U.S. Department of Justice
Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530-0001*

March 27, 2008

The Honorable Ricardo H. Hinojosa
Chair, U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Hinojosa:

On behalf of the Department of Justice, we submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register in January 2008. We appreciate the opportunity to comment upon these amendments and look forward to continuing to work with the Commission on these and other issues that will arise during the next year to ensure a fair sentencing guidelines system.

1. Repromulgation of the Emergency Disaster Fraud Amendment

Congress passed the *Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007,* Pub. L. 110-179, on December 19, 2007, and it was signed into law by the President on January 7, 2008. The Commission promulgated an emergency amendment, effective February 6, 2008, that responded to the directive in section five of the Act. We believe that emergency amendment should now be made permanent with certain changes.

At a public hearing on February 13, 2008, United States Attorney David Dugas outlined the Department of Justice's views on the amendment and the issues for comment presented by the Commission in the *Proposed 2008 Guideline Amendments*. In his testimony, Mr. Dugas explained that the Act was passed to reverse the perception by some that they could make fraudulent claims in emergency situations, remain undetected and, even if caught, go relatively unpunished. As Senator Sessions noted at the time the bill was passed, "We need to make it clear that those who steal that money are going to be prosecuted more vigorously and punished more severely than somebody who commits some other kind of crime because I think it is worse to steal from the generosity of the American people who intended to help those in need." S. Rep. 110-69, at 4-5 (2007). In passing the Act, Congress recognized that, unlike conventional frauds involving routine

government benefits where the harm from fraudulent applications is generally dispersed over time and not particularly visible in its effects, disaster fraud schemes can cause immense and widespread harm in a short span of time. The concerns raised by Congress are reflected in the increased penalties for these offenses.

In response to this legislation, the Commission took a significant first step in addressing the concerns by including as part of the emergency amendment a specific offense characteristic (SOC) directing a two-level increase "[i]f the offense involved fraud or theft involving any benefit authorized, . . . in connection with a declaration of a major disaster or emergency." U.S.S.G. § 2B1.1(b)(16). This SOC, however, would rarely result in a sentence of imprisonment and is therefore insufficient in many cases to achieve the goals of sentencing in 18 U.S.C. § 3553 or Congressional intent.[1]

We believe that an essential next step is to establish a minimum base offense level, or "floor" for these cases. Establishing a floor will reflect the seriousness of the offense and is consistent with both Congressional intent and the general framework of the guidelines. We submit that a floor of an offense level 14 is appropriate as it is commensurate with the other existing SOCs for which a "floor" has been established and will assure that those convicted of disaster fraud likely will receive an appropriate sentence involving some term of incarceration.[2] The Department's experience in prosecuting these cases demonstrates that sentences in disaster-fraud prosecutions vary widely, not only in simple, single-application fraud cases but also in cases involving substantial and sophisticated schemes. For example, because sentences have been based upon the fraud table in section 2B1.1(b)(1), first-time offenders generally have been sentenced to probation and fined an amount equivalent to the disaster assistance funds that they fraudulently obtained, even though they may be part of a larger scheme that involves multiple claims for relatively small amounts from a number of false claimants. These probationary sentences do not adequately reflect

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[1] For example, many of these offenders commit frauds involving less than $10,000 of loss and would have a total offense level of 11 under the current guideline. Thus, only in those cases where the "loss" exceeds $10,000 would some period of imprisonment be recommended.

[2] Section 2B1.1 provides for the following "floors": single acts of fraud committed during bankruptcy proceedings or involving financial assistance for certain student loans are set a minimum level of 10; if a substantial part of the fraudulent scheme was committed outside of the United States the minimum level is 12; and if the fraud involved an organized scheme to steal vehicles or their parts or goods from a cargo shipment the minimum offense level is 14. Certainly stealing emergency aide to those who are already suffering is at least as serious, if not more, than these offenses. Indeed, one could argue that the concerns expressed in section 2B1.1(b)(13)(B), which assign a floor of 24 for offenses that jeopardize the financial soundness or solvency of an organization, are similar to those noted by Congress in passing the "Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007."

the harm caused by these offenses, do not achieve specific or general deterrence and are not consistent with Congress' intent to treat these offense seriously.

These cases are different from other types of government benefit-related fraud, such as unlawfully obtaining social security benefits or welfare fraud. These other fraud offenses are not triggered by a catastrophic event that requires the quick disbursement of funds and services and without some of the typical safeguards. In order to be effective in times of disaster, the aide delivery system must be immediate and, thus, must rely on the honest representations of the applicant. Those that use these emergency situations for their own personal profit commit a far more serious offense than those who try to exploit the typical delivery systems, which generally have well-established verification procedures in place and do not require rapid response and disbursement. Congress recognized these differences by increasing the maximum penalty to 30 years, far higher than the maximum for those statutes generally used to prosecute social security or welfare fraud.[3] Because of the nature of the triggering events, these frauds receive much greater public scrutiny and therefore minimal sentences have two deleterious effects. First, they discourage contributors who see that donations are being wasted and that those who undeservedly obtained the funds are receiving little punishment. Second, the current relatively light punishment imposed for disaster fraud encourages the belief that the potential benefits from such fraud far outweigh any possible punishment.

During the hearing, some expressed concern as to whether offenders who may also have been victims of the major disaster or emergency should be treated differently that individuals were not victims. While the suggestion to create a specific departure for "victims" of disaster fraud may have some appeal, we believe the identification of "victims" and the interrelationship between the fraud and "victimization" is, in reality, extremely complex and not susceptible to such generalizations. By definition, those offenders subject to this guideline are not mere victims, but instead have been found criminally liable for defrauding a benefit organization in connection with a declared disaster. The following are some examples of recent cases that have been prosecuted that some may deem to be "victims," yet the offenders were involved in substantial frauds that might well have been even greater but for their being caught.

- *United States v. Thalisha Davis,* CR-07-171-FJP, (M.D. La.): Davis was an evacuee from New Orleans who received over $19,000 from the Federal Emergency Management Administration (FEMA) on her first disaster assistance application filed in her own name. Davis then filed two additional applications in the name of "Thalisha Smith," using two social security numbers assigned to other individuals. She admitted in Court that she fabricated the Social Security numbers used in the

[3] *See generally* 18 U.S.C. § 1001(False Statements) (establishing a five year maximum); § 1028 (Identification Fraud)(establishing a 15 year maximum); § 1029(Access Device Fraud) (establishing a 10 and 15 year maximum); § 1341(Mail Fraud not related to a major disaster) (establishing a 20 year maximum); and §1343(Wire Fraud not related to a major disaster) (establishing a 20 year maximum).

applications without knowing to whom the numbers were assigned. Davis obtained over $14,000 on the second application, and was set to receive approximately the same amount on her third application, but FEMA discovered the fraud prior and cancelled the checks before they were cashed. Ms. Davis was also charged with and pled guilty to fraudulently obtaining Disaster Unemployment Assistance (DUA) by falsely reporting that she lost her job because of Hurricane Katrina. Ms. Davis awaits sentencing on these charges.

- *United States v. Edward Good,* H-06-47, (S.D. Tx.): Edward Good was an evacuee from New Orleans who relocated to Conroe, Texas. Through the internet, he filed a legitimate claim with the Louisiana Department of Labor for disaster unemployment assistance. Good admitted at his plea hearing that he realized from this first application that it would not be difficult to submit other applications through the internet. He then purchased (using money or drugs) names and social security numbers from Conroe-area residents which he then used to file DUA claims, listing New Orleans employers of which Good was aware. These individuals were not evacuees and had not worked in Louisiana prior to Katrina. At sentencing, the district court determined that Good filed approximately 70 fraudulent DUA applications, had the debit cards sent to his Conroe hotel room, and received more than $120,000 in fraudulent funds. He was sentenced to 27 months imprisonment.

- *United States. v. Bobby Hammond,* H-07-116, (S.D. Tx.): Hammond was an evacuee from New Orleans who relocated to Houston. He filed a legitimate claim for DUA. The evidence at Hammond's trial established that he then filed a second claim for DUA using another's social security number. The DUA program requires a weekly call to verify continued eligibility in order to receive the weekly $98 benefit on the debit card. The government put forth evidence at trial showing that each week Hammond called to verify eligibility for both cards. To access the second card, each week he had to enter the false social security number used to obtain that card in the first place. The jury convicted Hammond of wire fraud and aggravated identity theft. Hammond is pending sentencing.

- *United States v. Travis Frank and Regina Dewey,* H-07-135, (S.D. Tx.): Frank and Dewey evacuated from the New Orleans area to Houston. Frank filed a claim for Katrina benefits, listing his primary residence of Reserve, Louisiana. FEMA denied this application. According to the agreed factual proffer at the plea hearing in this case, Frank then filed a second application, fraudulently listing a primary residence in New Orleans. FEMA asked for additional information to support his claim of New Orleans residency. Frank admitted at the plea hearing that he created a fraudulent lease and had his girlfriend Dewey forge the signature of a supposed landlord at the address. Dewey admitted that she also wrote a letter, which was faxed to FEMA, supposedly from the landlord falsely stating that Frank had lived at the New Orleans address. FEMA paid $12,000 after receiving these fraudulent

address verifications. Frank and Dewey split the money. The district court sentenced Frank to ten months imprisonment and Dewey to a term of time served, which was approximately two months.

While in each one of the cases the defendant might qualify as a "victim," we do not believe that a downward departure would be warranted given the amount and/or degree of sophistication in carrying out the fraud. Nevertheless, should the Commission determine that an offender's "victim" status should be given some consideration, rather than a downward departure, we suggest including an application note indicating that the minimum base offense level should not apply if the defendant was legitimately entitled to some portion of the funds and the funds illegally received were only an extension or overpayment of that which he obtained lawfully. The application note should place the burden on the defendant to establish that he was legally entitled to the initial disbursements and should exclude those who (1) fraudulently obtained or sought to obtain $5,000 or more in benefits and (2) submitted multiple claims to a single agency or submitted claims to multiple agencies.

Finally the Commission sought comment on "whether the proposed specific offense characteristic should include language expanding the scope of the enhancement to cover fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with 'any procurement of property or services related to any emergency or major disaster declaration as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States.'" We believe that it should. The same type of emergencies that necessitate the quick disbursement of funds to individuals who are the victims of a major catastrophe are also present in the contracting process. Due to the same immediate need for services, the contracting process often takes place with little, if any, vetting. Basic services such as gasoline, electricity generators, housing, food, water, must all be supplied, often in large amounts and within hours of the triggering event. As Section 1040 recognizes, these services are desperately needed, yet are susceptible to fraud because of the chaos surrounding the disaster and should be protected by the deterrent effect of increased punishment.[4]

2. Honest Leadership and Open Government Act of 2007

This proposed amendment implements the Honest Leadership and Open Government Act of 2007, Pub. L. 110-81 (the "Act") by referencing the new offenses under 18 U.S.C. § 227 to section 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).

We support this amendment.

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[4] Some have questioned the inclusion of administrative costs in Application Note 3(A)(v)(IV). The definition used here is nearly identical to that included in Application Note 3(A)(v)(II) (Procurement Fraud Cases) and we believe it is appropriate.

3. Miscellaneous Food and Drug Offenses

The Commission has proposed amending the guidelines to include penalties for offenses involving the illegal distribution of hGH and to increase penalties for certain violations of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 et seq.) (the "FDCA") and the Prescription Drug Marketing Act of 1987 (the "PDMA"). We support the proposed changes.

These two areas have been the subject of a longstanding concern to the Food and Drug Administration, as was most recently outlined in the testimonies of William McConagha, Assistant Commissioner for Accountability and Integrity; Robert Perlstein, M.D., Medical Officer, Center for Drug Evaluation and Research; and Special Agent Alex Davis, Office of Criminal Investigations. Their testimony and the other available materials establish a firm basis for treating hGH in the same manner as anabolic steroids. Additionally, hGH should be included in SOC 2D1.1(b)(6) and should also be added to SOC 2D1.1(b)(8).

With regard to the other specific issues for comment, we agree with the FDA that the relevant measurement should be of a mixture or substance containing hGH as this is the most practical test not requiring time consuming measurements of purity. The equivalency conversion should use the same methodology that was used in establishing the anabolic steroids based in part on the amount required by a user for "one enhancement cycle." The maximum base offense level of 20 should also apply to hGH with the issue of whether to raise or eliminate that cap to be considered in a future amendment cycle.

With regard to FDCA offenses, section 2N2.1 presently treats both first and subsequent violators of the FDCA the same even though a first offense is only a misdemeanor while a second conviction increases the maximum sentence to three years. We believe the addition of an SOC directed specifically to repeat violations of 21 U.S.C. § 331 would address this problem. An increase of seven levels would be appropriate and would result in a Zone C sentence for someone who pleaded guilty and received a reduction under section 3E1.1(a). We support the amendment to Application Note 3(A) calling for an upward departure if the "offense created a substantial risk of bodily injury" in addition to death or actual injury.

With regard to PDMA offenses, the base offense level of six in section 2N2.1 does not reflect the seriousness of certain offenses that carry a 10-year maximum penalty. We support a new base offense level for those specific offenses and suggest that it be set at 13 so as to parallel the sentence imposed for a second violation of the FDCA. The amended Application Note 3(A) should apply to these cases as well.

4. Animal Fighting Prohibition Enforcement Act of 2007

This proposed amendment results from Congress' decision to increase the maximum penalties for animal fighting from a six-month misdemeanor to a three-year felony. We agree with

the proposal to include this as an offense under section 2E3.1 and that it should have a separate BOL. The BOL should be 10 rather than 8. At a BOL of 10 even an organizer under section 3B1.1(c) with a criminal history I would be eligible for a Zone B sentence of 6 to 12 months after a guilty plea; in contrast, at a BOL of 8, the range would be 0 to 6 months.

We also agree with the inclusion of Application Note 2 suggesting that an upward departure may be warranted if the offense involved extreme cruelty to the animal. We have two additional suggestions. First, in Application Note 1, the Commission should consider including the definition of "Animal Fighting" in the guideline rather than simply including a statutory reference. While such a reference may make sense for title 18 violations, many practitioners do not have easy access to provisions of Title 7. Second, there should be an SOC directing a two-level increase if a firearm or other weapon was possessed in conjunction with the animal fighting enterprise. This enhancement is common in other guideline provisions. *See* Sections 2A4.1(b)(3), 2B2.1(b)(4), 2B5.1(b)(4), 2D1.1(b)(1), 2E2.1(b)(1), and 2L1.1(b)(5)(C). The guidelines should differentiate between those offenses where firearms are used to further the enterprise and those that do not and provide increased punishment for this increased risk.

5. Technical Amendment

This six-part technical amendment would make several changes to the guidelines to correct technical errors or to include conforming language. We have no objection to these changes.

6. Criminal History

The proposal would clarify the definition of arrest to include "an attempted service of an arrest warrant where the defendant escapes the arrest or the service of the arrest warrant". We support this change.

7. Immigration

The Commission undoubtedly has had a difficult task responding to the frequent changes to 8 U.S.C. § 1326 the statute that either increased the penalties or expanded the definition of "aggravated felony" or both. Not surprisingly, courts have rendered often conflicting opinions on what offenses qualify under various categories while also placing restrictions on the manner of proof, thus limiting the ability to use prior convictions anticipated by the statutes and guidelines as the basis for increased sentences. Given that historical context to the options proposed, we believe that another attempt at defining terms will not alleviate the problems.

The Commission is aware of our strong support for a version of Option Three. Under this approach, the Guideline calculation is driven primarily by the length of sentence imposed for prior

convictions. Although state sentencing regimes are not entirely uniform, the length of sentence imposed provides a far more objective and readily-determined basis for an increased offense level under Section 2L1.2 than does the current categorical approach, which is governed entirely by varying practices in charging and record-keeping among the 50 states and thousands of counties and parishes throughout the United States. At the same time, for very serious offenses, namely a prior felony conviction for murder, rape, kidnapping, a human trafficking offense, a child pornography offense, or an offense of child sexual abuse, it would keep the present categorical approach. In our experience, the litigation surrounding these offenses has not proven to be as problematic as with other offenses current listed in section 2L1.2(b).

We believe length of sentence has been proven to be an appropriate indicator of the seriousness of an offender's prior record. The present criminal history categories in the Guidelines are largely based on sentence length and extensive study by the Commission has shown a direct relationship between recidivism and these same criminal history categories. While some have expressed concern with the disparate way sentences are imposed from one jurisdiction to another, this problem already exist in the guidelines because sections 2L1.2(b)(1)(A)(i) and (B) both are currently keyed to the length of sentence imposed.

Option Three, however, could be improved by including certain provisions from the other proposed options. Option Two includes at Application Note 4 departure considerations in those cases where the defendant has been removed from the United States multiple times or where the Court finds that the resulting offense level "substantially overstates or understates" the seriousness of the prior conviction. The latter consideration parallels the present language of Section 4A1.3 (Criminal History) and would provide judges with the flexibility to address the concern that sentences for illegal aliens sometimes understate the seriousness of the underlying offense because the local court takes into account the fact that the illegal alien will be deported upon completion of the sentence. We also suggest including the definition of "forcible sex offense" proposed in sub-option A of Option One for the definition of "Crime of Violence."

With regard to Option One, the proposed change to the definition of a "drug trafficking offense" included in Sub-option A and the proposed inclusion of a definition for "forcible sex offense" will correct clear appellate errors in interpreting the intent of the Commission regarding the scope of these terms and we therefore support those specific amendments. These changes, however, will have little effect on the widely-expressed concerns regarding the general difficulty in applying section 2L1.2 and ultimately will not alleviate the substantial amount of litigation resulting from the categorical approach.

Adoption of sub-option 1(A) may alleviate some litigation burden. By including "an offense that, by its nature, involves a substantial risk that physical force against the person of another will be used in the course of committing the offense," this option eliminates the need to parse through the multitude of comprehensive statutes that contain alternative elements involving both the use and/or substantial risk of use of physical force. Because the proposed change would

bring the guideline in line with the current definition of crime of violence found at 18 U.S.C. § 16, courts would be able to rely on the years of precedent already established.

We also strongly support the proposed Departure Consideration 7(A) which suggests an upward departure for prior drug possession convictions where the amount of the drugs possessed exceeds an amount for personal use. Rather than merely including this consideration as a potential departure basis, we propose that drug possession convictions involving large amounts of drugs be included in the amended definition of a drug trafficking offense. The failure to include prior felony convictions of large amounts of drugs leads to disparity in treatment of like defendants simply because of the vagaries of local statutes and charging practices. For example, under the current guideline, a defendant who was previously convicted of possessing with intent to distribute one gram of crack will have his base offense level increase by at least 12 levels, and perhaps 16, depending upon the length of sentence imposed. On the other hand, if a defendant had previously been prosecuted in a jurisdiction which uses a felony possession offense as their primary statute for drug prosecutions, he would receive at most a four-level increase even if he possessed five kilograms of cocaine. If both defendants were a criminal history II and had previously received a sentence imposed of greater than 13 months, then under current section 2L1.2, the first defendant would have get a sentence of 57-71 months (before acceptance) while the five kilogram defendant would be subject to a maximum sentence of 12-18 months. This disparity is hard to explain and can be corrected by including the large quantity drug possession cases in the definition of "drug trafficking offense."

The Commission's consideration of these options must, however, be informed by an additional factor that has already impacted the fairness, and will increasingly do so in the future, of current section 2L1.2(b) or the application of Option One. That factor is the disappearance of the complete records necessary to make the factual and legal determinations required to apply the SOCs. When presented with a request for records some local courts now are providing only an abstract of a conviction record. That abstract usually includes the defendant's name, some other identifiers, a description of the offense, statute of conviction, the date of sentence, the actual sentence imposed. The information about the offense characteristics and statutory reference is often generic rather than specific, leading to an inability to identify the specific charge that would serve as the predicate for the SOCs.[5] In some instances, the necessary underlying information is unavailable due to a court's practice of destroying records after a period of time. As a result, application of the enhancements under existing section 2L1.2 or under Option One will depend upon how the local jurisdiction keeps and reports its records. Adoption of Option Three helps avoid that disparate effect.

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[5] Using the United States Code as an example, an abstract might state that the defendant had been convicted of "tampering with a witness, victim or an informant" in violation of 18 U.S.C. § 1512. A court, looking at that statute, would find violent and non-violent offenses, felonies and misdemeanors. It would be necessary to find additional information (information which may no longer be available) before the court could determine whether one of the SOCs applied to that conviction.

There has been some question as to whether a "sentenced-based" guideline such as that proposed in Option Three would avoid many of the problems resulting from the increasing reliance upon sentencing abstracts. While the Ninth Circuit has limited the use of an abstract to establish the specific type of offense of conviction, it has accepted their use for proving the length of sentence. In *United States v. Sandoval-Sandoval*, 487 F.3d 1278, 1280 (9th Cir. 2007) the Court addressed this issue:

> Defendant challenges this use of the abstract of judgment, asserting that our decision in *United States v. Navidad-Marcos*, 367 F.3d 903 (9th Cir. 2004), prohibits district courts from relying on abstracts of judgment. That broad proposition is incorrect. In *Navidad-Marcos*, we held that a district court may not rely on an abstract of judgment to determine the *nature* of a prior conviction for purposes of analysis under *Taylor v. United States*, 495 U.S. 575 (1990). We held that the documents contain insufficient information for that purpose. We did not hold, as Defendant contends, that abstracts of judgment are categorically unreliable. Indeed, recently, we permitted reliance on an abstract of judgment, in combination with the charging document, for the purpose of determining whether a defendant had a qualifying conviction under U.S.S.G. § 2L1.2(b)(1)(A). *United States v. Valle-Montalbo*, 474 F.3d 1197, 1201-02 (9th Cir. 2007).
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> Here, as in *Valle-Montalbo*, the district court relied on the abstract of judgment to determine a discrete fact regarding Defendant's prior conviction, namely, the length of sentence imposed. *People v. Mitchell*, 26 Cal.4th 181, 109 Cal.Rptr.2d 303, 26 P.3d 1040, 1042-43 (2001). The document unequivocally contained the information needed. This was a permissible use of the abstract of judgment. Therefore, the sentence is not erroneous for the reason that Defendant argues.

Thus, while abstracts have been problematic in developing an adequate basis for the application of certain SOCs under current section 2L1.2(b) or under Option One, they are accepted as adequate proof of length of sentence imposed.

8. Court Security Improvement Act of 2007

On January 7, 2008, the President signed into law *The Court Security Act of 2007*, Pub L. 110-177. Among its many provisions it created two new offenses: 18 U.S.C. § 1521, retaliating against a federal judge or federal law enforcement officer by false claim or slander of title, which is punishable by up to 10 years in prison, and 18 U.S.C. § 119, protection of individuals performing certain official duties, which is punishable by up to five years in prison.

We submit that the appropriate guideline for the new offenses of retaliation by filing a false lien should be section 2A6.1 (Threatening or Harassing Communications; Hoaxes).[6] Under section 2A6.1 the base offense level for these offenses would be 12. In addition, we suggest that the SOCs contained in section 2A6.1(b)(2)-(4) should be amended so as to apply to the filing of multiple false liens, or filings that violate a specific court prohibition, or are so voluminous and disruptive as to cause a substantial amount of effort to remove them. Further we believe it would avoid substantial litigation if an Application Note was added to assure the application of section 3A1.2(a) and (b).

As to the new offense at 18 U.S.C. § 119, making public restricted personal information with the intent that "the information will be used, to threaten, intimidate, or incite or facilitate the commission of a crime of violence against that covered person or a member of that person's immediate family" we believe that the appropriate guideline is section 2H3.1, which presently includes, among other things, the "Disclosure of Certain Private Protected Information." The base offense level under section 2H3.1 is nine and we recommend a new SOC calling for a six-level increase if the defendant is convicted for a violation of 18 U.S.C. § 119. We also suggest that there be a second SOC that would call for an additional two-level increase if the restricted information was made available by use of the internet since use of the electronic medium would facilitate its widespread dissemination and make the likelihood of someone using the information for the desired purpose all the more likely. With these two SOCs the guideline range for a defendant with Criminal History VI would be 51-63 months, *i.e.*, at the maximum statutory sentence.

Our final comment pertains to what we believe is the unreasonably low maximum sentence for 18 U.S.C. § 119, an offense that involves taking significant steps in an attempt to have someone commit a crime of violence against a protected person. The maximum sentence should be substantially more than five years. Section 994(r) of Title 28 states:

> The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, **and thereafter whenever it finds it**

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[6] Alternative suggestions have been to include this new statute in section 2J1.2 (Obstruction of Justice) or section 2B1.1 (Offenses Involving Fraud or Deceit). As to section 2J1.2, while the offense may appear to be that of an obstruction of justice, our experience is that in many instance the filings have nothing to do with an intent to influence any particular case but instead are simply a tool used to harass certain specified individuals. In fact, corrections officers in the federal penitentiaries where the defendants are serving previously imposed sentences frequently are the target of these harassing actions. While the offense does involve fraud and deceit, there is often no actual monetary loss and the gravamen of the offense is harassment, not the deceit. If section 2B1.1 were to apply, the sentencing courts would be required to look at the expenditures made for "clearing title" and the seriousness of the offense could well be determined by the wealth of the victim and the cost of the property subject to the lien. We do not believe that is a desirable methodology for determining length of sentence.

advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(emphasis added). When forwarding the proposed amendments to Congress, the Commission should include a recommendation that the maximum sentence for this offense be increased.

9. Rules of Practice and Procedure

The Commission has proposed amending *Commission's Rules of Practice and Procedure* Rule 4.1 - Promulgation of Amendments by deleting the present requirement that it "shall decide whether to make the amendment retroactive at the same meeting at which it decides to promulgate the amendment." Rather than remove the linkage between the decision to amend a specific guideline and making that decision apply retroactively, the Commission should look to amendments that would further strengthen that requirement and assure that there is an opportunity for informed Congressional review.

While we recognize that presently there is no statutory requirement that the Commission give Congress an opportunity to review a decision to give an amendment retroactive effect, the Commission acknowledged the propriety of this critical review function when it wrote the current rule in 1997. Given the recent criticism of the Commission's decision to apply the crack amendments retroactively and the specific complaints from members of Congress that postponement of the decision until after November 1st precluded meaningful Congressional review, we believe this proposed change to the Commission's rule moves in the wrong direction.

In enacting this rule in 1997, the Commission recognized the interrelationship of the decision to amend a guideline so that the resulting sentences would be reduced and the decision as to whether or not that reduction should apply retroactively. Obviously, the second decision cannot occur without the first. Perhaps less apparent, but just as important, is the impact that the decision to apply an amendment retroactively could and should have on the Congressional review of the amendment itself. In enacting 28 U.S.C. 994(p), Congress clearly felt that this review should not be perfunctory and thus required at least a six-month delay before any amendment to the guidelines could go into effect.[7] While Congress did not address review of

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[7] Title 28, United States Code, Section 994(p) states:

The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the

retroactivity decisions, the Commission recognized that the two decisions should not be bifurcated. Thus, the Commission included in its rules the requirement that the decision on retroactivity be made at the same time as the decision on the amendment.

Some have expressed concern that it may be impractical in some circumstances to begin the retroactivity impact analysis and request public comment on the retroactive application of an amendment prior to a vote on the amendment at issue. The solution, however, is not to preclude Congressional review; instead, the Commission ought to seek a statutory change that would permit both. This could be accomplished in a number ways. Section 994(p) could be amended so that it also applies to the general policy statements, thus making any change to section 1B1.10 subject to the current six-month Congressional review. Alternatively, Congress could add an entirely new subsection that would "delink" the retroactivity decision from the deadlines of § 994(p) and instead allow the proposed amendment to section 1B1.10 to be submitted to Congress at any time with a delay of six months before it could go into effect. We suggest combing these two solutions by amending § 994(p) so that after the Commission submitted to Congress a proposed amendment it would have five months to decide whether it want to make the amendment retroactive. If, in that period, the Commission decided it did not want to apply the amendment retroactively, it would do nothing and the provisions of current § 994(p) would apply. If, on the other hand, the Commission decided to apply the amendment retroactively, it would inform Congress and by statute both decisions would be subject to an additional six-month review period. Finally, if after five months, the Commission was still unable to make a decision on retroactivity, it could so inform Congress and the amendment would be withdrawn. It then could be resubmitted any time after the start of the next session of Congress.

We believe that this final alternative would permit Congress to exercise its right to review the proposed amendment and all of its potential ramifications. Depending upon the situation, Congress may decide that it would not agree to a reduction if it meant it would apply retroactively. Congress could then decide whether to reject the amendment entirely or, alternatively, to delete the corresponding amendment to section 1B1.10. On the other hand, if Congress had the Commission's impact analysis, it could decide to allow the entire amendment to go into effect. Regardless of Congress' ultimate decision, this process would assure that the Commission's critical decisions would be subject to the Congressional oversight that was clearly intended when the guideline procedures were originally enacted.

Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

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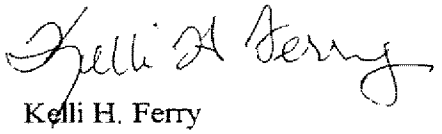
Thank you for the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to our continuing work with the Commission in the important area of sentencing guidelines and policy.

Sincerely,



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