guideline to cover circumstances in which it was impossible for the defendant to register, because such circumstances would be covered by the affirmative defense at 18 U.S.C. § 2250(b). Moreover, prosecutors exercise their discretion soundly and it is extremely unlikely that a case would be prosecuted in which an offender was prevented from registering due to uncontrollable circumstances, debilitating illness, or severe mental impairment.

We recommend that the reduction for voluntary attempts to comply with registration requirements should not apply in cases where offenders actually commit qualifying offenses. Simply put, unregistered offenders who commit these offenses are precisely the reason that the registration requirements are in place, and it would be unjust to provide these offenders – who victimized others yet again, while unregistered – a windfall reduction in their sentences.

Issue for Comment 4 - We believe new 18 U.S.C. § 2244(a)(5) is already covered by § 2A3.4, which accounts for offenses that would have violated § 2241(c) had the sexual contact been a sexual act via its specific offense characteristics.

Issue for Comment 5 - As noted above, we recommend a 6 level enhancement under § 2G2.5 for cases where offenders refuse to permit inspections under applicable provisions of 18 U.S.C. §§ 2257 and 2257A. That said, it would also be appropriate to provide in an application note that when warranted by the facts of the refusal, in cases where that 6 level enhancement does not adequately account for the offenders' misconduct, an upward departure as well as application of § 3C1.1 may be appropriate.

Issue for Comment 6 - As noted above, among the proposal's options ranging from a base offense level of 34 to 37 for § 2G2.6 offenses, we recommend 37, as it is the only one which encompasses the 20 year mandatory minimum for 18 U.S.C. § 2252A(g) offenses for a criminal history category I offender. However, as we recommend that the best approach for addressing mandatory minimums is to set the base offense level at the guideline range in excess of the statutory minimum, level 39 (262-327 months for a criminal history category I offender) would be more appropriate. We do not believe a separate specific offense characteristic for 18 U.S.C. § 1591 offenses is necessary. As noted above, however, we support a 2 level enhancement for use of a computer or interactive computer service.

We do not recommend a decrease for conduct that is limited to possession or receipt of child pornography without the intent to traffic or distribute that material. Those who receive and possess child pornography contribute to the demand for child pornography, thereby causing other offenders to sexually exploit children to supply that demand. Accordingly, those who receive and possess child pornography do not merit any sentence reduction, as their conduct fuels child sexual exploitation committed by other offenders. Moreover, those who receive and possess child pornography also harm the child victims depicted in the child pornography they receive and possess, even if they themselves were not physically involved in the child sexual abuse depicted in those images. Additionally, often these offenders' receipt and possession of child pornography drives them to sexually abuse children themselves, as their receipt and possession of child

pornography to satisfy their desires is part of a cycle that leads to their own sexual abuse of children. Simply put, it is appropriate to use all available means to deter this conduct.

As if that were not enough, we anticipate that violations of this statute may involve offenders who receive and possess child pornography produced or distributed by other members of the child exploitation enterprise, often at the request of those who receive and possess it. In these cases, there is an even more direct causal link between receivers/possessors' conduct and the sexual exploitation of the child victim. It would thus be wholly inappropriate to afford these receivers/possessors a sentence reduction in these circumstances. Finally, it appears that Congress intended to punish all members of these enterprises equally. For all these reasons, we strongly recommend that receivers/possessors not receive a windfall sentence reduction.

Issue for Comment 7 - We have no comment on whether an enhanced penalty at § 2G3.1 should be provided for those who deceive a person other than a minor into viewing obscene material.

Issue for Comment 8 - As noted above, we recommend that the specific offense characteristic at § 2G1.3(b)(5) applicable in cases where the victim is under 12 be kept at 8 levels. This is appropriate because while certain of the offenses at issue include enhanced penalties based on the age of the victim, none of these enhanced penalties apply to cases where the victim is under 12.

Issue for Comment 9 - It does not appear that any change is necessary to address proportionality between §§ 2G1.3 and 2A3.1 in cases where the cross-reference at § 2G1.3(c)(3) applies because the cross-reference only applies in cases where the offense level under § 2A3.1 is higher than that reached under § 2G1.3. It appears that the offense levels contemplated by the current proposals under §§ 2G1.3 and 2A3.1 are appropriate.

3. Technical and Clarifying Amendments to the Sentencing Guidelines

We have no comments on these technical and clarifying amendments.

4. Miscellaneous Laws

We have no comments on these amendments reflecting recently enacted legislation - *Respect for America's Fallen Heroes Act, Pub L. 109-228* and *Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub L. 109-162.*

5. Intellectual Property Re-Promulgation

USSG §2B5.3 We support making permanent the amendments promulgated on an emergency basis concerning counterfeit trademarked labels, documentation and packaging pursuant to the *Stop Counterfeiting in Manufactured Goods Act ("SCMG Act"), Pub. L. 109-181.*

The *Digital Millennium Copyright Act (DMCA), (17 U.S.C. §§ 1201-1205)* criminalizes three types of conduct: (1) circumventing an *access* control (17 U.S.C. § 1201(a)(1)); (2) trafficking in technology to circumvent an *access* control (§ 1201(a)(2)); and (3) trafficking in technology to circumvent a *copy* control (§ 1201(b)(1)).

We support new application note 2(A)(viii) with two minor drafting changes. Because "circumvention" itself is prohibited only under 17 U.S.C. § 1201(a), but not § 1201(b), the note should be limited to cases where a defendant circumvented a technological measure in violation of "17 U.S.C. Secs. 1201(a)(1) and 1204," rather than "17 U.S.C. Secs. 1201 and 1204." We also would suggest that the clause "the 'retail value of the infringed item' is the price the user would have paid to access lawfully the copyrighted work" should be reworded to move the adverb "lawfully" to follow "copyrighted work."

For the trafficking crimes, there are three options. Option 1 would use a specific offense characteristic that increases the offense level by 2, regardless of how many devices the defendant trafficked in. In our view, this is the worst of the alternatives because: (1) it does not differentiate between small- and large-scale traffickers; (2) it does not specify how to calculate the "infringement amount" in trafficking cases, which was the very question on which the Department sought clarification (when it drafted the SCMG Act provision); and (3) it limits its applicability to defendants "convicted under 1201(b) and 1204," thereby leaving out 1201(a)(2) trafficking crimes entirely. The latter can easily be corrected by simply referring to convictions under "1201 and 1204," as is done with Option 2.

Option 2 would calculate the infringement amount in all trafficking cases by using the retail value of the circumvention device(s), multiplied by the number of devices involved in the offense. This would underestimate the economic harm for cases in which the circumvention device was not sold (as in the classic warez example of a barter transaction) and had no legitimate retail value. The department's proposal would use *the greater of* the retail value of the circumvention device *or* the price a person using the device to access or make use of a copyrighted work would have had to pay to access or use the work legitimately.

Option 3 is closest to what the Department would suggest, but we propose a few changes. First, as with Option 1, § 1201(a)(2) trafficking crimes are not covered. Again, this could be easily remedied by simply substituting "1201" for references to "1201(b)." Second, the phrase "the price a person legitimately using the device to access or make use of a copyrighted work would have paid" needs to be changed because of the placement of the word "legitimately." In most or all DMCA trafficking cases, there is no "legitimate" use of the circumvention device. Therefore, that phrase should be replaced with a phrase such as "the price a person using the device to access or use a copyrighted work would have had to pay to access or use the work lawfully."

Finally, for each of the DMCA-related proposals, the Proposed Amendment defines the term "circumvent a technological measure" as having the same meaning as that term in 17 U.S.C.

§ 1201(a)(3)(A). This definition applies to the circumvention of access controls, prohibited by 17 U.S.C. Sec. 1201(a)(1), and trafficking in devices for such circumvention, under 1201(a)(2). However, it should be noted that the operative term in DMCA trafficking cases involving devices for circumventing copy controls (i.e., those under 17 U.S.C. § 1201(b)), rather than access controls, is somewhat different: "to circumvent protection afforded by a technological measure...." The definitions of these operative terms also differ slightly. In order to avoid confusion and make clear that the amended application notes are intended to apply to both § 1201(a) and § 1201(b) trafficking offenses, we recommend the Commission include a separate definition of "device for circumventing a technological measure," such as the following: "'Device for circumventing a technological measure' includes any technology, product, service, device, component, or part thereof for circumventing a technological measure (as defined in 17 U.S.C. § 1201(a)(3)) or for circumventing protection afforded by a technological measure (as defined in § 1201(b)(2))."

6. Terrorism

USSG § 2K1.4 (18 U.S.C. § 2282B): Congress enacted 18 U.S.C. § 2282B to address violence against aids to maritime navigation, and the Sentencing Commission has referred the new statute to USSG § 2K1.4 (Arson; Property Damage by Use of Explosives). The Department agrees with the offense level of 16 if the offense involved conduct under 18 U.S.C. § 2282B, which has a statutory maximum of 20 years. A lesser offense level would not adequately reflect the statutory maximum or the seriousness of the conduct, which must be done intentionally and must endanger or be likely to endanger the safe navigation of a ship. The Commission has proposed two alternative phrasings of the guideline (USSG § 2K1.4(a)(3)); the Department favors the guideline describing the offense conduct, rather than the guideline simply referencing the statute. There are other statutes that could address damage to aids to maritime navigation, and describing the conduct generally in the guideline would provide a clearer reference for the same conduct that might be charged under other statutory provisions.

7. Drugs (not including crack cocaine)

21 U.S.C. § 841(g) (Adam Walsh Child Protection and Safety Act): With regard to the new offense in 21 U.S.C. §841(g), which provides a penalty of not more than 20 years for distributing a date rape drug over the internet knowing or with reasonable cause to believe it would be used to commit criminal sexual conduct, or to any unauthorized purchaser, the Department supports Option Three. That option provides a six level enhancement with a floor of 29 if the person knew the drug would be used to commit criminal sexual conduct, a three level increase with a floor of 26 if the person had reasonable cause to believe the drug would be used to commit criminal sexual conduct, and a two level increase if the drug were sold to an unauthorized purchaser.

Option Three is preferable to Options One and Two for the following reasons. First, Option Three establishes a significant sentencing floor (29), whereas Options One and Two do not. The Department believes that situations involving knowing distribution of a drug over the

internet to commit a criminal sexual act require a significant minimum offense level and a mere two or four level increase is not sufficient to adequately reflect the severity of the offense. Second, Option Three provides a more appropriate enhancement (six levels) than the smaller enhancements in Options One and Two (two or four levels). Again, the severity of the offense requires a six level, rather than a two or four level enhancement. Third, while providing an appropriately severe penalty for the most egregious conduct, Option Three also provides a tiered approach that punishes less severe conduct – such as distribution with reasonable cause to believe the date rape drug would be used for illicit purposes – less severely than distribution knowing the date rape drug would be used for illicit purposes. In general, the Department favors tiered approaches that establish more stringent guidelines for the most culpable and allow lesser sentences for less culpable individuals. Finally, Option Three provides the appropriate two level enhancement for illegal distribution to an unauthorized purchaser. This enhancement is similar to the enhancement applicable to those who use the internet for mass marketing.

We believe floor levels of 26 and 29 are appropriate based on a comparison with the various gradations for sexual offenses under Criminal Sexual Abuse Guideline Section 2A3.1.

- 18 USC § 2241 (USSG §2A3.1) (aggravated sex abuse -- i.e., actual use of force or threat of death or serious bodily injury or kidnapping, or by rendering the victim unconscious by some means, including by drug) has a base offense level of 30 plus an SOC of 4 for subsections (a) and (b) which means effectively an offense level of 34.

- 18 USC § 2242 (USSG 2A3.1)(sex abuse, i.e., a sexual act committed by threat less aggravated than 2241, or where the person is incapable of declining permission) has a base offense of 30.

The 29/26 proposal falls below those levels. Given that a conviction under 21 U.S.C. § 841(g) would demonstrate that the probable intent of the defendant selling the drugs over the internet was to further the purchaser's intent to render a victim unconscious, incapacitated, or at least less resistant to a sexual assault, the choice of a base offense level on the higher end of the range in Section 2A3 is justified. From this perspective, a level 29/26 base offense is rather modest. Moreover, cases where the drug seller can actually be shown to "know" of the intended use of the drug will doubtless be rare; prosecutions for "reasonable cause to believe" -- subject to base offense level 26 -- are likely to be more frequent. The guidelines provide a 3 level differential for the "knowing" versus "reasonable cause to believe" in the context of prohibited listed chemical distribution under 841(c)(2) and 2D1.11, thus allowing a comparison and basis for the 3 level differential between level 29 and 26 for the two distinct mens rea states.

21 U.S.C. § 860a (USA PATRIOT Act): With regard to the new offense in 21 U.S.C. §860a, which provides a mandatory consecutive term of imprisonment of not more than 20 years for manufacturing, distributing (or possession with intent thereof) methamphetamine on premises in which a minor is present or resides, the Department supports Option Two, which provides a six

level increase with a floor of 29 for a manufacturing offense and a three level increase with a floor of 15 in distribution cases.

Option Two establishes a tiered, measured response which properly punishes at a significant level offenders who manufacturer methamphetamine in the presence of minors, while imposing a lesser offense level for defendants who distribute methamphetamine on premises. In our view, Option Two appropriately reflects the severity of the offense, while protecting the public from further crimes of the defendant.

Option Two is preferable to Option One for the following reasons. First, manufacturing offenses inherently involve a risk of harm to a minor and expending the resources to demonstrate actual risk in each and every case by presenting expert testimony at the sentencing phase should not be required particularly given the dictates of Congress. Since Option One provides a six level enhancement with a level 30 floor, it is appropriate to provide for near parity through Option Two (six level increase with floor of 29). Second, in situations where the Government did not present evidence of risk of harm to the minor (even in manufacturing cases), Option One only provides a two level increase with no floor. This paltry enhancement fails to reflect the severity of the offense, e.g., the actual or potential harm caused by manufacturing methamphetamine where young people are present. Finally, in addition, all distribution convictions under Section 860a would only be subject to the two level increase, as opposed to a three level increase with a 15 floor. Again, the meager two level enhancement fails to adequately reflect the harm caused by distribution on premises with a minor.

In the event the Commission adopts Option One, the Department respectfully requests that the six level enhancement with a 30 floor be applicable to distribution, and possession with intent to distribute and manufacture cases. This would allow the Government to obtain meaningful sentences for a broader range of offenses. The establishment of a floor is important. In many of these cases the Government will be unable to establish a drug amount, for example when a lab blows up or is destroyed by fire. Thus the small increases proposed, without a significant minimum offense level, would result in little jail time.

21 U.S.C. § 960a (Narco-Terrorism): The Government believes that 21 U.S.C. § 960a is an important provision designed to target the insidious connection between drug trafficking and terrorism and punish proportionately. The Government agrees with the basic approach of calculating the drug quantity first, then increasing the sentence by an appropriate number of levels so that the sentence is twice the mandatory minimum punishment. The Government strongly believes, however, that a six-level (6) increase would effectuate congressional intent more than a four-level (4) increase, because the six-level increase consistently produces a doubling of the mandatory minimum sentence. Moreover, using a four-level increase to allow for the specific offense characteristics to increase the base offense level to the statutory double range is counterintuitive. The specific offense characteristics are designed to increase the base offense level found in § 2D1.1(a) due to the presence of conduct in § 2D1.1(b), which were deemed independently worthy of an increase by the Commission. Thus, a four-level (4) increase designed

to allow specific offense characteristics to "make up" any shortcomings of a four-level (4) increase defeats the enhancement mechanism of § 2D1.1(b). The specific offense characteristics should be in addition to, not in lieu of, the intent of Congress to punish those convicted of narco-terrorism harshly.

The Government does not have a strong preference on whether the new provision should be incorporated into § 2D1.1 or be placed in a new and separate section § 2D1.14, so long as the result is the same.

Finally, the Government suggests a few minor changes to ensure that the provisions are clear. First, the language in § 2D1.14 eliminates all of § 2D1.1(a)(3), including the base offense level. This should be clarified to simply eliminate the safety valve and mitigating role reduction. Second, the heading for § 2D1.14 should read: § 2D1.14 Narco-terrorism; ***attempt or conspiracy***. This would appear to be consistent with the rest of the provisions in § 2D.

8. Immigration

USSG §§ 2L1.1 and 2L2.1: With regard to the proposed amendments to the tables in §§ 2L1.1 and 2L2.1, that provide for increases in sentence based on the number of aliens or the number of documents, the Department strongly supports the idea of amending both tables to cover a broader numerical range. Our experience reveals that the tables do not adequately address the scale of the more serious alien smuggling and immigration fraud offenses we now regularly encounter. The challenges we face in enforcement in this area have grown dramatically since these guidelines went into effect. Offenses involving hundreds of fraudulent immigration documents have become common, and offenses involving a thousand or more documents are not unique. Reform is needed in order to provide a uniform mechanism for handling cases of this size in place of the current undefined upward departure process. This, in our view, serves the twin purpose of proportionality and uniformity.

We think both of the options under consideration are an improvement over the existing Guidelines. We favor option two because it offers a more discriminating approach to the escalating seriousness of offenses involving 6 to 99 aliens or documents. Our experience reveals that the degrees of misconduct between the extremes of 6 and 99 aliens or documents are more significant than the present tables acknowledge. For instance, a smuggling offense involving 23 aliens generally is indicative of greater culpability than one involving 8 aliens, but the current table treats the offenses identically.

Second, option 2 is superior because it provides greater offense-level increases for smuggling and fraud offenses involving larger numbers of aliens or documents. We welcome such increases because organized alien smuggling and immigration fraud are two of the most serious enforcement problems we face today. Alien smuggling, for example, is a global affair with estimated annual profits in the billions. The increasing scale of immigration fraud is similarly alarming. In a recent prosecution in the Eastern District of Virginia, several U.S. members of an

international network of visa brokers–including a former CIA officer–were prosecuted for selling 1,400 fraudulent applications for U.S. visas to Chinese and Russian citizens abroad. One particular application was offered for an astonishing $120,000. If we are to turn this tide, it is very important that the Guidelines provide adequate punishment and deterrence to those who violate the law on such a grand scale.

USSG § 2L1.2: We believe that in contrast to the other guidelines, 2L1.2 is in dire need of major change. The Courts, the probation offices, defense attorneys, law enforcement officers and prosecutors are unnecessarily expending significant time and effort parsing over words and statutory construction of state and local laws without any real benefit to the ultimate outcome, namely, a fair, predictable and appropriate sentence. In FY 2006, the Courts handled over 17,000 immigration cases (24.2% of its cases). We must do more, however, to ensure that we are fully utilizing the resources that have been given to us by Congress to enforce our immigration laws. The simple reality is that the current immigration guidelines provide a significant barrier to doing more. The Department favors a variation of either Option 6 or Option 7.

We do not favor either of these options as a means to increase the overall sentences for illegal re-entry cases. Rather, we favor these as a means to achieving fair sentences more efficiently, thereby allowing all participants in the process to make better use of their limited resources. We originally offered the potential triggers in Option 6 as examples only, and recognize that the Commission may need to employ different triggers to develop a balanced Guideline with the goal of increased simplicity and net neutrality in terms of the total number of defendants who would receive the particular adjustments to their base offense level. The triggers in Option 7 were based on a subsequent analysis of a sample of cases and are the levels that would produce little change in the over all length of sentences. Of the 108 cases reviewed, 85 received the same sentence under option 7 as they would under existing § 2L1.2. Of the 23 that did not "neutralize," 14 were increased, and 9 were reduced.

In its current form, § 2L1.2 encourages endless litigation over whether convictions qualify for enhancement under the "categorical approach" outlined in the Supreme Court's *Taylor* decision. This litigation has become a major impediment to efficient sentencing and places a significant strain on the courts, the probation office, the prosecution, and the defense. This burden falls disproportionately on the five Southwest Border judicial districts, which prosecute the overwhelming majority of immigration related cases.

Making the Guidelines simpler will in turn make the system stronger and allow these cases to be handled more efficiently. Prosecutors, agents and probation officers spend an inordinate amount of time identifying, documenting, and researching prior convictions to determine whether they qualify as aggravated felonies or trigger specific offense characteristics under § 2L1.2. Defense attorneys must perform the same analysis, and eventually judges must do so as well. Reported court decisions are replete with examples in which the categorical analysis has led to counter-intuitive, if not capricious results, allowing bad actors to avoid appropriate punishment on seemingly technical grounds. For example, even when documents show what looks like a

qualifying conviction, the outcome remains subject to litigation and the courts reach inconsistent results on whether convictions will qualify. For example, in *United States v. Cortez-Arias*, 403 F.3d 1111 (9th Cir. 2005), the Ninth Circuit held shooting at an occupied dwelling is a "crime of violence." However, in *United States v. Martinez-Martinez*, 468 F.3d 604 (9th Cir. 2006), the same court, relying on a different State statute, declared such an offense is not a crime of violence, requiring proof that the residence actually was occupied at the time of the shooting–a fact one scarcely could glean from court records. The Fifth Circuit, based on yet another State statute, also found shooting at an occupied dwelling is not a crime of violence. *United States v. Alfaro*, 408 F.3d 204 (5th Cir. 2005). Further, the problem of the categorical analysis is not limited to crimes of violence. For example, the Supreme Court's *Lopez* v. *Gonzalez, 126 S. Ct. 625 (2006)* decision and the Ninth Circuit's *United States v. Corona-Sanchez, 291 F.3d. 1201 (9th Cir. 2002) (en banc)* decisions did not involve crimes of violence.

Options 6 and 7 would largely obviate the categorical approach in re-entry cases and substantially reduce the time needed to litigate and resolve these cases – an extremely important consideration given the increasing volume of cases. It is important to emphasize also that the benefit will not be felt in just the cases prosecuted but also in the cases that we review and decline to prosecute criminally because it will make it far easier for prosecutors to ascertain the possible sentence and, therefore, whether the case merits the expenditure of federal resources. The Guideline calculation would be driven primarily by the length of sentence imposed for prior convictions. Although state sentencing regimes are not entirely uniform, we believe the length of sentence imposed provides a far more objective and readily-determined basis for an increased offense level under 2L1.2 than does the current categorical approach which is governed entirely by varying practices in charging and record-keeping among the 50 states and thousands of counties and parishes throughout the United States. After all, the present criminal history categories in the Guidelines are largely based on sentence length, and extensive study by the Commission has shown that there is a direct relationship between recidivism and these same criminal history categories. We also note that present Guideline 4A1.3, (Criminal History) provides judges with the flexibility to address prior sentences that overstate the seriousness of an underlying offense.

While we are in favor of a shift away from the categorical approach, we do believe that convictions for certain specified offenses (murder, rape, for a child pornography offense or an offense involving sexual abuse of a child, or for conspiracies or attempts to commit such offenses), regardless of the length of sentence, should merit a 16 level increase to the base offense level.

We also recognize that in making such a major change, and despite the fact that there will be general neutrality in the effect on sentences imposed, in specific cases a defendant may receive a greater sentence or lesser sentence depending upon their particular record. We believe that these changes are a necessary result of a need to shift to a far more efficient, predictable, and rational system for determining the seriousness of the prior record.

We urge the Commission not to wait to amend 2L1.2 until Congress considers again this year possible amendments to the Immigration and Nationalization Act. The system needs relief now. First, as the media has repeatedly reported there is a good chance that nothing will happen and we will be in the same position we were last year at the end of the Commission cycle. Second, even if legislation is passed, it would most likely have little, if any, impact on the changes proposed in option 6 or 7. The compromise Senate bill, S 2611, which was passed by the Senate last year and has been the basis for discussions this year, amends the sentencing scheme for illegal entry and re-entry violations so that they are based for the most part on the length of sentence imposed for prior convictions rather than the type of offense. We would submit that delaying change to 2L1.2 for another year only prolongs the expenditure of unnecessary resources and continues time consuming litigation. We urge the Commission to act this year to shift away from the use of the categorical approach, an approach we believe ill-serves all involved.

Finally, with regard to the request for comment regarding whether the Department believes the base offense levels for §§ 2L1.1, 2L2.1, and 2L2.2 should be increased. With respect to § 2L1.1, we do not believe the Commission should increase the current base offense level of 12, assuming the Commission adopts either option 1 or 2 to amend the table governing the number of aliens involved in the offense. Regarding § 2L2.1, last year we recommended that the Commission raise the current base offense level from 11 to 12 to match the base offense level in 2L1.1, and we stand by that recommendation here. As for § 2L2.2, we believe the base offense level of 8 should be increased, especially for offenses involving immigration or naturalization documents. Under the present Guideline, most offenders face a zone A sentence of 0 to 6 months upon conviction for an offense involving a green card, naturalization certificate, or asylum claim – this is insufficient punishment in light of the seriousness of the offense.

9. Compassionate Release

We reiterate the comments included in our letter to the Commission on July 14, 2006.

We do not believe that the Commission should provide examples of extraordinary and compelling reasons but if it does so, they should be limited to the inmate's medical condition. These medical conditions may be terminal, with a life expectancy of one year or less, or medical conditions that are profoundly debilitating in nature. While the statute itself does not define "extraordinary and compelling," the Bureau of Prisons (BOP) has always narrowly interpreted the statutory language, established medical criteria for reduction in sentence consideration, and limited motions for reduction in sentence to circumstances where an inmate has either been diagnosed with a terminal illness with a life expectancy of one year or less, or a profoundly debilitating and irreversible medical condition that severely limited the inmate's ability to attend to fundamental bodily functions and personal care needs without substantial assistance from others.

With respect to consideration of terminal medical conditions, BOP considers cases where the inmate has entered into the "terminal phase" of his/her disease, which medically is usually

measurable as one year or less. The prognosis in these patients is based on the medical expertise and clinical judgment of the physician, based upon his or her knowledge of the disease. An essential element associated with the terminal phase of an illness is that medical care becomes focused on palliation or comfort care, as there are no available therapeutic measures that can prolong the patient's life or alter the course of the disease. The terminal phase of a disease is experienced by an individual over a period of days to months and is characterized by a decline in physical functioning, while cognitive functioning may be preserved in some patients until death.

To expand consideration to medical conditions where the life expectancy is greater than one year would result in the inclusion of many chronic diseases which can broadly be defined as "terminal," will predictably shorten an individual's life, but has not progressed beyond the chronic stage. In treating a chronic illness, available medical treatment options have not been exhausted and treatment remains focused on managing and stabilizing the disease. In addition, treatment therapies may often improve functional status and prevent or significantly slow the progression of the disease to the terminal phase.

The BOP has not approved reduction in sentence for inmates who have chronic medical conditions (e.g. advanced heart disease or AIDS) unless the inmate is also significantly functionally impaired. In assessing these inmates, it is often the degree of functional impairment paired with the exhaustion of treatment options that gives rise to a determination that the individual has entered the terminal phase of his or her illness.

With respect to BOP motions for medical conditions, the BOP feels that 1B1.13 should allow the court the opportunity to consider cases where the circumstance fall under options (i) or (ii). Clearly, the court should be able to consider a BOP motion for a reduction in sentence where the medical condition did not exist at the time of sentencing, or the court was simply unaware of the inmate's medical condition at the time of sentencing. In addition, the court should also be able to consider a BOP motion where it may have been aware of a medical condition at the time of sentencing, but that condition has significantly deteriorated during the inmate's incarceration and the inmate's condition has entered the terminal phase of his or her illness, or his or her condition has become profoundly debilitating.

Finally we would like to note that Page 8 of the ABA's letter to the Commission provides compelling substantiation of the possible adverse consequences, noted in the Department's letter, if the Commission were to adopt (pursuant to 28 U.S.C. 994(t)) standards for the judicial granting of reduction in sentence motions which were broader than the grounds on which the Department has traditionally (and currently) sought such reductions. Specifically, the ABA argues that it would be unconstitutional for BOP to continue to apply their current standards, and that BOP would be constitutionally required to make its decisions whether to seek sentence reductions instead on the basis of the Commission's policy statement for judicial granting of sentence reduction motions. This directly confirms the concern raised in the Department's letter that such discrepancies "would be an incitement to prisoners to file more suits seeking to compel the Department to exercise its authority under section 3582(c)(1)(A)(i) -- in contravention of its own

policies, judgment, and discretion -- in order to get them out of prison before they have served their sentences as imposed by the court."

We submit that this current effort to persuade the Commission to adopt standards which would effectively treat the 3582(c)(1)(A)(i) reduction in sentence authority as an open-ended parole-like early release mechanism, thereby undermining the fundamental premises and operation of the determinate sentencing system established by the Sentencing Reform Act of 1984 is just the first step. If successful, the next step would be the bringing of injunctive suits against the Department of Justice which would seek to compel the use of these parole-like standards in deciding whether to file 3582(c)(1)(A)(i) motions, and force the Bureau of Prisons to function as a de facto Parole Commission for this purpose. As noted in our letter last year, the potential result -- the undermining of the abolition of parole and determinate sentencing -- would be "exactly the evil . . . that Congress sought to avoid by vesting exclusive authority to seek reductions of sentence for prisoners under section 3582(c)(1)(A)(i) in the executive agency responsible for their custody."

10. Criminal History

The Department believes that the criminal history sentencing guidelines have created an effective and workable system that identifies offenders who have a greater risk of recidivism and provides progressively higher penalties as that risk of recidivism increases. Before the Commission moves forward with any proposal that excludes additional offenses from the criminal history score, it should be very confident that such additional exclusions will improve (and not worsen) the guidelines' effectiveness in identifying and appropriately punishing offenders with higher recidivism risk. Further, we believe that just because certain records may not be uniformly available does not mean that those that can be obtained are not useful in determining the risk of a particular offender. With regard to the offense of driving while suspended we would suggest that the Commission may well want to examine if the basis for the suspension may be an important criteria. It is clearly one thing if the person was suspended for what has been described as an "economic offense." It is a far different and more serious situation if the defendant had been suspended for driving under the influence, vehicular manslaughter, or even reckless driving.

11. Pretexting

USSG §2H3.1 (18 U.S.C. § 1039): The Department supports the Commission staff's proposal to refer 18 U.S.C. § 1039 to §2H3.1, but we recommend that it be modified to properly take into account the victims of these offenses. In particular, pretexting crimes can violate the privacy of many people. While some offenses involve one person obtaining the records of another (in furtherance of a stalking crime, for instance), others involve offenders who obtain the records of many individuals. For example, by data brokers may obtain confidential records of many people in order to resell them. Additionally, where the crime is committed through a computer intrusion, there may be thousands of victims.

Moreover, in general, the seriousness of the offense is directly related to the number of victims. An offense that violates the privacy of ten people is simply much more serious than one that involves only one. Consequently, the USSC should consider adding to §2H3.1 a victim table similar to that currently found in §2B1.1 in order to ensure that pretexters (as well as those committing related privacy offenses referenced to §2H3.1) are rationally sentenced based on the scope of their offense.

The current proposal makes an offense that involves "a large number of customers" grounds for an upward departure. While this approach is not without merit, we believe that the use of a table like that in §2B1.1 would be more appropriate. Like financial crimes, pretexting offenses become more serious as the number of victims increases.

We also suggest that the USSC contemplate adding a definition of "victim" to §2H3.1 that includes those suffering privacy invasions whether or not they suffer a measurable monetary loss. Because §2H3.1 is used for sentencing offenses, including pretexting, where invasion of privacy is the core harm, existing definitions of "victim" that require pecuniary loss would fail to account for much of the damage caused by privacy offenders. A revised definition would improve the application of other privacy offenses to be referred to §2H3.1 in addition to § 1039. Courts will not have a problem identifying who is a victim under the expanded definition as it is easy to determine whose confidential records were disclosed.

12. Crack Cocaine

In 2002, Deputy Attorney General Larry Thompson testified before the Commission on behalf of the Administration opposing proposals, then under consideration, to lower penalties for crack cocaine offenses. The existing policy – including statutory mandatory minimum penalties and sentencing guidelines – has been an important part of the Federal government's efforts to hold traffickers of both crack and powder cocaine accountable, including violent gangs and other organizations that traffic in crack cocaine and operate in open air crack markets that terrorize neighborhoods, especially minority neighborhoods. The problems that crack brought to our communities have not gone away.

That said, the Department recognizes that the Commission and many others have been especially concerned that the 100-to-1 quantity ratio appears to many to be an example of unwarranted racial disparity in sentencing. We believe it may very well be appropriate to address the ratio between the drug weight triggers for mandatory minimum and guidelines sentences for the trafficking of crack and powder cocaine, and we hope over the next months, the Commission, the Administration, and the Congress will continue its work together to determine whether any changes are indeed warranted. We think this collective work is especially critical, and should continue in consideration of larger, systemic changes taking place in federal sentencing. We are committed to continuing our participation in this collective work. Creating a sensible, predictable, and strong federal sentencing system is necessary to keeping the public safe and keeping crime rates at historic lows. Addressing the debate over federal cocaine sentencing policy is part of this effort.

We continue to stress that changes to federal cocaine sentencing policy, as with systemic changes to federal sentencing more generally, must take place first and foremost in Congress. Existing statutes embody federal cocaine sentencing policy and represent the democratic will of the Congress. The Commission, however, has a critical role to play. We think the Commission should continue to provide Congress, the Department of Justice, and the general public updated information on the current overall sentencing environment, crack and powder cocaine sentences being imposed in district courts around the country, and other research and data that will assist in the consideration of federal cocaine sentencing policy. We think all of this information will help ensure that federal policy will be crafted in a way that best achieves the purposes of sentencing. While we look forward to continuing all of this work with the Commission, we reiterate here that we would oppose any sentencing guideline amendments that do not adhere to enacted statutes clearly defining the penalty structure for federal cocaine offenses.

* * * * * * *

Thank you for the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to our continuing work with the Commission in the important area of sentencing guidelines and policy.

Sincerely,

Benton J. Campbell
Acting Principal Deputy Assistant Attorney
General and Chief of Staff

United States
Sentencing Commission

Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

March 14, 2007

Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: Response to Request for Comments on Proposed Amendments for 2007

Dear Judge Hinojosa:

On behalf of the Practitioners Advisory Group, we submit the following comments on the Commission's various proposed amendments and requests for comment for the 2007 amendment cycle. We look forward to addressing some of these proposals at the Commission's hearing, on March 20, 2007.

1. TRANSPORTATION

Appropriateness Of Sentence Enhancement For Convictions Under 18 U.S.C. §§ 659 or 2311 (Section 307(c) of PATRIOT Act)

Congress has directed the Commission to determine whether a sentence enhancement is appropriate for convictions under 18 U.S.C. §§ 659 or 2311. Accordingly, the Commission requests comment on whether the two-level enhancement under § 2B1.1(b)(4) should be expanded to include cases where the defendant was convicted under § 659. It should not. The current enhancement under § 2B1.1(b)(4) is narrowly tailored to those defendants who were *in the business of* receiving and selling stolen property. Application Note 5 lists a number of factors to consider in distinguishing these more culpable "professional" purveyors of stolen property from those who merely receive or sell stolen property without being in the business of doing so. In that respect, note 5 parallels the criminal livelihood provision, § 4B1.3, in recognizing that one who makes a living out of criminal conduct is more culpable than one whose conduct is less involved. The proposed amendment would eliminate the distinction because § 659 applies to a very broad range of conduct, including every theft from an interstate shipment and every receipt or sale of such stolen items. For the same reason it would be inappropriate to impose the enhancement for those convicted under §§ 2312 or 2313. Those statutes criminalize the transportation, sale or receipt of stolen motor vehicles without any distinction between those who, for example, receive a single stolen vehicle and those who are "in the business" of committing such violations.

Similarly, the suggestion in Option 2 of expanding § 2B1.1(b)(11) to those convicted under § 659 should be rejected. That enhancement of two levels, with a floor of 14, is currently reserved for those whose offense "involved an organized scheme" to steal vehicles or vehicle parts. As noted above, § 659 is

not limited to those involved in such organized schemes, nor is it limited to offenses involving vehicles or vehicle parts.

Adequacy Of § 2Q1.2 For New Aggravated Felony Under 49 U.S.C. § 5124 (Request For Comment 1)

The Commission seeks comment on whether the penalties are adequate under § 2Q1.2 for this new offense, which applies to the release of a hazardous material causing bodily injury or death. There is no need to enhance the penalties under this provision. For a conviction under this statute involving a repetitive discharge, the top of the guideline range is 71 months (approximately six years). A judge would be able to impose a higher sentence in those cases where the other § 3553(a) factors weigh in favor of a sentence above the guideline range. The guideline already encourages an upward departure where death or serious bodily injury results. We are unaware of data showing that death or serious bodily injury is occurring in enough cases to make the addition of an enhancement necessary. If any change is made to account for actual bodily injury or death, as opposed to the risk of such outcomes, a minimum offense level would properly account for that factor.

Cross Reference or Specific Offense Characteristic For Trespasses Committed With Intent to Commit Another Offense (Request For Comment 2)

The Commission seeks comment on whether trespasses committed with the intent to commit other offenses should be punished more severely through a cross reference or, instead, a specific offense characteristic. The PAG opposes cross references to other guidelines in the absence of a jury finding that warrants using the more severe provision. There are serious due process concerns when the more severe Chapter Two guideline is used based on judicial findings alone. A modest specific offense characteristic is the preferred approach because it prevents a fact not found by the jury from converting a conviction for one offense into the functional equivalent of a conviction for one that was not charged and found by the jury.

Bribery Affecting Port Security (Request for Comment 3)

The Commission requests comment on whether the new offense of bribery affecting port security, 18 U.S.C. § 226, should be referenced to § 2C1.1 and, if so, whether the cross reference is sufficient to punish bribery with the intent to commit an act of terrorism. Alternatively, it suggests adding a specific offense characteristic. PAG believes that § 2C1.1 is the appropriate guideline for 18 U.S.C. § 226 because it provides the same starting point for all bribery offenses. An enhancement in that guideline to account for the intent to commit an act of terrorism is preferable to a cross reference. Such a provision would be more in line with the goal of simplifying the guidelines and would better ensure that the enhancement – which can significantly change the sentence range – is based on convicted conduct. Finally, if an enhancement is adopted, there should be clear guidance that § 3A1.4 does not apply because it would account for precisely the same offense characteristic.

2. SEX OFFENSES/ADAM WALSH ACT

In an effort to implement the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 (the Act), and directives related thereto, the Commission has developed a four-part proposed

amendment. The PAG is in substantive agreement with the comments that the Federal Public and Community Defenders submitted on March 6, 2007 (J. Sands 3/6/07 Ltr.). Rather than reiterate the Defenders' comprehensive, thoroughly-researched submission, we offer the following brief comments.

§ 2A3.5/18 U.S.C. § 2250

For the new offense of Failure to Register (18 U.S.C. § 2250), the Commission proposed § 2A3.5. The PAG supports Option 1's establishment of base offense levels tied to the tier of the offense which gave rise to the need to register, and it also supports the availability of a four-level reduction where a defendant voluntarily attempted to ameliorate the targeted harm by correcting the failure to register. In response to Issue for Comment 3, the scope of conduct constituting an attempt to register should be construed broadly. The PAG does not believe it necessary to define and offer examples of what types of attempts may serve as a basis for relief; however, it would be appropriate to make clear that courts should view such efforts in the context of a defendant's physical or mental health limitations and/or the practical impossibilities that may be present in certain cases. Furthermore, a reduction should be available regardless of any new convictions a defendant may have sustained.

The proposed reduction, which gives meaning to Directive 3, is sound by encouraging compliance with registration requirements and authorizing leniency for less culpable defendants. Equally sensible are the Defenders' proposed bases for downward departure and reductions for defendants whose offense giving rise to the need to register resulted in a relatively short sentence (13 months or less) or who have established a "clean record" of ten years or more, a consideration that would apply only to Tier II or III offenders. J. Sands 3/6/07 Ltr. at 6-7, 9-11; *see* USSC, *Literature Review – Targeting Sex Offenders* in *Sentencing Federal Offenders: Protection of Children from Sexual Predators Act of 1998*, App. K (Feb. 2000) (discussing value of risk assessment models).

The PAG opposes the other specific offense characteristics set forth in § 2A3.5(b)(1) [or (b)(2) of Option 2]. Notwithstanding the language of Directives 1 and 2, Congress intended the term "committed" to mean "convicted of" when referring to other offense conduct. *See* 42 U.S.C. § 16911(1). Thus, as proposed, § 2A3.5 needlessly opens the floodgates of "relevant conduct." USSC, *Discussion Paper: Relevant Conduct and Real Offense Sentencing* (since 1987, "training staff has found that the relevant conduct guideline has been among the most troublesome for application and that the guideline's application has been very inconsistent across districts and circuits"). There is particular unease with the inclusion of uncharged or acquitted conduct as well as expansion of the definition of "minor" beyond that envisioned by Congress. *See* 42 U.S.C. § 16911(14).

Where a State conviction would serve as the basis for application of the proposed specific offense characteristics, there appears to be a substantial risk of double-counting criminal history. Moreover, when a defendant who has failed to register pursuant to SORNA commits a new State offense that may be classified a "sex offense" or an "offense against a minor," he will be subject to local prosecution and punishment, which will undoubtedly account for his failure-to-register status. Therefore, the proposed enhancement, which is designed for those who violate federal registration requirements, effectively duplicates punishment for the underlying State conviction.

When, and only when, a prosecution under 18 U.S.C. § 2250 is brought jointly with other federal sexual offenses that would ostensibly satisfy the proposed enhancement, the PAG submits that the better

approach is to implement a two-level adjustment under Chapter Three for "sex offenses" (*e.g.*, § 2G1.1) and "offenses against minors" (*e.g.*, §§ 2G1.3, 2G2.1) akin to § 3C1.1's more general application to conduct reflected in § 2J1.2. As an example, under this approach a two-level increase in application of § 2G2.1, before enhancement(s), produces a 30-month increase in the low end of a defendant's offense level. In offering this proposal, the PAG cautions that the two-level adjustment should not apply in circumstances where a defendant voluntarily attempted to correct the failure to register. Additionally, we note that enhancements and recommendations for an upward departure intended to reflect recidivist considerations are already contained in the Guidelines' sexual abuse provisions. *See, e.g.*, §§ 2G2.2, cmt., n. 6 & 4B1.5.

With respect to Issue for Comment 2, the PAG opposes extending the enhancement to other than sex offenses. Congress did not intend to encompass non-sexual offenses. *See, e.g.*, 42 U.S.C. § 16911(7). Indeed, absent clear evidence of congressional design, the contemplated expansion would produce incongruous results. For instance, where the offense that gave rise to a defendant's registration requirement did not involve a child, there would be no rationale for enhancing his offense level if, while in failure-to-register status, he is convicted of a non-sexual offense involving a child. This is but one example, yet it highlights the disturbing consequences of singling out this class of offender for enhanced penalties where the conduct at issue is non-sexual in nature.

New Offenses and Increased Penalties

Issue for Comment 1 requests input about how the mandatory minimum terms of imprisonment created or increased by the Act should affect calculation of the guideline range. The Commission offers four possible approaches: (1) set base offense levels to correspond to the first offense level on the sentencing table with a guideline range in excess of the mandatory minimum; (2) set base offense levels to correspond to the first offense level on the sentencing table with a guideline range to include the mandatory minimum; (3) set base offense levels below the mandatory minimum, anticipating that ordinary application of specific offense characteristics will increase the guideline range to encompass the mandatory minimum; or (4) make no change to base offense levels and allow § 5G1.1(b) to operate.

The PAG supports Option 4. Congress has not directed or otherwise promoted amendment to the Guidelines, and the Commission does not rely on new empirical data or evidence to substantiate a need for change. Leaving aside relatively recent amendments to the sex offense guidelines that increased dramatically defendants' sentence ranges, Option 1, and to a similar extent Option 2, is imprudent because it serves to propagate an approach that has been roundly subject to criticism and debate since the Guidelines' inception. Anchoring offense levels to statutory mandatory minimums, in the absence of any congressional mandate, drives guideline sentences too high. Allowing § 5G1.1(b) to operate, rather than make the proposed offense level changes (*e.g.*, §§ 2A3.1, 2G1.1 and 2G1.3), affords the opportunity for study and review, specifically to determine more accurately the necessity for and suitability of potential increases. At most, the approach set forth in Option 3 should be considered because history shows that offense levels, once adopted, are seldom reduced.

With respect to § 2A3.3, there appears no need to raise the base offense level. Notwithstanding the increase in the statutory maximum under 18 U.S.C. § 2243(b) from one to 15 years' imprisonment, Commission data shows that courts have sentenced within the prescribed guideline range in each of the 11 cases to which this guideline has applied in the past three years. *See* USSC, *Sourcebook of Federal*

Sentencing Statistics, Table 28 (2004-2006). Over time the Commission can gauge courts' experience with the existing guideline, along with any systemic dissatisfaction with prescribed penalties, and amend as necessary. For reasons articulated above, as well as the practical realities attendant to unlawful conduct under § 2443(b) that are set forth in the Defenders' letter, the PAG also opposes as inappropriate the definition of "minor" proposed in Application Note 1. J. Sands 3/6/07 Ltr. at 16-17.

With respect to § 2A3.4 and Issue for Comment 4, in the absence of congressional directive or support, the PAG opposes the proposed increase in minimum offense levels where the victim has not yet attained the age of 12 years. Commission data shows that of the 44 cases sentenced under this guideline in the past three years, courts have sentenced within the prescribed range 35 times (80 percent), with relatively equal occurrences of upward departures (4) and downward departures and/or below range sentences (5). *See* USSC, *Sourcebook of Federal Sentencing Statistics*, Table 28 (2004-2006). In sum, the existing guideline has proven to be sufficient.

Other Criminal Provisions

In response to Issue for Comment 7, the PAG opposes an enhancement to§ 2G3.1 where the use of embedded words or digital images in the website source code deceived an adult into viewing obscene material. Congress did not direct or suggest the enhancement. Furthermore, the new offense is wholly analogous to the use of misleading domain names criminalized in 18 U.S.C. § 2552B and merits analogous treatment. Correspondingly, the PAG sees no need for an increase from two to four levels under § 2G3.1(b)(2).

3. TECHNICAL AND CLARIFYING AMENDMENTS

The PAG supports the only substantive amendment in this category – applying the rules in § 3D1.1 to a situation where the defendant is sentenced on multiple counts in different indictments.

4. MISCELLANEOUS LAWS

Fallen Heroes

The Respect for America's Fallen Heroes Act prohibits unapproved protests at cemeteries under the control of the National Cemetery Administration or on the property of the Arlington National Cemetery. 38 U.S.C. § 2413. The Commission has recommended that this new offense be sentenced under § 2B2.3 (Trespass). Although the Commission has identified the proper guideline, we agree with the Federal Public and Community Defenders that a two-level enhancement is not appropriate because a cemetery is materially different from the other locations, such as a nuclear energy facility, a vessel or aircraft of the United States or a secured area of an airport, that give rise to the higher offense level. Those other locations are not ordinarily open to the public, and trespass on them implicates security concerns not present at public cemeteries.

International Marriage Brokers

Section 833 of the Violence Against Women Act creates both a misdemeanor (8 U.S.C. § 1375a(d)(3)(C)) and a felony (8 U.S.C. § 1375a(d)(5)(B)) for marriage brokers who unlawfully disclose

certain information required to be collected under the law. The Commission has incorporated both offenses under § 2H3.1, with the felony at a base offense level of 9 and the misdemeanor at a base offense level of 6. We agree with the Commission's treatment of these two offenses.

Internet Gambling

On October 13, 2006, the President signed the Security and Accountability For Every Port Act of 2006 (the SAFE Port Act) into law. Included in the SAFE Port Act are provisions that make it a crime to accept funds in connection with "unlawful internet gambling." Those provisions are codified at 31 U.S.C. § 5363. The new statute prohibits persons engaged in the business of betting or wagering from knowingly accepting various financial instruments from another person engaged in unlawful internet gambling. The penalty for this offense is imprisonment of up to five years. In response to this new offense, the Commission has requested comments regarding whether it should be referenced to § 2E3.1 (Gambling Offenses) or either § 2S1.1 or § 2S1.3 (money laundering).

The PAG supports the Commission's proposal to reference to § 2E3.1, the existing guideline for Gambling Offenses. The new offense is identical in virtually every respect to the offenses currently referenced to § 2E3.1. Like the offenses referenced to § 2E3.1, 31 U.S.C. § 5363 contains a statutory maximum of 5 years. Conversely, the offenses referenced to § 2S1.1 and § 2S1.3 involve very different criminal conduct that carries maximum penalties of up to 20 years.

Currently, § 2E3.1 contains no cross references or specific offense characteristics, and there is no need to add either if the Commission refers 31 U.S.C. § 5363 to § 2E3.1. A cross reference to the money laundering related guidelines is inappropriate. Unlike the offenses covered by § 2S1.1 and § 2S1.3, § 5363 is not intended to deter the concealment of certain criminal behavior. Rather, § 5363 merely prohibits engaging in transparent financial transactions with persons engaged in unlawful internet gaming. The conduct covered by guidelines appropriate for laundering of monetary instruments or structuring transactions to evade reporting requirements is dissimilar to unlawful internet gambling.

5. INTELLECTUAL PROPERTY RE-PROMULGATION

The Commission has asked for comment on Congress's directive to determine whether the infringement amount definition in § 2B5.3 is adequate for certain offenses. Various options are proposed for measuring the infringement amount. The PAG believes Option 1 – which would give every trafficking case under 17 U.S.C. § 1201(b) a minimum of 12 offense levels – is premature. The experience with this offense is still developing, and there is no relevant case law. There is not yet any reason to think the guideline as it stands, including its provision that allows for upward departures, will be insufficient to capture the seriousness of trafficking cases under § 1201(b). And Option 3 is too complex to be applied reliably: it is not at all clear what is meant by "the price a person legitimately using the device ... would have paid" in the context of a copy control circumvention device. The PAG believes that Option 2 is the simplest to apply and should be adopted.

There are two issues for comment, and the PAG agrees with the responses and recommendations made by the Federal Public and Community Defenders. First, the PAG believes there should be a downward departure provision in § 2B5.3 to deal with cases where the infringement amount overstates the offense's seriousness. Given the rapidly-changing technology involved, the guideline should provide

flexibility. Just as other guideline sections allow for upward and downward departures in appropriate cases, so too should § 2B5.3. Second, the PAG supports the deletion of Application Note 3 and believes the special skill enhancement should not be required in every instance of initial access. Again, given the complexity and ever-changing nature of the relevant technologies, the PAG believes that significant flexibility in the guidelines, particularly in the short term, is desirable so as to permit accumulation of more sentencing data and experience under sections 1201 and 1204.

6. TERRORISM/PATRIOT ACT

Narco-terrorism

In response to the new crime of Narco-Terrorism enacted at 21 U.S.C. § 960a, the Commission has proposed referencing either § 2D1.1 (Option 1), or an entirely new guideline § 2D1.14 (Option 2). First, we agree with the Defenders that the current guidelines already adequately account for this new offense through § 3A1.4. We also agree that if the Commission chooses to make any changes it should use Option 2, which would treat the new offense in a manner similar to the sale of drugs within 1,000 feet of a school. *See* § 2D1.2. We are concerned about the broad reach of the statute. It would apply, for example, to a defendant who knew some of the drug proceeds would make their way to a person who had previously engaged in a terrorist act but for whom there was no realistic likelihood of terrorist acts in the future. As a result, we do not support a categorical disqualification from eligibility for the lower sentences available under § 2D1.1(a)(3) and §2D1.1(b)(9). In addition, the Commission should add an Application Note to § 2D1.14 stating that the enhancement under § 3A1.4 does not apply. The four [or six] level enhancement proposed under § 2D1.14 already accounts for the fact that justifies the § 3A1.4 enhancement – an intent to promote terrorism.

Border Tunnels And Passages (And Request For Comment 2)

In response to the congressional directive to promulgate or amend guidelines for persons convicted of offenses involving tunnels, the Commission has proposed new guideline: § 2X7.1. The new guideline provides a base offense level of 8 or 9 for defendants convicted under 18 USC § 554(b) (permitting the construction of a tunnel on one's property), 16 for defendants convicted under 18 U.S.C. § 554(a) (constructing or financing the construction of a tunnel) and 4, plus the underlying offense level for a minimum combined offense level of 16, for a violation of 18 U.S.C. § 554(c) (using a tunnel to unlawfully smuggle an alien, goods, controlled substances, weapons of mass destruction or a member of a terrorist organization). The PAG opposes the four-level increase to the offense level for the underlying offense. In immigration offenses, in particular, this could lead to very significant increases for those with an already high offense level – an increase disproportionate to the added culpability of using a tunnel rather than other means of illegal entry. In response to the second request for comment, we also see no reason to increase the other penalties beyond those proposed.

Adequacy Of Punishment For Smuggling Offenses (Request For Comment 1)

The Commission asks whether the current guidelines provide sufficient punishment for violations of 18 U.S.C. §§ 545 and 549. The sole basis cited for raising this issue is the recent increase in the statutory maximum for each offense. But in the absence of either an explicit directive from Congress that the guidelines are too low or data gathered from prior sentencings demonstrating that judges have

frequently needed to exceed the current guidelines, the Commission should not increase the guidelines. There may be unusual cases where the higher statutory penalty gives the courts the ability to impose a sentence above the current norm, but that is no reason to increase the sentences for the heartland of cases prosecuted under those statutes.

Displaying insignias and uniforms (Request for Comment 3)

The PAG agrees with the Federal Public and Community Defenders that the appropriate response to the congressional directive regarding offenses committed while wearing or displaying insignia and uniform is to, at most, provide an application note recognizing the directive but explaining that the guidelines do not apply to Class B or C misdemeanors.

7. DRUGS (NOT INCLUDING CRACK COCAINE)

18 U.S.C. § 865 and Issues for Comment 3(a)-(c)

The PATRIOT Act created a new offense – 21 U.S.C. § 865, "Smuggling Methamphetamine or Methamphetamine Precursor Into the United States While Using Facilitated Entry Programs." It provides a new mandatory consecutive sentence of not more than 15 years for any drug offense involving smuggling of methamphetamine or any listed chemical while using a facilitated entry program.

The proposed amendment would add two levels in §§ 2D1.1(b)(5) and 2D.11(b)(5) if the defendant is convicted under 21 U.S.C. § 865. The proposal includes an application note instructing judges on how to impose the sentences under section 865 consecutively.

Congress intended that those who abuse their facilitated entry privileges to import methamphetamine receive an enhanced sentence. In our view, the Commission's handling of the enhancement is consistent with Congress's intention.

Issue for Comment 3(a) asks whether the enhancement should exceed two levels and whether the offense should trigger a separate base offense level. The PAG opposes both courses. The two-level enhancement in the proposed amendment is in line with other enhancements that punish relatively comparable harms, such as use of an aircraft (§ 2D1.1(b)(2)) or use of mass marketing (§ 2D1.1(b)(5)). Providing more than two levels would dwarf the enhancements for comparable harms and we can discern no justification for doing so. Indeed, increased enhancements are inconsistent with enhancements for conduct that is arguably more serious, such as the two levels provided for gun possession (§ 2D1.1(b)(1)), or for distribution in a prison (§ 2D1.1(b)(3)). Moreover, importers of actual methamphetamine already face stiff sentences, comparable to those for crack cocaine, and their sentences are enhanced under § 2D1.1(b)(4) by two levels. The real effect of the proposed two-level enhancement is thus a four-level enhancement for all facilitated entry abusers, save those who receive a mitigating role adjustment under § 3B1.2. *See* § 2D1.1(b)(4)(B).

Issue for Comment 3(b) asks whether the Commission should extend the facilitated entry enhancement to importation of all drugs under 21 U.S.C. §§ 960 and 963. The PAG opposes this suggestion. We see no reason that justifies extending this enhancement to other than methamphetamine. To our knowledge there is no reason to assume that the practice of using facilitated entry programs to

import drugs is so widespread that it warrants a special enhancement beyond the special case of methamphetamine. Congress certainly has not identified it as a concern and explicitly limited enhanced penalties to methamphetamine importers. *See* 151 Cong. Rec. H11279-01, H11309 (Dec. 8, 2005) (The provision "creates an added deterrent for anyone who misuses a facilitated entry program to smuggle methamphetamine or its precursor chemicals.")

In Issue for Comment 3(c), the Commission asks if it should amend § 3B1.3, Abuse of Position of Trust or Use of a Special Skill, to include offenses that involve a facilitated entry program. The PAG opposes this suggestion. It is difficult to see how facilitated entry offenders fit the abuse of trust or special skill parameters. As Application Note 1 states, the public or private trusts that triggers section 3B1.3 is a position of trust "characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference)." Thus, for example, while bank tellers or hotel clerks are trusted to safeguard currency and other valuables, they are excluded from the guideline due to their lack of professional or managerial discretion. *Id.* Those who use the facilitated entry program bear no resemblance to the offenders contemplated in § 3B1.3. The program serves not only the interests of the frequent border crosser, but also of the government. The program shortens the long lines and delays by permitting easier access to individuals who provide information in advance that assists the government in administering border crossings. Facilitated entry program users enjoy no special relationship of trust nor do they employ any special skill. They are in fact subject to the same level of inspection as is any border crosser, but the time the inspection takes is shortened because the user has provided much of the information ahead of time. *See* U.S. Customs and Border Patrol, *Secure Electronic Network for Travelers Rapid Inspection (SENTRI)* (available at http://www.cbp.gov/xp/cgov/travel/frequent_traveler-/sentri/sentri.xml).

Section 3B1.3 would have to be significantly rewritten to accommodate these sorts of offenses. The PAG sees no need to do so.

18 U.S.C. § 860a

The PATRIOT Act also added 21 U.S.C. § 860a, "Consecutive Sentence for Manufacturing or Distributing, or Possessing with Intent to Manufacture or Distribute, Methamphetamine on Premises Where Children are Present or Reside." The Act provides for a consecutive mandatory term of not more than 20 years' imprisonment for possession with intent to distribute, or manufacture methamphetamine on premises where a minor is present or resides. Two options are presented.

Proposed Option 1. Congress directed the Commission in 2000 to enhance sentences for defendants whose manufacturing conduct creates a substantial risk of harm to a minor or incompetent. The Commission complied and in § 2D1.1(b)(8)(C) provides a six-level enhancement (minimum of level 30) for the harm.

Proposed Option 1 sets out a two-level enhancement where the methamphetamine manufacturing is punishable under 21 U.S.C. § 860a but does not pose a substantial risk of harm as already contemplated by § 2D1.1(b)(8)(C). Otherwise, and as currently provided in § 2D1.1(b)(8)(C), a six-level enhancement (minimum of level 30) applies.

The PAG recommends option one. It utilizes the current enhancement to address the risks posed

to minors, while providing an appropriately smaller enhancement where the activity does not pose such a risk. This is sound, punishing significantly more severely the more culpable manufacturer whose activity creates a substantial risk to minors, while still additionally penalizing conduct conducted in places where children are present or reside, as Congress intended.

Proposed Option 2 creates a two-tiered penalty enhancement. It proposes a six-level enhancement (and floor of level 29) for manufacture where a minor is present or merely resides. It proposes a three-level enhancement (and floor of level 15) for distribution or possession with intent to distribute methamphetamine where a minor is present or resides. The PAG opposes this option in light of the adequacy of the existing six-level and two-level enhancements provided in Option 2.

Option 2 contains penalties that are overbroad and dwarf existing enhancements that punish similar – and in some cases – greater harms. For example, the proposed three-level enhancement for possession with intent to distribute in the residence of a minor could be applied when no minor is present (and has not been present for some time) and when no drug distribution ever took place. Clearly the enhancement is unduly harsh in such cases. Moreover, the enhancement, of its own and when compared to others, is disproportionate. For example, it is greater than the enhancement for defendants who possessed drugs in a school zone, § 2D1.2 (two levels), possessed a firearm in connection with a drug trafficking offense, § 2D1.1(b)(1) (2 levels), or who distributed drugs in a juvenile detention facility (§ 2D1.1(b)(3) (2 levels)).

The Commission also seeks comment on whether the enhancement for risk of substantial harm to a minor should be based on relevant conduct. The PAG opposes basing the enhancement on other than convicted offenses under the statute. Doing otherwise exposes a defendant to a six-level enhancement in unwarranted circumstances. For example, applying the relevant conduct rule, a defendant who never manufactured methamphetamine, but received and distributed it, could be subject to a six-level enhancement due to the conduct of a co-conspirator, whose manufacturing posed a substantial risk of harm to a minor, or following Option 2, where no risk is present whatsoever. Such an enhancement would also be applied under a preponderance of the evidence standard. The PAG can discern no justification for such an outcome; it offers no discernable deterrent to defendants who traffic methamphetamine but do not manufacture it, and it punishes defendants for harm neither intended nor risked.

The pernicious effects of applying the enhancement for relevant conduct are even more pronounced when the proposals move away from substantial risk of harm from the manufacture of methamphetamine to risks attendant to possession with intent to distribute methamphetamine or any other drug. There is simply no real offense involved in such a scenario and the underlying purposes of the relevant conduct rules are not served by this approach. Furthermore, in light of the Commission's stated intention to re-examine the relevant conduct rules, it is particularly unwise to increase their impact at this time.

The issue for comment further asks if the enhancement should be broadened to include simple distribution of methamphetamine or even possession with intent to distribute methamphetamine to the extent the distribution of methamphetamine poses a substantial risk of harm. And the Commission asks whether the enhancement should be further expanded to include all drugs. We oppose these constructions.

Congress, in 2000, recognized a special danger attendant to methamphetamine manufacturing.

The nature of the chemicals involved, the risks of their combinations and the dangers posed by their disposal all trigger special concerns that are simply not implicated when already manufactured methamphetamine, or any other drug, is present. The Commission drafted guidance in Application Note 20 addressing factors such as the quantity of chemicals and hazardous or toxic substances, the manner of their disposal, the extent of the operation and the location of the lab. Such a nuanced examination is an appropriate approach for courts to take in making a determination of whether an operation poses the accepted risks. Presence of the end product does not trigger them. If such an enhancement were adopted, it is an easy step to apply the same penalty in the case of simple possession of the drug, making drug addicts who keep their drugs on the premises liable for extreme sentences because their minor children reside with them. This approach is excessive, unnecessary and unsupported by any evidence.

Furthermore, Congress has not seen fit to expand this protection. Congress, in 2000 and again in 2006, could have addressed an enhancement for simple possession or possession with intent to distribute methamphetamine. It did not. Similarly, Congress could have expanded the reach of the substantial risk of harm to a minor to include manufacture or possession of all other drugs, but it has not. The Commission does not present any support for an option that would be used to increase already significant sentences for drug defendants.

Similarly, we know of no evidence supporting any increased risk of substantial risk of harm to a minor that would be posed by the mere presence of already manufactured methamphetamine or any other drug. In the case where a defendant's conduct with respect to a controlled substance poses a substantial risk of harm to a minor, the judge may exceed the top of the guideline range.

21 U.S.C. § 841(g)

Issue for Comment 1 concerns three proposed approaches to enhancements intended to account for convictions under 21 U.S.C. § 841(g), which, pursuant to Section 201 of the Adam Walsh Act, prohibits the knowing use of the Internet to distribute a date rape drug to any person knowing or with reasonable cause to believe either that the drug would be used in the commission of criminal sexual conduct or that the person is not an authorized purchaser as defined by the statute. As an initial matter, we offer three observations.

First, § 841(g)(1)(B) criminalizes the use of the Internet to distribute a date rape drug to an unauthorized purchaser. For guidelines purposes, this provision is superfluous; all offenses within Section 2D1.1 involve, in one form or another, the distribution of drugs to unauthorized purchasers. There is no support or justification for an "unauthorized purchaser" enhancement exclusive to convictions under § 841(g)(1)(B).

Second, Section 2D1.1(b)(5) [or 2D1.1(b)(6) under proposed changes] already provides a two-level increase whenever a controlled substance is distributed through mass marketing by means of an interactive computer service. This enhancement encompasses the use of the Internet (i.e., websites) for mass promotion of sale of date rape and other drugs. In other words, Section 2D1.1(b)(5) already affords an increased penalty for what might be characterized as an aggravated § 841(g) offense, wherein a defendant's offense conduct involves extensive or far-reaching Internet use.

Third, in enacting § 841(g), Congress expressed no intent as to specific enhancements or

penalties, aside from increasing the statutory maximum for ketamine offenses in one, limited circumstance (see below). Accordingly, the Commission should act judiciously and consistent with existing guidelines and policy. In particular, enactment of § 841(g) does not support adoption of the type of minimum base offense level (floor) proposed in Option 3. Indeed, the Commission should move away from such stringency.

With the foregoing in mind, the PAG submits an alternate amendment:

9. If the defendant was convicted under § 841(g)(1)(A) and (i) had reasonable cause to believe that the drug would be used to commit criminal sexual conduct, add 1 level, or (ii) knew that the date rape drug was to be used to commit criminal sexual conduct, add 2 levels.

This approach satisfies several considerations. For one, it distinguishes the degrees of culpability established by § 841(g)(1)(A). It also advances the aim of consistency within the guidelines. Section 2D1.1(e) makes cross-reference to § 3A1.1(b) when a defendant is found to have used a controlled substance to facilitate commission of a sexual offense. Inasmuch as a defendant who actually uses the controlled substance is subject to no greater than a two-level enhancement, a defendant who violates § 841(g) should be subject to comparable penalties — a consideration that, standing alone, undermines the unduly harsh proposal set forth in Option 3. Finally, in view of the additional two levels for aggravated use of the Internet under § 2D1.1(b)(5) [or (b)(6)], a defendant convicted under § 841(g)(1)(A) would effectively be subject to a three- or four-level increase in his base offense level. In spite of general disfavor with judicial inquiry into a defendant's state of mind when determining offense levels, the PAG believes this proposal tracks the purpose conveyed in the language of 21 U.S.C. § 841(g) and is sufficiently straightforward that it will not complicate plea negotiations.

Ketamine

Although not listed in the Issues for Comment, the PAG is concerned about the apparent mistaken premise upon which the Commission proposes amendment to the offense levels for ketamine offenses. Because ketamine is a Schedule III controlled substance, the Drug Quantity Table currently provides a maximum offense level of 20. Citing 21 U.S.C. § 860(a) for the proposition that Congress has raised the statutory maximum for ketamine offenses from five to 20 years, the Commission proposes to lift the Quantity Table ceiling/cap for ketamine. However, § 860(a) concerns methamphetamine; it is silent as to ketamine. The only increase in the statutory maximum for ketamine offenses is where a defendant is convicted under 21 U.S.C. § 841(g). Indeed, Congress has expressed no intent, nor otherwise directed, that the Commission create penalties for ketamine separate from those for other Schedule III controlled substances.

The PAG believes that the enhancements designed to reflect convictions under 21 U.S.C. § 841(g) are sufficient to achieve congressional ends and that the guidelines for ketamine offenses do not require amendment. Concurrently, we recognize the apparent interest in eliminating the ceiling/cap for ketamine-related offenses to reflect the one scenario where the statutory maximum is higher. We, therefore, submit that the appropriate approach is an Application Note, such as:

In any case in which a defendant is convicted under 21 U.S.C. § 841(g) for distributing

ketamine, ketamine should not be treated as a Schedule III substance. Rather, the Drug Quantity Table for Schedule I or II Depressants should be used. This means that for ketamine offenses under 21 U.S.C. § 841(g), a maximum level of 20 does not apply, as it does for other ketamine offenses.

This approach, which eliminates the need for additional listings in the Drug Quantity and Drug Equivalency Tables, advances the aim of simplification while satisfying the debatable end sought to be achieved.

8. IMMIGRATION

The Commission has invited comment on its proposed amendments to 2L1.1, the guideline for offenses involving the smuggling, transporting, or harboring unlawful aliens; 2L2.1, for offenses involving unlawful trafficking in immigration-related documents; and 2L1.2, for unlawfully entering or remaining in the United States. The Commission has also asked for comment on *Lopez v. Gonzalez*, 127 S. Ct. 625 (2006).

The PAG agrees with the comments submitted on behalf of the Federal Public and Community Defenders by Jon M. Sands, Federal Public Defender in Arizona, in his letter of March 2, 2007. With regard to the proposed increases under 2L1.1, any increase at present is unwarranted, and therefore, the PAG opposes both Options 1 and 2. Under Option 1, the Commission proposes additional increases in the offense level for offenses involving more than 200 illegal aliens. As Mr. Sands notes in his letter, offenses involving more than 100 illegal aliens account for fewer than two percent of the total. One of the Commission's reasons for the proposed increase appears to be two bills introduced in the House last year containing directives to the Commission to increase penalties based on the number of aliens smuggled. See Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines at 8. However, Congress did not pass immigration reform legislation last year, and it continues to debate the issue. With the targeted cases accounting for such a small percentage of the total, and with Congress still debating immigration reform, the Commission should continue to gather data and determine whether those data support a change before amending the existing guideline.

Option 2 is likewise unwarranted. Like Option 1, Option 2 would increase offense levels for that very small percentage of cases involving more than 100 illegal aliens. In addition, Option 2 would significantly increase the sentences for offenses involving 16 to 24 and 50 to 99 aliens. As Mr. Sands points out, according to the Commission's data the vast majority of cases involve fewer than 25 illegal aliens, and in approximately 65 percent of the cases defendants receive sentences within the advisory guideline range. Under these circumstances, the PAG does not see any empirical justification for the proposed increases.

The proposed amendment to 2L2.1 (for illegal trafficking in immigration-related documents) is also unwarranted. The offense level increases, which are based on the number of documents involved in the offense, mirror the increases based on number of illegal aliens under 2L1.1, and are, for the same reasons, unwarranted at this time. Moreover, the PAG, like the Defenders, questions the underlying premise that one document is, as a measure of offense seriousness, the equivalent of one illegal alien. The Commission should study further the issue of the appropriate ratio of documents to illegal aliens. In the interim, the Commission should allow the district courts, using the existing advisory guidelines, to assess

the actual and potential harm in each case based on its own facts. If variance or departure trends emerge from that process, the Commission could then assess whether the guidelines need to be amended.

The PAG also endorses the Defenders' detailed comments on the Commission's proposed amendment to 2L1.2 for illegal re-entry offenses. In particular, we note the absence of any apparent justification for the 16-level increase under 2L1.2(b)(1), which runs through most of the proposed options. Additionally, the Defenders point out the value of distinguishing between "sentence served" and "sentence imposed," given the wide variation in state sentencing procedures. The Commission should use the former rather than the latter in measuring the seriousness of the re-entry offense, an approach that would reduce the existing disparity resulting from differences in state sentencing procedures. If the Commission is inclined to mention the availability of an upward departure in cases where the elements of the prior offense under-represent its seriousness, then fairness requires (as illustrated by the examples given by the Defenders) a downward departure in those cases in which the elements of the prior offense over-represent its seriousness.

Lastly, with regard to *Lopez v. Gonzalez*, 127 S.Ct. 625, for reasons set forth in the Defender's comments, the Supreme Court's decision requires no response by the Commission. If Congress passes new legislation in response to the *Lopez* decision, then the Commission can consider whether an amendment to the guidelines is warranted.

9. BUREAU OF PRISONS MOTION/"COMPASSIONATE RELEASE"

On March 8, 2007 the PAG sent the Commission a separate letter addressing requests for comments on § 1B1.13, which governs motions by the Bureau of Prisons for reductions in sentence based on extraordinary and compelling circumstances. Since then, the PAG has reviewed the ABA's revised proposed policy statement, dated March 12, 2007, and it supports that updated proposal.

10. CRIMINAL HISTORY

Minor Offenses

USSG §4A1.2(c)(1) was intended to exclude minor offenses in all but a few circumstances. In practice, however, the exceptions have swallowed the rule. Minor offenses regularly add to the criminal history score, resulting in higher sentence ranges and, in many cases, preventing application of the safety valve. Section 4A1.2(c)(1) should be amended to provide that the listed offenses never count for criminal history computation purposes. If the Commission is not prepared to take this corrective action, which will ensure that such dispositions are appropriately excluded (while allowing for a higher sentence if there really is an aggravating circumstance surrounding a petty offense disposition), then the guideline should be amended and restricted so that criminal history points are assigned for minor and non-criminal offenses only in the rarest and most limited of circumstances: aggravated, recent minor offenses involving lengthy terms of incarceration.

The Commission originally drafted § 4A1.2(c)(1) with the intention and goal that sentences for extremely minor, petty and non-criminal dispositions would be presumptively excluded from criminal history calculations because such sentences are not indicative of the seriousness of a person's criminal history and nor predictive of the likelihood of future criminal conduct. The exceptions for when such

offenses were counted were designed to be rarely applicable, and only for aggravated instances where a stiff sentence was imposed for the minor offense. This made great sense. The listed offenses are extremely minor; most have no intent requirement; and many are not even *criminal*. Moreover, none has predictive value for future criminality, that is, the fact that someone has a conviction for non-criminal disorderly conduct makes it no more likely that they will ever be in trouble again.

Despite this clear intention, gradually, over the years, the exceptions to the bar on including minor offenses have swallowed the rule. And they have done so in a way that presents a frontal attack on the Commission's goal to have a workable, easily understandable, and reliably predictive way of assigning criminal history points. The rules of application have become extremely difficult in practice, consuming thousands of hours of Probation Office, attorney, district court and court of appeals time in applying and interpreting the results in countless cases. Equally troubling is that minor offenses often count for up to three points (one point for the prior sentence itself and another two points under USSG §4A1.1(d) for being under that sentence at the time of the instant offense), resulting not just in a higher criminal history category but the loss of safety valve eligibility for low-level drug offenders.

There are hundreds of examples of how this occurs every day, but we will focus on just one that reflects the common impact on minor drug offenders. In that case, the defendant had no prior felony or misdemeanor criminal record. However, she had two convictions for non-criminal New York violations: harassment in the second degree and disorderly conduct. *See* N.Y. Penal § 10.00(3) & Comm'n Staff Notes (referring to violations, defined by a maximum jail term of 15 days, as non-criminal offenses). For both offenses, she received no jail time or fine. Instead, she was given one-year conditional discharge as to each, an unsupervised sentence that, under New York law, is not probation and has no conditions other than to lead a law-abiding life. The applicable sentence calculation without these dispositions was Criminal History Category I (zero points) and offense level 10, which included the safety valve reduction. The calculations ended up being increased following a determination that the two conditional discharge sentences – deemed to be one-year terms of probation – counted as one point each, and the instant federal offense was committed while under the conditional discharge. As a result of these two non-criminal violations, which generated one of the most lenient sentences available under New York law, the defendant now faced the loss of the safety valve, criminal history category III, and a sentencing range of 15-21 months (Zone D), rendering her ineligible for probation.

This result is inconsistent with the purpose of the criminal history calculations, the Commission's original intentions, and the facts and circumstances of this particular offender and her federal offense: the sale of one milligram of crack. It is also inconsistent with the realities of the state statute. Consider that if this defendant had received the statutory maximum under New York law for each of her convictions – fifteen days incarceration – that neither conviction would have counted. However, because she received the *more lenient* sentence of a conditional discharge, which can only be imposed when the sentencing judge determines that a harsher sanction is not appropriate, the two convictions/sentences *count* for criminal history purposes. Such an absurd outcome cannot be what the Commission intended in promulgating § 4A1.2(c)(1).

Other examples, which cumulatively run into thousands of federal cases per year, abound, and they are cogently set out in the letter submitted by the Federal Public and Community Defenders to the Commission. For example, under USSG § 4A1.2(c)(1)(B), convictions for minor offenses are often

deemed "similar" to a federal narcotics trafficking offense, such that one point is counted for the disorderly conduct conviction. In the following example, a conviction for "driving without a license" that resulted in a fine was considered "similar to" a federal narcotics trafficking conviction such that one point was assessed:

Criminal Trespassing, 2nd Degree, A misdemeanor	02/12/1997 (Age 23) 04/24/1997: Pled Guilty to **Driving Without a License,** $100 fine, conditional discharge	1
Possession of a Hyperdermic Instrument, A misdemeanor		
Aggravated Unlicense Operation, U misdemeanor		
Failure to Obey Traffic Signs, an infraction		
City Court Buffalo, New York 97M-[redacted]		

DETAILS: On February 12, 1997, at approximately 10:00 a.m. the defendant was stopped by Buffalo Police officers for running a red light. At that time, a hypodermic needle was found in his jacket. Additionally, his driver's license was suspended and a VTL warrant was outstanding.

The Guideline must be amended to ensure that the Commission's original intent to exclude such dispositions is honored. To deal with these various problems, we agree with the proposals suggested by the Federal Public and Community Defenders.

Proposal 1 – providing that sentences for these offenses are never counted – is best because it provides for a practical bright line rule, allows for reliable and easy application, and is consistent with the Commission's original intent and with the purposes of guideline sentencing. A more idealized solution, such as tailoring a guideline that would only count offenses when there is a sufficiently serious aggravator, is not feasible because of the state variations (by offense, by sentence and by plea bargaining policies) that frustrate universal application of such a rule and its myriad exceptions. Any proposal that continues to include exceptions to the general rule of exclusion will continue to "overcapture" non-

criminal and petty offense dispositions that should not properly be included in the criminal history calculations.

The Commission should not hesitate in amending the guideline in this way. First, and importantly, whether it is specified in the application note or not, the sentencing court always has the option of considering an upward departure or variance for minor/non-criminal offenses that might, in the rare case, be appropriate for consideration. The best analogy is the Commission's decision to always exclude foreign convictions/sentences for criminal history purposes under § 4A1.2(h). Even with that prohibition, such sentences "may be considered under § 4A1.3." This is a workable, common sense, easily-applied rule that provides for consistency in sentencing while allowing for the consideration of special circumstances. The same approach can be used in amending § 4A1.2(c).

Second, the Commission should not lose sight of the types of offenses covered by § 4A1.2(c). All of the offenses are, by definition, minor. Almost all of them, except for scattered definitions in a few states, are misdemeanors or non-criminal violations. Sentences for these offenses are imposed in a manner that demonstrates a defendant is not deserving of more serious charges or prosecution, and usually the result is a non-prison sentence.

Third, the proposed approach avoids the unwarranted and very harsh denial of safety valve relief to hundreds of otherwise-eligible defendants for whom such relief was intended. Persons convicted of non-criminal violations and petty offenses are within the category of offenders that, if they meet all the other requirements, merit application of the safety valve.

Fourth, the proposed approach will streamline and simplify federal sentencing, free up time for the participants to give their attention to more serious matters and promote better, more equitable and more accurate sentencing decisions.

Proposal 2 by the Defenders has our full support if the Commission decides to amend the Guideline rather than adopt a rule excluding such offenses from criminal history calculations. The amendments will narrow the situations in which sentences for minor offenses will be counted to those that include only very serious criminal conduct with sufficiently stiff sentences.

The Defenders' Proposal 2 would eliminate the counting of offenses at § 4A1.2(c)(1)(A) if the sentence "was a term of probation of at least one year." We believe that eliminating this qualifier is appropriate and would ensure that only sufficiently stiff and serious punishments (*i.e.*, significant incarceration) trigger counting of the minor offense. However, if the Commission decides to keep the current structure of § 4A1.2(c)(1)(A), we strongly urge modification of this subsection to provide that the minor offense counts only if "the sentence was a term of *supervised* probation of at least one year...." (Emphasis added). Counting only supervised probation terms will provide a more accurate measure of the seriousness of the prior offense. More importantly, it would avoid the irrational result noted above in which a prior conviction counts where the defendant received the most lenient possible disposition, such a conditional discharge under New York law, *see United States v. Ramirez*, 421 F.3d 159 (2d Cir. 2005), yet receives *no* points if he received the most *severe* sentence (*e.g.*, 15 days in jail for violations such as disorderly conduct or harassment in the second degree under New York law).

We have only one addition to the Defenders' comprehensive second proposal, and accompanying

explanation. The offense of "harassment," like disorderly conduct, is a minor offense and, in many jurisdictions, is even a noncriminal offense. As is the case with disorderly conduct, harassment should be included as an offense that never counts in the amended USSG § 4A1.2(c)(2). This is consistent with the purpose of the Guideline, and it will save extensive time and resources that are now spent litigating whether a harassment disposition is "similar to" the listed offenses of disorderly conduct, resisting arrest or disturbing the peace. *See, e.g., United States v. Morales*, 239 F.3d 113 (2d Cir. 2000) (New York second degree harassment conviction/sentence was "similar to" listed offenses such that it should not have been counted; vacated and remanded for resentencing).

Related cases

The PAG joins in the recommendations of the Federal Public and Community Defenders and their proposed amendment to Application Note 3 to USSG § 4A1.2.

11. PRETEXTING

For the new statute criminalizing, among other things, the fraudulent acquisition and disclosure of confidential telephone records, the PAG believes the appropriate guideline is § 2H3.1, which the Commission has proposed expanding to cover disclosure of certain personal information. We understand that consideration is also being given to use of § 2B1.1, but that provision is not as good a fit. The harm from unauthorized access to telephone records is principally an invasion of privacy. As reflected in Congress's findings, telephone records ("call logs") may reveal the names of a telephone user's doctors, public and private business relationships, business associates and more. *See* Pub. L. 109-476, § 2. The privacy interest at stake does not readily equate to a dollar amount, nor would it be practical for courts to try to translate the injury into pecuniary harm. Section 2H3.1 provides a higher base offense level than § 2B1.1 (9 versus 6) to account for the harm caused in the absence of pecuniary loss.

In the event the new telephone records offense is committed in its aggravated form – usually with the intent to further the commission of another crime – the cross reference will frequently direct the application of a higher offense level. We believe, consistent with the Sixth Amendment implications of the statutory sentence enhancements, that the Commission should require a conviction under either subsection (d) or (e) for the cross reference to apply. Under subsection (e), the court is *required* to impose some additional period of imprisonment of up to five years (although no particular amount of prison time is specified). Subsection (d) contains a similar requirement: an additional prison term of up to five years, a fine up to double the normal statutory maximum, or both. The Commission already takes this "offense of conviction" approach for violations of 21 U.S.C. §§ 859, 860 and 861, which deal with aggravated forms of drugs offenses, such as those occurring within 1,000 feet of a school. *See* § 2D1.2. Consistent with the approach used in § 3C1.3 for imposition of the sentence enhancement in 18 U.S.C. § 3147, we recommend an application note explaining that some portion of the total sentence determined under 18 U.S.C. § 3553(a) be apportioned to the consecutive enhancement under subsection (d) or (e).

It would be premature to add specific offense characteristics to § 2H3.1. To maintain consistency with the Commission's goal of simplifying the Guidelines, the better approach is to let courts vary from the guideline range in those cases where the base offense level does not adequately account for an aggravating or mitigating circumstance. If it turns out that certain circumstances are resulting in variances

in a large number of cases, the Commission can then consider whether a new specific offense characteristic is appropriate.

On a related note, we understand that the President's Task Force on Identity Theft is proposing an expanded definition of "victim" under § 2B1.1 that would include persons who suffer non-monetary harm, such as invasion of privacy, damage to reputation and inconvenience. This proposed definitional expansion is terribly ill-advised. Section 2B1.1 is already complicated enough without requiring courts to identify the number of non-monetary-harm victims, as well as to assess the extent to which the offense has harmed them in such a non-monetary manner. The proposed definition is sufficiently broad and vague that it could conceivably require courts to count as victims any person who is required to testify as a witness before the grand jury or at trial. Even the larger categories of persons who are interviewed, or entities from which the government subpoenas or otherwise requests records, during the course of an investigation would surely have a claim of being "inconvenienced" by the offense.

The proposed expansion of the definition is also unnecessary. The guideline already contains Application Note 19, which encourages courts to sentence above the range if the loss amount understates the seriousness of the offense. It specifically mentions cases where the harm is invasion of privacy. Absent some indication that courts have needed to vary from the guideline in a sizeable number of cases to account for non-monetary harms, the Commission should not further complicate this provision.

Finally, the proposed definition could have the unintended consequence of greatly expanding the number of persons to whom the Crime Victims' Rights Act applies. *See* 18 U.S.C. § 3771. If the courts are required to identify and consider as victims, for Guidelines purposes, those persons who incur non-monetary harm, including "inconvenience," they may very well determine that the Commission's approach justifies considering such persons "victims" for purposes of the Act. If so, persons who suffered no harm other than inconvenience would have to be accorded a number of rights at and before sentencing, including the right to be heard, the right to confer with the prosecutor, the right to file a motion in the district court asserting their rights, and the right to file a petition for mandamus if the district court denies the relief the victim has sought. The Commission should not send the courts down the road of either greatly expanding the scope of the Act or creating a glaring and confusing inconsistency between who is a victim under the Guidelines and who is a victim under the Act.

12. CRACK COCAINE

The Commission seeks comment on the testimony it received regarding cocaine sentencing policy at the November 14, 2006 hearing. The PAG stands by its proposal that the Commission equalize crack and powder cocaine sentences at the current powder cocaine levels. The hearings confirmed that equalization is appropriate in light of the lack of evidence supporting the current penalty structure. Crack cocaine sentencing policy is fundamentally unsound, as discussed by many of the witnesses at the hearing. There is no legitimate justification for continuing the policy and many reasons to abandon it.

Many of the witnesses pointed out that the crack cocaine penalty structure creates racial disparity in sentencing that is unsupportable and profoundly detrimental. For example, A.J. Kramer, Federal Public Defender for the District of Columbia echoed the assessment of the Honorable Robert Sweet, who called federal crack policy the "new Jim Crow law" and that of the Honorable Louis F. Oberdorfer, who has likened the guideline and the mandatory minimum from which it derives its questionable legitimacy to the

Fugitive Slave Law.[1] The NAACP told the Commission that the penalty "show[s] a callous disregard for our people and our communities."[2] The Commission has long identified the perception of racial bias as a reason to abandon the penalty.[3] The disparity in sentencing that results from the starkly different penalties and their correspondence to race undermines confidence in our criminal justice system.

A number of witnesses discussed the fact that the various justifications cited in the Anti-Drug Abuse Act of 1986 have been found baseless or no longer exist. For example, Dr. Harolyn Beltcher of Johns Hopkins University repeated the now well-known fact that prenatal exposure to crack cocaine is no different than that for powder and less damaging by far than the impact of alcohol and tobacco.[4] Professor Alfred Blumstein reiterated his findings that the violence associated with crack cocaine markets has long since abated as the markets for crack cocaine evolved.[5] Crack cocaine's perceived preferential appeal for young people is contradicted by evidence from the Monitoring the Future study.[6]

The deterrent impact of the 100:1 ratio is impossible to determine. Dr. Bruce Johnson testified that "[c]rack sellers/distributors rarely mention awareness of it, nor do they report changing their business activities due to its existence."[7]

While some witnesses testified in favor of maintaining crack penalties at their current levels, none presented the Commission with compelling evidence to justify their conclusions or to overcome the wealth of evidence for eliminating the distinction. For example, Alexander Acosta testified that weapon involvement was somewhat higher for crack cocaine involved defendants.[8] This factor is present in some crack cases, yet it is reflected in the penalty structure for all crack cocaine defendants. The PAG has long urged that the better course is to equalize the penalties and address added harms, defendant by defendant, at sentencing by using appropriate offense characteristics.[9]

The Commission has taken evidence and heard from the community for a dozen years on this issue. The PAG urges that the Commission bring its investigation to a close and now act to eliminate the current penalty for crack cocaine and equalize the two penalty structures. Thousands of defendants have been incarcerated for unjustifiably long terms of imprisonment based on a fiction that the Sentencing Commission exposed twelve years ago. There is no justification for further delay.

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[1] *See* Testimony of A. J. Kramer, Federal Public Defender for the District of Columbia, at 1-2.
[2] Testimony of Hilary O. Shelton, Director, NAACP Washington Bureau, at 2.
[3] *See* United States Sentencing Commission, *Cocaine and Federal Sentencing Policy* 102-103 (May 2002).
[4] Testimony of Harolyn Beltcher, M.D., M.H.S., Associate Professor of Pediatrics, Johns Hopkins School of Medicine, at 1.
[5] *See* Testimony of Alfred Blumstein, H. John Heinz III School of Public Policy and Management, Carnegie Mellon University, at 3-4; *see also* Testimony of Bruce D. Johnson, Institute for Special Population Research at 4 (ADAM research indicates "violence is relatively rare among current crack/cocaine users.").
[6] *See* Testimony of Nora D. Volkow, Director, National Institute on Drug Abuse, at 3.
[7] Testimony of Bruce D. Johnson, at 4.
[8] Testimony of R. Alexander Acosta, United States Attorney, Southern District of Florida 13-14.
[9] *See* Testimony of David Debold, Co-Chair of the Practitioners' Advisory Group to the United States Sentencing Commission, at 2.

CONCLUSION

On behalf of the our members, who work with the guidelines on a daily basis, we appreciate the opportunity to offer our input on the proposed amendments and issues for comment. We look forward to discussing some of these topics at the hearing on March 20, and we hope that our perspective is useful as the Commission continues to carry out its responsibilities under the Sentencing Reform Act.

Sincerely,

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Honorable Ricardo H. Hinojosa
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Comments on Proposed Amendments Relating to Terrorism and Transportation

Dear Judge Hinojosa:

With this letter, we provide the comments of the Federal Public and Community Defenders on the proposed amendments and issues for comment under the headings of Terrorism and Transportation that were published January 30, 2007.

I. Terrorism

A. Foreign terrorist organizations, terrorist persons and groups, 21 U.S.C. § 960a

The Commission proposes two options for implementing the new offense at 21 U.S.C. § 960a, each of which would make the base offense level 4 or 6 plus the offense level specified in the Drug Quantity Table, and would allow the 12-level increase/32-level minimum/Criminal History Category VI under § 3A1.4 to apply in addition. It is also suggested that it may be appropriate to exclude the mitigating role cap and the safety valve reduction in such cases.

We oppose these proposals because they would result in punishment far in excess of what the statute requires, would punish the same conduct twice, and would unjustifiably assume that no defendant convicted under this statute is deserving of a mitigating role cap or safety valve reduction. We recommend that the Commission adopt one of two alternative proposals.

1. Defender Proposals

Proposal 1. Congress did not direct the Commission to amend the guidelines in any way to implement the new offense set forth at 21 U.S.C. § 960a. Accordingly, our first proposal is to allow § 5G1.1(b) to operate. It would rarely if ever have to operate because § 3A1.4 would apply in most, and probably all, cases. This would accomplish only what the new statute requires, which is a term of imprisonment of not less than twice the statutory minimum that would apply under 21 U.S.C. § 841(b)(1).

Proposal 2. In the alternative, we recommend a separate offense guideline at § 2D1.14. If § 3A1.4 applied, the base offense level would be the offense level from § 2D1.1 applicable to the underlying § 841(a) offense. This would result in a sentence greater than twice any applicable statutory minimum from 21 U.S.C. § 841(b)(1), and a minimum offense level of 32, 34 or 36 and a Criminal History Category of VI in any case without an applicable statutory minimum. *See* footnote 1, *infra*. In the unlikely event § 3A1.4 did not apply, the base offense level would be 4 plus the offense level from § 2D1.1 applicable to the underlying § 841(a) offense. This too would result in a sentence greater than twice any applicable statutory minimum from 21 U.S.C. § 841(b)(1), and a 34-100% increase in cases without an applicable statutory minimum. In the few cases in which the guideline range fell below the minimum required by § 960, that minimum would trump under § 5G1.1(b).

§2D1.14. Narco-Terrorism

(a) Base Offense Level

(1) If § 3A1.4 (Terrorism) applies, the base offense level is the offense level from § 2D1.1 applicable to the underlying offense.

(2) Otherwise, the base offense level is 4 plus the offense level from § 2D1.1 applicable to the underlying offense.

2. What the Statute Requires

Title 21 U.S.C. § 960a states: "Whoever engages in conduct that would be punishable under section 841(a) of this title if committed within the jurisdiction of the United States, or attempts or conspires to do so, knowing or intending to provide, directly or indirectly, anything of pecuniary value to any person or organization that has engaged or engages in terrorist activity (as defined in section 1182(a)(3)(B) of Title 8) or terrorism (as defined in section 2656f(d)(2) of Title 22), shall be sentenced to a term of imprisonment of not less than twice the minimum punishment under section 841(b)(1) of this title, and not more than life . . . ."

That is, defendants convicted of trafficking in a quantity of drugs set forth in 21 U.S.C. § 841(b)(1)(A) receive a sentence of no less than 20 years, defendants convicted

of trafficking in a quantity of drugs set forth in 21 U.S.C. § 841(b)(1)(B) receive a sentence of no less than 10 years, and defendants convicted of trafficking in a quantity of drugs set forth in 21 U.S.C. § 841(b)(1)(C) receive no minimum sentence. Precisely what the statute requires can be accomplished by allowing § 5G1.1(b) to operate.

3. The Proposed Amendments Exceed What the Statute Requires.

Even without the effect of § 3A1.4, the addition of six levels to the base offense level is clearly excessive because it results in a range for defendants in Criminal History Category I with no specific offense characteristics that exceeds the statutory minimum at 16 of 17 levels. At only one level (32 + 6 = 38) does it simply include the statutory minimum. Thus, it is not accurate to say, as the proposed note does, that "[a]dding six levels . . . establishes a guideline range with a lower limit as close to twice the statutory minimum as possible."[1]

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[1]

Normal Base Offense Level = Range in months in CHC I	Sentence required by 21 USC 960a	Guideline Range Under Normal Base Level if 3A1.4 Applies (CHC VI)	Base Offense Level +4 = Range in months in CHC I	Base Offense Level +6 = Range in months in CHC I	Base Offense Level + 4 + 3A1.4 = Range in months in CHC VI	Base Offense Level + 6 + 3A1.4 = Range in months in CHC VI
38 = 235-293	20 years	50 = life	42 = 360-life	44 = life	54 = life	56 = life
36 = 188-235	20 years	48 = life	40 = 292-365	42 = 360-life	52 = life	54 = life
34 = 151-188	20 years	46 = life	38 = 235-293	40 = 292-365	50 = life	52 = life
32 = 121-151	20 years	44 = life	36 = 188-235	38 = 235-293	48 = life	50 = life
30 = 97-121	10 years	42 = 360-life	34 = 151-188	36 = 188-235	46 = life	48 = life
28 = 78-97	10 years	40 = 360-life	32 = 121-151	34 = 151-188	44 = life	46 = life
26 = 63-78	10 years	38 = 360-life	30 = 97-121	32 = 121-151	38 = 360-life	44 = life
24 = 51-63	0	36 = 324-405	28 = 78-97	30 = 97-121	40 = 360-life	42 = 360-life
22 = 41-51	0	34 = 262-327	26 = 63-78	28 = 78-97	38 = 360-life	40 = 360-life
20 = 33-41	0	32 = 210-262	24 = 51-63	26 = 63-78	36 = 324-405	38 = 360-life
18 = 27-33	0	32 = 210-262	22 = 41-51	24 = 51-63	34 = 262-327	36 = 324-405
16 = 21-27	0	32 = 210-262	20 = 33-41	22 = 41-51	32 = 210-262	34 = 262-327
14 = 15-21	0	32 = 210-262	18 = 27-33	20 = 33-41	32 = 210-262	32 = 210-262

The addition of four levels also is excessive even without the effect of § 3A1.4 because it results in a range that exceeds the statutory minimum for defendants in Criminal History Category I with no specific offense characteristics at 14 of 17 levels. At two levels (34 + 4 = 38, and 26 + 4 = 30) it includes the statutory minimum. At one (32 + 4 = 36) it is 5 months shy of the statutory minimum, in which case the sentence would be the statutory minimum. *See* USSG § 5G1.1(b).

If the Commission rejects our Proposal #1, an increase that exceeds the minimum at 14 of 17 levels and never results in a sentence less than the minimum would be preferable to an increase that exceeds the minimum at 16 of 17 levels.

4. Application of § 3A1.4 in Addition to an Elevated Base Offense Level Would Constitute Exceedingly Harsh Double Punishment for the Same Conduct.

With a four-level increase in the base offense level, the effect of § 3A1.4 (adding 12 levels, minimum offense level 32, criminal history category VI) would be a guideline sentence ranging from 210 months to life for defendants subject to no statutory minimum, a guideline sentence ranging from 360 months to life for defendants subject to a ten-year statutory minimum, and a guideline sentence of life for defendants subject to a twenty-year statutory minimum. With a six-level increase in the base offense level, the effect of § 3A1.4 would be a guideline sentence ranging from 210 months to life for defendants subject to no statutory minimum, and a guideline sentence of life for all other defendants.

We have been told that this would not punish defendants twice for the same conduct because § 3A1.4 requires intent to coerce, intimidate or retaliate against government conduct, while a conviction under § 960a requires intent to provide a thing of value to those engaging in terrorism.

Even if it is theoretically possible that a person convicted of knowingly or intentionally providing terrorists with a thing of value would not be found to have acted with intent to promote the terrorists' goals, the fact is that the plain language and the courts' interpretation of § 3A1.4 do not require a finding that the defendant himself acted with intent to coerce, intimidate or retaliate against government conduct.

Section 3A1.4 applies to a "felony that involved, or was intended to promote, a federal crime of terrorism," as defined in 18 U.S.C. § 2332b(g)(5)(b). A "federal crime

12 = 10-16	0	32 = 210-262	16 = 21-27	18 = 27-33	32 = 210-262	32 = 210-262
10 = 6-12	0	32 = 210-262	14 = 15-21	16 = 21-27	32 = 210-262	32 = 210-262
8 = 0-6	0	32 = 210-262	12 = 10-16	14 = 15-21	32 = 210-262	32 = 210-262
6 = 0-6	0	32 = 210-262	10 = 6-12	12 = 10-16	32 = 210-262	32 = 210-262