1. In General. Sections 2250(c) and 2260A of Title 18, United States Code, provide mandatory minimum terms of imprisonment that are required to be imposed consecutively to sentences for other offenses. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 2250(c) is the minimum term of imprisonment required by statute, and the guideline sentence for a defendant convicted under 18 U.S.C. § 2260A is the term of imprisonment required by statute.

2. Inapplicability of Chapter Two Enhancement. If a sentence under this guideline is imposed for a conviction under 18 U.S.C. § 2250(c) in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for the same offense that forms the basis of conviction of a crime of violence under 18 U.S.C. § 2250(c) when determining the sentence for the underlying offense.

3. Inapplicability of Chapters Three and Four. Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. *See* §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction).

Option 2

§2A3.5. Failure to Register as a Sex Offender

(a) Base Offense Level:

(1) 16, if the offense that gave rise to the requirement to register was a Tier III offense;

(2) 14, if the offense that gave rise to the requirement to register was a Tier II offense;

(3) 12, if the offense that gave rise to the requirement to register was a Tier I offense.

(b) Specific Offense Characteristics **[in Option 2, some or all of these SOCs could be converted to encouraged downward departures]**

(1) If the sentence served for the offense that gave rise to the requirement to register was less than 13 months, decrease by two levels.

(2) If, for a period of ten or more years between the date the defendant was convicted of the offense that gave rise to the requirement to register and the date of the instant failure to register offense (excluding any periods the defendant was in custody or civilly committed for that offense), the defendant (A) was not convicted of an offense punishable by more than one year, (B) was not convicted of a sex offense, and (C) successfully completed any supervised release, probation, parole or sex offender treatment in connection with the offense that gave rise to the requirement to register, decrease by two levels.

(3) If the defendant voluntarily attempted to correct the failure to register, decrease by 4 levels.

Application Notes

1. Definitions

"Sex offense" has the meaning given that term in 42 U.S.C. § 16911(5).

"Tier I offense," "Tier II offense," and "Tier III offense" have the meaning given those terms in 42 U.S.C. § 16911(2), (3) and (4) respectively.

2. Departures

(A) A downward departure may be warranted if the defendant did not comply or attempt to comply with the requirement to register because of circumstances to which he did not intentionally contribute.

(B) The Sex Offender Registration and Notification Act requires that a person convicted of a sex offense register in each jurisdiction in which the person currently resides, is employed, and/or is a student, and in the jurisdiction in which the person was convicted if different from the jurisdiction in which the person resides. *See* 42 U.S.C. §§ 16911(11), (12), (13), 16913(a). A downward departure may be warranted if the defendant was registered in at least one but fewer than all jurisdictions in which the defendant resided, was employed, and/or was a student. The departure would not be warranted if the defendant moved to a new address and knowingly failed to inform at least one of the jurisdictions where the defendant was required to register of the change of address.

§2A3.6. Aggravated Offenses Relating to Registration as a Sex Offender

(a) If the defendant is convicted under 18 U.S.C. § 2250(c), the guideline sentence is the minimum term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

(b) If the defendant is convicted under 18 U.S.C. § 2260A, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

Application Notes

1. In General. Sections 2250(c) and 2260A of Title 18, United States Code, provide mandatory minimum terms of imprisonment that are required to be imposed consecutively to sentences for other offenses. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 2250(c) is the minimum term of imprisonment required by statute, and the guideline sentence for a defendant convicted under 18 U.S.C. § 2260A is the term of imprisonment required by statute.

2. Inapplicability of Chapters Three and Four. Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. *See* §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction).

3. Upward Departure. If the defendant was convicted under 18 USC § 2250(c), an upward departure may be warranted if the crime of violence was a sex offense as defined in 42 U.S.C. § 16911(5).

APPENDIX B

TABLE 1							
	Statute of Conviction	**Real or False Minor**	**Facts that Would Support Enhancements under Proposed 2G1.3**				
Case			(b)(1) (A) parent; (B) supvy control	(b)(2) (A) misrep identity; (B) undue influence	(b)(3) computer (A) to entice minor; (B) to solicit another	(b)(4) (a) sex act; (B) commercial sex act	(b)(5) under 12
US v. Madison, 2007 WL 437680 (11th Cir. 2007)	18 USC 1591	Real (16)		undue influence		commercial sex act	N/A
*US v. Sutherland, 191 Fed. Appx. 737 (10th Cir. 8/11/06)	18 USC 1591	Real (unstated but at least 12 and not yet 16)		undue influence		commercial sex act	N/A
US v. Jimenez-Calderon, 183 Fed. Appx. 274 (3d Cir. 6/9/06)	18 USC 1591	Real (appears to be 16 or more)		undue influence		commercial sex act	N/A
*US v. Sims, 161 Fed. Appx. 849 (11th Cir. 1/4/06)	18 USC 1591	Real (16)		undue influence		commercial sex act	N/A
US v. Wild, 143 Fed. Appx. 938 (10th Cir. 8/4/05)	18 USC 1591	Real (14 & 16)		undue influence		commercial sex act	N/A
US v. Bohannon, 2007 WL 273473 (11th Cir. 2/1/07)	18 USC 2422(b)	False			entice minor		
US v. Armendariz, 451 F.3d 352 (5th Cir. 2006)	18 USC 2422(b)	False			entice minor		
US v. Sims, 428 F.3d 945 (10th Cir. 2005)	18 USC 2422(b)	False			entice minor		
US v. Searcy, 418 F.3d 1193 (11th Cir. 2005)	18 USC 2422(b)	False			entice minor		
US v. Thomas, 410 F.3d 1235 (10th Cir. 2005)	18 USC 2422(b)	False			entice minor		
US v. Crayton, 143 Fed. Appx. 77 (10th Cir. 6/8/05)	18 USC 2422(b)	False			entice minor		
US v. Riccardi, 405 F.3d 852	18 USC 2422(b)	Real		undue influence		sex act	

(10th Cir. 2005)							
US v. Pipkins, 378 F.3d 1281 (11th Cir. 2004)	18 USC 2422(b)	Real		undue influence		commer-cial sex act	
US v. Murrell, 368 F.3d 1283 (11th Cir. 2004)	18 USC 2422(b)	False			entice minor		
US v. Morton, 364 F.3d 1300 (11th Cir. 2004)	18 USC 2422(b)	False			entice minor		
US v. Orrega, 363 F.3d 1093 (11th Cir. 2004)	18 USC 2422(b)	False			entice minor	-	
US v. Miranda, 348 F.3d 1322 (11th Cir. 2003	18 USC 2422(b)	False			entice minor		
US v. Payne, 77 Fed. Appx. 772 (6th Cir. 2003)	18 USC 2422(b)	False			entice minor		
US v. Panfil, 338 F.3d 1299 (11th Cir. 2003)	18 USC 2422(b)	False			entice minor		
US v. Angle, 234 F.3d 326 (7th Cir. 2000)	18 USC 2422(b)	False			entice minor		
*US v. Sutherland, 191 Fed. Appx. 737 (10th Cir. 8/11/06)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. Diaz, 170 Fed. Appx. 884 (5th Cir. 3/15/06	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
*US v. Sims, 161 Fed. Appx. 849 (11th Cir. 1/4/06)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. York, 428 F.3d 1325 (11th Cir. 2005)	18 USC 2423(a)	Real	supvy control	undue influence		sex act	
*US v. Wild, 143 Fed. Appx. 938 (10th Cir. 8/4/05)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. Elliott, 130 Fed. Appx. 365 (11th Cir. 5/4/05)	18 USC 2423(a)	Real		undue influence		sex act	
US v. Jeakins, 116 Fed. Appx. 909 (9th Cir. 12/2/04)	18 USC 2423(a)	Real	supvy control	undue influence		sex act	under 12
US v. Hayward, 359 F.3d 631 (3d Cir. 2004)	18 USC 2423(a)	Real	supvy control	undue influence			
US v. Long,	18 USC	Real	supvy	undue		sex act	

328 F.3d 655 (D.C. Cir. 2003)	2423(a)		control	influence			
US v. Hersh, 297 F.3d 1233 (11th Cir. 2002)	18 USC 2423(a)	Real	supvy control	undue influence		sex act	
US v. Spruill, 296 F.3d 580 (7th Cir. 2002)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. Williams, 291 F.3d 1180 (9th Cir. 2002)	18 USC 2423(a)	Real		undue influence		commer-cial sex act -	
US v. Evans, 285 F.3d 664 (8th Cir. 2002)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. Evans, 272 F.3d 1069 (8th Cir. 2001)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. Willard, 8 Fed. Appx. 743 (9th Cir. 2001)	18 USC 2423(a)	Real	parent	undue influence		sex act possible	
US v. Lawrence, 187 F.3d 638 (6th Cir. 1999)	18 USC 2423(a)	Real	supvy control	undue influence		sex act	
US v. Anderson, 139 F.3d 291 (1st Cir. 1998)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. Vang, 139 F.3d 902 (7th Cir. 1998)	18 USC 2423(a)	Real		undue influence		sex act	

This chart contains cases resulting from the following Westlaw search in the CTA database. (1591! 2422(B) 2423(A)) & (2G1.3! 2G1.1!) The search resulted in 38 cases in which the defendant was convicted under 18 U.S.C. §§ 1591, 2422(b) or 2423(a). Three of the cases contained insufficient facts about the case to tell which SOCs would have applied. The three cases marked with an asterisk (*) involved convictions under both section 1591 and 2423(a).

TABLE 2					
	Statute of Convic-tion	**Applica-ble Manda-tory Minimum**	**Guideline Range in CHC I, USSC Alternative 1**	**Guideline Range in CHC I, USSC Alternative 2**	**Defenders' Proposed Alternative**
US v. Madison, 2007 WL 437680 (11th Cir. 2007)	18 USC 1591(b)(1)	180 months	34 + 2 + 2 = 38 = 235-293 months	36 + 2 + 2 = 40 = 292-365 months	30 + 2 + 2 = 34 = 151-188 months
US v. Sutherland, 191 Fed. Appx. 737 (10th Cir. 8/11/06	18 USC 1591(b)(1)	180 months	34 + 2 + 2 = 38 = 235-293 months	36 + 2 + 2 = 40 = 292-365 months	30 + 2 + 2 = 34 = 151-188 months
US v. Jimenez-Calderon, 183 Fed. Appx. 274 (3d Cir. 6/9/06)	18 USC 1591(b)(1)	180 months	34 + 2 + 2 = 38 = 235-293 months	36 + 2 + 2 = 40 = 292-365 months	30 + 2 + 2 = 34 = 151-188 months
US v. Sims, 161 Fed. Appx. 849 (11th Cir. 1/4/06)	18 USC 1591(b)(1)	180 months	34 + 2 + 2 = 38 = 235-293 months	36 + 2 + 2 = 40 = 292-365 months	30 + 2 + 2 = 34 = 151-188 months
US v. Wild, 143 Fed. Appx. 938 (10th Cir. 8/4/05)	18 USC 1591(b)(1)	180 months	34 + 2 + 2 = 38 = 235-293 months	36 + 2 + 2 = 40 = 292-365 months	30 + 2 + 2 = 34 = 151-188 months
US v. Madison, 2007 WL 437680 (11th Cir. 2007)	18 USC 1591(b)(2)	120 months	30 + 2 + 2 = 34 = 151-188 months	32 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 = 30 = 97-121 months
US v. Sutherland, 191 Fed. Appx. 737 (10th Cir. 8/11/06	18 USC 1591(b)(2)	120 months	30 + 2 + 2 = 34 = 151-188 months	32 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 = 30 = 97-121 months
US v. Jimenez-Calderon, 183 Fed. Appx. 274 (3d Cir. 6/9/06)	18 USC 1591(b)(2)	120 months	30 + 2 + 2 = 34 = 151-188 months	32 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 = 30 = 97-121 months
US v. Sims, 161 Fed. Appx. 849 (11th Cir. 1/4/06)	18 USC 1591 (b)(2)	120 months	30 + 2 + 2 = 34 = 151-188 months	32 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 = 30 = 97-121 months
US v. Wild, 143 Fed. Appx. 938 (10th Cir. 8/4/05)	18 USC 1591 (b)(2)	120 months	30 + 2 + 2 = 34 = 151-188 months	32 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 = 30 = 97-121 months
US v. Bohannon, 2007 WL 273473	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months

(11th Cir. 2/1/07)					
US v. Armendariz, 451 F.3d 352 (5th Cir. 2006)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Sims, 428 F.3d 945 (10th Cir. 2005)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Searcy, 418 F.3d 1193 (11th Cir. 2005)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Thomas, 410 F.3d 1235 (10th Cir. 2005)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Crayton, 143 Fed. Appx. 77 (10th Cir. 6/8/05)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Riccardi, 405 F.3d 852 (10th Cir. 2005)	18 USC 2422(b)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	28 + 2 + 2 = 32 = 121-151 months
US v. Pipkins, 378 F.3d 1281 (11th Cir. 2004)	18 USC 2422(b)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	28 + 2 + 2 = 32 = 121-151 months
US v. Murrell, 368 F.3d 1283 (11th Cir. 2004)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
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US v. Panfil, 338 F.3d 1299 (11th Cir. 2003)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Angle, 234 F.3d 326 (7th Cir. 2000)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Sutherland, 191 Fed. Appx. 737 (10th Cir. 8/11/06	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Diaz, 170 Fed. Appx. 884 (5th Cir. 3/15/06	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Sims, 161 Fed. Appx. 849	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months

(11th Cir. 1/4/06)					
US v. York, 428 F.3d 1325 (11th Cir. 2005)	18 USC 2423(a)	120 months	28 + 2 + 2 + 2 = 151-188 months	30 + 2 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 + 2 = 32 = 121-151 months
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US v. Jeakins, 116 Fed. Appx. 909 (9th Cir. 12/2/04)	18 USC 2423(a)	120 months	28 + 2 + 2 + 2 + [4, 6 or 8] = 38 or 40 or 42 = 235-293, 292-365 or 360-life	30 + 2 + 2 + 2 + [4, 6 or 8] = 40 or 42 or 44 = 292-365, 360-life, life	26 + 2 + 2 + 2 + 4 = 36 = 188-235 months
US v. Hayward, 359 F.3d 631 (3d Cir. 2004)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Long, 328 F.3d 655 (D.C. Cir. 2003)	18 USC 2423(a)	120 months	28 + 2 + 2 + 2 = 151-188 months	30 + 2 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 + 2 = 32 = 121-151 months
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US v. Lawrence, 187 F.3d 638 (6th Cir. 1999)	18 USC 2423(a)	120 months	28 + 2 + 2 + 2 = 151-188 months	30 + 2 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 + 2 = 32 = 121-151 months
US v. Cavallo, 185 F.3d 875 (10th Cir. 1999)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Anderson, 139 F.3d 291 (1st Cir. 1998)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Vang, 139 F.3d 902 (7th Cir. 1998)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months

APPENDIX B

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US v. Madison, 2007 WL 437680 (11th Cir. 2007)	18 USC 1591	Real (16)		undue influence		commer-cial sex act	N/A
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US v. Jimenez-Calderon, 183 Fed. Appx. 274 (3d Cir. 6/9/06)	18 USC 1591	Real (appears to be 16 or more)		undue influence		commer-cial sex act	N/A
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US v. Wild, 143 Fed. Appx. 938 (10th Cir. 8/4/05)	18 USC 1591	Real (14 & 16)		undue influence		commer-cial sex act	N/A
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US v. Thomas, 410 F.3d 1235 (10th Cir. 2005)	18 USC 2422(b)	False			entice minor		
US v. Crayton, 143 Fed. Appx. 77 (10th Cir. 6/8/05)	18 USC 2422(b)	False			entice minor		
US v. Riccardi, 405 F.3d 852	18 USC 2422(b)	Real		undue influence		sex act	

(10th Cir. 2005)							
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US v. Murrell, 368 F.3d 1283 (11th Cir. 2004)	18 USC 2422(b)	False			entice minor		
US v. Morton, 364 F.3d 1300 (11th Cir. 2004)	18 USC 2422(b)	False			entice minor		
US v. Orrega, 363 F.3d 1093 (11th Cir. 2004)	18 USC 2422(b)	False			entice minor		
US v. Miranda, 348 F.3d 1322 (11th Cir. 2003	18 USC 2422(b)	False			entice minor		
US v. Payne, 77 Fed. Appx. 772 (6th Cir. 2003)	18 USC 2422(b)	False			entice minor		
US v. Panfil, 338 F.3d 1299 (11th Cir. 2003)	18 USC 2422(b)	False			entice minor		
US v. Angle, 234 F.3d 326 (7th Cir. 2000)	18 USC 2422(b)	False			entice minor		
*US v. Sutherland, 191 Fed. Appx. 737 (10th Cir. 8/11/06)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. Diaz, 170 Fed. Appx. 884 (5th Cir. 3/15/06	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
*US v. Sims, 161 Fed. Appx. 849 (11th Cir. 1/4/06)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. York, 428 F.3d 1325 (11th Cir. 2005)	18 USC 2423(a)	Real	supvy control	undue influence		sex act	
*US v. Wild, 143 Fed. Appx. 938 (10th Cir. 8/4/05)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. Elliott, 130 Fed. Appx. 365 (11th Cir. 5/4/05)	18 USC 2423(a)	Real		undue influence		sex act	
US v. Jeakins, 116 Fed. Appx. 909 (9th Cir. 12/2/04)	18 USC 2423(a)	Real	supvy control	undue influence		sex act	under 12
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US v. Long,	18 USC	Real	supvy	undue		sex act	

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US v. Spruill, 296 F.3d 580 (7th Cir. 2002)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. Williams, 291 F.3d 1180 (9th Cir. 2002)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. Evans, 285 F.3d 664 (8th Cir. 2002)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. Evans, 272 F.3d 1069 (8th Cir. 2001)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. Willard, 8 Fed. Appx. 743 (9th Cir. 2001)	18 USC 2423(a)	Real	parent	undue influence		sex act possible	
US v. Lawrence, 187 F.3d 638 (6th Cir. 1999)	18 USC 2423(a)	Real	supvy control	undue influence		sex act	
US v. Anderson, 139 F.3d 291 (1st Cir. 1998)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. Vang, 139 F.3d 902 (7th Cir. 1998)	18 USC 2423(a)	Real		undue influence		sex act	

This chart contains cases resulting from the following Westlaw search in the CTA database. (1591! 2422(B) 2423(A)) & (2G1.3! 2G1.1!) The search resulted in 38 cases in which the defendant was convicted under 18 U.S.C. §§ 1591, 2422(b) or 2423(a). Three of the cases contained insufficient facts about the case to tell which SOCs would have applied. The three cases marked with an asterisk (*) involved convictions under both section 1591 and 2423(a).

TABLE 2					
	Statute of Convic-tion	**Applica-ble Manda-tory Minimum**	**Guideline Range in CHC I, USSC Alternative 1**	**Guideline Range in CHC I, USSC Alternative 2**	**Defenders' Proposed Alternative**
US v. Madison, 2007 WL 437680 (11th Cir. 2007)	18 USC 1591(b)(1)	180 months	34 + 2 + 2 = 38 = 235-293 months	36 + 2 + 2 = 40 = 292-365 months	30 + 2 + 2 = 34 = 151-188 months
US v. Sutherland, 191 Fed. Appx. 737 (10th Cir. 8/11/06	18 USC 1591(b)(1)	180 months	34 + 2 + 2 = 38 = 235-293 months	36 + 2 + 2 = 40 = 292-365 months	30 + 2 + 2 = 34 = 151-188 months
US v. Jimenez-Calderon, 183 Fed. Appx. 274 (3d Cir. 6/9/06)	18 USC 1591(b)(1)	180 months	34 + 2 + 2 = 38 = 235-293 months	36 + 2 + 2 = 40 = 292-365 months	30 + 2 + 2 = 34 = 151-188 months
US v. Sims, 161 Fed. Appx. 849 (11th Cir. 1/4/06)	18 USC 1591(b)(1)	180 months	34 + 2 + 2 = 38 = 235-293 months	36 + 2 + 2 = 40 = 292-365 months	30 + 2 + 2 = 34 = 151-188 months
US v. Wild, 143 Fed. Appx. 938 (10th Cir. 8/4/05)	18 USC 1591(b)(1)	180 months	34 + 2 + 2 = 38 = 235-293 months	36 + 2 + 2 = 40 = 292-365 months	30 + 2 + 2 = 34 = 151-188 months
US v. Madison, 2007 WL 437680 (11th Cir. 2007)	18 USC 1591(b)(2)	120 months	30 + 2 + 2 = 34 = 151-188 months	32 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 = 30 = 97-121 months
US v. Sutherland, 191 Fed. Appx. 737 (10th Cir. 8/11/06	18 USC 1591(b)(2)	120 months	30 + 2 + 2 = 34 = 151-188 months	32 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 = 30 = 97-121 months
US v. Jimenez-Calderon, 183 Fed. Appx. 274 (3d Cir. 6/9/06)	18 USC 1591(b)(2)	120 months	30 + 2 + 2 = 34 = 151-188 months	32 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 = 30 = 97-121 months
US v. Sims, 161 Fed. Appx. 849 (11th Cir. 1/4/06)	18 USC 1591 (b)(2)	120 months	30 + 2 + 2 = 34 = 151-188 months	32 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 = 30 = 97-121 months
US v. Wild, 143 Fed. Appx. 938 (10th Cir. 8/4/05)	18 USC 1591 (b)(2)	120 months	30 + 2 + 2 = 34 = 151-188 months	32 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 = 30 = 97-121 months
US v. Bohannon, 2007 WL 273473	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months

(11th Cir. 2/1/07)					
US v. Armendariz, 451 F.3d 352 (5th Cir. 2006)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Sims, 428 F.3d 945 (10th Cir. 2005)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Searcy, 418 F.3d 1193 (11th Cir. 2005)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Thomas, 410 F.3d 1235 (10th Cir. 2005)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Crayton, 143 Fed. Appx. 77 (10th Cir. 6/8/05)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Riccardi, 405 F.3d 852 (10th Cir. 2005)	18 USC 2422(b)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	28 + 2 + 2 = 32 = 121-151 months
US v. Pipkins, 378 F.3d 1281 (11th Cir. 2004)	18 USC 2422(b)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	28 + 2 + 2 = 32 = 121-151 months
US v. Murrell, 368 F.3d 1283 (11th Cir. 2004)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Morton, 364 F.3d 1300 (11th Cir. 2004)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Orrega, 363 F.3d 1093 (11th Cir. 2004)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Miranda, 348 F.3d 1322 (11th Cir. 2003	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Payne, 77 Fed. Appx. 772 (6th Cir. 2003)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Panfil, 338 F.3d 1299 (11th Cir. 2003)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Angle, 234 F.3d 326 (7th Cir. 2000)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Sutherland, 191 Fed. Appx. 737 (10th Cir. 8/11/06	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Diaz, 170 Fed. Appx. 884 (5th Cir. 3/15/06	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Sims, 161 Fed. Appx. 849	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months

(11th Cir. 1/4/06)					
US v. York, 428 F.3d 1325 (11th Cir. 2005)	18 USC 2423(a)	120 months	28 + 2 + 2 + 2 = 151-188 months	30 + 2 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 + 2 = 32 = 121-151 months
US v. Wild, 143 Fed. Appx. 938 (10th Cir. 8/4/05)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Elliott, 130 Fed. Appx. 365 (11th Cir. 5/4/05)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Jeakins, 116 Fed. Appx. 909 (9th Cir. 12/2/04)	18 USC 2423(a)	120 months	28 + 2 + 2 + 2 + [4, 6 or 8] = 38 or 40 or 42 = 235-293, 292-365 or 360-life	30 + 2 + 2 + 2 + [4, 6 or 8] = 40 or 42 or 44 = 292-365, 360-life, life	26 + 2 + 2 + 2 + 4 = 36 = 188-235 months
US v. Hayward, 359 F.3d 631 (3d Cir. 2004)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Long, 328 F.3d 655 (D.C. Cir. 2003)	18 USC 2423(a)	120 months	28 + 2 + 2 + 2 = 151-188 months	30 + 2 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 + 2 = 32 = 121-151 months
US v. Hersh, 297 F.3d 1233 (11th Cir. 2002)	18 USC 2423(a)	120 months	28 + 2 + 2 + 2 = 151-188 months	30 + 2 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 + 2 = 32 = 121-151 months
US v. Spruill, 296 F.3d 580 (7th Cir. 2002)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Williams, 291 F.3d 1180 (9th Cir. 2002)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Evans, 285 F.3d 664 (8th Cir. 2002)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Evans, 272 F.3d 1069 (8th Cir. 2001)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Willard, 8 Fed. Appx. 743 (9th Cir. 2001)	18 USC 2423(a)	120 months	28 + 2 + 2 + 2 = 151-188 months	30 + 2 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 + 2 = 32 = 121-151 months
US v. Lawrence, 187 F.3d 638 (6th Cir. 1999)	18 USC 2423(a)	120 months	28 + 2 + 2 + 2 = 151-188 months	30 + 2 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 + 2 = 32 = 121-151 months
US v. Cavallo, 185 F.3d 875 (10th Cir. 1999)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Anderson, 139 F.3d 291 (1st Cir. 1998)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Vang, 139 F.3d 902 (7th Cir. 1998)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months

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March 13, 2007

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Re: Comments on Proposed Amendments Relating to Miscellaneous Laws

Dear Judge Hinojosa:

With this letter, we provide the comments of the Federal Public and Community Defenders on the proposed amendment relating to the statute criminalizing unapproved demonstrations at national cemeteries and the issues for comment regarding Internet gambling.

I. Demonstrations at National Cemeteries, Military Funerals

Pub. L. 109-228 created a new offense prohibiting unapproved protests at cemeteries under the control of the National Cemetery Administration or on the property of Arlington National Cemetery, and created a no-protestor zone around military funerals that begins one hour before a funeral and ends one hour after its conclusion. *See* 38 U.S.C. § 2413. The statutory maximum is one year, *see* 18 U.S.C. §1387, making it a Class A misdemeanor.

Understandably, there is no guideline for sentencing defendants for engaging in political speech. Thus, we agree that the offense should be referred to §2B2.3 (Trespass).

We oppose the 2-level enhancement under subsection (b)(1) for this offense. Currently, that specific offense characteristic applies if the trespass was on a secured government installation, a nuclear energy facility, on a U.S. vessel or aircraft, in a secured airport, at a residence, or on a critical computer system. *See* U.S.S.G.

§2B2.3(b)(1). Those locations are not ordinarily open to the public and involve special security concerns. Engaging in a demonstration at a national cemetery does not entail any similar potential for security breach or injury to anyone. The core offense is trespassing. Adding two levels based on naming the place, a public cemetery with no special security or safety concerns, is unjustified.

II. Internet Gambling, Issues for Comment

Public Law 109-347 created a new offense at 31 U.S.C. § 5363, entitled "Prohibition on acceptance of any financial instrument for unlawful internet gambling." The offense should be referenced to USSG § 2E3.1 (Gambling Offenses) because it covers the conduct prohibited by § 5363.

The Commission should not add a cross reference to § 2S1.1 or 2S1.3. The statute does not prohibit money laundering or structuring. Rather, it prohibits a person engaged in the business of betting or wagering from knowingly accepting payment by credit card, electronic funds transfer, check, and other financial instruments from a person engaging in unlawful Internet gambling. The purpose of the law, according to its sponsors, is to protect families from devastating losses through Internet gambling. *See* Conference Report on H.R. 4954, Safe Port Act at H8029 (House of Representatives - September 29, 2006). The "Congressional findings and purpose" also mentions debt collection problems, but mentions nothing about money laundering or structuring. *See* 31 U.S.C. § 5361. Indeed, Congress admittedly does not know whether or not Internet gambling is used to launder money. *See* Pub. L. No. 109-347 § 803 (encouraging United States government in deliberations with foreign countries to study *whether* Internet gambling is used to launder money). Thus, after a careful review of the record, Congress did not direct or suggest that the guideline for this offense should punish Internet gambling operators for money laundering. Accordingly, there is no justification for adding a cross reference to § 2S1.1 or 2S1.3.

Further, the Commission should not add cross references that permit a person convicted of one offense to be punished for another. Cross references allow defendants to be sentenced for offenses that cannot be proved with reliable evidence beyond a reasonable doubt, create unwarranted disparity, result in unfairness, and are a primary source of criticism of the Guidelines. If Internet gambling operators launder money, they can be charged and convicted of that offense.

We hope that these comments are useful. Please do not hesitate to contact us if you have any questions or concerns, or would like additional information.

Very truly yours,

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March 12, 2007

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Re: Comments on Proposed Amendments Relating to Intellectual Property and Pretexting

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 relating to Intellectual Property and Pretexting published January 30, 2007.

I. Intellectual Property, § 2B5.3

A. "Anti-Circumvention Devices"

Congress directed the Commission to review and amend § 2B5.3 "if appropriate" after determining whether the definition of "infringement amount" was adequate to address situations in which the defendant was convicted under 18 U.S.C. §§ 2318 or 2320 and the item in which the defendant trafficked was not an infringing item but "was intended to facilitate infringement, such as an anti-circumvention device."[1] For three

[1] The directive states:

> (c) SENTENCING GUIDELINES-
> (1) Review and amendment- Not later than 180 days after the date of enactment of this Act, the United States Sentencing Commission, pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this subsection, shall review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under **section 2318 or 2320** of title 18, United States Code. . . .
> (3) RESPONSIBILITIES OF UNITED STATES SENTENCING COMMISSION- In carrying out this subsection, the United States Sentencing

reasons, we believe the directive is too ambiguous (at best) to warrant Commission action without clarification from Congress. First, neither section 2318 nor 2320 imposes criminal liability for trafficking in any device. (Sections 1201 and 1204 of the Copyright Act do impose such liability, *see* 17 U.S.C. §§ 1201, 1204, but the directive does not mention those sections.) Second, no federal statute—not even 17 U.S.C. §§ 1201, 1204—imposes liability (civil or criminal) for trafficking in an *anti-circumvention* device. (Sections 1201, 1204 criminalize trafficking in *circumvention* devices.) Third, trafficking in a circumvention device is not a form of or equivalent to fraud or theft, making any recourse to the table in §2B1.1 inappropriate. Until Congress clarifies its intent, no amendment is warranted.

Failing that, we offer our thoughts on the proposed options. 17 U.S.C. § 1201(b)(1) involves trafficking in devices designed to "circumvent[] protection afforded by a technological measure that effectively protects a right of a copyright holder," with the phrase "circumvent protection afforded by a technological measure" defined in 17 U.S.C. § 1201(b)(2). A "right of a copyright holder," with respect to a work which could be protected by a technological measure (*i.e.*, software, a DVD, recorded music) is the right to exercise one of copyright's exclusive entitlements, such as copying or distribution.[2] 17 U.S.C. § 1201(a)(2) involves trafficking in devices designed to "circumvent[] a technological measure that effectively controls access," with the phrase

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> Commission shall determine whether the definition of 'infringement amount' set forth in application note 2 of section 2B5.3 of the Federal sentencing guidelines is adequate to address situations **in which the defendant has been convicted of one of the offenses listed in paragraph (1)** and the item in which the defendant trafficked was not an infringing item but rather was intended to facilitate infringement, **such as an anti-circumvention device**, or the item in which the defendant trafficked was infringing and also was intended to facilitate infringement in another good or service, such as a counterfeit label, documentation, or packaging, taking into account cases such as U.S. v. Sung, 87 F.3d 194 (7th Cir. 1996).

Pub. L. No. 109-181 § 1(c) (emphasis supplied).

[2] A copyright owner has "exclusive rights to do and to authorize any of the following:
(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission." 17 U.S.C. § 106.

"circumvent a technological measure" defined in 17 U.S.C. § 1201(a)(3). As we understand it, "accessing" a copyrighted work means using it as intended (*i.e.*, using software, watching a DVD, listening to music), and does not necessarily involve copying or distributing. Violating either subsection of § 1201, if "willfully and for purposes of commercial advantage or private financial gain," is a crime subject to a statutory maximum of five years for a first offense. *See* 17 U.S.C. § 1204.

Option 1 would make the "infringement amount" for a defendant convicted under 17 U.S.C. § 1201 the "price the user would have paid to access lawfully the copyrighted work" times the number of "accessed works," and would add two levels and require a minimum offense level of 12 if the conviction was under 17 U.S.C. § 1201(b). Option 2 would make the "infringement amount" the retail value of the device times the number of devices for any conviction under 17 U.S.C. § 1201. Option 3 would make the "infringement amount" the greater of the retail value of the device times the number of devices, or the "price a person legitimately using the device to access or make use of a copyrighted work would have paid" times the number of devices for a conviction under 17 U.S.C. § 1201(b).

Options 1 and 3 are both too complex. Under Option 1, the court would have to determine the price a user would have paid to "access lawfully" the copyrighted work.[3] Under Option 2, the court would have to determine the price a person would have paid to "legitimately us[e] the device to access or make use of" the copyrighted work. Option 3 is even more complex and confusing than Option 1 because it would require two calculations in every case, and what is meant by the "price a person legitimately using the device to access or make use of a copyrighted work would have paid" is entirely unclear. Option 1 may well result in sentences that exceed the seriousness of the offense, because not every such conviction will necessarily involve actual copying or distribution. With no case law involving an offense under 17 U.S.C. § 1201(b), a conclusion that every such case deserves a minimum of 12 levels seems unjustified—a single distribution of a circumvention device, such as a software program, hardly seems to call for so high an offense level.

We support Option 2 because it is the simplest of the three options. If the Commission wishes to add punishment for a conviction under § 1201(b) that involved copying or distribution, we suggest that it add a specific offense as follows:

> If the defendant was convicted under 17 U.S.C. § 1201(b) and also copied or distributed the copyrighted work, increase by two levels.

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[3] If the Commission uses Option 1, it should provide some examples of what is meant by "the price the user would have paid to access lawfully the copyrighted work." Based on discussions with staff, in the case of software, this would be the cost of adding another user to a software license.

B. Downward Departure

In response to Issue for Comment #1, there should be a downward departure for cases in which the infringement amount overstates the seriousness of the offense. We proposed such a departure in 2005. There has been an invited upward departure since 2000 but no invited downward departure. There have been zero upward departures and a consistently high rate of downward departures. In 2006, the rate of within-guideline sentences under § 2B5.3 reached an all-time low of 47%, with none above the guideline range, 66 non-government sponsored below-guideline range, and 38 government-sponsored below-guideline range. *See* 2006 Sourcebook, Table 28.

The history, and the fact that this guideline is concerned with rapidly changing technology, counsels in favor of flexibility that goes both ways. This guideline can easily overstate the seriousness of the offense for a variety of reasons, including that (1) the vast majority of infringements do not result in anywhere near a one-to-one displacement of sales, (2) studies show that infringement can actually benefit trademark and copyright holders, consumers and the economy, and (3) victims submit the alleged loss amount directly to the Probation Officer rather than to the prosecutor who would otherwise weed out false, misleading, unsupported, inflated or legally irrelevant amounts. *See* 8/3/05 Letter of Jon M. Sands to Kathleen Grilli at 3-6 at 3-6 (attached). There will be situations under new Application Note 2(A)(vii) where there is insufficient evidence that some number of the labels, stickers, boxes, etc., would ever have been affixed to an infringing item.

We recommend the same language we recommended in 2005 for a downward departure:

> There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

C. Special Skill

In response to Issue for Comment #2, the Commission should delete Application Note 3 based on the information it has received that not every de-encryption or circumvention case involves a "special skill" not possessed by members of the general public that requires substantial education, training or licensing. There is no need to modify the note to re-state what is already stated in § 3B1.3. The new information is reason enough to delete the note. In addition, where there has been actual circumvention, the offense level is a minimum of 12 under (b)(3) or more than that through (b)(1) and (b)(2). If the Commission adopts any of the three options involving trafficking in devices used to circumvent a technological measure, de-encryption or circumvention will receive additional points there as well.

II. Pretexting, § 2H3.1; Proposed Expansion of "Victim," § 2B1.1

We join the Practitioners Advisory Group's comments on the proposed guideline for the new offense at 18 U.S.C. § 1039, fraudulent acquisition or disclosure of confidential telephone records. USSG § 2H3.1 is more appropriate than USSG § 2B1.1 because the harm is non-monetary and it would be impractical for courts to translate an invasion of privacy into pecuniary loss, and because the additional 3 levels in the base offense level when there is no pecuniary loss (9 versus 6) is sufficient punishment for an invasion of privacy.

We also agree that the best way to implement the mandatory consecutive penalties for aggravated forms of the offense is to require a conviction under 18 U.S.C. § 1039(d) or (e) in order for the cross reference in § 2H3.1(c) to apply. In order for the additional punishment to apply, there will have to be a conviction under subsection (d) or (e) of the statute. The guideline should follow the same course. This offense of conviction approach would avoid a Sixth Amendment violation and would be consistent with the approach the Commission has taken with respect to other statutes requiring consecutive additional punishment with no minimum and only a maximum. *See* USSG § 2D1.2, applicable to convictions under 21 U.S.C. §§ 859, 860 and 861. An application note should explain how to attribute a portion of the total sentence determined under 18 U.S.C. § 3553(a) to the conviction under 18 U.S.C. § 1039(d) or (e).

We do not believe any specific offense characteristics should be added. There have been no prosecutions under the new statute. The courts can sentence above or below the guideline range if they find the range to be insufficient or greater than necessary to satisfy the purposes of sentencing.

We strongly oppose the proposal by the President's Task Force on Identity Theft to expand the definition of "victim" in USSG § 2B1.1 (or anywhere in the Guidelines) to include a person or entity who sustained no pecuniary harm or bodily injury but "the theft of a means of identification, invasion of privacy, reputational damage, and inconvenience." There is already a specific offense characteristic for identity theft, *see* § 2B1.1(b)(10), and invited upward departure for non-monetary harm. *Id.*, comment. (n.19).

Because the guideline already accounts for these factors, the sole effect of changing the definition of "victim" to include a person or entity who sustained no pecuniary harm or bodily injury but "the theft of a means of identification, invasion of privacy, reputational damage, [or] inconvenience" would be to expand the reach of the Crime Victim's Rights Act, 18 U.S.C. § 3771. Courts would be inundated with assertions of a right to be heard at sentencing by persons and entities claiming perceived damage to their reputations, emotional distress, the inconvenience of a few telephone calls, a headache or loss of a few hours sleep, and then disruptive petitions for mandamus if the court denied the asserted right. Prosecutors would be required to confer with all such persons and entities. Defendants would have to defend against all such persons and entities. The proposed definition would create a practical nightmare in the courts, would

turn a solemn proceeding into a spectacle, and would jeopardize the foundations of our adversary system.

We hope that these comments are useful to the Commission. Please do not hesitate to contact us if you have any questions or concerns, or would like any additional information.

Very truly yours,

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Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee

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August 3, 2005

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Re: Family Entertainment and Copyright Act of 2005 (Pub. L. 109–9); Intellectual Property Protection and Courts Amendment Act of 2004 (Pub. L. 108–482); CAN SPAM Warning Label Offense (Pub. L. 108-187 section 5(d)(1))

Dear Ms. Grilli:

We write on behalf of the Federal Public and Community Defenders to comment on an appropriate response to the above-referenced intellectual property statutes. As you know, we represent the vast majority of criminal defendants in federal court, and Congress has directed us to submit observations, comments or questions pertinent to the Commission's work whenever we believe it would be useful.[1] We thank you for meeting with us and for this opportunity to follow up with more specific information and analysis.

I. Family Entertainment and Copyright Act of 2005

The FECA adds an offense at 18 U.S.C. § 2319B for unauthorized recording of motion pictures in a motion picture exhibition facility, and an offense at 17 U.S.C. § 506(a)(1)(C) for infringing a copyright of a work being prepared for commercial distribution. The conduct described by each provision was already a crime, and was subject to the same or higher statutory maximums under prior law. Thus, the FECA does not target new conduct for criminal prosecution or harsher penalties.

[1] 28 U.S.C. § 994(o).

The FECA directs the Commission to "review and, if appropriate," amend the guidelines and policy statements applicable to intellectual property offenses,[2] in four ways, each of which we address below.

A. Section 2B5.3 is sufficiently stringent to deter and reflect the nature of intellectual property offenses.

The first directive is a general one to ensure that the intellectual property guideline is "sufficiently stringent" to "deter, and adequately reflect the nature of" such offenses. Based on the history and impact of the NET Act and 2000 amendments, more recent statistical research on the loss attributable to on-line infringement, and Commission statistics on cases sentenced under section 2B5.3, we believe that the current guideline is more than adequate to deter and reflect the nature of intellectual property offenses.

1. History and Impact of the NET Act and 2000 Amendments

Congress enacted the NET Act of 1997 in response to United States v. LaMacchia, 871 F. Supp. 535 (D. Mass. 1994), a case in which an MIT student was charged with wire fraud for running an Internet bulletin board where copyrighted computer games could be uploaded then downloaded at no charge. The district court dismissed the Indictment because, absent a commercial motive, the conduct was not punishable as a crime under the copyright laws or the wire fraud statute.

Congress responded by expanding 17 U.S.C. § 506 to include the reproduction or distribution of copyrighted material accomplished by electronic means – i.e., via the Internet -- regardless of whether the conduct is motivated by commercial advantage or private financial gain, and broadened the definition of "financial gain" to include the receipt of copyrighted works. It also directed the Commission to ensure that the guideline range for intellectual property offenses was "sufficiently stringent to deter such a crime," and required that the guideline provide for "consideration of the retail value and quantity" of the infringed item.

After extensive study, the Commission substantially increased the potential guideline range for intellectual property offenses in a variety of ways. It increased the base offense level from 6 to 8; added a 2-level enhancement with a minimum offense level of 12 for manufacture, importation or uploading of infringing items; provided that the 2-level enhancement for use of a special skill under section 3B1.3 would apply if the

[2] See 17 U.S.C. §§ 506 (copyright infringement), 1201 (circumvention of copyright protection systems) and 1202 (misuse of copyright management information), and 18 U.S.C. §§ 2318 (trafficking in counterfeit labels, illicit labels or counterfeit documentation or packaging), 2319 (penalties for copyright infringement), 2319A (unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), 2319B (unauthorized recording of motion pictures in a motion picture exhibition facility), and 2320 (trafficking in counterfeit goods or services).

defendant de-encrypted or circumvented a technological security measure to gain initial access to the infringed item; and encouraged upward departure both for substantial harm to the copyright or trademark owner's reputation, and for commission of the offense in connection with or in furtherance of a national or international organized criminal enterprise. It provided for a 2-level decrease if the offense was not committed for commercial advantage or private financial gain, but excluded from that definition the receipt or expected receipt of anything of value, including other protected works. Thus, the decrease does not apply in most, if not all, cases involving on-line file sharing.

Importantly, the Commission also required that the value of the *infringed* item times the number of infringing items would be used in cases in which the Commission thought it was highly likely that infringing items displaced sales of legitimate items on a one-to-one basis,[3] i.e., where the infringing item is a digital or electronic copy or otherwise appears to be identical or substantially equivalent, or the retail price of the infringing item is at least 75% of the retail price of the infringed item. While the latter may approximate displaced sales, the fact that an infringing item is an electronic or digital copy or otherwise substantially equivalent substantially overstates displaced sales. No matter how perfect the quality of an infringing item, many people simply cannot afford to buy it at its retail price. For example, last month a defendant pled guilty to selling copies of copyright protected software and video games over the Internet. He was paid $192,000 for the infringing items, and the total retail value of the infringed items was $1,154,395.85. That is, he sold the infringing items for 16% of the infringed items' retail value. No one would contend that all or even most of his customers would have paid, or could afford to pay, 84% more. In reality, the majority of those games and software simply would not have been sold. Yet, the defendant's guideline range will be increased based on an infringement amount of over $1 million as well as an uploading enhancement, resulting in a range of 46-57 months.[4] Under the pre-2000 guideline, the range would have been 8-14 months. The 2000 amendments result in a 468% increase from the mid-point of the range.

As noted in the NET Act Policy Development Team Report, economists and even industry representatives agreed that the vast majority of infringements do not result in a one-to-one displacement of sales, the retail value of the infringed (or even the infringing) item overstates loss to the victim because it fails to account for production costs, and although production costs represent payments that would have been made to suppliers of material and labor (assuming the infringement actually displaced a sale), some economists believe that infringement can benefit trademark and copyright holders, consumers and the economy as a whole.[5] See U.S. Sentencing Commission, No

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[3] U.S.S.G. App. C, Amendment 593.

[4] See "Texas man pleads guilty to felony copyright infringement for selling more than $1 million of copyright protected software and video games over the Internet," www.usdoj.gov/criminal/cybercrime/poncedeleonPlea.htm.

[5] Previously, the sentence was increased by the value of the *infringing* item times the number of infringing items. The Commission believed that even that formula would "generally exceed the

Electronic Theft Act Policy Team Development Report at 5, 15, 16, 22-23 (February 1999). Recent studies lend strong support to these concerns. See below.

We also want to alert the Commission to an issue that may further overstate the loss, as well as create unreliability, unpredictability and disparity, in the sentencing of intellectual property cases. With the NET Act, Congress added an unusual provision to these statutes: Victims are permitted to submit *directly* to the Probation Officer "during the preparation of the pre-sentence report" a statement on "the extent and scope of the injury and loss suffered by the victim, including the estimated economic impact."[6] This seems clearly to invite the Probation Officer to use the victim's estimate of loss in calculating the infringement amount. Normally, victims and other witnesses provide evidence to the prosecutor, who sifts through it and passes on to the Probation Officer what is relevant and accurate. Since the prosecutor has an ethical duty of candor to the court, s/he is likely to weed out false, misleading, unsupported, inflated or irrelevant claims of loss. Corporate victims of intellectual property offenses come from a different place. They do not have an ethical duty to the court, may be motivated by concerns such as obtaining restitution or showing investors that intellectual property crime is the cause of falling profits, and are likely to think of "loss" in terms of civil damages. The prosecutor would be obliged to sort out what was actually provable and relevant under the guideline, but we do not believe that most Probation Officers will have sufficient familiarity with the issues to do so, particularly because these cases are so rare. In some districts, sentencing courts hold hearings and resolve disputes about loss with care, but in many districts, the unfortunate fact is that the Pre-Sentence Report is accorded the status of evidence, and evidentiary hearings are rarely if ever held. We raise this not only as a further reason not to increase the guideline range for intellectual property offenses, but as a reason for stronger procedural protections in Chapter 6 and Fed. R. Crim. P. 32.

2. Statistical Research on the Impact of File-Sharing on Sales

A well-respected statistical study of the effect of file sharing on music sales published in March 2004 by researchers at the Harvard Business School and the University of North Carolina at Chapel Hill concluded that "the impact of downloads on sales continues to be small and statistically indistinguishable from zero,"[7] which is inconsistent with industry claims that file sharing explains the decline in music sales

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loss or gain due to the offense," U.S.S.G. § 2B5.3, comment. (backg'd.) (1999), because not every purchase of a counterfeit item represents a displaced sale, and it overestimated lost profits by failing to account for production costs. See U.S. Sentencing Commission, No Electronic Theft Act Policy Team Development Report at 5 (February 1999).

[6] See 18 U.S.C. §§ 2319(e), 2319A(d), 2319B(e), 2320(d).

[7] See Felix Oberholzer and Koleman Strumpf, The Effect of File Sharing on Record Sales: An Empirical Analysis at 24 (March 2004) (hereinafter "Harvard Study"), available at http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf.

between 2000 and 2002.[8] Unlike other studies, which rely on surveys, this study directly observed actual file sharing activities for 17 weeks in the Fall of 2002, and compared it to music sales during the same time period.[9]

The researchers used several models, the most conservative of which showed that it would take 5,000 downloads to reduce sales of an album by one copy.[10] For the top 25% of best-selling albums, downloading was found to have a *positive* effect on sales, while the negative effect on sales of less popular albums was still statistically insignificant.[11] This provides strong support for the concern that section 2B5.3 already overstates the loss by assuming a one-to-one correspondence between infringing items and displaced sales.

The authors pointed out that file sharing may promote new sales by allowing people to sample and discuss music to which they otherwise would not be exposed.[12] In addition to their statistical analysis of actual behavior, they conducted a survey that showed that file sharing led the average user to purchase eight additional albums.[13] Another survey of 2,200 music fans released in 2000 showed that Napster users were 45% more likely to have increased their music spending than non-users.[14]

After the Harvard Study was published, the Recording Industry Association of America reported a 2.8% increase in the number of CDs sold from 2003 to 2004.[15]

The researchers noted that their results were consistent with the fact that sales of movies, video games and software, which are also heavily downloaded, have continued to increase since the advent of file-sharing.[16]

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[8] File sharing of music recordings has been going on since 1999. According to the Recording Industry Association of America (RIAA), CD sales continued to rise during 1999 and 2000, then dropped by 15% between 2000 and 2002. The RIAA claims this is due to file sharing. Id. at 1-2.

[9] Id. at 6, 11.

[10] Id. at 22.

[11] Id. at 23, 25.

[12] Id. at 2.

[13] Id. at 3.

[14] See "Report: File Sharing Boosts Music Sales," E-commerce Times, July 21, 2000, available at http://www.ecommercetimes.com/story/3837.html.

[15] See RIAA 2004 Yearend Statistics (Exhibit A).

[16] Harvard Study at 1, 24.

They suggested (without attempting to definitively identify) several reasons for the decline in music sales from 2000 to 2002: poor economic conditions, a reduction in the number of album releases, growing competition from other sources of entertainment, a reduction in music variety, a consumer backlash against recording industry tactics, and that music sales may have been abnormally high in the 1990s as people replaced records and tapes with CDs.[17]

Finally, the authors suggested that file sharing increases the aggregate social welfare in that it does not reduce the supply of music, and lowers prices overall, which allows more people to buy it.[18]

3. Commission Statistics on Sentencing Under Section 2B5.3

An important factor in evaluating whether the current guideline adequately reflects the nature of intellectual property offenses is how the front-line actors treat these cases. According to Commission statistics, intellectual property cases are few, ranging from a low of 96 in 2000 to a high of 137 in 1998, and 121 in 2003.[19] Since the Commission began keeping track of departures by offender guideline in 1997, there has been only one upward departure in an intellectual property case. That was in 1998, well before the 2000 amendments took effect. The percentage of downward departures has ranged from a low of 22% in 1997, to a high of 41% in 2002 (when sentences under the 2000 amendments were likely to be imposed), then 36% in 2003 (the year of the PROTECT Act).[20] Without knowing the specific departure reasons, it at least appears

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[17] Id. at 24.

[18] Id. at 2, 25.

[19] See Table 17 of U.S. Sentencing Commission Sourcebooks of Federal Sentencing Statistics, 1996-2003.

[20] Downward Departures in Cases Sentenced under 2B5.3 1997-2003, based on Sourcebooks of Federal Sentencing Statistics:

	1997	1998	1999	2000	2001	2002	2003
# cases analyzed	115	133	107	87	107	123	112
5K1.1	21	27	25	20	19	38	30
Other govt initiated	N/A	N/A	N/A	N/A	N/A	N/A	2
Non-govt initiated	4	6	0	4	6	13	8
% downward departures	22%	25%	23%	28%	23%	41%	36%

that judges and prosecutors do not regard sentences under current section 2B5.3 as being too low, and in many cases regard them as too high.

No recidivism statistics for intellectual property offenses are publicly available, but one would think that these defendants are relatively easy to deter without excessive sentences. We suspect that most are employed and relatively highly educated. The Commission has identified employment within the year preceding conviction and level of education as factors that indicate reduced recidivism.[21] Those who engage in file sharing on the Internet (with whom Congress and the industry seem most concerned) are not motivated by greed, financial need, or addiction, and therefore are probably more easily deterred. Furthermore, intellectual property prosecutions have a big impact on the relevant population, because they are publicized widely and fast over the Internet.

4. Suggested Basis for Downward Departure

In light of the above, we suggest that the Commission include an encouraged basis for downward departure in the application notes to section 2B5.3:

> Downward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

B. An Enhancement for Pre-Release Infringement is Not Appropriate.

The second directive tells the Commission to determine whether an "enhancement" is appropriate for the "display, performance, reproduction or distribution of a copyrighted work," in any media format, before it has been authorized by the copyright owner. By its terms, this applies to any copyrighted work in any media format. The impetus, however, was the movie industry's representation that "a significant factor" in its "estimated $3.5 billion in annual losses . . . because of hard-goods piracy" stems from the situation where "an offender attends a pre-opening `screening' or a first-weekend theatrical release, and uses sophisticated digital equipment to record the movie," and then sells the recording as DVDs or posts it on the Internet for free downloading.[22]

We do not believe such an enhancement is appropriate. The notion that pre-release DVD sales or Internet postings create losses for the movie industry is highly questionable. The Motion Picture Association of America reports box office sales of $9.5 billion in 2004, a 25% increase over five years ago, and the highest in history.[23] The

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[21] See U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines at 12 (May 2004).

[22] H.R. Rep. No. 109-033.

[23] See Motion Picture Association Worldwide Market Research, U.S. Entertainment Industry: 2004 MPA Market Statistics at 3-4, selected pages attached as Exhibit B, available from www.MPAA.org.

Recording Industry Association of America reports that the number of DVD videos sold increased 66% between 2003 and 2004.[24]

A pre-release enhancement would apply to anything from a defendant using a camcorder to tape a movie and showing it to his family, to making a software package available on the Internet. A one-size-fits-all enhancement would overstate the harm in the first example. It would be excessive in the second example since the defendant would be sentenced for the retail value of all of the software packages downloaded (whether anyone would have bought them or not), as well as an uploading enhancement.

The Commission considered a pre-release enhancement in 2000. The reasons industry gave for such an enhancement were that when the copy is exact, it displaces sales, and when it is inferior, it causes harm to reputation.[25] The 2000 amendments addressed the first concern by increasing the sentence by the value of the infringed item times the number of infringements. If there is increased demand for pre-release works, this will increase the sentence accordingly. The second reason was addressed with an invited upward departure for substantial harm to the copyright or trademark owner's reputation.

C. The Scope of the "Uploading" Enhancement Adequately Addresses Loss from Broad Distribution of Copyrighted Works Over the Internet.

The third directive tells the Commission to determine whether the scope of "uploading" in U.S.S.G. § 2B5.3 adequately addresses loss when people "broadly distribute copyrighted works over the Internet." Defendants who broadly distribute copyrighted works over the Internet receive an increase for that activity in two ways: a 2-level enhancement for uploading, with a minimum offense level of 12, under section 2B5.3(b)(2), and the retail value of all resulting downloads.

In a case where the retail value of an infringed CD is $20, and there was a single upload with no downloads, the uploading enhancement would increase the sentence for a first offender from 0-6 months in Zone A to 10-16 months in Zone C, an increase of 433% in the mid-point of the range, and the difference between probation and approximately one year in prison, in a case in which the copyright owner suffered no loss. If there were 1,000 downloads of the CD, the sentence would increase from 10-16 months to 15-21 months, a 138% increase in the mid-point of the range. In this example, according to the Harvard Study's most conservative model, not even one sale of the CD would have been displaced.

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[24] See RIAA 2004 Yearend Statistics (Exhibit A).

[25] U.S. Sentencing Commission, No Electronic Theft Act Policy Team Development Report at 34 (February 1999).

Two further increases will be available in the more serious cases involving broad distribution over the Internet. In a recent case, eight members of the so-called "warez scene" were indicted for copyright infringement. According to the press release and indictments, "warez" groups are at the "top of the copyright piracy supply chain" and the original sources for most copyrighted works distributed over the Internet. They are highly-organized, international in scope, and some of them specialize in cracking copyright protection systems.[26] These defendants apparently would be eligible for an upward departure for committing copyright infringement in connection with or in furtherance of a national or international organized criminal enterprise, and for an enhancement for use of a special skill for circumventing technological security measures.

In sum, the scope of the uploading enhancement is more than adequate.

D. There is No Need for an Enhancement to Reflect Harm in Cases, If Any, in Which the Number of Infringing Items Cannot Be Determined.

The final directive tells the Commission to determine whether the existing guidelines and policy statements adequately reflect "any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed."

We do not believe that any change is appropriate. In a case in which the government fails to prove that any download resulted, the defendant already receives an additional four levels through the uploading enhancement. An enhancement explicitly based on a *lack* of evidence is likely to be unconstitutional.

Moreover, a review of recent cases indicates that the scope of the infringement *can* be determined. When copyrighted works are sold over the Internet, buyers have to pay for it, which is easily tracked.[27] Files are shared for free using file transfer protocol ("FTP") or peer-to-peer ("P2P") networks. FTP involves a server with a computer that keeps detailed logs of all traffic on the server. Until recently, all of the file sharing prosecutions involved FTP servers. "Warez" groups not only typically use FTP servers that keep detailed logs of uploads and downloads, but place their "signature mark" on the infringing items they send out into the world. In the case mentioned above, the government removed "more than 100 million dollars worth of illegally-copied copyrighted software, games, movies, and music from illicit distribution channels," and

[26] See "Justice Department Announces Eight Charged in Internet Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/OpSiteDown8Charge.htm; Indictment of Alexander Von Eremeef (attached as Exhibit C).

[27] See "Texas man pleads guilty to felony copyright infringement for selling more than $1 million of copyright protected software and video games over the Internet," www.usdoj.gov/criminal/cybercrime/poncedeleonPlea.htm.

identified numerous particular uploads and downloads attributable to each defendant.[28] Many P2P networks, including OpenNap and the former Napster, use central servers that (like FTP servers) generate detailed logs of all traffic.[29] The government can also determine the scope of infringement based on the bandwidth used and/or the size of the files shared, by downloading files in a "sting," and by using cooperators.[30]

II. Intellectual Property Protection and Courts Amendment Act of 2004

Despite the lack of evidence of a widespread problem, Congress, in the Intellectual Property Protection and Courts Amendments Act of 2004, has directed the Commission to provide a sentencing enhancement for anyone convicted of a felony offense furthered through knowingly providing, or knowingly causing to be provided, material false contact information to a domain name registration authority.

Notwithstanding this directive, given the dearth of information on the exact nature of this problem, we believe it is best to proceed with caution. Our anecdotal evidence suggests that this conduct occurs mainly, if not entirely, in fraud related offenses. Accordingly, the most appropriate place for this enhancement would be in Guideline §2B1.1. We propose the following:

2B1.1(b)(16) If a felony offense was furthered through knowingly providing or knowingly causing to be provided materially false information to a domain name registrar, domain registry or other domain name registration authority **add 1 offense level.**

Application Notes

(20) Use of a Falsely Registered Domain Name under Subsection (b)(16) -

(A) Definition of Materially False. - For purposes of subsection (b)(16), "materially false" means to knowingly provide registration information in a manner that prevents the effective identification of or contact with the person who registers.

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[28] See "Justice Department Announces Eight Charged in Internet Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/OpSiteDown8Charge.htm; Indictment of Alexander Von Eremeef (attached as Exhibit C).

[29] See Harvard Study at 7-8.

[30] See "First Criminal Defendants Plead Guilty in Peer-to-Peer Copyright Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/trwobridgePlea.htm; Final Guilty Plea in Operation Digital Gridlock, First Federal Peer-to-Peer Copyright and Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/tannerPlea.htm; Government's Memorandum in Aid of Sentencing at 6-7 in United States v. Boel, Cr. No. CR-05-090-01 (attached as Exhibit D).

(B) Non-Applicability of Enhancement.- If the conduct that forms the basis for an enhancement under subsection (b)(16) is the only conduct that forms the basis for an adjustment under Section 3C1.1, do not apply that adjustment under Section 3C1.1.

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

Further, we propose an application note to define "materially false." This definition tracks the exact language in the Act. We believe that this definition is necessary to limit application of this enhancement to only the conduct Congress intended.

Finally, we believe that it would be impermissible double counting to allow for an increase for Use of a Falsely Registered Domain Name and Obstruction of Justice to apply. The language suggested in the above application note is identical to that of U.S.S.G. §2B1.1, Application Note 8(C), which, similarly, addresses a double counting concern. Specifically, it precludes the addition of an adjustment for Obstruction of Justice where an enhancement for Sophisticated Means per §2B1.1(b)(9) has already been applied.

III. CAN SPAM Act of 2003

Section 5(d)(1) of Pub.L. 108-187 makes it a crime punishable by up to five years imprisonment to transmit a commercial electronic mail that includes "sexually oriented" material without including in the subject heading the marks or notices prescribed by the Federal Trade Commission, or without providing that the message when initially opened includes only those marks or notices, information identifying the message as a commercial advertisement, opt-out provisions, and physical address of the sender, and instructions on how to access the sexually oriented material. "Sexually oriented" has the definition of "sexually explicit" in 18 U.S.C. § 2256.

Our understanding is that the only issue you need to resolve at this point is whether to incorporate this offense into an existing guideline, and if so, which one. We do not think that this offense fits comfortably in any of the existing guidelines in Part G of Chapter 2 because it does not involve a "victim," and does not involve material that is necessarily obscene or child pornography. It is essentially a regulatory offense, and should be treated differently and less seriously than offenses involving victimization and

illegal material. It could be included as an enhancement in the guidelines for other offenses, but Congress has made it a free-standing crime. We suggest that the Commission promulgate a new guideline for it at section 2G4.1.

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

Very truly yours,

JON M. SANDS
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Chair, Federal Defender Sentencing Guidelines Committee

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Sentencing Resource Counsel

March 30, 2007

The Honorable Ricardo H. Hinojosa
United States Sentencing Commission
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Re: **Comments on Proposed Amendment 5 to Sentencing Guidelines Relating to Criminal Copyright Infringement**

Dear Judge Hinojosa:

The Entertainment Software Association ("ESA") thanks the Sentencing Commission for the opportunity to comment on the January 30, 2007 amendments of the Sentencing Guidelines, specifically Amendment 5 "Re-Promulgation of Emergency Intellectual Property Amendment" ("Amendment"). The Amendment is being proposed, pursuant to the directive in the Stop Counterfeiting in Manufactured Goods Act, Pub. L. 109-181, to address, among other things, the adequacy of the Sentencing Guidelines' definition of "infringement amount" to cover situations where "the item in which the defendant trafficked was not an infringing item but rather was intended to facilitate infringement," such as a circumvention device.

With the increased incidence of circumvention of the security technologies of video game consoles, we believe it is indeed timely to assess whether current criminal penalties for violations of the anti-circumvention provision of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. §1201, are adequate to deter those who facilitate video game piracy through circumvention activities. We welcome this opportunity to offer our perspective.[1]

A. The ESA and the Video Game Industry

The ESA serves the business and public affairs interests of companies that publish interactive games for video game consoles, personal computers, handheld devices, and the Internet. ESA members published more than 90 percent of the $7.4 billion in entertainment software sold in the United States in 2006. In addition, ESA's member companies produced billions more in exports of American-made entertainment software, helping to power a global game software market estimated to be approaching $30 billion in sales. The entertainment software industry is one of the nation's fastest growing economic sectors, more than doubling in size since the mid-1990s and in so doing, has generated thousands of highly skilled jobs in the creative and technology fields.

The entertainment software industry makes a tremendous investment in its intellectual property. For an ESA member company to bring a top game to market, it often requires a team of 40 to 50 professionals—sometimes twice that number—working for two or three years to fuse together the work of writers, animators, musicians, sound engineers, software engineers, and programmers into an end product

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[1] I testified on behalf of the ESA at the March 20, 2007 hearing before the Sentencing Commission.

which, unlike any other form of entertainment, is interactive, allowing the user to direct and control the outcome of the experience. On top of several million dollars in research and development costs, a publisher will invest millions more to market and distribute a video game. The reality is that only a small percentage of these titles actually achieve profitability, with many never even recovering their front-end R&D costs. Moreover, the commercial life of a video game is quite short compared to other entertainment content, as the average video game is estimated to earn roughly 75% of its total revenues in the two-month period following its release. In this type of market, it is easy to understand how devastating piracy can be as it siphons off the revenue required to sustain the high creative costs necessary to produce successful products.

B. The DMCA and Video Game Piracy

Congress recognized the important role that technological measures play in controlling the piracy of digital content when it enacted the DMCA in 1998. The DMCA discourages the development and dissemination of technological burglars' tools that threaten the copyright industries. The DMCA implements two 1996 World Intellectual Property Organization ("WIPO") treaties: the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty. The purpose of this measure was to make digital networks safe places to disseminate copyrighted works for the benefit of consumers, the global economy, and copyright owners. The DMCA prohibits the circumvention of technological protection measures and criminalizes the activities of those engaged in the manufacture or trafficking of devices used to circumvent such measures, with "access protection" measures covered under §1201(a)(2) and "copy protection" measures covered under §1201(b).

Notwithstanding the enactment of the DMCA, because of the strong appeal of video games and the business opportunity that the popular demand for games fosters, the "hacker" community has targeted the technological protection measures used by the game software industry. Hackers are skilled programmers and technicians who are adept at breaching security systems and gaining unauthorized access to software and other content. Once they discover the way into a system or protected content, they often share this knowledge with other hackers, amplifying the potential damage to the victim. Many of these "hackers" are resident abroad and are thus beyond the purview of the DMCA's prohibitions. With few exceptions, almost every game console system launched since the early 1990's has had its protection technology compromised within six to nine months of its release, sometimes sooner. As an example, the popular Wii game console, launched by Nintendo just this past November, has seen its security measures hacked in just a few months. This track record is not a function of the low robustness or sophistication of the technological protection measures used in these systems, as most of these protections are quite advanced, particularly the ones found in recent consoles. It is, rather, a result of the illicit profits to be made from the creation and commercialization of circumvention devices that bypass such measures and permit pirated versions of games to be played on these consoles.

Indeed, in the wake of each and every "hack" of a console's security technology, there inevitably follows widespread dissemination and sale of circumvention devices that exploit that hack. This, in turn, leads to a mushrooming of pirated games infesting the marketplace. For every step removed from the original hack, there is an ever widening circle of economic damage to the copyright owner. This is why it is vital to focus on the punishing and deterring of those who distribute piracy-enabling technologies.

The most prevalent forms of circumvention devices are semi-conductor chips that modify the lock-out systems incorporated into the consoles.[2] Each game console system has its own proprietary technological measures, so that the measures used in the Microsoft Xbox are different from the ones used in the Sony PlayStation 2. In addition, with each successive generation of consoles, the console makers have designed and incorporated into their console systems the latest access-control technologies, so that the Xbox 360 has a different, more sophisticated set of protection measures from the Xbox. Unfortunately, despite the enormous and continual investments made in state-of-the-art technological protections, hackers have succeeded in compromising each of these systems through the development of chips that, when installed in the console (by either the console owner or any number of back alley chip jockeys who will do so for a fee), modify the console's processes to bypass its authentication system and thereby enable it to play illegal copies of games.

These modification chips are commonly referred to as "mod chips." Once installed in a game console, a mod chip will allow that console to play an unlimited number of pirated copies of the games designed for that, and in some instances, other console(s). Different mod chips are designed and made to work on different game consoles. Mod chips are engineered as custom-tailored workarounds for a particular video game system's copy protection and access control systems and, as such, play a crucial role in furthering piracy.

Since the enactment of the DMCA, the entertainment software industry has supported enforcement of its provisions against individuals and enterprises in the United States engaged in the trafficking of mod chips and other circumvention devices. In most cases, when the defendants have been engaged in pirate activities in addition to the sale and installation of circumvention devices, federal prosecutors have charged defendants with both DMCA violations and copyright infringement. Recently, ESA's investigations into game piracy across the United States have seen an increase in the number of enterprises that will offer to sell mod chips or modify game consoles, without directly engaging in copyright infringement. This may be attributable to a perception among such illegal businesses that installing mod chips is less likely to attract the attention of law enforcement than enterprises that engage in more direct forms of software piracy. So, there appear to be an increasing number of individuals and enterprises engaging only in circumvention activities with respect to game consoles and thus subject only to charges of violating the DMCA. While these enterprises are usually not large, there are many of them and they tend to be very active, with many of these businesses estimated to take in several thousands of dollars in sales per month.

Thus, the Sentencing Commission's Amendment to enhance the level of punishment recommended for individuals convicted of DMCA violations is very timely and could serve to increase the level of deterrence against mod chip enterprises.

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[2] Mod chips are only one of the tools used to circumvent console copy-protection and access controls. Unauthorized bypass may also be accomplished through the assistance of software, such as Swap Magic, that tricks the console into thinking that a bootleg copy is legitimate. Creating the bootleg copies themselves involves yet other software used to replicate the disc embodying the game.

C. Option 1

Of the three options outlined in the Amendment, the ESA believes Option 1 offers the best approach for determining the level of punishment for trafficking in circumvention devices. Option 1 provides for a two or more level enhancement (to a minimum level of 12) for anyone convicted of "trafficking in devices used to circumvent a technological measure." Trafficking in circumvention devices inevitably results in more pirated copies of games making their way into the stream of commerce. Thus, we agree that trafficking in circumvention devices warrants an elevated penalty comparable to that which currently applies to those who upload, manufacture, or import infringing copies. We also agree that establishing a minimum sentencing level of 12 will provide a useful benchmark for judges.

The Sentencing Commission's approach to calculating the "infringement amount" under Option 1 is conceptually attractive. It involves multiplying the number of accessed works by the "price the user would have paid to access lawfully the copyrighted work." In theory, this would provide a straightforward means of assessing the economic harm to the copyright owner. But arriving at the correct data points to insert into that calculation could be problematic, particularly where the person has sold mod chips or modified consoles but has not "accessed" pirated copies of games.

In the context of someone convicted of trafficking in mod chips, such a calculation would require that a federal judge make a judgment on how many pirated games a person using a mod chip would play and then multiply that figure by the retail value the person would have paid for legitimate versions of those games. This is a difficult and conjectural calculation, as it requires an assessment of how many pirated games are played by those using mod chips and then requiring a deep knowledge and understanding of retail game software prices. ESA fears that such a formulation will often result in an infringement amount that is disproportionately low. That being said, we agree with the Sentencing Commission that the two-level enhancement and a "floor" offense level of 12 are necessary to establish the gravity of the offense, regardless of the infringement amount.

We suggest one modification to Option 1. It should be expanded to embrace all of §1201, and not just §1201(b). That particular section of the DMCA covers only trafficking in devices that circumvent copy-protection controls. It does not reach those who circumvent access controls, which is covered under §1201(a)(2) of the DMCA. Through its parallel prohibitions, the DMCA recognizes that the circumvention of access controls (the means by which mod chips further piracy) is just as damaging to copyright owners as circumvention of copying controls.

A bootleg copy of a game played upon a modified console requires the infringer to bypass both the copy-control/access control features of the game as well as the copy-control/access control features of the playback hardware. For this reason, both forms of circumvention facilitate copyright infringement.[3] The Sentencing Guidelines should reflect this reality,[4] just as the DMCA does.

Technologies that protect games also benefit consumers. For example, protection technologies permit publishers to distribute "try before you buy" game demos. These allow consumers to experiment with playing a game to see if they like it before purchasing it. Absent the ability to protect the conditional access technology that permits such sampling of game content, these free offerings to consumers might vanish. Additionally, unlike any other type of software, consumers enjoy the opportunity to rent video games. This would not be economically feasible were it not for security technologies that mitigate the risk of rampant piracy resulting from such rentals.[5]

D. Options 2 & 3

Options 2 and 3 are problematic and therefore less preferable than Option 1.

Option 2 understates the value of the "infringement amount" as it uses a calculation that factors the retail value of the circumvention device multiplied by the number of such devices. As most mod chips retail for $30-50, equivalent to the retail value of one legitimate game, such a calculation produces a minimal infringement amount. Given that the installation of a mod chip in a game console facilitates dozens of infringements (i.e., the number of pirated games played on a console after it has been

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[3] Infringement does not benefit rights holders, consumers, and the economy, as some have claimed. Money paid for pirated copies does not go to copyright owners. Sales of pirated software depress demand for genuine copies. The less revenue a game publisher earns, the less money it has for hiring new people, investing in new equipment, and bankrolling further projects. Also, these off-the-book transactions deprive states and localities of tax revenues.

[4] Some have argued that the penalty imposed by Option 1 may result in criminal penalties even absent actual copying or distribution of a copyrighted work. But this assertion fails to recognize that actual copying or distribution is not an element of a violation under Section 1201. It also does not account for the reality that most people use these circumvention technologies for infringing purposes.

[5] Under federal law, video games are the only form of software that may be rented without the permission of the copyright holder, and over the years video game rentals have become a huge business, generating over $558 million in 2006. The threat of significant criminal penalties for circumvention is a necessary deterrent to discourage the unauthorized use of rental copies as source material for the creation of infringing copies, which would require circumvention of technological protection measures.

modified), the retail value of each mod chip is a fraction of the value of the damage it inflicts on legitimate game sales.[6]

One commenter suggested that the Sentencing Commission could expand Option 2 to include enhanced punishment for those convicted under §1201(b) who also copied or distributed the copyrighted work. We see no sound reason to limit any such enhancement only to those who have engaged in copying or distribution of a copyrighted work. To impose an actual infringement requirement would leave out a large swath of culprits: those who put piracy-enabling technologies into the hands of bootleggers. Traffickers are no less culpable than bootleggers. Besides, the DMCA "de-links" circumvention from actual infringement. It would frustrate the purpose of that statute to adopt a contrary view in the Sentencing Guidelines.

While Option 3 attempts to address the understatement problem by offering an alternative formulation, it does so in a way that makes it very difficult to calculate the "infringement amount." Option 3 specifies that the infringement amount is the greater of the amount calculated under Option 2's formula or the number of circumvention devices "multiplied by the price a person legitimately using the device to access or make use of a copyrighted work would have paid." These calculations suffer from the same ambiguities we cited in our comments to Option 1. If, in any event, the Sentencing Commission adopts Option 3, at the very least it should expand its scope to cover all of §1201.[7]

E. Issues for Comment

ESA would also like to take this opportunity to address the two issues raised for comment at the end of the proposed amendment.

The Sentencing Commission has requested comment on whether it should "provide a downward departure provision for cases in which the infringement amount overstates the seriousness of the offense." ESA would suggest that no such provision is required as it is ESA's experience that, in most cases involving intellectual property infringement, the infringement amount *understates* the seriousness of the offense, rather than the opposite. In the rare instance, where the seriousness of the case might be overstated by the infringement amount, ESA believes that federal judges already factor this into their

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[6] See, e.g., Press Release, Department of Justice, Game Store Owners Charged with Copyright Infringement for Selling Modified Xbox Systems with Pirated Games (Dec. 19, 2005) (defendant agreed to install a mod chip and new hard drive on an Xbox console and load it with 77 pirated games for $265) *available at* http://www.cybercrime.gov/jonesCharge.htm.

[7] Before moving on to the "Issues for Comment," ESA takes this opportunity to address one final point with respect to the calculation of the infringement amount. The suggestion offered by one commenter that prosecutors are uninvolved in reviewing industry's figures when computing the "infringement amount" is inaccurate. In our experience, a prosecutor is deeply involved in collecting and reviewing industry data for a case well in advance of sentencing. It is the prosecutor, not the video game industry, who is responsible for calculating the infringement amount.

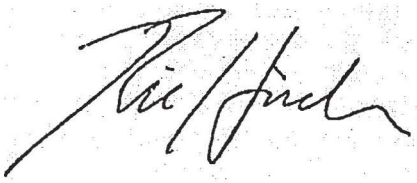
determination of the punishment to be imposed. ESA does not see the need for any additional provision in the Sentencing Guidelines embodying a principle already being applied in practice.

The Sentencing Commission has also asked for comment on Application Note 4 providing for an adjustment to be made under §3B1.3 "in any case in which the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item." The Sentencing Commission has received comment that not every de-encryption or circumvention requires a "special skill" as defined in §3B1.3. The ESA's comment is that the Sentencing Commission should not make any change to Application Note 4 as it sees this as applying to de-encryptions and circumventions of technological measures to gain "initial" access to protected content. Such instances of de-encryption and circumvention, where initial access to protected content is achieved, generally refers to situations where hackers have achieved the first breakthrough in compromising a technological measure. As opposed to some less complex acts of circumvention, these "cracks" in security measures invariably do require "special skills."

In the game software context, these initial "cracks" of protected game software are performed by groups of individuals working together through the Internet, commonly known as "warez" groups. These groups will "crack" the copy protection of a newly released game (sometimes, even prior to release), strip out the protection technology, and then release an unprotected downloadable version for dissemination on the Internet. Within days, if not hours, thousands of copies are being copied and downloaded throughout the Internet. The "crackers" in these groups are individuals with high technological skills who are able to figure out how to penetrate the security measures in order to access the digital content of game software and would thus meet the "special skills" requirements of §3B1.3. As ESA believes that Application Note 4 is intended to cover such activity, in accordance with the original statutory purposes of the No Electronic Theft (NET) Act, it would recommend that the Sentencing Commission not make any change in such Application Note.

ESA is grateful for the Sentencing Commission's efforts reflected in the Amendment to address this important aspect of the law governing enforcement against digital piracy. ESA is appreciative of this opportunity to provide its comments on such efforts.

Sincerely,



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March 12, 2007

Honorable Ricardo H. Hinojosa
Chair
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Re: Comments on Proposed Amendments Relating to Drug Offenses

Dear Judge Hinojosa:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders on the proposed amendments relating to drug offenses (including crack but not including 21 U.S.C. § 960a) that were published on January 30, 2007.

I. New Offenses Under the Combat Methamphetamine Epidemic Act of 2005

A. Using a Facilitated Entry Program to Import Methamphetamine, §§ 2D1.1, 2D1.11

The Commission has published for comment a proposal for sentencing defendants who use a facilitated entry program (e.g., FASTPASS) to import methamphetamine in violation of 21 U.S.C. § 865. The proposal would amend U.S.S.G. §§ 2D1.1 and 2D1.11 to add a two-level enhancement for a conviction under 21 U.S.C. § 865. It would also add an application note instructing courts how to impose the sentence so as to ensure that the portion of the sentence relating to the enhancement will be served consecutively. The proposal appears to implement Congress's intent and adequately reflects the seriousness of the offense.

In response to Issue for Comment 3(a), the increase should not be more than two levels and there should not be a minimum offense level. A defendant who imports methamphetamine and is not a minor or minimal participant is already subject to a two-level enhancement under § 2D1.1(b)(4). Proposed § 2D1.1(b)(5) would add another two-level increase for using a facilitated entry program in order to do so, thereby resulting in a four-level increase for any such defendant. Similarly, those in charge of any vessel that uses a facilitated entry program to commit a methamphetamine-related offense would

receive a four-level increase and a minimum offense level of 28 (in addition to the number of levels specified in the Drug Quantity Table) under the combined effect of §2D1.1(b)(2) and proposed § 2D1.1(b)(5).

Issue for Comment 3(b) asks whether the proposed enhancement should be expanded to reach defendants who are not convicted of methamphetamine-related offenses. It should not. 21 U.S.C. § 865 was enacted as part of the Combat Methamphetamine Epidemic Act of 2005. *See* Pub. L. 109-177, Title VII, section 731. The statute specifically applies only to defendants who use facilitated entry programs to commit offenses involving methamphetamine or the chemicals required to manufacture it. By requiring a conviction under § 865, the proposed enhancement is properly limited to methamphetamine-related cases, which is what Congress intended. *See* 151 Cong. Rec. H11279-01, H11309 (Dec. 8, 2005) ("This section of the conference report creates an added deterrent for anyone who misuses a facilitated entry program to smuggle methamphetamine or its precursor chemicals."). Given Congress' clear intent to target only defendants who use facilitated entry programs to import methamphetamine, there is no reason to expand the enhancement to reach offenses involving other drugs.

Issue for Comment 3(c) asks whether the Commission should amend § 3B1.3 to require a two-level increase for offenses that involve use of a facilitated entry program. Such an amendment would double count the offense conduct for convictions under 21 U.S.C. § 865, once under §§ 2D1.1 or 2D1.11 and again under § 3B1.3. One increase in Chapter Two is sufficient. Moreover, there is no justification for amending § 3B1.3 to reach any offense that involves use of a facilitated entry program. Congress has suggested no such broad concern, and such an amendment would stretch § 3B1.3 well beyond its meaning. Section 3B1.3 is intended to reach defendants who hold a position of public or private trust characterized by a special skill or by professional or managerial discretion. *See* 3B1.3, comment. (n. 1). People authorized to use a facilitated entry program do not have any special skill and do not exercise any discretion whatsoever. Nor are they subject to any less scrutiny than other travelers. Facilitated entry programs simply permit participants to reduce the amount of time they spend when entering the United States by providing much of the information required by U.S. Customs ahead of time. See United States 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. In other words, the programs do not reduce border requirements for participants but merely provide an administratively easier method for meeting them. Program participants continue to be held to the same standards as all other travelers, including being subject to further inspection at border crossings. *See id.* There is no principled basis for concluding that use of a facilitated entry program is equivalent to holding a position of trust or having a special skill.

B. Manufacturing, Distributing or Possessing Methamphetamine on Premises Where a Minor Is Present or Resides, § 2D1.1

In addition to 21 U.S.C. § 865, section 734 of the Combat Methamphetamine Epidemic Act of 2005 created 21 U.S.C. § 860a, which provides an additional penalty for

manufacturing, distributing, or possessing with intent to manufacture or distribute methamphetamine on premises in which an individual who is under the age of 18 years is present or resides.

The Commission has proposed two alternatives for sentencing defendants convicted under § 860a. Option One would maintain the six-level enhancement with a floor of 30 under § 2D1.1(b)(8)(C) for any defendant who manufactured methamphetamine under circumstances that created a substantial risk of harm to the life of a minor, and would add a two-level enhancement for any defendant convicted under § 860a where the offense conduct did not create such a risk. Option Two would add an enhancement of six levels or to level 29 (whichever is greater) for § 860a convictions involving manufacturing or possessing with intent to manufacture, and an enhancement of two or three levels or to level 15 (whichever is greater) for § 860a convictions involving distributing or possessing with intent to distribute. Under the second option, the actual risk of harm to the minor would be irrelevant.

Issues for Comment 2. Both proposals are appropriately based on the offense of conviction and not relevant conduct rules. Relevant conduct (contrary to its original purpose) permits prosecutors to control sentencing, creates unwarranted disparity, results in unfairness, and is the primary source of criticism of the Guidelines. The Commission only recently announced that it was going to reconsider the relevant conduct rules. It should not add new unconvicted offenses to the Guidelines.

The proposed enhancements are also properly limited to the methamphetamine offenses addressed by § 860a, rather than covering all drug offenses. The Commission should not create new sentence enhancements not directed or even suggested by Congress. As discussed in Part I(A), *supra*, the Combat Methamphetamine Epidemic Act of 2005 is specifically focused, according to both the statutory language and the legislative history, on offenses involving methamphetamine.

Sentence enhancements solely for methamphetamine-related offenses are nothing new. In section 102 of the Methamphetamine and Club Drug Anti-Proliferation Act of 2000, Congress specifically directed the Commission to add what is now § 2D1.1(b)(8)(C) only for crimes involving the manufacture of amphetamine and methamphetamine. *See* Methamphetamine and Club Drug Anti-Proliferation Act of 2000, Pub. L. 106-310 (Dec. 16, 2000). It did so because of the drugs' unique manufacturing process, which involves combining chemicals in a manner that is unstable, volatile, highly combustible, and leaves toxic residue behind. *See* H.R. Rep. 106-878 (Sept. 21, 2000). Nothing in any subsequent legislation, including the Combat Methamphetamine Epidemic Act of 2005, has suggested that Congress believes § 2D1.1(b)(8)(C) should be expanded to reach other drugs. Nor has there been any suggestion that sentences for drug offenses are generally too low; to the contrary, the Commission's own reports reflect that, if anything, the drug guidelines are too harsh. There is thus no need and no justification to expand either § 2D1.1(b)(8)(C) or the proposed § 860a-based enhancements to apply to offenses involving any drug other than methamphetamine.

With respect to the specific proposals, we believe that Option One, which focuses on the actual risk of harm to a minor resulting from the manufacturing process, is more consistent with congressional intent and better reflects appropriate distinctions in culpability. It would result in significant increases in cases where a minor is actually put at substantial risk by the manufacturing process, which is the specific harm that Congress intended § 860a's enhanced penalties to address. *See* H.R. Conf. Rep. No. 333, 109th Cong., 1st Sess. 2005, 2006 U.S.C.C.A.N. 184, 208. It would also permit variations depending on the risk of harm attendant to the crime. For § 860a convictions involving possession or distribution, or where the defendant manufactured methamphetamine in such a way as to not create a substantial risk of harm, Option One permits a two-level enhancement, which is consistent with § 860a.

We oppose Option Two because it does not permit courts to take into account the risk of harm to the minor when sentencing a defendant convicted under § 860a conviction. Option Two would require a floor of 29 for any defendant convicted under § 860a of manufacturing or possessing with intent to manufacture methamphetamine. Given that § 860a does not require either that the minor actually be present during the commission of the crime or that the defendant knew that a minor was present or resided on the premises, the 29-level floor would vastly overstate the potential seriousness of the offense in many cases and would create unwarranted uniformity. Suppose, for example, there are two defendants, each with a criminal history category of I, who are each convicted under § 860a of manufacturing between 2.5 and 5 grams of methamphetamine. The first defendant committed the crime in an acquaintance's house while the minor resident was on vacation. The second defendant committed the crime while the minor resident was in the room. Under Option Two, these defendants would be treated equally, despite the clear differences in their culpability and the risk to the respective minors.

Option Two is explicitly premised on the assumption that manufacturing methamphetamine "poses an inherent danger to minors" in all cases. This assumption is not justified in all cases. As § 2D1.1, comment. (n. 20) recognizes, the danger posed by manufacturing methamphetamine can vary significantly depending upon numerous factors, including the quantity of chemicals or toxic substances, the manner in which such substances were stored and/or disposed, the duration of the offense, the extent of the operation, the location of the laboratory, and the number of people placed at substantial risk of harm. Unwarranted uniformity and other unintended consequences of lumping a variety of cases together should be avoided.

Additional Issues. Although not addressed in the Issues for Comment section, the Commission has also proposed to raise sentences for ketamine across the board by eliminating the 20-level cap in the Drug Quantity Table for ketamine, a Schedule III drug. This proposal appears to have been based on the mistaken assumption that ketamine distribution is covered under § 860a. *See* 72 Fed. Reg. 4372-01, 4390 (Jan. 30, 2007) (proposing to eliminate offense level cap for ketamine because "[i]f a defendant is convicted under 21 U.S.C. § 860a for distributing ketamine, however, the defendant is subject to a statutory maximum of 20 years"). As noted above, § 860a applies only to manufacturing and distributing offenses involving "methamphetamine, or its salts,