the criminal conduct is part of an ongoing commercial organization or enterprise, (2) aliens were transported in groups of 10 or more, *and* (3) aliens were transported in a manner that either endangered their life or a presented a life-threatening health risk to people in the United States. We are asked to comment on the proposed options.

As noted, the new statutory enhancement *does not* apply if *only one* of these three elements is met. This fact points squarely against the Commission's options that would add an enhancement or departure any time only one of these elements (an "ongoing commercial organization") exists. If the statute itself is strong on this, the legislative history is even stronger. The Commission should know that, in an earlier, rejected version of what became Pub. L. 108-458, the House of Representatives had suggested applying this enhancement if any one of these elements applied. *See* H. Rep. No. 108-724 (Part 5), at 69 (then-§ 3041 would have allowed 10-year enhancement if any element existed). That "disjunctive" suggestion was rejected by Conference Committee, with Congress instead passing a law applying the enhancement only in the conjunctive – i.e., only when all three of these elements exist. If the Commission were to enact a new sentencing enhancement that applied whenever an "ongoing commercial organization" is found, it would essentially codify the rejected House approach. The guidelines instead should be modified to enact the final law that Congress passed. In implementing § 5401, the Commission should adopt only proposed Option One, or the Option Three alternative requiring a conviction under 8 U.S.C. § 1324(a)(4).[10]

If the Commission follows this approach, it will also gain the benefit of no longer needing to define "ongoing commercial organization," since an enhancement would only apply if a defendant is found guilty under § 1324(a)(4) (and an "ongoing commercial organization" is found by a jury or via a guilty plea). In any event, however, PAG responds to the Issue for Comment by discouraging any new definition of "ongoing commercial organization." As the Commission notes, the Act did not define the term, and PAG has not located any legislative history that elucidates its meaning. The Commission would essentially be creating a definition from scratch, and before the courts have faced real-world examples that might put meat on these bones. In sum, even if the Commission were inclined to define an "ongoing commercial organization," it would be wise at least to wait until some facts and a real dispute (or circuit conflict) develop instead of trying to establish artificial parameters in the abstract at this time.

On the other proposed amendments, PAG notes a few additional concerns, particularly given the breadth of some of these directives. For example, in implementing § 6903 of the Act, the Commission plans to reference only U.S.S.G. § 2K2.1, since the weapons described "would seem to be covered as destructive devices under 26 U.S.C. § 5845(a)." If they are indeed covered by § 5845(a), PAG does not oppose the suggested reference to § 2K2.1, but PAG must note that § 6903 of the Act also punishes "any part

[10] Tracking the statute will also avoid potential double-counting concerns that would otherwise arise if a defendant received an enhancement for being part of an "ongoing commercial organization" and then other, seemingly-similar adjustments under § 3B1.1 (aggravating role) or § 4B1.4 (criminal livelihood) as well.

or combination of parts" used in "fabricating" a rocket or missile – items that would clearly seem to fall outside of § 5845(a). In such circumstances, the Commission at least should allow for a downward departure. Similarly, under the Commission's proposed implementation of § 6803 of the Act, we question whether providing "material support or resources" is always as culpable as the direct development of the weapons themselves. The divergent statutory maximums (20 years v. life) suggests they are not, yet the Commission suggests that all 18 U.S.C. § 832 convictions must be referenced only to U.S.S.G. § 2M6.1. PAG suggests instead that 18 U.S.C. § 832 be cross-referenced to both § 2M6.1 and § 2M6.2, or at least that a downward departure option be considered.

Finally, on the Commission's implementation of § 6702 of the Act, PAG has no objection to the proposed referral to U.S.S.G. § 2A6.1, but does not understand the proposed cross-reference to § 2M6.1. This new law involves "hoaxes" – where there is, by definition, no intent to carry out a threat. The proposed cross-reference, by contrast, would apply § 2M6.1 when there is "an intent to carry out a threat." In other words, the proposed change does not appear to be an implementation of § 6702 of the Act at all. It instead appears to be a general broadening of 2M6.1's application to cover offenses previously covered by § 2A6.1.

8. Proposed Guideline Amendments on False Domain Names

The Commission proposes to create a new U.S.S.G. § 3C1.3, in an effort to implement the directive in § 204(b) of Pub. L. 108-482. The Commission proposes an increase of 1-4 levels, with no indication of which increase might be chosen, or why.

PAG suggests that any increase should not exceed 2 levels. A higher increase would actually be inconsistent with Pub. L. 108-482, since at the high end of the guidelines (such as an Offense Level 32 with a Criminal History Category VI), a 4-level increase would increase ranges more than 7 years, despite the 7-year cap on increases in the statutory maximum established in the Act's § 204(a). PAG also notes the Commission's recently-proposed 2-level increase for steroids "masking." PAG sees some logic in treating "masking" and hiding one's identity through false domain names as similar, and accordingly believes that any increase here should not exceed 2 levels.

Finally, as the introduction to the Commission's proposed amendment notes, the statute only directs the Commission to establish this enhancements when an underlying "felony" offense is "furthered" through false domain names. Consistent with this statutory directive, the amendment should be changed to clarify that any enhancement does not apply to misdemeanors, and that the underlying offense must be "furthered" by the false domain name before this enhancement can be applied.

9. Proposed Guideline Amendments for "Miscellaneous Laws"

PAG submits two comments to the Commission's proposed "Miscellaneous" changes, the first of which relates to the new proposed Class A Misdemeanor guideline.

PAG believes that a general misdemeanor base offense level of 4, rather than 6, is appropriate. There are several reasons for this. First, the guidelines have historically been structured in ways that preserve a benefit to defendants who accept responsibility. The newly-proposed misdemeanor guideline, U.S.S.G. § 2X5.2, would start at an Offense Level of 6, and then add 2 points for a person who had committed the same offense before.[11] A Category VI offender in this situation would find no guideline benefit at all to pleading guilty in an effort to gain an acceptance of responsibility adjustment, since this would only move him to a 12-18 month range (still in Zone D). Starting at 4 (or even 5), by contrast, would preserve these traditional guideline incentives of skipping a trial. Second, PAG believes the Commission should recognize, and codify, the fundamental difference between a misdemeanor and a felony. Congress has made a formal classification decision that misdemeanors are simply not the same as felonies. The guidelines' catch-all misdemeanor guideline should reflect that difference. The Commission is proposing that this guideline will apply only to misdemeanors not already covered by another guideline, suggesting that it will be used with many unusual regulatory violations. PAG submits that it is simply illogical to start these types of documentation-type offenses at the same base offense level as Class C and D felony thefts and frauds, for example. Regulatory offenses involving controlled substances in U.S.S.G. § 2D3.2, for example, have a Base Level of 4, and PAG believes that is where this catch-all Class A Misdemeanor guideline should start as well. The new guideline would then be in line with numerous similar offenses. *See, e.g.*, U.S.S.G. § 2A2.3 (Base Offense Level 3 for some forms of Minor Assault); § 2B2.3 (Base Offense Level 4 for Criminal Trespass); § 2J1.5 (Base Offense Level of 4 for a material witness' failure to appear at a misdemeanor trial); § 2P1.2 (Base Offense Level of 4 for providing or possessing certain contraband in prison); § 2T1.7 (Base Level of 4 for Failing to Deposit Collected Taxes in Trust Account as Required After Notice); § 2T1.8 (Base Offense Level of 4 for Offenses Relating to Withholding Statements); § 2T2.2 (Base Offense Level of 4 for Regulatory Offenses); § 2T3.1 (Base Offense Level of 4 for smuggling if the tax loss does not exceed $100).

Second, PAG wishes to comment on the two options proposed for Plant Protection Act ("PPA") sentences. PAG does not believe that a new specific offense characteristic is necessary here, especially given the expected infrequency of PPA prosecutions, which the Commission concedes. At most, the Commission should adopt Option Two's establishment of an encouraged upward departure in PPA cases, especially given the wide array of divergent plants (ranging from biological control organisms down to far less significant plants) that may fall within the parameters of the PPA, and the need for judges to factor those into departure decisions. Unfair disparities would arise from lumping all such plants together into a single and uniform specific offense characteristic.

[11] PAG does not object to the general concept of adding 2 offense levels when a defendant has committed the same misdemeanor before, but as noted, believes this adjustment fits into the general guidelines scheme only if the starting point for Class A misdemeanors is placed at a Base Offense Level of 5.

10. Proposed Guideline Amendments Relating to "Application Issues"

The Commission proposes to create a new U.S.S.G. § 3C1.3 for Offenses Committed While on Release, eliminating § 2J1.7. Although PAG does not object generally to the movement of this guideline to Chapter 3, we do object to the proposed elimination of § 2J1.7's background commentary. Among other things, the existing commentary notes that, although a court should impose a consecutive sentence, "there is no requirement as to any minimum term." That analysis, gleaned from § 3147's legislative history, has been the law and remains the law, yet the proposed amendment would eliminate it. PAG is concerned that this elimination may be improperly construed as a substantive change in the law where none (according to the Commission's explanations for its amendment in a mere "Application" change) was intended. PAG believes that § 2J1.7's background comment should be carried forward to § 3C1.3.

Carrying forward the background commentary would also properly continue the Commission's notice requirement. The Commission claims that "[t]he majority of circuit courts have found that there is no notice requirement in order for 18 U.S.C. § 3147 to apply." But this statement ignores that two very different types of "notice" issues that these circuits have discussed. As the circuits note, cases raising § 3147 and § 2J1.7 issues involve both "pre-release" and "pre-sentencing" notice. "Pre-release" notice arguments have claimed that a defendant might avoid § 3147's enhancement if a defendant did not receive notice of the possibility of additional punishment when released, either on an earlier offense or at the time bond was granted. PAG acknowledges that a majority of circuits have rejected this argument as inconsistent with the mandatory requirements of § 3147 itself. As Judge (now Justice) Alito explained:

> We read the commentary to mandate, not pre-release notice in the first case, but simply pre-sentencing notice in the second case.

United States v. Hecht, 212 F.3d 847, 849 (3d Cir. 2000). This distinction is important, however, for it explains why the subject commentary is worth keeping, even if the Commission believes (as it reasonably may) that this commentary should be clarified so that judges know that only "pre-sentencing" notice is required. To PAG's knowledge, *no circuit* has ever held that "pre-sentencing" notice is unnecessary in this context. And PAG submits that such "pre-sentencing" notice serves a highly useful function here. When a § 3147 enhancement is applied, defendants are being hit with a sentencing enhancement based on another, wholly collateral "offense." In this context, defense counsel should be given advance notice of the possibility of this enhancement, so that counsel can investigate the sometimes-complicated underlying facts of an entirely different offense, and then present whatever relevant arguments may be gleaned, so that the Court can reach a more-informed judgment on what sentence is fair and just. In short, defendants and their counsel should not be surprised at sentencing by an enhancement based upon another "offense" about which they had no earlier notice. The Commission

should keep its notice requirement, and at most clarify that it is intended to require only pre-sentence notice akin to what is required when an upward departure is sought.

11. 3C1.1 (Obstruction of Administration of Justice) Circuit Conflicts

The Commission has proposed certain changes to the text and commentary of Section 3C1.1 (Obstructing or Impeding the Administration of Justice). PAG believes the Commission should adhere to the approach, clarified in 1998 through amendment 581, that this guideline does *not* apply to pre-investigative conduct. The proposed change to expand the guideline to pre-investigative is both unnecessary and unwise. Unnecessary, because the purported circuit conflict that has prompted the proposal is not as significant as appears at first blush and could be cured by re-affirmation of the 1998 clarifying amendment. And unwise, because the amendment would create thorny applicability issues that are likely to produce more, rather than less, unwarranted sentence disparity. We also believe that the Commission's proposed new examples of "covered conduct" are in tension with the definition of obstructive conduct found in the text of the guideline itself, and these new examples would unduly complicate sentencing proceedings. To the extent the conduct mentioned in these examples occurs in individual cases, the sentencing judges and others have sufficient and more desirable options for addressing that conduct.

The synopsis of the proposed amendment to Section 3C1.1 states that it addresses a circuit conflict regarding whether pre-investigative conduct can form the basis for the 2-level enhancement. But the Commission has already addressed and resolved the stated conflict. In 1998, the Commission added a new application note to the guideline which reads, in part: "This adjustment applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction . . . ." The stated purpose of this amendment was to "clarify the temporal element of the obstruction guideline (*i.e.*, that the obstructive conduct must occur during the investigation, prosecution, or sentencing, of the defendant's offense of conviction)." USSG, App. C (Amendment 581).

Although the synopsis of the proposed 2006 amendment identifies four circuits that "have concluded that pre-investigative conduct can be used to support an obstruction enhancement," not one of those cases applied the 1998 clarifying amendment to the facts before it. The case from the D.C. Circuit was decided in 1991. *See United States v. Barry*, 938 F.2d 1327 (D.C. Cir. 1991). The Tenth Circuit case, decided shortly after the 1998 amendment went into effect, merely relied on a pre-1998 case to hold that the enhancement can apply where the defendant is aware of an "impending investigation"; the court made no mention of the effect of the 1998 amendment on the pre-1998 ruling. *See United States v. Mills*, 194 F.3d 1108, 115 (10th Cir. 1999). The Seventh Circuit case, also decided in 1999, noted the promulgation of the 1998 amendment but found it "need not resolve" whether it precludes an enhancement "when the obstructive conduct occurs before any investigation has begun," because the defendant in that case engaged in (and continued) the threatening conduct after the investigation had begun. *United States v. Snyder*, 189 F.3d 640, 649 (7th Cir. 1999). Finally, the First Circuit case mentioned in

the synopsis relied on a pre-1998 case, in addition to *Mills* and *Barry*, *supra*, again without discussing or even acknowledging the 1998 clarifying amendment. *See United States v. McGovern*, 329 F.3d 247, 252 (1st Cir. 2003).

The Commission made the right decision in 1998 when it added language expressly limiting the enhancement to post investigative conduct, and it should not reverse course now. Not surprisingly, most criminals try to avoid getting caught. They do so in a number of ways. Some take steps to shield their identity when they are committing or concluding their offense (*e.g.*, using false identities, disguises or convoluted transactions that make conduct difficult to trace, or destroying a paper trail that would otherwise lead back to themselves). Some endeavor to hide the fact that a crime has occurred. in the hope either that the victim will not realize there is anything to report or that the government will never know there is something to investigate (*e.g.*, structuring a fraudulent investment to make it appear that losses to investors had an innocent explanation). And so on. It is therefore very difficult to draw a predictable line between conduct that is part and parcel of the offense and conduct designed to "prevent" or "hinder" the investigation, prosecution or sentencing of the offense. On which side of the line should the sentencing judge put the structuring of a securities fraud to make it look like the drop in price was the result of market forces, or the disposal of clothing immediately after a bank robbery? By abandoning a clear and logical temporal line – the start of the official investigation – the Commission would be inviting individual judges to draw different lines. Without any logical guidance, the inevitable result is unwarranted disparity.

There undoubtedly will continue to be cases from time to time where pre-investigation conduct designed to prevent or hinder deserves an incremental level of punishment. One of types of conduct that the Commission's proposal would add to application note 4 is a good example. The Commission has proposed making explicit that the obstruction enhancement applies to defendants who make threats to a victim for the purpose of "prevent[ing] the victim from reporting the conduct constituting the offense of conviction." A threat designed to prevent an investigation is usually worthy of enhanced punishment because it results in a separate and tangible psychic harm to another person. In order to address examples like this, the Commission should encourage a higher sentence, perhaps through a departure, as is done with other guideline provisions. But it should not expand the scope of the guideline to cover pre-investigative conduct.

In addition to "victim threats," the Commission has proposed two other categories to add to its list of "Examples of Covered Conduct" in application note 4 to the guideline. Neither should be adopted. New application note 4(l) would include within the guideline "making false statements on a financial affidavit in order to obtain court-appointed counsel." The main problem with this "example" is that the conduct described does not satisfy one of the elements of the enhancement. That is, to receive the enhancement the defendant's object must be to "obstruct" or "impede" the administration of justice. As the Second Circuit has correctly noted, the defendant who lies on a financial affidavit is "not seeking to prevent justice or even delay it." *United States v. Khimchiachvili*, 372

F.3d 75, 80 (2d Cir. 2004). Rather, he is trying to avoid paying his legal fees. *Id.* When the Commission uses, as an example of obstruction, conduct that by its nature does not meet the provision's definition of obstruction, it runs the risk that judges will apply the "object to obstruct or impede" requirement in an inconsistent manner when dealing with other types of allegedly obstructive conduct.

A further problem with this proposed example is that it is likely to cause significant disruption in those cases where the example is invoked. If the government or the probation department alleges that the defendant made false statements to qualify for appointment of the lawyer who has been representing him in the criminal case, that attorney will likely be unable to continue representing the defendant due to a conflict of interest. As a result, new counsel would need to be brought in very late in the case to complete the criminal proceedings, resulting in delay and even greater public expense. This problem is readily avoided. There are a number of ways the courts can remedy lies on a financial affidavit, including separate contempt proceedings. PAG is also unaware of any showing that this type of problem has become both widespread and incapable of redress in those other ways.

The other example that would be added under the proposed amendment is similarly flawed. It would recognize, as an example of obstruction, perjury "during the course of a civil proceeding pertaining to conduct constituting the offense of conviction." The first problem, again, is that the conduct described in the proposed example is not really an "example" of what the guideline covers. Perjury in a civil proceeding, even where the subject matter of the criminal case is identical, does not by its nature obstruct or impede the administration of justice during the course of the investigation, prosecution or sentencing of the instant offense of conviction, nor is such perjury necessarily "related to" the offense of conviction or other closely related offenses (even though the subject matter of the testimony may in fact be "related"). If the new example is meant to enhance the sentence for defendants who perjure themselves in a civil case in order to thwart the criminal investigation, the proposed amendment needs to be rewritten. It should read: "(b) committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding pertaining to conduct constituting the offense of conviction, with the intent to obstruct or impede the criminal investigation, prosecution or sentencing." (Proposed new language underscored).

To expand the scope of Section 3C1.1 perjury, as proposed in application note 4(b), would do more than conflict with the limiting language of the guideline itself. It would unnecessarily complicate the sentencing process by requiring the judge presiding over the criminal case to assess the impact on "the administration of justice" of alleged perjury that occurred in a separate non-criminal proceeding with which the judge may have little or no familiarity. For example, the sentencing judge would need to review substantially all of the record in a state court private civil suit before he could determine whether the defendant's alleged perjury was an attempt to obstruct or impede the administration of justice in that other proceeding. Even if perjury in civil proceedings that "pertain to conduct constituting the offense of conviction" is common enough to warrant separate mention in the guidelines – a point for which we have seen no data – the

officials that preside over these other proceedings, and the prosecutors with jurisdiction over perjury offenses committed in those tribunals, are well equipped to attach consequences to such misconduct.

In sum, the proposed changes to the obstruction guideline are not needed, would generate little benefit, and impose high costs on the system. PAG urges the Commission to reject these proposals. Instead, the Commission should revise the commentary of Section 3C1.1 to reiterate that the provision applies only to post-investigation conduct. If sufficient evidence is available that judges do not properly account for those instances of pre-investigation obstructive conduct that are outside the heartland (such as threats of physical violence for reporting an offense), the Commission may wish to add language to the commentary recognizing that a departure of up to two levels is available in unusual cases. *Cf.* USSG §§ 2A2.4, comment. (n.3) (encouraging upward departure under offense guidelines for obstructing or impeding officers where substantial interference with government function results) 2B1.1, comment. (n.19) (encouraging upward departures for various reasons where fraud and theft guideline understates seriousness of the offense); 2C1.1, comment. (n.7) (encouraging upward departure where amount paid in bribery case understates seriousness of offense); 2Q1.2, comment. (nn. 4-9) (encouraging various guided departures for environmental offenses).

12. <u>Chapter Eight (Privilege Waiver)</u>

The Commission has solicited comment on whether it should modify or replace the following sentence from the commentary to U.S.S.G. § 8C2.5:

> Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) [Self-Reporting, Cooperation, and Acceptance of Responsibility] unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.

PAG believes that this sentence should be deleted from Chapter 8 and that the Commission should state, either in the commentary or in the Reasons For Amendment, that the purpose of the change is to establish that an organization's decision whether to waive the attorney-client privilege or work product protections is not a factor for the court to consider in calculating an organization's culpability score. Such an amendment would harmonize U.S.S.G. § 8C2.5(g) with corresponding guideline provisions applicable to individuals – specifically, U.S.S.G. §§ 3E1.1 & 5K1.1 – and would thereby reduce the undue pressure currently placed on organizations to waive these paramount privileges and protections.

A number of diverse groups, including those that provided testimony and written submissions in October 2005, have already offered extensive input on the problems caused by the waiver language in the commentary to § 8C2.5. PAG concurs in the views expressed by these groups. In particular, we echo their reminder of the special status held

by the attorney-client privilege and work-product protections. The attorney-client privilege, in particular, is an irreplaceable element of the American legal system. Without a vibrant privilege, individuals are less likely to seek advice of counsel on how to comply with the law and less likely to report questionable conduct in a timely manner, if at all. Waiver of the privilege in any particular case has negative consequences well beyond that proceeding. In the corporate context, the privilege works – and can only work – if employees and officers can be reasonably certain that the promise of confidentiality will be kept, or at least that a decision by others in the corporation to waive the privilege will not be coerced. The language found in Chapter 8, however, has resulted in greater pressure on organizations to waive the attorney-client privilege and work product protections in order to satisfy government investigators. For that reason, we endorse the recommendation of the American Bar Association that the waiver language be replaced.

It is apparent from the wording of the commentary that the Commission made a good faith attempt in 2004 to strike a balance between promotion of the attorney-client privilege and work product protections on the one hand, and legitimate law enforcement objectives on the other. In practice, however, this language has the unintended consequence of placing undue pressure on organizations to waive such privilege and protections at the early stages of an administrative, civil or criminal investigation.

The problem lies in the inherent inability of organizations to know, until it is too late, whether waiver is needed to satisfy the requirements for a reduced sentence. The commentary makes waiver a prerequisite to reductions in the culpability score for self-reporting and cooperation (along with acceptance of responsibility) if "such waiver is necessary" to provide "timely" and "thorough" disclosure of "all pertinent information known to the organization." Because the commentary requires disclosure in a "timely" manner, the organization must make its decision whether to turn over the protected information early in the investigation, usually before counsel for the organization has had time to assess the facts in anything approaching a thorough manner. Especially at this early stage, the organization also is not in a position to know the scope of information already in the government's possession. Indeed, it is the rare case where a lawyer for an organization is aware of the full universe of pertinent information known to the government until the government's investigation is complete (and many times, not even then). Counsel for the organization therefore simply cannot know, until it is too late, whether the government has, from its own sources, all of the pertinent information that the organization's counsel has separately acquired through an attorney-client communication or as the product of work conducted by counsel.

A second reason organizations feel undue pressure to waive their rights is this: Even assuming the decision-makers at the organization know the government lacks certain information that the organization gathered in a privileged or otherwise protected manner, the organization cannot reliably predict *when* the government might acquire that information absent waiver. If the organization incorrectly predicts that the government will independently acquire the pertinent information sooner rather than later, it may learn after-the-fact that it still has failed the "timely" and "thorough" disclosure test. Thus, in

all but the rarest of investigations, an organization cannot rationally choose whether to waive a privilege that serves as the foundation for our legal system—the privilege that enables individuals to seek the advice and guidance of legal counsel.

The undue pressure to waive that the commentary creates is confirmed by the recent survey conducted by a coalition of organizations including the National Association of Criminal Defense Lawyers and the Association of Corporate Counsel. Among other things, the majority of outside counsel responding to the survey reported that enforcement officials have directly or indirectly requested waiver of the attorney-client privilege in investigations involving companies that the responders represent. These counsel also report that the commentary to Section 8C2.5 is second only to the relevant DOJ memoranda on prosecution policies on the list of reasons cited by the government for the company to waive the privilege.

The attorney-client privilege retains its value in our legal system only if the client can count on the confidentiality of the communications covered by the privilege. As the Supreme Court emphasized in the seminal case on the availability of the attorney-client privilege to organizations, "an uncertain privilege . . . is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). As more and more corporations give in over time to undue pressure to waive the privilege, it is inevitable that employees – whatever their level – in corporations across the country will be deterred from seeking advice about how to comply with an increasingly complex matrix of rules, regulations and statutes.

It is no answer that waiver serves a valuable purpose, or even that its benefits outweigh its costs in some instances. That may be true sometimes, and in those cases the organization may very well choose on its own to waive the privilege. But such a choice should not be coerced through the threat of harsher treatment – or the unavailability of more lenient treatment – if it "insists" on playing by the venerable rules of our adversary system.

The language of the relevant guidelines for individuals is instructive on this point and, in our view, dispositive. To qualify for acceptance of responsibility credit or a substantial assistance downward departure, an individual must make difficult choices including the possible waiver of certain constitutional rights. For example, the extra one-level reduction for acceptance of responsibility in § 3E1.1(b) is conditioned upon timely waiver of the Sixth Amendment right to a jury trial and the Fifth Amendment right not to incriminate one's self. Although these required waivers have generated controversy, to our knowledge it has never been suggested that the Commission include as a factor in the availability of either of these provisions the individual's decision whether to waive the attorney-client privilege or work-product protections. No doubt this is due to a universal recognition that these protections are basic to the operation of our legal system, even in those instances where the defendant has ultimately agreed to "give up the fight." Before a defendant can get to the point where he decides to accept responsibility or cooperate or both, he must be able to discuss his conduct and his options in confidence with counsel,

safe in the belief that he will not be coerced into revealing those confidences at some later date.

The same is true for organizations. The attorney-client privilege and work-product protection are part of the basic rules that make the adversary system work. Indeed, they are the very tools that make it possible for defendants – be they individuals *or* organizations – to get to the place where they can make the fully informed decision whether to self-report, cooperate and accept responsibility. We urge the Commission to harmonize the commentary of § 8C2.5 with the guideline provisions applicable to individuals and remove the decision whether to waive from the sentencing guidelines calculus.

13. Proposed New Guideline Related to Crime Victims' Rights

On this proposal, PAG does not object generally to the new U.S.S.G. § 6A1.5's directive that courts must afford crime victims the rights described in 18 U.S.C. § 3771. PAG does, however, object to the Commission's call for new sentencing procedures that would extend beyond § 3771. In particular, we do not understand what might be encompassed in the Commission's policy statement calling on courts to adopt procedures related to "any other provision of Federal law pertaining to the treatment of crime victims." PAG can envision how a court might use this phrase to create new procedural rights for victims that Congress never intended. As the Justice for All Act of 2004's Crime Victims' Rights Amendment ("CVRA") itself showed, the establishment of new procedural rights in this area involves a very careful balancing of interests, not only for defendants, but also for prosecutors who inherently lose certain control of a case when victims' procedural rights increase. PAG respectfully suggests that the Commission should respect that procedural balancing established by Congress in the CVRA, and omit the clause quoted above so that § 6A1.5's new language is tailored specifically to the procedural rights the CVRA intended. If the Commission wishes to expand the list of procedural rights, it should do so later upon reflection of specific requests, rather than adopting a catch-all clause whose meaning and parameters are wholly unknown.

14. Proposed New Guideline for Bureau of Prisons Motions to Reduce Terms of Imprisonment Pursuant to 18 U.S.C. § 3582(c)(1)(A)

We commend the Commission for its decision to promulgate policy guidance for courts considering motions filed by the Bureau of Prisons to reduce sentences under 18 U.S.C. § 3582(c)(1)(A)(i). As we noted in our June 14, 2005 letter to the Commission, it is essential to have some "safety valve" in a determinate sentencing scheme, so that the government may respond to any extraordinary and compelling situations that arise after sentencing that render continued imprisonment unjust or meaningless. We believe that Congress intended § 3582(c)(1)(A)(i) to serve just such a safety valve function, and the legislative history of the Sentencing Reform Act of 1984 supports this interpretation. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 37-150 at p. 121 ("safety valves" contained in § 3582(c) "keep[] the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations").

We are concerned, however, that the Commission's new policy statement at U.S.S.G. § 1B1.13 is largely a restatement of the statutory language in § 3582(c)(1)(A), and that it still does not respond to the directive in 28 U.S.C. § 994(t) that the Commission describe what should be considered extraordinary and compelling reasons, "including the criteria to be applied and a list of specific examples." In the expectation and hope that the Commission intends to include criteria and examples in its final rule, we make some recommendations below.

Before doing so, however, we note that proposed U.S.S.G. § 1B1.13(2) appears to improperly narrow the statutory circumstances in which sentence reduction may be sought. First, it extends the requirement in § 3582(c)(1)(A)(ii) that the court determine that the prisoner "is not a danger to the safety of any other person or the community, as provided in 18 U.S.C. § 3142(g)," to motions under § 3582(c)(1)(A)(i). Subsection (i) contains no such requirement. While we agree that a determination of *present* dangerousness is an appropriate consideration when deciding whether or not to reduce a prisoner's sentence, we do question whether § 3142(g), which governs pretrial release decisions, is the appropriate source of standards in this situation. For example, § 3142(g)(1) requires consideration of the nature and circumstances of the offense of conviction, "including whether the offense is a crime of violence or involves narcotic drug," and § 3142(g)(2) refers to "the weight of the evidence against the person." Neither of these sections is necessarily relevant to the question of present dangerousness, which may be many years after the original offense. It would be particularly inappropriate to infer present dangerousness from the mere fact that the underlying offense "involves narcotic drugs." Even § 3142(g)(3), which requires the court to consider of "the history and characteristics of the person," may not always be relevant to a finding of present dangerousness. It would seem preferable in this context to refer only to § 3142(g)(4), which requires consideration of "the nature and seriousness of the danger to any person or the community that would be posed by the person's release." Applying the broader standard of dangerousness under § 3142(g)(1) through (3) may unfairly invite rejection of prisoner petitions at the administrative level on grounds that have no relevance to any danger the prisoner may currently present.

We also note what may simply be a drafting oversight – the Commission's reference to a singular "extraordinary and compelling reason" in proposed U.S.S.G. § 1B1.13(1)(A). We assume that the Commission did not mean to suggest that a court must rely upon a single reason that is both extraordinary and compelling, as opposed to a combination of such reasons. We therefore recommend that proposed § 1B.1.13(1)(A) be amended to state "reasons" in the plural, as in the statute.[12]

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[12] Alternatively, the Commission could adopt the language in the FAMM Proposal for Policy Guidance published in the Federal Sentencing Reporter in 2001:

> An "extraordinary and compelling reason" may consist of several reasons, each of which alone is not extraordinary and compelling, that

We now turn to the matter of criteria and examples of "extraordinary and compelling reasons" warranting sentence reduction. As a general matter, we do not believe that Congress intended this statute to apply only to medical cases, much less cases involving terminal illness. Rather, Congress intended a court to be able to respond affirmatively to a government motion for sentence reduction in a broad range of circumstances, both medical and non-medical. The language of § 3582(c)(1)(A)(i) suggests no specific limits on the government's ability to bring cases warranting sentence reduction to the court's attention, and the reference to "rehabilitation alone" in § 994(t) strongly suggests that Congress contemplated use of the statute in circumstances where rehabilitation would be a relevant reason to consider sentence reduction together with other factors.

The legislative history of the 1984 Sentencing Reform Act also indicates that § 3582(c)(1)(A)(i) was intended to be applied in circumstances other than those involving a prisoner's health. See S. Rep. No. 225, 98th Cong., 1st Sess. 37-150 at p. 5 (statute available to deal with "the unusual case in which the defendant's circumstances are so changed, *such as* by terminal illness, that it would be inequitable to continue the confinement of the prisoner"); *id.* at 55 (changed circumstances warranting sentence reduction would include "cases of severe illness, [and] cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence"). The use of terminal illness as one example ("such as") of an extraordinary and compelling reason in the first quoted passage, and the distinction drawn between "severe illness" and "other extraordinary and compelling circumstances" in the second, demonstrate that Congress clearly expected the statute to be available in circumstances other than those involving the prisoner's medical status.

While in practice the Bureau of Prisons (BOP) has thus far not invoked this statute except in cases of imminent death, its own regulations recognize that sentence reduction may be sought for both medical and non-medical reasons. *See* 28 C.F.R. § 571.61 (directing prisoner to describe plans upon release, including where he will live and how he will support himself and, "if the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment." *See also* 28 C.F.R. § 571.62 (a) through (c)(describing a process by which sentence reduction requests based on medical reasons are reviewed by the Medical Director, and non-medical cases are reviewed by the Assistant Director for Correctional Programs). Moreover, BOP's policy under the predecessor statute § 4205(g) was to invoke the statute "in particularly meritorious or unusual circumstances which could not reasonably have been foreseen by the court at the time of sentencing," including "if there is an

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together make the rationale for a reduction extraordinary and compelling.

See Mary Price, The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A), 13 Fed. Sent. Rep. 188, 191 (2001).

extraordinary change in an inmate's personal or family situation or if an inmate becomes severely ill." BOP Program Statement No. 5050.41 (October 5, 1983). In practice, BOP invoked § 4205(g) in cases involving a broad range of equitable circumstances. *See, e.g., United States v. Diaco*, 457 F. Supp. 371 (D.N.J. 1978)(federal prisoner's sentence reduced because of unwarranted disparity among codefendants); *United States v. Banks*, 428 F. Supp. 1088 (E.D. Mich. 1977)(good behavior in prison). In the *Banks* case, the Director of the Bureau of Prisons noted that "Prior to the passage of the Parole Commission and Reorganization Act, applications for relief in cases of this type had to be processed through the Pardon Attorney to the President of the United States. The new procedure offers the Justice Department a faster means of achieving the desired result." 428 F. Supp. at 1089. *See also Diaco*, 457 F. Supp. at 372 (same).

It may be, as Vice Chairman Steer has suggested, that BOP's reluctance to invoke this statute more broadly and frequently stems from the absence of codified standards and policy guidance from this Commission, as well as from its conception of its own role in as that of turnkey. *See* John Steer and Paula Biderman, "Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences," 13 Fed. Sent. R. 154 (2001). If that is the case, it is all the more imperative for this Commission to step forward to give explicit policy guidance in this area, and to spell out the criteria and give examples so that the statute can begin to function as the "safety valve" that Congress intended it to be.

In developing specific criteria and examples, we cannot improve upon the thorough and thoughtful approach taken in the Families Against Mandatory Minimums (FAMM) Proposal for Policy Guidance, published as an Exhibit to Mary Price's article. *See* Mary Price, The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A), 13 Fed. Sent. Rep. 188, 191 (2001). Both the general criteria in FAMM's proposed § 1B1.13(b) and the more specific examples set forth in the proposed "application note," deserve the Commission's careful consideration. The criteria define "extraordinary and compelling reasons" to include a situation or condition 1) that was unknown to the court at sentencing; 2) that may have been known to the court but has changed significantly since sentencing; and 3) that the court was prohibited from taking into account at the time of sentencing but would no longer be prohibited from considering. Examples include terminal illness, severely diminished physical capacity, deteriorating health as a result of aging, substantial assistance to the government, changes in the applicable law that have not been made retroactive, disparity among codefendants, and compelling family circumstances. Rehabilitation may be relevant and properly be taken into account in many of these situations, even though it cannot serve as the sole reason for sentence reduction. The FAMM proposal is appended to this letter.

In addition to the criteria and examples proposed by FAMM, we would suggest that the Commission consider the criteria for equitable reduction in sentence that the Department of Justice itself has identified in the United States Attorneys' Manual as grounds for recommending commutation of sentence to the President. Section 1-2.113 of the U.S.A.M. states that commutation may be recommended in cases involving

"disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner, e.g. cooperation with investigative or prosecutive efforts that has not been adequately rewarded by other official action." The section goes on to say that "a combination of these and/or other equitable factors may also provide a basis for recommending commutation in the context of a particular case." Particularly in light of the original purpose of the sentence reduction authority when it was enacted in 1976 to provide a judicial alternative to clemency, it seems appropriate that the circumstances identified by the government as appropriate for clemency should also be appropriate in this situation.

Thank you in advance for considering our comments, and please let us know if we may be of further assistance to the Commission.

Sincerely,

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March 9, 2006

Honorable Ricardo H. Hinojosa
United States Sentencing Commission
One Columbus Circle, N.E.
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Washington, D.C. 20002-8002

Re: Proposed Amendments to the Firearms Guideline, § 2K2.1

Dear Judge Hinojosa:

On behalf of the Federal Public and Community Defenders, we write to provide our comments on the proposed amendments to the firearms guideline, § 2K2.1.1

As of 2003, firearms offenders comprised approximately 10% of offenders sentenced in federal court, the fourth largest proportion of the federal docket.2 Average time served for illegal firearms trafficking and possession under 18 U.S.C. § 922(g) doubled from the guidelines' inception to 2002.3 From 2002 to the present, average sentence length for offenders sentenced under § 2K2.1 increased from 53 months to 58 months.4

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1 Thanks to Assistant Federal Defenders John Reichmuth and Richard Ely for their technical expertise and research. Thanks to Steve Jacobson, Brian Rademacher, John Rhodes, and Kristen Rogers for their practical and legal input.

2 The Commission has acknowledged that, to date, the Guidelines have been used to increase sentence severity, but that they *could be* used to reduce sentence severity for targeted offenses or offenders, and *could be* used to carry out its statutory duty to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons," 28 U.S.C. § 994(g).

3 U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform at 139 (2004).

4 U.S. Sentencing Commission, Federal Sentencing Statistics by State, District and Circuit, Table 7 (average sentence length for firearms offenders receiving prison sentence increased from 71 to 75.8 months from 2002 to 2003) (2002-2003), http://www.ussc.gov/JUDPACK; U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Table 13 (average sentence length for all firearms offenders increased from 65.8 to 70 months from 2002 to 2003 (2002-2003), http://www.ussc.gov/JUDPACK; U.S.

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As of 2004, the Bureau of Prisons was 40% overcapacity,5 with over 188,000 inmates,6 at a cost to the taxpayers of over $4 billion a year.7 The Commission is required by statute to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons,"8 to assure that the purposes of sentencing, including proportionate punishment, are met, and to avoid unwarranted disparity and inappropriate uniformity.9

Yet, most of the proposed amendments would raise penalties for less serious conduct. As set forth below, by following Congress' lead in the firearms area and relying on accurate information about firearms, the Commission can and should lower firearms sentences, or at least not indiscriminately raise them, and assure that any enhancements in this area are appropriately focused and narrowly drawn.

(A) § 921(a)(30)

The proposed amendment sets forth two options. Option One would replace a "firearm described in [the now-repealed] 18 U.S.C. § 921(a)(30)" with a "high-capacity, semiautomatic firearm" in the enhanced base offense levels set forth in § 2K2.1(a).10 Option Two would encourage upward departure if the offense involved a "high-capacity, semiautomatic firearm." Under either option, "high capacity, semiautomatic firearm" would be defined as a "semiautomatic firearm that has a magazine capacity of more than [15] cartridges," the same definition as in § 5K2.17 (upward departure if possessed in connection with a crime of violence or controlled substance offense), except that the threshold magazine capacity in § 5K2.17 is "more than 10 cartridges."

Sentencing Commission, Special Post-Booker Coding Project at 13-15 (average sentence length for offenders sentenced under § 2K2.1 increased from 53 to 58 months from 2002 to 2005) (Prepared Feb. 14, 2006), http://www.ussc.gov/Blakely/postBooker_021406.pdf.

5 U.S. Department of Justice, Bureau of Justice Statistics Bulletin, Prisoners in 2004 at 7, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf.

6 http://www.bop.gov/news/quick.jsp#1.

7 FY 2004 Costs of Incarceration and Supervision, The Third Branch, Vol. 37, No. 5 (May 2005) ($23,205.59 per inmate in FY 2004), available at http://www.uscourts.gov/ttb/may05ttb/incarceration-costs/index.html; U.S. Department of Justice, Bureau of Justice Statistics, State Prison Expenditures, 2001 1 (June 2004) ($22,632 per federal inmate in FY 2001), available at http://www.ojp.usdoj.gov/bjs/pub/ascii/spe01.txt.

8 28 U.S.C. § 994(g).

9 28 U.S.C. § 991(b); 18 U.S.C. §3553(a)(2).

10 The enhanced base offense levels are 26 for any firearms offender with two prior felony convictions of a crime of violence or controlled substance offense, U.S.S.G. § 2K2.1(a)(1), 22 for any firearms offender with one such prior conviction, U.S.S.G. § 2K2.1(a)(3), 20 for possession by or transfer to a prohibited person, U.S.S.G. § 2K2.1(a)(4)(B), and 18 for any other firearms offense. U.S.S.G. § 2K2.1(a)(5).

The Commission seeks comment on (1) whether an alternative definition should be considered, (2) whether there are other categories of firearms that should form the basis for an enhanced base offense level or upward departure, and (3) whether the Commission should make similar changes to the definition of "high capacity, semiautomatic firearm" in § 5K2.17.

Congress allowed the semiautomatic assault weapons legislation to lapse because there was no empirical justification for it while it was in effect.11 The Commission has a non-controversial opportunity to simplify and lower penalties in what appears to be a small number of cases. Thus, the Commission should delete the references to the repealed legislation, and take no action unless and until a particular action is demonstrated to be necessary based on (1) analysis of sentencing data, and (2) research about the types of weapons it is considering for more severe punishment. In the meantime, courts can take into account under § 3553(a) in any case any heightened seriousness of the offense or need to protect the public flowing from the type of weapon. Further, upward departure is available for multiple "military type assault rifles," § 2K2.1, comment. (n.13), and for "high capacity, semiautomatic firearms" possessed "in connection with" a crime of violence or controlled substance offense, § 5K2.17.

As set forth in subsection (c), the proposed definition of "high capacity, semiautomatic weapon" would sweep in ordinary firearms with legitimate uses, including target shooting at Boy Scout camps, quite *unlike* the bombs, machine guns and sawed-off shotguns described in 26 U.S.C. § 5845, and also well beyond the firearms described in 18 U.S.C. § 921(a)(30) which Congress has repealed. If the Commission feels compelled to act in this amendment cycle for reasons that seem contrary to congressional intent and are not apparent in any reason offered in support of the amendment or in any data of which we are aware, it should provide for an upward departure for involvement of a semiautomatic assault weapon, as defined in former 18 U.S.C. § 921(a)(30) and subject to the exemptions in former 18 U.S.C. § 922(v)(2) and (3).

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A study mandated by Congress to be performed thirty months after enactment of the semiautomatic assault weapons ban concluded that, "[a]t best, the assault weapons ban can have only a limited effect on total gun murders, because the banned weapons and magazines were never used in more than a fraction of all gun murders," and that there was no detectable reduction "in two types of gun murders that are thought to be closely associated with assault weapons, those with multiple victims in a single incident and those producing multiple bullet wounds per victim." See Roth, Koper, et. al, Urban Institute, Impact Evaluation of the Public Safety and Recreational Firearms Use Protection Act of 1994 at 2, 97 (March 13, 1997), http://www.urban.org/UploadedPDF/aw_final.pdf. Semiautomatic assault weapons are used in only 1-2% of crimes. See David B. Kopel, Rational Basis Analysis for "Assault Weapon" Prohibition, 20 J. Contemp. L. 381 (1994) (SAWs used in 1% of gun crime); U.S. Department of Justice, Bureau of Justice Statistics, Survey of State Prison Inmates 1991 (3/93) ("fewer than 1% of all violent inmates, were armed with a military-type weapon, such as an Uzi, AK-47, AR-15, or M-16"), http://www.ojp.usdoj.gov./bjs/pub/ascii/sospi91.txt; U.S. Department of Justice, Bureau of Justice Statistics, Firearm Use by Offenders (2/5/02) ("about 2% had a military-style semiautomatic gun or machine gun"), http://www.ojp.usdoj.gov./bjs/pub/ascii/fuo.txt.

1. Consistent with congressional intent and the Commission's duty to revise guidelines based on data and research, the Commission should delete the reference to weapons described in 18 U.S.C. § 921(a)(30) and take no further action unless indicated by sentencing data and research regarding semiautomatic weapons.

The Violent Crime Control and Law Enforcement Act of 1994 ("the Act") became law on September 13, 1994. Subtitle A of Title XI of the Act, among other things, criminalized the manufacture, transfer or possession of a "semiautomatic assault weapon," 18 U.S.C. § 922(v)(1) (repealed September 13, 2004), defined in 18 U.S.C. § 921(a)(30) (repealed September 13, 2004) with numerous exemptions set forth in 18 U.S.C. § 922(v)(2)-(4) (repealed September 13, 2004), subject to a maximum penalty of five years, 18 U.S.C. § 924(a)(1)(B) (amended to delete § 922(v) September 13, 2004); enacted a ten-year mandatory minimum for a violation of § 924(c) with a "semiautomatic assault weapon," 18 U.S.C. § 924(c)(1)(B)(i) (repealed September 13, 2004); and directed the Commission to enhance punishment for a crime of violence or drug trafficking offense involving a "semiautomatic firearm," defined as "any repeating firearm that utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round and that requires a separate pull of the trigger to fire each cartridge." Pub. L. 103-322 § 110501 (repealed September 14, 2004).

In response to the congressional directive, the Commission provided for a potential upward departure in § 5K2.17 in recognition that any increased risk of harm from a "high capacity, semiautomatic firearm" would vary substantially with the inherent dangerousness of the weapon and the circumstances of the offense.12 Without a congressional directive, the Commission amended § 2K2.1 to subject "semiautomatic assault weapons" as defined in 18 U.S.C. § 921(a)(30) to the same enhanced base offense levels as the sawed-off firearms, machine guns, bombs and silencers described in 26 U.S.C. § 5845(a).13

By the terms of the Act, Subtitle A in its entirety was repealed effective September 13, 2004.14 Congress has taken no action to reinstate any of its provisions. Nonetheless, the Commission proposes to either maintain the enhancements or replace them with an upward departure, and in either case to vastly broaden the definition of the enhancing type of firearm. Compared to firearms offenses *not* involving a "semiautomatic firearm with a magazine capacity of more than 15 cartridges," Option One would increase sentences for offenders with prior drug trafficking or crime of violence convictions by 20-25%, more than double sentences for most other offenders, and place offenders convicted of record-keeping offenses otherwise subject to probation in prison for more than two years. Taking two common offenses, Option One would more than double the sentence for a first time offender convicted of possession by or transfer to a

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12 U.S.S.G., App. C., amend. 531.

13 U.S.S.G., App. C., amend. 522.

14 Pub. L. 103-322 § 110105(2).

prohibited person (from 15-21 months to 33-41 months),15 and more than double the sentence for a first time offender convicted of possession or transfer of a stolen firearm or one with an altered serial number (from 10-16 to 27-33 months).16 Further, the six-level reduction for sporting or collection purposes would be precluded for any offense involving a semiautomatic firearm with a magazine capacity of more than 15 cartridges. This reduction is not precluded for many such weapons now.

The only explanation offered for these substantial sentences is that "possession of certain weapons, particularly by a prohibited person, may still be considered an aggravating factor warranting an increase in the base offense level." This begs a number of questions: Which certain firearms warrant aggravating status? What is the rationale for doing so? Why does the proposal apply to all firearms offenses if the concern is possession by a prohibited person? Is the cost justified? When the Commission equalized penalties for semiautomatic assault weapons with bombs, machine guns and sawed-off shotguns in 1995, it estimated that this would increase the prison population by 82 inmates,17 which, at today's rates, would cost nearly $2 million annually.18 Pursuant to the Commission's duty to formulate guidelines that are "effective" in meeting the purposes of punishment and that minimize prison overcrowding,19 the Commission should answer these questions before taking any action.

a. The proposal is unsupported by published data.

Recently published data on the frequency of use of different base offense levels and specific offense characteristics does not separate enhancements for weapons described in 18 U.S.C. § 921(a)(30) from those for firearms described in 26 U.S.C. § 5845(a), or from enhancements under § 2K2.1(a)(4)(A) that involved neither.20 Thus, at present, the frequency and circumstances of offenses involving weapons described in 18 U.S.C. § 921(a)(30) appears to

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15 18 U.S.C. § 922(d), (g).

16 18 U.S.C. § 922(j), (k).

17 U.S. Sentencing Commission, 1995 Annual Report at 149, http://www.ussc.gov/ANNRPT/1995/CH5_95.PDF.

18 FY 2004 Costs of Incarceration and Supervision, The Third Branch, Vol. 37, No. 5 (May 2005) ($23,205.59 per inmate in FY 2004), available at http://www.uscourts.gov/ttb/may05ttb/incarceration-costs/index.html; U.S. Department of Justice, Bureau of Justice Statistics, State Prison Expenditures, 2001 1 (June 2004) ($22,632 per federal inmate in FY 2001), available at http://www.ojp.usdoj.gov/bjs/pub/ascii/spe01.txt.

19 28 U.S.C. § 991(b)(1)(A), (2); § 994(g).

20 Guideline Application Frequencies for Fiscal Year 2003 at 35, http://www.ussc.gov/GAF/03_guideline_application_frequency.htm.

be unknown. According to anecdotal reports from Defenders, the enhanced base offense levels are rarely if ever used for weapons described in 18 U.S.C. § 921(a)(30).

According to the Commission's Sourcebooks, the upward departure in § 5K2.17 for a "high capacity, semiautomatic firearm in connection with a crime of violence or controlled substance offense," in which the weapon is defined the same as in the proposed new definition for § 2K2.1 but with a lower threshold magazine capacity, has never been used.21

As explained in subsection (c) below, the proposed definition would sweep in numerous ordinary firearms with legitimate uses, unlike those described in 26 U.S.C. § 5845, and well beyond those Congress temporarily included in the now-repealed 18 U.S.C. § 921(a)(30). Thus, Option One would require unwarranted uniformity among dissimilarly situated offenders. Option 2 would invite upward departure when there is no apparent basis for it. The Commission should devote careful study to the attributes and common uses of whatever weapon it is considering for enhanced punishment.

b. The proposal is contrary to congressional intent.

All firearms potentially could be used as instruments of unlawful violence, but § 2K2.1 applies to firearms offenses, not crimes of violence. The offenses covered by § 2K2.1 are prophylactic in nature, i.e., to prevent violent crimes by prohibiting possession and transfers that would be legal but for the individual's criminal record, mental health or drug addiction background, or failure to comply with various licensing or record-keeping requirements.22 The question for purposes of *enhanced* punishment based on certain weapons is whether those certain weapons are largely used for violent purposes or have substantial legitimate uses.

Congress requires registration of any sawed-off shotgun or rifle, machine gun, silencer or bomb, and failure to register is a crime punishable by up to ten years.23 This reflects Congress' judgment that these devices have a very high likelihood of use for unlawfully violent purposes.24 Congress has never required blanket registration of semiautomatic firearms, not as narrowly defined in 18 U.S.C. § 921(a)(30) much less as broadly defined in the Commission's proposal. This demonstrates Congress' recognition that, unlike machine guns, sawed-off shotguns, silencers and bombs, semiautomatic firearms have lawful uses, such as target shooting, hunting, defense of self, property or others, and as collectibles, and are less likely than sawed-off shotguns, machine guns and bombs to be used as instruments of unlawful violence. Even while

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21 U.S. Sentencing Commission Sourcebooks, Table 24 (1996-2003).

22 United States v. Lewis, 249 F.3d 793, 796-97 (8th Cir. 2001).

23 26 U.S.C. §§ 5841, 5845, 5862(d), 5871.

24 United States v. Serna, 435 F.3d 1046 (9th Cir. 2006); United States v. Brazeau, 237 F.3d 842, 845 (7th Cir. 2001); United States v. Jennings, 195 F.3d 795, 799 (5th Cir. 1999).

the semiautomatic assault weapons legislation was in effect, any firearm lawfully possessed before its passage as well as over 650 semiautomatic weapons were exempt.25 Further, Congress indicated that when semiautomatic weapons *are* used for unlawful purposes, the offense is still less serious than an offense involving a machine gun, sawed-off shotgun or bomb, providing in § 924(c) for a thirty-year mandatory minimum for the latter, and a ten-year mandatory minimum for the former (now repealed). The Commission too has recognized that weapons described in 26 U.S.C. § 5845(a) are *sui generis*, having deemed mere possession of such a weapon, but no other kind of weapon, a "crime of violence" for career offender purposes.26

Congress has allowed all of the semiautomatic weapons provisions to lapse, finding them unnecessary and placing semiautomatic weapons on the same footing as any other firearm other than those described in 26 U.S.C. § 5845.27 It would be unwarranted for the Commission to continue to equate these weapons with those described in 26 U.S.C. § 5845, much less to broaden the category to include ordinary firearms with substantial legitimate uses.

c. The proposed definition would include even more ordinary firearms with substantial legitimate uses and with little risk of unlawful violence than did 18 U.S.C. § 921(a)(30) before it was repealed.

The Commission proposes to replace the references to § 921(a)(30) in the enhanced base offense levels in § 2K2.1 with a "firearm that is a high-capacity, semiautomatic firearm," defined as a "semiautomatic firearm that has a magazine capacity of more than 15 cartridges," or to create an upward departure in § 2K2.1 for offenses involving a firearm so defined. The definition is both artificial and exceedingly broad.

A "semiautomatic firearm that has a magazine capacity of more than 15 rounds"

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25 18 U.S.C. § 922(v)(2)-(3).

26 U.S.S.G. § 4B1.2, comment. (n. 1).

27 As Judge Kozinski of the Ninth Circuit recently wrote:

> The most plausible inference to be drawn from the evolution of federal law as to assault weapons is that Congress allowed the ban to lapse, having found it unnecessary. Because current federal policy places assault weapons on the same footing as other non-registerable weapons, we see this, on balance, as supporting [the defendant's] position. We find more significant the fact that, when the federal assault-weapon ban ended, Congress didn't require previously-banned semiautomatic weapons to be registered. The fact that semiautomatic weapons are not now, nor have ever been, subject to a blanket registration requirement suggests that mere possession of them does not pose the same risk of physical injury as possession of weapons subject to a blanket federal registration requirement-like silencers and sawed-off shotguns.

Serna, 435 F.3d at 1049.

encompasses many weapons that have never been considered "assault weapons." Among others, it describes several standard-sized pistols not within the scope of former § 921(a)(30). These include the Glock 17,[28] the Beretta 92-SB,[29] the Heckler and Koch USP 9,[30] and the Smith and Wesson Sigma SW9F.[31] There is nothing remarkable about these guns; they were all commercially available self-defense handguns released by major manufacturers. They are not considered to be examples of "paramilitary design."[32] They are completely distinct in appearance from all of the weapons included within § 921(a)(30).

The proposed amendment would divide the category of full-sized 9 mm semi-automatics arbitrarily down the middle. It is extremely common for full-sized 9 mm handguns to have a magazine capacity at or near 15 rounds. Those sold with factory magazines holding greater than 15 rounds are mentioned above. Those with 15-round magazines are also extremely common, including, but not limited to, popular models like the Ruger P85,[33] Sig-Sauer P226,[34] Smith and Wesson 915,[35] Taurus PT-92,[36] Beretta 92F,[37] Glock 19,[38] and Springfield P9.[39] Since the proposed change would only affect guns with magazines holding more than 15 rounds, it would not affect these common guns, thereby creating an artificial, inexplicable distinction between virtually identical handguns.

No handgun of the type mentioned above was included in 18 U.S.C. § 921(a)(30). Guns included in the ban were marketed with larger magazine capacities. The Tec-9 came with a 32-

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2817 rounds. S.P. Fjestad, Blue Book of Gun Values (19th Ed.) 544 (hereinafter "Blue Book").

2916 rounds. Id. at 206.

3016 rounds. Id. at 579.

3117 rounds. Id. at 1056.

32 See id. at 631, referring to Intra-Tec Tec-9, a weapon included within § 921(a)(30), as of "paramilitary design."

33Id. at 1093.

34Id. at 1017.

35Id. at 1050.

36Id. at 1114.

37Id. at 207.

38Id. at 544.

39Id. at 1067.

round magazine.[40] The Tec-22, also of "paramilitary design," came standard with a 30-round magazine.[41] The Cobray/SWD M-11 was issued and sold with a 32-round magazine.[42] The Uzi pistol came with a 20-round magazine.[43] Nearly all of the firearms included in the former ban are based on military designs and have fully automatic analogues. They are essentially semiautomatic versions of submachine guns. Placing standard 9 mm handguns in that category and giving them the same enhanced base offense levels as machine guns would significantly broaden the guideline's scope.

A significant problem with the proposed definition is that many, indeed most, semiautomatic firearms do not have a magazine capacity inherent to them. Instead, *magazines* have a capacity, and a number of different magazines may fit any specific gun.[44] Would the proposal be interpreted to apply where a firearm is found without a magazine or with a magazine that holds 15 or fewer rounds? The government could argue that an SWD M-11 found without a magazine has a magazine capacity of more than 15 rounds, because there exists a factory-made magazine holding more than 15 rounds. But there also exist factory and after-market ten-round magazines for this gun. Read one way, enhanced base offense levels would hinge on what magazine a defendant was caught possessing. Read another way, the enhanced base offense levels would apply based on a firearm's ability to accept a greater-than-15 round magazine. Aftermarket high-capacity magazines are available for more than a dozen models,[45] so the enhanced base offense levels could be creatively applied to vastly more cases of firearm possession than ever before, including to firearms never actually outfitted with a 15+-round magazine.

The proposed definition would thus elevate any firearm that accepts a detachable box magazine to the status of a machine gun, sawed-off shotgun, or bomb. In contrast, 18 U.S.C. § 921(a)(30)(B) and (C) described semiautomatic rifles and pistols that accepted a detachable magazine *and* had at least two constant physical features (e.g., bayonet mount, pistol grip, flash suppressor, etc.). To illustrate, the Ruger 10/22 .22LR rifle is a semi-automatic firearm that shoots .22LR cartridges.[46] The .22LR cartridge is not a military round. It is commonly used for recreational target shooting and to teach marksmanship to new shooters and children, and is used at Boy Scout camp shooting ranges. Aftermarket twenty-five round magazines are available for

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40Id. at 633.

41*Id.* at 632.

42Id. at 971.

43Id. at 1150.

44See www.brownells.com (Well known shooting supply company offering high-capacity magazines for numerous firearms).

45Id.

46Blue Book at 1101.

this rifle to allow extended target shooting sessions without reloading.[47] Under the proposed definition, possession of this firearm would be treated the same as the possession of a machine gun, sawed-off shotgun, or bomb.

Similarly, magazine capacity for rifles varies widely; they may be 10, 12, 15, 20, 25, 30, or 40 rounds, to name only a few. Does the definition require that 15+ rounds be inserted in the rifle, present in the area of the rifle, or merely potentially used in the rifle even if no such rounds had ever been used in the rifle? The government could argue, and some judges would accept, that the definition encompasses all rifles and pistols that accept a detachable magazine, vastly expanding the application of the enhanced base offense levels without a reasoned justification. Increased litigation and inconsistency in application would result.

In sum, reacting to the lapse of the assault weapons ban by creating heightened base offense levels for an even broader range of weapons makes no sense.

If the Commission feels compelled to act at this time without more careful study and despite apparently contrary congressional intent, the Commission should, at most, provide for a discretionary upward departure for firearms offenses involving firearms described in former § 921(a)(30) and subject to the exemptions in former 18 U.S.C. § 922(v)(2) and (3). If so, the Commission should provide an application note stating that the statute has been repealed, explaining that conduct involving firearms previously identified in it may warrant an upward departure, and providing the text of the former statute. This would at least provide clear guidance as to when the upward departure may apply.

2. There is no other category of firearms that should form the basis of an enhanced base offense level or upward departure.

As explained above, Congress treats weapons described in 26 U.S.C. § 5845, and only those weapons, as requiring registration and deserving of increased penalties. The Commission should accept Congress' judgment in this regard. As Justice Breyer has advised, the Commission should not add further adjustments, but should "act forcefully to diminish significantly the number of offense characteristics attached to individual crimes," because the existing Guidelines already make distinctions without a difference and create a false façade of precision.48 Moreover, further adjustments seem particularly wasteful of judicial resources now that the overarching sentencing mandate is to impose a sentence that is sufficient but not greater than necessary to achieve sentencing purposes, with the Guidelines "advisory" within that framework.

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47 Id.

48 See Justice Stephen Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent. R. 180 (Jan./Feb. 1999).

If the Commission has any particular weapons in mind, we would appreciate the opportunity to comment on them specifically.

3. The Commission should either delete § 5K2.17, revise the definition to focus on features more pertinent to dangerousness than magazine capacity, or at least increase the magazine capacity.

The Commission has asked for comment on whether it should make "similar changes" to the definition of "high capacity, semiautomatic firearm" in § 5K2.17. Since the legislation that prompted § 5K2.17 has been repealed, see Pub. L. 103-322 §§ 110501, 110105(2), and the departure appears never to have been used, the Commission should delete § 5K2.17. If retained, based on the information in section 1(c), infra, and further study, the definition should be revised to capture increased dangerousness. Failing that, the threshold magazine capacity should be increased to at least "more than 15 cartridges."

4. The Commission should promulgate a downward departure for inoperable firearms and firearms and ammunition with no intended use.

There is a difference relevant to the purposes of sentencing in § 3553(a)(2), which § 2K2.1 does not recognize, between possession of a loaded gun and possession of an unloaded gun, as well as between possession of an operable gun and possession of an inoperable gun. Further, there is unwarranted uniformity between the punishment for possession of a single bullet and that for possession of a loaded firearm. These disparities should be addressed in an application note inviting downward departure. C.f. U.S.S.G. § 2B5.1, comment. (n.4) (enhancement does not apply to "persons who produce items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny"). We propose the following language:

> When the firearm involved was inoperable, or the firearm was unloaded and the defendant did not intend to load it in the future, a downward departure may be warranted. Similarly, possession of only a small amount of ammunition and no firearm, where the defendant did not intend to use the ammunition in the future, may justify downward departure.

(B) Trafficking SOC

1. The proposed amendment lacks any criteria that would limit the SOC to "firearms trafficking."

The proposed amendment would add a specific offense characteristic at § 2K2.1(b)(7) as follows:

> (7) If the defendant engaged in trafficking of (A) [[2]-24] firearms, increase by [2][4] levels; or (B) [25 or more] firearms, increase by [6][8] levels.

The proposed corresponding application note 13 would state:

(A) Definition of "Trafficking".—For purposes of subsection (b)(7), "trafficking" means transporting, transferring, or otherwise disposing of, [firearms][a firearm] to another individual, (i) [as consideration for anything of value][for pecuniary gain]; or (ii) as part of an ongoing unlawful scheme, even if nothing of value was exchanged.

(B) Use of the Term "Defendant".—Consistent with §1B1.3 (Relevant Conduct), the term "defendant" limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

There is no description in the synopsis of what kind of activity this proposed specific offense characteristic is intended to cover, nor can one be discerned from the language of the proposal. We assume the Commission would want to confine this specific offense characteristic to offenses that involved engaging in the business of selling firearms, for monetary profit or a criminal purpose, consistent with commonsense understanding, legal definitions, and the nature of the cases subject to sentencing under § 2K2.1.

The essence of the definition of "illicit trafficking in firearms" is the "business or merchant nature" of the defendant's firearms conviction.[49] In the firearms chapter itself, Congress defined the concept of "in the business" as meaning one who "devotes time, attention, and labor ... as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution" of firearms or, alternatively, one who engages in the "regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism," specifically defined. See 18 U.S.C. § 921(a)(21)(A-F) & (a)(22). Using Congress' definitions in the firearms area is appropriate, while borrowing from entirely dissimilar areas like identity theft and counterfeit labels is a mis-match and not in keeping with congressional intent.[50]

Similarly, if the purpose is to focus on firearms trafficking, the only scheme that should be considered for enhancement is one involving the regular and repeated unlawful dealing in firearms for profit or a criminal purpose, i.e., an ongoing "firearms trafficking scheme." See U.S.S.G. § 2B1.11(b)(11) & comment. (n.10) (an increase for trafficking in stolen goods – the "chop shop" enhancement – must be based on a scheme involving the offense at issue, i.e., the unlawful "organized scheme to steal vehicles or vehicle parts").[51]

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49 Kuhali v. Reno, 266 F.3d 93, 107-08 (2d Cir. 2001) (analyzing the meaning of "illicit trafficking in firearms" under 8 U.S.C. § 1101(a)(43)).

50 Under other guidelines, trafficking connotes "for profit." See U.S.S.G. § 2L1.1(b)(1) & comment. (n.1); § 2L2.1(b)(1) & comment. (n.1) (immigration offenses, involving trafficking in persons).

51 As proposed below, the unlawful scheme should be confined to the transport, transfer or disposition of firearms to an individual whose possession, receipt, or use the defendant knows or has reason to know will be either (i) unlawful (consistent with Congress' rationale that a prohibited possessor is more likely

As presently written, the proposal lacks any limiting criteria and thus would commonly apply to activity well beyond the scope of any commonsense understanding or legal definition of "firearms trafficking." For example, a licensed dealer in firearms who violates (with respect to two or more firearms) any one of a host of regulatory directives in 18 U.S.C. § 922, such as selling firearms to an adult who did not appear in person or submit a sworn statement as to his age, § 922(c), though the buyer is a lawful possessor planning to use the firearms for a lawful purpose, since dealers dispose of firearms for pecuniary gain. A legitimate common carrier that violates (with respect to two or more firearms) a regulatory directive, such as delivering firearms without obtaining a receipt from the recipient, § 922(f), though the recipient is a lawful possessor planning to use the firearms for a lawful purpose would be a firearms trafficker, as common carriers transport firearms for pecuniary gain.

Any individual who violated the law with respect to two or more firearms he bought for personal use and without any intent at the time to profit would be a firearms trafficker if he later disposed of them in exchange for money or something of value. This would include a lawful possessor who sells personal firearms to a relative, friend or neighbor he knows to be law-abiding but is a juvenile only days shy of turning 21 or was dishonorably discharged from the Armed Forces, or whom he knows has a drug problem or a prior conviction for misdemeanor domestic violence. See §§ 922(x)(1); 922(d)(3), (6), (9). It would include an individual who is an unlawful possessor but sells, trades, or pawns his personal firearms, acquired before he was a prohibited person, to a lawful possessor for rent money or to meet other financial needs, not unusual among the poor, or trades them for farm equipment, car parts, or other necessary items, quite common in rural America. See §922(g). This was the situation in United States v. VanLeer, 270 F.Supp.2d. 1318 (D. Utah 2003). VanLeer was a felon who, because he "was destitute and needed money for rent," took a gun he had purchased before he was a felon then later gave to a friend and sold it to a pawn shop, using his own name and fingerprints. Id. at 1319. These facts, and that he was divesting himself of the gun rather than keeping it, showed he was less culpable and less harmful than the typical felon-in-possession at which the statute was aimed. Id. at 1326-27. Under this proposal, if he had divested himself of two guns instead of one, he would be punished as a "firearms trafficker," a ludicrous result.

As demonstrated by these examples, it makes no meaningful difference whether "pecuniary gain" or "anything of value" is used. Moreover, if "pecuniary gain" were defined as elsewhere in the Guidelines, it is the same as "anything of value." See § 2B1.5, comment. (n.5(A)).

Further, an individual who transferred firearms "even if nothing of value was exchanged" would be a "firearms trafficker" if done as part of *any* "ongoing unlawful scheme," regardless of its nature.

In addition, the proposal suffers from a serious double counting problem. The defendant should not receive, in addition to the additional 2 to 10 levels based on the number of guns

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to use the firearm in an illegal manner) or (ii) in connection with another felony offense.

involved under subsection (b)(1), another 2 to 8 levels for the number of guns involved under subsection (b)(7).

2. Defenders' Proposed Substitute

To avoid application to persons who simply are not "firearms traffickers," we suggest the following modification to the proposed amendment and accompanying application note, which relies on statutory language in the firearms area and avoids double counting:

The proposed amendment should be modified to read:

(7) If the defendant engaged in the business of trafficking in firearms, increase by 2 levels.

The proposed corresponding application note should be modified to read:

(13) Application of Subsection (b)(7).--

(A) Definition of "engaged in the business of trafficking." —For purposes of subsection (b)(7), "engaged in the business of trafficking" means a defendant who (1) engages in the regular and repetitive acquisition and transport, transfer or disposition of firearms, (2) has as his predominant objective in doing so (i) livelihood and profit, or (ii) criminal purposes or terrorism, and (3) knows or has reason to believe that the transport, transfer, or disposition (i) would be to another individual or individuals whose possession or receipt would be unlawful or (ii) would be used or possessed in connection with another felony offense.

"Livelihood and profit" is defined for purposes of subsection (b)(7) and this application note in the first sentence of 18 U.S.C. § 921(a)(22).

"Terrorism" is defined for purposes of subsection (b)(7) and this application note in 18 U.S.C. § 921(a)(22)(A)-(C).

(B) Use of the Term "Defendant".—Consistent with §1B1.3 (Relevant Conduct), the term "defendant" limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused,

(C) An increase to the offense level under § 2K2.1(b)(7) is in addition to any increase to the offense level under § 2K2.1(b)(1) for the number of firearms involved in the offense.

(C) If an increase of 4 levels is made under § 2K2.1(b)(5), and § 2K2.1(b)(7) would otherwise apply because the defendant trafficked in firearms to

another individual or individuals whose possession or receipt the defendant knew or had reason to believe would be used or possessed in connection with another felony offense, [do not apply § 2K2.1(b)(7)] [increase the offense level by 1 level rather than 2 levels under § 2K2.1(b)(7)].

3. Issues for Comment

1) As in our proposed Application Note 13(A), the definition of trafficking should be restricted to offenses in which the defendant knew or had reason to believe that the transfer would be to an individual whose possession or receipt would be unlawful. It should not include offenses in which the defendant was willfully blind to the fact that the transfer would be to an individual whose possession or receipt would be unlawful. Willful blindness is not the standard under § 2K2.1(b)(5), nor is it used in any other guideline in the Manual, for good reason. Many courts have cautioned against use of the willful blindness standard in criminal cases because it essentially holds defendants responsible for mere negligence, and entails a presumption of guilt. See United States v. Alston-Graves, 435 F.3d 331, 341 n.10-n.14 (D.C. Cir. 2006) (citing cases); United States v. Heredia, 429 F.3d 820, 824 (9th Cir. 2005); United States v. de Francisco-Lopez, 939 F.2d 1405, 1411 (10th Cir. 1991). When combined with the elastic and exceedingly forgiving preponderance of the evidence standard that remains in § 6A1.3 (despite the likelihood of unconstitutionality under guidelines with "substantial weight"/a "presumption of reasonableness"), a willful blindness standard for firearms trafficking would result in intolerably unfair and unreliable enhancements.

2) The definition should not include merely receiving firearms from another individual. A trafficker is one who distributes an illegal product after first acquiring (i.e., receiving) it, not one who only receives it. One who simply receives without taking any further action with respect to the firearm, though he may be an unlawful possessor, is not a "firearms trafficker."

(C) Stolen Firearms/Altered or Obliterated Serial Numbers

The Commission proposes changing § 2K2.1(b)(4), which currently provides for a two-level enhancement for a firearm that either is stolen or has an altered or obliterated serial number regardless of knowledge or reason to believe, see comment. (n.16), to require the greater of a two-level enhancement for a stolen firearm or a four-level enhancement for an altered or obliterated serial number regardless of knowledge or reason to believe.

We object to the proposed increase, and instead recommend that the Commission either make no change to subsection (b)(4), or provide that the altered/obliterated serial number enhancement not be applied at all where the serial number is recovered. In either event, a *mens rea* requirement should be added in order to assure punishment *proportionate* to the defendant's culpability. See 18 U.S.C. § 3553(a)(2)(A).

The increased enhancement for an altered or obliterated serial number -- which, depending on the base offense level, other SOCs, and criminal history, would result in anywhere

from six months to eight years additional time in prison at a cost to the taxpayers of approximately $23,000 per year -- is said to "reflect[] the difficulty in tracing firearms with altered or obliterated serial numbers."

The addition of any number of levels (two or four) in every case based on this rationale assumes that altered or obliterated serial numbers are unable to be restored. In fact, in many cases, they are restored by a simple laboratory procedure:

> Serial numbers are usually stamped on a metal frame or plate, with hard steel dies. These dies are applied with enough force to sink each digit into the metal. Restoration of obliterated serial numbers can *many times* be accomplished because the metal crystals under the stamped numbers are placed under a permanent strain. When a suitable etching agent is applied, the strained crystals will dissolve at a faster rate as compared to the unaltered metal, thus permitting the etched pattern to appear in the form of the original numbers. *If* the number is ground to a depth that removes the strained crystals, or if the area has been impressed with a different strain pattern, it is *usually* not possible to restore.

See Division of Criminal Investigation, Iowa Department of Public Safety, Restoration of Obliterated Serial Numbers, http://www.state.ia.us/government/dps/dci/lab/firearms/serialno.htm (emphasis supplied). According to anecdotal reports from Defenders, the number is recovered more often than not because the numbers are removed very superficially.

An altered or obliterated serial number results in no additional harm unless it makes the firearm untraceable. An additional hour of routine laboratory work, whether to recover a serial number, to lift fingerprints from an object, or to determine the type or quantity of drugs, is not an additional harm to society warranting increased punishment.

We therefore recommend that the Commission make no increase in the adjustment for an altered or obliterated serial number, or revise subsection (b)(4) as follows:

> (4) If any firearm was stolen, or had an altered or obliterated serial number that was unable to be recovered, increase by two levels.

By way of explanation, the following could be added to Application Note 9:

> The adjustment under subsection (b)(4) for an altered or obliterated serial number seeks to address the harm of the firearm being rendered untraceable by the alteration or obliteration. Thus, for the adjustment in subsection (b)(4) to apply on the basis that the offense involved a firearm that had an altered or obliterated serial number, the serial number must have been unable to be recovered.

We also urge the Commission to delete application note 16, and to provide for a *mens rea* requirement for the adjustment in subsection (b)(4) to apply. The Commission is required to assure that the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) are met. One of those

purposes is "just punishment" in light of the "seriousness of the offense," a concept that entails personal culpability. When punishment is disproportionate to the offense, it squanders resources, creates disrespect for law, and fails to achieve just punishment. When the same punishment is required for a person who does not know or have reason to believe that a firearm is stolen or has an obliterated serial number as one who does have knowledge or reason to know, this creates punishment that is disproportionate to the seriousness of the offense and unwarranted disparity. As the Commission has said, "Unwarranted disparity is defined as different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing." See Fifteen Year Report at 113 (emphasis in original).

We assume that the reason for not requiring any *mens rea* for this adjustment is that the government does not want to have to prove it. But the Commission was not instructed to assure that the government was relieved of any burden of proof as to facts that increase punishment to reflect increased seriousness of the offense. Moreover, the Commission's advice that the preponderance of the evidence standard meets due process requirements remains in § 6A1.3. While we believe this advice is wrong in light of the Apprendi to Booker line of cases and particularly in light of the Commission's instructions to the courts to give the Guidelines "substantial weight," see Letter from Federal Defenders Regarding Report on Federal Sentencing Since United States v. Booker at 18-21 (January 10, 2006), that is the standard most courts are applying. It is not too much to ask that the government prove the facts that put people in prison for months or years by a mere preponderance.

We therefore propose that Application Note 16 be deleted and that § 2K2.1(b)(4) be changed as follows:

> (4) (A) If the defendant knew or had reason to believe that any firearm was stolen, increase by 2 levels.
>
> (B) If the defendant knew or had reason to believe that any firearm had an altered or obliterated serial number, and the serial number was unable to be recovered, increase by 2 levels.

(D) "In Connection With" in Burglary and Drug Offenses (and other offenses)

The proposed amendment provides that subsections (b)(5) and (c)(1) of § 2K2.1 apply if the firearm "facilitated, or had the potential of facilitating, another felony offense or another offense, respectively."

We generally support the adoption of the "facilitation" test. A substantial majority of courts have concluded that the firearm must "facilitate" the other felony offense. These courts treat the "in connection with" language as coterminous with the "in relation to" language in §

924(c)(1),52 as interpreted by the Supreme Court in Smith v. United States, infra. See United States v. Blount, 337 F.3d 404 (4th Cir. 2003); United States v. DeJesus, 347 F.3d 500 (3d Cir. 2003); United States v. Brown, 314 F.3d 1216, 1222 (10th Cir. 2003); United States v. Letts, 264 F.3d 787, 791 (8th Cir. 2001); United States v. Spurgeon, 117 F.3d 641 (2d Cir. 1997); United States v. Wyatt, 102 F.3d 241, 247 (7th Cir. 1996); United States v. Thompson, 32 F.3d 1, 7 (1st Cir. 1994); United States v. Routon, 25 F.3d 815 (9th Cir. 1994).

The Eleventh Circuit has rejected the facilitation test and interpreted the "in connection with" language more broadly. United States v. Rhind, 289 F.3d 690, 694 (11th Cir. 2002). The Fifth Circuit did the same, United States v. Condren, 18 F.3d 1190, 1195-96 (5th Cir. 1994), then limited that approach to drug cases, United States v. Fadipe, 43 F.3d 993 (5th Cir. 1995), then made clear that there was no "*ipso facto* nexus rule between firearms and illicit drugs every time a defendant who is convicted of the abuse of one has some relationship with the other, no matter how attenuated." United States v. Mitchell, 166 F.3d 748, 753-56 (5th Cir. 1999). In any event, some of these cases (and some earlier cases in the Eighth Circuit as well) appear to treat the "in connection with" language as interchangeable with the standard in § 2D1.1(b)(1) and its commentary. This is inappropriate. First, § 2D1.1(b)(1) requires only that a weapon "was possessed" with no "in connection with" or "in relation to" requirement; its commentary states that it does not apply only if it is "clearly improbable that the weapon was connected with the offense."53 Second, § 2K2.1(b)(5) and (c)(1) reference and cross-reference offenses other than drug offenses. Thus, the policy underlying the commentary accompanying § 2D1.1(b)(1), i.e., an "increased danger of violence when drug traffickers possess weapons,"54 is inapplicable in many cases to which § 2K2.1(b)(5) and (c)(1) apply. Third, the § 2K2.1(b)(5) and (c)(1) adjustments are more substantial than the § 2D1.1(b)(1) adjustment, i.e., four levels or a cross-reference compared to two levels, and thus should require more culpable conduct. Fourth, some courts have interpreted U.S.S.G. § 2D1.1, comment. (n.3), to place the burden on the defendant to disprove a connection between the drugs and the firearm. See United States v. Hall, 46 F.3d 62, 63 (11th Cir. 1995); United States v. Roberts, 980 F.2d 645, 647 (10th Cir. 1992); United States v. Corcimiglia, 967 F.2d 724, 727-28 (1st Cir. 1992); Contra United States v. Richmond, 37 F.3d 418, 419 (8th Cir. 1994). We believe that this is an incorrect and unconstitutional interpretation in any case, but an additional danger of equating "in connection with" in § 2K2.1 with "mere possession unless a connection is clearly improbable" in § 2D1.1, comment. (n.3) is

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Section 924(c)(1) prohibits the use of a firearm during and "in relation to" the commission of a drug trafficking or violent crime.

53 Section 2D1.1(b)(1) provides for a 2-level upward adjustment "[i]f a dangerous weapon (including a firearm) was possessed" in a drug manufacturing, importing, exporting, or trafficking offense. Application note 3 to § 2D1.1 provides: "The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet."

54 U.S.S.G. § 2D1.1, comment. (n.3).

that the burden would be shifted to the defendant to disprove the even more substantial adjustments under § 2K2.1(b)(5) and (c)(1).

While we generally support adoption of a facilitation test, we believe the phrase "had the potential of facilitating" requires a narrowing clarification, because a firearm always "has the potential of facilitating" another offense. The language comes from Smith v. United States, 508 U.S. 223 (1993) (quoted below), in which the Supreme Court articulated the facilitation test, but the Court made clear in Smith that "potential of facilitating" does not include mere possession or presence of a firearm during another offense, even a drug trafficking offense. Id. at 238. While clarification is needed, the cases are highly fact specific, such that examples may only confuse matters. A simple statement that "mere possession or presence of a firearm is not enough to establish a 'potential of facilitating'" should be adequate.

The proposed amendment also addresses a circuit split regarding "whether the presence of a firearm by mere coincidence during the course of a burglary or drug offense 'facilitated or had the potential of facilitating' another offense."

Both Option One (applicable to all "other felony offenses" or "other offenses") and Option Two's Application Note 14(C) (applicable to other offenses that are drug offenses) are inconsistent with the facilitation test. In Smith v. United States, 508 U.S. 223 (1993), the Supreme Court interpreted the phrase "in relation to" as follows:

> The phrase "in relation to" thus, at a minimum, clarifies that the firearms must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. . . . [T]he "in relation to" language allays explicitly the concern that a person could be punished under § 924(c)(1) for committing a drug trafficking offense while in possession of a firearm even though the firearm's presence is coincidental or entirely unrelated to the crime. Instead, the gun at least must facilitate, or have the potential of facilitating, the drug trafficking offense.

Id. at 238 (internal citations and quotation marks omitted). In short, the facilitation test excludes both mere coincidence and mere possession or presence even when the other offense is a drug trafficking offense. Further, a firearm cannot be coincidentally present, and at the same time facilitate or potentially facilitate another offense. Thus, the Commission cannot adopt Option One or Option Two's Note 14(C) consistent with the facilitation test.

Option Two's Note 14(C) has further problems. Even if one accepts that "the mere presence" of a firearm presents a heightened risk of violence in connection with drug *trafficking*, it sweeps too broadly. First, subsection (b)(5) is not limited to drug trafficking. "Another felony offense" for purposes of subsection (b)(5) is any federal, state or local offense punishable by more than one year. Simple drug possession is punishable by more than one year in many states. Thus, subsection (b)(5) would add four levels to the sentences of drug *users* who possess firearms for reasons unrelated to the drugs. See § 2D1.1, comment. (n.3) ("enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess

weapons"; compare § 2D2.1 (no gun enhancement for simple possession). Second, the note is even broader than § 2D1.1, comment. (n.3), in that it would apply when a firearm was merely present even when clearly improbable that it was connected with the offense.

Option Three is the only option that is consistent with the facilitation test and with the purposes underlying § 2K2.1(b)(5) and (c)(1). Sections 2K2.1(b)(5) and (c)(1) were created in response to a concern about the *increased* risk of violence when firearms are used or possessed during commission of another offense. See United States v. McDonald, 165 F.3d 1032, 1037 (6th Cir. 1999). Because there is no *increased* risk of violence when a firearm's presence is merely coincidental, see Smith, supra, § 2K2.1(b)(5) and (c)(1) should apply only when there is evidence that the firearm was not merely coincidentally present, but was used, possessed or intended to be used or possessed to facilitate the other offense.

Finally, the last sentence of Option Two's Application Note 14(B) should be added to Option Three after the second sentence, amended with the language in bold as follows: "However, if the defendant subsequently **uses or possesses the firearm in connection with another felony offense (under subsection (b)(5)) or another offense (under subsection (c)(1))** that is separate and distinct from the initial taking of the firearm, subsection (b)(5) or subsection (c)(1) **may** apply."

(E) Lesser Harms and Felon in Possession

This proposal would prohibit a downward departure under § 5K2.11 (Lesser Harms) "in any case in which a defendant is convicted under 18 U.S.C. § 922(g), even if the possession of a firearm were brief or existed because the defendant was disposing, or attempting to dispose of, a firearm." No explanation is given for this proposal, but we understand that it was proposed by the Department of Justice based on a single case, United States v. VanLeer, 270 F. Supp.2d 1318 (D. Utah 2003), about which the Department is unhappy.

In VanLeer, Judge Cassell relied on § 5K2.11 to grant a four-level downward departure in a felon-in-possession case. The facts were as follows:

> VanLeer has a history of non-violent criminal offenses, all apparently stemming from his use of illegal drugs. On September 10, 2002, VanLeer was released from prison after serving time connected with a forgery charge. Several weeks after his release, he met a friend who was in possession of a shotgun that VanLeer had purchased and owned before acquiring a felony conviction. As VanLeer was destitute and needed money for rent, he took the firearm-a Ted Williams 12 gauge shotgun-to a local pawn shop and sold it. During this transaction on October 1, 2002, VanLeer gave his correct name, address, and an inked fingerprint to verify his identity as owner of the firearm to the pawn shop clerk. On November 5, 2002, an investigator from the Salt Lake City Police Department conducted a record check and determined that VanLeer was a previously convicted felon. This led to the filing of a one-count indictment, charging felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

Id. at 1319. Finding that VanLeer's conduct -- briefly possessing the gun so that he could dispose of it to obtain money for rent, giving his own name and fingerprints -- did not threaten the harm that the felon in possession statute seeks to prevent -- violent crimes and consequent personal injury or death -- and was less harmful and less culpable than a felon continuing to possess a gun, Judge Cassell departed by four levels and sentenced Mr. VanLeer to 18 months in prison. Id. at 1326-27.

This proposal is indefensible for several reasons. First, it would fly in the face of Booker for the Commission to prohibit departure based on a factor that is plainly relevant to the statutory mandate to impose a sentence minimally sufficient to achieve the purposes of sentencing, and would represent a move by the Commission to reinstate mandatory guidelines. Second, judges who blindly adhere to the Guidelines despite Booker would not depart or vary in any felon-in-possession case, unnecessarily using prison space in the already overcrowded Bureau of Prisons and wasting tax dollars. Third, other judges would impose a sentence below the guideline range for the reasons prohibited by this proposal, citing the lesser seriousness of the offense, see § 3553(a)(2)(A). This would result in different treatment in different courts, with the latter approach *required* by the governing law. See 18 U.S.C. § 3553(a). Fourth, such a move would marginalize and foster disrespect for the Guidelines. Before Booker, the Commission prohibited or restricted consideration of many offender characteristics and offense circumstances that were relevant to the purposes of sentencing.55 To continue in that vein after Booker is contrary to the statute that now governs sentencing. As Justice Breyer said at the Guidelines' inception and again recently, the Commission was intended to learn from judicial departures.56 The Commission should not begin anew to eliminate departures, especially based on the Department of Justice's unhappiness with a plainly justified result.

(F) "Brandished" or "Otherwise Used"

The proposed amendment addresses a circuit conflict regarding whether waiving a firearm or pointing it at a specific person constitutes "brandishing" or "otherwise using." This normally comes up in the robbery guideline, where there is a several tiered system of increases for threats and weapons in § 2B3.1(b)(2). Currently, the three tiers for firearms are a 7 level increase for discharge, a 6 level increase for "otherwise used," and a 5 level increase for "brandish" or possess.

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55 Without any congressional directive to do so, the Commission prohibited consideration of drug or alcohol dependence, gambling addiction, lack of guidance as a youth, similar circumstances indicating a disadvantaged background, and post-sentencing rehabilitation on re-sentencing, and strictly limited consideration of age, mental and emotional conditions, physical condition or appearance, and military, civic, charitable or public service, and good works.

56 Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 7-8 (1988); Justice Stephen Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent. R. 180, *30 (Jan./Feb. 1999).

The interpretive difficulty has been in deciding where to draw the line between "brandishing" and "otherwise used" on the continuum of factual possibilities. This has been made particularly difficult by the definition of "otherwise used," which merely states that it is less than discharging, but "more than brandishing, displaying or possessing." § 1B1.1, App. Note 1(I).

The typical scenario in which this issue comes up is a bank robbery where the defendant waves a firearm about or points the firearm at a specific bank employee. A majority of courts have held that "pointing a weapon at a specific person or group of people in a manner that is explicitly threatening is sufficient to make out 'otherwise use' of that weapon." United States v. Orr, 312 F.3d 141, 145 (3d Cir. 2002); see also United States v. LaFortune, 192 F.3d 157 (1st Cir. 1999); United States v. Nguyen, 190 F.3d 656 (5th Cir. 1999); United States v. Warren, 279 F.3d 561 (7th Cir. 2002); United States v. Fuller, 99 F.3d 926 (9th Cir. 1996); United States v. Rucker, 178 F.3d 1369 (10th Cir. 1999). These courts do not require that the defendant physically contact the victim or victims with the firearm or dangerous weapon for the "otherwise use" adjustment to apply. Some courts have made clear that explicit threats need not be verbal for the conduct to qualify as "otherwise use." See, e.g., Nguyen, 190 F.3d at 661; Orr, 312 F.3d at 145.

A minority position holds that "the pointing of [a] weapon in a threatening manner, even when coupled with a verbal threat, constitutes 'brandishing,' rather than 'other use' of the weapon." United States v. Matthews, 20 F.3d 538, 554 (2d Cir. 1994). At the time of the Matthews case, the definition of brandishing specifically stated that brandishing meant "that the weapon was pointed or waved about, or displayed in a threatening manner." § 1B1.1, App. Note 1(C). Since Matthews, the Commission amended the definition of brandishing, excising the language about pointing or waving a firearm and using a new definition imported from 18 U.S.C. § 924(c), which emphasizes situations where the firearm is not seen at all, or only partially visible, so long as its presence is made known in order to intimidate. The reason for the amendment evinces no intention that the deletion of the language about pointing, waving or displaying in a threatening manner to alter the meaning of brandishing or to move those fact patterns to "otherwise used." See U.S.S.G. App. C, amend. 601.

A middle ground has been struck by other courts by not applying the "otherwise used" enhancement when a firearm was pointed at a person with orders to open the register, but no other threats were made. United States v. Gonzales, 40 F.3d 735 (5th Cir.), cert. denied, 514 U.S. 1074 (1995); United States v. Moerman, 233 F.3d 279 (6th Cir. 2000). These decisions emphasize that a broader interpretation of "otherwise used" would subsume all brandishing cases and make that intermediate increase meaningless.

Option 1 of the proposed amendment "combines brandished and otherwise used with respect to firearms under the theory that the same risk of harm, and the same fear, exists whether a firearm is generally waved about or specifically pointed at a particular individual." It effectively broadens the definition of "otherwise used" to include what has classically been

described as "brandishing" (pointing or waving the firearm).57 It then moves brandishing to the same 6 level increase as otherwise used in the robbery and extortionate threat guidelines.

Option 1 is inappropriate for several reasons. Under this proposal, a defendant who allows a firearm to be seen in a holster during a robbery will be punished the same as one who waves a firearm about in a threatening manner, and the same as a defendant who strikes a bank employee with a firearm or holds a firearm to the head of a bank employee during a robbery. The latter examples present both a greater risk of harm to, and a greater fear by, the targeted employee(s). This option simply collapses any attempt to have a continuum and appropriately graded penalties when a firearm is involved. If the Commission chooses to expand the definition of "otherwise used" to clearly encompass general pointing and waving in order to address the circuit conflict, then brandishing should be left at a level 5 increase. It should be noted that the only brandishing cases remaining would be those in which the firearm was not taken out and used other than to make its presence known.

Option 1 also calls for comment as to whether, if the Commission chooses this approach, it should make similar changes in other guidelines with weapon increases. The other guidelines at issue do not have the same set of increases as §§2B3.1 and 2B3.2. Rather, they treat dangerous weapons and firearms the same and only deal with 3, 4, and 5 level increases. Therefore, the same solution would not work. More important, the same observation would apply to the collapsing of the graded responses to a continuum of behavior. Moving all "brandishing" cases to the "otherwise used" level punishes a wide range of less culpable behavior more harshly than necessary. Therefore, this solution should not be applied to other guidelines.

Option 2A is unsatisfactory because, while it purports to distinguish between "otherwise using" and "brandishing," it blurs the distinction by including "implicit threats" in the definition of "otherwise used," while including "generally point[ing] or wav[ing a firearm] in a threatening manner" in the definition of "brandished." It appears that rather than solve the circuit conflict, these definitions will perpetuate it. As one court has concluded, "When a robber points a gun, or what appears to be a gun, at a robbery victim or bystander, that gesture is inherently threatening . . . [W]e should not have to point out, for it is tautological, that there can be no 'display of the gun in a threatening manner' . . . without an implicit threat." Matthews, 20 F.3d at 554. Thus, it appears that the same actions are covered by both definitions. This will likely generate extensive litigation and additional circuit splits rather than solving the problem.

We urge the Commission to adopt Option 2B. Defining "otherwise used" to require physical contact (or attempted physical contact) with the victim creates a bright-line rule that

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57
"Brandish" is defined by Merriam-Webster as:

1 : to shake or wave (as a weapon) menacingly
2 : to exhibit in an ostentatious or aggressive manner

http://www.m-w.com/dictionary/brandish.

would reduce litigation. It also incrementally increases punishment for more culpable offenders. It accords with a common sense definition of brandishing, which includes showing and pointing a firearm, but leaves room for greater punishment for those who do more than that.

Thank you for considering our comments, and please let us know if we can be of any further assistance.

Very truly yours,

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March 27, 2006

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Washington, DC 20002-8002

Re: Comment on Proposed Emergency Amendments to Anabolic Steroids Guidelines

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders to comment further on the Commission's proposed emergency amendments to the anabolic steroids guidelines.

In written testimony presented to the Commission on March 15, 2006, Jodi L. Avergun, Chief of Staff of the Drug Enforcement Administration, argued against using a purity-based scheme to measure anabolic steroids. In her testimony, Ms. Avergun acknowledged that there are other controlled substances which are currently measured by purity. Written Testimony of Jodi L. Avergun, 03/15/06 ("Avergun Testimony") at 12. Those substances are: methamphetamine, amphetamines, PCP and oxycodone. Avergun Testimony at 13. Ms. Avergun supports using a purity-based measure for these substances because it is "particularly crucial to ensure that the resulting sentences are justified by the offense conduct" in light of the fact that the maximum penalty for trafficking in any of these substances is life imprisonment. Avergun Testimony at 13.

The implication of Ms. Avergun's testimony is that it is less crucial to ensure that the resulting sentences are justified in cases involving trafficking in anabolic steroids because the maximum penalty is only five years imprisonment. We strongly object and urge the Commission to adopt a purity-based measure precisely because it is crucial to ensure that all sentences – including those for trafficking in anabolic steroids – are justified by the offense conduct.

Ms. Avergun also stated that using a dosage methodology instead of a purity-based one would only result in a two-level increase regardless of whether Option 1 or Option 2 is adopted. Avergun Testimony at 15. The costs and delays Avergun suggested would result if a purity-based model were adopted would, in her opinion, far outweigh the "cost" of a two-level increase for anabolic steroid traffickers. Avergun Testimony at 15. This aspect of the testimony fails to appreciate both human and institutional costs of increased punishment. A two-level increase is

approximately six (6) additional months of a person's life. Given that it costs the Bureau of Prisons approximately $25,000/year to incarcerate someone, the cost/benefit analysis set forth in Avergun's testimony does not capture the real costs of using a dosage rather than purity-based method of measurement.

Finally, Ms. Avergun explained that most penalties for drug offenses rely on the weight of the mixture or substance containing a controlled substance and not the actual amount of controlled substance in the mixture and that Congress adopted such an approach with street drugs in mind. Avergun Testimony at 11. Anabolic steroids are not street drugs and the reasons for using the weight of the total quantity distributed rather than the amount of pure drug involved do not apply to steroids. For one thing, street drugs do not carry labels indicating the amount of pure steroid.

The Commission has recognized that "the weight of different inactive ingredients mixed with the drug – dilutants, carrier media, and even humidity – can result in disparate sentences for offenders who sell similar numbers of doses of a drug" and that "arbitrary variations due to the weight of inactive ingredients remain." Fifteen Years of Guideline Sentencing at 50. Using the "mixture or substance" approach urged by Ms. Avergun to determine the quantity of anabolic steroid involved only ensures more disparity and more arbitrary variations – a result the Commission cannot permit.

Thank you for considering our comments, and please let us know if we can be of any further assistance.

Sincerely,

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March 13, 2006

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Re: 2006 Proposed Amendments to the Sentencing Guidelines

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders to comment on the proposed amendments pertaining to the Transportation Act, the Intelligence Reform and Terrorism Prevention Act of 2004, False Registration of Domain Names, Miscellaneous Laws, Application Issues, Obstruction of Justice Circuit Conflicts, Privilege Waiver, Crime Victims' Rights, and Reductions in Terms of Imprisonment Based on Bureau of Prisons Motion.1

We incorporate by reference the comments we submitted regarding proposed amendments pertaining to Steroids (see letter dated February 28, 2006); Immigration (see written and oral testimony, February 21 and March 6, 2006); Firearms (see letter dated March 9, 2006); Intellectual Property (see letter dated August 3, 2005); and Obstruction of Justice in terrorism investigations (see letter dated October 7, 2005).

We thank you for the opportunity to comment and hope that our input is useful.

I. Transportation Act

Section 4210 of the Transportation Act creates a new offense at 49 U.S.C. § 14915 for failure to give up possession of household goods, defined as "the knowing and willful failure, in violation of a contract" to deliver or unload household goods, with a maximum penalty of two years. The Commission proposes to implement 49 U.S.C. § 14915 by referring it to § 2B1.1. Section 2B1.1 covers offenses involving theft, embezzlement, property destruction, fraud and deceit. This Class E Felony is essentially

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1 Thanks to Assistant Federal Defenders Randy Alden, Alan DuBois, Beverly Dyer, Corey Endo, Lisa Freeland, Steve Jacobson, Esther Salas, and Fredilyn Sison for their assistance in preparing these comments.

a civil contract breach that Congress criminalized. A violation occurs merely by failure to deliver; no theft or destruction of property, fraud or deceit is required. Disputes between trucking companies and individuals are typically resolved and household items returned, causing no lasting harm.

A first offender who failed to deliver $125,000 worth of household goods (a reasonable estimate for a middle class household), though later returned, would, if the court interpreted the "intended pecuniary harm" to be the value of the property not delivered in compliance with the contract, be punished by 21-27 months, at the statutory maximum, and the same as an embezzler or thief who permanently stole $125,000. In many cases, the guideline sentence would exceed the statutory maximum. In short, the punishment would be disproportionate to the offense. The appropriate solution would be to promulgate a new guideline for this unique offense with a graduated table that goes no higher than two years. Alternatively, the Commission should promulgate an application note in § 2B1.1 stating that in cases under 49 U.S.C. § 14915, the loss is "actual loss" as defined in Application Note 3(A)(i).

The Commission requests comment on whether, and if so how, it should implement section 7121 of the Transportation Act. Section 7121 amends 49 U.S.C. § 5124, which already criminalizes knowing and willful violations, to increase the maximum penalty to ten years if a release of hazardous materials occurs and results in death or serious bodily injury. Congress did not direct the Commission to increase penalties, and rightly so.

Under the current guideline, § 2Q1.2, which provides for a 9-level increase for a substantial likelihood of death or serious bodily injury and a 2-level increase for any violation of 49 U.S.C. § 5124, a release of hazardous materials resulting in death or serious bodily injury results in a base offense level of 23, 25, 27, 29, 31 or 33. In Criminal History Category I, the corresponding guideline ranges are 46-57 months, 57-71 months, 70-87 months, 87-108 months, 108-135 months, and 135-168 months. Thus, we think it is obvious that the Commission should not increase penalties under the guideline. If anything, the Commission should reduce the 9-level increase for a substantial likelihood of death or serious bodily injury, and provide for a 9-level increase if death or serious bodily injury actually results.

II. Intelligence Reform and Terrorism Prevention Act of 2004

A. Section 5401: 8 U.S.C. § 1324

Section 5401 of the Act added a new subsection (a)(4) to 8 U.S.C. § 1324 as follows:

> (4) In the case of a person who has brought aliens into the United States in violation of this subsection, the sentence otherwise provided for may be increased by up to 10 years if--

(A) the offense was part of an ongoing commercial organization or enterprise;
(B) aliens were transported in groups of 10 or more; and
(C)(i) aliens were transported in a manner that endangered their lives; or
(ii) the aliens presented a life-threatening health risk to people in the United States.

The Commission proposes three options. Option One would create a specific offense characteristic that would add 2 levels if "the defendant was convicted under 8 U.S.C. § 1324(a)(4)." Option Two would create a specific offense characteristic that would add 2 levels if "the offense was part of an ongoing commercial organization or enterprise." One version of Option Three would provide for a potential upward departure if "the defendant was convicted under 8 U.S.C. § 1324(a)(4)." The other version of Option Three would provide for a potential upward departure if "the offense was part of an ongoing commercial organization or enterprise."

Option Two and the latter version of Option Three would be contrary to congressional intent, on the face of the statute which requires that all three requirements are met, and in the legislative history which rejected a prior version that would have enhanced the sentence if any one of the requirements was met. See H. Rep. No. 108-724, § 3041. We recommend a potential upward departure if "the defendant was convicted under 8 U.S.C. § 1324(a)(4)."

As to the Issue for Comment, the Commission should not define "ongoing commercial organization" in a vacuum. It should wait until fact patterns develop and it appears that a definition is necessary based, for example, on an unfair interpretation by the courts or a circuit split.

B. Section 6702: 18 U.S.C. § 1038(a)

Section 6702 creates a new offense at 18 U.S.C. § 1038(a), entitled "False Information and Hoaxes," prohibiting "conduct with intent to convey false or misleading information under circumstances where such information may reasonably be believed and where such information indicates that an activity has taken, is taking, or will take place that would constitute" a variety of violations of the law ranging from minor firearms offenses to aircraft piracy,2 and prohibiting "a false statement, with intent to convey false or misleading information, about the death, injury, capture, or disappearance of a member of the Armed Forces" during a war or armed conflict. The maximum penalties are 5 years, 20 years if serious bodily injury results, or life if death

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2 i.e., Title 18, chapter 2 (destruction of aircraft or motor vehicles, violence at international airports, fraud involving aircraft parts), 10 (biological weapons), 11B (chemical weapons), 39 (explosives and combustibles), 40 (explosive materials), 44 (firearms), 111 (shipping), or 113B (terrorism); 42 U.S.C. § 2284 (sabotage of nuclear facilities or fuel); Title 49 §§ 46502 (aircraft piracy), 46504 (use of dangerous weapon in assaulting or intimidating flight crew member or attendant), 46505(b)(3) (explosive or incendiary device on aircraft) or (c) (weapon or explosive on aircraft willfully or with reckless disregard for human life), 46506 (commission of homicide or attempted homicide on an aircraft), or 60123(b) (damaging or destroying pipeline facility).

results. Most convictions would be subject to a maximum punishment of five years, since it is unlikely that serious bodily injury or death would result from a hoax or false information.

The proposed amendment would refer an offense under 18 U.S.C. § 1038(a) to § 2A6.1. It is inappropriate to equate a hoax or false statement with a threat. A threat, at minimum, is a "statement that *expresses* an *intent* to inflict bodily harm," in addition to being susceptible to reasonable belief.3 Based on our experience, many of these offenses are going to involve mentally unstable people who either believe that some disaster is afoot or who think that the hoax is a joke. A false report that a neighbor or estranged spouse is a convicted felon or drug user and possesses a gun would also be subject to prosecution under 18 U.S.C. § 1038(a). Many of these offenses, in other words, will be akin to a harassing telephone call, which has a base offense level of 6 rather than 12 if it "did not involve a threat to injure a person or property." § 2A6.1(a)(2).

If the Commission is going to include hoaxes and false statements in a threats guideline, it should likewise distinguish it from a threat by providing for a lesser base offense level, or an invited downward departure, if the offense did not involve an expression of intent to injure a person or property. We suggest two alternatives:

Defenders' Option One would amend § 2A6.1(a)(2) as follows:

(2) 6, if the defendant is convicted of an offense under 47 U.S.C. § 223(a)(1)(C), (D), or (E), or 18 U.S.C. § 1038, that did not involve a threat to injure a person or property.

Defenders' Option Two would create an application note stating as follows:

If the defendant is convicted of an offense under 18 U.S.C. § 1038 that did not involve a threat to injure a person or property, a downward departure may be warranted.

We strongly object to the proposal to create a cross reference to §2M6.1 for conduct "evidencing an intent to carry out a threat to use a weapon of mass destruction, as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)." This would permit "relevant conduct" which could have been but was not charged, was dismissed, or of which the defendant was acquitted, rather than the offense of conviction, to increase the sentence dramatically based on a mere preponderance of the evidence. Title 18 U.S.C. § 2332a prohibits, *inter alia*, "threaten[ing]" to use a weapon of mass destruction, as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D), which is punishable by imprisonment for life (or the death penalty), and is already referenced to §2M6.1. If the government obtains a conviction under 18 U.S.C. § 2332a for a threat to use a weapon of mass destruction, the guideline range will be determined under §2M6.1. If the government does not obtain

3 United States v. Fulmer, 108 F.3d 1486, 1495 (1st Cir. 1997).

such a conviction, a cross reference to that guideline is not currently and should not be made available. Nothing in Section 6702 suggests that the Commission should "implement" the new hoax statute by creating a cross reference for a threat to use weapons of mass destruction. Thus, we fail to see why the Commission would expand the most criticized and constitutionally suspect features of the Guidelines.4 See Blakely v. Washington, 542 U.S. 296, 306 (2004).

C- F. Sections 6803, 6903, 6905, 6906: 18 U.S.C. §§ 832, 2332g, 2332h, 175c

Part C of the proposal would reference the new offense in 18 U.S.C. § 832 to § 2M6.1. This new offense includes participating in or providing "material support or resources" to a nuclear or weapons of mass destruction program or attempting or conspiring to do so, with a statutory maximum of 20 years, and also development, possession, threats to use, or use of a radiological weapon, with a statutory maximum of life. "Material support or resources" is defined to include a broad range of support or resources,5 which (as indicated by the lower statutory maximum) defines much less serious conduct than developing or using a radiological weapon. Yet, under § 2M6.1, a person who was convicted of conspiring to provide material support or resources to such a program (for example, by providing lodging to a relative involved in developing a nuclear weapon), would be punished exactly the same as the person who actually developed or used the weapon. Since this offense is new and it is difficult to predict the fact patterns to which it may be applied, we recommend that the Commission promulgate an Application Note providing for downward departure as follows:

> If the defendant was convicted under 18 U.S.C. § 832(a), a downward departure may be warranted if the offense level overstates the seriousness of the offense.

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4 American College of Trial Lawyers, Proposed Modifications to the Relevant Conduct Provisions of the Federal Sentencing Guidelines, 38 Am. Crim. L. Rev. 1463 (2001); Kate Stith & Jose Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 140, 159 (1998); David Yellen, Illusuion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines, 78 Minn. L. Rev. 403, 425-54 (1993); Kevin R. Reitz, Sentencing Facts: Travesties of Real Offense Sentencing, 45 Stan. L. Rev. 523, 524 (1993); Pamela B. Lawrence & Paul J. Hofer, An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3, Federal Judicial Center, Research Division, 10 Fed. Sent. Rep. 16 (July/August 1997); Paul J. Hofer, Implications of the Relevant Conduct Study for the Revised Guideline, 4 Fed. Sent. Rep. 334 (May/June 1992).

5 "Material support or resources" is defined in 18 U.S.C. § 2339A(b) as "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials."

Parts C, E and F of the proposal would reference the new offenses in 18 U.S.C. §§ 832, 2332h and 175c to § 2M6.1. The first two statutes include threats to use radiological weapons or dispersal devices; the third includes threats to use the variola virus. At present, § 2M6.1(a)(4) provides for a base offense level of 20 if the offense involved a threat to use a list of weapons or materials if there was no intent or ability to carry out the threat. Though "nuclear weapon" in this list probably includes a "radiological weapon" (as in § 832(c)) and might include a "radiological dispersal device" (as in § 2332h), and "biological agent" probably includes the variola virus (as in § 175c), it would be clearer if "radiological weapon," "radiological dispersal device," and "virus" were specifically added to § 2M6.1(a)(4).

Part D would reference the new offense in 18 U.S.C. § 2332g to U.S.S.G. § 2K2.1. This offense includes a threat to use a rocket, missile, launching device or parts, but § 2K2.1 would result in an offense level of at least 31 even if there was no intent or ability to carry out the threat. See § 2K2.1(a)(5), (b)(3)(A). This is in stark contrast to § 2M6.1(a)(4), which provides for a base offense level of 20 for threats under those circumstances involving equivalent weapons and materials. Thus, we recommend that the Commission amend § 2K2.1(b)(3)(B) to provide for a 2-level rather than a 15-level increase under those circumstances:

> (B) a destructive device other than a destructive device referred to in subdivision (A), or a threat to use a destructive device referred to in subdivision (A) that did not involve any conduct evidencing an intent or ability to carry out the threat, increase by two levels.

III. False Registration of Domain Name

Section 204(b) of Pub. L. 108-482 directs the Commission to "review and amend the sentencing guidelines and policy statements to ensure that the applicable guideline range for a defendant convicted of any felony offense *carried out online* that may be facilitated through the use of a domain name registered with materially false contact information is sufficiently stringent to deter commission of such acts," and, specifically, to "provide sentencing enhancements for anyone convicted of any felony offense *furthered* through knowingly providing or knowingly causing to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used *in connection with* the violation."

The proposed amendment would create a new Chapter Three adjustment, whenever a "statutory enhancement under 18 U.S.C. § 3559(f)(1) applies," of 1, 2, 3 or 4 levels.

18 U.S.C. § 3559(f)(1) provides for an increased statutory maximum (the lesser of doubling the maximum or an additional seven years) if a defendant who is "convicted of a felony offense (other than an offense of which an element is the false registration of a domain name) knowingly falsely registered a domain name and knowingly used that

domain name in the course of that offense." Under (f)(2), "falsely registers" means "registers in a manner that prevents the effective identification of or contact with the person who registers."

We have two concerns with the proposal. First, while it incorporates the requirement of a felony and the statutory definition of "falsely registers," it omits certain requirements from the statutory directive, italicized above. The Commission should not go further than Congress required. Second, it does not exclude the possibility that this adjustment would apply in addition to an adjustment for obstruction of justice, resulting in impermissible double counting. U.S.S.G. §2B1.1, Application Note 8(C) addresses an analogous double counting concern by precluding the addition of an adjustment for Obstruction of Justice where an enhancement for Sophisticated Means per §2B1.1(b)(9) has already been applied.

We believe that a one-level enhancement is an appropriate adjustment for this conduct and is consistent with the overall scheme of the Guidelines Manual. To add two levels would suggest that the conduct in question was as serious as: (1) the possession of a dangerous weapon (including a firearm) during a controlled substance offense (see U.S.S.G. §2D1.1(b)(1)); (2) causing bodily injury during a robbery (see U.S.S.G. §2B3.1(b)(3)(A)); (3) making a threat of death during the course of a robbery (see U.S.S.G. §2B3.1(b)(2)); (4) using a minor to commit a crime (see U.S.S.G. §3B1.4); (5) using body armor to commit a crime (see U.S.S.G. §3B1.5); and (6) reckless endangerment during flight (see U.S.S.G. §3C1.2), to name just a few examples.

We recommend the following replacement language:

> If (1) a statutory enhancement under 18 U.S.C. § 3559(f)(1) applies, (2) the felony offense was carried out online, and (3) the felony offense was furthered through knowingly falsely registering a domain name, increase by 1 level. If the conduct that forms the basis for an adjustment under this section is the only conduct that forms the basis for an adjustment under Section 3C1.1, do not apply that adjustment under Section 3C1.1.

IV. Miscellaneous Laws

A. Section 9(A): 18 U.S.C. § 1369

The Veterans' Memorial Preservation and Recognition Act of 2003, section 2, codified at 18 U.S.C. § 1369(a), prohibits the destruction of veterans' memorials and establishes a ten-year maximum sentence. The proposed amendment would (1) refer violations of the new offense to USSG §§ 2B1.1 (Theft, Property, Destruction, and Fraud) and 2B1.5 (Theft of, Damage to, or Destruction of Cultural Heritage Resources), and (2) establish an enhancement of two, four, or six levels if the offense involved a national cemetery or veteran's memorial.

The Commission should use a uniform two-level enhancement rather than raising it (for both national cemeteries and veterans' memorials) to four or six levels. The Commission previously determined that a two-level increase was appropriate for offenses involving the property of a national cemetery. See USSG §§ 2B1.1(b)(6), 2B1.1(b)(2). Both the Veterans' Cemetery Protection Act, which called for a two-level enhancement for property offenses against cemeteries, and the Veterans' Memorial Preservation and Recognition Act, were enacted by Congress to punish offenders who willfully injure or destroy protected property of the United States. Congress did not instruct the Commission to increase penalties for either national cemeteries or veterans' memorials. No explanation is offered for an increased enhancement. Sentences are too high already; they should not be increased without a congressional directive or very compelling reason.

B. Section 9(B): 7 U.S.C. § 7734

The Plant Protection Act of 2002 increased the maximum penalties available for certain violations of 7 U.S.C. § 7734. Specifically, the Act increased the maximum penalty for knowingly importing or exporting plants, plant products, biological control organisms, and like products for distribution or sale "in violation of this chapter" to five years for the first offense and ten years for any subsequent offense. The Act did not change the maximum one-year penalty for other knowing violations of Title 7 and other offenses involving documents covered by Title 7.

In response to the legislative change, the Commission has proposed two options. Option One would increase the base offense level to either 8 or 10; Option Two would provide for an upward departure.

We believe the current reference to § 2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product), which has a base offense level of 6, is sufficient and object to both proposed options. Although Congress increased the maximum punishment for such offenses, Congress did not instruct the Commission to increase the applicable guideline ranges. When Congress decides that an increase in the guideline range is necessary, it passes legislation suggesting or mandating such an increase. Congress has not done so here and thus the Commission should make no change.

The proposed amendment is unnecessary because the guideline already provides for an upward departure if "death or bodily injury, extreme psychological injury, property damage or monetary loss resulted." USSG § 2N2.1, comment. (n.3). Sentencing courts therefore have the means to increase the sentence in unusual circumstances. Moreover, because the guidelines are now advisory, see United States v. Booker, 125 S. Ct. 738 (2005), courts have the flexibility to increase the sentence if the movement of the plants resulted in some greater harm other than those addressed in the departure provision. See 18 U.S.C. § 3553(a)(1) (instructing courts to consider "nature and circumstances of the offense"); § 3553(a)(2)(A) (instructing courts that sentence must "reflect the seriousness of the offense").

If the Commission believes it is necessary to adopt one of the two proposed options, Option Two is more appropriate, for the reasons the Commission stated: "because of the expected infrequency of plant protection offenses and because it provides the court with a viable tool to account for the harm involved during the commission of these offenses on a case-by-case basis."

In addition to imposing unnecessary rigidity, Option One would also lead to unnecessarily severe sentences. Individuals convicted of violating the Plant Protection Act are likely to be first-time offenders. Increasing the base offense level from a six to a ten would increase the guideline range, for an individual with a criminal history category I, from 0-6 months to 6-12 months. Such an increase would contravene the Commission's mandate to "insure that guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 18 U.S.C. § 994(j).

C. Section 9(D): 18 U.S.C. § 1841

The Unborn Victims of Violence Act of 2004 created a new offense, codified at 18 U.S.C. § 1841, for causing death or serious bodily injury to a fetus while engaging in conduct that violates one of several enumerated statutes. The statute provides that the maximum penalty for the offense shall be the penalty "for that conduct had that injury or death occurred to the unborn child's mother." 18 U.S.C. § 1841(a)(2)(A). In cases where the person "intentionally kills or attempts to kill the unborn child that person shall be punished under sections 18 U.S.C. §§ 1111 [murder], 1112 [manslaughter], and 1113 [attempted murder or manslaughter]." 18 U.S.C. § 1841(a)(2)(C).

The proposed amendment refers violations of 18 U.S.C. § 1841(a)(1) to USSG § 2X5.1 (Other Offenses), which instructs courts to apply "the most analogous offense guideline." Thus, if the defendant is convicted under 18 U.S.C. § 1841(a)(1), the court would apply the guideline that covers the conduct the defendant is convicted of having engaged in, as that conduct is described in 18 U.S.C. § 1841(a)(1) and listed in 18 U.S.C. § 1841(b).

We object to the proposed upward departure provision set forth in proposed Application Note 2(B). This proposal states that "an upward departure may be warranted if the offense level under the applicable guideline does not provide an adequate sentence to account for the death of or serious bodily injury to the child in utero."

The upward departure provision is contrary to Congress's intent. A violation of the Unborn Victims of Violence Act "does not require proof that . . . the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying crime was pregnant" or proof that "the defendant intended to cause the death of, or bodily injury to, the unborn child." 18 U.S.C. §§ 1841(a)(2)(B)(i) and (ii). In all circumstances other than the intentional killing or attempted killing of the unborn child, which is covered separately by 18 U.S.C. § 1841(a)(2)(C), Congress mandated that the

punishment for the new offense be the same as that provided under Federal law had the injury or death occurred to the child in utero's mother. See 18 U.S.C. § 1841(a)(2)(A). Thus, the enhancement is contrary to Congress's intent. Again, the Commission should not encourage higher sentences than Congress intended or required.

Moreover, in light of the nature of the offense, a defendant convicted under 18 U.S.C. § 1841(a)(1) will likely be exposed to emotional and other volatile influences at sentencing. The proposed invitation for an upward departure is objectionable because of the risk that these influences might provoke inappropriately harsh sentences. Finally, given the highly-charged nature of the offense, the proposed upward departure provision would invite unwarranted sentencing disparities among different defendants in different districts sentenced by different judges with different views.

We strongly oppose the proposed upward departure.

D. Section 9(E): Proposed Guideline § 2X5.2

Title 18 U.S.C. § 3559(a)(6) classifies as a Class A misdemeanor an offense punishable by one year or less but more than six months. The Commission has proposed guideline USSG § 2X5.2 to apply to five new Class A misdemeanor offenses6 -- one of which, the Social Security Administration Act, 42 U.S.C. § 1129, we have been unable to locate on Westlaw or http://thomas.loc.gov/ -- and any Class A misdemeanor not referenced to a more specific Chapter Two guideline.

Proposed § 2X5.2 provides a base offense level of six and a specific offense characteristic of two for subsequent convictions under the same provision of law as the instant offense of conviction.

We believe that a base offense level of four, rather than six, is appropriate, consistent with guidelines for other Class A misdemeanors. See, e .g., USSG § 2B2.3 (base offense level 4 for criminal trespass); § 2D2.1(a)(3) (base offense level 4 for simple possession of certain controlled substances and list I chemicals); § 2J1.5 (base offense level 4 for material witness's failure to appear at misdemeanor trial); § 2P1.2 (base offense level 4 for providing or possessing certain contraband in prison); § 2T1.7 (base offense level 4 for failing to deposit collected taxes in trust account as required after notice); § 2T2.2 (base offense level 4 for regulatory offenses); § 2T3.1 (base offense level 4 for smuggling if tax loss did not exceed $100).

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6 As listed in the Synopsis, these are (1) the interstate movement of animals for fighting, in violation of 7 U.S.C. § 2156; (2) the corrupt and forcible interference with the administration of the Social Security Administration Act committed by threats of force, in violation of 42 U.S.C. § 1129(a); (3) illegal tampering with a consumer product, in violation of 18 U.S.C. § 1365(f); (4) the misuse or illegal disclosure of DNA analyses, in violation of 42 U.S.C. § 14133; and (5) the knowing capture of an image of an individual's "private area" without that person's consent and under circumstances in which the person has a reasonable expectation of privacy, in violation of 18 U.S.C. § 1801.

No explanation is given as to why some Class A misdemeanors should be subject to a base offense level 1 ½ times higher than that for other Class A misdemeanors. As the Commission points out, many misdemeanors not covered by another Chapter Two guideline are regulatory violations. Moreover, a base offense level of four would, and should, reflect the fundamental difference between a misdemeanor and a felony.

The proposed two-level SOC for subsequent offenses would import the unwise policy in the immigration area of double counting criminal history into a broad range of Class A misdemeanors. This would foster litigation, and the Commission has not offered any justification for it.

We do not believe that the Commission should reference any Class A misdemeanors currently referenced to a guideline with a lower base offense level to proposed § 2X5.2, and have not identified any Class A misdemeanors not currently referenced in Appendix A that should be included in Appendix A and referenced to proposed §2X5.2.

Again, with sentences that are already too severe and the BOP 40% overcapacity, we do not believe that the Commission should be raising penalties absent a congressional directive or a very compelling reason to do so.

V. Application Issues

A. Cross Reference to Second Degree Murder Guideline in § 2D1.1

The Commission proposes adding another cross reference to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Possession with Intent to Commit These Offenses; Attempt or Conspiracy) to permit courts to apply § 2A1.2 (Second Degree Murder) in drug cases in which the conduct involved is second degree murder if the resulting offense level is greater than that determined under the drug guideline.

We oppose any expansion of unconvicted conduct because it is unfair and only serves to transfer sentencing power to the government. The resulting guideline range would be severe -- 20 years to life, depending on criminal history -- based on a mere preponderance of the evidence. If death results and the conduct does not amount to first degree murder, the court can use its discretion to increase the sentence commensurate with the seriousness of the offense and other relevant factors. See 18 U.S.C. § 3553(a). Again, we strongly urge the Commission not to expand one of the most pernicious aspects of the Guidelines, criticized by most participants, disinterested observers, and the Supreme Court. See Blakely v. Washington, 542 U.S. 296, 306 (2004).

B. § 3C1.3 (Offenses Committed While on Release)

The Commission proposes eliminating § 2J1.7 and moving the three-level enhancement for cases in which the statutory sentencing enhancement at 18 U.S.C. §

3147 applies, to a new Chapter Three Adjustment, § 3C1.3 (Offenses Committed While on Release), but eliminating important commentary protective of defendants' rights.

Without explanation, the proposal would eliminate the commentary explaining, based on the legislative history, that the sentence must be consecutive but that there is no requirement as to any minimum term. The commentary should be retained. Otherwise, some courts (but not others) will believe that a substantive change was intended, when that is not the case. This will complicate sentencings by requiring the parties and courts to try to divine the meaning of the change, resulting in different interpretations, and unwarranted disparity.

Without explanation, the Commission proposes to eliminate the commentary stating that the enhancement may be imposed "only in the case of a conviction for a federal offense that is committed while on release on another federal charge." This commentary is consistent with the statutory definition of "offense." See 18 U.S.C. § 3156(a)(2). As above, eliminating it would create confusion and unwarranted disparity. The commentary should be retained.

The proposal would also eliminate the commentary requiring "sufficient notice to the defendant by the government or the court," claiming that a majority of courts have found that there is no notice requirement for 18 U.S.C. § 3147 to apply. This is not correct. Three circuits have squarely held that the statutory enhancement may not be applied unless the court gave the defendant specific warning *in the pretrial release order* of potential enhancement under 18 U.S.C. § 3147. See United States v. Cooper, 827 F.2d 991, 994 (4th Cir. 1987); United States v. Onick, 889 F.2d 1425, 1434 (5th Cir. 1989); United States v. DiCaro, 852 F.2d 259, 264-65 (7th Cir. 1988). Five circuits have held that pre-release notice is not required but that *pre-sentence* notice is required by the Guideline and/or the Due Process Clause. United States v. Kentz, 251 F.3d 835, 840-41 (9th Cir. 2001) (citing guideline and due process); United States v. Hecht, 212 F.3d 847, 849 (3d Cir. 2000) (citing guideline) (Alito, J.); United States v. Bozza, 132 F.3d 659, 661 (11th Cir. 1998) (citing guideline and opportunity to prepare and defend against the enhancement); United States v. Browning, 61 F.3d 752, 757 (10th Cir. 1995) (citing guideline and opportunity to prepare and defend against the enhancement); United States v. Feldhacker, 848 F.2d 293, 299 (8th Cir. 1988) (citing guideline and due process). The Second Circuit has not decided if pre-release notice must be given, but recognized that notice must be given before sentencing. United States v. Vazquez, 113 F.3d 383, 389-90 (2d Cir. 1997). The Sixth Circuit has stated in *dicta* that pre-release notice was not required, and declined to decide whether pre-sentence notice was required because the defendant waived the argument. United States v. Lewis, 991 F.3d 322, 324 (6th Cir. 1993).

Particularly in light of the Apprendi to Booker line of cases, the Commission should not eliminate any notice requirement when a *majority of circuits has held that pre-sentence notice* is required by the Guideline or both the Guideline and the Due Process Clause and *no circuit has ever held that pre-sentence notice is not required.* This, of course, makes sense, because a defendant must prepare to defend himself against an

allegation of an entirely separate offense. Instead, the Commission should change the sentence to read as follows:

> An enhancement under 18 U.S.C. § 3147 may be imposed only if the defendant is given sufficient notice prior to sentencing, and applies only in the case of a conviction for a federal offense committed while on release on another federal charge.

Defendants do not always receive notice, see Lewis, supra, and this enhancement is not covered by Rule 32(h). As with elimination of the other commentary noted above, elimination of the notice provision could be interpreted as meaning that no pre-sentence notice need be given, and will create confusion, unfairness, and unwarranted disparity.

VI. §3C1.1 (Obstruction of Administration of Justice) Circuit Conflicts

We have a number of serious concerns about the Commission's proposed amendments to U.S.S.G. § 3C1.1. An enhancement for obstruction of justice should apply when the purpose of the conduct is to obstruct or impede the investigation, prosecution or sentencing of the offense of conviction, the defendant's relevant conduct or a closely related offense. In other words, it should apply only to conduct which is intended to thwart the truth-seeking function of the proceeding. It should not apply to obstructive conduct related to administrative or ancillary matters, such as pre-investigation conduct not directed at thwarting the investigation itself, to perjury in a civil proceeding between private parties, or to misrepresentations on CJA applications, since such conduct does not have the purpose or potential to impede the investigation or subvert the outcome of the case. Dishonesty of this sort may be dealt with through denial of the acceptance of responsibility reduction or through the district court's discretionary choice of sentence either within or outside the advisory guideline range. Therefore, we support the addition of language which makes it clear that, in order for the obstruction enhancement to apply, the conduct must have been "intended to prevent or hinder the investigation, prosecution, or sentencing" of the offense of conviction. For the reasons below, we oppose expanding the reach of the obstruction enhancement to include conduct that occurs before the onset of an official investigation, to non-governmental civil proceedings or to CJA applications. The current guideline, which limits the enhancement to post-investigation conduct, provides a clear, bright-line rule for courts to follow.

By contrast, the proposed amendment would open up an essentially unlimited range of conduct for courts to scrutinize for some sign of obstructive intent. Such an inquiry would present a host of evidentiary and epistemological problems. How would a court go about determining whether an act was intended to hinder an investigation that did not exist at the time the act was committed? Does a defendant who hides questionable bookkeeping decisions from an employer to avoid being fired commit obstruction, even if no criminal investigation has begun and the defendant is unaware of the relevant law? Does the defendant have to know that an investigation is likely or merely that there is a possibility the conduct will be investigated? Can obstruction take

place before the crime if, for instance, the defendant lays the groundwork for an alibi or obtains false identification in case of apprehension?

The problem with expanding the enhancement to pre-investigation conduct is the inevitable dilution of the bond between the allegedly obstructive conduct and the offense, as well as the difficulty of accurately discerning an obstructive intent in pre-investigative conduct which may have been motivated by a host of factors at the time it occurred, but will invariably be viewed through the distorting lens of post-conviction hindsight (and the preponderance of the evidence standard) at sentencing. Though some courts have criticized the temporal requirement contained in the current guideline, even they have recognized it serves a purpose. For instance, the Sixth Circuit has noted that it served "to require, at least in an indirect sense, a nexus between the acts of obstruction and the crime of conviction. With no causal link to the crime of conviction, obstructive conduct could conceivably include acts wholly unrelated to the crime of conviction or conduct that should have been the subject of separate criminal charges." United States v. Baggett, 342 F.3d 536, 542 (6th Cir. 2003).

The temporal requirement also serves to limit the reach of what could otherwise be an extraordinarily broad enhancement. Offenders hide their loot, destroy their disguises, discard their weapons. All of these acts are part and parcel of the offense itself, but arguably "obstructive" in the sense that they make discovery of the crime more difficult. Rare is the criminal who does not attempt to cover his tracks in some way. Absent some means of singling out defendants who act with the specific purpose of obstructing justice, the §3C1.1 enhancement could be applied in almost every case. Requiring that the obstructive conduct take place after the investigation began is the most reasonable and reliable way of ensuring that the enhancement captures something more than the offense conduct itself.

Simply put, the balance struck by the existing guideline is the proper one. The Commission has considered this issue in the past and decided that the obstruction enhancement should be limited to post-investigation conduct. This rule has the value of clarity, simplicity and ease of application. In any case where a court sees a clear instance of pre-investigation obstruction, it may upwardly depart or impose a non-Guideline sentence. There is no need to amend the current Guideline.

In addition, the Commission should limit any consideration of perjury during the course of a civil proceeding to material matters in proceedings brought by or involving a governmental agency. While issues involved in an action brought by an administrative agency might be closely related to those later involved in a criminal case, a civil lawsuit between private parties typically involves issues unrelated to criminal justice. Therefore, perjury occurring in a civil suit should not be the subject of an obstruction of justice enhancement even if facts at issue in the lawsuit overlap with conduct required to prove a criminal offense. Cf. United States v. Kirkland, 985 F.2d 535, 537-38 (11th Cir. 1993) (U.S.S.G. § 3C1.1 inapplicable to obstructive conduct occurring during internal bank audit). In addition, perjury should not be considered obstruction unless it pertains to

material issues that hinder the investigation, prosecution or sentencing in the case. The proposed requirement that the perjury "pertain" to the offense of conviction is too broad.

We recommend that subsection (b) of application note 4 be amended to read:

> (b) committing, suborning, or attempting to suborn perjury regarding material evidence in the case, including during the course of a civil proceeding brought by or involving a government agency and pertaining to conduct constituting the offense of conviction.

To limit its otherwise overly broad application, application note 6, which defines "material" evidence or information, should be amended to replace the phrase "the issue under determination" with "an issue under determination affecting the investigation, prosecution or sentencing of the offense of conviction."

Making false statements on a financial affidavit in order to obtain court-appointed counsel does not warrant an obstruction enhancement because that conduct is not aimed at impeding justice or at affecting the outcome of the case. Instead, it affects only the allocation of resources. In United States v. Khimchiachvili, 372 F.3d 75, 80 (2d Cir. 2004), the Second Circuit rejected an enhancement for a false CJA financial affidavit, describing "a common sense definition of what constitutes obstruction of justice [as] conduct that willfully interferes with or attempts to interfere with the disposition of the criminal charges against a defendant." Continuing, the court stated:

> An enhancement for obstruction is therefore only warranted "if the court finds that the defendant willfully and materially impeded *the search for justice in the instant offense*." Or, as we have written, the "conclusion that obstruct,' in this context, relates to anything that can make it more difficult to carry out a just result in a criminal case [is] erroneous as a matter of law." For a defendant's conduct to qualify as obstruction of justice, it must have the "potential to impede" the investigation, prosecution, or sentencing of the defendant. It cannot simply be a misrepresentation.

Id. (citing United States v. Zagari, 111 F.3d 307, 328 (2d Cir. 1997) (emphasis added in Khimchiachvili); United States v. Stroud, 893 F.2d, 504, 507 (2d Cir. 1990); and United States v. McKay, 183 F..3d 89, 95 (2d Cir. 1999)). Of the circuits that have considered this issue, the Second Circuit's decision is the most extensively reasoned. Compare United States v. Hernandez-Ramirez, 254 F.3d 841, 843-44 (9th Cir. 2001); United States v. Ruff, 79 F.3d 123, 125 (11th Cir. 1996). As the Second Circuit explained, the defendant did not want to pay for a lawyer, but "[h]e was not seeking to prevent justice or even delay it." Id. The Second Circuit recognized that "[w]hat happened here may amount to fraud" and that it was "reprehensible," "possibly deserving a higher sentence," but that it nonetheless did not require an enhancement for obstruction of justice. Id.

The misrepresentation of financial information to obtain appointment of counsel is even less apt to have any affect on the outcome of the case than other behavior not

subject to the obstruction enhancement, such as lying about drug use while on pretrial release, providing false identification to the police upon arrest, or fleeing from arrest. See § 3C1.1, comment. (n.5). It is in no way similar to conduct that typically constitutes obstruction of justice by attempting to alter the outcome of a case, such as destroying evidence, tampering with witnesses, or lying on the stand about facts necessary to prove a criminal offense, or to delay justice, such as failure to appear at a court hearing. Id, comment. (n.4).

Moreover, many defendants who are potentially eligible for court-appointed counsel complete financial affidavits shortly after arrest and without access to their bank statements and other financial records, increasing the risk of mistakes that may be construed as intentional. In addition, requiring a court to enhance the sentence for obstruction of justice where a defendant misrepresented assets to obtain court-appointed counsel creates a conflict of interest between counsel and the defendant. Finally, a court can easily remedy a defendant's understatement of assets by ordering the defendant to repay amounts used to appoint counsel under the Criminal Justice Act.

Therefore, the Commission should not list making false statements on a financial affidavit in order to obtain court-appointed counsel under application note 4 as proposed. Instead, that conduct should be listed under application note 5, as an example of conduct that does not justify an enhancement for obstruction.

VII. Privilege Waiver

We join in the comments of the Practitioners' Advisory Group. While we do not represent organizations, we believe that the current commentary contributes to the undue pressure placed on organizations by the government to waive the attorney-client and work product privileges, and thus threatens those fundamental basics of our adversary system and the right to counsel.

VIII. Crime Victims' Rights

This proposal would add a new guideline, § 6A1.5, stating that "[i]n any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. § 3771 and any other provision of Federal law pertaining to the treatment of crime victims," with "crime victim" defined as in 18 U.S.C. § 3771(e).

The Crime Victim Rights Act (CVRA) reflects a careful balancing of the rights of defendants, the discretion of prosecutors, and new rights for victims. The Commission should therefore strictly adhere to the statutory language. Requiring the court "in any case" to ensure that the crime victim is afforded the statutory rights departs from the statute, which states that "[i]n any *court proceeding* involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a)." Beyond that, the statute states that "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged

in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)." The Federal Rules Advisory Committee has interpreted this to mean that the government is in charge of giving notice of proceedings.7 Another good reason for the Commission to strictly adhere to the statutory language is that the Rules Committee has not yet even published for comment its rules implementing the CVRA.

The phrase "and any other provision of Federal law pertaining to the treatment of crime victims" should be deleted. It is undefined and undefinable. It could be interpreted by victims and their counsel in unexpected and unforeseeable ways to enforce "rights" that may not exist in the CVRA, inviting litigation, an undue burden on the courts, and either disappointment for victims or unwarranted incursions on defendants' rights. The phrase should be deleted.

We suggest the following substitute:

A crime victim, as defined in 18 U.S.C. § 3771(e), shall be afforded the rights described in 18 U.S.C. § 3771(a).

IX. Reductions in Term of Imprisonment Based on Bureau of Prisons Motion

The proposed amendment is the Commission's first attempt to provide guidance for court consideration of Bureau motions to reduce sentences based on extraordinary and compelling reasons as provided in 18 U.S.C. § 3582(c)(1)(A)(i). We applaud that attempt and offer suggestions which we believe may improve the initial draft and respond more definitively to the congressional directive in 28 U.S.C. § 994(t). We also respond to the issues for comment regarding release after age 70 pursuant to 18 U.S.C. § 3582(c)(1)(A)(ii). First, we offer some background regarding the "extraordinary and compelling" reduction statute.

A. Background of Reduction for "Extraordinary and Compelling Reasons"

Many people who work in the federal criminal justice system are unfamiliar with this statute. It is little known and little utilized. However, some of us have learned of it after a client, already sentenced, inquires whether some radical change of circumstance can qualify him or her for some relief or reduction of sentence. Sometimes, the circumstance is some sort of family emergency, sometime a matter of life or death, sometime concern about the welfare of a child, which the prisoner can only assist with if released early. Initially, the provisions of 18 U.S.C. § 3582(c)(1)(A)(i) appear to offer relief, if the situation truly appears compelling and extraordinary. However, that hope is quickly dashed when we learn that the BOP only rarely makes the motion and then only when a prisoner is about to die or is completely incapacitated. This state of affairs and unduly cramped usage of the statute could be altered by this Commission's policy

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7 Report to Standing Committee at 5-6 (December 8, 2005), http://www.uscourts.gov/rules/Reports/CR12-2005.pdf.

statement. The policy statement should reflect congressional intent that the mechanism be used, however rarely, to address a variety of post-sentencing developments.

Prior to the advent of the Sentencing Reform Act and the Sentencing Guidelines, the federal criminal justice system used indeterminate sentences and a parole model in which various factors, including progress toward rehabilitation, would result in release on parole before the term of a sentence expired. The sentencing court could impose a mandatory minimum period to be served of up to one third of the sentence before parole eligibility. 18 U.S.C. § 4205(b)(1) (repealed effective Nov. 1, 1987). In that system, Congress allowed the Bureau of Prisons to move the court, at any time post-sentence, for a reduction of a minimum time before parole eligibility. 18 U.S.C. § 4205(g) (repealed effective Nov. 1, 1987). This motion was not confined to extraordinary and compelling circumstances and could even be made based on prison overcrowding.

The Sentencing Reform Act of 1984 (SRA) established a determinate sentencing system with sentencing guidelines to aid the courts in establishing an appropriate sentence. The parole system, and the rehabilitative model it embodied, were rejected in favor of a system which provided more certainty, finality and uniformity.8 However, Congress also recognized that post-sentencing developments might provide appropriate grounds to reduce a sentence. Using §4205(g) as a model for the mechanism, the SRA provided a way to adjust a sentence if necessary to accommodate post-sentence developments, which is codified in 18 U.S.C. § 3582(c)(1)(A)(i):

> The court may not modify a term of imprisonment once it has been imposed except that-
>
> (1) in any case–
>
> (A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that–
>
> (ii) extraordinary and compelling reasons warrant such a reduction;

Congress also mandated that the United States Sentencing Commission, created by the SRA, promulgate policy statements regarding how that section should operate and what should be considered extraordinary and compelling:

> The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

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8 See, generally, Mistretta v. United States, 488 U.S. 361, 363-370 (1989).

28 U.S.C. § 944(t).

The legislative history of these provisions demonstrates that Congress intended this release motion as a way to account for changed circumstances. The Senate Judiciary Committee's Report, the authoritative source of legislative history on the SRA, said, in pertinent part:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment....the bill...provides...for court determination, subject to consideration of Sentencing Commission standards, of the question whether there is justification of reducing a term of imprisonment in situations such as those described.9

B. History of Sentence Reductions

Despite the broad language of the statutory provision, the BOP has historically used §3582(c)(1)(A)(i) only to seek release of dying inmates. See, Mary Price, The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A), 13 FED. SENT. R. 188, 2001 WL 1750559 (Vera Inst. Just.) (2001). Originally, BOP policy allowed consideration of release when death was predictable within six months. In 1994, the policy was amended to include other serious medical situations where disease resulted in markedly diminished public safety risk and quality of life. Although there is nothing in the statute or in the BOP policy statement to disqualify a reduction based on something other than medical condition of the inmate, the BOP has never acted on any other basis.

During the first two decades of the SRA, the Sentencing Commission has not responded to the congressional directive to issue policy statements and give examples of extraordinary and compelling reasons. A Vice Chairman of the Commission opined that the lack of policy statements might be partly responsible for the BOP's narrow use of this provision:

> Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section. It is not unreasonable to assume, however, that Congress may have envisioned compelling and extraordinary circumstances to encompass more than a terminally ill individual with a nonviolent criminal record.

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9 S.Rep.No.225, 98th Cong., 1st Sess. 37-150 at p. 55, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3220-3373.

John Steer and Paula Biderman, Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences, 13 Fed. Sent. R. 154, 2001 WL 1750551 (Vera Inst. Just.). The actual numbers collected and appended to Ms. Price's article reflect extremely rare usage of the § 3582 reduction through 2000. The numbers for 2001 through 2004 continue to be quite low despite a growing prison population.10

C. The Proposed Amendment; Extraordinary and Compelling Reasons

The Commission's proposed amendment provides a first step and a structure for a policy statement regarding 18 U.S.C. § 3582(c)(1)(A) reductions. However, it does not comply with the statutory directives to describe what should be considered extraordinary and compelling reasons, nor does it provide examples as required by statute. 28 U.S.C. § 944(t). We believe the Commission should tackle this admittedly difficult task and we provide our suggestions for doing so below, along with other comments on the draft. Luckily, there is already a very good model for addressing these difficult issues in the Appendix of Ms. Price's previously cited article (copy attached).

First, as a drafting matter, proposed U.S.S.G. § 1B.1.13(1)(A) should be amended to state "reasons" in the plural, as in the statute, instead of singular. Otherwise, this drafting change would alter the clear intent of the statute to allow consideration of multiple reasons and their combination as opposed to one single reason. In the alternative, the Commission could adopt the language in Ms. Price's proposal, which is to add a defining statement as follows:

> An "extraordinary and compelling reason" may consist of several reasons, each of which alone is not extraordinary and compelling, that together make the rationale for a reduction extraordinary and compelling.

This option has the advantage of clearly restating the statutory intent that reasons may be plural, to prevent a mechanistic approach to this broadly worded provision.

Second, the proposed draft, in § 1B1.13(2), requires that the person not be a danger. This imports the statutory requirement of 18 U.S.C. § 3582(c)(1)(A)(ii) and applies it to §3582(c)(1)(A)(i) as well. As a practical matter, this expanded requirement will probably have little effect, since it is difficult to envision the BOP moving to reduce a sentence and release a prisoner who is still dangerous. In our experience, the BOP takes great care to eliminate any prisoners from early release consideration if they are considered a danger to the community. However, we believe the proposal should insert the word "present" before the word "danger" in order to assure the proper interpretation stated in the Synopsis, i.e., that the person is "no longer" a danger.

Third, the Synopsis states that the policy statement creates a rebuttable presumption when there is a BOP motion. Presumably, this refers to proposed Application Note 1A, where the only definition of "extraordinary and compelling reasons" appears. The actual language used--"shall be considered as such"-- does not

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10 The 2001 through 2004 figures received from BOP are attached.

appear to operate to create a rebuttable presumption. If that is what is intended, it should be stated simply and in those words. More importantly, this definition provides no guidance whatsoever to the Bureau of Prisons in making their determination, which is the whole purpose of the policy statement and Congress' directive to the Commission.

We believe that providing only a circular definition of extraordinary and compelling reasons, i.e. they presumptively exist when BOP makes a motion, does not comport with the Commission's directive from Congress. We suggest that such reasons should be broadly defined to include all basic post-sentencing changes that could support a reduction, as was intended by Congress. These should not be limited to terminal illness or other extreme medical conditions of the inmate, as has been BOP policy.

Again, Ms. Price's article contains a description of extraordinary and compelling reasons in the proposed policy statement:

> An "extraordinary and compelling reason" is a reason that involves a situation or condition that–
> (1) was unknown to the court at the time of sentencing;
> (2) was known to or anticipated by the court at the time of sentencing but that has changed significantly since the time of the sentencing; or
> (3) the court was prohibited from taking into account at the time of sentencing but would no longer be prohibited because of changes in applicable law.

This proposed language covers the basics of changed conditions or circumstances which could support a reduction of sentence consistent with the SRA and the guidelines. As previously outlined, the §3583(c)(1)(A)(i) provision was placed in the Act to allow some safety valve for post-sentencing changed circumstances. Congress clearly understood that in enacting a determinate sentencing system, there had to be some outlet for compelling changed circumstances after sentencing. This definition provides a flexible model which does not unduly emphasize or confine itself to extreme illness of the inmate. It would allow the court to consider facts or law which changed after sentencing and which present a compelling case for a reduction of the sentence.

Finally, we believe that the Commission should provide a non-exclusive list of examples of what could qualify as extraordinary and compelling reasons. Again, the list proposed in Ms. Price's article appears to offer an excellent starting place in an application note:

> The term "extraordinary and compelling reason" includes, for example, that–
> (A) the defendant is suffering from a terminal illness that significantly reduces life expectancy;
> (B) the defendant's ability to function within the environment of a correctional facility is significantly diminished because of permanent physical or mental condition for which conventional treatment promises no significant improvement;
> (C) the defendant is experiencing deteriorating physical or mental health as a result of the aging process;

(D) the defendant has provided significant assistance to the government to a degree and under circumstances that was not or could not have been taken into account at the time of sentencing or in a post-sentencing proceeding;
(E) the defendant would have received a significantly lower sentence had there been in effect a change in applicable law that has not been made retroactive;
(F) the defendant received a significantly higher sentence than other similarly situated co-defendants because of factors beyond the control of the sentencing court;
(G) the death or incapacitation of family members capable of caring for the defendant's minor children, or other similarly compelling family circumstance, occurred.

These examples do not purport to be exhaustive, but can provide some guidance as to possible categories of changed circumstances which could provide extraordinary and compelling reasons for a reduction in sentence.

D. Issues for Comment

The Commission solicits comment regarding whether the suggested policy statement regarding release of those over 70 years old who have already served 30 years should be expanded to include those sentenced under statutes other than 18 U.S.C. § 3559(c). Further, the Commission asks whether, if so, certain offenses should be excluded, such as terrorism or sexual offenses involving minors.

Extending the possibility of release for aged inmates to sentences outside of 3559(c) sentences would be good policy.11 There are many other statutes which provide for extremely long, even life terms, e.g., the drug statutes found in 21 U.S.C. § 841(b)(1)(A). As the Commission has concluded, risk of recidivism drops dramatically after age 50, and surely even more dramatically after age 70.12 With increased sentence severity over the past twenty years has come an aging prison population, with medical problems, and little risk of re-offense.13 It has been estimated that housing an elderly prisoner costs $60,000 annually.14 It would make just as much sense to expand the release possibility to other cases.

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11 This portion of the statute was passed in 1994 as part of the "Three Strikes" legislation creating life sentences in § 3559(c), which is the only reason it was restricted to those sentenced under that statute.

12 U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 12 & Exhibit 9.

13 U.S. Department of Justice, Bureau of Justice Statistics, Prisoners in 2003 8 (85% increase in inmates 55 or older since 1995), http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf; U.S. Department of Justice, Bureau of Justice Statistics, Medical Problems of Inmates (1997) (48% of federal inmates age 45 or older reported medical problems), http://www.ojp.usdoj.gov/bjs/pub/ascii/mpi97.txt.

14 Sentencing Project, Aging Behind Bars: "Three Strikes" Seven Years Later (August 2001) 12, http://www.sentencingproject.org/pdfs/9087.pdf.

If the expansion were available, it would be unnecessary and unduly broad to exclude certain offenses from the operation of the policy as a categorical matter. The statute and policy statements requiring a current lack of dangerousness fully address the concerns about public safety implicit in the issue for comment. After 30 years served and with defendants over 70 years old, there would be little reason to categorically exclude any conviction, so long as the current lack of dangerousness requirement remains.

Thank you for considering our comments, and please let us know if we can be of any further assistance.

Very truly yours,

JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee
AMY BARON-EVANS
ANNE BLANCHARD
Sentencing Resource Counsel

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
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March 23, 2006

The Honorable Ricardo H. Hinojosa
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Dear Judge Hinojosa,

As President of the Archaeological Institute of America (AIA), I am writing to comment on the proposed amendments to Section 2B1.5 of the United States Sentencing Guidelines. The Archaeological Institute of America is the oldest and largest organization in the United States devoted to archaeology and the preservation of the human record. Founded in 1889 and chartered by an act of Congress in 1906, the AIA's 8,000 members include not only professional archaeologists and students but a majority of members from all walks of life united by a passion for archaeology and what it has to tell us about our shared human past. For over a century the AIA has cultivated the interests of and educated the American public about the past.

Of particular concern to both the professional and avocational members of the AIA is the preservation of archaeological sites, historic monuments and museum collections, which form the basis for our understanding and knowledge of the past. The AIA today leads the debate concerning the trade in illicit antiquities. It was one of the first organizations in the United States to call for adherence to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property and to incorporate UNESCO principles into its Code of Ethics. The AIA has been instrumental in the enactment of United States cultural heritage legislation from the Antiquities Act of 1906 to the Convention on Cultural Property Implementation Act of 1983 and the Emergency Protection for Iraqi Cultural Antiquities Act of 2004.

The AIA submitted comments to the Sentencing Commission in support of the original Cultural Heritage Resource Crimes Sentencing Guideline when it was proposed in 2002. Today I write in support of the new proposed amendment, which would refer a new offense, created under the Veterans' Memorial Recognition and Preservation Act of 2003, 18 U.S.C. § 1369, to § 2B1.5 (Theft of, Damage to, or Destruction of Cultural Heritage Resources). The AIA supports the addition of Veterans' Memorials to the list of culturally significant places in § 2B1.5(b)(2). The proposed amendment also raises the question of whether the enhancement for damage or destruction to a Veterans' Memorial should be raised to four or six levels instead of the current two-level enhancement provided under § 2B1.5(b)(2). The AIA strongly supports an increase in the amount of enhancement to four or six levels for all the offense characteristics listed in §

2B1.5(b)(2) (offenses involving specially protected places) and § 2B1.5(b)(3) (offenses involving specially protected cultural items). This type of uniform increase in the enhancement will send an even clearer message to those who loot, deface or destroy cultural sites and monuments that the United States government is serious about protecting our cultural heritage for future generations of Americans. However, the AIA does not support an increase in the enhancement level if it applies only to Veterans' Memorials, but only if it applies to all the special offense characteristics listed in § 2B1.5(b)(2) and § 2B1.5(b)(3).

Particularly with respect to the characteristics listed in § 2B1.5(b)(2), there seems to be no policy justification for treating one type of protected location differently from other types of protected locations. For example, § 2B1.5(b)(2) currently lists museums and sites listed on the World Heritage List. There is no apparent reason to subject an offense involving any of these different locations to different levels of punishment. The AIA has a particular interest in the sentence to be given to those involved in the trafficking of cultural items stolen from museums located both in the United States and in other countries. For example, the looting of the Iraq Museum in Baghdad in April 2003 and the world's reaction to that event illustrate the deep concern of the American public as well as that of museum professionals and archaeologists for the losses suffered from these types of thefts. The AIA feels strongly that all these types of cultural losses should be treated equally under the Cultural Heritage Resource Crimes Sentencing Guideline and none should be subjected to disparate or inconsistent treatment.

Congress has demarcated all of the cultural places and types of cultural resources listed in the special offense characteristics in § 2B1.5(b)(2) and § 2B1.5(b)(3) for heightened protection through specific statutory treatment. Therefore, the Sentencing Guidelines should also treat them in a uniform and consistent manner, particularly as one of the goals of the Sentencing Guidelines is to achieve consistency in the punishments given to similar crimes. In the past, when the sentence was determined primarily by market value, defendants involved in the trafficking of looted and stolen archaeological artifacts might receive a different sentence depending on whether the artifact involved was a Classical sculpture from Italy, a ceramic vessel from Peru or a Native American artifact from the Southwest, even though the cultural harm inflicted was comparable. The AIA would not want to see this type of inconsistency reintroduced to the Cultural Heritage Resource Crimes Sentencing Guideline through the proposed amendment. As the AIA commented in its 2002 letter to the Sentencing Commission, "the places and types of objects included have all been recognized by federal law, international agencies, or international conventions as having particular value to the cultural history of humankind."

An increase in the offense level enhancements will raise again the issue of the statutorily imposed maximum sentences contained in the Archaeological Resources Protection Act (ARPA), the Native American Graves Protection and Repatriation Act and the Theft from Indian Tribal Organizations act. This issue was addressed in the Sentencing Commission's statement on Reason for Amendment and in a letter from the former Chair of the Sentencing Commission, Judge Diana Murphy, to Congress at the time the Cultural Heritage Resource Crimes Sentencing Guideline was submitted to Congress in 2002. These statutory maxima can prevent imposition of the full sentence permitted under the Sentencing Guideline and therefore help to defeat the goals of the Guideline to achieve more meaningful punishment of cultural heritage resource crimes.

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The AIA has a particular interest in the sentence that can be imposed for violation of ARPA. While the primary goal of ARPA is the protection of archaeological sites located on federally owned and controlled lands, the trafficking provision of ARPA also pertains to archaeological resources that are stolen in other countries and brought to the United States. This section of ARPA has been applied, for example, to prosecutions involving manuscripts stolen from the Vatican library, ancient Etruscan ceramics looted from archaeological sites in Italy, and ancient Inca and Huari ceramics and textiles looted from Peru. The statutory maximum, however, can limit unreasonably the sentence that can be given in similar cases that may be prosecuted in the future. The AIA therefore urges you to suggest again to Congress that it take up the issue of changing the statutory maximum sentences provided in ARPA and the other affected legislation.

I thank you for this opportunity to provide comments on the proposed changes in the Sentencing Guideline for Cultural Heritage Resource Crimes. If any additional explanation or comments are requested, please feel free to contact me.

Sincerely,

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March 24, 2006

The Honorable Ricardo H. Hinojosa
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Dear Judge Hinojosa,

I am submitting this letter on behalf of the Lawyers' Committee for Cultural Heritage Preservation commenting on the proposed amendments to Section 2B1.5 of the United States Sentencing Guidelines. The Lawyers' Committee for Cultural Heritage Preservation (http://www.culturalheritagelaw.org) is an association of lawyers who have joined together to promote the preservation and protection of cultural heritage resources in the United States and internationally through education and advocacy.

The proposed amendment would refer a new offense, created under the Veterans' Memorial Recognition and Preservation Act of 2003, 18 U.S.C. § 1369, to § 2B1.5 (Theft of, Damage to, or Destruction of Cultural Heritage Resources) of the Sentencing Guidelines. The Lawyers' Committee supports the addition of Veterans' Memorials to the list of culturally significant places. The current guideline provides as one of its specific offense characteristics that if the offense involves property damage to one of the protected places, the base offense level will be enhanced by two levels.

The proposed amendment also raises the question of whether the enhancement for damage or destruction to a Veterans' Memorial should be raised to four or six levels. The Lawyers' Committee supports this increase in the enhancement but only if the increase applies to all the special offense characteristics listed in § 2B1.5(b)(2) (offenses involving specially protected places) and § 2B1.5(b)(3) (offenses involving specially protected cultural items). Particularly with respect to the characteristics listed in § 2B1.5(b)(2), there seems to be no policy justification for treating one type of protected location differently from other types of protected locations. For example, § 2B1.5(b)(2) currently lists national monuments, national memorials and national cemeteries, as well as the national park system, National Historic Landmarks, national marine sanctuaries, museums, and sites listed on the World Heritage List. There is no apparent reason to subject an offense involving any of these different locations to different levels of punishment. By the same reasoning, offenses involving human remains (listed in § 2B1.5(b)(3)) should be subject to the same punishment as offenses involving cemeteries and memorials.

[103]

What unites all of the special offense characteristics listed in § 2B1.5(b)(2) and § 2B1.5(b)(3) is that Congress has singled out all of these culturally significant places and types of cultural resources for special treatment. This is reiterated in the Reason for Amendment given by the Sentencing Commission at the time that § 2B1.5 was adopted:

> The first two of these enhancements, at subsections (b)(2) and (b)(3), relate to whether the offense involves a place or resource that Congress has designated for special protection. A two level enhancement attaches if the offense involves a resource from one of eight locations specifically designated by Congress for historic commemoration, resource preservation, or public education. ... An additional two level enhancement attaches to offense conduct that involves any of a number of specified resources, including human remains and other resources that have been designated by Congress for special treatment and heightened protection under federal law.

The Lawyers' Committee strongly believes therefore that all of the offense characteristics listed in § 2B1.5(b)(2) and § 2B1.5(b)(3) should be treated in a uniform and consistent manner. Only uniform treatment is justified under the Sentencing Commission's own original rationale for the enactment of these sections of the Sentencing Guideline. Establishing an unfortunate precedent for non-uniform treatment may create misunderstanding of the purpose and application of the Guideline. One of the central accomplishments of the Cultural Heritage Resource Crimes Sentencing Guideline is its capacity to achieve uniformity in sentencing because the sentencing provisions are based primarily on the cultural significance of the resource involved without regard for extraneous factors such as whether the resource was found within the United States or in another country and whether the resource has a relatively high or low commercial value.

At the same time, the Lawyers' Committee strongly supports an increase in the amount of enhancement to four or, even preferably, six levels for all the offense characteristics listed in § 2B1.5(b)(2) and § 2B1.5(b)(3). This type of uniform increase in the enhancement will send an even clearer message to those who loot, deface or destroy cultural sites and monuments that the United States government is serious about protecting our cultural heritage for future generations of Americans.

Any increase in the offense level enhancements will make even more urgent a point made in the Sentencing Commission's statement on Reason for Amendment and in a letter from the former Chair of the Sentencing Commission, Judge Diana Murphy, to Congress—that the statutory maxima established under three of the relevant statutes, the Archaeological Resources Protection Act, the Native American Graves Protection and Repatriation Act, and the Theft from Indian Tribal Organizations Act, prevent full implementation of the Cultural Heritage Resource Crimes Sentencing Guideline. The Sentencing Commission previously pointed out that "full implementation of this new guideline for the most serious offenders often will be limited in its application because of the extremely low statutory maxima of some of the potentially applicable statutes, such as the criminal provisions of ARPA, NAGPRA, and 18 U.S.C. § 1163 (covering theft of tribal property)." These statutes have either a one or two year statutory maximum term of imprisonment for the first offense and a statutory maximum term of five years for second and subsequent offenses. At the time the Commission submitted the Guideline to Congress it recommended that Congress raise the statutory maximum terms of imprisonment for these offenses.

In her letter to Senators Leahy and Hatch, Judge Murphy gave several examples where an individual who violates one or more of these statutes would not receive the sentence allowable under the Guidelines because of the statutory maxima. In order to achieve uniformity in sentencing and to accomplish the goal of greater enforcement of these statutes that protect our cultural heritage, Judge Murphy urged Congress to change these statutory maxima to ten years, consistent with other general property crimes and the Theft of Major Artwork statute, 18 U.S.C. § 668. The Lawyers' Committee strongly urges you to send a similar letter to Senators Specter and Leahy this year suggesting that the Judiciary Committee consider increasing the statutory maxima for ARPA, NAGPRA and the Theft from Tribal Organizations Act so that judges can give the sentences provided for under the Sentencing Guideline.

I thank you for this opportunity to provide comments on the proposed changes in the Sentencing Guideline for Cultural Heritage Resource Crimes. If any additional explanation or comments are requested, please feel free to contact me.

Sincerely,

Patty Gerstenblith
Professor
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March 28, 2006

United States Sentencing Commission
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Attention: Public Affairs—Priorities Comment

Re: Comments on the Issue of "Chapter Eight – Privilege Waiver"

Dear Sir/Madam:

On behalf of the American Bar Association (ABA) and its more than 400,000 members, I write in response to the Commission's Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings for the amendment cycle ending May 1, 2006.[1] In particular, we would like to express our views regarding Final Priority (6), described in the Notice as the "review, and possible amendment" of the language regarding waiver of attorney-client privilege and work product protections contained in the Commentary in Section 8C2.5 of the Federal Sentencing Guidelines.[2] We urge the Commission to amend this language to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government.

The ABA has long supported the use of sentencing guidelines as an important part of our criminal justice system. In particular, our established ABA policy, which is reflected in the Criminal Justice Standards on Sentencing (3d ed.), supports an individualized sentencing system that guides, yet encourages, judicial discretion while advancing the goals of parity, certainty and proportionality in sentencing. Such a system need not, and should not, inhibit judges' ability to exercise their informed discretion in particular cases to ensure satisfaction of these goals.

In February 2005, the ABA House of Delegates met and reexamined the overall Sentencing Guidelines system in light of the recent Supreme Court decision in *United States v. Booker* and *United States v. Fanfan* (the "*Booker/Fanfan* decision"). At the conclusion of that process, the ABA adopted a new policy recommending that Congress

[1] 71 Fed. Reg. 4782-4804 (January 27, 2006)

[2] In addition to this comment letter on the issue of "Chapter Eight – Privilege Waiver," the ABA is also filing separate comments with the Commission today on the specific issue of "Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)(i)."

take no immediate legislative action regarding the overall Sentencing Guidelines system, and that it not rush to any judgments regarding the new advisory system, until it is able to ascertain that broad legislation is both necessary and likely to be beneficial.

Although the ABA opposes broad changes to the Sentencing Guidelines at this time, we continue to have serious concerns regarding certain narrow amendments to the Guidelines that took effect on November 1, 2004. These amendments, which the Commission submitted to Congress on April 30, 2004, apply to that section of the Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. While the ABA has serious concerns regarding several of these recent amendments, most alarming is the amendment that added the following new language to the Commentary for Section 8C2.5 of the Guidelines:

> Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government]...unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.[3]

Before the adoption of this privilege waiver amendment, the Commentary was silent on the issue of privilege and contained no suggestion that such a waiver would ever be a factor in charging or sentencing decisions. This was true, even though the Department of Justice—acting in accordance with the 1999 "Holder Memorandum" and 2003 "Thompson Memorandum"[4]—was increasingly requesting that companies and other organizations waive their privileges as a condition for certifying their cooperation during investigations.

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[3] In August 2004, the ABA adopted a resolution supporting five specific changes to the then-proposed amendments to the Federal Sentencing Guidelines for Organizations, including amending the Commentary to Section 8C2.5 to state affirmatively that waiver of attorney-client and work product protections "should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government." Subsequently, on August 9, 2005, the ABA adopted a resolution, sponsored by the ABA Task Force on Attorney-Client Privilege, supporting the preservation of the attorney-client privilege and work product doctrine, opposing governmental actions that erode these protections, and opposing the routine practice by government officials of seeking the waiver of these protections through the granting or denial of any benefit or advantage. Both ABA resolutions, and detailed background reports discussing the history and importance of the attorney-client privilege and work product doctrine and recent governmental assaults on these protections, are available at http://www.abanet.org/poladv/acprivilege.htm. In addition, other useful materials regarding privilege waiver are available on the website of the ABA Task Force on Attorney-Client Privilege at http://www.abanet.org/buslaw/attorneyclient/.

[4] The Justice Department's privilege waiver policy originated with the adoption of a 1999 memorandum by then-Deputy Attorney General Eric Holder, also known as the "Holder Memorandum," that encouraged federal prosecutors to request that companies waive their privileges as a condition for receiving cooperation credit during investigations. The Department's waiver policy was expanded in a January 2003 memorandum written by then-Deputy Attorney General Larry Thompson, also known as the "Thompson Memorandum." Subsequently, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Heads in October 2005 instructing each of them to adopt "a written waiver review process for your district or component," although the directive—also known as the "McCallum Memorandum"—does not establish any minimum standards for, or require national uniformity regarding, privilege waiver demands by prosecutors. The Thompson and McCallum Memoranda are available online at http://www.usdoj.gov/dag/cftf/business_organizations.pdf and http://www.abanet.org/poladv/mccallummemo212005.pdf, respectively.

Since the adoption of the privilege waiver amendment to the Sentencing Guidelines in 2004, the ABA has been working in close cooperation with a broad and diverse coalition of legal and business groups—ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union—in an effort to persuade the Commission to reconsider, and perhaps modify, the waiver provision. Towards that end, the coalition sent a letter to the Commission expressing its concerns over the privilege waiver amendment on March 3, 2005 and the ABA sent a similar letter on May 17, 2005.

In June 2005, the Sentencing Commission issued its "Notice of Proposed Priorities and Request for Public Comment" for the amendment cycle ending May 1, 2006 in which it stated its tentative plans to reconsider the 2004 privilege waiver amendment to the Federal Sentencing Guidelines during its 2005-2006 amendment cycle. In response, the ABA, the informal coalition, and a prominent group of nine former senior Justice Department officials[5]—including three former Attorneys General—and Rep. Dan Lungren (R-CA) submitted separate comment letters to the Sentencing Commission on August 15, 2005 urging it to reverse the 2004 privilege waiver amendment and add language to the Guidelines stating that waiver should not be a factor in determining cooperation.[6] Later that month, the Commission issued its "Notice of Final Priorities" for the amendment cycle ending May 1, 2006 in which it stated its intent to formally reconsider the 2004 privilege waiver amendment to the Federal Sentencing Guidelines.

On November 15, 2005, the ABA, several organizations from the coalition, and former Attorney General Dick Thornburgh testified before the Sentencing Commission on the subject of privilege waiver.[7] In response to questions from several Commissioners regarding the frequency with which governmental entities have been requesting that businesses waive their privileges as a condition for cooperation credit, as well as the effects of these waiver requests, the coalition and the ABA subsequently undertook a detailed survey of in-house and outside corporate counsel, and the results were presented to the Commission in early March 2006.[8] Several representatives of the coalition also testified before the Commission on March 15, 2006 regarding the results of the new survey.

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[5] The August 15, 2005 comment letter signed by the nine former senior Justice Department officials—including three former Attorneys General, one former Acting Attorney General, two former Deputy Attorneys General, and three former Solicitors General—is available at http://www.abanet.org/poladv/acpriv_formerdojofficialstletter8-15-05.pdf.

[6] The signatories to the coalition's August 15, 2005 comment letter to the Commission were the American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, the Financial Services Roundtable, Frontiers of Freedom, National Association of Criminal Defense Lawyers, National Association of Manufacturers, National Defense Industrial Association, Retail Industry Leaders Association, U.S. Chamber of Commerce, and Washington Legal Foundation. In addition, the ABA, which is not a formal member of the coalition but has worked in close cooperation with that entity, also submitted similar comments to the Commission on August 15, 2005. Links to the ABA, coalition and other August 15, 2005 comment letters and most other privilege waiver materials referenced in this letter are available at http://www.abanet.org/poladv/acprivilege.htm.

[7] The November 15, 2005 testimony of the American Bar Association, American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, National Association of Criminal Defense Lawyers, National Association of Manufacturers, U.S. Chamber of Commerce, and former Attorney General Dick Thornburgh are available at http://www.ussc.gov/AGENDAS/agd11_05.htm.

[8] The detailed results of the new March 2006 surveys of in-house and outside corporate counsel are available online at http://www.acca.com/Surveys/attyclient2.pdf. The new March 2006 surveys expanded upon the coalition's previous surveys of in-house and outside counsel that were completed in April 2005. Executive summaries of the April 2005 surveys are available at www.acca.com/Surveys/attyclient.pdf and www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf, respectively.

by the organization. A prime test of whether the organization has disclosed all pertinent non-privileged information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. *Waiver of attorney-client privilege and of work product protections is not* a factor in determining whether ~~*a prerequisite to*~~ *a reduction in culpability score under subdivisions (1) and (2) of subsection (g)* is warranted. ~~*unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.*~~."

Thank you for considering our comments. If you would like more information regarding the ABA's position on these issues, please contact our senior legislative counsel for business law issues, Larson Frisby, at (202) 662-1098.

Sincerely,

Robert D. Evans

Robert D. Evans

cc: Members of the U.S. Sentencing Commission
Charles R. Tetzlaff, General Counsel, U.S. Sentencing Commission
Paula Desio, Deputy General Counsel, U.S. Sentencing Commission
Amy L. Schreiber, Assistant General Counsel, U.S. Sentencing Commission

March 27, 2006

VIA ELECTRONIC FILING

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attention: Public Affairs—Priorities Comment

Re: Follow up pursuant to the testimony of the Coalition to Preserve the Attorney Client Privilege: Request for changes to the commentary language of Section 8C2.5 regarding waiver of the attorney-client privilege.

Dear Commissioners and Staff:

On behalf of the Coalition to Preserve the Attorney-Client Privilege,[1] please accept our thanks for allowing us time to present our views to you on March 15, 2006, during Panel Three of your hearings schedule.

You have our testimony – both oral and written, as well as the document providing the results of our privilege survey of in-house and outside lawyers. On March 28, we are filing under separate cover a formal comment letter on behalf of this Coalition, as well. And of course, you have our previous testimonies and submissions.

I only wish to offer one follow-up from our testimony based on the back-and-forth discussion with the Commissioners. Ex-Officio Commissioner Michael Elston of the Department of Justice challenged our testimony regarding the statement of Associate Attorney General Robert McCallum before Members of Congress at the March 7, 2006, House Judiciary Committee Subcommittee hearings on the erosion of the attorney client privilege. The Coalition noted it its testimony to you that Mr. McCallum suggested at the Congressional hearing that the Department of Justice would not challenge the removal of the privilege waiver language; Mr. Elston suggested that our report of that hearing was incorrect, and that our statement that Mr. McCallum was retracting what he told Congress when he testified before the Sentencing Commission earlier in the morning on March 15 was inappropriate.

While we did not wish to argue the issue further at the hearing and while we certainly do not dispute what Mr. McCallum told the Commission on March 15 during its first panel of speakers

[1] The complete listing of Coalition members appears at the end of this letter. Please note that the American Bar Association is not a member of this coalition, but regularly cooperates in the Coalition's work and has participated side by side with the Coalition in regard to this effort.

(namely, that the Department would object to any changes in the language), we think it important for the Commission to know what it is that Mr. McCallum actually did say to the Congress on March 7, since the Members who were pressing him on waiver issues eased off their questioning on the Sentencing Guidelines language after he made the following statement. (And Representative Lundgren was not the only Member who mentioned concern about the Sentencing Guidelines' privilege waiver language – see our March 28 submission for more quotes from other Members of the House.) Members of Congress who were present at this hearing and who oversee the work of this Commission may have reason to believe that the privilege waiver language will not be a continuing issue of contention as a result of Mr. McCallum's statements.

We have produced the relevant text of the preliminary transcript for your reference below. (The final transcript of this session is not available to us to submit with this letter.)

Beginning at line 1295 and ending at line 1325 of the preliminary transcript of the Office of the Clerk of the U.S. House [White Collar Enforcement (Part I): Attorney-Client Privilege and Corporate Waivers, Tuesday, March, 7, 2006, House of Representatives, Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, Washington, DC]:

> Mr. Lundgren: ... And here you have a situation where you want a corporation to follow the law, I presume. And you would want the corporation to listen to good counsel, I would think. And here we have got a rule that seems to me to work in the opposite direction.
>
> And I think that that weighs heavy on me and other members here on this panel. And so I would ask, don't you see the creeping intrusion here? I mean, first you have the first memorandum. Now we have the second memorandum, which is a little tighter and a little tougher. And then, following that, you have the Sentencing Commission saying, well, that is a bad idea. As a matter of fact, we are going to have that as evidence of cooperation, and the lack of it as evidence of lack of cooperation.
>
> What is a corporate counsel to do under those circumstances?
>
> Mr. McCallum: Well, there are a series of questions there, Mr. Lundgren. Number one, with respect to the Sentencing Commission, the Department's position has been we would be comfortable with the Sentencing Commission going back to where it was before that amendment.
>
> Mr. Lungren: Well, is that your position? Is that the administration's position?
>
> Mr. McCallum: I believe that that is the Department of Justice's review –
>
> Mr. Lungren: That is what I mean.

Mr. McCallum: -- underway at this particular time. I do not know whether that has been absolutely finalized. But my review of that is that there would not necessarily be an objection to going back to the way it was before, where it was not addressed.

I do not believe that there were any other issues that you requested we address during or after the hearing, and so I thank you once again for your time and your courtesy in allowing us to present our survey findings for your consideration. Please feel free to contact me or any of the other members of our Coalition if we can be of assistance to you in your deliberations.

Respectfully Submitted For the Coalition to Preserve the Attorney-Client Privilege by:

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COALITION MEMBERS:

AMERICAN CHEMISTRY COUNCIL
AMERICAN CIVIL LIBERTIES UNION
ASSOCIATION OF CORPORATE COUNSEL
BUSINESS CIVIL LIBERTIES, INC.
BUSINESS ROUNDTABLE
THE FINANCIAL SERVICES ROUNDTABLE
FRONTIERS OF FREEDOM
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
NATIONAL ASSOCIATION OF MANUFACTURERS
NATIONAL DEFENSE INDUSTRIAL ASSOCIATION
RETAIL INDUSTRY LEADERS ASSOCIATION
THE U.S. CHAMBER OF COMMERCE
WASHINGTON LEGAL FOUNDATION

March 28, 2006

VIA ELECTRONIC FILING

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attention: Public Affairs—Priorities Comment

Re: Comments on "Chapter Eight – Privilege Waiver"

Dear Sir/Madam:

The Coalition to Preserve the Attorney-Client Privilege, which is composed of the undersigned organizations,[1] is pleased to provide these comments on the Commission's Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings for the amendment cycle ending May 1, 2006.[2] These comments exclusively address Final Priority (6): "review, and possible amendment," of the language regarding waiver of attorney-client privilege and work product protections contained in the Commentary to Section 8C2.5 of the Federal Sentencing Guidelines. For the reasons explained below, we urge the Commission to amend that language to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction for cooperation with the government is warranted.

Background

On April 30, 2004, the Commission submitted to Congress a number of amendments to Chapter 8 of the Guidelines relating to organizations. Included in these amendments, all of which became effective on November 1, 2004, was the addition of the following new language to the Commentary for Section 8C2.5of the Guidelines:

> Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government]...unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.

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[1]The Coalition to Preserve the Attorney-Client Privilege includes the following organizations: American Chemistry Council, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, the Financial Services Roundtable, Frontiers of Freedom, National Association of Criminal Defense Lawyers, National Association of Manufacturers, National Defense Industrial Association, Retail Industry Leaders Association, the U.S. Chamber of Commerce, and Washington Legal Foundation. The American Civil Liberties Union (ACLU) is a part of the coalition as well but was not able to secure approval to co-sign this comment letter prior to today's deadline. The ACLU did sign the coalition's August 15, 2005 comment letter to the Commission, referenced in footnote 5, *infra,* which makes many of the same substantive points outlined in this comment letter. Although the American Bar Association is prevented by internal policies from formally joining coalitions, it is working in close cooperation with the Coalition to Preserve the Attorney-Client Privilege on the privilege waiver issue and will be filing separate comments with the Commission today on the issue of "Chapter Eight – Privilege Waiver."

[2] 71 Fed. Reg. 4782-4804 (January 27, 2006)

Meanwhile, the Commission issued its Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings on January 27, 2006. One of the issues on which the Commission sought public comment was the issue of "Chapter Eight – Privilege Waiver." In particular, the Commission sought additional comment on the following specific issues:

> (1) whether this commentary language [in Application Note 12 of Section 8C2.5 of the Guidelines] is having unintended consequences; (2) if so, how specifically has it adversely affected the application of the sentencing guidelines and the administration of justice; (3) whether this commentary language should be deleted or amended; and (4) if it should be amended, in what manner.[9]

Unintended Consequences of the Privilege Waiver Amendment

In response to the first two issues posed by the Commission, the ABA believes that the 2004 privilege waiver amendment to the Sentencing Guidelines has helped cause a variety of profoundly negative, if unintended, consequences.

The ABA believes that as a result of the privilege waiver amendment and related Justice Department policies and practices, companies have been forced to waive their attorney-client and work product protections in most cases. The problem of coerced waiver that began with the 1999 Holder Memorandum and the 2003 Thompson Memorandum was exacerbated when the Commission added the new privilege waiver language to the Section 8C2.5 Commentary in 2004. While the new language begins by stating a general rule that a waiver is "not a prerequisite" for a reduction in the culpability score—and leniency—under the Guidelines, that statement is followed by a very broad and subjective exception for situations where prosecutors contend that waiver "is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." Without some meaningful oversight over what waivers prosecutors may deem to be "necessary," this exception essentially swallows the rule. Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required.

Now that this amendment has become effective, the Justice Department is even more likely than it was before to require companies to waive their privileges in almost all cases. Adding to our concern is that the Justice Department, as well as other enforcement agencies, is viewing the lack of congressional disapproval of this amendment as congressional ratification of the Department's policy of routinely requiring privilege waiver. From a practical standpoint, companies increasingly have no choice but to waive these privileges whenever the government demands it, as the government's threat to label them as "uncooperative" in combating corporate crime will have a profound effect on their public image, stock price, and standing in the marketplace.

Substantial new evidence confirms that the privilege waiver amendment, combined with the Justice Department's waiver policies, has resulted in the routine compelled waiver of attorney-client and work product protections. According to the new survey of over 1,200 in-house and outside corporate

[9] *See* Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings, 71 Fed. Reg. 4782-4804 (January 27, 2006).

counsel that was completed by the coalition and the ABA in March 2006, almost 75% of corporate counsel respondents believe that a "culture of waiver" has evolved in which governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work product protections. In addition, 52% of in-house respondents and 59% of outside respondents have indicated that there has been a marked increase in waiver requests as a condition of cooperation in recent years. Corporate counsel respondents also indicated that when prosecutors give a reason for requesting privilege waiver, the Sentencing Guidelines rank second only to the Justice Department's waiver policies among the reasons most frequently cited.

The ABA is concerned that that the 2004 privilege waiver amendment to the Guidelines and the related Justice Department waiver policies—which together have resulted in routine government requests for waiver of attorney-client and work product protections—will continue to unfairly harm companies, associations, unions and other entities in a number of ways. First and foremost, the 2004 privilege waiver has helped to seriously weaken the confidential attorney-client relationship between companies and their lawyers, resulting in great harm both to companies and the investing public. Lawyers for companies and other organizations play a key role in helping these entities and their officials to comply with the law and to act in the entity's best interests. To fulfill this role, lawyers must enjoy the trust and confidence of the managers and the board and must be provided with all relevant information necessary to properly represent the entity. By authorizing and encouraging routine government demands for waiver of attorney-client and work product protections, the privilege waiver amendment discourages personnel within companies and other organizations from consulting with their lawyers. This, in turn, seriously impedes the lawyers' ability to effectively counsel compliance with the law, thereby harming not only companies, but the investing public as well.

Second, while the privilege waiver amendment—like the Justice Department's waiver policies—was intended to aid government prosecution of corporate criminals, it has actually made detection of corporate misconduct more difficult by helping to undermine companies' internal compliance programs and procedures. These compliance mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, are one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act. Unfortunately, because the effectiveness of these internal mechanisms depends in large part on the ability of the individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client and work product protections will be honored makes it more difficult for companies to detect and remedy wrongdoing early. Therefore, by further encouraging prosecutors to seek waiver on a routine basis, the privilege waiver amendment undermines, rather than promotes, good corporate compliance practices.

Third, the privilege waiver amendment unfairly harms employees by infringing on their individual rights. By fostering a system of routine waiver, the 2004 privilege waiver amendment and the other related governmental policies place the employees of a company or other organization in a very difficult position when their employers ask them to cooperate in an investigation. They can cooperate and risk that statements made to the company's or organization's lawyers will be turned over to the government by the entity or they can decline to cooperate and risk their employment. It is

fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights.

In recent months, many others—including the coalition of business and legal groups and the former senior Justice Department officials referenced above—have expressed similar concerns regarding the unintended consequences of the 2004 privilege waiver amendment to the Sentencing Guidelines. The ABA shares these concerns and believes that the privilege waiver amendment is counterproductive and undermines, rather than enhances, compliance with the law as well as the many other societal benefits that are advanced by the confidential attorney-client relationship.

Congressional Oversight of Governmental Waiver Policies

On March 7, 2006, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held an oversight hearing on the subject of government-coerced waiver policies. The hearing, titled "White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers," included a number of prominent witnesses, including Associate Attorney General Robert McCallum, former Attorney General Dick Thornburgh, U.S. Chamber of Commerce President Thomas Donohue, and William Sullivan, Jr. of the law firm of Winston & Strawn.[10] With the exception of Mr. McCallum, all of the other witnesses expressed serious concerns regarding the growing trend of government-coerced privilege waiver and identified the Justice Department's waiver policies and the 2004 privilege waiver amendment as major contributing factors causing the erosion of the privilege.

During the hearing, the Chairman of the Subcommittee, Rep. Howard Coble (R-NC), expressed his strong support for the attorney-client privilege and his concerns regarding routine prosecutor demands for waiver during investigations. In addition, after acknowledging that prosecutors "must be zealous and vigorous in their efforts to bring corporate actors to justice," Chairman Coble said that "there is no excuse for prosecutors to require privilege waivers as a routine matter." In addition, Chairman Coble vowed that his subcommittee would "examine the important issue with a keen eye to determine whether Federal prosecutors are routinely requiring cooperating corporations to waive such privilege." After noting that the Sentencing Commission is now reexamining the privilege waiver issue as part of the current amendment cycle, he concluded that "while the guidelines do not explicitly mandate a waiver of privileges for the full benefit of cooperation, in practical terms we have to make sure that they do not operate to impose a requirement..."

Later in the hearing, similar concerns regarding government-coerced waiver were also raised by Rep. Dan Lungren (R-CA), who previously served as California Attorney General. During the question and answer period, Rep. Lungren reiterated his longstanding opposition to the 2004 privilege waiver amendment to the Sentencing Guidelines as explained in his August 15, 2005 letter to the Commission, and he said that he had a "huge concern" with the 2004 amendment to the extent that it "require[d] entities to waive the attorney-client privilege and work product protections as a condition of showing cooperation." In addition, Rep. Lungren criticized the 1999 Holder Memorandum, the

[10] The written testimony of each of the witnesses who appeared at the March 7, 2006 hearing and the letter submitted by the ABA to the Subcommittee regarding the hearing are available at http://www.abanet.org/poladv/testimony306.pdf.

2003 Thompson Memorandum, and the 2004 privilege waiver amendment as together constituting a "creeping intrusion" on the attorney-client privilege.

Rep. William Delahunt (D-MA), himself a former long-time prosecutor, expressed similar misgivings at the hearing regarding government-coerced waiver in general and both the Justice Department's waiver policy and the 2004 privilege waiver amendment to the Sentencing Guidelines in particular. At the conclusion of the hearing, Rep. Delahunt summed up the serious concerns that all the Subcommittee members had previously expressed regarding governmental privilege waiver policies, and he respectfully asked Associate Attorney General McCallum to convey those concerns to the Justice Department in order to avoid having to face bipartisan legislation designed to resolve the issue.

The concerns that the members of the House Judiciary Subcommittee expressed during the March 7 hearing are consistent with those previously expressed to the ABA and the coalition on November 16, 2005 by Sen. Arlen Specter (R-PA), Chairman of the Senate Judiciary Committee, and Rep. James Sensenbrenner (R-WI), Chairman of the House Judiciary Committee.[11]

Recommended Changes to the 2004 Privilege Waiver Amendment to the Sentencing Guidelines

In order to reverse the negative consequences that have resulted from the 2004 privilege waiver amendment to the Guidelines and help prevent further erosion of the attorney-client privilege, we urge the Commission to amend the applicable language in the Commentary to Section 8C2.5 of the Guidelines to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction under the Guidelines is warranted. To accomplish this, we recommend that the Commission (1) add language to the Commentary clarifying that cooperation only requires the disclosure of "all pertinent non-privileged information known by the organization", (2) delete the existing Commentary language "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization", and (3) make the other minor wording changes in the Commentary outlined below.

If our recommendations were adopted, the relevant portion of the Commentary would read as follows[12]:

> "12. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent non-privileged information known

[11] On November 16, 2005, Sen. Specter and Rep. Sensenbrenner spoke at a legal conference dealing with the erosion of the attorney-client privilege that was sponsored by the U.S. Chamber of Commerce, the ABA, the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, and the American Civil Liberties Union. A transcript of Sen. Specter's comments on the privilege waiver issue, as well as the full text of Rep. Sensenbrenner's prepared remarks, are available online at http://www.abanet.org/poladv/acpriv_transcriptofsenspecter11-16-05.pdf and http://www.abanet.org/poladv/acprivsensenbrenner11-16-05.pdf, respectively.

[12] Note: The Commission's November 1, 2004 amendments on the privilege waiver issue are shown in italics. Our suggested additions are underscored and our suggested deletions are noted by strikethroughs.

Before the adoption of the privilege waiver amendment, the Commentary was silent on privilege and contained no suggestion that such a waiver would ever be a factor in charging or sentencing decisions. The issue of waiver emerged during deliberations of the Commission's Ad Hoc Advisory Group on the Organizational Guidelines. The Advisory Group was concerned about the effect on effective corporate compliance programs of the Justice Department's privilege waiver policies, as spelled out in the Holder and Thompson Memoranda.[3] After considering the views of the Department of Justice, various bar associations, and regulated entities—and weighing the concerns raised by numerous representatives of the business community and various legal groups—the Advisory Group recommended privilege waiver language somewhat similar to, though more general than, the language quoted above. The Commission revised that language and incorporated it into the 2004 amendments to the Guidelines.

After the 2004 privilege waiver amendment to the Guidelines was adopted, a broader cross-section of business, legal, and public policy organizations, including many of the undersigned entities and the American Bar Association (ABA), began to evaluate the substantive and practical impact of the waiver provision on their operations—and on the legal and business communities in general—and communicated their concerns to the Commission. On March 3, 2005, the coalition sent a letter to the Commission expressing its concerns over the privilege waiver amendment. The ABA expressed similar concerns in its separate letter to the Commission dated May 17, 2005.

In June 2005, the Sentencing Commission issued its "Notice of Proposed Priorities and Request for Public Comment" for the amendment cycle ending May 1, 2006, in which it stated its tentative plans to reconsider the 2004 privilege waiver amendment to the Federal Sentencing Guidelines during its 2005-2006 amendment cycle. In response, the coalition submitted a comment letter to the Commission on August 15, 2005, urging it to reverse the privilege waiver amendment and add language to the Guidelines stating that waiver should not be a factor in determining cooperation. Similar comment letters opposing the November 2004 privilege waiver amendment were also filed by a prominent group of nine former senior Justice Department officials—including three former Attorneys General—and by the ABA.

In August 2005, the Sentencing Commission issued its "Notice of Final Priorities" for the amendment cycle ending May 1, 2006, in which it stated its intent to formally reconsider the 2004 privilege waiver amendment to the Federal Sentencing Guidelines. Subsequently, several organizations from the coalition, former Attorney General Dick Thornburgh, and the ABA, testified before the Commission on November 15, 2005, on the subject of privilege waiver. During the November 15 hearing, the coalition presented the results of its April 2005 surveys of in-house and

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[3] The Justice Department's privilege waiver policy originated with the adoption of a 1999 memorandum by then-Deputy Attorney General Eric Holder, also known as the "Holder Memorandum," that encouraged federal prosecutors to request that companies waive their privileges as a condition for receiving cooperation credit during investigations. The Department's waiver policy was expanded in a January 2003 memorandum written by then-Deputy Attorney General Larry Thompson, also known as the "Thompson Memorandum." Subsequently, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Heads in October 2005 instructing each of them to adopt "a written waiver review process for your district or component," although the directive—also known as the "McCallum Memorandum"—does not establish any minimum standards for, or require national uniformity regarding, privilege waiver demands by prosecutors. The Thompson and McCallum Memoranda are available online at http://www.usdoj.gov/dag/cftf/business_organizations.pdf and http://www.abanet.org/poladv/mccallummemo212005.pdf, respectively.

outside counsel, both of which confirmed the importance of the privilege to corporate counsel and the growing trend of government-coerced privilege waiver.[4] At that hearing, the Commission asked coalition members to help to gather additional information and data regarding the frequency with which governmental entities have been requesting that businesses waive their privileges as a condition for cooperation credit, as well as the effects of these waiver requests.

After considering the comments and testimony presented by the coalition, the ABA, and others,[5] the Commission issued its Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings on January 27, 2006. One of the issues on which the Commission sought public comment was the issue of "Chapter Eight – Privilege Waiver." In particular, the Commission sought additional comment on the following specific issues:

> (1) whether this commentary language [in Application Note 12 of Section 8C2.5 of the Guidelines] is having unintended consequences; (2) if so, how specifically has it adversely affected the application of the sentencing guidelines and the administration of justice; (3) whether this commentary language should be deleted or amended; and (4) if it should be amended, in what manner.[6]

In response to the Commission's November 15, 2005, request for additional information and data on the frequency of government demands for privilege waiver and their effects, the coalition undertook a second, more detailed survey of in-house and outside corporate counsel. The results of the new survey were presented to the Commission in early March 2006.[7] Subsequently, on March 15, 2006, two representatives of the coalition—Susan Hackett of the Association of Corporate Counsel (ACC) and Kent Wicker of the National Association of Criminal Defense Lawyers (NACDL)—testified before the Commission regarding the results of the new survey.

Unintended Consequences of the 2004 Privilege Waiver Amendment to the Guidelines

The coalition continues to believe that the 2004 changes to the Section 8C2.5 Commentary of the Sentencing Guidelines, though well-intentioned, have helped cause a number of profoundly negative unintended consequences. The results of our new survey provide substantial and compelling evidence supporting the validity of these concerns. In our view, the 2004 privilege waiver amendment to the Guidelines, combined with the existing Justice Department privilege waiver policy as expressed in the Holder and Thompson Memoranda, has led to the following negative consequences:

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[4] Executive summaries of these April 2005 surveys are available online at www.acca.com/Surveys/attyclient.pdf and www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf, respectively.

[5] Links to all of the comment letters, written testimony, and other statements that the coalition, the ABA, and the former senior Justice Department officials previously presented to the Sentencing Commission and Congress are available at http://www.abanet.org/poladv/acprivilege.htm. In addition, other useful materials regarding privilege waiver are available on the ABA Task Force on Attorney-Client Privilege website at http://www.abanet.org/buslaw/attorneyclient/.

[6] *See* Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings, 71 Fed. Reg. 4782-4804 (January 27, 2006).

[7] The detailed results of the new March 2006 surveys of in-house and outside corporate counsel are available online at http://www.acca.com/Surveys/attyclient2.pdf.

•The privilege waiver amendment and related Justice Department policies and practices have forced companies to waive their attorney-client and work product protections in most cases. The problem of coerced waiver that began with the 1999 Holder Memorandum and the 2003 Thompson Memorandum was exacerbated when the Commission added the new privilege waiver language to the Section 8C2.5 Commentary in 2004. While the new language begins by stating a general rule that a waiver is "not a prerequisite" for a reduction in the culpability score—and leniency—under the Guidelines, that statement is followed by a very broad and subjective exception for situations where prosecutors contend that waiver "is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." Without some meaningful oversight over what waivers prosecutors may deem to be "necessary," this exception essentially swallows the rule. Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required.

Now that this amendment has become effective, it is the experience of our members that the Justice Department is even more likely than it was before to require companies to waive their privileges in almost all cases. Adding to our concern, it is our perception that the Justice Department, as well as other enforcement agencies, view the lack of Congressional disapproval of this amendment as Congressional ratification of the Department's policy of routinely requiring privilege waiver. From a practical standpoint, companies increasingly have no choice but to waive these privileges whenever the government demands it, as the government's threat to indict them for being "uncooperative" presents an unacceptable prospect of diminished or destroyed public image, stock price, and standing in the marketplace.

The concerns previously expressed by the coalition that government-coerced waiver had become routine—and that the 2004 privilege waiver amendment was a significant factor contributing to that trend—were confirmed by the results of the new coalition survey. In particular, the survey revealed the following trends:

A Government "Culture of Waiver" Exists. Almost 75% of both inside and outside corporate counsel respondents believe (almost 40% believe strongly) that a "'culture of waiver' has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections." (Only 1% of inside counsel and 2.5 % of outside counsel disagreed with the statement.)

Waiver is a Condition of Cooperation. Fifty-two percent of in-house respondents and 59% of outside respondents confirmed that they believe that there has been a marked increase in waiver requests as a condition of cooperation. Consistent with that finding, roughly half of all investigations or other inquiries experienced by survey respondents resulted in privilege waivers.

A "Government Expectation"[8] of Waiver of Attorney-Client Privilege Confirmed. Of the respondents who confirmed that they or their clients had been subject to investigation in the last

[8] The survey defined 'government expectation' of waiver as a demand, suggestion, inquiry or other showing of expectation by the government that the company should waive the attorney-client privilege.

five years, approximately 30% of in-house respondents and 51% of outside respondents said that the government expected waiver in order for a company to engage in bargaining or to be eligible to receive more favorable treatment.

Prosecutors Typically Request Privilege Waiver – It Is Rarely "Inferred" by Counsel. Of those who have been investigated, 55% of outside counsel responded that waiver of the attorney-client privilege was requested by enforcement officials either directly or indirectly. Twenty-seven percent of in-house counsel confirmed this to be true.[9] Only 8% percent of outside counsel and 3% of in-house counsel said that they "inferred it was expected."

Sentencing Guidelines Rank Second Only to Justice Department Policies Among the Reasons Given For Waiver Demands. Outside counsel indicated that while the Justice Department's waiver policies (i.e., the Thompson/Holder/McCallum Memoranda) are cited most frequently when a reason for waiver is provided by an enforcement official, the Sentencing Guidelines are cited second. In-house counsel placed the Guidelines third, behind "a quick and efficient resolution of the matter," and Justice Department policies, respectively.

Based on this survey data, and the voluminous anecdotal evidence provided by the in-house and outside corporate counsel in the essay portions of our survey, it is clear that government demands for privilege waiver have become routine and that the 2004 privilege waiver amendment to the Guidelines have been a significant contributing factor to this growing trend.

•**The 2004 privilege waiver amendment has helped to weaken the confidentiality of communications between companies and their lawyers.** Lawyers for companies and other organizations play a key role in helping these entities and their officials comply with the law and act in the entity's best interests. To fulfill this role, lawyers must enjoy the trust and confidence of managers, boards, and other key personnel of the entity and must be provided with all relevant information necessary to properly represent that entity. By authorizing and encouraging routine government demands for waiver of attorney-client and work product protections, the privilege waiver amendment discourages personnel within companies and other organizations from consulting with their lawyers. This, in turn, seriously impedes the lawyers' ability to effectively counsel compliance with the law.

The results of the original, April 2005 surveys of in-house and outside corporate counsel conducted by the ACC and the NACDL confirmed the important purpose that privilege and work product doctrines serve in facilitating the lawyer's work, with over 95% of respondents expressing agreement with this principle. (*See* April 2005 ACC and NACDL surveys at pgs. 4 and 5, respectively) In addition, over 90% of respondents in both surveys believed that the privilege enhances the likelihood that company employees will discuss sensitive/difficult issues regarding legal compliance. (*Id.* at pgs. 4 and 6, respectively) The April 2005 surveys also confirmed the chilling effect that privilege waiver would have on the confidential attorney-client relationship. According to those surveys, approximately 95% of both in-house and outside corporate counsel agreed that there would be "a 'chill' in the flow/candor of information provided to counsel if the

[9] Sixty percent of in-house counsel who had experience with a waiver request responded "N/A" (not applicable) to this question, suggesting they had not been present when privilege waivers were discussed.

privilege did not offer protection to client communications or your attorney work-product." (*Id.* at p. 3)

In addition, in response to the open-ended text questions offered at the end of the new March 2006 survey, numerous in-house and outside corporate counsel confirmed that government-coerced waiver policies have had a severe chilling effect on the attorney-client relationship and on the ability of corporate attorneys to counsel their clients to comply with the law. The following quotations are typical of the many narrative responses to the survey's open-ended questions:

> "The fear of privilege waiver has curtailed my ability to frankly and strongly direct my colleagues in areas of risk. I can no longer send memos that say: 'under no circumstances may you do this,' or the like, for fear of reprisal [in the future]. My inability to speak forthrightly forces my advice to be sugar-coated in ways that I believe lessen my power and effectiveness to force others to do the right thing...When things appear as if they will be highly sensitive, I carefully retain outside counsel, often in matters I could handle better internally, thereby wasting significant not-for-profit dollars because of the government's inappropriate intrusion in this formerly sacrosanct land." (*See* March 2006 survey results at p. 15)

> "Our corporate strategy is to have in-house counsel active and involved in business deals early and often. We have found that this significantly minimizes the risk that employees engage in questionable behavior. This 'prevention' strategy demands on open dialogue with employees. DOJ demands for waiver have a chilling effect on our employees seeking out in-house counsel to discuss potentially tricky legal situations. We depend on open lines of communication with employees and these are being strained by DOJ's policy and their push to alter the Sentencing Guidelines. We should have policies in place that encourage dialogue with employees. DOJ's waiver push is short sighted and counter productive." (*Id.*)

> "It is my opinion that the concept of the government asking any person (either individual or corporate) to waive attorney-client privilege in order to facilitate their investigation is a travesty of justice. The attorney-client privilege is there as a means to have open discussions between the client and their attorney regarding all possibilities. To allow for this type of request will merely result in many corporations no longer including in-house counsel in important decision making processes which may in fact lead to even more wrongdoing." (*Id.*)

> "In my experience, it is remarkably difficult for corporations and their employees to get legal advice in today's environment. There is a clear expectation -- sometimes unspoken, often spoken -- that any communication, privileged or not, will be shared with the government. There is no balancing of the advantages of waiver against the risks, including the company's ability to defend itself in ongoing civil litigation. This puts company counsel in a completely untenable position, unable to give or seek advice freely. The important purposes behind the privilege are simply being ignored." (*Id.* at p. 16)

> "Reviewing the reports of waivers and requested waivers in the general press and in the legal periodicals has had a chilling effect on my function as general counsel. I warn our

> senior managers regularly that they should not count on having any privilege regarding their communications with me. We try hard to follow the law at this organization, so criminal prosecution is not a concern. What is a concern is that the continued erosion of privilege in prosecution by state and federal agencies will spill over into the civil arena. We are in a business sector in which litigation is common and the stakes are often very large. The self-censoring I feel compelled to do at this point hinders the company's ability to protect against or plan for anticipated claims." (*Id.*)
>
> "As a result of our experiences, we now routinely advise our clients that there is...[no] such thing as information protected by the attorney client privilege. Although I have no belief that the prosecutors requiring the waivers understand what they have done, within a matter of a few years, these attorneys have utterly eviscerated the attorney client privilege and undermined the most important aspect of the attorney client relationship. As a result, instead of advancing the interests of the public, government attorneys have now created a situation where clients are going to be less, not more, forthcoming; a result that will only lead to more corporate misdeeds." (*Id.*)
>
> "At this stage, much of the damage is done--one has to conduct affairs, take (or not) notes, write communications and obtain information on the assumption that there will be no protection. In that environment, lawyers are already much less effective in discovering information and counseling compliant conduct." (*Id.*)

The sheer number of these and the many other unequivocal responses to the new survey demonstrate that prosecutors' routine demands for waiver—further exacerbated by the 2004 amendment to the Guidelines—have seriously weakened the confidential attorney-client relationship between many companies and their lawyers and made it more difficult for the lawyers to counsel compliance with the law.

•**The privilege waiver amendment helps to undermine internal compliance programs.** The net effect of the privilege waiver amendment and other government policies encouraging routine waiver is to make the detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. As the Commission itself has repeatedly emphasized, effective corporate compliance mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, are one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act. The April 2005 surveys confirmed the important contribution that the attorney-client privilege makes to internal compliance programs, with over 94% of corporate counsel respondents agreeing that the privilege improves the lawyer's ability to monitor, enforce, and improve compliance initiatives. (*See* April 2005 ACC and NACDL surveys at pgs. 4 and 6, respectively.) Unfortunately, because the effectiveness of these internal investigations depends on the ability of the individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client and work product privileges will be honored makes it more difficult for companies to detect and remedy wrongdoing early. Therefore, by further encouraging prosecutors to seek waiver on a routine basis, the privilege waiver amendment undermines, rather than promotes, good compliance practices.

The new March 2006 survey confirmed the fact that when prosecutors request that a company waive its privileges, they often seek sensitive documents directly relating to companies' internal investigations, including (1) written reports of an internal investigation, (2) files and work papers that supported an internal investigation, (3) lawyers' interview notes or memos or transcripts of interviews with employees who were targets, (4) notes/oral recollections of privileged conversations with or reports to senior executives, board members, or board committees, and (5) lawyers' interview notes with employees who were not available for interviews by the government or memos/transcripts of the same. (*See* March 2006 survey at pgs. 8-10) Clearly, prosecutors are taking a very expansive view regarding the types of sensitive internal materials that companies should be forced to turn over during investigations.

•**The privilege waiver amendment unfairly harms employees by infringing on their individual rights.** The privilege waiver amendment and the other governmental policies encouraging routine waiver place the employees of a company or other organization in a very difficult position when their employers ask them to cooperate in an investigation. They can cooperate and risk that statements made to the company's or organization's lawyers will be turned over to the government by the entity, or they can decline to cooperate and risk losing their employment. It is fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights.

In the new survey, many outside corporate counsel confirmed that government-coerced waiver has had substantial adverse effects on companies' employees in a number of specific ways. A majority of the outside counsel who responded to the survey cited instances in which prosecutors encouraged or required companies to take certain actions against employees, including (1) not advancing legal expenses to, or agreeing to reimburse, a targeted employee, (2) not entering into, or breaching, a joint defense agreement with a targeted employee, (3) refusing to share requested documents with a targeted employee, or (4) discharging an employee who would not consent to be interviewed by the government. (*See* March 2006 survey at p. 13.)

Moreover, many if not most corporate criminal investigations do not involve black-and-white types of potential criminality, such as embezzlement. Particularly in the environmental field, there can be substantial question whether the conduct that the government posits is even illegal. In such cases, companies are often being coerced to identify, and treat as possible criminals, employees whose conduct they regard as lawful. In such "gray" areas, the possibility that employees' conversations with company counsel may be turned over to the government can quickly and prematurely squelch such communications.

For all these reasons, we believe that the privilege waiver amendment is flawed and uniquely dangerous to our shared goal of protecting the policies that are advanced by the attorney-client relationship.

Congressional Concern Regarding Privilege Wavier

In addition to the coalition, the ABA, and the former senior Justice Department officials referenced above, many prominent Congressional leaders have also expressed serious concerns regarding both the 2004 privilege waiver amendment to the Sentencing Guidelines and the Justice Department's internal privilege waiver policy.

On March 7, 2006, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the subject of "White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers." Witnesses testifying at the hearing included Associate Attorney General Robert McCallum, former Attorney General Dick Thornburgh, U.S. Chamber of Commerce President Thomas Donohue, and William Sullivan, Jr. of the law firm of Winston & Strawn.[10]

During the hearing, the Chairman of the Subcommittee, Rep. Howard Coble (R-NC), expressed his strong support for the attorney-client privilege and his concerns regarding routine prosecutor demands for waiver during investigations. After noting the "institutional tension between preserving corporate attorney-client and work product privileges and a prosecutor's quest to unearth the truth about criminal acts," Chairman Coble made the following remarks:

> Prosecutors must be zealous and vigorous in their efforts to bring corporate actors to justice. However, zeal does not in my opinion equate with coercion in fair enforcement of these laws. To me, the important question is whether prosecutors seeking to investigate corporate crimes can gain access to the information without requiring a waiver of the attorney-client privilege. There is no excuse for prosecutors to require privilege waivers as a routine matter, it seems to me. This subcommittee will examine the important issue with a keen eye to determine whether Federal prosecutors are routinely requiring cooperating corporations to waive such privilege...[In addition to the McCallum Memorandum of October 21, 2005,] I am also aware of the fact that the Sentencing Commission is examining its current policy of encouraging such waivers when determining the nature and extent of cooperation. While the guidelines do not explicitly mandate a waiver of privileges for the full benefit of cooperation, in practical terms we have to make sure that they do not operate to impose a requirement...

During the March 7 hearing, the Subcommittee's Ranking Member, Rep. Robert Scott (D-VA), expressed similar concerns regarding erosion of the attorney-client privilege. After acknowledging the many policy reasons for preserving the privilege, Rep. Scott noted:

> For some time now I have been concerned about reports that the Department of Justice is coercing corporations to waive their attorney-client privilege during criminal investigations of the corporation and its employees by making waiver a prerequisite for consideration by the Department and its recommendation for not challenging leniency should criminal conduct be established...It is one thing for officials of a corporation to break the attorney-client privilege in their own self-interest by their own volition. It is another thing for the Department to require or coerce it by making leniency considerations contingent upon it, even when it is merely on a fishing expedition on the part of the Department. Complaints have indicated that the practice of requiring a waiver of the corporate attorney-client privilege has become routine. And of course, why wouldn't it be the case? What is the advantage to the Department of not requiring a waiver in the corporate investigation?...Now, coercing corporate attorney-client privileges has not been—has not long been the practice in

[10] The written testimony of each of the witnesses who appeared at the March 7, 2006 hearing and the letter submitted by the ABA to the Subcommittee regarding the hearing are available at http://www.abanet.org/poladv/testimony306.pdf.

> the Department. It has really been the last two administrations that have practiced this, and it has been growing by leaps and bounds...

Similar concerns were also raised during the hearing by Reps. Dan Lungren (R-CA)—who previously served as California Attorney General—and William Delahunt (D-MA)—a long-time former prosecutor. During the question and answer period, Rep. Lungren reiterated his longstanding opposition to the 2004 privilege waiver amendment to the Sentencing Guidelines:

> Just to put it on the record, I have submitted a letter last August to the Sentencing Commission regarding my concerns about the Sentencing Commission's commentary with respect to the rule. It looks to me like that amendment authorizes and encourages the Government to require entities to waive the attorney-client privilege and work product protections as a condition of showing cooperation. And that is the huge concern that I have here.

During his questioning of Associate Attorney General McCallum, Rep. Lungren favorably compared companies' current efforts to preserve their attorney-client privilege with the Bush Administration's recent attempts to invoke and preserve executive privilege:

> If we in the Congress were to every time the President says that there is a reason to protect executive privilege, not only for his administration but for future administrations, that every time he did that he was violating the sense of cooperation that should prevail between two equal branches of government, I think we would be wrong. And I see the Justice Department taking a position that if a corporate defendant or potential defendant refuses to waive that privilege, that is a priori evidence of the fact that they are not cooperating. And that is the problem I really have here...And so I would ask, don't you see the creeping intrusion here? I mean, first you have the first [Holder] memorandum. Now we have the second [Thompson] memorandum, which is a little tighter and a little tougher. And then, following that, you have the Sentencing Commission...[adding privilege waiver language to the Guidelines], well, that is a bad idea...

Rep. Delahunt expressed similar concerns regarding the erosion of the privilege in recent years and questioned Associate Attorney General McCallum's assertion that government-coerced waiver may be necessary to effectively investigate complex corporate frauds. Rep. Delahunt stated:

> You know what I can't understand, Mr. McCallum, is what happened in the past 10 years?... For 20 years of my own professional life...I was a prosecutor. Did a number of sophisticated white collar crime investigations. And, I mean, there are grand juries. There is the use of informants...We knew how to squeeze people without sacrificing or eroding the attorney-client privilege...I just have this very uneasy feeling that it is the easy way to do it...There is a certain level of...why should I have to really exercise myself to secure the truth...I got to tell you something. I am a little annoyed with the Sentencing Commission, too, making this [e.g., privilege waiver] a factor...

At the conclusion of the hearing, Rep. Delahunt summed up the serious concerns that various Subcommittee members had previously expressed regarding governmental privilege waiver policies. In his final comments to Mr. McCallum, Rep. Delahunt explained:

> I think you can probably sense by the questions that have been posed, as well as observations by individual members, that there is a real concern here. And you don't want someone like [Rep.] Lungren from California, you know a far right conservative Republican, and [Rep.] Delahunt, this Northeast liberal, filing legislation on this because I think that is the order of magnitude that is being expressed here. So respectfully, that is a message that I think you can bring back to Justice, is that there is concern about the Thompson/McCallum Memorandum. Okay?

The concerns that the members of the House Judiciary Subcommittee expressed during the March 7 hearing are consistent with those previously expressed on November 16, 2005 by Sen. Arlen Specter (R-PA), Chairman of the Senate Judiciary Committee, and Rep. James Sensenbrenner (R-WI), Chairman of the House Judiciary Committee.[11]

Proposed Changes to the 2004 Privilege Waiver Amendment to the Sentencing Guidelines

In order to stop and reverse the negative consequences resulting from the 2004 privilege waiver amendment to the Guidelines, we urge the Commission to amend the applicable language in the Commentary to Section 8C2.5 of the Guidelines to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction under the Guidelines is warranted for cooperation with the government.

To accomplish this, we recommend that the Commission (1) add language to the Commentary clarifying that cooperation only requires the disclosure of "all pertinent non-privileged information known by the organization", (2) delete the existing Commentary language "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization", and (3) make the other minor wording changes in the Commentary outlined below.

If our recommendations were adopted, the relevant portion of the Commentary would read as follows[12]:

> "12. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent non-privileged information known

[11] On November 16, 2005, Sen. Specter and Rep. Sensenbrenner spoke at a conference dealing with the erosion of the attorney-client privilege that was sponsored by the U.S. Chamber of Commerce, the ABA, the ACC, the NACDL, and the American Civil Liberties Union. A transcript of Sen. Specter's comments and Rep. Sensenbrenner's prepared statement are available online at http://www.abanet.org/poladv/acpriv_transcriptofsenspecter11-16-05.pdf and http://www.abanet.org/poladv/acprivsensenbrenner11-16-05.pdf, respectively.

[12] Note: The Commission's November 1, 2004 amendments on the privilege waiver issue are shown in italics. Our suggested additions are underscored and our suggested deletions are noted by strikethroughs.

by the organization. A prime test of whether the organization has disclosed all pertinent non-privileged information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. *Waiver of attorney-client privilege and of work product protections is not* a factor in determining whether ~~*a prerequisite to*~~ *a reduction in culpability score under subdivisions (1) and (2) of subsection (g)* is warranted. ~~*unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.*~~."

Thank you for the opportunity to present our views on this important matter.

Respectfully submitted,

AMERICAN CHEMISTRY COUNCIL

ASSOCIATION OF CORPORATE COUNSEL

BUSINESS CIVIL LIBERTIES, INC.

BUSINESS ROUNDTABLE

THE FINANCIAL SERVICES ROUNDTABLE

FRONTIERS OF FREEDOM

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

NATIONAL ASSOCIATION OF MANUFACTURERS

NATIONAL DEFENSE INDUSTRIAL ASSOCIATION

RETAIL INDUSTRY LEADERS ASSOCIATION

THE U.S. CHAMBER OF COMMERCE

WASHINGTON LEGAL FOUNDATION

cc: Members of the U.S. Sentencing Commission
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March 27, 2006

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

Re: The 2004 Amendment to the Commentary to Section 8C2.5 of the United States Sentencing Guidelines

Dear Sir or Madam:

I am pleased to enclose the report of our Association's Task Force on Attorney-Client Privilege, commenting on the 2004 amendment to the Commentary to Section 8C2.5 of the United States Sentencing Guidelines. This report was approved unanimously by our Association's Executive Committee earlier today, and represents the position of the New York State Bar Association. As set forth in the report, we urge that the 2004 amendment language be eliminated and replaced with an express statement that waiver of the attorney-client privilege and work-product protection is not to be considered in evaluating the level of cooperation and culpability score.

The attorney-client privilege is one of the most fundamental and sacred principles of our legal system. We believe that the 2004 amendment undermines the attorney-client privilege and thus undermines clients' confidence in the confidentiality of attorney-client communications, affects the quality and candor of communications, and adversely affects the ability of counsel to provide clients with effective representation. Given the potential of significant increases in penalties in the absence of waiver, there is tremendous pressure on corporations to waive a privilege that, for centuries, has been recognized as serving the public interest.

I commend this report to you for your review and consideration. If our Association can provide additional information or comment on this issue, please do not hesitate to contact me.

Very truly yours,

A. Vincent Buzard

A. Vincent Buzard

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Report of
Task Force on Attorney-Client Privilege
March 27, 2006

The Task Force on Attorney-Client Privilege of the New York State Bar Association, joined by the Business Law Section of the Association, welcomes the opportunity to respond to the request by the United States Sentencing Commission (the 'Commission") for comments on the 2004 amendment to the Commentary to Section 8C2.5 of the United States Sentencing Guidelines (the "Guidelines").[1] This amendment stated that waiver by a corporation of its attorney-client privilege and work product protections (hereinafter jointly referred to as the "Privilege") can be considered in determining whether a corporation qualifies for a reduction in its sentence under the Guidelines.[2]

Summary of Issue and Conclusion

The amended Commentary authorizes and encourages the government to require entities to waive the Privilege and, by its express appearance in the Guidelines, has contributed to the pressure on entities to waive the Privilege. As a result, in the experience of the members of the Task Force, waiver has become the rule, not the exception. Many attorneys have come to believe that it is necessary for their clients to offer to waive the Privilege in the hope of obtaining credit for cooperation, even when waiver has not been requested, and there have been many situations where corporate clients have felt compelled to waive the Privilege, before even being asked, lest they be viewed as less than fully cooperative and less than fully interested in having the truth revealed.

We believe that this has, and will have, the effect of undermining the confidence of clients in the confidentiality of their communications with their attorneys, will have a "chilling effect" upon

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[1] The Task Force on Attorney-Client Privilege was appointed by President Vincent Buzard of the New York State Bar Association to examine and make recommendations concerning the practice of state and federal prosecutors, regulators and agencies of requesting that corporations waive their attorney-client privilege and the protection of the work product rule in various circumstances, including plea agreements, deferred prosecution agreements, decisions as to whether to commence enforcement proceedings, and sentencing. The Task Force consists of fifteen members from private practice, the government, self-regulatory organizations, and law school faculty, including two former United States Attorneys for the Eastern District of New York, three former Assistant United States Attorneys for the Southern and Eastern Districts of New York, a former SEC Division of Enforcement Branch Chief, an attorney for the New York Stock Exchange, a professor of Law at Fordham Law School and well known and highly distinguished criminal and civil defense counsel.

The Business Law Section is comprised of members of the New York Bar whose practices focus in the fields of securities regulation, corporation law, finance, banking, and commercial law. The Section includes lawyers in private practice, in-house counsel of corporate legal departments, law school faculty, and self-regulatory agencies.

[2] The views set forth in these comments are those of the New York State Bar Association, the Task Force and Business Law Section and do not necessarily reflect the views of the organizations with which its members are associated.

the quality and candor of those communications, and will compromise the ability of counsel to provide effective representation of their clients.

We urge the Commission to remove the amended Commentary and, instead, to include an express statement in the Commentary that waivers of the attorney-client privilege and work product rule are not to be considered in evaluating the level of cooperation of a defendant or in determining the appropriate sentence under the Guidelines.[3] We recognize that there may be rare instances in which prosecutors may need to request that a corporation waive the Privilege as part of an investigation; removal of the Privilege waiver language from the Commentary will not deprive prosecutors of that option.

Introduction

The first formal written suggestion that a corporation seeking to avoid criminal prosecution and demonstrate cooperation waive the attorney-client privilege and work product protections arose in a June 1999 Department of Justice memorandum prepared by Deputy Attorney General Eric H. Holder, Jr. That document, entitled "Bringing Criminal Charges against Corporations", outlined the factors for a prosecutor to consider in charging a target corporation. One such factor was the target's degree of cooperation in the criminal investigation. In gauging the extent of cooperation, the prosecutor was to consider the corporation's willingness to identify the culprits, to make witnesses available, to disclose the results of its internal investigation, and to waive the attorney-client privilege and work product protection.

In discussing the reasons for seeking waiver, the Holder Memorandum noted the advantages of obtaining the results of the corporation's internal investigation and communications between specific employees and counsel. This permits the government to obtain witness statements without having to negotiate individual cooperation or immunity agreements. In addition, it enables the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation.

On its heels in October 2001 was the Securities and Exchange Commission 21(a) Report entitled the "Statement on the Relationship of Cooperation to Agency Enforcement Decisions" (the so-called "Seaboard Report"). In the Seaboard Report, the SEC announced that no action was being taken against a corporation for fraudulent activities by a former controller of a subsidiary. In making this determination, the SEC stated that the corporation cooperated in the SEC's investigation and did not assert the applicable attorney-client privilege and work product protection. The Report sets forth a number of criteria that the SEC will consider in determining whether and how much to credit cooperation, including the following: "Did the company voluntarily disclose information our staff did not directly request and otherwise might not have uncovered?" By so stating, the SEC was, in our view, encouraging companies to consider not asserting, or waiving, privileges they otherwise might have, even when not requested by the SEC staff.

In 2003, Deputy Attorney General Larry D. Thompson issued a Memorandum to the heads of Department Components and United States Attorneys. Mr. Thompson reiterated the statements from

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[3] Two members of the Task Force, Loretta E. Lynch, Esq. and Jean T. Walsh, Esq., dissent from the recommendation that the Commentary contain an express statement that waivers of the Privilege not be considered.