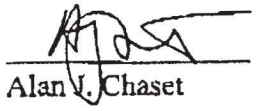
in their individual remarks to what the PAG was saying on that particular proposal.

I remain uncomfortable, however, with what I and what we in the defense bar provided the Commission this year including the minimal participation at the public hearing. Part of the problem clearly relates to the somewhat mixed messages that we were getting or that the Commission was giving or some combination of both. And some of the problem relates to the fact that we in the defense bar are still out of the direct loop and must depend on being provided with our information somewhat after the fact. And some of the problem clearly rests upon the reality that those of us who chose to work with the Commission in this capacity remain volunteers with other primary responsibilities and any signal that might mean less of a burden is latched onto quite quickly.

Putting my hats back on, however, I pledge to try to do better in the coming year. And I ask that you continue to try to provide me and us with materials and messages in a timely fashion so as to help us all work better together.

Thank you.

Respectfully,



Alan J. Chaset

SENTENCING GUIDELINES GROUP
OF THE FEDERAL DEFENDERS
625 Indiana Avenue, N.W., Suite 550
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202-208-0262

April 4, 1997

Honorable Richard P. Conaboy
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Conaboy:

On the afternoon of Wednesday, April 2, I received a copy of a portion of revised amendment 18. (A complete set of materials pertaining to revised amendment 18 arrived on Thursday morning, April 3.) The revised amendment would change the loss tables in the theft, fraud, and tax guidelines; add to the theft and fraud guidelines an enhancement for use of sophisticated means; and add to § 2F1.1 enhancements for telemarketing offenses. In written comments on the original version of amendment 18, the Federal Public and Community Defenders recommended that the Commission postpone consideration of that amendment until the next cycle. The Federal Public and Community Defenders continue to believe that the Commission should defer action on amendment 18. Indeed, in our judgment, promulgating amendment 18 would be a step backward.

The biggest shortcoming of revised amendment 18 is its failure to deal with all of the issues presented in original amendment 18. For example, decisions about revising the loss table should be informed by how the Commission defines loss. Any determination made now about how the loss table should be structured will have to be reconsidered when the Commission formulates a comprehensive definition of loss. We believe the Commission should address the many complex and important issues presented by amendment 18 to provide some principled context for any proposed changes to the theft, fraud, and tax guidelines.

As the impact analysis shows, revised amendment 18 will significantly increase the severity of sentences under the affected guidelines. The justification for the increase is that more serious offenses are not being punished sufficiently. Part of the evidence for that conclusion is a survey of judges and chief probation officers. The survey indicates that about 38% of the judges (and a greater percentage of the chief probation officers) perceive that the guidelines do not adequately punish "defendants whose [fraud] offenses involve large monetary losses." The survey indicates a similar result for theft offenses. We believe that a better indicator of perception is how judges actually

sentence in theft and fraud cases. If judges impose sentences at the top of the applicable guideline range or depart upward based upon application note 10 to § 2F1.1, that would be a clear indication that the guidelines are not providing sufficient punishment. We think that the Commission should conduct such a study before deciding what the loss table should be.

The other part of the evidence for concluding that more serious offenses are not being punished sufficiently is the Commission's Just Punishment study. We have seen a description of that study in a Commission research bulletin. We do not believe that the study supports an across-the-board increase in punishment for fraud offenses. (The bulletin does not report findings on larceny and other theft offenses.) Figure 5 in the bulletin, for example, shows that 58.4% of the respondents would have sentenced below the guideline range in an offense of "causing savings and loan failure" that involved $200,000 (32.6% would have sentenced above the guideline range). Virtually the opposite results were obtained in two other kinds of fraud offenses involving $200,000. The mixed findings regarding fraud suggest that something other than loss guided the respondents' view of what made the fraud offenses serious.

Assuming, however, that the goal is to increase punishment for "defendants whose offenses involve large monetary losses," revised amendment 18 goes beyond that. We do not know from the survey of judges and chief probation officers what constitutes a "large" loss because the survey left that for each respondent to determine for him- or herself. Revised amendment 18 begins increasing punishment when the loss exceeds $2,000 in theft cases and $5,000 in fraud cases -- hardly "large" by nearly any standard.

Revised amendment 18's treatment of the more-than-minimal-planning matter is troubling. The revised amendment eliminates the enhancement, but builds the two-level increase into the loss table. The revised amendment then complicates matters by adding a new two-level enhancement for the use of "sophisticated means" to impede discovery of the offense or the extent of the offense. If there is a basis for an enhancement for sophisticated means, then there is an even stronger basis for a corresponding reduction for minimal planning. The Commission's data indicates that nearly 18% of § 2F1.1 defendants and some 41% of § 2B1.1 defendants currently do not receive a more than minimal planning enhancement -- that is, their offenses involved minimal planning. Because the loss table assumes more than minimal planning, those defendants should be entitled to a reduction in their offense level. Given the numbers of defendants involved, and the interest in avoiding unwarranted disparity, a specific offense characteristic, rather than a departure commentary, is called for.

We believe that there is a need to address the more-than-minimal-planning enhancement, and have said so during previous amendment cycles. We do not think that revised amendment 18 is the way to address the matter.

Revised amendment 18 would also amend § 2F1.1 by adding a two-level enhancement "[if the offense involved telemarketing" and a two-level enhancement "[if the offense [involved telemarketing conduct and either] victimized 10 or more persons over the age of 55, or targeted persons over the age of 55." We oppose these enhancements.

Section 250003 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, authorized increased sentences for fraud offenses involving telemarketing, but did not mandate that the Commission amend the guidelines to increase the punishment for such offenses. The Congressional concern with victims over the age of 55 seems to be a concern with victims who are particularly vulnerable. The Commission already has provided a two-level vulnerable victim adjustment in § 3A1.1. Indeed, the Commission reviewed the adequacy of the vulnerable victim enhancement in light of the Act during the 1995 amendment cycle and concluded that no change in offense level was necessary. See U.S.S.G. App. C, amend. 521. The Commission was created to fashion a rational and just sentencing policy. Why should the means of defrauding (telemarketing instead of use of the mails) make a fraud offense more egregious? The premise behind the proposed enhancement based on age is that every person over the age of 55 is incompetent to handle personal financial affairs. We do not believe this premise to be true.

We ask the Commission to defer action on revised amendment 18. We believe that the proper course of action for the Commission is to deal comprehensively with the issues presented by amendment 18 as soon as practicable after the Commission completes action on the other proposed amendments.

Sincerely,

Thomas W. Hutchison

Thomas W. Hutchison, Chief
Sentencing Guidelines Group of the Federal Public and Community Defenders

cc: Members of the Commission

BARRY BOSS
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April 3, 1997

Andy Purdy
Chief Deputy General Counsel
United States Sentencing Commission
One Columbus Circle, NE
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RE: 1997 amendment cycle, Amendment 18(a)

Dear Andy:

On behalf of the PAG, I wanted to thank you for sending me yesterday the supplementary Commission materials relevant to Amendment 18(A). Given the short time-frame for responding, I am writing to share with you some of our general thoughts on the pending proposal with the hope that you will share our perspective with the Commissioners.

Initially, the PAG strongly opposes approaching this issue in a fragmented manner, rather than addressing the fraud guidelines as a whole, including the definition of loss. Before revising the loss table or at least at the same time that such revisions are considered, we suggest that the Commission address the underlying definition of loss so that we will all have a better understanding of the types of offenders who will be subject to these higher offense levels, and will be able to gauge the true impact of the revised loss table.

Our primary objection to Amendment 18(a) is that it will result in the over-punishing of low level fraud and theft offenders. While we understand the Commission's objective to increase the offense levels for serious offenders who cause substantial losses, we do not understand why the current proposal must also increase offense levels for low-level offenders. It does not appear that there is any support for the proposition that low level fraud offenders are not receiving appropriate sentences; yet, Amendment 18(A) would significantly increase the offense levels for those individuals. For example, the amended impact summary reveals that the amendment would substantially increase the number of defendants subject to incarceration (from 58.6% to 84.5%). In addition, the impact summary reveals that the heartland fraud and theft cases are not ones involving substantial losses, but rather ones which currently involve sentences of approximately eleven months.

Furthermore, the PAG does not believe that there has been any demonstrated justification or data to support the proposition that the current loss table is insufficient with regard to high level offenders. Nevertheless, if the Commission is intent on revising the loss table so that serious offenders are punished more harshly, then this can be accomplished by revising the loss table at the high end without changing the sentences for the drug addict who finds a Treasury check in the garbage and attempts to cash it at a check cashing store. Amendment 18(A), by incorporating the more than minimal planning upward adjustment into the loss table, increases the offense levels for these types of

defendants by two points.

However, the PAG does not oppose eliminating the more than minimal planning adjustment. Instead, as set forth in our previous submission, because there are a significant number of fraud and theft cases which do involve only minimal planning, the PAG strongly believes a specific offense characteristic should be added which provides for a two level *decrease* in those cases in which the defendant used no more than minimal planning. This is particularly appropriate in view of the effect the proposed revision of the loss table would have on offenders in criminal history category II, who may otherwise lose the ability to be considered for a probationary punishment for minor theft and fraud offenses. Limitation of the two level decrease to cases involving losses of less than $250,000 may also be appropriate in order to reduce the need to consider this SOC in those cases in which it is unlikely to be applicable.

The PAG opposes applying the sophisticated means enhancement in fraud cases. There is a risk that the enhancement as it is currently worded could be applied in virtually every fraud case since almost every case involves some type of concealment or attempt "to avoid discovery." Thus, the PAG is concerned that the net effect of such an upward adjustment will be simply to increase the vast majority of defendants' sentences by two levels. We are further concerned that such a provision will merely create the same problems which are currently posed by the more than minimal planning adjustment. If the Commission decides to proceed with Amendment 18(A), then we suggest that this should be clarified to reflect that it only applies where the defendant acts in an unusually sophisticated or pernicious manner, and should not be used as an automatic upward adjustment in the same way as the more than minimal planning adjustment.

Finally, the PAG opposes the proposed enhancement for telemarketing fraud. We do not see any justification for treating individuals who might defraud somebody over the telephone more harshly than individuals who conduct their fraud in person.

Again, thank you for providing us with the opportunity to provide some input into this process. And, please do not hesitate to give us a call if you have any questions or if we can be of further assistance.

Sincerely,

Barry Boss

cc: Fred W. Bennett, Esq.
James Felman, Esq.
John Cline, Esq.
Alan Chaset, Esq.

March 28, 1997

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

Dear Chairman Conaboy and Commissioners:

We write on behalf of the National Association of Criminal Defense Lawyers to comment on the proposed 1997 Amendments, Part II.

The NACDL is a nationwide organization comprised of 9000 attorneys actively engaged in defending criminal prosecutions, including private attorneys and public defenders; our membership also includes judges, law professors and law students. NACDL is also affiliated with 78 state and local criminal defense organizations, allowing us to speak for more than 25,000 members nationwide. Each of us is committed to preserving fairness within America's judicial system.

Thank you for your consideration of NACDL's comments. If the Commission desires additional information on any of these matters, we welcome the opportunity to provide it.

Very truly yours,

Judy Clarke/cdh

Judy Clarke
President

Alan Chaset
Carmen Hernandez
Benson Weintraub
Co-Chairpersons
Post-Conviction and Sentencing Committee

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COMMENTS ON THE 1997 AMENDMENTS - Part II

Amendment 1 - § 2D1.11 (Listed Chemicals)

As we stated in our comments when this amendment was published as an emergency amendment, NACDL does not support it because we believe that Congress had insufficient evidence before it that the penalties available under title 21 and the guidelines were inadequate. However, because this amendment implements the congressional mandate, and no more, we recognize the Commission's limited authority in promulgating it as a permanent amendment. See Comprehensive Methamphetamine Control Act of 1996, Pub.L. 104-237, § 302.

Amendment 2 - §§2L1.1, 2L2.1, 2L2.2, 2H4.1

For the reasons we stated in our comments when these amendment were published as emergency amendments, NACDL objects to certain of the provisions that are being re-promulgated in these permanent amendments. In particular we object to those provisions that enhance the sentence beyond that which Congress mandated in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, ("IIRIRA"), Pub. L. 104-208, Div.C. NACDL recommends that the Commission heed the comments of the Honorable George P. Kazen, who (partially based on his "handling of countless cases of this kind over seventeen years") wrote on behalf of the Committee on Criminal Law of the Judicial Conference of the United States that:

> In general, we urge the Commission to proceed cautiously in making upward adjustments higher than those mandated by Congress. Historically, most of these cases usually result in guilty pleas, at least partially because the sentences are relatively modest. If the sentences

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> are significantly enhanced and more of these cases proceeded to trial, serious logistical problems will result. Typically, these cases involve "material witnesses," namely the aliens being smuggled or transported. These witnesses inevitably must be detained. They are generally indigent, illegally in this country, very poorly educated, and require interpreters. . . .
>
> The pre-trial detention of the necessary witnesses is itself a logistical problem of no small proportion. They must be detained in crowded pretrial detention facilities, which are limited and often located far from the court location. Indeed, the Department of Justice recently wrote to me, asking the assistance of the Criminal Law Committee in conveying to all judges the fact that housing pretrial detainees has become a major problem for the Marshals Service -- in absolute numbers, in medical needs, and in transportation needs.
>
> It is also true that the defendants being prosecuted for these offenses are generally not the main organizers of smuggling rings but rather low-level underlings.

Letter to Honorable Richard P. Conaboy, dated February 4, 1997.

Three provision are of particular concern.

a. **Prior Offenses - § § 2L1.1(b)(3); 2L2.1(b)(4); 2L2.2(b)(2)**

In providing an increase of 2 or 4 offense levels if the defendant has prior convictions, these permanent amendments define the predicate priors more broadly than Congress intended when it directed an enhancement for certain priors.

Congress directed the Commission, in § 203(e)(2)(C) & (D) of IIRIRA, to

> impose an appropriate sentencing enhancement upon an offender with . . . prior felony conviction[s] arising out of . . . separate and prior prosecution[s] for offense[s] that involved the same or similar underlying conduct as the current offense . . .

(emphasis added).

The proposed amendment provides an increase of 2 (or 4, if there are two or more prior convictions) offense levels if

> the defendant committed any part of the instant offense after sustaining . . . conviction[s] for . . . felony immigration and naturalization offense[s] . . .

U.S.S.G. §§ 2L1.1(b)(3); 2L2.1(b)(4); 2L2.2(b)(2). By including as predicate priors any felony "immigration and naturalization offense," the Commission includes offenses that do not involve the "same or similar conduct" as the offense of conviction. As we pointed out in our comments to the emergency amendments, this broadening of the congressional mandate is unfair, unsupported by any empirical evidence, and not in keeping with the requirement that sentences be "sufficient, but not greater than necessary" to comply with the purposes of sentencing. 18 U.S.C. § 3553(a). The unfairness is exacerbated because these priors are being double-counted both as criminal history and as part of the offense level.

b. Vicarious Liability for Firearms and for Causing Bodily Injury - § § 2L1.1(b)(4)-(6)

NACDL opposes the amendment options that make the defendant vicariously liable for the actions of others who possess or use a firearm, or who cause bodily injury. Congress directed enhancements where the defendant himself used the firearm or caused the injury. IIRIRA, §203(e)(2)(E).[1] For the reasons that we stated above and in our comments on the emergency amendments, the NACDL recommends that the Commission not exceed the

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[1] Section 203(e)(2)(E) of IIRIRA directs the Commission to

> impose an appropriate sentencing enhancement on a defendant who, in the course of committing an offense described in this subsection--
>
> (i) murders or otherwise causes death, bodily injury, or serious bodily injury to an individual;
>
> (ii) uses or brandishes a firearm or other dangerous weapon; . . .

enhancements mandated by Congress.

c. **Cross-Reference to Murder Guidelines - § 2L1.1(c)**

NACDL opposes a cross-reference to the murder guideline under any circumstances, but especially under a theory of vicarious liability. NACDL opposes a cross-reference to the murder guideline even where the maximum penalty for the offense of conviction limits the ultimate sentence to something less than life. It corrupts the criminal justice system and our constitutional guarantees to sentence a defendant on the basis that he or she committed murder in the absence of a grand jury indictment for the murder, the right to confront the witnesses who allege the murder, proof beyond a reasonable doubt to be determined by a jury and all the other constitutional and procedural guarantees afforded criminal defendants.

Amendment 3 - § 2L1.2 (Unlawful Entering or Remaining in the United States)

NACDL commends the Commission for recognizing that in imposing an enhancement if the defendant was deported after a conviction for an aggravated felony, it must differentiate among the wide-range of felonies that now fit the broadened definition of "aggravated felony" established in IIRIRA. "Aggravated felonies" now include conduct as serious as "murder, rape, or sexual abuse of a minor",[2] or as relatively minor as receipt of stolen property for which the court suspends the execution of a one-year term of imprisonment and imposes a term of probation.[3]

NACDL agrees generally with the comments of the Federal Public Defenders respecting this amendment. In particular, NACDL agrees that the Commission should further refine this amendment to differentiate the severity of "aggravated felonies" by reference to the prison term served by the defendant for the prior felony. NACDL concurs that the Commission should adopt the provision proposed by the public defenders which utilizes criminal history scoring to reduce unwarranted enhancements on defendants whose past criminal conduct reflects much less serious criminal behavior.

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[2] 8 U.S.C. § 1101(a)(43)(A).

[3] 8 U.S.C. § 1101(a)(43)(G).

Amendment 5 - § 3C1.2 (Reckless Endangerment During Flight)

NACDL opposes this amendment which creates a mandatory minimum offense level of either 18, 19 or 20 for any offense where the "defendant recklessly created a substantial risk of death of death or seriously bodily injury to another person in the course of fleeing from a law enforcement officer." U.S.S.G. § 3C1.2. As currently formulated, this guideline provides a two-level offense enhancement but does not provide for a minimum offense level. The current formulation is better than the proposed tariff approach which focuses on a single factor and disregards other factors relevant to culpability and just punishment.

The Commission itself has explained why it should not adopt a mandatory minimum approach in promulgating amendments.

> This tariff approach has been rejected historically primarily because there were too many defendants whose important distinctions were obscured by this single flat approach to sentencing. A more sophisticated, calibrated approach that takes into account gradations of offense seriousness, ... and level of culpability has long since been recognized as a more appropriate and equitable method of sentencing.

U.S. Sentencing Commission, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 27 (1991).

Amendment 10 - § 2D1.1 (Unlawful Manufacturing, Importing, Exporting or Trafficking - Methamphetamine)

NACDL opposes the increased penalties for methamphetamine offenses which the Commission has published in this amendment. The amendment purports to "implement sections 301 and 303 of the Comprehensive Methamphetamine Control Act of 1996." Synopsis of Proposed Amendment, 10(A); see Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237, §§ 301 & 303 (hereinafter "the Methamphetamine Act"). The amendment proposes to double the current quantity ratio in U.S.S.G. § 2D1.1 to the very same ratio that the 104th Congress considered

in two bills but did not enact.[4]

The proposed amendment fails, however, to do what Congress directed. The Methamphetamine Act provides:

> (a) In General.--Pursuant to its authority under section 994 of title 28, United States Code, the United States Commission shall determine whether the Sentencing Guidelines adequately punish the offenses described in subsection (b) and, if not, promulgate guidelines or amend existing guidelines to provide an appropriate enhancement of the punishment for a defendant convicted of such an offense.

Pub. L. 104-237, § 303. Congress directed the Commission first to determine whether the current guidelines "adequately punish" methamphetamine offenses. Only if the Commission finds that the current guidelines do not provide adequate punishment, is it directed to increase the guidelines penalties for methamphetamine offenses.

Congress enacted the Methamphetamine Act on October 3, 1996. There is no indication that since that time the Commission has conducted any studies, held any hearings or otherwise deliberately considered whether the current methamphetamine guidelines "adequately punish the offenses". Until the Commission undertakes such consideration and makes a reasoned determination that methamphetamine penalties are inadequate, it should not raise the penalties. Certainly, until such time, it is not correct for the Commission to state that the enhanced penalties it proposes "implement" the congressional directive.

Indeed, as the Commission explained in the Cocaine Report,

> In tying mandatory minimum penalties to the quantity of drug involved in trafficking offenses, Congress apparently intended that these penalties most typically would apply to discrete categories of traffickers -- specifically, "major" traffickers (ten-year minimum) and "serious" traffickers (five-year minimum). In other words, Congress had in mind a tough penalty scheme under which, to an extent, drug quantity would serve as a proxy to identify those traffickers of greatest concern.

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[4] In the summer of 1996, bills were introduced in both the House and the Senate which would have increased the penalties for methamphetamine offenses to the levels now proposed by the Commission. See e.g.,1995 S.B. 1965; H.R. 3852. Both the House and the Senate bills were amended to delete the provisions that increased the penalties.

U.S. Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy 118 (1995); see also Chapman v. United States, 111 S.Ct. 1919, 1927 (1991) (explaining that Congress used a market-oriented scheme in establishing the penalties for drug trafficking offenses).[5] The Cocaine Report also reflects that only crack cocaine offenses are being punished more harshly than methamphetamine offenses when considered in terms of the street-level value of the drug quantities that trigger the mandatory minimums. See Cocaine Report at 173, Table 19.[6] Absent some hard scientific evidence that methamphetamine is a more dangerous drug than heroin or powder cocaine the Commission should not deviate from the congressional purpose of targeting the mid-level and kingpin methamphetamine traffickers that Congress targeted when it established the current penalties.

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[5] The Supreme Court in Chapman explained the market-driven rationale enacted by Congress:

> We find that Congress had a rational basis for its choice of penalties for LSD distribution. The penalty scheme set out in the Anti-Drug Abuse Act of 1986 is intended to punish severely large-volume drug traffickers at any level. It assigns more severe penalties to the distribution of larger quantities of drugs. By measuring the quantity of the drugs according to the "street weight" of the drugs in the diluted form in which they are sold, rather than according to the net weight of the active component, the statute and the Sentencing Guidelines increase the penalty for persons who possess large quantities of drugs, regardless of their purity. That is a rational sentencing scheme.

111 S. Ct. at 1927-28 (internal citations omitted).

[6] As reported in table 19 of the Cocaine Report, the street level value of different drugs at the 5-year and 10-year mandatory minimum quantities is:

Base Offense Level/Quantity	Powder Cocaine	Crack Cocaine	Heroin	Marijuana	Methamphet-amine
26	$ 53,500	$ 575	$ 100,000	$ 838,000	$ 9,500
32	$535,000	$5,750	$1,000,000	$8,380,000	$95,000

The Commission is charged with developing sentencing guidelines that "provide certainty and fairness" based on rational distinctions. 28 U.S.C. § 991. As the Supreme Court explained just last summer:

> The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice.

Koon v. United States, 116 S.Ct. 2035, 2053 (1996). Anecdotal reports that are driving the concern about methamphetamine offenses cannot and should not form the basis for the Commission's proposed enhanced penalties for methamphetamine offenses.

The proposed revised ratio for methamphetamine offenses is not tied to any principled rationale. For example, it does not purport to reflect the "true" mid-level and kingpin dealers at the five- and ten-year mandatory minimum levels. It does not reflect dosage ratios more properly attributable to those dealers. It does not reflect profit ratios of those dealers. It does not reflect a "harm" or "addictiveness" scale. In any event, the Commission does not appear to have made any such determinations based on empirical data.

It is said that those who ignore history are doomed to repeat their mistakes. A number of parallels exist between the now universally renounced crack cocaine ratio and the proposed enhanced methamphetamine ratio. As with the proposed methamphetamine enhancements, the 100-to-1 powder/crack cocaine quantity ratio was selected without any known rational basis from among other ratios (50-to-1 and 20-to-1) contained in a number of bills introduced in Congress at the time. Cocaine Report at 117. A number of now substantially discredited assumptions about the extraordinarily addictive nature of crack and its physiological effects drove Congress to increase the penalties for crack cocaine. Id. at 118. Similar anecdotal reports about the extraordinary perils of methamphetamine use have surfaced. Methamphetamine is rumored to be the drug of choice of the less affluent, especially young women, just as users of crack cocaine were believed to include an underclass particularly vulnerable to drug abuse. Prosecution of crack cocaine cases has impacted disparately on African-American in a manner that presages the alarm over the manufacturing and importation of methamphetamine by Mexican nationals.

For all these reasons, NACDL strongly urges the Commission to follow the congressional directive and make an informed determination of whether the current penalties for methamphetamine offenses are inadequate before it undertakes to enhance willy-nilly the penalties for these offenses.

Thank you for your consideration of NACDL's comments.

FEDERAL PUBLIC DEFENDER
Western District of Washington

Thomas W. Hillier, II
Federal Public Defender

March 26, 1997

The Honorable Richard P. Conaboy, Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. · 20002

Dear Chairman Conaboy:

Enclosed are written comments presented by Federal Defenders in response to Part II of the 1997 Guideline amendment proposals. We appreciate the Commission's consideration of our input. Please let me know if our comments need further explanation.

Very truly yours,

Thomas W. Hillier, II
Federal Public Defender

TWH/ls
Enclosure

1111 Third Avenue, Room 1100, Seattle, Washington 98101 - Telephone (206) 553-1100 Fax (206) 553-0400

Statement of

Thomas W. Hillier, II
Federal Public Defender
Western District of Washington

on behalf of

Federal Public and Community Defenders

concerning the

Proposed Guideline Amendments, Part II

March 28, 1997

Amendment 1
(§ 2D1.1)

Amendment 1 would repromulgate as a permanent amendment the emergency amendment to § 2D1.11 promulgated by the Commission in February. The amendment would raise the penalties for list I chemicals by two levels and increase from level 28 to level 30 the top of the chemical quantity table for list I chemicals. This amendment is in response to a specific Congressional directive in the Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237. We do not oppose promulgating Amendment 1 as a permanent amendment.

Amendment 2
(§§ 2L1.1, 2L2.1, 2L2.2, 2H4.1)

Amendment 2 would repromulgate as permanent amendments several emergency amendments the Commission approved on March 19, 1997. On February 4, 1997, we submitted to the Commission our comments on these amendments. We do not oppose repromulgating the version of the amendments that the Commission adopted on March 19, 1997.

Amendment 3
(§ 2L1.2)

Amendment 3 would implement section 321 and 334 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Section 321 of that Act amends the definition of the term "aggravated felony" in 8 U.S.C. §1101(a)(43), and section 334 of that Act requires the Commission to amend the guidelines to reflect amendments made by sections 130001 and 130009 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 2023, 2030.

Congress initially defined the term "aggravated felony" in 1988 to mean murder, drug trafficking, and illegal trafficking in guns or explosives. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4469 (enacting 8 U.S.C. § 1101(A)(43)). Since then, the

definition has become complex and broad. For example, a fraud offense is an aggravated felony if the loss to the victim exceeds $10,000, and receipt of stolen property is an aggravated felony if the court imposed a prison term of one year, suspended execution of the prison term, and placed the defendant on probation for one year. The result is that the label "aggravated felony" is not a reliable way to identify defendants who are deserving of greater punishment.

The unfairness of using an unreliable indicator is heightened by the drastic consequences that § 2L1.2 imposes -- a 16-level enhancement if the defendant has been deported after having been convicted of an aggravated felony. For a defendant in criminal history category II, the effect of this enhancement is to increase the guideline range from 4-10 months to 57-71 months. The unfairness is further heightened by the double counting that occurs. The aggravated felony also counts towards the defendant's criminal history score.

Amendment 3 would revise § 2L1.2 to call for a 16-level enhancement if the defendant had been deported after "conviction . . . for a crime of violence or controlled substance offense [,and such conviction was punishable by more than five years imprisonment]," and a [10, 12]-level enhancement if the conviction was for any other aggravated felony. We believe that, if the Commission adopts the proposal, the bracketed language should be included. The statutory maximum is way to distinguish serious offenses from less serious offenses.

We believe that using the statutory maximum to distinguish between the more serious and less serious offenses is preferable to including all crimes of violence and controlled substance offenses. We also believe, however, that the statutory maximum is still too rough a measure of severity. A defendant may be convicted of a drug trafficking offense that has a 20-year maximum prison term but, because the offense was the sale of a small amount of marijuana, receive probation.

That defendant is less dangerous than a defendant who receives a prison term of 15 years for the sale of three kilograms of heroin or a prison term of 20 years for manslaughter.

We believe that the prison term served by the defendant is a better measure of actual severity than the statutory maximum.[1] The Commission can implement this measure rather easily and without complicating matters by utilizing the criminal history scoring. We suggest that the Commission adopt the following provision:

> If the defendant previously was deported after a criminal conviction, or if the defendant unlawfully remained in the United States following a removal order issued after a criminal conviction, increase as follows (if more than one applies, use the greater):
>
> (1) if the conviction was for a crime of violence or controlled substance offense for which the defendant receives 3 criminal history points under § 4A1.1(a), increase by 16 levels;
>
> (2) if the conviction was for (A) a crime of violence or controlled substance offense for which the defendant receives 2 criminal history points under § 4A1.1(b) or (B) an aggravated felony, other than a crime of violence or controlled substance offense, for which the defendant receives 3 criminal history points under § 4A1.1(a), increase by 8 levels;
>
> (3) if the conviction was (A) for (I) an aggravated felony, other than an aggravated felony described in subdivisions (1) and (2), or (ii) any other felony for which the defendant receives 3 criminal history points under § 4A1.1(a), or (B) three or more misdemeanors that were either crimes of violence or

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[1]Another possible approach might be to measure the severity on the basis of other statutory or guideline indicators of severity. For example, federal drug laws call for mandatory minimums based upon quantity. A prior drug trafficking offense might qualify the defendant for a 16-level enhancement if the quantity of drugs involved in the prior offense were sufficient to trigger a ten-year mandatory minimum sentence. We do not advocate such an approach because we believe that such an approach would unduly complicate application of this guideline.

controlled substance offenses, for each of which the defendant receives 2 criminal history points under § 4A1.1(B), increase by 4 levels.

Amendment 4
(Appendix A -- statutory index)

Amendment 4 would amend the statutory index to add two new offenses enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Amendment 4 would list § 2H2.1 (obstructing an election or registration) as the offense guideline applicable to the new offense of voting by aliens (18 U.S.C. § 611). Amendment 4 would list § 2A2.4 (obstructing or impeding officers) as the offense level applicable to the new offense of "high speed flight from immigration checkpoint" (18 U.S.C. § 758). We do not oppose the amendment.

Amendment 5
(§ 3C1.2)

Section 3C1.2 currently provides for a two-level enhancement "[i]f the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." Amendment 5, requested by the Department of Justice, would add a mandatory minimum offense level -- that is, where the enhancement applies and after adding two points, "if the resulting offense level is less than [18-20], increase [the level] to [18-20]." We oppose this amendment.

The enhancement would apply only to 0.3 percent of defendants sentenced each year. See, e.g., U.S. Sentencing Comm'n, 1995 Annual Report 74; U.S. Sentencing Comm'n, 1994 Annual Report 69. Moreover, the base offense level for the type of case in which the enhancement is most commonly applied, robbery, see U.S. Sentencing Comm'n, 1993 Annual Report 89, 103 (34 of 91 cases in which enhancement applied were robbery cases), is already at or above the proposed

minimum level, U.S.S.G. § 2B3.1(a) (setting base offense level for robbery at 20). More importantly, for those cases that would be below the proposed mandatory minimum, the current two-level enhancement already represents a proportionally larger increase in offense level than it does for offenses that start at a relatively high level, such as robbery. The Commission has provided no justification for implementing such a disproportionate additional increase.

Amendment 6
(interstate stalking; harassing communications)

The proposals in amendment 6 are cumbersome and complex and if adopted, would impose significant and unwarranted policy changes. The synopsis of this amendment states that the proposals incorporate in the guidelines several new federal offenses. In our view, however, every one of the proposals in amendment 6 is flawed and would unnecessarily increase the difficulty in applying the guidelines. We urge the Commission to take a less sweeping and more reasonable approach to addressing the new federal offenses.

This past November, Congress enacted several new offenses that involve threatening or harassing behavior. Section 1069 of the National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201 makes interstate stalking (18 U.S.C. § 2261A) a federal offense:

> Whoever travels across a State line or within the special maritime and territorial jurisdiction of the United States with the intent to injure or harass another person, and in the course of, or as a result of, such travel places that person in reasonable fear of the death of, or serious bodily injury . . . to, that person or a member of that person's immediate family . . . shall be punished as provided in section 2261 of this title.

The maximum penalties range from five years to life, depending on whether and to what degree the victim is injured.

Section 502 of the Telecommunications Act of 1996, Pub. L. 104-104, adds several new telephone call offenses to 47 U.S.C. § 223. The new offenses (47 U.S.C. § 223(a)(1)(C)-(E)), which have a maximum prison term of two years, make it a crime for a person to--

> (C) make a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications;
>
> (D) make or cause the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or
>
> (E) make repeated telephone calls or repeatedly initiate communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication.

In response to these new offenses, the Commission has published for comment a two-part amendment. Part A of amendment 6, consists of two options that would significantly alter the operation of several guidelines, including the statutory index. Part B requests comment on how to address the new offenses.

The new harassing telephone calls and stalking offenses are different from other offenses covered by the guidelines of chapter 2, part A. The harm in these offenses is ongoing or continuous. These offenses are unlikely to be prosecuted with any frequency in federal court. In the long run, a separate guideline may be the most appropriate way to incorporate these new offenses. In the short term, however, the current version of § 2A6.1 (threatening communications) should suffice to cover the few cases that occur. If § 2A6.1 does not adequately address the circumstances of a particular case, the court may depart.

Part A

As outlined below, we are particularly concerned about the implications of the proposals in Part A. In an apparent attempt at guideline economy, the proposals would amend existing guidelines by adding additional enhancements, cross-references, and commentary that would only increase the complexity of calculating an offense level. Some of the proposed changes would result in significant policy changes as well. The new offenses, particularly the stalking offense, are unlikely to be prosecuted with any frequency in federal court. These offenses, which are often connected with some domestic dispute, are commonly prosecuted in State courts. Most states already have laws prohibiting stalking, and threatening or harassing behavior. The complicated changes in Part A are not only unnecessary, but also counterproductive to the goal of simplifying the guidelines.

Option One

Statutory Index. Option One would amend the statutory index to allow a court to choose one of eleven guidelines to calculate a sentence for a stalking offense. The proposed revision would include as guidelines applicable to a violation of 18 U.S.C. § 2261A the following guidelines: §§ 2A1.1(first degree murder), 2A1.2(second degree murder), 2A1.3(voluntary manslaughter), 2A1.4(involuntary manslaughter), 2A2.1 (attempted murder), 2A2.2 (aggravated assault), 2A2.3 (minor assault), 2A4.1(kidnaping), 2B1.3 (property damage), 2B3.2 (extortion by force), and 2K1.4 (arson).

This proposed change to the statutory index is dramatically at odds with guideline policy. It appears to be an attempt to provide real-offense sentencing of a stalking offense, but is in reality impractical and confounding. How is a court to choose the applicable guideline? The application

instructions in § 1B1.2 (applicable guideline) direct the court to choose the offense guideline from the statutory index "most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant is convicted)." The elements of a stalking offense are that the defendant (1) intended to injure or harass and (2) placed another person in reasonable fear of death or serious bodily injury to that other person or that person's family. The charging document for a stalking offense, therefore, will not include any elements that would assist the court in selecting one of the eleven guidelines in the statutory index.

The synopsis of Part A attempts to justify the inclusion of the eleven potentially applicable guidelines by stating that "[t]his approach is consistent with the approach the Commission adopted two years ago with respect to the federal domestic violence offenses, 18 U.S.C. §§ 2261-62." The problem with that analysis is that, unlike interstate stalking, convictions under §§ 2261-62 require either "a crime of violence" or the infliction of some bodily injury.[2] The type of crime of violence (aggravated assault, e.g.) ordinarily will be set forth in the charging document. Stalking requires only an "intent to injure or harass."

Option One of Part A would undercut a fundamental policy of the guidelines by rendering the elements of the offense of conviction relatively meaningless. See William Wilkins, Jr. & John Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C.L.Rev. 495, 497 (1990). We believe it would be more appropriate to list no guideline at all in the statutory index (particularly since federal stalking is unlikely to be prosecuted frequently), than to change dramatically the structure of the guidelines.

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[2]A conviction under 18 U.S.C. § 2261(2) (interstate domestic violence) requires the intentional infliction of a crime of violence and infliction of bodily injury. A conviction under 18 U.S.C. § 2262 requires the infliction of bodily injury.

§ 2A2.3 (minor assault). Option One would also merge § 2A2.4 (obstructing or impeding officers) into § 2A2.3 (minor assault). Option One would increase by three-levels the base offense levels in § 2A2.3, add enhancements to address stalking or violation of a court protection order and obstructing a government officer, and add a cross-reference to § 2A2.2 (aggravated assault). We oppose these proposals.

We believe that the Commission was correct in 1994 when it rejected a proposed merger of §§ 2A2.3 and 2A2.4. We think it would be a mistake for the Commission to change its mind. As we stated in 1994, the proposed merger would do much more than simplify application by implementing a policy change. The consolidated guideline would include a cross-reference that calls for use of § 2A2.2 if the offense involves aggravated assault. At present, § 2A2.4 has a cross-reference to § 2A2.2, but § 2A2.3, the guideline for minor assault, does not. The effect of this merger would be to make § 2A2.3 a mere conduit to § 2A2.2. We oppose the increasing use of cross-references to create a real offense system. The increased use of cross-references is rendering the count of conviction almost meaningless.

We oppose increasing the base offense level of § 2A2.3. The synopsis of the amendment states that the reason for the increase is to "provide a more appropriate and sufficiently severe offense level for offenses sentenced under that guideline." There is no indication that the current base offense level does not provide sufficiently severe punishment for relatively minor offenses. See § 2A2.3 (comment (n.1)(definition of "minor assault")). The majority of offenses covered by § 2A2.3 are misdemeanor assaults -- offenses punishable by imprisonment for one year or less. By raising the base offense level, the proposed guideline would result in overpunishment by reserving a straight sentence of probation only to someone who had a criminal history category of I and only

if the conduct involved no bodily injury. Further, in some cases, the base offense level would exceed the statutory maximum, whether it be six months or one year. We cannot understand why it is necessary to raise the base offense level of minor offenses when no rational justification for the increase has been articulated.

The amended version of § 2A2.3 would also unnecessarily increase the offense level for an offense currently covered under § 2A2.4. In addition to the increased base offense level, the proposal would provide an additional three-level increase "if the offense involved obstructing or impeding a governmental officer in the performance of his duty." Currently, under § 2A2.4, the offense would result in an offense level of six or nine. Under the proposal, the offense level would be nine or twelve. Again, the Commission should refrain from increasing the offense levels when there is no showing of a need for an increase. If the enhancement is intended to allow real offense sentencing by punishing obstructive conduct in offenses not covered under the existing § 2A2.4, such conduct is already covered by § 3A1.2 (official victim), § 3C1.1 (obstructing or impeding the administration of justice), and § 3C1.2 (reckless endangerment during flight).

We also oppose the proposed enhancements for "[two or more] instances of stalking." A stalking offense, by its nature, will ordinarily involve more than one incident of harassing or threatening behavior.[3] What differentiates stalking from other threat offenses is the repetition of the threat over a period of time. In a typical case, it is the repeated encounters that prompt a victim to report the offense to the police or to seek a restraining order. Thus, the enhancement would be

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[3]Indeed, a typical state statute prohibiting stalking, requires that the offense include "repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof." 2C N.J. Stat. Ann. § 12-10 (West 1996).

routinely applied. Further, what would constitute an "incident," and would the court be allowed to consider conduct that occurred prior to the offense, as proposed in the amendment of § 2A6.1? Finally, when both enhancements (including the enhancement for violation of a court order) apply, the resulting offense level would be higher than if the victim had actually suffered bodily injury as a result of the offense.

§ 2A6.1 (threatening communications). Option One of Part A would also revise § 2A6.1 (threatening communications) and list it as the applicable guideline for the new harassing telephone call offenses under 47 U.S.C. § 223(a)(1)(C)-(E). The amended guideline would include enhancements for "conduct evidencing an intent to cause bodily injury or to carry out a threat," and conduct by "the defendant [or another person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct)]," involving repeated instances of stalking or threatening behavior or violation of a court order.

We oppose the proposed changes to § 2A6.1. We believe the amendment attempts to incorporate in one guideline the characteristics of too many offenses.

The proposed version of § 2A6.1(b)(1) would read "if the offense involved any conduct evidencing an intent to cause bodily injury or to carry out a threat, increase by 6 levels." We suggest that the term "threat" needs to be defined. A violation of the telecommunications offense may involve intent to "annoy, abuse, threaten, or harass." The offenses currently covered by § 2A6.1 require specific types of threats, such as threats to kill, injure, or kidnap. We suggest that for the enhancement to apply, the offense must have involved conduct evidencing an intent to cause death or bodily injury. The new telecommunications offense carries a maximum penalty of two years. With a base offense level of 12 and a 6-level increase for "any conduct evidencing an intent to carry

out a threat," the minimum possible offense level possible would be 18, resulting in a guideline range (27-33 months) that exceeds the statutory maximum by at least three months.

We also oppose the enhancement that would apply for two or more instances of stalking or threatening communications. Stalking involves more than one instance of harassment. Likewise, harassing telephone calls commonly involve more than one phone call. Indeed, two of the new harassing phone call offenses specifically prohibit "mak[ing] or caus[ing] the telephone of another repeatedly or continuously to ring," and "mak[ing] repeated telephone calls or repeatedly intiat[ing] communication." Thus, the proposed enhancement for repeated instances would almost always apply. The current version of § 2A6.1 does not include an enhancement for repeated instances of other threatening communications, and we are not aware of any problem with the resulting offense levels for those offenses. A court can always depart in an egregious.

In addition, a proposed application note would direct the court to consider "any conduct that occurred prior to or during the offense," even if that conduct did not qualify as relevant conduct. This instruction could result in application problems and an unprecedented change in policy. Repeated instances would not be considered part of the "same course of conduct" for purposes of § 1B1.3, because the grouping rules of chapter three specifically exclude all offenses under chapter two, part A. Thus, even though these offense typically involve "ongoing or continuous" behavior, the use of any guideline under chapter two, part A would prevent the consideration of conduct that occurred prior to or during the offense. We think it is unwise to carve out an exception to the relevant conduct rule to accommodate offenses that are unlikely to be prosecuted in federal court.

We also oppose holding the defendant accountable for violation of a court protection order when the defendant was not subject to and possibly not aware of the order. We question whether

the enhancement for violation of a court protection order is really necessary, particularly since a protective order presupposes that the person subject to the order previously engaged in some type of offensive contact with the same victim. Thus, both the enhancement for repeated instances and violation of an order could result in double counting. Further, if the defendant receives convictions for a prior instance of stalking behavior or for violation of a court protection order, the convictions would raise the criminal history score and result in double punishment.

Because the enhancement for repeated instances would apply in most cases, we are confused as to what the Commission deems to be the "heartland" of a stalking or harassing communications offense. If the four-level reduction offered in § 2A6.1(b)(4) would apply to a single instance "evidencing little or no deliberation" (which would seem to be the norm for a "single instance" of such behavior) or to "harassing communication that did not involve a threat or stalking," then to what type of "single instance" conduct would a base offense level of 12 apply?

We oppose the proposed cross-reference in § 2A6.1. The proliferation of cross-references in the guidelines is disturbing. Eventually, the count of conviction will become meaningless to the point where a judge should be instructed to disregard the statutory index and choose a guideline that the judge determines, by a preponderance of evidence, to represent the "real" offense. This trend toward total real offense sentencing is at odds with the Commission's own determination at the inception of the guidelines that "such a system risked return to wide disparity in sentencing practice." U.S.S.G. Ch. 1, Pt. A(4)(a). Further, this increase in cross-references shows a lack of confidence in a jury's factfinding ability and hinders effective plea negotiations.

Option Two

Option Two of Part A would revise the statutory index to list § 2A6.1 (threatening

communications) as the applicable guideline for a stalking offense under 18 U.S.C. § 2261A or one of the new harassing telephone communication offenses under 47 U.S.C. § 223(a)(1)-(C). Option Two would also amend § 2A2.2 (aggravated assault) and § 2A2.3 (minor assault) by adding a two-level enhancement "if the offense involved the violation of a court protection order." The version of § 2A6.1 in Option Two is basically the same as that in Option One, except that Option Two would change the caption of § 2A6.1 to "threatening or harassing communications; stalking." The amended version of § 2A6.1 would provide a two-level increase for two or more instances of stalking or making a threatening communication to the same victim; a two-level increase for violation of a court protection order; and a six-level increase if the defendant "engaged in any conduct evidencing an intent to carry out the threat made in a threatening communication or to cause bodily injury." The amended version of the guideline would provide a decrease of [4-8] levels if none of the above enhancements applied and the offense involved either "(A) a single instance evidencing little or no deliberation, or (B) only harassing communication that did not involve a threatening communication or stalking." Finally, the amended version of § 2A6.1 would provide a cross reference "if the offense involved conduct covered by another offense guideline."

Option Two would also amend the commentary to § 2A6.1 to require the court, in determining whether any enhancement applied, to "consider any conduct that occurred prior to or during the offense." In addition, the amended commentary would state that an upward departure may be warranted if the offense involved "[numerous][more than two] instances of stalking or making a threatening or harassing communication to the same victim."

We oppose Option Two for many of the same reasons we oppose Option One, which sets forth basically the same proposal. The only significant difference is that the reduction for a "single

instance" would provide a decrease of [4-8] levels, whereas Option One would provide a four-level reduction. For instance, a defendant who caused no bodily injury but violated a court protection order would be subject to the same sentence as a defendant who actually inflicted bodily injury. In addition, since the harassing communications offenses typically involve more than one phone call, the enhancement for repeated instances would routinely apply.

We believe the proposal, attempts to incorporate too many offenses in one guideline. We believe that § 2A6.1 is the appropriate guideline to incorporate an offense involving harassing communications, but not as set forth in this proposal. The new harassing communications offenses have a maximum penalty of two years imprisonment. The proposed version of § 2A6.1 would result in overpunishing these offenses.

Part B

Part B seeks comment on two issues. First, the Commission seeks comment on alternative ways to address the new federal stalking offense. Second, the Commission requests comment on whether conduct not part of the offense should be considered in determining the offense level under § 2A6.1. Finally, the Commission seeks comment on "whether the definition of aggravated assault in the commentary to § 2A2.2 should be amended to eliminate the requirement that intent to do bodily injury be present in an assault involving a dangerous weapon in order for that assault to be considered 'aggravated,' rather than 'minor,' under the guidelines."

As we have indicated above, neither option in Part A would satisfactorily address the new offenses. The new offenses, particularly the stalking offense, are unlikely to be prosecuted in federal court in great numbers. We believe the Commission should examine the characteristics of any cases that may be brought in federal court, and then determine whether and to what extent the guidelines

should be amended. The Commission may decide that a separate guideline for stalking may be more appropriate than revising existing guidelines or the Commission may decide that no amendment is necessary. The proposed revisions would unnecessarily complicate the application of § 2A2.3 and 2A6.1.

We believe that the existing version of § 2A6.1 (threatening communications) should adequately cover the new harassing communications offenses. Because the offenses call for a maximum of only two years imprisonment, we would suggest providing a reduction if the offense did not involve an intent to carry out a threat.

The new offenses typically involve repeated instances or continuing conduct. For this reason, the offenses are not easily accommodated under any guideline in chapter two part A. We would advise against establishing a special exception to the relevant conduct rules just to accommodate these offenses. If it is necessary to amend the guidelines to cover these offenses, then the applicable guideline should be listed under § 3D1.2(d) as offense behavior that is "ongoing and continuous in nature." Otherwise, an unusual number of repeated instances can be handled by a departure.

We oppose revising the definition of aggravated assault. We are unaware of any documented instance where the application note inhibited sufficient punishment of an assault involving a weapon.

Amendment 7
(Chapter 2, parts B and F)

Amendment 7 of part II would amend five guidelines in chapter 2, parts B and F, and the statutory index to respond to changes in law enacted by the Economic Espionage Act of 1966, Pub. L. No. 104-294, 110 Stat. 3488.

Section 101 of the Economic Espionage Act of 1966 enact a new offense, captioned economic espionage (18 U.S.C. § 1831), that punishes theft of, or receipt of a stolen, trade secret, obtaining a trade secret by fraud, and unauthorized duplication of a trade secret. The defendant must intend or know that the offense will benefit a foreign government, foreign instrumentality, or foreign agent, terms defined in 18 U.S.C. § 1839 (also enacted by the Economic Espionage Act of 1966). The maximum prison term for an economic espionage offense is 15 years.

Amendment 7 would amend § 2B1.1 (larceny, embezzlement, and other forms of theft; receiving, transporting, transferring, transmitting, or possessing stolen property) by adding a new specific offense characteristic designated subsection (b)(7). Subsection (b)(7) would provide that if the offense involved misappropriating a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, "increase by [2] levels." We do not oppose the amendment.[4]

Section 201 of the Economic Espionage Act of 1966 amended 18 U.S.C. § 1030 (fraud and related activity in connection with computers). Amendment 7 would add an application note to § 2B1.1 stating that, for an offense under 18 U.S.C. § 1030(e)(2)(A) or (B), loss includes "the

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[4]Amendment 7 would amend the statutory Index to indicate that § 2B1.1 is the offense guideline for offenses set forth in 18 U.S.C. § 1831 and § 1832 (theft of trade secrets, also enacted by section 101 of the Economic Espionage Act of 1966), but would not amend the statutory provisions note at the end of § 2B1.1 to list § 1831 and § 1832. We believe that the statutory provisions note to § 2B1.1 should also be amended. Similarly, amendment 7 would amend the Statutory Index to indicate that § 2B3.2 is the offense guideline for a violation of 18 U.S.C. § 1030(a)(7). While amendment 7 would also add a sentence to the background note to § 2B3.2 stating that guideline applies to "offenses under 18 U.S.C. § 1030(a)(7) involving a threat to impair the operation of a 'protected computer,'" amendment 7 would not amend the statutory provisions note to § 2B3.2. We believe that amendment 7 should also amend the statutory provisions note to § 2B3.2.

reasonable cost to the victim of conducting a damage assessment, restoring the system and data to their condition prior to the offense, and any lost revenue or costs incurred due to interruption of service." We do not oppose the amendment.

Amendment 7 would also add two application notes addressing grounds for departure. New application note 16 would indicate that an upward departure may be warranted "in cases involving theft of information from a 'protected computer,'" if the defendant sought the stolen information to further a broader criminal purpose.[5] We oppose this language as vague and unhelpful.

New application note 15 would indicate that an upward departure may be warranted if loss "does not fully capture the harmfulness of the conduct . . . ." The new application note gives as an example the theft of personal information that involves a substantial invasion of a privacy interest. U.S.S.G. § 2F1.1 currently contains a similar application note. We believe that the Commission should defer action on new application note 15 and take it up when the Commission begins work on amendment 18 in part I of the proposed amendments. Loss as determined under § 2B1.1(b)(1) -- and § 2F1.1(b)(1) -- may not adequately reflect the harm of the offense, but not only because loss can understate the harm of the offense. Loss so determined can also overstate the harm. New application note 15 should be more balanced and reflect that reality, as should application note 10 to § 2F1.1.

Amendment 7 would amend § 2B1.3 and § 2F1.1 to provide that a defendant convicted under 18 U.S.C. § 1030(a)(4) or (5) receive a prison term of at least six months. These amendments are

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[5]The proposed application note does not define the term "protected computer," but 18 U.S.C. § 1030(e)(2) does. If the Commission intends to adopt that definition, the proposed application note should be modified to say so.

in response to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 805(c), 110 Stat. 1305. We question the wisdom of mandatory minimum sentences restricting the discretion of judges to fashion an appropriate punishment, but the Commission has no choice in the matter. We do not oppose the amendment.

Finally, amendment 7 would amend § 2B3.2 to add a new specific offense characteristic calling for an enhancement of the offense level using the fraud loss table "if the offense involved invasion of a protected computer resulting in a loss . . . ." We recommend that the Commission not act on this part of amendment 7. This matter should be considered after this cycle as a part of the consideration of the issues involved in amendment 18 in part I. There are a number of questions that need to be addressed. If the protected computer trespassed upon is a federal government computer, does the enhancement of § 2B3.2(b)(1) apply? If the defendant committed the offense at home, where he or she keeps a weapon, does the Commission intend that the enhancement of § 2B3.2(b)(2) apply? By its literal terms, that enhancement would apply, but computer trespassing is different from trespassing upon real property. A first offense under 18 U.S.C. § 1030(a)(3) carries a maximum prison term of one year. Use of the loss table may result in all first offenders under that provision receiving the statutory maximum.

Amendment 8
(flunitrazepam)

Amendment 8 consists of two parts in response to the Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. No. 104-305, which directs the Commission to "review and amend, as appropriate, the sentencing guidelines for offenses involving flunitrazepam." The Act increases the maximum penalty for offenses involving flunitrazepam. For violations of 21 U.S.C.

§ 841, the Act raises the maximum penalty for flunitrazepam from three-years imprisonment to five-years imprisonment for thirty milligrams and twenty-years imprisonment for one gram. The Act also revises 21 U.S.C. § 959 (import and export) to provide a maximum penalty of twenty-years imprisonment for offenses involving any quantity of flunitrazepam. The Act increases the penalty for simple possession of flunitrazepam to three years.

Part A

Part A presents two options to amend § 2D1.1 (drug trafficking) and § 2D2.1 (simple possession) to address offenses involving flunitrazepam. Both options would revise § 2D1.1 to treat flunitrazepam as a Schedule I and II depressant. Under option one, the base offense level for simple possession of flunitrazepam in § 2D2.1 would remain at level four. Option Two would amend § 2D2.1 to provide a base offense level of eight if the substance possessed is flunitrazepam. We oppose Option Two and do not oppose Option One.

Because the maximum prison term for a flunitrazepam offense is twenty years, it makes sense to treat flunitrazepam like Schedule I and II depressants, which have a maximum prison term of twenty years. We oppose that part of Option Two, however, that would treat simple possession of flunitrazepam as equivalent to possession of heroin or crack and much more seriously than possession of any Schedule I or II depressant. The proposed revision of § 2D2.1 would result, in some cases, in sentencing simple possession of flunitrazepam more harshly than trafficking flunitrazepam. Under the proposed amendment, a trafficking offense involving less than 250 units of flunitrazepam would yield an offense level of six, while simple possession of that same amount would result in an offense level eight.

Part B

Part B seeks comment on how the guidelines should incorporate "date rape" and related crimes. The Drug-Induced Rape Prevention and Punishment Act enacted a new federal offense of "date rape," codified at 21 U.S.C. § 841(b)(7):

> Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18, United States Code (including rape), against an individual, violates subsection (a) by distributing a controlled substance to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18, United States Code.

"Date rape" is essentially a state law crime and is unlikely to be prosecuted with any frequency in federal court. We suggest that at this time the Commission not amend the guidelines to incorporate this new offense. The Commission will be in a better position to determine whether and what type of amendment is necessary after there have been some cases prosecuted in federal court.

Amendment 9
(methamphetamine)

Amendment 9 consists of two parts in response to certain parts of the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237.

Part A

Part A would respond to sections 101, 201, and 209 of the Act. Section 101 revises 21 U.S.C. § 959 (manufacture or distribution for purpose of unlawful importation) to make it unlawful to manufacture or distribute a listed chemical. Section 201 of the Act revises 21 U.S.C. § 844 to make it unlawful "for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person . . . if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business

in the manner contemplated by his registration." Section 209 of the Act corrects the spelling of certain precursor chemicals.

Part A would amend § 2D2.1 (unlawful possession) to provide a base offense level of 4 "if the offense involved a list I chemical." In addition, part A would amend the statutory index to include § 2D1.11 (listed chemicals) as an applicable guideline for violations of importation offenses under 21 U.S.C. §§ 959 and 960(d)(7).

We do not oppose part A.

Part B

Part B invites comment in response to section 203 of the Act, which revises 21 U.S.C. § 843(d) to provide up to ten years imprisonment for a violation of 21 U.S.C.§ 843(a)(6) or (7) (possession, manufacture or distribution of certain laboratory equipment) if the offense is committed with intent to manufacture or to facilitate the manufacture of methamphetamine. Section 203 directs the Commission to amend the guidelines "to ensure that the manufacture of methamphetamine in violation of section 403(d)(2) of the Controlled Substances Act . . . is treated as a significant violation." Part B requests comment on how to respond to this directive and specifically, on whether there should be an additional enhancement in § 2D1.12 (prohibited flask or equipment) "if the equipment is used to manufacture methamphetamine."

We believe that § 2D1.12, the guideline currently applicable to violations of 21 U.S.C. § 843(a)(6) - (7), treats those offenses as a significant violation. The new offense requires an intent to manufacture methamphetamine, and § 2D1.12 provides a cross reference to § 2D1.1, "if the offense involved unlawfully manufacturing a controlled substance, or attempting to manufacture a controlled substance." The cross-reference should ensure a guideline range at or above the statutory

maximum of ten years. If the resulting sentence is inadequate, the government can prosecute the offense as an attempt to manufacture under 21 U.S.C. § 846, for which the statutory maximum is twenty years. Such cases would be sentenced under § 2D1.1.

Amendment 10
(§§ 2D1.1 and 2D1.11)

Amendment 10 consists of five parts in response to sections 301 and 303 of the Comprehensive Methamphetamine Control Act of 1996. Section 301 of the Act directs the Commission to amend the guidelines "to provide for increased penalties" for offenses involving methamphetamine and to "submit to Congress explanations therefor and any additional policy recommendations for combating methamphetamine offenses." Section 303 directs the Commission to "determine whether the Sentencing Guidelines adequately punish" certain offenses in the Controlled Substance Act (specifically, 21 U.S.C. §§ 841(d), 841(g)(1), 843(a)(6), and 843(a)(7) which result in violations of subsection (d) or (e) of section of the Solid Waste Disposal Act; section 103(b) of the Comprehensive Environmental Response, Compensation and Liability Act; section 301(a), 307(d), 309(c)(2), 309(c)(3), 311(b)(3), or 311(b)(5) of the Federal Water Pollution Control Act; or 49 U.S.C. § 5124 (violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material)).

Parts A through D of Amendment 10 would increase the guideline penalties for methamphetamine offenses. Part A would revise the drug quantity table. Part B would raise the penalties for importation offenses involving methamphetamine. Part C would provide new penalties for environmental harm caused by manufacturing methamphetamine. Part D would state explicitly that manufacturers may be subject to a special skill adjustment. We believe that before

implementing any of these changes, the Commission should undertake a comprehensive study methamphetamine offenses and their sentencing.

The Congressional directive to increase the guideline penalties for methamphetamine offenses is a part of the latest craze in the current political arena. We trust that the Commission will maintain its role as an independent body committed to a reasoned and rational sentencing policy, and will resist responding impulsively to the political concerns of Congress.[6] Implicit in the Congressional directive is an assumption that the current penalties are not stringent enough. The Commission, as the federal agency entrusted to ensure rational sentencing policy, is best qualified to determine whether this assumption is correct, and if so, what specific changes are called for. For this reason, we believe that the Commission's initial response to the directive should be to gather the facts upon which sound policy judgments can be based.

Part A

Part A would increase the penalty for methamphetamine offenses by revising the drug quantity table in § 2D1.1. The proposal would reduce by one-half the current quantities of methamphetamine required for each offense level in the table. Thus, for a base offense level of 26, the quantity of methamphetamine would be reduced from "at least 100 G but less than 400 G of Methamphetamine" to "at least 50 G but less than 200 G of Methamphetamine." Part A would also amend the drug equivalency table by increasing two-fold the quantity of marijuana listed as equivalent to a particular amount of methamphetamine. For instance, the amount of marijuana equivalent to one gram of methamphetamine would be increased from one kilogram to two

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[6]There is a parallel to the crack cocaine hysteria that produced swift legislation resulting in unfair and unwise sentencing policy. The Commission is to this day attempting to remedy that problem.

kilograms. Finally, part A would amend application note B to state "[i]n the case of a mixture or substance containing PCP or methamphetamine, if the purity of the mixture or substance can be determined and exceeds ten percent, then the weight of the actual controlled substance in the mixture shall be used to determine the offense level. In any other case involving a mixture or substance containing PCP or methamphetamine, use the weight of the mixture containing PCP or methamphetamine to determine the offense level."

We oppose Part A. The synopsis of Part A states that the increased guideline penalties would have "the same effect on methamphetamine guideline penalties that would have occurred if Congress had passed legislation to reduce by half the quantities to trigger the mandatory minimum penalties under 21 U.S.C. § 841." Congress considered and rejected that proposal. We fail to understand the rationale for increasing the penalties based on legislation that was never enacted. We suggest that before increasing the penalties for methamphetamine, the Commission come up with a rational explanation for the extent of any such increase. We believe that the Commission should conduct a comprehensive study of the methamphetamine offenses to determine whether, relative to other drugs, methamphetamine offenses are being treated too leniently.[7] Once that question is answered, the Commission will be in a better position to determine how to provide more appropriate punishment.

Part B

Part B of amendment 10 presents three options ("either as an alternative or an addition to Part A") to amend § 2D1.1 to include an enhancement for offenses involving the importation of

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[7]The drug trafficking guideline already treats methamphetamine offenses differently from other controlled substances. The determination of the base offense level of a methamphetamine offense takes into account the purity of the drug by differentiating between methamphetamine and methamphetamine (actual).

methamphetamine or precursor chemicals. Option One would revise § 2D1.1 to provide a two-level increase "if the offense involved the importation of methamphetamine, or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully." Option Two would amend § 2D1.1 to provide a two-level increase if "(A) the offense involved the importation of methamphetamine [or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully,] and (B) the defendant [is subject to an adjustment under § 3B1.1 (Aggravating Role)][is not subjected to an adjustment under § 3B1.2 (Mitigating Role)]." Option Three would amend the commentary to § 2D1.1 to state that an upward departure may be warranted "if the offense involved the unlawful importation of methamphetamine, or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully. . .. [particularly if the defendant had an aggravating role in the offense under § 3B1.1 Aggravating Role]."

We realize that Congress has directed the Commission to increase the penalties for importation offenses involving methamphetamine, but, in our view, sound policy does not require an increase. We do not understand why importing methamphetamine is any more serious than manufacturing methamphetamine in this country. The vast majority of defendants who are arrested for importing are low-level mules or couriers. Their sentences are already too high. Frequently couriers and mules are poor people without a future who bring drugs into the United States for a fee that has no relation to the street-value of what they bring in. They generally are unaware of the scope of the drug enterprise they are assisting or even the identity of the participants. A simple enhancement for importing will inevitably result in even greater sentences for these least culpable offenders. The enhancement as set forth in Option One is too broad and would unfairly increase the

punishment of those who deserve a reduced rather than an increased sentence, and we therefore oppose it. We also oppose the departure instruction in Option Three because it could result in disparate sentencing. The problem with Option Three is that the proposed commentary provides no guidance as to what type of importation offense would warrant a departure.

We suggest that to comply with the directive, the Commission, as part of the study of methamphetamine offenses, identify those factors that would justify an enhancement for importation. For example, the market-oriented approach Congress has taken to punishing drug offenses suggests that the leaders of methamphetamine-importing organizations are probably most deserving of increased punishment. The exploitation of desperate and despairing individuals who become mules or couriers only makes drug kingpins more deserving of punishment. Although we believe the enhancement for importation is greatly at odds with sound policy, we suggest that the Commission adopt the least onerous alternative in Option Two which would read: "If (A) the offense involved the importation of methamphetamine and (B) the defendant is subject to an adjustment under § 3B1.1, increase by two levels."

Part C

Part C presents two options to amend the drug guidelines ("either as an alternative or an addition to Part A") to provide an enhancement if the offense caused "environmental damage associated with the manufacture of methamphetamine." Option One would amend § 2D1.1 (unlawful manufacturing, importing, exporting, or trafficking; attempt or conspiracy), § 2D1.11 (distributing, importing, exporting, or possessing a listed chemical; attempt or conspiracy), § 2D1.12 (prohibited flask or equipment; attempt or conspiracy), and § 2D1.13 (structuring chemical transactions or creating a chemical mixture to evade reporting or record keeping requirements;

presenting false or fraudulent identification to obtain a listed chemical; attempt or conspiracy) to provide an increase of [2-6] levels "if the offense involved a discharge or emission into the environment of a hazardous or toxic substance or created a substantial risk of environmental harm." Option Two would amend the commentary to §§ 2D1.1, 2D1.11, 2D1.12, and 2D1.13 to state that an upward departure may be warranted "if the offense involved a discharge or emission into the environment of a hazardous or toxic substance or created a substantial risk of environmental harm." We oppose both options.

We believe that manufacturing offenses that create a significant risk of serious environmental harm (at least in this country) occur too infrequently to warrant adding a specific offense characteristic. We believe that a departure would best address the rare instance when such a risk is created. The manufacture of methamphetamine always produces some waste that contains toxic substances. An increased sentence should be reserved for those cases where the toxic or hazardous substance poses a substantial risk of serious environmental harm.

Part D

Part D would amend the commentary to § 2D1.1 and § 3B1.3 (abuse of position of trust or use of special skill) to state that drug manufacturers ("cooks") may be subject to an enhancement under § 3B1.3. Part D also offers an option that would delete that part of § 3B1.3 that states that a sentence may not be enhanced for both use of a special skill and aggravating role. We oppose the amendment.

We believe that the revised commentary is unnecessary and conflicts with existing commentary on the definition of special skill. Not all drug manufacturing takes a significant amount of skill. For instance, converting cocaine powder into crack cocaine or free-base cocaine requires

neither much skill nor much training. The definition of "special skill" in the existing guideline is sufficient to alert a court that it may adjust a sentence when the manufacturing process involves some degree of sophistication.

We also oppose deleting the prohibition against adjusting a sentencing for both use of a special skill and aggravating role. There has been no justification for changing the existing policy to prevent double-counting.

Part E

Part E requests comment on three issues relating to punishing methamphetamine offenses. We believe that the issues can best be resolved after a comprehensive study of methamphetamine cases. As indicated above, we urge the commission to conduct such a study.

Amendment 11
(Indexing of New Offenses)

Part A

Part A of amendment 11 would add offenses created under the Health Insurance Portability and Accountability Act of 1996 to the statutory index contained in Appendix A.

1. The offense guideline applicable to a violation of 18 U.S.C. § 1347, the new offense of health care fraud (punishable by a maximum of ten years in prison (20 years if the violation results in serious bodily injury, and life imprisonment if the violation results in death)) would be the fraud guideline, § 2F1.1. We do not oppose this change.

2. The offense guideline applicable to violations of 18 U.S.C. § 669, the new offense of "theft or embezzlement in connection with health care" (punishable by a maximum of ten years in prison) would be the fraud guideline, § 2F1.1. We oppose this portion of amendment 11.

The new offense, entitled by Congress "theft or embezzlement in connection with health care" and placed in chapter 31 (embezzlement and theft) of title 18, United States Code, punishes "[w]hoever knowingly and willfully embezzles, steals, or otherwise without authority converts to the use of any person other than the rightful owner, or intentionally misapplies any of the moneys, funds, securities, premiums, credits, property, or other assets of a health care benefit program" with up to ten years in prison. The appropriate guideline for this offense is § 2B1.1, covering larceny, embezzlement, and other forms of theft, not § 2F1.1. Cf. 18 U.S.C. § 1347 (new offense entitled "Health care fraud," placed in chapter 63 (mail fraud) of title 18, United States Code, and violations of which to be sentenced under U.S.S.G. § 2F1.1, see Proposed Amendments, Pt. II, amendment 11(A)(1)).

3. The offense guideline applicable to a violation of 18 U.S.C. § 1035, the new offense of "false statements relating to health care matters" (punishable by a maximum of five years in prison) would be the fraud guideline, § 2F1.1. We do not oppose this change.

4. The offense guideline applicable to a violation of 18 U.S.C. § 1518, the new offense of "obstruction of criminal investigations of health care" (punishable by a maximum of 5 years in prison) would be the guideline for obstruction of justice, § 2J1.2. We do not oppose this change.

Part B

Part B of amendment 11 addresses changes made by the Omnibus Consolidated Appropriations Act for Fiscal Year 1997.

1. Section 648 of the Appropriations Act increased the statutory maximum term of imprisonment for 18 U.S.C. §§ 474 and 474A (counterfeiting offenses) from 12 years to 25 years by reclassifying these offenses from Class C offenses to Class B offenses. Section 474, covering the

possession, use, manufacture, or sale of counterfeiting equipment, is presently addressed by § 2B5.1. Section 474A, covering the possession of special paper or counterfeit deterrents, is not listed in the statutory index. Part B(1) of amendment 11 would reference § 474A to § 2B5.1. We do not oppose this change.

2. Section 648 also created a new offense involving fictitious obligations, that is, obligations that are completely made up but used as if real (e.g., Monopoly money used instead of currency), as opposed to being copies of real obligations (i.e., counterfeit). This offense also criminalizes the use of the mail, wire, radio, or other electronic communication to transfer the fake instruments. To be convicted, a defendant must have committed the offense with the intent to defraud. Part B(2) of amendment 11 would reference the new offense, 18 U.S.C. § 514, to the fraud guideline, § 2F1.1. We do not oppose this change.

Amendment 12
(Guidelines incorporating loss table of § 2F1.1)

Amendment 12, which would amend ten guidelines that rely on the loss table of § 2F1.1 to determine the offense level, is dependent upon the Commission's approval of amendment 18 in part I of the amendments published by the Commission for public comment. We recommend that the Commission take no action on amendment 12.

Amendment 18 in part I raises complicated and important issues about defining and calculating loss. We have recommended that the Commission postpone action on amendment 18 and take up the issues raised by that amendment after completion of work on this cycle's amendments. Because amendment 12 in part II is dependent upon Commission action on amendment 18 in part I, we make the same recommendation for amendment 12.

UNITED STATES SENTENCING COMMISSION
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March 26, 1997

MEMORANDUM:

TO: Chairman Conaboy
Commissioners
John Kramer
Paul Martin
John Steer
Jonathan Wroblewski
Judy Sheon
Jeanne Gravois

FROM: Mike Courlander

SUBJECT: Public Comment

Attached is recently-received public comment from the Department of the Treasury.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

ASSISTANT COMMISSIONER
(CRIMINAL INVESTIGATION)

MAR 21 1997

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002-8002

Dear Mr. Courlander:

Enclosed is an 8-page document prepared by Office of Chief Counsel, Criminal Tax Division. It contains technical explanations and legal citations which support our position on the proposed 1997 amendments to the Federal Sentencing Guidelines.

Simply summarized, the enclosed document expresses our long-standing position that criminal tax offenders should be sentenced to longer periods of incarceration at lower tax loss thresholds. We believe that the existing guidelines do not always provide adequate punishment for white collar crimes in general, and tax crimes in particular.

The document also expresses our position that the loss tables for tax offenses should be set at identical amounts as those for theft and fraud. By the same token, we oppose any amendment which would measure the offense level based on the amount of potential benefit to the perpetrator rather than on the potential harm to the victim(s).

Thank you for the opportunity to comment on these matters. If you need further information, please contact Ed Delehanty, Office of Tax Crimes (CP:CI:O:T) at 202-622-5755.

Sincerely,

Ted F. Brown

Ted F. Brown

Enclosure

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

MAR 21 1997

MEMORANDUM FOR TED F. BROWN, ASSISTANT COMMISSIONER
(CRIMINAL INVESTIGATION) CP:CI

FROM: Office of Chief Counsel
Criminal Tax Division

SUBJECT: Public Comment on Proposed 1997 Amendments

This document expresses the Internal Revenue Service's views on the proposed 1997 non-emergency amendments to the sentencing guidelines. As an overview, we wish to point out our perspective when examining sentencing issues relating to federal criminal tax statutes.

The Service has increased efforts to help taxpayers comply rather than relying solely on after the fact enforcement. However, we recognize that, despite our most aggressive efforts, some segments of the population refuse to voluntarily comply. To this end, tough but fair sentencing rules permit courts to send the message, tax offenses are serious, and intentional violators will be punished seriously.

With this view in mind, our comments are offered in regard to the following proposed amendments:

Proposed Amendment 9 - Relevant Conduct (§1B1.3)

Proposed Amendment 9 addresses the issue of whether acquitted conduct may be considered for sentencing purposes. Option 1(A) adds language providing that acquitted conduct shall be considered if established independently of evidence admitted at trial. Option 1(B) invites the use of acquitted conduct as a basis for an upward departure. Option 2 excludes conduct from consideration in determining the guideline range unless such conduct is established by the "clear and convincing" standard. Option 3 provides that acquitted conduct should be evaluated using the same standards as any other form of unconvicted conduct.

The Service supports the traditional view of sentencing, i.e., acquitted conduct may be considered by a sentencing court because a verdict of acquittal demonstrates a lack of proof sufficient to meet "beyond a reasonable doubt" standard, a standard higher than that required for considering relevant conduct at sentencing. United States v. Averi, 922 F.2d 765, 766 (11th Cir. 1991). Cf. United States v. Karterman, 60 F.3d 576, 580 (9th Cir. 1995). Consequently, we oppose any amendment that places a limit on the use of acquitted conduct either by definition or standard of proof.

Proposed Amendment 18(A) - Fraud, Theft, and Tax Offenses

Proposed Amendment 18(A), as set forth in the Proposed Guideline Amendments for Public Comment - Part I and the Federal Register (Vol. 62, No. 1, 152-19), the Sentencing Commission, inter alia, proposed to make the following changes to §§ 2B1.1, 2F1.1 and 2T1.4: (1) eliminate the more than minimal planning enhancement in §2B1.1 and §2F1.1 and other guidelines, build a corresponding increase into the loss tables, and create a two level enhancement like the one in § 2T1.4[1] for offenses involving "sophisticated means" and provide a level floor of 12 in such cases; (2) increase the base offense level of §2B1.1 (theft guideline) and §2B1.3 (property damage guideline) from level four to level six, and revise the loss tables in §2B1.1, §2F1.1 and §2T4.1 (theft, fraud and tax offenses, respectively); (3) change the current one level increments in the aforementioned loss tables to two level increments or to a combination of one and two level increments; (4) increase the severity of the three loss tables at higher loss amounts.

Subsequently, the Sentencing Commission prepared an "Unofficial Staff Alternative" combined loss table for §§ 2B1.1 and 2F1.1 which includes two options pertaining to "sophistication", and deletes more than minimal planning from both guidelines.

Considering the various loss table options and assuming that the proposed Unofficial Staff Alternative loss table will be modified so as to be applicable to the tax loss table, the latter is our preference. Our preference is based on the fact that, in most instances, tax losses result in higher offense levels in this table than in the existing tax loss table which is consistent with the Commission's intent of treating tax violations as serious crimes. We note that this proposed table incorporates two level increases as opposed to the one level increments in the present tax loss table but we do not find this objectionable. In fact, this table seems to provide a somewhat smoother progression through the loss amounts than the current table. Notwithstanding our endorsement of this proposed table if it is equally applicable to tax losses, if it is not, we oppose the Unofficial Staff Alternative on the ground that we strongly believe that identical loss amounts should be sentenced at least as severely under the tax loss table as losses are under the fraud and theft tables. Any change that would provide for higher sentences for identical amounts under the fraud and theft tables than under the tax table, would clearly send the wrong message as to the seriousness of criminal tax violations.

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[1] The same two level enhancement for sophisticated means which the proposed amendment addresses and identifies as appearing in §2T1.4, also appears in §2T1.1 and is set forth in the subsequent text of Proposed Amendment 18(A).

If the Commission considers its original loss table options under proposed amendment 18(A)2 as opposed to the Unofficial Staff Alternative, we favor the proposed tax table for § 2T4.1 as set forth in Option One. We believe that the tax table as set forth in Option One will result in more significant periods of confinement for most of our cases, a result which is vital to our ability to maintain an acceptable level of voluntary compliance. Nevertheless, by way of reiteration, our primary preference between the proposed tables is the one set forth as the Unofficial Staff Alternative.

Proposed Amendment 18(A)1 provides for the elimination of more than minimal planning in the fraud and theft guidelines and replacing it with a two level enhancement, with a floor level of 12, for sophisticated means. This would also include a definitional amendment, concerning "sophistication," to Application Note (f) of §1B1.1. Likewise, §§ 2T1.1 and 2T1.3 which currently contain a two level enhancement for "sophisticated means" would be amended, to provide for a floor level of 12. We are in favor of this amendment.

The Unofficial Staff Alternative also contains two options for sophistication. Option One of the Unofficial Staff Alternative is virtually the same as the sophistication enhancement of proposed amendment 18(A)1, and it contains a provision for conforming §2T1.1(b)(2). We assume there will also be a conforming aspect for §2T1.4(b)(2) and, accordingly, we endorse Option One of the Unofficial Staff Alternative. However, we oppose Option Two of the Unofficial Staff Alternative because it seems to limit its scope of sophistication to the use of foreign bank accounts and transactions, thus making it an unnecessarily restrictive enhancement. Nevertheless, if it is determined that the fraud guideline is to be amended to include a specific offense characteristic with a floor level of 16 for the use of foreign bank accounts or transactions to conceal, we believe that a similar change should be made to the tax guideline.

Another area concerning sophisticated means which we would like the Commission to address is the inclusion of clarifying language that the sophisticated means enhancement is offense specific rather than offender specific. In other words, the enhancement should be applied based on the nature of the scheme and not on the defendant's role in the scheme. This clarification would resolve a circuit conflict between the Second Circuit and the Sixth Circuit. The Second Circuit has held that a sophisticated means enhancement is to be applied regardless of whether the defendant devised the sophisticated means involved in the scheme. United States v. Lewis, 93 F.3d 1075 (2d Cir. 1996); United States v. Richman, 93 F.3d 1085 (2d Cir. 1996). By contrast, the Sixth Circuit has refused to apply the enhancement where the individual defendant's role in an admittedly complex scheme was nominal. United States v. Kraig, 99 F.3d 1361 (6th Cir. 1996). From our perspective, if a defendant takes advantage of a scheme involving the use of sophisticated means to conceal the nature or existence of an offense, the enhancement should be applied even if the defendant had no role in creating the sophisticated means. Typically, a defendant's

role in the offense is addressed by other guidelines. U.S.S.G. §§3B1.1 and 3B1.2.

Proposed Amendment 18(C)(8) - Issue for Comment

This issue for comment is, in essence, how to deal with an intended loss pursuant to §2F1.1. More broadly stated, the issue becomes whether the current rule should be changed to provide that a loss should be based primarily on the actual loss, with the intended loss available only as a possible ground for departure or whether, if the substance of the current rule is retained, the magnitude of the intended loss should be limited by the amount that a defendant realistically could succeed in obtaining. In other words, whether the intended loss should be limited by concepts of "economic reality" or "impossibility." We believe that the current rule should be retained with no modification for the amount that the defendant realistically could have succeeded in obtaining.

Basing loss on actual loss has the potential to reward defendants for factors beyond their control. For instance, a defendant who intended a large loss but who was discovered before he/she could consummate the offense would be treated less seriously than a defendant who was not discovered until after the offense was completed. Sentencing a defendant based on the intended loss still permits courts to take into account the value of pledged collateral in cases involving fraudulently obtained loans and actual performance in cases involving falsification to obtain contracts.

In addition, basing a determination of loss on the economic reality of a defendant's scheme would require courts to make speculative judgments and quite probably would lead to similarly situated defendants being treated differently.

Proposed Amendment 18(C)(10) - Issue for Comment

This issue for comment is, in essence, whether it is necessary to provide guidance for applying the current provision allowing departure where the loss amount over- or understates the significance of the offense within the meaning of Application Note 10 to §2F1.1. We believe that Application Note 10 is, in its present form, adequate to address the issue without encumbering the courts with restrictive definitions and special rules. However, we are concerned about the situation where the loss amount included pursuant to §1B1.3 (Relevant Conduct) is far in excess of the benefit personally derived by the defendant and the court might depart down to an offense level corresponding to the loss amount that the court determines to more appropriately measure the defendant's culpability. We believe that the potential harm or loss to the victim should be the measure of the seriousness of the offense rather than the actual benefit to the criminal. For instance, a defendant who prepares 100 fraudulent tax returns for $100 each, may only realize a personal benefit in the amount of $10,000 while causing hundreds of thousands of dollars of loss to the government.

Consequently, we oppose any language which advocates a downward departure based on the personal benefit derived by a defendant when it is less than the harm caused to the victim.

Proposed Amendments 24, 25 and 26 - Acceptance of Responsibility

Proposed Amendment 24 is purportedly designed to provide greater flexibility to the sentencing judge in determining whether a defendant qualifies for a reduction in sentence, particularly the additional one level reduction in subsection (b). Proposed Amendment 26 is designed to allow consideration of the additional one level reduction for defendants at all offense levels. We oppose both of these proposed amendments. In regard to Proposed Amendment 24, there is no evidence that the proposed changes are needed. Furthermore, the removal of the presently listed factors from §3E1.1(a) will make it more difficult for probation officers to make informed recommendations to trial courts concerning the appropriateness of this reduction.

We are even more opposed to Proposed Amendment 24 which, in essence, dramatically raises the acceptance of responsibility reduction in all cases from two levels to three levels. We note that the factors that would engage the additional one level reduction are of the type which would ordinarily be applicable to the basic two level reduction in its current form. More significantly, if the three level acceptance of responsibility is applied to all offense levels, the potential exits whereby a defendant's sentence can be reduced as many as two sentencing zones. For instance, if a defendant is sentenced at a Zone C offense level of 11 where he/she would serve at least four months, a three level acceptance of responsibility reduction would result in the defendant being sentenced at a Zone A offense level of 8 and possibly receiving no sentence of imprisonment. Once again, this sends the wrong message in regard to all serious crimes and, specifically, to tax crimes where the sentences often fall within the sentencing zones set forth in the foregoing example.

Proposed Amendment 25 resolves a conflict in the circuits by providing an addition to Application Note 4 that commission of an offense while awaiting trial or sentencing, whether or not the new offense is similar to the instant offense, ordinarily indicates that a defendant has not accepted responsibility for the instant offense. We support this amendment which will resolve the conflict consistent with the holding in United States v. Watkins, 911 F.2d 983 (5th Cir. 1990).

Proposed Amendment 28(6) - Issue for Comment

The issue for comment is whether and how to address the circuit conflict of whether "victim of the offense" under §3A1.1 refers only to the victim of the offense of the conviction or to the victim of any relevant conduct. If this issue is to be addressed, we favor the view of the Second Circuit in United States v. Echevarria, 33 F.3d 175 (2d Cir. 1994) which held that a vulnerable victim need not be the victim of the offense of