Public Comment

Proposed Amendments

2000

COMMISSION MEETING

March 2000

March 23

8:30 am	Reports to the Commission
9:30 am	Public Hearing (nine registered witnesses)
12:00 pm	Lunch
1:00 pm	Briefing Session and Deliberations
	NET Act
	Telephone Cloning
	Identity Theft
3:30 pm	Probation Officers Advisory Group
4:30 pm	Adjourn

March 24

8:30 am	Briefing Session and Deliberations
	Identity Theft (continued)
	Firearms
Noon	Lunch
1:00 pm	Briefing Session and Deliberations
	Circuit Conflicts Drug Sales in Protected Locations Bankruptcy Frauds Section 5K.2.0 Post Conviction Rehabilitation Departures
3:00 pm	Adjourn

COMMISSION MEETING

April 2000

April 3

8:30 am	Briefing Session and Deliberations
	Circuit Conflicts Aberrant Behavior Departures Dismissed/Uncharged Conduct
	Sexual Predators
Noon	Lunch
1:00 pm	Briefing Session and Deliberations
	Sexual Predators (continued)
2:30 pm	Public Meeting and Vote
	Technical Amendments Methamphetamine Telemarketing No Electronic Theft Act Circuit Conflicts
4:30 pm	Adjourn

April 4

8:30 am	Briefing Session and Deliberations
	All Remaining Issues and Revisions
Noon	Lunch
1:00 pm	Briefing Session and Deliberations
	All Remaining Issues and Revisions

2:30 pm Public Meeting and Vote

Circuit Conflicts
Firearms
Telephone Cloning
Identity Theft
Sexual Predators

4:30 pm Adjourn

April 20

10:00 am Possible meeting via teleconferencing

Noon Adjourn

UNITED STATES SENTENCING COMMISSION

Upcoming Meetings*

March 23-24	Commission Meeting Washington, DC
April 3-4	Commission Meeting Washington, DC
(April 20)	Commission Meeting Via Teleconference
May 3-5	USSC/Federal Bar Association Sentencing Workshop Clearwater, Florida
May 22-25	USSC Retreat for Commissioners Airlie Center in Warrenton, Virginia
June 4-6	Meeting with the Criminal Law Committee Boston, Massachusetts
July 8	American Bar Association New York, New York
Sept. 10-13	Sentencing Institute Phoenix, Arizona
(Sept. 14)	Commission Regional Meeting Phoenix, Arizona
(Oct. 10-11)	Commission Meeting Washington, DC
Oct. 12-13	Economic Crimes Symposium Arlington, Virginia

* Items listed in parentheses are tentative dates.

UNITED STATES SENTENCING COMMISSION
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March 16, 2000

To: Commissioners
Diana Murphy, Chair
Ruben Castillo, Vice Chair
Sterling Johnson, Jr.
Joe Kendall
Michael O'Neill
William Sessions, Vice Chair
John Steer, Vice Chair

Ex Officio Commissioners
Michael Gaines
Laird Kirkpatrick

From: Timothy McGrath, Staff Director

Re: Public Comment

Enclosed are revisions to the NET Act options following your instructions at the March 10th meeting, staff summaries of public comment by topic, and finally, the actual public comment indexed by topic and found under the final tab labeled "Public Comment." The deadline for submitting comment was March 10, 2000.

The Commission is scheduled to conduct its annual public hearing on March 23, 2000, beginning at 9:30 a.m. The following witnesses have asked to testify and copies of their testimony are due by close of business today:

- James K. Robinson, Assistant Attorney General, Dept. of Justice (NET Act, Telemarketing Fraud, Sexual Predators Act, Identity Theft & Aberrant Behavior)
- Jon Sands and Tom Hillier, Federal Public and Community Defenders (circuit splits and firearms)
- Julie Stewart (President), William Bowman, Dr. Arthur Curry, FAMM (Methamphetamine & Drug Guidelines)

- Bob Krueger, Vice President of Enforcement, Business Software Alliance (NET Act)

- David Quam, General Counsel, International AntiCounterfeiting Coalition (NET Act)

- James G. Huse, Inspector General, Social Security Administration (Identity Theft)

- Roseanna DeMaria, Senior Vice President Business Security, AT&T Wireless (Telephone Cloning)

- Greg Regan, Special Agent in Charge, & Mary Riley, Assistant Special Agent in Charge, U.S. Secret Service (Identity Theft & Telephone Cloning)

Once we receive the testimony, it too will be summarized and provided prior to the hearing on Thursday. In many cases, however, the written testimony will substantially match the public comment that is provided in the enclosed binder.

Finally, also included is the most recent legislative update containing the testimony submitted by the Chair in support of the Commission's Fiscal Year 2001 Budget. Should you have any questions, please contact me at (202) 502-4556.

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March 15, 2000

To: Commissioners
Diana E. Murphy, Chair
Ruben Castillo, Vice Chair
Sterling Johnson, Jr.
Joe Kendall
Michael O'Neill
William Sessions, Vice Chair
John Steer, Vice Chair

Ex Officio Commissioners
Michael Gaines
Laird C. Kirkpatrick

From: Ken Cohen

Re: Third Revised NET Act Amendment Options

Attached you will find a copy of the third revised NET Act amendment options. Pursuant to the Commission's instruction at last week's meeting, this latest version is pared down to two options, Option 3 and Option 4. In addition, the following substantive changes were made to Option 3 and Option 4:

Option 3

- The order of the manufacturing, importing, uploading (MIU) enhancement and the downward adjustment for offenses not committed for commercial advantage or private financial gain were reversed. As a result, the proposed downward adjustment will have an effect on the final offense level regardless of whether the minimum offense level proposed in the MIU enhancement takes effect.

Option 4

- The order of the manufacturing, importing, uploading (MIU) enhancement and the downward adjustment for offenses not committed for commercial advantage or private financial gain were reversed. As a result, the proposed downward adjustment will have an effect on the final offense level regardless of whether the minimum offense level proposed in the MIU enhancement takes effect.

- A downward departure consideration for substantial overstatement of pecuniary harm was added. The departure is structured to apply only in cases in which the 2-level downward adjustment is inadequate to account for the overstatement of pecuniary harm. However, the court may not reduce the offense level below the offense level which would result if the retail value of the infringing item were used in the calculation under subsection (b)(1).

THIRD REVISED PROPOSED AMENDMENT: Implementation of the NET Act

Third Revised Proposed Amendment:

(3) Option 3:

§2B5.3. Criminal Infringement of Copyright or Trademark

(a) Base Offense Level: ~~6~~ [8]

(b) Specific Offense Characteristics

(1) If the ~~retail value of the infringing items~~infringement amount exceeded $2,000, increase by the ~~corresponding~~ number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to that amount.

(2) If the offense involved the manufacture, importation, or uploading of infringing items, increase by [2] levels. If the resulting offense level is less than level [12], increase to level [12].

(3) If the offense was not committed for commercial advantage or private financial gain, decrease by [2] levels, but not less than level [6][8]].

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

"Commercial advantage or private financial gain" means the receipt, or expectation of receipt, of anything of value, including other protected works.

"Infringed item" means the copyrighted or trademarked item with respect to which the crime against intellectual property was committed.

"Infringement amount" means the approximate pecuniary harm to the copyright or trademark owner caused by the offense.

"Infringing items" means the items that violates the copyright or trademark laws ~~(not the legitimate items that are infringed upon)~~.

"Uploading" means making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item.

2. *Determination of Infringement Amount.—This note applies to the determination of the infringement amount for purposes of subsection (b)(1).*

(A) *Use of Retail Value of Infringed Item.—The infringement amount is the retail value of the infringed item, multiplied by the number of infringing items, in a case involving any of the following:*

(i) *The infringing item is identical to, or substantially equivalent from, or the infringing item is a digital or electronic reproduction of, the infringed item.*

(ii) *The retail price of the infringing item is not less than [75%] of the retail price of the infringed item.*

(iii) *The retail value of the infringing item is difficult or impossible to determine without unduly complicating or prolonging the sentencing proceeding.*

(iv) *The offense involves the illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511. (In a case involving such an offense, the "retail value of the infringed item" is the price the user of the transmission would have paid to lawfully receive that transmission, and the "infringed item" is the satellite transmission rather than the intercepting device.)*

(v) *The government provides sufficient information to demonstrate that the retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than does the retail value of the infringing item.*

(B) *Use of Retail Value of Infringing Item.—The infringement amount is the retail value of the infringing item, multiplied by the number of infringing items, in any case not covered by subdivision (A) of this Application Note, including a case involving the unlawful recording of a musical performance in violation of 18 U.S.C. § 2319A.*

(C) *Retail Value Defined.—For purposes of this Application Note, the "retail value" of an infringed item or an infringing item usually is the retail price of that item in the market in which it is sold.*

(D) *Determination of Infringement Amount in Cases Involving a Variety of Infringing Items.—In a case involving a variety of infringing items, the infringement amount is the sum of all calculations made for those items under subdivisions (A) and (B). For example, if the defendant sold both counterfeit videotapes that are identical in quality to the infringed videotapes and obviously inferior counterfeit handbags, the infringement amount, for purposes of subsection (b)(1), is the sum of the infringement amount calculated with respect to the counterfeit videotapes under subdivision (A)(i) (i.e., the quantity of the infringing videotapes multiplied by the retail value of the infringed videotapes) and the infringement amount calculated with respect to the counterfeit handbags under subdivision (B) (i.e., the quantity of the infringing handbags multiplied by the retail value of the infringing handbags).*

3. *Manufacturing, Importing, and Uploading Enhancement.—With respect to uploading, subsection (b)(2) applies only to uploading with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item. For example, this subsection applies in the case of illegally uploading copyrighted software to an Internet site, but it does not apply in the case of downloading or installing that software on a hard drive on the defendant's personal computer.*

4. *Application of §3B1.3.—If the defendant engaged in de-encryption or circumvented some other technological security measure in order to gain initial access to an infringed item, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply.*

5. *Upward Departure Considerations.—If the offense level determined under this guideline substantially understates the seriousness of the offense, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:*

   (A) The offense involved the conscious or reckless risk of serious bodily injury.

   (B) The offense involved substantial harm to the reputation of the copyright or trademark owner.

Background: This guideline treats copyright and trademark violations much like theft and fraud. ~~Note that the enhancement is based on the value of the infringing items, which will generally exceed the loss or gain due to the offense.~~ Similar to the sentences for theft and fraud offenses, the sentences for defendants convicted of intellectual property offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, similar to the loss enhancement in the theft and fraud guidelines, the infringement amount in subsection (b)(1) serves as a principal factor in determining the offense level for intellectual property offenses.

Subsection (b)(1) implements section 2(g) of the No Electronic Theft (NET) Act by using the retail value of the infringed items, multiplied by the number of infringing items, to determine the pecuniary harm for cases in which use of the retail value of the infringed item is a reasonable estimate of that harm. For cases referred to in Application Note 2(B), the Commission determined that use of the retail value of the infringed item would overstate the pecuniary harm or otherwise be impracticable or inappropriate. In these types of cases, use of the retail value of the infringing item, multiplied by the number of those items, is a more reasonable estimate of the resulting pecuniary harm.

~~The~~Section 2511 of title 18, United States Code, as amended by the Electronic Communications Act of 1986, prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.

(4) Option 4:

§2B5.3. Criminal Infringement of Copyright or Trademark

(a) Base Offense Level: **6[8]**

(b) Specific Offense Characteristic

(1) (A) If the retail value of the ~~infringing items~~infringed item, multiplied by the quantity of infringing items, exceeded $2,000, increase by the ~~corresponding~~ number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to that amount; or

(B) if (i) the offense involved a copyright violation under 18 U.S.C. § 2319A; and (ii) the retail value of the infringing item, multiplied by the quantity of infringing items, exceeded $2,000, increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to that amount.

(2) If the offense involved the manufacture, importation, or uploading of infringing items, increase by [2] levels. If the resulting offense level is less than level [12], increase to level [12].

(3) If (A) the offense was not committed for commercial advantage or private financial gain; (B) the offense involved greatly discounted merchandise; or (C) the quality or performance of the infringing item was substantially inferior to the quality or performance of the infringed item, decrease by 2 levels, but not below level **[6][8]**.

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

"Commercial advantage or private financial gain" means the receipt, or expectation of receipt, of anything of value, including other protected works.

"Greatly discounted merchandise" means an infringing item the retail price of which is not more than [25%] of the retail price of the infringed item.

"Infringed items" means the copyrighted or trademarked items with respect to which the crime against intellectual property was committed.

"Infringing items" means the items that violate the copyright or trademark laws (not the

legitimate items that are infringed upon).

"Uploading" means making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item.

2. *Determination of Retail Value.—For purposes of subsection (b)(1), the "retail value" of an infringed item or an infringing item usually is the retail price of that item in the market in which it is sold.*

In a case involving the illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511, the "retail value of the infringed items", for purposes of subsection (b)(1)(A), is the price the user of the transmission would have paid to lawfully receive that transmission. (In such a case, the "infringed items" are the satellite transmissions rather than the intercepting devices.)

In a case to which both subdivisions (1)(A) and (1)(B) of subsection (b)(1) apply, the total retail value for purposes of that subsection is the sum of the calculations made under those subdivisions.

3. *Manufacturing, Importing, and Uploading Enhancement.—With respect to uploading, subsection (b)(2) applies only to uploading with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item. For example, this subsection applies in the case of illegally uploading copyrighted software to an Internet site, but it does not apply in the case of downloading or installing that software on a hard drive on the defendant's personal computer.*

4. *Application of §3B1.3.—If the defendant engaged in de-encryption or circumvented some other technological security measure in order to gain initial access to an infringed item, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply.*

5. *Departure Considerations.—*

   (A) Upward Departure Considerations.—If the offense level determined under this guideline substantially understates the seriousness of the offense, an upward departure may be warranted. The following is a non-exhaustive list of circumstances that may warrant an upward departure:

      (i) The offense involved the conscious or reckless risk of serious bodily injury.

      (ii) The offense involved substantial harm to the reputation of the copyright or trademark owner.

   (B) Downward Departure Considerations.—If the offense level determined under this guideline substantially overstates the seriousness of the offense, a downward departure may be warranted. For example, a downward departure may be warranted if (i) the amount determined under subsection (b)(1) substantially overstates the pecuniary harm to the copyright or trademark owner, and (ii) the adjustment under subsection (b)(3)

applies but, in light of unusual circumstances, the weight of the adjustment (i.e., two levels) is inadequate to account for the overstatement of pecuniary harm. See §5K2.0 (Grounds for Departure). However, in the case of a downward departure based on the overstatement of pecuniary harm, the court may not reduce the offense level below the offense level that would result if the retail value of the infringing item were used in the calculation under subsection (b)(1).

Background: ~~This guideline treats copyright and trademark violations much like fraud. Note that the enhancement is based on the value of the infringing items, which will generally exceed the loss or gain due to the offense.~~

Subsection (b)(1) implements section 2(g) of the No Electronic Theft (NET) Act of 1997, which directs the Commission to ensure that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the intellectual property offense was committed.

~~The~~Section 2511 of title 18, United States Code, as amended by the Electronic Communications Act of 1986, prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.

SUMMARY OF PUBLIC COMMENT

Amendment 1: Implementation of the No Electronic Theft Act

- Business Software Alliance (BSA)

  BSA opposes Options 1 and 2 because: (1) Option 1 would result in unwarranted sentencing disparity in cases involving copyright infringement; and (2) Option 2 would reward the pirate of the infringed items based on the price charged by the defendant.

  BSA believes that Option 3 is viable but would prefer Option 4 (base offense level 8) with the inclusion of specific offense characteristics (b)(1) and (b)(3) as proposed in Option 4. BSA recommends that Application Note 5 (iii) of Option 4 be amended to also apply when the offense involves substantial harm to the market of the infringed item. Incorporating this additional language to Application Note 5(iii) would account for the harm to the intellectual property owner that results from unauthorized reproduction, distribution, performance or display of a copyrighted work before the work is commercially released into the open market.

  BSA also recommends removal of the word "usually" from Application Note 2 of Option 4 as it may mislead some courts to believe that they can substitute other benchmarks in lieu of the retail price standard. BSA further recommends that Option 4 should (1) add a specific offense characteristic increase where the offense involves a conscious or reckless risk of serious bodily injury; and (2) eliminate (b)(2) (two-level decrease) as a specific offense characteristic because it rewards the defendants for discounting their wares to prices that are substantially the same in quality and performance.

  If the Commission decides against eliminating (b)(2) in Option 4, then BSA recommends that the Commission add an Application Note 6 to Option 4 that distinguishes the quality or performance of an infringed item that is digitally or electronically reproduced from an infringed item that is substantially inferior.

- Judicial Conference of the United States, Committee on Criminal Law (CLC)

  No comment.

- U.S. Department of Justice, Criminal Division (DOJ)

  No comment.

- Federal Public and Community Defender Organization (FPDO)

  FPDO favors Option 3 of the amendment because it is easier to apply and it best accounts for harm not readily quantifiable. The formula in Option 3 adequately captures lost sales because the retail value of the infringed item is used. FPDO opposes increasing the base offense level to eight in order to factor in "more than minimal planning." The congressional concern with copyright and trademark infringement has not been repeated acts over an extended period, but instead has been the increased risk to copyright and trademark owners because of the widespread availability of computers. FPDO recommends that the base offense level remain at six. FPDO supports the proposed enhancements for manufacturers and uploaders, and for pre-release of infringed items. FPDO recommends that the proposed enhancement for deceiving the purchaser should be reduced from two levels to one level.

- International AntiCounterfeiting Coalition (IACC)

  IACC supports Option 4 but recommends eliminating the two-level decrease under (b)(2) because it rewards counterfeiters and pirates that sell substantially inferior merchandise at substantially reduced prices. If the Commission decides not to eliminate (b)(2), IACC recommends as an alternative that the Commission amend Option 4 to restrict the application of the two-level decrease to cases in which the offense involved greatly discounted merchandise and the quality or performance of the infringing item was substantially inferior to the quality or performance of the infringed item.

- Microsoft

  Microsoft supports Option 4 of the Amendment. Microsoft recommends that the Commission adopt Option 4 with the exception of (b)(2)(C) based on the same reasons cited by the Business Software Alliance and the International AntiCounterfeiting Coalition.

- Practitioners' Advisory Group (PAG)

  PAG supports Option 3 because they find it to be the only option that both appropriately deals with cases in which there is little or no loss to the copyright or trademark owner and is focused more directly on the harm from the kind of offense that concerned Congress in the No Electronic Theft Act. However, PAG is of the opinion that some changes to Option 3 are necessary - believing that there is no need to both increase the base offense level and add new enhancements, PAG favors adding the new enhancements because they are aimed directly at the conduct that increases the harm from copyright and trademark infringement offenses. PAG

further opines that the enhancement found at proposed specific offense characteristic (b)(3) ("[i]f a purchaser of an infringing item actually believed such item was the infringed item") should result in only a one-level increase instead of the proposed two-level increase.

SUMMARY OF PUBLIC COMMENT

Amendment 2: Temporary, Emergency Telemarketing Fraud Amendment

- Judicial Conference of the United States, Committee on Criminal Law (CLC)

  Inasmuch as there were no serious objections raised to the passage of the emergency amendments in 1998 and CLC is not aware of any problems having arisen in the interim, CLC unanimously supports the enactment of these amendments as permanent amendments.

- U.S. Department of Justice, Criminal Division (DOJ)

  No comment.

- Federal Public and Community Defender Organization (FPDO)

  Noting its opposition to several features of amendment 587 at the time it was promulgated, FPDO asks the Commission to revisit those features. If the Commission chooses not to revisit this matter, FPDO recommends that the Commission repromulgate amendment 587.

- Practitioners' Advisory Group (PAG)

  Noting its opposition to several features of amendment 587 at the time it was promulgated, PAG asks the Commission to revisit those features. PAG then noted, "The Commission is not in a position to do so during this cycle, so it has no choice but to re-promulgate the amendment. Not to do so would be irresponsible on the Commission's part." (PAG March 7, 2000 Letter to The Honorable Diana E. Murphy at 3.)

SUMMARY OF PUBLIC COMMENT

Amendment 3: Implementation of the Sexual Predators Act

- Judicial Conference of the United States, Committee on Criminal Law (CLC)

  No comment.

- U.S. Department of Justice, Criminal Division (DOJ)

  No comment.

- Federal Public and Community Defender Organization (FPDO)

  FPDO supports Part A and recommends that the enhancement for the retail value of the material under §2G3.1(b)(1) continue to use the loss table in the fraud guideline. Since the current enhancement is clear and allows for uniform increases for large-scale commercial enterprises, FPDO believes an encouraged upward departure for large-scale commercial enterprises would only result in increased litigation and sentencing disparities. FPDO however recommends two modifications to §2G3.1(b)(1)(B): (1) reduce the enhancement from five levels to three levels "to recognize individuals who engage in conduct that is significantly less harmful than conduct to which the five-level enhancement applies" (FPDO March 10, 2000 Statement submitted to the United States Sentencing Commission at 24); and (2) clarify that the proposed amendment to §2G3.1(b)(1)(B) is limited to "quid pro quo" transactions or understandings, not just to transactions in general.

  FPDO supports §2G3.1(b)(1)(C) but recommends adjusting the age requirement from 18 to 16 years in order to make this guideline consistent with other sexual abuse guidelines. FPDO opposes an additional enhancement for distribution of obscene matter that does not involve pecuniary gain, anything of value, or anything to a minor.

  FPDO supports Part B, but recommends an additional cross reference to §2A6.1 (Threatening or Harassing Communications) depending on the underlying conduct. FPDO also supports Part C, but with a recommendation that the enhancement under §2G2.4(b)(2) not depend on the number of visual depictions because of the difficulty in quantifying the amount of visual depictions and their harm. FPDO supports Part D but recommends that the Commission promulgate revisions set forth in Part A to §2G2.2(b)(2), based on the same reasons cited earlier by FPDO. FPDO supports Part E and recommends a two level computer enhancement for computer or Internet

device used to locate children apply to victims over 16 years old. The Commission should also seek further clarification of what is meant by "misrepresentation of identity."

- Practitioners' Advisory Group (PAG)

  PAG does not have sufficient experience with offenses covered by the Act to enable it to comment. However, it points out that any amendment to §§2A3.1 through 2A3.4 will have "the greatest impact" on Native Americans.

SUMMARY OF PUBLIC COMMENT

Amendment 4: Offenses Relating to Methamphetamine

- Judicial Conference of the United States, Committee on Criminal Law (CLC)

  CLC favors Option 1 because it includes the current definitions for methamphetamine (which should be retained as they provide the court a full range of options in cases where lab reports containing an analysis of the purity of the methamphetamine are available) and alters the drug quantity table to make it consistent with the increased statutory penalties.

- U.S. Department of Justice, Criminal Division (DOJ)

  DOJ favors Option 1 because, in establishing a 10-to-1 quantity ratio of methamphetamine in mixture versus actual form, it is consistent with the statutory scheme. DOJ points out several problems with Option 2, including the resulting trumping of the guideline sentence by the mandatory minimum sentence in low-purity cases, the fact that it is at odds with the statute's dual sentencing structure for methamphetamine offenses, and the probability of litigation resulting from the presumed purity level.

  Responding to the issue for comment concerning phenylacetone/P2P, DOJ is of the opinion that increased guideline penalties for offenses involving methamphetamine-related chemicals are needed and is willing to work with the Commission in an attempt to develop appropriate increase levels.

- Families Against Mandatory Minimums Foundation (FAMM)

  FAMM opposes any amendments relating to methamphetamine. In doing so, FAMM attempts to rebut the bases for the first two proposed amendments by asserting that (1) there is no evidence methamphetamine offenses are under-punished; (2) methamphetamine offenses may in fact be over-punished (as, they contend, demonstrated by "disproportionate reliance on ameliorative provisions" and the apparent over-reliance on meth-mix penalties rather than the harsher meth-actual penalties); (3) the deterrence rationale and other law enforcement considerations do not support increased sentences; and (4) past practices should not impede the evolution of the guidelines.

- Federal Public and Community Defender Organization (FPDO)

  FPDO recommends that the Commission adopt Option 1 so as to be consistent with the manner in which the Commission treats other drugs. FPDO also suggests that the Commission undertake a comprehensive reexamination of the drug quantity table and determine whether it should be tied to the congressionally determined quantities that trigger mandatory minimums.

- Joseph R. Meiss (Private Citizen)

  Mr. Meiss recommends that the Commission should only change the calculations in the Drug Quantity Table in §2D1.1 for methamphetamine substance to conform the quantities for those drugs to the quantities that now trigger the statutory five- and ten-year mandatory minimums.

- Practitioners' Advisory Group (PAG)

  Arguing the absence of any apolitical reason for amending the guidelines, PAG urges the Commission to take no action now to alter the methamphetamine guidelines. Instead, it encourages the Commission to reexamine all of the issues surrounding drug sentencing and, if changes are deemed necessary, to postpone making such until a more comprehensive examination of drug policy is undertaken.

  "Any changes in the methamphetamine guidelines should await a broader review of drug sentencing by this Commission. The current proposals are unnecessary, were not mandated by Congress, are inconsistent with Congressional policy toward first offenders and might not be consistently enforced by judges and prosecutors whose current practices belie any need for harsher guidelines. No action should be taken on this issue." (PAG March 7, 2000 Letter to The Honorable Diana E. Murphy at 8.)

SUMMARY OF PUBLIC COMMENT

Amendment 5: Implementation of the Identity Theft and Assumption Deterrence Act

- Judicial Conference of the United States, Committee on Criminal Law (CLC)

  CLC believes that these amendments involve numerous issues that could benefit from further analysis. However, comparing the options presented, all but one member of CLC favors Option 1 because it appears to be subject to easier application.

- U.S. Department of Justice, Criminal Division (DOJ)

  No comment.

- Federal Public and Community Defender Organization (FPDO)

  FPDO recommends that the Commission not decide this matter at this time because there have not been enough prosecutions under this new offense to warrant a change in the guidelines. FPDO recommends, pending further study of the matter by the Commission, that the Commission treat the unauthorized use of identification means as a basis for upward departure.

  If the Commission elects not to defer the matter, FPDO supports Option 1 with a recommendation to make the floor for the enhancement level 10. Option 1 targets those who manufacture unauthorized means of identification and those who possess five or more unauthorized means of identification. FPDO believes that the number of unauthorized identification means, rather than the number of victims, is a better measure. Enhancements similar to those in Option 1 should not be added to theft, money laundering and tax fraud guidelines because it would be premature.

  FPDO opposes adding a Chapter Three adjustment to account for the unauthorized use of an "identification means" because Option 1 is a better response to the Congressional mandate. If the Commission defers action on this matter, FPDO recommends an encouraged departure factor for the unauthorized use of an identification means as an interim step. FPDO recommends that no changes be made regarding the presumed loss amount from a stolen credit card or regarding the language defining "access device." FPDO believes that an offense-level enhancement for a defendant previously convicted of a similar offense would be unfair double counting because such prior convictions are considered for criminal

history purposes.

- U.S. Postal Inspection Service, Office of the Counsel (POSTAL)

  Because it does not believe that Option 1 captures the scope of criminal activity as contemplated by Congress, POSTAL opposes this Option. POSTAL supports Option 2 because it tracks the statutory elements and covers the key elements of identity offenses, i.e., harm to victims. In regard to Option 2, POSTAL (1) supports the proposed minimum offense level of 12; and (2) "agree[s] with the proposed enhancement language regarding 'more than minimal' harm to the victim as clarified in the application notes, but feel the 'production or transfer' enhancement based on the number of identity items should start at three or more such items, as opposed to the proposed six items." (POSTAL March 10, 2000 Letter to the United States Sentencing Commission at 2.)

  POSTAL also believes that, because mail theft and mail fraud adversely impact the U.S. mail and postal systems as an essential government function, "a person's mailing address should be included in the guideline language as found in the definition of 'means of identification' as stated in 18 U.S.C. § 1028(d)(3)(C)." (POSTAL March 10, 2000 Letter to the United States Sentencing Commission at 2).

  POSTAL is in favor of a specific offense characteristic to address the offense element of multiple victims in both the theft and fraud guidelines, and, if such is adopted, POSTAL believes it should be a graduated offense level increase based on the number of victims. In the alternative, POSTAL believes that a separate specific offense characteristic should be added to address the number of unauthorized identification means involved in the offense. If the identity offense involves five or more victims or means of identification, POSTAL agrees the offense level should be increased.

  POSTAL also supports a change in the alternate loss valuation for credit card offenses to the limit of unused credit on each card stolen and used, and agrees that a $1,000 valuation as the minimal loss for credit cards that have been stolen but not used is appropriate.

- Practitioners' Advisory Group (PAG)

  PAG urges the Commission to engage in further study before a guideline amendment addressing the Act is implemented because "[u]ntil more information is available regarding the types of cases that will be brought under this statute, it would be premature to amend the guidelines based on assumptions regarding the offenses that may be charged under it." (PAG March 7, 2000 Letter to The Honorable Diana E. Murphy at 11.) However, should the Commission decide to go forward with

amending the guidelines, PAG recommends that the Commission provide for a general upward departure under Chapter Five of the guidelines when an offense involving the use of unauthorized means of identification causes harm not adequately taken into account in the guidelines.

PAG opposes both of the proposed amendments to the fraud guidelines because both have the potential to create large and unwarranted disparities in sentencing under the guidelines. It was noted, nonetheless, that if one of the options is adopted, "the Commission should consider modifying the amendment to provide for an upward adjustment of one rather than two offense levels. Additionally, PAG recommends that the minimum offense level be set at eight rather than a higher level to minimize the possibility of unwarranted disparities in sentencing under the amended guideline. Finally, PAG suggests limiting the application of any amended guideline to cases involving unauthorized means of identification and individual victims, as Option 1 does, to make it more likely that sentencing will be affected under the amendment only where the harm that the Act is intended to target actually occurred." (PAG March 7, 2000 Letter to The Honorable Diana E. Murphy at 14.)

- Social Security Administration, Office of the Inspector General (SSA)

The concern of SSA is that the guidelines adopted by the Commission adequately address the egregious conduct the agency investigates, involving misuse of social security numbers (SSN). Specific examples of the contemplated egregious conduct are provided.

Without indicating which of the two proposed options it favors, SSA responded to the Commission's request for comment on several issues relating to this amendment:

Issue 1: *SSA believes the Commission should consider including an additional provision in the proposed enhancement that would increase sentences based on the number of individual victims involved in the offense. SSA provides suggestions as to specific level increases.*

Issue 2: *SSA agrees that a similar sentencing increase should be provided for identity theft conduct in any or all other economic crime guidelines so as to help ensure defendants receive sentences commensurate with their crimes.*

Issue 3: *While willing to defer to those with more experience, SSA is of the opinion that a general adjustment to Chapter Three may be best way to proceed. However, if such a general adjustment is adopted, SSA believes "there should be a table or tiered adjustment based on the number of unauthorized identification means involved in the offense." (SSA March 10,*

2000 Letter to United States Sentencing Commission at 3.)

Issue 4: *SSA is "concerned about encouraging departures in sentencing guidelines 'if the guideline range does not adequately reflect the seriousness of the offense conduct.' Our concern is based on the basis of the decision as to when the guideline range does not adequately reflect the seriousness of the offense conduct. If this were adopted, we would suggest that the reasons for the departure must be clearly stated and that the amendment to Chapter 5 clearly state what is and is not acceptable as a basis for departure." (SSA March 10, 2000 Letter to United States Sentencing Commission at 3.)*

Issue 5: *SSA is unsure of the effect of the proposal contained in this issue. However, it pointed out that, because cases involving a defendant's possession of multiple means of identification do not always involve loss, requiring a minimum loss per access device may adversely affect identity theft prosecutions.*

Issue 6: *SSA believes the Commission should provide an enhancement in the relevant Chapter Two guideline or guidelines if a defendant has previously been convicted of conduct similar to identity theft. It also suggests specific level increases and suggests that the enhancement should be tiered. SSA is of the opinion that the enhancement should require a minimum offense level.*

- Department of the Treasury (TREASURY)

TREASURY believes stronger penalties are warranted for identity theft because the incidence of such is on the rise. TREASURY's consideration of the proposed amendment options are guided by their concerns that (1), because the length of sentences under §2F1.1 is largely dependent upon the monetary loss amount, the guideline does not adequately account for the significant non-monetary harms suffered by victims of identity theft; and (2) §2F1.1 fails to provide greater penalties for identity thieves who produce, transfer, or unlawfully possess multiple means of identification.

While supporting the intent of Option 1, TREASURY is concerned that that option, as drafted, may be "overly confusing" in its application, e.g., the definition of "unauthorized means of identification" is confusing and may cause the courts difficulty in distinguishing it from the guideline definition of "means of identification." However, TREASURY finds that Option 2 addresses TREASURY's concerns in a simple and direct manner.

In regard to Option 2, TREASURY:

(i) *favors a floor of 12 because, with such, it will be more probable that defendants convicted of identity theft will be sentenced to incarceration;*

(ii) *is of the opinion that the application notes should clarify that even when the stolen means of identification is used to defraud an institution or the government, the non-monetary harm to the individual to whom the identification rightfully belonged should be considered (TREASURY provides an example of such harm);*

(iii) *believes the proposed two-level increase in Option 2 for offenses involving 6 or more identification documents can be improved by (a) including "unlawful possession" of 6 or more documents as a condition triggering the increase, and (b) providing for specific additional increases, cumulative to the two-level increase, for cases involving specific numbers of identification documents or means rather than simply encouraging courts to depart upward in such cases (TREASURY provided examples of specific level increases, e.g., one-level increase for offenses involving more than 10 means of identification, two-level increase for cases involving more than 50, etc.); and*

(iv) *suggests an alternative basis, actually taken from Option 1, for the application of Option 2's two-level increase for harm to an individual's reputation or credit standing. This suggestion would result in the application of the increase "if the offense involved <u>either</u> (1) harm to an individual's reputation or credit standing, or inconvenience related to the correction of records or restoration of reputation [taken from Option 2]; or (2) the use of an individual's identifying information to create new identification documents or means of identification without the victim's knowledge or permission [taken from Option 1]." (TREASURY March 10, 2000 Letter to The Honorable Diana E. Murphy at 3.). TREASURY is willing to work with the Commission in determining whether this proposed combination of Options 1 and 2 is workable.*

SUMMARY OF PUBLIC COMMENT

Amendment 6: Implementation of the Wireless Telephone Protection Act

- U.S. Department of Justice, Criminal Division (DOJ)

  DOJ believes "[a]mendment of the guidelines is necessary because the currently applicable guideline, §2F1.1, does not adequately recognize harms associated with many cloning-related offenses. The current guideline is driven to a great extent by loss, which is often difficult to assess in this context." (DOJ March 10, 2000 Letter to The Honorable Diana E. Murphy at 3.) DOJ points out three categories of harm it believes to be inadequately addressed by the current guidelines: (1) offenses involving the use, production, trafficking, or possession of equipment used to make cloned phones are under-sentenced because, while the potential loss linked to such activity may be great, there may not be any provable loss; (2) offenses involving the distribution of cloned phones are under-sentenced because there may not be any loss associated with the distribution of the phones, which is separate and distinct from their use; and (3) the use of cloned phones to facilitate another offense should be recognized when a defendant is sentenced for the cloning-related conduct. These concerns extend to access devices and device-making equipment.

  DOJ prefers Option 2 because it is broader in scope than Option 1 and deals with "device-making equipment." However, neither it nor Option 1 addresses the full range of equipment offenses to which the DOJ thinks it should apply. DOJ recommends that the full range of offenses be added, including production and trafficking.

  As to its concern that offenses involving the distribution of cloned phones are currently under-sentenced, DOJ notes that while both options address the harm caused by this distribution both do so by providing for a flat increase which results in all distribution offenses being treated alike. Responding affirmatively to the Commission's query whether a minimum dollar amount should apply in this context, DOJ recommends "that a minimum dollar amount that reflects the average loss associated with a cloned phone be assigned to each phone involved in an offense and to each electronic serial number/mobile identification number pair. If the Commission adopts the broader formulation in Option 2, a variety of access devices and counterfeit access devices should carry a minimum dollar amount, but not necessarily the same amount for all devices since average loss may vary depending upon the device." (DOJ March 10, 2000 Letter to The Honorable Diana E. Murphy at 4.)

DOJ believes that, all other things being equal, a defendant who uses a cloned phone or counterfeit access device to facilitate another crime commits a more serious offense than a defendant who simply uses a cloned phone or access device to obtain free cellular service. For that reason, DOJ is of the opinion that the guidelines should be amended to provide for an enhancement for the use of a cloned phone or access device to facilitate another offense, and that such an enhancement would be most appropriate in the fraud guideline.

- Judicial Conference of the United States, Committee on Criminal Law (CLC)

  No comment.

- Federal Public and Community Defender Organization (FPDO)

  FPDO supports the adoption of Option 1 as directly responding to what is required under the Wireless Telephone Protection Act. FPDO opposes any consideration of an enhancement for a presumptive loss amount because "the goal in determining loss should be to calculate, as nearly as possible, the actual loss inflicted." (FPDO March 10, 2000 Statement submitted to the United States Sentencing Commission at 62). FPDO asserts that the "presumptive loss" method is too imprecise a tool.

- Practitioners' Advisory Group (PAG)

  PAG again cautions against making any changes to the fraud guidelines during this amendment cycle. However, if the Commission decides to go forward in this area, PAG recommends Option 1 which essentially tracks the statute.

- Department of the Treasury (TREASURY)

  TREASURY believes stronger penalties are warranted for offenses involving the cloning of wireless telephones because the incidence of such is on the rise. TREASURY's consideration of the proposed amendment options are guided by the following concerns with the current guidelines: (1) due to the guideline's reliance on proof of actual financial loss, they do not adequately account for the common difficulty in determining financial loss in cases involving the use or possession of cloned telephones and cloning equipment; and (2) the guidelines do not provide for enhancements based on the use or possession of cloning equipment and other device-making equipment.

  Of the two options proposed, TREASURY favors Option 2 because the Department believes it more fully restores consideration of device-making equipment and better addresses its concerns. TREASURY also favors the two-level enhancement over the "presumptive loss amount" alternative because it guarantees a set increase in offense

level across the full range of loss amounts.

Because neither of the proposed options addresses TREASURY's concern that the sentences provided for in §2F1.1 rely too heavily on proof of actual loss, TREASURY urges "the Commission to adopt a specific offense characteristic that would assign an alternative minimum loss amount not just for stolen or fraudulent credit cards . . . but for cloned phones and certain other access devices . . . as well." (TREASURY March 10, 2000 Letter to The Honorable Diana E. Murphy at 4.)

TREASURY recommends that the Commission also provide for a minimum loss amount of at least $1,000 per access device.

TREASURY also encourages the Commission to provide for increased penalties when a cloned wireless telephone is used in connection with other criminal activity, and specifically supports a two-level enhancement in §2F1.1 for this type of conduct.

SUMMARY OF PUBLIC COMMENT

Amendment 7: Offenses Relating to Firearms

Amendment 7A

- U.S. Department of Justice, Criminal Division (DOJ)

  No comment.

- Judicial Conference of the United States, Committee on Criminal Law (CLC)

  No comment.

- Federal Public and Community Defender Organization (FPDO)

  FPDO opposes Amendment 7A and strongly believes that the guideline definition of "brandish" under §1B1.1 should not be replaced with the statutory definition of "brandish" developed by Congress. The Commission should not unsettle the law by replacing a definition that applies to a broad range of offenses. The current definition has worked well since the guidelines were first promulgated and should not be replaced with a definition drafted for the limited purpose of a specific offense.

- Practitioners' Advisory Group (PAG)

  PAG opposes the use of the definition of "brandish" added by Congress to 18 U.S.C. § 924(c) throughout the guidelines. It recommends that this statutory definition be applied only to §2K2.4, the guideline applicable to section 924(c) violations.

Amendment 7B

- U.S. Department of Justice, Criminal Division (DOJ)

  No comment.

- Judicial Conference of the United States, Committee on Criminal Law (CLC)

  No comment.

- Federal Public and Community Defender Organization (FPDO)

  FPDO supports Amendment 7B, in part. FPDO supports the change in §2K2.4 to clarify the "term required by statute" as the "minimum term specified by statute," but opposes the adoption of any other factors under consideration as encouraged grounds for departure. FPDO believes the Commission should see how sentencing courts actually sentence under the new section 924(c) before deciding whether it is necessary to adopt encouraged departure language.

- Practitioners' Advisory Group (PAG)

  PAG supports the portion of this Amendment that adds language to the guideline itself specifying that the term of imprisonment required under the guideline is the minimum term in the statute. PAG opposes the second portion of the Amendment concerning commentary to the guideline because it is not believed to be helpful; it is their position that the Commission should wait to see how the courts sentence under the new section 924(c) before attempting to define encouraged departure grounds.

Amendment 7C

- U.S. Department of Justice, Criminal Division (DOJ)

  No comment.

- Judicial Conference of the United States, Committee on Criminal Law (CLC)

  No comment.

- Federal Public and Community Defender Organization (FPDO)

  FPDO supports Amendment 7C.

- Practitioners' Advisory Group (PAG)

  PAG supports Amendment 7C because it believes that this amendment clarifies that a section 924(c) conviction is treated as a replacement for the weapon enhancement in the guideline for the underlying offense and should therefore be treated no differently.

Amendment 7D

- U.S. Department of Justice, Criminal Division (DOJ)

  DOJ objects to the proposed exclusion of section 924(c) offenses as instant offenses under the career offender guideline for several reasons, including: (1) there is no principle by which the offense can be excluded for purposes of the instant offense of conviction when it is included as a prior offense; (2) excluding section 924(c) offenses as instant offenses while including as prior offenses is the equivalent of ignoring the maximum penalty available and is inconsistent with the statutory directive; and (3) the fact that section 924(c) creates a significant sentencing enhancement under the career offender guideline is not a basis to exclude it as an instant offense.

  DOJ believes that section 924(c) convictions should count as an instant offense for purposes of the career offender guideline. Responding to the Commission's query as to how to craft an amendment that would so count section 924(c) convictions, DOJ emphasizes that the starting point is the relevant statutory directives and sentencing requirements of applicable statutes including section 924(c)'s requirement that sentences under that statute are to run consecutively to other sentences and the career offender statute's requirement that the guidelines specify a sentence at or near the maximum term authorized for qualifying defendants. "We believe the above requirements are satisfied as long as a career offender convicted of a section 924(c) offense has his or her sentence determined on the basis of the statutory maximum for section 924(c), which is life imprisonment, and as long as the sentence for the section 924(c) offense runs consecutively to the sentence for any other count. We find nothing in section 924(c) that requires the term of imprisonment determined under the career offender statute to apply entirely to the count of conviction under section 924(c). Thus, the Commission would be free to assign part of the career offender sentence to the underlying offense of conviction and part to section 924(c), the underlying offense should carry the guideline sentence that would apply in the absence of a career offender sentence and both parts of the sentence should meet applicable mandatory minimum requirements." (DOJ March 10, 2000 Letter to The Honorable Diana E. Murphy at 8.)

- Judicial Conference of the United States, Committee on Criminal Law (CLC)

  No comment.

- Federal Public and Community Defender Organization (FPDO)

  FPDO supports Amendment 7D.

- Practitioners' Advisory Group (PAG)

  Because PAG believes that section 924(c) convictions should not be considered an instant offense for purposes of the career offender guideline, it supports this amendment.

Amendment 7E

- U.S. Department of Justice, Criminal Division (DOJ)

  No comment.

- Judicial Conference of the United States, Committee on Criminal Law (CLC)

  No comment.

- Federal Public and Community Defender Organization (FPDO)

  FPDO supports Amendment 7E.

- Practitioners' Advisory Group (PAG)

  PAG supports Amendment 7E.

Amendment 7F - Issues for Comment

- U.S. Department of Justice, Criminal Division (DOJ)

  No comment.

- Judicial Conference of the United States, Committee on Criminal Law (CLC)

  No comment.

- Federal Public and Community Defender Organization (FPDO)

  Issue 1: *FPDO opposes the use of the statutory definition of brandish,*

but feels that, if the Commission decides to use it, the inclusion of "displayed" is redundant. Adoption of the statutory definition would also require that the definition of "dangerous weapon" in the commentary to §1B1.1 be changed.

Issue 2: *FPDO opposes the inclusion in §2K2.4 of a cross-reference to the underlying offense.*

Issue 3: *FPDO opposes treating section 924(c) offenses as instant offenses for purposes of the career offender guidelines.*

- Practitioners' Advisory Group (PAG)

Issue 1: *While PAG does not favor the use of the statutory definition of "brandish" for guideline purposes, it is of the opinion that should the Commission decide to adopt that definition, there is no reason to retain "displayed" from the enhancement.*

Issue 2: *PAG opposes the inclusion in §2K2.4 of a cross-reference to the underlying offense, for use in those cases where the defendant is not convicted of the underlying offense, "as undercutting the integrity of the jury system." (PAG March 7, 2000 Letter to The Honorable Diana E. Murphy at 17.)*

Issue 3: *PAG believes that section 924(c) offenses should not be counted as an instant offense for purposes of the career offender guidelines.*

SUMMARY OF PUBLIC COMMENT

Amendment 8: Circuit Conflicts

Circuit Conflicts Generally

- U.S. Department of Justice, Criminal Division (DOJ)

  DOJ brings the Commission's attention to the fact that there are more circuit conflicts than those published for comment by the Commission. It states it will provide more detail concerning these other conflicts (specifically the three mentioned in their letter) for the Commission's next amendment cycle. DOJ urges the Commission to address circuit conflicts on a regular basis.

- Judicial Conference of the United States, Committee on Criminal Law (CLC)

  CLC supports the Commission's efforts to resolve circuit conflicts, and plans to resume its customary submission to the Commission of its list of the "top ten" circuit conflicts for resolution during each of the future amendment cycles. CLC encourages the Commission to this year resolve all of the circuit conflicts published for comment, regardless of whether they are resolved in the manner favored by CLC.

Amendment 8A - Aberrant Behavior Departure

- Judicial Conference of the United States, Committee on Criminal Law (CLC)

  The majority of the CLC supports the majority view of the circuits, requiring a spontaneous and thoughtless act. The majority also believes that the "totality of the circumstances" approach is too vague, and so broad as to allow departures in too many cases.

  CLC also (i) proposes specific language to include in commentary to describe the new Chapter Five departure; and (ii) unanimously recommends that the Commission eliminate the suggested departure language from Chapter One and move it to Chapter Five, Part K,

Subpart 2.

In addition to defining the departure as requiring a spontaneous and thoughtless act and moving it to Chapter Five, CLC unanimously urges the Commission to include a carefully chosen example to the commentary to provide further guidance and clarification of the departure standard.

CLC finds a "factors" approach to be essentially the same as the "totality of the circumstances" approach and, consequently, to be objectionable for the same reasons (see first paragraph above). However, if the Commission is determined to define departure by using a list of factors, CLC unanimously suggests that:

(i) any factors listed should make it clear that substantially more than first offender status is needed (CLC believes that merely saying "first offender is not enough to warrant a departure" would allow, or even require, departures whenever any other factor is added to the first offender status);

(ii) characteristics common among first offenders are not likely to be appropriate factors;

(iii) "the factors should require the presence of circumstances so unusual as to lead an otherwise law-abiding citizen to commit an offense" (CLC March 10, 2000 Letter to The Honorable Diana E. Murphy at 5);

(iv) the factors should keep the definition of departure narrow, focusing on the special circumstances surrounding the offense; and

(v) "whether the defendant derived any pecuniary gain from the offense is not a good 'factor' for determining aberration." (CLC March 10, 2000 Letter to The Honorable Diana E. Murphy at 5).

While CLC unanimously suggests there is no inconsistency in a defendant engaging in aberrant conduct that involves violence, it suggests the Commission may, as a matter of public policy, wish to exclude conduct involving violence from qualifying for this downward departure.

- Federal Public and Community Defender Organization (FPDO)

FPDO supports an aberrant behavior departure predicated on a combination of factors approach rather than the mere singularity or

spontaneity of the offense. FPDO recommends that the Commission draft a new policy statement that outlines factors courts should consider in determining aberrant behavior departures, and has provided a proposed basis for same.

- The Honorable Nancy Gertner, U.S. District Court Judge (Massachusetts)

  Judge Gertner suggests that the Commission make no amendment or policy statement with respect to the departure ground of aberrant behavior at this point, but instead allow the common law to evolve. She proposes that the Commission study the departure; as part of such study, Judge Gertner suggests the Commission encourage the courts to issue more detailed opinions, evaluate the data, and distribute the data generated along with fact patterns which have led to particular departures.

- Practitioners' Advisory Group (PAG)

  PAG recommends the guidelines be amended to provide for a modified and limited "totality of the circumstances" standard for departures based on aberrant behavior.

  Because PAG believes that reading of this departure to require a single act will effectively result in departure not being used, it recommends that the existing guideline be clarified to specify that "a downward departure may [be] appropriate for aberrant conduct which manifests itself through more than a single 'act.'" (PAG March 7, 2000 Letter to The Honorable Diana E. Murphy at 19.)

  PAG also recommends the existing guideline be clarified to require the sentencing court to consider the "totality of the circumstances" in making a determination as to the appropriateness of an aberrant behavior departure. If the Commission adopts the "totality of the circumstances" approach, the Commission should provide a list of potential factors to be considered (and such a list could include the factors enumerated by the minority view courts).

  And, finally, to insure that any "totality of the circumstances" test adopted by the Commission is not "unduly open-ended," PAG suggests that "the guideline could include a series of absolute limitations to prevent the aberrant behavior departure from becoming a 'departure reason that swallows every white-collar first offense

case." (PAG March 7, 2000 Letter to The Honorable Diana E. Murphy at 20). Suggested limitations for aberrant behavior departures are: they should be limited to defendants in criminal history category I; they should be granted in truly violent offenses only in the most extraordinary circumstances; the criminal conduct must have occurred during a fairly brief period of time; and departure should only be allowed in those cases which did not involve more than "minimal planing" or "sophisticated means."

Amendment 8B - Drug Offenses Near Protected Areas

- U.S. Department of Justice, Criminal Division (DOJ)

  DOJ recommends "that the Commission amend the statutory index, Appendix A, to clearly establish that the Appendix controls the selection of the applicable guideline for the offense of conviction and that the sentencing court is not free to choose a guideline other than one listed. In so doing, the Commission would clarify that the enhanced penalties in guideline §2D1.2 for drug offenses near protected locations or involving underage or pregnant individuals apply only when the defendant is convicted of an offense referenced to that guideline." (DOJ March 10, 2000 Letter to the Honorable Diana E. Murphy at 8-9.)

  DOJ recommends that the Introduction to Appendix A and Application Note 1 in the commentary for §1B1.2 be amended. DOJ provides specific language to be included in the amendments.

- Judicial Conference of the United States, Committee on Criminal Law (CLC)

  While CLC believes the view adopted by the majority of circuits is the legally correct view under the guidelines as currently written, CLC believes that the result by the minority circuits is the more desirable one. Therefore, CLC recommends that the guidelines be amended so that a proper application of the guidelines will reach the minority view's result. Specifically, such an amendment would delete §2D1.2 and add an enhancement for §2D1.1 for when a defendant's relevant conduct included drugs sales in protected locations or involving protected individuals. CLC also supports the strengthening of the language in the Introduction of Appendix A so as to have it more closely track the language of §1B1.2.

CLC also recommends that the Commission include, in commentary, an encouraged downward departure for those situations where the enhancement literally applies but there was no harm of the kind meant to be addressed by the enhancement.

- Federal Public and Community Defender Organization (FPDO)

FPDO recommends that Application Note 1 to §1B1.2 be amended to explicitly state that "the sentencing court cannot consider relevant conduct beyond the conduct set forth in the count of conviction in the charging document." (FPDO March 10, 2000 Statement submitted to the United States Sentencing Commission at 84). This issue arises when a defendant is convicted of a basic drug-trafficking offense -- a violation of 21 U.S.C. § 841(a) -- but a portion of the defendant's relevant conduct takes place in a protected location. Some courts have applied §2D1.1 according to a straight forward application of §1B1.2(a), while others have applied §2D1.2 under the assumption that the sentencing courts could look to relevant conduct when selecting the offense guideline.

FPDO also recommends the inclusion, in Application Note 1 to §1B1.2, language providing that "the determination of the applicable offense guideline is not a determination made on the basis of the defendant's relevant conduct under §1B1.3. Rather, that determination is made on the basis of the nature of the offense conduct set forth in the count of conviction." (FPDO March 10, 2000 Statement submitted to the United States Sentencing Commission at 101).

FPDO opposes requiring the use of the guideline listed in Appendix A because such would inappropriately diminish the exercise of judicial discretion. FPDO points out that many offenses are not included in Appendix A and some offenses are referenced to more than one guideline.

- Practitioners' Advisory Group (PAG)

PAG believes that, under the current guidelines, §2D1.2 applies only when the defendant is convicted of an offense referenced to that guideline.

PAG does not believe the guidelines should require a sentencing court to use the guideline listed in the Statutory Index (Appendix A).

Amendment 8C - Application of Fraud Guideline Enhancement to Bankruptcy Cases

- U.S. Department of Justice, Criminal Division (DOJ)

  DOJ believes that the intent behind the existing enhancements and departure for disruption of a governmental function (i.e., the need to protect the integrity of the executive and judicial branch institutions, programs, and processes) is equally important for the bankruptcy court function. It accordingly supports a two-level sentencing enhancement in §2F1.1 for fraudulent conduct involving falsely completing bankruptcy schedules or forms or otherwise misusing bankruptcy or other proceedings.

- Judicial Conference of the United States, Committee on Criminal Law (CLC)

  While CLC unanimously agrees with the minority view courts that the guidelines, as written, do not support the application of the §2F1.1(b)(4)(B) enhancement to bankruptcy fraud, it agrees with the arguments used by the majority view courts to support the application of the enhancement on policy grounds. Therefore, CLC recommends that the guidelines be amended to explicitly provide for enhanced penalties for bankruptcy fraud, and provides specific language for such an amendment.

- Federal Public and Community Defender Organization (FPDO)

  FPDO recommends that the commentary to §2F1.1 be amended to state that the enhancement does not apply to falsely completing bankruptcy schedules and forms.

- Practitioners' Advisory Group (PAG)

  PAG believes that the current guidelines do not, and should not, support the application of the §2F1.1(b)(4)(B) enhancement to bankruptcy fraud. To prevent the "erroneous" application of the enhancement in these cases, PAG recommends that §2F1.1 and its commentary be amended, and PAG provides specific amendment language to clarify that the enhancement only applies where there has been a violation of a prior order or process directed to a specific person or entity.

Amendment 8D - Post-Sentencing Rehabilitation

- U.S. Department of Justice, Criminal Division (DOJ)

  DOJ supports an amendment which would strongly discourage, if not outright prohibit, departures for a defendant's post-sentencing rehabilitation. Its opposition is based primarily upon its belief that the congressional and Bureau of Prisons structure for addressing post-conviction rehabilitation is the appropriate one and that downward departures for such rehabilitation would significantly interfere with that structure.

  As for post-offense, pre-conviction rehabilitation, DOJ is of the opinion that §3E1.1 adequately takes such into account and, to the extent that the Commission may want to reconsider this issue, it believes it should do so as part of a more comprehensive examination of §3E1.1.

- Judicial Conference of the United States, Committee on Criminal Law (CLC)

  CLC first acknowledged that exceptional post-offense, pre-sentencing rehabilitation is an appropriate ground for departure at initial sentencing proceedings.

  Then, turning to the issue of post-sentencing rehabilitation, CLC "unanimously endorses the position of the Eight Circuit [minority view that post-sentencing rehabilitation may not justify a departure at resentencing] as the correct one, and recommends that the guidelines be amended to prohibit a downward departure for post-sentencing rehabilitation." (CLC March 10, 2000 Letter to The Honorable Diana E. Murphy at 9.) The CLC's reasons for its position are that departures for post-sentencing rehabilitation would inject a large degree of inequity into the system, Congress has provided by statute the maximum reduction to which a defendant is entitled each year for his good conduct, and prohibiting downward departures based on post-sentencing rehabilitation is consistent with the principles of the Commission's policy statement at §1B1.10.

  CLC unanimously recommends "the addition of language in Chapter 5, part K, Subpart 2 (Other Grounds for Departure), stating that post-offense rehabilitation may be the basis for a downward

departure, if the efforts at rehabilitation are exceptional, but that post-sentencing rehabilitation may not form the basis for a downward departure, no matter how exceptional." (Emphasis in original; CLC March 10, 2000 Letter to The Honorable Diana E. Murphy at 10.)

- Federal Public and Community Defender Organization (FPDO)

  FPDO agrees with the majority of circuits that post-conviction rehabilitation, as a subcategory of post-offense rehabilitation, is a basis for a downward departure. While it may be desirable to amend the guidelines to clarify that post-conviction rehabilitation is an unaddressed departure factor, FPDO does not recommend that the Commission do so because such an amendment is unnecessary under the guidelines as currently written. FPDO disagrees that permitting departure for post-conviction rehabilitation will create disparity, and believes that Congress did not intend to preclude such departures.

- The Honorable Nancy Gertner, U.S. District Court Judge (Massachusetts)

  Judge Gertner suggests that the Commission make no amendment or policy statement with respect to the departure ground of post-offense rehabilitation at this point, but instead allow the common law to evolve. She proposes that the Commission study the departure; as part of such study, Judge Gertner suggests the Commission encourage the courts to issue more detailed opinions, evaluate the data, and distribute the data generated along with fact patterns which have led to particular departures.

- Practitioners' Advisory Group (PAG)

  PAG also first acknowledges that exceptional post-offense rehabilitation is an appropriate ground for departure at initial sentencing proceedings.

  Then, turning to the issue of post-sentencing rehabilitation, PAG points out that this circuit split involves a minority of only one circuit, what it perceives to be the flawed analysis of the minority view, and the possibility that the actual issue involved in the minority view case is one concerning the scope of the circuit's remand rule which the Commission may not have the authority to address. PAG is of the opinion that the Commission should not insert itself into this conflict at the present time.

Amendment 8E - Dismissed/Uncharged Conduct under Plea Agreement

- U.S. Department of Justice, Criminal Division (DOJ)

  DOJ thinks that the issue is not yet ripe for the Commission to take action by way of amendment. It believes that additional study and consideration are warranted before the circuit conflict can be properly resolved. However, if the Commission is determined to resolve this conflict this amendment cycle, it should be guided by 18 U.S.C. §§ 3553(b) and 3661.

- Judicial Conference of the United States, Committee on Criminal Law (CLC)

  CLC states that the majority view is that the current guidelines allow a sentencing court to base an upward departure on conduct underlying counts that were dismissed or not charged pursuant to a plea agreement. CLC unanimously believes that the majority position is the correct result, believes the guidelines should be amended to affirm it, and proposes some suggested language (which includes reference to acquittals) to be added to the commentary for §5K2.0.

  CLC also responded to the Commission's request for comment on whether the same criteria should be used for departures as is used for relevant conduct. CLC opposes the use of the same criteria for both because of (1) actual cases handled by members of the CLC in which departures were warranted for conduct that would not be part of the relevant conduct of that offense under §1B1.3, and (2) any rule equating the consideration of conduct for departures and for relevant conduct would be inconsistent with long established sentencing law as well as guideline and statutory provisions.

- Federal Public and Community Defender Organization (FPDO)

  FPDO recommends that the Commission clarify its intention under §6B1.2(a) regarding the use of dismissed or uncharged conduct that was part of a plea agreement.

  FPDO believes that since a defendant's principal concern in negotiating a plea is exposure, "the ability of a sentencing court to depart upward based upon conduct in charges that have been

dismissed or not brought pursuant to a plea agreement generates uncertainty for a defendant and makes it harder for a defendant to determine the extent of his or her exposure." (FPDO March 10, 2000 Statement submitted to the United States Sentencing Commission at 127). FPDO believes that "§6B1.2(a), p.s. should require the sentencing court to determine if the applicable guideline range permits imposition of a sentence that adequately reflects the seriousness of the actual conduct." (FPDO March 10, 2000 Statement submitted to the United States Sentencing Commission at 128). FPDO recommends that §6B1.2(a) be amended by deleting "remaining charges adequately reflect" and inserting in lieu thereof "guideline range applicable to the remaining charges adequately reflects."

- Practitioners' Advisory Group (PAG)

PAG believes that, to protect the integrity of the plea bargaining and guilty plea processes, the Commission should adopt a rule that conduct underlying charges either dismissed and not charged pursuant to a plea agreement may be used to determine the sentence within the guideline range, but may not be used as a basis for an upward departure. PAG is of the opinion that §6B1.2(a) as currently written covers the issue well and requires only minimal clarification. PAG suggests the only amendment that needs to be, or should be, made to §6B1.2 is the addition of language clarifying that conduct underlying dismissed or uncharged offenses is not to be used to increase, by way of an upward departure, a defendant's sentence above the applicable guideline range.

SUMMARY OF PUBLIC COMMENT

Amendment 9: Technical Amendments Package

- U.S. Department of Justice, Criminal Division (DOJ)

  DOJ supports the proposed amendments package, but believes "that, in Part (C), additional commentary should be added to the proposed commentary changes in §§2D1.11 and 2D1.12 that would indicate that an unlawful discharge, emission, or release into the environmental includes, among other things, a discharge into any sewer system." (DOJ March 10, 2000 Letter to The Honorable Diana E. Murphy at 13.) DOJ also believes that a conforming amendment to the already existing enhancement in §2D1.1 would also be appropriate.

- Judicial Conference of the United States, Committee on Criminal Law (CLC)

  No comment.

- Federal Public and Community Defender Organization (FPDO)

  FPDO supports adoption of the five technical and conforming amendments to various guidelines and commentary.

- Practitioners' Advisory Group (PAG)

  No comment.

Public Comment Summaries

2001 Amendment Cycle

Proposed Amendment 1 – Ecstasy

Department of Justice (DOJ)
Criminal Division
Michael Horowitz, Ex-Officio Commissioner

DOJ strongly supports this amendment because current ecstasy penalties are too low to serve as an effective deterrent. DOJ states that the proposed penalty levels for ecstasy comply with the statutory directive and are consistent with the 20-year statutory maximum term of imprisonment for a first offense.

Department of Justice
Statement of Robert S. Mueller, III
Acting Deputy Attorney General

The Department of Justice (DOJ) strongly supports the proposed amendment increasing the penalties for ecstasy. Mr. Mueller states that ecstasy has a high potential for abuse, causes widespread actual abuse, and has no acceptable medical use. Further, the target population consists of teenagers and young adults, and the drug is quickly becoming one of the most abused drugs in the United States. DOJ also states that medical evidence demonstrates the serious danger it poses to users, including the death of brain cells. For these reasons, DOJ urges the adoption of this amendment.

Federation of American Scientists (F.A.S.)
307 Massachusetts Avenue, N.E.
Washington, D.C. 20002

The F.A.S. states that because the usual doses of MDMA and heroin differ, treating the substances alike on a weight-for-weight basis would implicitly treat one dose of MDMA as being equivalent to ten doses of heroin. While MDMA has risks, the damage done by heroin to its users, and the damage done by its users and dealers to others, vastly outweighs the damage done by MDMA.

The F.A.S. suggests treating ten doses of MDMA as equivalent, for sentencing purposes, to one

dose of heroin. This implies an equivalency of 1 gram of MDMA to 10 grams of marijuana. Such an equivalency would mean that a single dose of MDMA would be treated as equivalent to approximately eight doses of marijuana. The F.A.S. states that the published proposal would treat a single dose of MDMA as equivalent to eight hundred doses of marijuana, a quantity that would support daily smoking for more than two years. The F.A.S. submits that if the Commission ratifies the published proposed amendment, the resulting change in sentencing would have the effect of diverting enforcement resources away from heroin, cocaine, and methamphetamine toward MDMA. The result of such a diversion would be to make the overall drug abuse problem worse.

The F.A.S. states that weight is not an appropriate basis for comparing drugs for sentencing purposes. A more accurate measure is to convert weight into dosage units for meaning comparisons.

The F.A.S. submits the following additional statements:

- There is growing laboratory evidence suggesting that MDMA is capable of causing lasting neurological changes in some of its users.
- This evidence contradicts earlier claims that MDMA is "harmless" or "non-addictive." Still, while rates of damage on a per-dose basis are difficult to compute, the gross measured damages due to heroin and MDMA differ by orders of magnitude.
- According to the Drug Abuse Warning Network (DAWN) "heroin/morphine" accounted for 4,820 medical examiner mentions (deaths related to acute or chronic use) in 1999, while "MDM" [which the F.A.S. assumes to mean MDMA] accounted for 42 mentions: a ratio of more than 100:1.
- "Heroin/morphine" accounted for 84,409 emergency department mentions (emergency department visits related to acute or chronic use) in 1999, while "MDM" accounted for 2,850 mentions: a ratio of 30:1.
- MDMA, while more widely used than heroin according to surveys, is much less likely to lead to patterns of abuse or dependency requiring clinical treatment.
- Both in its pharmacology and its risk profile, MDMA more closely resembles the hallucinogens than it does heroin. MDMA has some level of toxic risk and has some non-trivial risk of generating addictive-like behavior. MDMA is far less likely than PCP or LSD to generate acute psychological crises ("bad trips") or extreme acting-out behavior. Moreover, unlike the true hallucinogens, MDMA is highly reinforcing, which suggests that the transition from initiation to regular use may be more common among MDMA users than among users of LSD or mescaline. Thus any overall comparison of MDMA with the other hallucinogens would depend on the relative weighting of the risk of acute psychological crisis and related behaviors against addictive and toxic risks.

Mark A. Kroeker, Chief of Police
City of Portland, Oregon
1111 S.W. 2nd Avenue
Portland, OR 97204

Mr. Kroeker encourages the Commission to pass an amendment that will enhance penalties for the manufacture, importation, and exportation or trafficking in Ecstasy. Mr. Kroeker stated that his community has realized a dramatic rise in the distribution and use of Ecstasy of the last year. In November of 2000, Portland recorded its first-ever Ecstasy death, when an 18 year-old man overdosed on Ecstasy at a local "rave club."

Dustianne North
MSW/Ph.D. Candidate, UCLA
3909 Cumberland Avenue
Los Angeles, CA 90027

Francis DellaVecchia
Los Angeles Mayoral Candidate
5850 W. 3rd Street #336
Los Angeles, CA 90036

Ms. North and Mr. DellaVecchia write to express their concern about proposed increases in penalties for MDMA. Both are members of the dance community and state that they strongly believe that tough sentencing guidelines will not address the problem of MDMA abuse and in fact will do further harm to the dance community and persons who use MDMA.

Ms. North and Mr. DellaVecchia recommend that effort be made by government and non-profit agencies concerned about ecstasy use to become more educated about the drug itself, the lifestyles that go along with its use, and the reasons people choose to do it.

Michael A. Greene
263 East 3560 South
Salt Lake City, UT 84115-4720

Mr. Greene writes to request that the Commission admit his report be admitted into the record for the pending proposal to increase ecstasy penalties.

Mr. Greene states that while he neither uses illegal drugs nor encourages the abuse of any drug, he is concerned about the total effect that drug prohibition has had on society.

The essence of Mr. Greene's report is that MDMA has potential positive therapeutic uses. He states that Food and Drug Administration officials have granted permission to demonstrate MDMA efficacy in terminal cancer patients; this is a strong indication that there are potential benefits to the clinical use of MDMA. Further, it is unreasonable to equate a potentially useful drug like MDMA with other "club drugs" like methamphetamine, when MDMA exhibits no more danger than many drugs now prescribed.

Dean Sheldon Serwin
Attorney
1680 N. Vine Street, Suite 1115
Hollywood, California 90028

Mr. Serwin writes to oppose the proposed increase in MDMA penalty. Mr. Serwin believes that our penal system should be used for rehabilitation purposes whenever possible and putting kids in jail and prison where they have easy access to drugs will not rehabilitate them.

Proposed Amendment 2 – Amphetamine

[No public comment submitted for this amendment.]

Proposed Amendment 3 – Trafficking in List I Chemicals

[No public comment submitted for this amendment.]

Proposed Amendment 4 – Human Trafficking

[No public comment submitted for this amendment.]

Proposed Amendment 5 – Sexual Predators

Department of Justice
Criminal Division
Michael Horowitz, Ex-Officio Commissioner

DOJ supports much of what the Commission has proposed and believes that the amendments are important to assure adequate punishment for the serious offenses addressed.

a. Pattern of Activity

DOJ prefers Option 1(which creates §4B1.5, Repeat and Dangerous Sex Offender, for those convicted of a sex offense for the second time) together with Option 3 (which includes an increase for "pattern of activity" within the sexual abuse guidelines). This combination of options would treat repeat sex offenders with appropriate severity, but like the child pornography guidelines, would provide an increase for those who engage in a pattern of sexual misconduct, even if the misconduct has not resulted in a conviction. DOJ believes that a Criminal History Category of not less than IV is appropriate for the proposed, new provision on repeat and dangerous sex offenders.

Under Option 1, DOJ suggests simplifying the proposal by using the same definition for both the present and past conviction of a "sex offense" and using this term in the guideline. DOJ recommends defining this term as it is defined in Application Note 2 of Option 1A but also include state offenses consisting of conduct that would have been a listed offense if the conduct had occurred within the special maritime and territorial jurisdiction of the United States. Thus, the proposed definition of "sex offense" would include all of Chapter 109A, Chapter 110 (except for trafficking, receipt and possession of child pornography, and record-keeping offenses), Chapter 117 (except for failure to file factual statements about aliens and transmitting information about a minor), and state offenses that would constitute such a violation. If the Commission adopts Option 1A as proposed, DOJ suggests that the term "sex offense conviction" be changed to "prior sex offense conviction" to be consistent with the statute.

DOJ also recommends deleting proposed Application Note 5 in Option 1 because this proposed departure provision could have the unfortunate effect of undermining the guideline.

Concerning Option 2, DOJ does not believe that an additional "sexual predator guideline" is necessary to account for serious offenders who do not have a prior sex offense conviction.

If Option 1 is not adopted in conjunction with Option 3, as DOJ suggests, then the scope of Option 3 should be expanded to assure that it applies to all of the offenses covered by the statutory directive on pattern of activity. In addition, the proposed pattern enhancement for the sexual abuse guidelines includes trafficking in child pornography, whereas the existing pattern

enhancement in the child pornography guideline excludes trafficking, §2G2.2., Application Note 1. DOJ states that the two definitions should be the same and should both include trafficking in child pornography as part of a "pattern of activity."

b. Supervised Release

DOJ agrees with this proposal, but states that the guideline's definition of a "sex offense" does not match the definition section of Option 1A. That portion of the proposed amendments defines "sex crime as an instant offense of conviction" as all of Chapter 109A, Chapter 110 (except for trafficking, receipt and possession of child pornography and record keeping offenses), and Chapter 117 (except for failure to file factual statements about aliens and transmitting information about a minor). DOJ suggests the proposed definition in §5D1.2 is somewhat broader than necessary; DOJ prefers the definition in Option 1A, Note 2.

c. Multiple Counts

DOJ supports Option 2; however, the statement about grouping in the last part of the paragraph of the synopsis for Part C is confusing. It states that the addition of an enhancement in §2G2.1 for the production of sadistic or masochistic material would result in the grouping of child pornography trafficking and production counts of conviction under §3D1.2(c), contrary to the non-grouping option in Part B. DOJ believes that the harms involved in production and distribution are separate and that the non-grouping rule should prevail.

d. Additional Enhancements

DOJ believes that no such additional enhancements are needed at this time.

Federal Public and Community Defenders
Jon Sands, Chair
Federal Defender Committee on the Guidelines

The defenders recommend deferring action on the pattern-of-activity and incest amendments and on the increase in the base offense levels in §2A3.2 until after hearing at which Native American tribes, organizations, and individuals can testify.

Part A – If the Commission decides to proceed without hearings, the defenders prefer option 4, adding commentary language encouraging an upward departure. The defenders, however, recommend deletion of that part of option 4 that would amend §5D1.2 to require the maximum term of supervised release if the defendant is convicted of a sex offense. The defenders believe that this part of option 4 unnecessarily restricts judicial discretion. In any event, the defenders recommend excluding acts of incest from a definition of pattern of activity. If the Commission adopts option 1, the defenders recommend a criminal history category of not less than IV (option

1A) and recommends that proposed §4B1.5 have the same temporal limitations under §4A1.2(e) that apply to the career offender guideline. The defenders oppose option 2 because proposed §4B1.6 (1) would vitiate the requirement of proof beyond a reasonable doubt; (2) would be susceptible to prosecutorial manipulation (prosecutors could obtain a greater sentence by changing one count and using other allegations to seek the enhancement under proposed §4B1.6, rather than charging all allegations); and (3) would result in disproportionate sentences among sexual offenders.

Part B – the defenders support option 1, which would call for the grouping of counts under §3D1.2(d), because it will encourage greater uniformity in sentencing, discourage sentence manipulation by plea agreements, and promote judicial economy.

Part C – *Base offense level.* If the Commission decides to act on the base offense level without hearings, the defenders believe that the increase in the base offense levels last cycle are generally sufficient to comply with the congressional mandate, but they would support a new base offense level of 21 that would apply to an offense under 18 U.S.C. ch.117 that involves a sexual act. A base offense level of 18 would apply to a violation of 18 U.S.C. ch.117 that does not involve a sexual act, and a base offense level of 15 would apply in all other cases.

Incest enhancement. The defenders oppose an incest enhancement because of the disparate impact on defendants who are Native Americans.

Probation Officers Advisory Group
Ellen S. Moore, Chairman
U.S. Probation Office
P.O. Box 1736
Macon, GA 31202

The Probation Officers Advisory Group (POAG) prefers a combination of Part A, Option 1, and Option 3 as an approach to satisfy the congressional directive in the Act that requires penalty increases in any case in which the defendant engaged in a pattern of activity involving sexual abuse or exploitation of a minor.

Option 1 is preferred as it mirrors the present Career Offender and Armed Career Criminal guidelines, but POAG does have two concerns regarding Option 1. First, POAG recommends clarifying that the prior sex offense conviction must receive criminal history points under the provisions of §4A1.1 in order for the defendant to qualify for the application of §4B1.5. Second, POAG offers a formatting change to §4B1.5(d). The language "a repeat and dangerous sex offender's criminal history category in every case shall be..." should precede the table at §4B1.5(b). This minor change would be consistent with the presentation of a career offender's criminal history category found in §4B1.1.

POAG prefers the commentary set forth in option 1B. They strongly recommend, however, that comment (n3) for option 1B, language be included to designate whether the prior sex offense conviction under §4B1.5(a)(2) is one that has to be counted under the provisions of §4A1.1.

POAG prefers Option 3, wherein a SOC is included in §2A3.1 that addresses pattern of activity. This allows for the consideration of additional sexual abuse or exploitation of a minor that does not necessarily result in conviction.

Judicial Committee on Criminal Law
Honorable Sim Lake
Chair, Sentencing Guideline Subcommittee
300 East Washington Street, Suite 222
Greenville, South Carolina 29601

The Judicial Committee on Criminal Law (CLC) is concerned with Application Note 2 in Option 2 because it believes the language "is likely to continue to engage in prohibited sexual conduct with minors in the future" is broad and subjective. CLC further believes this determination could be difficult for the sentencing court in cases where no psychosexual evaluation of the defendant was prepared.

The CLC has additional concerns that although it agrees that the maximum term of supervised release is justified for most offenders, requiring that the maximum term be imposed in every case is problematic because of the limited resources available to probation officers. Instead, the CLC recommends alternative language of, "[I]n the majority of cases the Commission believes that the maximum term of supervised release should be imposed."

Proposed Amendment 6 – Stalking and Domestic Violence

[No public comment submitted for this amendment.]

Proposed Amendment 7 – Re-Promulgation of Emergency Amendment Regarding Enhanced Penalties for Amphetamine and Methamphetamine Laboratory Operators as Permanent Amendment

[No public comment submitted for this amendment.]

Proposed Amendment 8 – Mandatory Restitution for Amphetamine and Methamphetamine Offenses

[No public comment submitted for this amendment.]

Proposed Amendment 9 – Safety Valve

Department of Justice
Statement of Robert S. Mueller, III
Acting Deputy Attorney General

The DOJ opposes any expansion of the safety valve. DOJ states that the safety valve was enacted to provide relief for persons who received high sentences and were identified by Congress as the least culpable group of such offenders. The guidelines therefore reduce an otherwise severe sentence in recognition of the safety valve criteria. By contrast, a low-level drug dealer, whose relevant conduct results in an offense level below 26, is subject to a sentence of less than five years, even before consideration of mitigating factors that can reduce the sentence further. DOJ suggests that the proposed 2- level reduction is not needed for this offender.

Department of Justice
Criminal Division
Michael Horowitz, Ex-Officio Commissioner

DOJ does not see the need for this amendment. The "safety valve" exemption from mandatory minimum sentences was enacted to provide relief for persons who received high sentences but who were identified by Congress as the least culpable group of persons subject to such sentences. By contrast, a courier of a small quantity of cocaine whose relevant conduct results in an offense level below 26 would be subject to a sentence of less than five years, even before consideration of mitigating factors, such as acceptance of responsibility and role in the offense, that can reduce the sentence. DOJ states that relief from high sentences under the "safety valve" and the proposed2-level reduction are simply not needed for this offender.

Probation Officers Advisory Group
Ellen S. Moore, Chairman
U.S. Probation Office
P.O. Box 1736
Macon, GA 31202

POAG strongly supports this amendment.