson
Assistant Attorney General

Laird C. Kirkpatrick
Counsel to the
Assistant Attorney General

Families Against Mandatory Minimums
FOUNDATION

March 10, 2000

The Honorable Diana E. Murphy
and Commissioners
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Amendment #4: Commission Response to the Methamphetamine Trafficking Penalty Enhancement Act of 1998

Dear Judge Murphy and Commissioners:

We are writing on behalf of Families Against Mandatory Minimums Foundation (FAMM) to comment on proposed Amendment Number 4, which concerns the penalties for methamphetamine offenses. FAMM is a nonprofit, nonpartisan organization that conducts research, promotes advocacy, and educates the public regarding the excessive cost of mandatory minimum sentencing. This cost is not limited to public expenditures but includes the perpetuation of unwarranted sentencing disparities, disproportionate sentences, and the transfer of the sentencing function from the judiciary to the prosecution. Founded in 1991, FAMM has 30 chapters and 18,000 members nationwide. FAMM conducts sentencing workshops for its members, publishes a newsletter, serves as a sentencing clearinghouse for the media, and researches sentencing cases for pro bono litigation. FAMM does not advocate the legalization of drugs nor does it minimize the serious impact of drug trafficking or other crimes. All we ask is that the punishment fit the offense and the offender. As an alternative to mandatory sentences, FAMM supports sentencing guideline systems that are more sensitive to differences in culpability.

Unfortunately, the benefits of guidelines over mandatory sentencing have never been fully realized in the federal system. This is because statutory mandatory minimums directly and indirectly impede the guidelines' capacity to distinguish between offenders. Amendment Number 4, which contains two options for responding to the Methamphetamine Trafficking Penalty Enhancement Act of 1998, further diminishes the Guidelines' value as an accurate measure of culpability.

The 1998 Act lowers the quantities of methamphetamine necessary to trigger the 5- and 10-year mandatory minimum sentences to the controversial triggering quantities applicable to crack cocaine. As noted in the Methamphetamine Policy Team's report, the subject legislation issued no directives to the Commission. In sum, FAMM submits that amending the methamphetamine guidelines to reflect politically inspired mandatory minimums, rather than Commission expertise, will result in individuals spending more time in prison than is justified by the fundamental purposes of sentencing and will undermine the Guidelines' goal of disparity reduction.

1612 K Street, NW • Suite 1400 • Washington, D.C. 20006 • (202) 822-6700 • fax (202) 822-6704 • FAMM@famm.org • http://www.famm.c

As possible bases for the first two proposed amendments, the methamphetamine report submits three considerations: (1) the drug's current popularity, (2) consistency with past practice, and (3) political concerns. Because guideline amendment is not mandated, however, the Commission should only act if it determines that higher guideline sentences -- many exceeding the mandatory minimums -- are necessary to promote the purposes of sentencing: punishment, deterrence, incapacitation and rehabilitation. *See* 18 U.S.C. § 3553(a)(2), 28 U.S.C. §§ 991(b), 994(m).

There is no evidence that methamphetamine offenses are under punished.

Under the first amendment option, the Commission's report predicts that average methamphetamine sentences, second in severity only to crack, will increase 20% -- from 97 to 116 months. The crack cocaine regime provides a useful point of comparison. The overall severity of the crack cocaine guidelines (apart from the issue of race) underlies much of the criticism lodged against federal drug sentencing. Fulfilling its duty under the Sentencing Reform Act of 1984 to consider community views in developing the Guidelines, the Commission surveyed public attitudes toward federal sentences in 1993 and 1994. This survey revealed that respondents preferred punishments below the guideline ranges for crack offenders and also for higher-quantity drug traffickers. Peter H. Rossi & Richard A. Berk, U.S. Sentencing Comm'n, *A National Sample Survey, Public Opinion on Sentencing Federal Crimes* 80, 84 (1995). This suggests that the proposed amendments would widen the gap between actual sentencing policy and just punishment in the public's eyes.

A few examples of first-time offenders illustrate the severity of methamphetamine penalties (even prior to 1998 law) and the comparative increases under the proposed guideline amendments:

- Joyce Nelson is an addict whose abusive relationship with a methamphetamine cooker cost her more than seven years in prison. Even with a four-level reduction for her minimal role and a three-level reduction for acceptance of responsibility, she received an 87-month guideline sentence. She was finally released, but would still be incarcerated under the first proposed option, which would prescribe at least 108 months imprisonment. (No. CR92-00026M-002, W.D. Wash.).

- Linda Bear became involved in a methamphetamine conspiracy as a result of her own addiction, permitting a childhood friend to manufacture at her residence in exchange for personal-use quantities of the product. Her drug abuse was apparently connected to certain mental disorders and tragic events, like the deaths of her prematurely born child and her husband. Although her 46-month sentence pales in comparison to some federal drug sentences, her guideline range under the second proposed option would be 87-108 months. (No. 97-CR-171-016-C, N.D. Okla.).

- Loretta Fish received a 235-month sentence for her short-term, minor role in her boyfriend's methamphetamine business. Her involvement in the conspiracy lasted about six months, during which time she allowed the co-conspirators to use her car and her trailer home, acted as a lookout and relayed messages concerning drugs. Her offense level was 38, based on more than 15 kilograms of methamphetamine, a two-level reduction for minor role and a two-level obstruction of justice enhancement based on perjury. Since Loretta Fish's base offense level is 38 (which caps the Drug Quantity Table), her sentence would not change if based on the proposed amendments. (No. 93-00158-03, E.D. Pa.).

In light of the fact that more than 50% of federal methamphetamine defendants have little or no criminal history (U.S. Sentencing Comm'n, *1998 Sourcebook of Federal Sentencing Statistics* 72), the proposed amendments would yield an increased supply of anecdotes to illustrate the unnecessary severity of the drug trafficking guidelines. *See, e.g., Prisoners of Love* (Court TV television broadcast, Feb. 14, 2000); *The Early Show with Bryant Gumbel* (CBS television broadcast, Feb. 22, 2000) (including detailed accounts of harsh drug guideline sentences meted out on several first-time offenders; tapes on file with FAMM).

Sentencers' use of ameliorative provisions and meth-mixture offense levels supports the conclusion that increased punishment is unwarranted.

Disproportionate reliance on ameliorative provisions may also reflect that methamphetamine offenses are currently over punished (but does not necessarily point to widespread guidelines circumvention). Although further research is needed, methamphetamine prosecutions may snare a higher proportion of low-level offenders who legitimately qualify for the safety valve and mitigating role adjustments. Similarly, the apparent over-reliance on the meth-mix penalties, as opposed to the harsher meth-actual penalties, may be due more to confusion than circumvention; if true, this commends clarification rather than stream-lining of the guideline at the expense of greater proportionality. On the other hand, if excessive reliance on the meth-mix penalties is due to dissatisfaction with current penalty levels, eliminating the meth-actual scheme may yield no more than better-camouflaged "disparity," while the sentence increases under both proposals will no doubt exacerbate the disparity. In this regard, it is useful to note the already high rate of substantial assistance departures -- often branded the "black box" of federal sentencing -- for methamphetamine offenses.

The deterrence rationale and other law enforcement considerations do not support increased sentences.

The Sentencing Reform Act suggests that the Commission consider "the current incidence of the offense," but only to the extent relevant. 28 U.S.C. § 994(c). Inasmuch as the

amendment proposals are inspired by epidemiological studies regarding methamphetamine, the Commission may see fit to focus on whether increased guideline sentences are likely "to afford [additional] deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). Of course, most research suggests that severe sentences do not provide any additional deterrent effect over moderate sentences. Michael Tonry, *Sentencing Matters* 136-42 (1996).

Rather, there is reason to believe that adoption of lower triggering quantities will undermine effective federal law enforcement. The Attorney General, the Office of National Drug Control Strategy and the previous Sentencing Commission opposed the identical penalty scheme for crack cocaine as contrary to federal law enforcement priorities. U.S. Sentencing Comm'n, *Cocaine and Federal Sentencing Policy* 4-8 (1997). In like fashion, the penalty levels under consideration are apt to divert scarce federal law enforcement resources from large-scale trafficking to low-level offenders. According to the DEA, 5 grams of methamphetamine is worth a few hundred dollars at most (Drug Enforcement Administration et al., *The NNICC Report 1997: The Supply of Illicit Drugs to the United States* 68) -- hardly an amount indicating a serious trafficker -- yet agents and prosecutors will have the incentive to concentrate on these cases.

Past practice should not impede evolution of the guidelines.

The amendment proposals would merely compound the original Commission's imprudence in incorporating the statutory quantity thresholds and prescribing sentences in excess of the mandatory minimums. As many experts have observed, the Commission was not required to incorporate the drug quantity thresholds from the mandatory minimum statutes as anchors for drug sentencing calculations. *See, e.g.*, Michael Tonry, *Sentencing Matters* 96-97 (1996) ("the commission's policies gratuitously raised sentences for drug offenders"); Stephen Schulhofer, *Excessive Uniformity -- And How to Fix It*, 5 Fed. Sent. R. 169 (1992) (Commission's decision to specify quantity-based sentences above the quantities triggering the 10-year mandatory minimum "goes beyond deference to congressional judgments."). In a report prompted by "anecdotal and empirical evidence suggesting that sentences for certain drug-trafficking defendants may be overly punitive," the Commission found that, among the states surveyed, the federal sentencing guidelines stand alone in their mandatory minimum-based approach to drug sentencing. U.S. Sentencing Comm'n, *Report of the Drugs/Role/Harmonization Working Group* 1, 50 (1992).

The methamphetamine report aptly frames the issue as follows: "Should no action be taken, the mandatory minimums established by Congress will trump the guidelines at sentencing but the impact of the Congressional increase will not be felt throughout the remainder of the Drug Quantity Table." The Commission, to its credit, has tolerated this trumping effect with respect to certain controlled substances (i.e. LSD and marijuana plants), and state sentencing commissions have adopted this approach. Michael Tonry, *Sentencing Matters* 96-97 (1996). In addition, this trumping effect occurs when the prosecutor files an information under 21 U.S.C. §

851, triggering an enhanced mandatory minimums for a drug offenders with one or more prior drug felonies. The Commission should also note that the safety valve diminishes the structural cliffs that the Commission sought to avoid by incorporating the mandatory minimums. In a recent year, the safety valve enabled 22% of drug defendants to receive guidelines-range sentences without regard to the mandatory minimum statutes. U.S. Sentencing Comm'n, *1998 Sourcebook of Federal Sentencing Statistics* 79.

In conclusion, while congressional enactments and any underlying drug-use trends merit the Commission's attention, analysis of the statutory guideposts indicate that the proposed amendments will take the methamphetamine guidelines in the wrong direction. In contrast to other legislation, Congress did not direct that the Commission amend the sentencing guidelines to reflect the new quantity thresholds. *See, e.g.*, Powder Cocaine Sentencing Act of 1999, S. Amdt. 2771 (to S. 625), 106th Cong. In the absence of specific statutory directives, guideline sentences should reflect the Commission's expert judgment, even if this entails some political risk. While the Commission does not operate in a political vacuum, "[i]f the commission refuses to take risks and simply reflects the views of the political agents to which it is ultimately responsible, it will accomplish nothing better that the legislature itself could in setting standards." Andrew von Hirsch & Judith Greene, *When Should Reformers Support Creation of Sentencing Guidelines?*, 28 Wake Forest L. Rev. 329, 337 (1993).

Thank you for considering our comments on this issue of great importance to the families of future methamphetamine prisoners.

Sincerely yours,

Julie Stewart
President

Kyle O'Dowd
General Counsel

Statement of the

Federal Public and Community Defenders

submitted to the

United States Sentencing Commission

March 10, 2000

Submitted by
Jon Sands
Assistant Federal Public Defender
Phoenix, Arizona

TABLE OF CONTENTS

INTRODUCTION

Federal Public and Community Defender Organizations, which operate under the authority of 18 U.S.C. § 3006A, exist to provide criminal defense services to defendants in federal criminal cases who are unable to afford counsel. Defender Organizations new operate in more than 70 federal judicial districts. We appear before magistrate-judges, United States District Courts, United States Courts of Appeals, and the United States Supreme Court.

Federal Public and Community Defenders represent the vast majority of criminal defendants in federal court. We represent persons who are charged with often-prosecuted offenses, like drug trafficking and fraud, as well as persons who are charged with infrequently-prosecuted federal crimes, like sexual abuse. We represent persons charged with street crime, like murder, and persons charged with suite crime, like embezzlement.

Congress has directed in 28 U.S.C. § 994(o) that certain entities, including the Federal Public and Community Defenders, "submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful." In addition, that provision directs us to submit, at least annually, written comments on the guidelines and suggestions for changes in the guidelines. The Federal Public and Community Defenders are pleased to comment upon the proposed amendments published by the Commission, but before turning to the specific proposals, we have several general observations.

Congress did not intend the Sentencing Reform Act of 1984 to divest federal judges of their sentencing discretion. Congress did not view the purpose of sentencing guidelines, and other provisions enacted by that legislation, to be to turn federal judges into calculators. The congressional goal was not to do away with discretion, but to guide it. "The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences."[1] The Supreme Court underscored this in *Koon*:

> It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.[2]

The Commission must keep this in mind when evaluating the proposed amendments, particularly amendments related to departures. As the Supreme Court stressed in *Koon*, "A district court's decision to depart from the Guidelines . . . embodies the traditional exercise of discretion by a sentencing court."[3] We hope that when the Commission takes up proposals that relate to departures, the Commission will decide to

---

[1]S. Rep. No. 98-225, 98th Cong., 1st Sess. 52 (1983).

[2]Koon v. United States, 518 U.S. 81, 113, 116 S.Ct. 2035, 2053 (1996).

[3]518 U.S. at 98, 116 S.Ct. at 2046.

draft language that helps federal judges to exercise sentencing discretion rather than language that denies them sentencing discretion. We believe that federal judges can be trusted to exercise discretion wisely.

The manner in which federal judges have been exercising sentencing discretion is noteworthy. Federal judges are sentencing at the bottom of the guideline range and below the guideline range far more often than they sentence at the top of the guideline range or above. The Commission's own data shows that, of the cases in which sentence is imposed within the guideline range, the sentence is at the bottom of the range 60.3% of the time and is at the top of the range 15.3% of the time.[4] When it comes to departing, leaving aside the 19.3% of the cases in which there is a substantial-assistance departure, sentencing courts depart below the guideline range 17 times as often as they depart above the guideline range.[5] This means, to us at least, that the federal judges who impose sentence find the guideline ranges to be too high. Whenever there is an increase in the guideline ranges, a consequence is that sentences falling at the bottom of the guideline range are higher than before and departures will have to be greater to get to the sentence that the departing court believes to be appropriate. Regrettably, most of the proposals under consideration will drive the guideline ranges even higher.

---

[4]U.S. Sentencing Comm'n, 1998 Sourcebook of Federal Sentencing Statistics 59 (table 29). The 1998 Sourcebook is the most recent Sourcebook available.

[5]*Id.* at 51 (figure G). Downward departures for other than substantial assistance occur in 13.6% of the cases; upward departures occur in 0.8% of the cases.

We believe that the Commission made the correct decision in limiting the number of proposed amendments it would take up during this cycle. The members of the Commission took office last Fall, at a time when the Commission in years past had done a considerable amount of work on amendments for the next cycle. There was simply not enough time available for the Commission to undertake work on a large number of proposed amendments and still do the kind of job that the members of the Commission want to do, and that Congress and the bench and bar expect the Commission to do. Despite having limited the number of proposed amendments it would take up, the Commission is confronted with a large number of issues to look at. Many of the issues are not ripe for resolution. Many are peripheral to the main thrust of the proposed amendment and seem to derive from a penchant to resolve, at once, every issue for all time. In that regard, we would remind the Commission of Mr. Justice Holmes' observation that the life of the law has not been logic, but experience. We urge the Commission to resolve those matters on which it must act and those matters for which there is sufficient research and information to enable the Commission to make informed choices that reflect experience.

AMENDMENT 1

Amendment 1 sets forth three options for implementing the No Electronic Theft

(NET) Act.[6] Section 2(g) of the NET Act directs the Commission to ensure that the guideline range of a crime against intellectual property is "sufficiently stringent" to deter such a crime. In addition, section 2(g) directs that the guidelines "provide for the consideration of the retail value and quantity of the items with respect to which the intellectual property offense was committed." The Federal Public and Community Defenders recommend that the Commission adopt option 3 with some changes.

Three Examples

For purposes of simplifying comparisons, we will use three examples throughout our comments on amendment 1. One example involves a case in which there is pecuniary gain to the defendant but no pecuniary loss to the direct victim. A second example involves a case in which there is no pecuniary gain to the defendant but there is a pecuniary loss to the direct victim. A third example involves a case in which there is both pecuniary gain to the defendant and pecuniary loss to the direct victim.

In the first example, a street vendor sells counterfeit copies of a Rolex watch that has a manufacturer's suggested retail price of $3,000 but that is generally discounted and can readily be purchased for $2,400. The street vendor sells 125 counterfeit copies for $20 each, making the vendor's gross pecuniary gain $2,500. For reasons discussed below, there is no pecuniary loss to Rolex.

In the second example, an internet surfer pays $50 to a legitimate retailer for a

---

[6]Pub. L. No. 105-147, 111 Stat. 2678 (1997).

software program. That program is widely available, and the purchase price paid by the public averages $50 per copy. The internet surfer makes it available on the internet for downloading without cost, and 50 people download the program. The price paid for a downloaded copy of the program is zero, and the internet surfer has no pecuniary gain. For reasons discussed below, the manufacturer (the copyright owner of the software program) has sustained a pecuniary loss.

In the third example, a compact-disk pirate has access to sophisticated equipment that permits her to make high-quality copies of compact disks. She makes copies of a copyrighted audio disk that retails generally for $13 and sells 200 of them at $5 each. The seller has a gross pecuniary gain ($1,000), and the manufacturer (the copyright owner of the audio disk) has sustained a pecuniary loss.

Background

The Commission addresses offenses involving criminal infringement of a copyright or trademark in § 2B5.3. That guideline has a base offense level of level 6, which is increased by using the loss table in the fraud guideline. The amount calculated under § 2B5.3 is "the retail value of the infringing items."[7] The goal of the formula in § 2B5.3 is not to determine the pecuniary "loss" caused by the offense or the pecuniary gain to the defendant from the offense, although that can be the effect of the formula.

---

[7]The "infringing items" are "the items that violate the copyright or trademark laws (not the legitimate items that are infringed upon)." U.S.S.G. § 2B5.3, comment. (n.1).

The formula in § 2B5.3 does not use the *price* of the infringing items, but the retail value of those items. The retail value of the infringing items may or may not be equivalent to the price of those items or to the price of the infringed items. The retail value of the infringing items and the price of the infringing items are the same in the watch example. The value of a counterfeit copy of that Rolex watch is not the retail value of a legitimate Rolex watch. The value is what the item (a counterfeit copy) actually sold for in the marketplace – in this instance $20, the price paid to the defendant. The retail value of the infringing items in the watch example, therefore, is $2,500 (125 items times the value of $20 per item). The gross pecuniary gain to the defendant is also $2,500.

In the compact-disk example, the retail value of the infringing item is the same as the retail price of the infringed item. Because of the high quality of the illegitimate compact disks, the retail value is what an authentic compact disk actually sold for in the marketplace, the retail price of $13 per disk. The retail value of the infringing items, therefore, is $2,600 (200 disks times $13, the retail value of a disk). The gross pecuniary gain to the defendant is less than the $2,600 retail value of the infringing items – $1,000 (200 disks times $5, the price for which the defendant sold a disk).

Similarly, in the software program example, the retail value of the infringing item is the same as the price of the infringed item. The price paid by the downloaders of the infringing program is zero (it costs nothing to download from the internet). The retail value of each infringing item (the downloaded program) is $50, what it would have cost

in the marketplace to have obtained a legitimate copy of the program. Thus, the retail value of all the infringing items $2,500 (50 copies times $50, the retail value of a program). The pecuniary gain to the defendant is zero.

The retail value of the infringing items formula will overstate the pecuniary loss to the direct victim, usually by a substantial amount. This is true for two reasons. First, not every person who bought an illegitimate item would have bought the real thing. Second, the victim's pecuniary loss is not the victim's gross gain from the items that would have been sold. The victim had costs (such as manufacturing and marketing costs) in producing the item. The victim's pecuniary loss is gross gain minus those costs.

The watch example illustrates the first reason. The 125 persons who bought a counterfeit copy of the Rolex watch undoubtedly believe that they are not getting the real item. In all likelihood, those persons do not have the means or desire to pay the full amount for the real Rolex watch, and none of them would have. Although the retail value of the infringing items is $2,500, because none of the buyers would have bought the real thing, Rolex has not suffered a pecuniary loss.

In both the software-program and compact-disk examples, however, at least some of the persons obtaining the illegitimate item would have bought the real thing. The higher the percentage of persons who would have done so, the greater will be the pecuniary loss. In addition, the profit per item will affect the pecuniary loss. The greater the profit per item, the higher the pecuniary loss.

Assume that the manufacturer of the software program spends $25 a copy to develop, produce, and market the program. The net pecuniary gain (profit) to the manufacturer of the software program, therefore, is $25 per copy sold. If every person who downloaded the program without cost would have bought a legitimate version of the program, the manufacturer of the program would have had a profit (net pecuniary gain) of $1,250 (50 items times $25 profit per item). The pecuniary loss to the manufacturer caused by the offense, therefore, is $1,250, the profit the manufacturer would have made from the sale of 50 copies of the program. If instead only 40 downloaders would have bought the program, the manufacturer's lost profit is $1,000 (40 items times $25 profit per item) and the pecuniary loss to the manufacturer is $1,000. If, as probably is the case generally, the profit percentage is not that high, the pecuniary loss is lower. Thus, if the profit per item is $10, the manufacturer's lost profit (the pecuniary loss to the manufacturer) would be $500 (50 items times $10 profit per item) if all 50 downloaders would have bought the program and $400 if 40 downloaders would have bought the program (40 items times $10 profit per item).[8]

---

[8]The results are the same in the compact disk example. If 90% of the price of a compact disk goes to produce and market the disk, the profit per disk is $1.30 (10% of $13). If all of the buyers of the illegitimate disk would have bought the real thing – an unlikely assumption given the price difference between the illegitimate and legitimate disks – the pecuniary loss to the manufacturer would be $26 (200 items time $1.30). If half of the buyers of the illegitimate disk would have bought the real disk, the manufacturer lost 100 sales (50% of 200 illegitimate items). The pecuniary loss to the manufacturer in that circumstance would be $13 (100 items times $1.30).

The Options

Option 1

Option 1 would replace the current formula with a general formula and a special formula for use with convictions under 18 U.S.C. § 2319A (unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances). The general formula would be "the retail value of the infringed items multiplied by the quantity of infringing items . . . ." In the watch example, that formula yields the amount of $300,000 (125 illegitimate items times the retail value of $2,400).[9] In the software-program example, the formula yields $2,500 (50 illegitimate items times $50), and in the compact-disk example, the formula yields $2,600 (200 illegitimate items times $13). For offenses under 18 U.S.C. § 2319A, option 1 retains, but rewords, the current formula.[10]

Option 2

Option 2 also proposes a general formula and a special formula for offenses under 18 U.S.C. § 2319A. The general formula is similar to the general formula in option 1, except that "average retail price" is used instead of retail value, which equates to average

---

[9]Option 1 retains the concept of "retail value" from the current guideline. Thus, even though the real watches have a retail price of $3,000 each, that is not their retail value because the real watches generally can be bought, legitimately, for $2,400.

[10]Offenses under 18 U.S.C. § 2319A involve unauthorized ("bootlegged") sound recordings of live musical performances for which there has been no commercial release of a legitimate recording of the performance. The general formula will not work in such a case because there is no "infringed item" and therefore no "retail value of the infringed items."

retail price. The result under the general formula in option 2, therefore, would mirror the result under the general formula in option 1. The special formula for offenses under 18 U.S.C. § 2319A is the price of the infringing item times the number of infringing items, the same formula as in option 1.

Option 2 also would add two new enhancements. One enhancement would add two levels "if the offense involved online electronic infringement," and the other would add two levels (with a floor of level 13) "if the offense involved a reasonably foreseeable risk to public health or safety." Finally, option 2 would provide for a two-level reduction (but not to lower than level 6) if (1) the offense was not committed for commercial purpose or private financial gain, or (2) the general formula is used and "the offense involved greatly discounted merchandise."

The formula in option 2 yields the same results as the formula in option 1. In the watch example, the amount calculated is $300,000. In the software-program example, the amount calculated is $2,500, and in the compact-disk example the amount calculated is $2,600. The two-level reduction in option 2 for "greatly discounted merchandise" would apply in the watch example.[11]

---

[11]The formula in option 2, like the formula in option 1, greatly overstates the harm from the offense in the watch example. There has been no pecuniary harm to Rolex or others and, as discussed later, no unquantifiable harm (such as injury to Rolex's reputation). The two-level reduction in option 2 does not adequately adjust for the overstatement of the harm from the offense that results from the formula. Using the defendant's gross pecuniary gain ($2,500) would result in a one-level increase from the fraud table. Using the amount determined by option 2's formula – $300,000 – results in

Option 3

Option 3, unlike its options 1 and 2, would increase the base offense level from level 6 to level 8. Option 3 would require the sentencing court to calculate the "infringement amount," which new commentary would define as "the approximate pecuniary harm to the copyright or trademark owner caused by the offense." New commentary would set forth a general formula and a special formula for calculating that amount.

The general formula would apply in four types of cases – cases in which (1) the infringing item is substantially identical to the infringed-upon item in quality and performance (as in the software-program and compact-disk examples); (2) the retail value of the infringing item is difficult to determine without unduly complicating or prolonging sentencing or is impossible to determine; (3) the offense involves illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511; and (4) "the government provides sufficient information to demonstrate that the retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than does the retail value of the infringing item." The general formula would be "the retail value of the infringed item, multiplied by the number of infringing items."

---

an eight-level increase from the fraud table. Deducting two levels for "greatly discounted merchandise" makes the net effect of the fraud table increase six levels. The result is that the vendor in the watch example is treated as if he had obtained $70,000 to $120,000 (the amounts that yield a six-level increase under the fraud table).

New commentary would define "infringed item" to mean "the copyrighted or trademarked item with respect to which the crime against intellectual property was committed." The definition of "infringing item" is retained from the current guideline.

The special formula would apply to offenses under 18 U.S.C. § 2319A and to other offenses not covered by the general formula. The special formula is "the retail value of the infringing item, multiplied by the number of infringing items" (the current formula).

In the software-program example, the general formula results in an infringement amount of $2,500 (50 infringing items times $50, the retail value of an infringed item). The general formula results in an infringement amount in the compact-disk example of $2,600 (200 infringing items times $13, the retail value of an infringed item).

The special formula is used to calculate the infringement amount in the watch example because the quality and performance of the counterfeit watches are not "identical to, or substantially indistinguishable from, the infringed item." The special formula results in an infringement amount of $2,500 (125 infringing items times $20, the retail value of an infringing item).

Option 3 also seeks comment upon four possible enhancements and one possible reduction. The enhancements would increase the offense level by two levels for (1) distributing an infringing item before the infringed item has been commercially released; (2) the purchaser believed the item purchased was the real thing; (3) "the offense involved the manufacture, importation, or uploading of infringing items" (which would call for the

increase with a floor of level 12); and (4) "the offense involved the conscious or reckless risk of serious bodily injury" (which would call for the increase with a floor of level 13). The reduction – of two levels (but not to a level below either level 6 or level 8 (to be decided)) – would apply if the offense was not committed "for commercial advantage or private financial gain." The Commission seeks comment upon whether any or all of these specific offense characteristics should be adopted even if the Commission chooses option 1 or 2.

The following chart shows the relationship in the three examples between pecuniary loss, gross pecuniary gain to the defendant, and the amount to be used in applying the fraud table that is derived from the formulas in the present guideline and in each of options 1, 2, and 3.

	Watch	Software	CD
Direct pecuniary loss	0	$1,250	$26
Gross gain to defendant	$2,500	0	$1,000
Current guideline	$2,500	$2,500	$2,600
Option 1	$300,000	$2,500	$2,600
Option 2	$300,000	$2,500	$2,600
Option 3	$2,500	$2,500	$2,600

Our Recommendations

The Formula

Congress has directed the Commission to ensure that the guidelines "provide for consideration of the retail value and quantity of the items with respect to which the crime against intellectual property was committed" (i.e., the infringed-upon item). In evaluating the three proposed formulas, we have considered whether each formula produces a result that fairly indicates the harm from the offense, as well as whether the formula is likely to be difficult to apply. With regard to the latter consideration, we are satisfied that all three of the proposed formulas will not be unduly difficult to apply.

With regard to fairness of result, each of the three proposed formulas yields an amount that at least equals and can significantly overstate the gross pecuniary gain to the defendant. Each of the three proposed formulas yields an amount that overstates – sometimes to a considerable degree – the pecuniary loss to the direct victim.

It is clear, however, that the complete harm from an offense may not be fully reflected by either the gross pecuniary gain to the defendant or the pecuniary loss to the direct victim. As the Commission's staff report has noted, however,

> it is difficult to establish a simple, generally applicable rule that will accurately and fully measure the harm caused by the wide variety of offenses sentenced under guideline § 2B5.3. The economists with whom the Team spoke agreed that, even in the context of civil litigation concerning the narrower issue of pecuniary damage

to a particular property holder, measuring the amount of damage is an inexact science. No simple formulas exist, and courts routinely hear time-consuming, conflicting and highly technical expert testimony. The practical realities of the sentencing process necessitate a simpler, more easily workable approach.[12]

We believe that option 3 is the most sharply-focused of the three options and best accounts for the harm that is not readily quantifiable. Option 3, although nuanced, is straightforward and not difficult to apply.

There is no difference among the options in their treatment of the software and compact-disk examples – cases in which there has been an actual pecuniary loss to the copyright or trademark owner. The options differ in their treatment of the watch example, in which there is no pecuniary loss to the copyright or trademark owner. Both Options 1 and 2 grossly exaggerate both the pecuniary loss to the direct victim and the gross pecuniary gain to the defendant. There is no need for overstating either the pecuniary loss or the gross pecuniary gain because in this kind of offense the unquantifiable harm is virtually nil. The street vendor has not deprived Rolex of any sales, so there is little, if any, harm to others (such as the people who supply materials to Rolex, the workers at the Rolex factory, and the shipping company that Rolex uses to send its watches to wholesalers and retailers). There would seem to be little, if any, harm

---

[12]U.S. Sentencing Comm'n, Policy Development Team Report, No Electronic Theft Act 19 (Feb. 1999).

to Rolex's reputation among those who are able to buy a Rolex watch. Indeed, the watch example offense is probably the kind of offense of least concern to those who sought the legislation. Option 3's treatment of such cases is the most realistic and fair.

Base Offense Level and Specific Offense Characteristics

Option 3 would both increase the base offense level (from level 6 to level 8) and add four new enhancements. We believe that the general, across-the-board increase in the base offense level is not justified. The proposed new enhancements, for the most part, are focused and increase punishment for conduct deserving of additional punishment.

The reason given in the request for comments for the increase in the base offense level is to bring § 2B5.3 "more in line with the fraud guideline, § 2F1.1. Both guidelines have a base offense level of level 6; however, the fraud guideline contains a 2-level enhancement for more than minimal planning, which applies in a great majority of fraud offenses." The analogy to a fraud offense, however, is inapt. The person who pays $20 for a $3,000 Rolex watch has not been defrauded. Neither has the person who downloads, at no cost, a software program that sells for $50. Those persons are not innocent victims. The analogy to fraud is appropriate if the defendant deceives the buyer into thinking that the item being purchased is authentic and not a counterfeit copy. There is a specific enhancement proposed for such conduct for such circumstances, and that enhancement takes care of the matter more directly and fairly.

The analogy to the more-than-minimal-planning enhancement in the fraud

guideline also is inapt. We think that the better analogy is to the enhancement for the use of sophisticated means that formerly was in the tax-evasion guideline and was added (as a temporary, emergency amendment) to the fraud guideline by amendment 587. The concept of more-than-minimal planning is broad and has been troublesome to the Commission. The Commission has defined the term "more than minimal planning" to mean "more planning than is typical for commission of the offense in a simple form. . . . 'More than minimal planning' is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune."[13] The congressional concern with copyright and trademark infringement has not been so much that wrongdoers have engaged in repeated acts over a period of time. Rather, the concern seems to have been more that the widespread availability of computers and high-end electronic equipment increases the risk to copyright and trademark owners and makes offenses more difficult to detect.[14]

The proposed new enhancements address directly important congressional concerns about infringement cases. If they are added to § 2B5.3, an increase in the base offense level would be redundant, unnecessary, and not justified on policy grounds.

We find the proposed two-level enhancement in option 3 for distributing an

---

[13]U.S.S.G. § 1B1.1, comment. (n. 1(f)).

[14]*See* U.S. Sentencing Comm'n, Policy Development Team Report, No Electronic Theft Act 18-19 (Feb. 1999).

infringing item before the commercial release of the infringed items to be appropriate. Such activity can cause lost sales of a magnitude that cannot be gauged with accuracy and also may harm the reputation of the owner of the intellectual property.[15] We do not object to the two-level enhancement (with a floor of level 13) if the offense involved the conscious or reckless risk of serious bodily injury. We expect that the enhancement will be applicable infrequently.

We believe that the enhancement for manufacturing, importing, or uploading infringing items is appropriate. The enhancement recognizes that manufacturers and importers are more culpable than sellers and that the widespread use of computers increases the risk of harm to the owners of intellectual property. We believe that this enhancement is appropriate. However, if there is to be an enhancement for manufacturing, importing, or uploading, then there should be a reciprocal reduction (or an encouraged departure) for an offense not committed for commercial advantage or private financial gain.

We believe that the proposed enhancement of two levels if the purchaser of an infringing item actually believed that the item was authentic should be reduced to one level. There would seem to be two bases for that enhancement. The first basis is lost

---

[15]For example, the infringing item may be an early version of a video game that has bugs that the manufacturer removed from later versions. Nevertheless, reports of the game's poor performance circulated by those who obtained the early version may harm the reputation of the company putting out the legitimate version of the game and make people reluctant to buy the later version, even though the bugs have been fixed.

sales of the infringed item. A buyer who is seeking the authentic item, but is deceived into buying a counterfeit, obviously would have bought the authentic item.[16] The second basis is that the buyer is not complicit in the offense and may be harmed as well, harm that is not otherwise captured by the guideline. The buyer of the $20 Rolex watch or a person who downloads a free copy of a software program that is sold commercially for $50 knows something illegal is afoot – they are neither innocent nor victims (especially in the case of the downloaders). That the downloaders cannot get upgrades or technical support from the manufacturer for lack of proof of purchase is not particularly troublesome. The downloaders knew that there was something questionable about the deal, and in any event did not pay anything for the copy of the program downloaded.

We believe that the lost sales are adequately accounted for by the formula and do not require an extra boost in the offense level. As indicated earlier, the amount calculated will be higher the greater the percentage of persons who would have bought the real item. Even if every deceived buyer would have bought the authentic item, the formula in option 3 adequately captures the lost sales because the retail value of the infringed item is used.[17]

---

[16]*See* U.S. Sentencing Comm'n, Policy Development Team Report, No Electronic Theft Act 25-26 (Feb. 1999) (discussing palmed-off goods).

[17]Assume, for example, that a defendant sells 500 copies of a video tape of a motion picture, which is sold by legitimate commercial retailers at an average price of $15. The copies are of high quality, and the defendant markets the infringing copies as authentic. The defendant charges $14 per copy. All of the buyers of the defendant's tapes believe that what they are buying is legitimate, and they would have paid an extra dollar to get a legitimate tape had they known that what they were buying was not a

We think that the second basis – harm to an innocent buyer – is not otherwise captured by the formula or other proposed enhancements, but we think that that factor is better accounted for by a one-level enhancement – or in the alternative by adding commentary indicating that an upward departure would be warranted.

We recommend that the Commission adopt option 3 with our suggested changes. Option 3 would not present unusual problems in application, and it produces a result that best reflects the actual harm from and infringement offense.

AMENDMENT 2

Amendment 2 would repromulgate as a permanent amendment the provisions of amendment 587, which the Commission promulgated as a temporary amendment under the authority of section 6 of the Telemarketing Fraud Prevention Act of 1998, Pub. L. No. 105-184, 112 Stat. 520. The Federal Public and Community Defenders do not agree with all of the changes made by amendment 587, and we believe that the Commission should revisit that amendment. The Commission, however, has not undertaken the work necessary to enable it to make an informed reevaluation of amendment 587. The

---

legitimate tape. The gross pecuniary gain to the defendant is $7,000 (500 infringing copies times the $14, the price at which the defendant sold a copy). Assuming that the profit for an authentic tape is $2 per tape, the actual pecuniary loss to the owner of the copyright on the tape is $1,000 (500 copies times $2 profit per item). The infringement amount under option 3 is $7,500 – more than seven times the pecuniary loss.

Commission's options, therefore, are to (1) repromulgate amendment 587 or (2) fail to comply with the congressional mandate. Under the circumstances, the Commission has no choice but to repromulgate amendment 587.

AMENDMENT 3

Amendment 3 responds to the Protection of Children from Sexual Predators Act of 1998.[18] Sections 502 through 507 of that Act give a number of directives to the Commission.

Part A

Part A of amendment 3 responds to the creation of the a offense, 18 U.S.C. § 1470, which prohibits the transfer of obscene materials to minors.[19] Part A also responds to a directive to clarify the term "distribution of pornography," so the distribution enhancement applies for both monetary remuneration and non-pecuniary interest.[20]

Part A would list § 2G3.1 in the Statutory Index as the offense guideline recommended for an offense under section 1470. Part A also would modify the distribution enhancement in § 2G3.1(b)(1) to apply if the distribution was (1) for

---

[18]Pub. L. No. 105-314, 112 Stat. 2974.

[19]*Id.* at § 401, 112 Stat. 2979.

[20]*Id.* at § 506, 112 Stat. 2981.

pecuniary gain; (2) for the receipt or expectation of receipt of anything of value, but not for pecuniary gain; or (3) to a minor. Finally, part A would add a two-level enhancement to § 2G3.1(b)(1) that applies if the offense involved the knowing transfer of obscene materials to a minor to persuade, induce, entice, coerce, or facilitate the transport of, that minor to engage in prohibited sexual conduct.

An issue for comment asks whether § 2G3.1(b)(1) should continue to use the loss table in the fraud guideline. We recommend that the enhancement continue to use the loss table. The current enhancement is clear and allows for uniform increases for large-scale commercial enterprises. A graduated punishment with increases for the most serious offenders is a proper function of the guidelines. The proposed encouraged upward departure for large-scale commercial enterprises could result in increased litigation and sentencing disparities.

The proposed § 2G3.1(b)(1)(B) would apply to distribution for the receipt or expectation of receipt of a thing of value (but not for pecuniary gain) and is consistent with the congressional directive.[21] We do not oppose § 2G3.1(b)(1)(B), but we recommend that the Commission make two modifications to it.

First, we recommend that proposed § 2G3.1(b)(1)(B) be modified to call for a three-level enhancement, instead of a five-level enhancement. We think that a three-level enhancement if the distribution is for value other than pecuniary gain is better policy.

---

[21] *Id.*

Proposed § 2G3.1(b)(1)(B) is intended to apply broadly and will apply to individuals who engage in conduct that is significantly less harmful than the conduct to which the five-level enhancement of proposed § 2G3.1(b)(1)(A) applies. Proposed § 2G3.1(b)(1)(A) applies if the defendant has distributed for profit. For proposed § 2G3.1(b)(1)(B) to apply, the defendant only needs an expectation that "anything of valuable consideration" will be received. Individuals who have exchanged a few pictures in a quid pro quo transaction should not receive the same enhancement as a defendant who is selling pictures for profit. The Commission can recognize the difference by changing the five-level enhancement in proposed § 2G3.1(b)(1)(B) to a three-level enhancement.

Our second recommendation is that it should be made clear that proposed § 2G3.1(b)(1)(B) is limited to quid pro quo transactions or understandings. We therefore recommend that the commentary to § 2G3.1 be amended to state that a quid pro quo transactions must be shown in order for the enhancement of § 2G3.1(b)(1)(B) to apply. This would reduce unnecessary litigation and indicate that the enhancement requires proof of more than a hope of receiving something of value. Thus, if there is an understanding that "I will give you my pictures if you give me yours," the enhancement will apply. If the defendant gave the pictures with unilateral hope of possibly receiving pictures from the recipient in the future, the enhancement would not apply.

Our recommendation could be effectuated by modifying the proposed definition of the term "distribution for the receipt, or the expectation of receipt, of a thing of value, but

not for pecuniary gain." We suggest deleting "transaction" from that definition and inserting in lieu thereof "quid pro quo transaction or understanding." The following shows the proposed definition with our modification (new text in italic):

> "'Distribution for the receipt, or the expectation of receipt, of a thing of value, but not for pecuniary gain' means any *quid pro quo transaction or understanding*, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. 'Thing of value' means anything of valuable consideration."

Our proposed modification would clarify, but not limit, the intended broad application of proposed § 2G3.1(b)(1)(B).

We do not oppose proposed § 2G3.1(b)(1)(C), which responds to the enactment of the new offense in 18 U.S.C. §1470. A five-level increase for any distribution to an individual below the age of consent with an additional two-level increase if the distribution was to induce the individual to engage in prohibited.

Proposed § 2G3.1(b)(1)(C) applies to distribution to a minor, which proposed new commentary would define as "an individual who has not attained the age of [18] years." The brackets indicate that the Commission is seeking comment on the appropriate age to use in the definition. We believe that the appropriate age to use is 16, the age of consent.[22] Making proposed § 2G3.1(b)(1)(C) applicable to individuals under the age of

---

[22]*See* 18 U.S.C. §§ 2241(c), 2243(a), (c), 2244(a), 2246(1)(D).

sixteen would avoid the confusion of whether to apply the two-level enhancement for distribution to entice the minor to engage in "prohibited sexual conduct," if the sixteen or seventeen year old can legally consent to the conduct and the conduct would not be a federal crime. Limitation the enhancement to minors under the age of 16 years also would be consistent with the application of other sexual-abuse guidelines. For example, § 2A3.1(b)(2) and § 2A3.4(b)(1) both have increases for sexual abuse when the victim is under 16 years of age. While it may still be a crime to distribute obscene material to an individual who is more than 16 years of age, the harm to the teenager, who is of the age of consent, would be minimal in comparison to the distribution of a younger child.

We recommend that the Commission adopt the proposed definition of the term "minor" using the age of 16. If the Commission adopts our recommendation, the proposed definition would read: "'Minor' means an individual who has not attained the age of 16 years." Adoption of that definition will eliminate confusion and unnecessary litigation, promote uniformity within the guidelines, and reduce unwarranted disparities in sentencing.

An issue for comment in part A asks whether there should be an additional enhancement in proposed § 2G3.1(b)(1) to apply to distribution of obscene matter that does not involve distribution (1) for pecuniary gain, (2) for anything of value, or (3) to a minor. We oppose adding such an enhancement. Given the intended broad application of proposed § 2G3.1(b)(1), an additional enhancement for any distribution of obscene matter

between adults would be tantamount to raising the base offense level of § 2G3.1. A simple exchange between adults without the expectation of any gain or getting anything of value in return is currently appropriately accounted for in the guidelines.

Part B

Part B of amendment 3 invites comment on whether and how the Commission should amend the guidelines to cover a new offense that prohibits the use of the mail or any facility or means of a interstate commerce knowingly to transmit identifying information about a minor with intent to entice, encourage, offer, or solicit anyone to engage in prohibited sexual activity (18 U.S.C. § 2425). Part B would amend the Statutory Index to list § 2G1.1 (promoting prostitution or prohibited sexual conduct) as the guideline ordinarily applicable to an offense under 18 U.S.C. § 2425. We do not oppose doing that.

Section 2G1.1 contains three cross references, and many of the offenses that begin at § 2G1.1 end up being sentenced under another offense guideline. We recommend adding a fourth cross reference, which would take the sentencing court to § 2A6.1 (threatening or harassing communication) if the underlying conduct is not intended to induce sexual activity but to threaten or harass the victim or victim's family. For example, during a neighborhood feud, the defendant posted information on the internet about a neighbor's minor daughter and her fictional willingness to perform illegal sex acts. The defendant's intention was to harass the neighbor's family, not to foster illegal

sexual activity with the daughter. In such a situation, § 2A6.1 would be the more appropriate guideline.

Part C

There is a two-level enhancement under § 2G2.4(b)(2) "if the offense involved possessing ten or more . . . items, containing a visual depiction . . . ." Part C of amendment 3 would amend the commentary to § 2G2.4 (possession of child pornography) to clarify if an individual computer file is "item" for purposes of the enhancement in § 2G2.4(b)(2). The proposed amendment is consistent with the existing case law, and we do not oppose promulgating the amendment as drafted.

Part C also seeks comment upon whether to base the enhancement of § 2G2.4(b)(2) upon the number of visual depictions. We believe the Commission should not do so. As a practical matter, it would be difficult to quantify the amount of visual depictions and their harm. How would an enhancement compare "visual depictions" in a book or magazine to those in a film or video tape? Additionally, ten "visual depictions" from ten separate sexual acts would represent a greater harm than a hundred "visual depictions" from one sexual act. How many "visual depictions" are on a 15-minute film? Would a 20-minute film of one sexual act with one child be counted less than a 15-minute film with three different sexual acts and four children? Given these inherent difficulties, we believe the current clear guideline is the best approach. If the sentencing court determines that a guideline sentence is inadequate, the sentencing court can weigh the

type and quantity of the items and the number of sex acts and "visual depictions" involved and depart.

Part D

Part D of amendment 3 addresses the congressional directive to clarify that the term "distribution of pornography" applies to the distribution of pornography for both pecuniary gain and any nonpecuniary interest.[23] The proposed amendment modifies the distribution enhancement in the pornography trafficking guideline, § 2G2.2(b)(2), to apply if the distribution of child pornography was (1) for pecuniary gain; (2) for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain; or (3) to a minor. Part D also would add a two-level enhancement if the offense involved the knowing transfer of child pornography to a minor to persuade, induce, entice, coerce, or facilitate the transport of, that minor to engage in prohibited sexual conduct.

For the reasons stated in our comments on part A, we do not oppose the addition of an enhancement for the distribution of child pornography for the receipt or the expectation of the receipt of a thing of value, but not for pecuniary gain. Again for the reasons stated in our comments on part A, we recommend that § 2G2.2(b)(2)(B) be modified. We believe the commentary to § 2G2.2 should modified in the same way that we suggested modifying the commentary to § 2G3.1, to clarify that the enhancement

---

[23]Protection of Children from Sexual Predators Act of 1998, § 506, Pub. L. No. 105-314, 112 Stat. 2981.

applies only to quid pro quo understandings or transactions. The enhancement would then apply in the cases that most concern Congress and the courts, the bartering of child pornographic material. We agree that the child pornographic material is a "thing of value" and if received in a bartered exchange for other child pornographic material, an enhancement should apply.

Also for the reasons stated in our comments on part A, we believe that § 2G2.2(b)(2)(B) should be a three-level enhancement. Those defendants who engage in the distribution of child pornography for profit, the heartland of § 2G2.2(b)(2)(A), are more pernicious than individuals who are simply trading pictures, the heartland of § 2G2.2(b)(2)(B). The guidelines should reflect the graduated harm to society.

For the reasons stated in our comments on part A, there should not be an additional enhancement for an adult who transfers child pornography and receives or expects to receive nothing in return. The simple transfer of child pornography between adults with no expectation of gain is already appropriately accounted for in § 2G2.2. The proposed additional enhancement would be tantamount to an increase of the base offence level because all defendants would be subject to at least one enhancement under § 2G2.2(b)(2).

We believe, for the reasons set forth in our comments on part A, that § 2G2.2(b)(2)(C), the proposed five-level enhancement for the distribution of pornography to a minor, should be limited to distribution to individuals who are not at least 16 years old. An enhancement for distribution to individuals under the age of 16 would be

consistent with other enhancements in the sexual abuse guidelines and with the age of consent. Society has recognized the increased maturity of individuals who are 16 and 17 year old – they can work, operate automobiles, and consent to engage in sex. Thus, the transfer of child pornography to a 16- or 17-year old, by itself, does not warrant a five-level increase. Additionally, the two-level increase for the distribution of child pornography to entice a child to engage in prohibited sexual conduct is only appropriate if the child is not yet 16 years old. If the definition of minor uses age 18, the definition will be inconsistent with the offenses in 18 U.S.C. ch. 109A (sexual abuse), which do not proscribe consensual sex with an individual who is at least 16 years old. Our proposed modification would eliminate confusion and be consistent to other sexual abuse enhancements in the guidelines.

We also believe, again for reasons set forth in our comments on part A, that the cross reference to the fraud guideline should not be deleted from § 2G2.2(b)(2)(A) Section 2G2.2(b)(2)(A) addresses the problem of large-scale distribution for profit. The current cross reference is clear and applies a uniform, graduated penalty that increases with the size of the illegal operation.

Part E

Part E of amendment 3 responds to the congressional directive to provide for an "appropriate enhancement if the defendant used a computer with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child of an age specified in the

applicable provision of law . . . to engage in any prohibited sexual activity."[24] Part E also responds to a congressional directive that calls for an appropriate enhancement "if the defendant knowingly misrepresented the actual identity of the defendant with the intent to persuade, induce, entice coerce, or facilitate the transport of a child of an age specified in the applicable provision of law . . . to engage in any prohibited sexual activity.[25]

Part E would add a two-level enhancement in the sexual abuse guidelines, § 2A3.1 through § 2A3.4, and the prostitution and promotion of prohibited sexual conduct guideline, § 2G1.1. That enhancement would apply in either of two circumstances. First, the enhancement would apply if the offense involved the use of a computer, or other means, to contact the minor electronically, to persuade, induce, entice, coerce, or facilitate the transport of a minor to engage in prohibited sexual conduct. Second, the enhancement would apply if the offense involved the knowing misrepresentation of a criminal participant's identity, to persuade, induce, entice, coerce, or facilitate the transport of a minor to engage in any prohibited sexual conduct. The enhancement as proposed in part E treats these two factors as alternative grounds for applying the enhancement. The description of part E, however, indicates that the Commission "could chose to provide separate cumulative enhancements for these two types of offense conduct."

The proposed enhancement for use of a computer is in direct response to a

---

[24]*Id.* at § 503, 112 Stat. 2980.

[25]*Id.* at § 504, 112 Stat. 2981.

congressional directive. As noted in the staff report, the legislative history indicates that one of the main purposes of the Act was to increase the punishment for child stalking on the internet.[26] Congress was greatly concerned about the increased access to children provided by computer links to the internet.[27] The core purpose of the enhancement is to increase punishment for pedophiles who troll the internet for victims.

We do not oppose a two-level enhancement if a computer or other internet access device is used to locate children. The computer has facilitated their molestation in such circumstances. However, the proposed enhancement is too broad. As written, the enhancement would apply to the 19-year old who calls his 14-year old girlfriend to tell her his parents are out of the house and to come over, and to the 20-year old soldier who emails his 15-year old girlfriend. Congress did not intend for the enhancement to apply for simply using a telephone or when the individuals already know each other. Congress was concerned with the older defendant, who uses the internet to meet and gain access to a child.

For the reasons stated in our comments on parts A and D, any enhancement for use of a computer or other internet access device should not apply when the victim is more than 16-years old. This would consistent with the age of consent otherwise recognized in

---

[26]Sexual Predators Act Policy Team, U.S. Sentencing Comm'n, *Sentencing Federal Sexual Offenders: Protection of Children from Sexual Predators Act of 1998*, at 36 (Jan. 24, 2000).

[27]*See id.*

18 U.S.C. ch. 109A (sexual abuse). Due to the increased maturity and mobility of individuals who are 16- and 17-years old, the computer does not provided a greater access to older teenagers. They can drive, shop, play, and work on their own. Younger children tend to be home bound and under greater adult supervision. Thus, the computer provides increased access to young children that was not available before the advent of the internet.

We do not oppose a two-level enhancement for knowingly misrepresenting identity with the requisite intent, if that is an alternative basis for application of the enhancement. We believe the proposed language is ambiguous, however, because it does not define misrepresentation of identity with particularity.

The enhancement for misrepresentation of identity should only apply if the defendant makes an affirmative misrepresentation that is material. For example, it is common on the internet for individuals not to use their actual names but to go by pseudonyms. Such pseudonyms, because they are known in the relevant community as not being an actual representation of identity, should not be deemed a knowing misrepresentation. Likewise, a misrepresentation of description should call for application of the enhancement only if it is misleads the other party as to identity. For example, a 45-year old man identifying himself as a 15-year old boy should receive enhancement. A 25-year old man who describes himself as muscular, but who is actually flabby, should not receive the enhancement. We will be happy to work with the

Commission to develop language that appropriately describes the conduct that should be covered by the enhancement.

For the above reasons, we recommend that proposed §§ 2A3.1(b)(6), 2A3.2(b)(2), 2A3.3(b)(1), 2A3.4(b)(4), and 2G1.1(b)(4) be modified to state as follows (language we suggest be deleted is struck through; suggested new language in italic):

> If *with intent* to persuade, induce, entice, coerce, or facilitate the transport of, a minor to engage in prohibited sexual conduct, the offence involved: (A) the use of a computer, or other *internet access device*, to communicate with ~~the~~ *such minor*, or (B) the knowing misrepresentation of a participants identity, increase by [2] levels.

We also recommend the definition of "minor" use 16 as the age. If the Commission adopts our recommendation, the definition would read: "'Minor' means an individual who has not attained the age of 16 years." Adoption of that definition will eliminate confusion and unnecessary litigation, promote uniformity within the guidelines, and reduce unwarranted disparities in sentencing.

We believe that using a computer and misrepresentation of identity are both directed at the same problem – gaining access to children. For that reason, we believe they should not be cumulative enhancements. For example, under the rape guideline, § 2A3.1, there is no additional harm if a defendant use a computer and misrepresented his identity because that guideline already accounts for nonconsensual sex and the defendant

is already receiving an enhancement for his means of access to the victim.

If the Commission decides to make the enhancement cumulative, the only offense for which there might be justification is an offense covered by § 2A3.2. Only in § 2A3.2 is it possible for the use of computer and the misrepresentation of identity to address different harms and without double counting. If the misrepresentation of identity affected the issue of consent in a § 2A3.2 case, but not to the extent of making the offense a rape covered by § 2A3.1, an increased sentenced may be appropriate. We believe, however, that such cases are better dealt with by way of departure. We believe that a single enhancement with alternative grounds for applying the enhancement is the better policy.

Part E seeks comment on whether the misrepresentation of identity should be added to the enhancement in § 2G2.1(b)(3) that applies if a computer is used to solicit a minor's participation in sexually explicit conduct to produce sexually explicit material. It would seem to be a logical, consistent, and appropriate application of the guidelines and response to the congressional directives to do so. However, the use of a computer basis should be limited to using the computer to entice the child and not to creating the sexually explicit material. An enhancement for the knowing misrepresentation for a participant's identity would not be appropriate, consistent, or logical if it were added § 2G2.2, the guideline for trafficking in material involving the sexual exploitation of a minor. By definition, offenses sentenced under § 2G2.2 involve the trafficking of child pornography, not the inducing, enticing, coercing, persuading, or facilitating the transportation of a

child to engage in prohibited sexual conduct. The proposed enhancement of § 2G2.2(b)(2)(C), which would require a seven-level increase for any distribution of child pornography to a child with the intent to induce, entice, or persuade that child to engage in prohibited sexual conduct, will adequately punish those individuals who distribute child pornography with prurient intent to children.

AMENDMENT 4

Amendment 4 contains two options for responding to the Methamphetamine Trafficking Penalty Enhancement Act of 1998.[28] That Act reduced the quantity of actual methamphetamine and methamphetamine mixture that triggers both the five- and ten-year mandatory minimum prison terms. The Federal Public and Community Defenders support option 1.

Background

Shortly after Congress established a guideline-based sentencing system in the Sentencing Reform Act of 1984, and even before the Commission had drafted the initial set of guidelines, Congress enacted five- and ten-year mandatory-minimum penalties for drug-trafficking offenses.[29] These penalties applied to certain drugs, such as cocaine,

---

[28]Pub. L. No. 105-277, div. E, § 2, 112 Stat. 2681-759.

[29]Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207-2.

heroin, and marijuana, and were based on the quantity of "a mixture or substance containing a detectable amount" of the drug. Thus, the mandatory-minimum penalties enacted by Congress were determined by congressional evaluation of two factors, the nature of the drug (it takes 500 grams of cocaine to qualify for a five-year mandatory minimum but only 100 grams of heroin) and the quantity of the mixture (one grams of LSD qualifies for a five-year mandatory minimum, and 10 grams qualifies for a ten-year mandatory minimum).

Congress did not require that the Commission adopt the congressional evaluation of either the relative severity of the drugs or the amount of punishment to be assigned to a given amount of a drug. The Commission was not prevented from introducing another factor – purity of the drug (a factor that the Parole Commission had used, and continues to use, when deciding release dates for persons convicted of drug offenses).[30] The Commission, however, when constructing the drug quantity table, decided to use the congressional factors and the congressional evaluations of relative severity and quantity.[31]

The Commission set at offense level 26 the quantity of a mixture containing a given drug that was subject to a five-year mandatory minimum. Thus, for example, the drug quantity table assigns offense level 26 to an offense involving 500 grams of a

---

[30]*See* 28 C.F.R. § 2.20.

[31]See U.S.S.G. § 2D1.1, comment. (backg'd). *See generally* Ronnie M. Scotkin, *The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses*, 26 Crim. L. Bull. 50 (1990).

mixture containing cocaine. For a criminal history category I offender, that results in a guideline range of 63-78 months. The Commission set at offense level 32 the quantity of a mixture containing a given drug that was subject to a ten-year mandatory minimum. The drug quantity table, therefore, assigns offense level 32 to an offense involving 10 grams of LSD. For a criminal history category I defendant, that results in a guideline range of 121-151 months. Using the starting points of offense levels 26 and 32, and the quantities assigned to those levels, the Commission expanded the table upwards and downwards to provide for offenses that involved greater or lesser quantities of the drug.[32]

The Commission, as noted above, could have taken a different approach. The Commission could have developed an empirically-based guideline. After gathering data and information from a wide variety of sources, the Commission – free from the emotions and passions of the political arena – could have independently determined the appropriate factors to us to determine the severity of a drug-trafficking offense.

The statutory penalty structure for methamphetamine, enacted in 1988 – unlike the statutory penalty for all other drugs except PCP – distinguishes between

---

[32]For drugs for which Congress did not enact a mandatory minimum, the Commission set offense levels using the congressional factor of the weight of a mixture or substance containing that drug. The Commission assigned offenses levels to some such drugs by their relationship to drugs for which there was a mandatory minimum. Schedule I and II hallucinogens were treated like LSD, for example. For a drug not dealt with in that manner, the Commission considered the nature of the other substances in the drug's category, the drug's potential for abuse, and the statutory maximum. *See id.* at 54-55.

methamphetamine and methamphetamine mixtures.[33] For methamphetamine, only the quantity of pure methamphetamine is used to determine if the mandatory minimum applies; with the latter, the quantity of the mixture containing the methamphetamine is used.[34] The following chart shows the mandatory-minimum quantities as originally established in 1988.[35]

---

[33]Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6470(g),102 Stat. 4378. *See* 21 U.S.C. § 841(B)(1)(a)(iv), (b)(iv) (PCP penalties).

[34]For example, assume that a mixture weighing 100 grams contains methamphetamine of 25% purity. For purposes of determining if a mandatory minimum applies, the court would use 100 grams of a methamphetamine mixture and 25 grams of methamphetamine.

In 1990, Congress became concerned about "ice," a crystalline form of methamphetamine that typically was 80-90% pure and could be smoked. The Crime Control Act of 1990, Pub. L. No. 101-647, § 2701, 104 Stat. 4912, directed the Commission to increase punishment for offenses involving ice. The Commission responded by treating ice as pure methamphetamine, even though ice is not pure methamphetamine. U.S.S.G. App. C, amend. 370.

[35]Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6470(g),102 Stat. 4378. The chart shows the ten-year quantity for a methamphetamine mixture as one kilogram, even though the Anti-Drug Abuse Act of 1988, by mistake, sets 100 grams as the ten-year quantity. The Crime Control Act of 1990, Pub. L. No. 101-647, § 1202, 104 Stat. 483, corrected the mistake by changing 100 grams to one kilogram. (The caption of § 1202 of the Crime Control Act of 1990 is "Correction of an Error Relating to the Quantity of Methamphetamine Necessary to Trigger a Mandatory Minimum Penalty.")

Methamphetamine Quantities Originally Triggering Mandatory Minimum

	5-year Mandatory	10-year Mandatory
Actual Methamphetamine	10 grams	100 grams
Methamphetamine Mixture	100 grams	1 kilogram

Congress revised the methamphetamine penalties in the Methamphetamine Trafficking Penalty Enhancement Act of 1998 by reducing the quantity that triggers the mandatory minimums.[36] This chart shows the mandatory-minimum quantities after the change made by that Act:

Methamphetamine Quantities Now Triggering Mandatory Minimum

	5-year Mandatory	10-year Mandatory
Actual Methamphetamine	5 grams	50 grams
Methamphetamine Mixture	50 grams	500 grams

For purposes of the drug quantity table, the Commission has distinguished between "methamphetamine" and "methamphetamine (actual)." The term "methamphetamine" does not have the statutory meaning of pure methamphetamine but means a mixture or substance containing methamphetamine. The term "methamphetamine (actual)" means

---

[36]Pub. L. No. 105-277, div. E, § 2, 112 Stat. 2681-759.

pure methamphetamine. For example, a 100 gram mixture of 20% pure methamphetamine constitutes, for guideline purposes, 100 grams of methamphetamine and 20 grams of methamphetamine (actual).[37] As noted above, the Commission places at level 26 the minimum quantity necessary to trigger a five-year mandatory minimum and at level 32 the minimum quantity necessary to trigger a ten-year mandatory minimum. This chart shows how the guidelines presently treat methamphetamine quantity:

Guideline Quantities for Offense Levels Corresponding to Mandatory Minimums

	Level 26	Level 32
Actual Methamphetamine	10 grams	100 grams
Methamphetamine Mixture	50 grams	500 grams

The guidelines, therefore, already use statutory quantities for mixture containing methamphetamine. The guidelines, however, do not use the statutory quantities for pure methamphetamine.

---

[37]Because the statutory terms and the guideline terms differ, there can be confusion unless the context in which the term is used is specified. For example, 25 grams of "methamphetamine" means, for statutory purposes, 25 grams of pure methamphetamine and means, for guideline purposes, 25 grams of a mixture containing methamphetamine.

Our Recommendations

The Options

Amendment 4 has two options. Option 1 would amend the drug quantity table to conform the actual methamphetamine quantity to the levels set by the Methamphetamine Trafficking Penalty Enhancement Act of 1998. Option 2 would significantly alter the treatment of methamphetamine by requiring that the quantity for all methamphetamine offenses be based upon actual methamphetamine. For cases in which the purity is unknown or undeterminable, option 2 would presume a standard purity that would be set forth in the commentary.[38]

Option 1 brings the guidelines into harmony with the statutory provisions and is the simplest way to comply with the congressional mandate. Option 2 would abandon the congressional distinction between pure methamphetamine and methamphetamine mixtures. If adopted, option 2 will produce situations in which the guideline sentence will be trumped by the mandatory minimum.[39] In addition, option 2 requires the Commission to formulate a presumptive purity for cases in which the purity is unknown

---

[38]Option 2 would continue to treat ice as if 100% pure methamphetamine.

[39]For example, the defendant is accountable for a 50 gram mixture containing methamphetamine at a 5% purity. Under option 2, the quantity used is 2.5 grams (5% of 50), which yields an offense level of 20. Assuming that there are no adjustments and the defendant is in criminal history category I, the applicable guideline range would be 33-41 months. Under 21 U.S.C. § 841(b)(1)(B)(viii), however, the mandatory minimum is 60 months because 50 grams of a methamphetamine mixture is involved.

or cannot be determined – no easy task. Should there be a single national standard, representing the average purity of all methamphetamine seized throughout the country? Should there be a standard by judicial circuit, by judicial district, by region of the country, or by state, representing the average purity of all methamphetamine seized within that area? Any of those approaches will under-punish defendants in areas where the purity is highest and over-punish defendants in areas where purity is lowest. In computing the average, how far back should the Commission (or court) look – 6 months, one year, three years, or more? Should the standard be to presume that the purity is the same as the purity of any mixture for which the purity is known and for which the defendant is accountable and look only to another standard if the purity is unknown for the entire quantity for which the defendant is accountable?

We believe that the Commission should adopt option 1. However, we also believe that the Commission ought to undertake a comprehensive reexamination of the drug quantity table and reconsider whether the drug quantity table should be tied to the congressionally-determined quantities that trigger mandatory minimums.

Issue for Comment

It is difficult to comment about the need to change the drug equivalency table in § 2D1.11 with respect to phenylacetone/P2P possessed for manufacturing methamphetamine. Nothing in the *Guidelines Manual* explains how the present ratio was set and how the ratio for phenylacetone/P2P possessed for manufacturing

methamphetamine should relate to the ratios for actual methamphetamine and methamphetamine mixture.[40] The same is true with respect to the chemicals listed in the chemical equivalency table of § 2D1.11. We do not see a need at this time to recalculate the equivalencies for phenylacetone/P2P possessed for manufacturing methamphetamine in the drug equivalency table of § 2D1.1 or to change the chemical quantity table of § 2D1.11 for chemicals listed in that table that are used to manufacture methamphetamine.

AMENDMENT 5

Amendment 5 presents two options for implementing the Identity Theft and Assumption Deterrence Act of 1998[41] and several issues for comment.

Background

The Identity Theft and Assumption Deterrence Act of 1998 amended 18 U.S.C. § 1028 (fraud and related activity in connection with identification documents and information). Section 1028(a)(7) makes it an offense knowingly to transfer or use, without authorization, another person's "means of identification," with intent to commit,

---

[40]At present, one gram of actual methamphetamine is equivalent to 10 kilograms of marijuana, one gram of methamphetamine mixture is equivalent to 2 kilograms of marijuana, and one gram of phenylacetone/P2P (when possessed for manufacturing methamphetamine) is equivalent to 416 grams of marijuana. If option 1 is adopted, the actual methamphetamine equivalency for one gram becomes 20 kilograms of marijuana.

[41]Pub. L. No. 105-318, 112 Stat. 3007.

or to aid the commission of, a federal offense or a state felony.[42] A "means of identification" is defined in section 1028(d)(3) to be, in essence, personal data about an individual.[43] Thus, it is an offense for A to use B's personal data (such as name, social security number, and date of birth) to obtain a credit card in B's name with the intention of using that credit card to make purchases that A will not pay for. By providing B's personal data to the credit card issuer A has used, without authorization, a "means of identification."[44]

The Act directs the Commission to "review and amend" the guidelines "to provide an appropriate penalty for each offense under" 18 U.S.C. § 1028.[45] The Act also directs the Commission, in carrying out this task, to consider seven specific factors, as well as "any other factor that the United States Sentencing Commission considers to be appropriate."[46]

---

[42]Enacted by *id.* at § 3.

[43]"[T]he term 'means of identification' means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual . . . ." 18 U.S.C. § 1028(d)(3). The definition lists as examples a name, social security number, date of birth, fingerprint, and an electronic serial number or other number or signal identifying a specific telecommunications instrument or account. *Id.*

[44]The credit card is a means of identification under 18 U.S.C. § 1028(d)(3) because it contains information (name and account number) that can be used, in conjunction with other information, to identify a specific individual.

[45]Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, § 4(a), 112 Stat. 3007.

[46]*Id.*

The offense guideline applicable to violations of section 1028 is § 2F1.1, the fraud guideline, which has a base offense level of 6. Of the seven separate enhancements in the fraud guideline, the ones that would seem to be applicable to nearly all identity-theft offenses are the enhancements for loss (from one to 18 levels), for more-than-minimal planning or defrauding more than one victim (two levels), and for use of sophisticated means (two levels with a floor of level 12).

The Options

Option 1

Option 1 would add a new enhancement to the fraud guideline. The enhancement – two levels with a floor of levels 10-13 (the level to be decided) – would apply in two circumstances. The first circumstance is that the offense involved use of "identifying information" of an "individual victim" to make an "unauthorized identification means" of that victim. The option defines "identifying information" to be "means of identification" as that term is used in section 1028 – i.e., personal data about another person. The option defines "unauthorized identification means" to be "any identifying information that has been obtained or made from any other identifying information without the authorization of the individual victim whose identifying information appears on, or as part of, that unauthorized identification means."[47] This enhancement would apply to A in the above

[47]There may be a problem with the definition as presently drafted. The definition seems to contemplate that the unauthorized identification means is something tangible (the information must appear "on, or as part of," something), but nothing tangible is

example because A, without authorization, used B's personal data to get an unauthorized identification means (the credit card).

The second circumstance in which the enhancement applies is if the offense involved possession of five (number to be decided) or more "unauthorized identification means." This enhancement would apply to A in the above example if A had obtained five credit cards by using the personal data of other persons without authorization.

Option 2 also would add commentary indicating that "an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense." The new commentary sets forth two examples. One is that the individual victim is wrongly arrested or denied a job because of the defendant's offense, and the other is that the defendant made numerous unauthorized identification means of a single individual victim, to the extent that the defendant "essentially assum[ed] and liv[ed] under that victim's identity."

Option 2

Option 2 would add two new enhancements to the fraud guideline. The first new enhancement – two levels with a floor of 10 or 12 (to be decided) – applies if the offense involved (A) harm to an individual's reputation or credit standing, inconvenience related

---

mentioned in the definition. We think the intended definition probably is something like "*a tangible item that contains* any identifying information that has been obtained or made from any other identifying information without the authorization of the individual victim whose identifying information appears on, or as part of, that unauthorized identification means."

to the correction of records or restoration of an individual's reputation or credit standing, or similar difficulties; and (B) the harm, inconvenience, or difficulties were "more than minimal." The proposed new commentary does not define "more than minimal" but does state that "neither an individual's speculation about potential harm to his or her reputation or credit standing nor a single, negative credit entry that was corrected in a short time would qualify for the 2-level adjustment under this subsection, but a showing of multiple, negative credit entries or a poor credit rating would."

The other new enhancement – two levels – applies if the offense involves the production or transfer of six or more "identification documents," "false identification documents," or "means of identification." That enhancement does not apply, however, if the offense level is enhanced for loss. The option does not define "identification document" and "means of identification," but those terms are defined in section 1028. We assume that the statutory definition would apply.[48] An "identification document" is a document issued by a government that is of a type commonly accepted for the purpose of identifying an individual – a driver's license, for example.[49]

The new commentary does not define the term "false identification document" and neither does section 1028. The lack of a definition in the new commentary renders the

---

[48]If the Commission were to adopt this option, we suggest that commentary be added either specifically adopting the statutory definition or providing a different definition for use with the fraud guideline.

[49]18 U.S.C. § 1028(d)(2).