Other Criminal Provisions

In response to Issue for Comment 7, the PAG opposes an enhancement to §2G3.1 where the use of embedded words or digital images in the website source deceived an adult into viewing obscene material. The PAG therefore sees no need for an increase from two to four levels under §2G3.1(b)(2).

The Probation Officers Advisory Group (POAG)

The Probation Officers Advisory Group (POAG) requests that the Commission's commentary to proposed sex offender registration guideline §2A3.5 include definitions of the Tier I through III offenses referenced in the guideline. The POAG requests these definitions because 42 U.S.C. § 16911 is not included in the Federal Criminal Code and Rules, and therefore these definitions are not readily available to probation officers. The POAG likes Option One for the proposed guideline, and requests clarification on the application of the special offense characteristic increase for committing a sex offence while in a failure to register status.

The POAG finds problematic the SOC decrease for a defendant voluntarily attempting to correct the failure to register. This is problematic in its view because all states are currently unable to register sex offenders as required under the Adam Walsh Act. It is also problematic, it claims, because no guidance has been provided as to how a defendant or probation officer can confirm an attempt to register. Also, the POAG states, no specific examples are provided as to what is and is not a voluntary attempt to comply. The POAG also requests specific instruction as to whether an SOC decrease for voluntarily attempting to correct the failure to register can be applied to a defendant who receives an SOC increase at §2A3.5(b)(1) under Option One.

Lastly, the POAG suggests that proposed guideline §2A3.6 specifically state that the guideline term of imprisonment is the minimum term required by the statute if the intent is to mirror the application in §2K2.4 for a conviction for a violation of 18 U.S.C. § 924(c).

Federal Public and Community Defenders (FPD)
Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee

A. Failure to Register §§2A3.5, 2A3.6

With respect to the first issue for comment, the FPD states the only defensible option is to allow §5G1.1 to operate unless either Congress instructed the Commission to increase the guideline range to incorporate a mandatory minimum or the Commission, acting as an independent expert body, determines that a particular mandatory minimum is good policy rather than the product of politics. The FPD further contends that in its view there is no empirical support for raising guideline sentences for sex crimes, citing Commission data showing that average sentence length in the categories covered by the Adam Walsh Act has nearly doubled over the past five years.

Option 1

The FPD maintains the enhancement at §2A3.5(b)(1) should be based on a convicted offense, which, in its view, would support a common sense reading of the directive. It offers two amendment options for the Commission's consideration, below. The FPD asserts that when Congress used the word "committed" in the directive, it meant "convicted." Additionally, in its opinion, applying a committed approach would result in serious practical problems for the courts because a sex offense as defined in the Adam Walsh Act can be an offense under the law of any jurisdiction, including tribal and state offenses. The FPD believes that the inherent problems with different definitions of sex offenses in different jurisdictions (which might lead the probation officer or government to believe the defendant should receive an enhancement) would be avoided by requiring a conviction. Further, the FPD argues that a convicted approach avoids unwarranted disparity because under a committed approach, prosecutors could double or triple the sentence without obtaining an indictment or proving the offense to a jury beyond a reasonable doubt. Last, the FPD opines, a convicted approach avoids Constitutional litigation because a majority of the Supreme Court has strongly disapproved of sentencing based on crimes of which the defendant was never charged or convicted, a central tenet in the Court's decisions in *Blakely* and *Booker*.

In response to the second Issue for Comment, the FPD believes the 6-level enhancement for the nonsexual offense against a minor should not be expanded to include all nonsexual offenses. In its view, the directive "probably meant a 'specified offense against a minor' . . . and surely did not mean any offense beyond those specified in SORNA." In addition, the FPD urges the Commission not to expand the definition of minor to include false representations by law enforcement officers because that definition is more broad than the definition in the Act. The FPD's Option 1 suggests a 6-level enhancement for a sex offense "against" a fictitious minor, a 6-level enhancement for kidnapping or false imprisonment of a minor but only if committed by a person other than a parent or guardian, and an 8-level enhancement for a sex offense against a real minor.

Proposed Floor of 24 or 28

The FPD asserts that the proposed floor of level 24 or 28 in §2A3.5(b)(1)(C) should be removed because the 8-level increase for committing a sex offense against a minor already triples the sentence. It stresses that sex offenses against minors vary widely in seriousness, from consensual sex between a teenaged boy and his girlfriend who is four years and a day younger, to forcible rape, and a floor of 28 would exacerbate the unwarranted uniformity inherent with a set number of points for offenses of varying seriousness. It is also disproportionate to the 5-year statutory mandatory minimum for a crime of violence in a failure to register status under section 2250(c), it argues. Also, the FPD notes that the floor would defeat the directive by making the guideline sentence the same regardless of the tier level of the offense that gave rise to the duty to register. And, it seems to the FPD to be a useless exercise and inconsistent with simplification to require the court to add 8 levels to a base offense level of 12, 14 or 16 when the result would always be 24 or 28 levels.

Directive Regarding Seriousness of the Offense

The FPD has proposed two specific offense characteristics that it believes more fully implements the directive to consider the seriousness of the offense which gave rise to the requirement to register. These include a 2-level reduction if the sentence served for the offense that gave rise to the requirement to register was less than 13 months, from §4A1.1(a), and a 2-level reduction if the defendant had a "clean record," as defined in 42 U.S.C. § 16915, for a period of 10 or more years between the date of conviction for the offense that gave rise to the duty to register and the date of the instant failure to register offense, excluding any periods the defendant was in custody or civilly committed for the offense that gave rise to the requirement to register, similar to the clean record portion of SORNA. The FPD explains this proposed reduction is based on research showing that most sex offenders do not recidivate, are less likely to recidivate than non-sex offenders, and are less likely to recidivate as time passes and if they successfully complete supervision and treatment. In its proposal, the reduction would not apply if the specific offense characteristic for conviction of a new offense applied.

Voluntary Attempt to Correct Failure to Register

The FPD argues the reduction for the voluntary attempt to correct the failure to register should be 4 levels because that would more likely encourage and rewards registration. Further, the FPD believes the reduction should not be precluded if there are any aggravating specific offense characteristics because this is a mitigating circumstance and an incentive, in its view, separate and apart from whether there was a new offense. The FPD points out that the affirmative defense does not cover all situations where a defendant attempts to register but is unsuccessful because it requires that the individual complied as soon as the circumstances ceased to exist.

Although the FPD does not believe examples should be provided of what constitutes a voluntary attempt, it provides the following proposed language:

> In applying subsection (b)(4), the court must consider all facts pertaining to the defendant's attempt(s) to register, including but not limited to disparate or conflicting state and federal registration requirements and/or regulations; whether the defendant was properly registered in at least one of the required jurisdictions; whether the defendant has been properly registered in the past; any circumstances, not intentionally created by the defendant and not amounting to a defense under 18 U.S.C. § 2250(b), that prevented or hindered the defendant's compliance with registration requirements such as illness, accident, homelessness, mental illness, location and hours of place(s) where the defendant must register, and the advice of authorities charged with advising and registering sex offenders. In extraordinary circumstances an additional downward departure for attempt(s) to correct a failure to register may be warranted.

The FPD further contends a downward departure might be warranted, stating "if the defendant did not comply or attempt to comply with the requirement to register because of circumstances to which he did not intentionally contribute." In its opinion, this downward departure would cover

situations in which the defendant cannot meet the affirmative defense because the "uncontrollable circumstances" never "ceased to exist," and he did not "voluntarily attempt to correct the failure to register" because of similar ongoing circumstances to which he did not intentionally contribute. The FPD urges this departure is necessary to account for the complexity and confusion of the SORNA, the various differing requirements under different state laws, the certainty that mistakes will be made in informing people whether, where or how to register, and various practical difficulties confronting persons subject to the Act.

Of particular concern to the FPD is that some federal cases involving a failure to register have been based on convictions that pre-date SORNA where it claims none of the offenders were informed of the duties to register as a sex offender under the Act. The absence of a mechanism for notice and registration is problematic for the FPD, especially as it relates to Native Americans who it asserts will have particular difficulty complying with SORNA's requirements. As it states, tribal offenses usually do not involve lawyers. Many states, it asserts, including New Mexico, do not require sex offender registration for tribal offenses. Without a lawyer or a state official, the FPD questions who will inform Native Americans convicted of a tribal offense of SORNA's requirements, have them sign a form stating they understand, and assure that they are registered. The FPD includes the interim rule published by the DOJ regarding the DOJ's opinion that SORNA is retroactive. The FPD notes that the interim rule does not provide any clue or assistance as to how people will be notified or registered.

FPD's Option 1 for §2A3.5

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

(a) Base Offense Level:

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

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

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

(b) Specific Offense Characteristics

(1) If, before sentencing, the defendant is convicted of an offense that occurred during the failure to register status which is (A)(i) a sex offense against an individual other than a minor; or (ii) kidnapping or falsely imprisoning a minor (unless committed by a parent or guardian), increase by 6 levels; or (B) a sex offense against a minor, increase by 8 levels.

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

(3) If (A) subdivision (b)(1) does not apply and (B) for a period of ten or more years between the date the defendant was convicted of the offense that gave rise to the requirement to register and the date of the instant failure to register offense (excluding any periods the defendant was in custody or civilly committed for that offense), the defendant (i) was not convicted of an offense punishable by more than one year, (ii) was not convicted of a sex offense, and (iii) successfully completed any supervised release, probation, parole or sex offender treatment in connection with the offense that gave rise to the requirement to register, decrease by two levels.

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

Application Notes

1. Definitions

"Minor" is an individual who had not attained the age of 18 years.

"Individual other than a minor" is (A) an individual who had attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to the defendant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to the defendant that the officer had not attained the age of 18 years.

"Sex offense" has the meaning given that term in 42 U.S.C. § 16911(5), except that kidnapping and false imprisonment are not included.

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

2. Departures

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

(B) The Sex Offender Registration and Notification Act requires that a person convicted of a sex offense register in each jurisdiction in which the person currently resides, is employed, and/or is a student, and in the jurisdiction in which the person was convicted if different from the

jurisdiction in which the person resides. *See* 42 U.S.C. §§ 16911(11), (12), (13), 16913(a). A downward departure may be warranted if the defendant was registered in at least one but fewer than all jurisdictions in which the defendant resided, was employed, and/or was a student. The departure would not be warranted if the defendant moved to a new address and knowingly failed to inform at least one of the jurisdictions where the defendant was required to register of the change of address.

FPD's §2A3.5 Option 2

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

(a) Base Offense Level:

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

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

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

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

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

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

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

Application Notes

1. Definitions

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

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

2. Departures

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

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

§2A3.6

The FPD agrees the guideline should state that "the guideline sentence is the minimum term of imprisonment required by statute" because the statute provides for a range of five to thirty years.

The FPD states that §§2B1.6 and 2K2.4 specifically prohibit application of a specific offense characteristic for the same conduct that forms the basis of the consecutive mandatory minimum when the guideline is applied in conjunction with an underlying offense. Thus, the FPD agrees with an application note providing that if a sentence under §2A3.6 is imposed for a conviction under section 2250(c) in conjunction with a sentence for an underlying offense, the specific offense characteristic for the same offense that forms the basis of conviction of a crime of violence under section 2250(c) is not to apply when determining the sentence for the underlying offense.

The FPD asserts that section 2250(c) will have a disparate impact on Native Americans because Native Americans make up a larger percentage than any other race in the crime of violence category; citing Commission data. The FPD notes a problem particular to the application of section 2250(c) to Native Americans is that the crime of violence might be proved with a certified judgement from a tribal court where the person had no lawyer. Additionally, the FPD notes that section 2260A will have a disparate impact on Native Americans because it states

while Native Americans comprise only 4 percent of all federal defendants, they are 53.2 perent of those sentenced under the sex abuse guidelines.

FPD's Option 1 for §2A3.6

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

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

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

Application Notes

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

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

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

FPD's Option 2 for §2A3.6

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

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

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

Application Notes

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

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

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

B. Sexual Abuse, §2A3.1

The FPD recommends that the Commission maintain the current base offense level, while still allowing §5G1.1(b) to operate when necessary. Should the Commission decide to modify the current base offense level, the FPD offers two additional suggestions:

1. The guidelines should ensure that the vulnerable victim adjustment will not be applied based on age alone.

In the FPD's opinion, the proposed offense guideline should clarify that the vulnerable victim

enhancement does not apply based on age alone when the defendant is convicted under 18 U.S.C. § 2241(c).

2. The base offense level should be set at 38 to ensure that frequently applied SOCs will result in a guideline range that does not exceed the mandatory minimum in most cases.

According to the FPD, a level 42 (360-life) or 44 (life) would be virtually automatic under the proposed amendment, since at least one 2-level SOC (victim was in defendant's custody, care, or supervisory control: 2 levels; victim abducted: 4 levels; defendant misrepresented his identity or used a computer: 2 levels) will likely apply, resulting in a guideline range of 292-365 months, which meets the mandatory minimum under 18 U.S.C. § 2241(c). As such, the FPD suggests that the Commission set the base offense level at a maximum of 38.

C. Sexual Abuse of a Ward, §2A3.3

The FPD states the base offense level should remain at 12. It opines that since non-consensual sexual acts are prosecuted under 18 U.S.C. §§ 2241 or 2242, the offenses described in § 2243(a) and (b) are consensual sex acts that are illegal for reasons other than lack of consent. While the offenders in all five FY 2006 cases were sentenced within the guideline range, the FPD points out that courts would still be free to sentence above the guideline range in cases that warrant a longer term of imprisonment.

Additionally, the FPD asserts that the fictitious minor definition is inapposite and therefore contrary to the goal of simplification. The FPD notes that the only reported cases under section 2243(b) involve prison guards having sex with adult inmates. It is difficult for the FPD to imagine how an agent could represent to a defendant that a person under the defendant's custodial authority was a minor who could be provided for sex, or how an agent could pretend to be a minor under the defendant's custodial. Unless the Commission is aware of cases demonstrating that the expanded definition could sensibly apply to sexual abuse of a ward, the FPD asserts that it should not be added to this guideline.

D. Abusive Sexual Contact or Attempt, §2A3.4

In response to Issue for Comment #4, the FPD opines that the current guideline is adequate, particularly in light of the fact that no mandatory minimum applies, and there is no directive to raise the guideline range. Further, the FPD comments that the proposed amendment would apply to Native Americans more frequently than defendants of other races, and that the proposal applies not only to convictions under section 2244(a)(5), but also those under sections 2244(1), (2), or (3).

E. Commercial Sex Act with an Adult, §2G1.1

The FPD recommends that the Commission maintain the current base offense level, which still allows §5G1.1(b) to operate if necessary. The FPD's case law research reveals only one case in

which any alleged victim was an adult. In the alternative, if the Commission creates a separate base offense level for convictions under 18 U.S.C. § 1591 involving an adult, the FPD recommends that it be a level 34, which still results in a guideline range of 151-188 – the first level to include the mandatory minimum.

F. Commercial Sex Act, Coercion and Enticement, Transportation Involving Minors, §2G1.3

The FPD believes that the base offense levels for convictions under 18 U.S.C. §§ 1591, 2422(b) and 2423(a) should be set sufficiently below the mandatory minimums so that frequently applied SOCs result in a guideline range that does not exceed the mandatory minimum in most cases. Again, the FPD believes that the base offense levels should remain unchanged and that §5G1.1(b) be allowed to operate when necessary. Should the Commission create a new base offense level, the FPD suggests that they be set sufficiently below the mandatory minimums so that frequently applied SOCs will result in a guideline range that does not exceed the mandatory minimum in most cases. In support of its position, the FPD cites statistics from "Guideline Application Frequencies for Fiscal Year 2006" indicating that at least one SOC applied in all cases and that more than one applied in up to half the cases.

The FPD further believes the base offense level under subsections (a)(1) and (a)(2) should be set at 30 and 26 respectively. The FPD reasons that convictions under 18 U.S.C. § 1591 must involve real minors because there is no such thing as an attempt to violate the statute. According to the FPD: 1) since a "commercial sex act" is an element of the offense, the "commercial sex act" SOC would apply in every case; and 2) given the broad definition of "undue influence," *see* Application Note 3(B), that SOC would also apply in every case. To ensure that the guideline range does not exceed the mandatory minimum, the FPD suggests that the Commission set the base offense level under subsection (a)(1) at 30, resulting in a guideline range of 151-188 months. Additionally, the FPD comments that the base offense level under subsection (a)(2) should be set at 26, resulting in a guideline range of 97-121 months.

The FPD argues the base offense level for conviction under section 2422(b) should be set at no more than 28, resulting in a guideline range of 97-121 months in most cases, and 121-151 months in some cases.

For offenses under section 2423(a), the FPD suggests the base offense level for conviction under section 2423(a) should be set at 26, asserting that in every case under section 2423(a), at least two SOCs would apply. Accordingly, the FPD recommends that the Commission set the base offense level for convictions under section 2423(a) at level 26, resulting in a guideline range of 97-121 months.

In additions, the FPD argues that subsections (a)(1) and (a)(2) should be revised to ensure that those base offense levels apply only if the mandatory minimum applies. In its view, as written, subsection (a)(1) can be read to apply even if the offense of conviction is not subject to the applicable mandatory minimum; in cases where the mandatory minimum would not apply, the FPD argues that the higher base offense level should not apply either. The FPD proposes the

following language:

(c) 30, if the defendant was convicted under 18 U.S.C. § 1591 and the mandatory minimum under 18 U.S.C. § 1591(b)(1) applies;
(d) 26, if the defendant was convicted under 18 U.S.C. § 1591 and the mandatory minimum under 18 U.S.C. § 1591(b)(2) applies;

Further, the FPD recommends that the specific offense characteristic for age should be limited to 4 levels for all cases (regardless of whether age is an element of the offense). Based on the fact that offense characteristics that will frequently be applied if the offense involved a minor under 12, the FPD believes that the relevant inquiry should be: What is the final guideline range, as a result of applying these offense characteristics?

Issue for Comment #9 The FPD is unsure about the exact meaning of the language in this issue, but assumes for the purpose of its comments that it means increasing sentences for offenses that are not subject to new mandatory minimums in order to make those sentences "proportional" to mandatory minimums. The FPD argues that mandatory minimums interfere with proportionality by treating different offenses and offenders the same. The FPD strongly believes that the Commission should refrain from raising sentences for other offenses to keep pace with mandatory minimums.

Additionally, the FPD favors lowering the base offense levels or the age SOC in §2G1.3, since the cross reference would never be used if the sentence under §2G1.3 was higher than under §2A3.1. Under the FPD's proposal (i.e., a base offense level of 28 for cases under § 2422(b), a base offense level of 26 for cases under § 2423(a), 4 levels for age in §2G1.3(b)(5), and taking into account the minimum other SOCs that would apply), the resulting offense level in the vast majority of cases under §§ 2422(b) or 2423(a) would be 34 under §2G1.3, and 36 under §2A3.1. The FPD believes that this approach would reach the correct result if the cross-referenced guideline is intended to result in a higher sentence than the original guideline.

The FPD requests the Commission to resolve a circuit split by clarifying that the "undue influence" SOC does not apply in cases involving fictitious minors. The FPD explains that there has been a circuit split since 2003 as to the applicability of the "undue influence" SOC under §2A3.2 when the "minor" is not real. The FPD strongly suggests that the Commission clarify in both §§2A3.2 and 2G1.3 that the undue influence SOC applies only when there was a real victim who had not attained the age of 18. The FPD insists that this approach is the correct one because the voluntariness of a fictitious minor's behavior cannot be compromised. The FPD urges the Commission to resolve the circuit split to avoid unwarranted disparities, and to minimize the impact of factor manipulation by law enforcement agents.

The FPD further notes that the guideline should make clear that the vulnerable victim enhancement does not apply based on age alone for convictions under 18 U.S.C. § 1591.

G. Recordkeeping, §2G2.5

Regarding Issue for Comment #5, the FPD argues that the Commission should not add an upward departure or refer the court to obstruction of justice. Congress treated a refusal to allow inspection the same as the other four ways of violating § 2257A(f), but the FPD asserts that there are many reasons a business would not allow inspection of its records other than to obstruct justice, and believes that the cross references in §2G2.5 (which are felonies subject to five-year terms of imprisonment, far in excess of the one-year statutory maximum for a violation of 18 U.S.C. § 2257A(f)) already cover efforts to conceal a substantive offense.

H. Child Exploitation Enterprise, §2G2.6

The FPD states that without knowing what kinds of fact patterns will give rise to prosecutions under this statute, it believes the Commission should not build any enhancement into the base offense level, as the result would be unwarranted punishment every time the built-in factor did not exist. Because a total offense level of 37 reaches the mandatory minimum, the FPD recommends that the base offense level not exceed 33.

The FPD argues that the Commission should neither provide a specific offense characteristic, nor expand a proposed offense characteristic, to cover offenses under section 1591 with adult victims. Instead, the FPD suggests that this guideline provide a decrease, or an invited downward departure, if the defendant's conduct was limited to possession, receipt, or solicitation of child pornography and the defendant did not intend to traffic in such material. The FPD explains that then the statute could be used to prosecute a defendant using an Internet chat room to solicit images of sexually explicit depictions of children, even if the defendant never possessed or received any such images. In the rare case involving only adult victims, if the guideline range is less than the mandatory minimum, the application of §5G1.1(b) will ensure that a sufficient sentence is imposed.

The FPD also adds that the guideline should provide a decrease, or an invited downward departure, if the only "victims" are not real minors but an agent posing as a minor or an agent's false representation that a "minor" is available for sexually explicit conduct.

I. Embedding Words or Digital Images, §2G3.1

The FPD concludes that the enhancement should remain at 2 levels, because it does not discern any difference between a misleading domain name and an embedded word or image, and no reason has been given for raising the enhancement from 2 to 4 levels.

Similarly, the FPD comments that there should not be any enhancement for use of a misleading domain name or embedded words or images to mislead an adult into viewing obscene material, because: 1) the Commission has never done so with respect to misleading domain names, and 2) no reason appears for doing so now with respect to either misleading domain names or embedded words or images.

If it is necessary to increase the SOC at subsection (b)(2) and/or add an enhancement for intent to mislead an adult based on the mere fact that the new statute applicable to embedding words or digital images has higher statutory maximums than the old statute applicable to misleading domain names, the FPD proposes that the Commission create a new guideline for embedding words or images rather than raising penalties for misleading domain names.

J. False Statements in connection with a Sex Offense Investigation, §2J1.2

The FPD urges the Commission to refrain from increasing the guideline. As support for its position, the FPD notes that there is no congressional directive with respect to the proposed guideline, that the Commission is inconsistent in its policy of increasing guideline sentences when statutory maxima are issued, and that statutory maxima for various offenses do not necessarily reflect their relative seriousness, but are more often than not the result of politics or mere happenstance. Again, the FPD references judges' ability to increase sentences as they see fit.

K. Repeat and Dangerous Sex Offenders Against Minors, §4B1.5

The FPD recommends that the text of the proposed amendment adding an offense against a minor (under 18 U.S.C. § 1591) to the list of covered sex crimes be changed as follows: "(B) an attempt to commit any offense described in subdivisions (A)(I) through (iii) of this note; or (C) a conspiracy to commit any offense described in subdivisions (A)(I) through (iv) of this note."

3. Amendment No. 3: Technical and Clarifying Amendments to the Sentencing Guidelines

Practitioners' Advisory Group (PAG)
David Debold & Todd Bussert, Co-Chairs

The PAG supports the proposed amendment that allows for the application of the rules in §3D1.1 to a situation where the defendant is sentenced on multiple counts in different indictments.

4. Amendment No. 4: Miscellaneous Laws

Practitioners' Advisory Group (PAG)
David Debold & Todd Bussert, Co-Chairs

A. The Respect for America's Fallen Heroes Act

The PAG agrees with the Commission's proposal to refer offenses under the Fallen Heroes Act to §2B2.3 (Trespass), but disagrees with the proposal for a 2-level enhancement for acts of trespass at a national cemetery. The PAG asserts that the policy reasons that support the 2-level enhancement for trespass at military bases and nuclear facilities are absent with respect to national cemeteries.

B. The International Marriage Brokers Regulatory Act (IMBRA)

The PAG agrees with the Commission's proposal to refer these offenses to §2H3.1 (Privacy and Eavesdropping) and thinks this appropriate because the alternative base offense levels at §2H3.1 may be used to sentence both felonies and misdemeanors created by the IMBRA.

C. Internet Gambling Provision of the Safe Port Act

The PAG supports the Commission's proposal to reference these offenses to §2E3.1 (Gambling Offenses), but disagrees with any suggestion that a cross reference should be added to either §2S1.1 or §2S1.3 (Money Laundering). The PAG contends that these offenses do not share the elements of money laundering offenses and, accordingly, a cross-reference to either of the money laundering guidelines is inappropriate.

5. Amendment No. 5: Re-Promulgation of Emergency Intellectual Property Amendment

U.S. Department of Justice (DOJ)
Benton J. Campbell, Acting Deputy Assistant Attorney General and Chief of Staff

Intellectual Property, §2B5.3

The Department of Justice (DOJ) writes that it supports making the amendments concerning counterfeit trademarked labels, documentation and packaging permanent.

Anti-Circumvention Devices

The DOJ would propose two minor changes to application note 2: (1) the note should be limited to violations of "17 U.S.C. §§ 1201(a)(1) and 1204" rather than "17 U.S.C. §§ 1201 and 1204"; and (2) the word "lawfully" should be removed from the clause "the 'retail value of the infringed item' is the price the user would have paid to access *lawfully* the copyrighted work."

The DOJ writes that Option 1 is "the worst of the alternatives because: (1) it does not differentiate between small- and large-scale traffickers; (2) it does not specify how to calculate the "infringement amount" in trafficking cases [...]; and (3) it limits its applicability to defendants 'convicted under 1201(b) and 1204,' thereby leaving out 1201(a)(2) trafficking crimes entirely." The DOJ believes that Option 2[1] would underestimate the economic harm where the circumvention device was bartered or "had no legitimate retail value." The DOJ prefers Option 3 with a few changes: (1) as in Option 1, substituting "1201" for the current references to "1201(b)"; and (2) substituting the phrase "the price a person using the device to access or use a copyrighted work would have had to pay to access or use the work lawfully," for the current language "the price a person legitimately using the device to access or make use of a copyrighted work would have paid."

The DOJ suggests that the definition of the term "circumvent a technological measure" as having the same meaning as that term in 17 U.S.C. § 1201(a)(3)(A), or "access controls," is confusing since the term used under 17 U.S.C. § 1201(b) is "copy controls." The DOJ recommends a separate definition of "device for circumventing a technological measure," such as: "'Device for circumventing a technological measure' includes any technology, product, service, device, component, or part thereof for circumventing a technological measure (as defined in 17 U.S.C. § 1201(a)(3)) or for circumventing protection afforded by a technological measure (as defined in § 1201(b)(2))."

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[1] "Option 2" as discussed by the DOJ was published in the Federal Register but was subsequently eliminated from consideration in response to commissioners' comments during the March Commission meeting. The current "Option 2" under consideration was formerly "Option 3" as addressed by the DOJ in its letter to the Commission. Option 1 remains the same in both the DOJ's public comment and current consideration.

Federal Public and Community Defenders (FPD)
Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee

Intellectual Property, §2B5.3

Anti-circumvention Devices

The FPD writes regarding Congress' directive that the Commission determine if the definition of "infringement amount" in application note 2 of §2B5.3 is adequate to address situations where the item trafficked was not an infringing item but "was intended to facilitate infringement, such as an anti-circumvention device." The FPD believes this instruction is too ambiguous to warrant Commission action "without clarification" from Congress. The FPD writes that 17 U.S.C. §§ 2318 and 2320 do not impose criminal liability for trafficking in any device, that no federal statute imposes criminal or civil liability for a "anti-circumvention device" (while noting that 17 U.S.C. §§ 1201, 1204 do criminalize trafficking in "circumvention devices"), and that trafficking in a circumvention device is not equivalent to fraud or theft making the use of §2B1.1 inappropriate.

The FPD writes that if the Commission moves ahead with an amendment to §2B5.3, Option 2 is preferred of the three options available.[2] The FPD states that Option 1 and Option 3 "are both too complex" since they require the sentencing judge to determine "the price a user would have paid to access lawfully the copyrighted work" or "the greater of the retail value of the device times the number of devices, or the price a person legitimately using the device would have paid" respectively. Option 2 requires the court to determine the retail value of the device times the number of devices only. Additionally, the FPD believes that Option 1 will result in sentences that exceed the seriousness of the offense and that the 12-level minimum is unjustified.

Downward Departure

The FPD restates its proposal from 2005 that there should be a downward departure in cases where the infringement amount overstates the seriousness of the offense. The FPD states that there have been a high percentage of below-guideline sentences under §2B5.3 noted in the 2006 Commission Sourcebook. The FPD believes that the guideline as written can overstate the seriousness of the offense since the vast majority of infringements do not displace sales, studies have shown that infringement can actually benefit trademark and copyright holders, consumers, and the economy, and the FPD is also concerned that submission of the loss amount directly to probation officers does not allow for "weed[ing] out false, misleading, usupported, inflated or legally irrelevant amounts." The FPD suggests the following draft language for a downward departure:

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[2] "Option 2" as discussed by the FPD was published in the Federal Register but was subsequently eliminated from consideration in response to commissioners' comments during the March Commission meeting. The current "Option 2" under consideration was formerly "Option 3" as addressed by the FPD in its letter to the Commission. Option 1 remains the same in both the FPD's public comment and current consideration.

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

Special Skill

The FPD writes that the Commission should delete Application Note 3 because not every de-encryption or circumvention case involves a "special skill,"or a skill not possessed by members of the general public. The FPD believes that the information regarding "special skill" now stated in §3B1.3 is sufficient. The FPD also notes that where there has been an actual circumvention then §2B5.3(b)(3) applies and the offense level is a minimum of 12.

Entertainment Software Association
Ric Hirsch

Intellectual Property, §2B5.3

Anti-circumvention Devices

The Entertainment Software Association (ESA) writes that it is "vital to focus on the punishing and deterring of those who distribute piracy-enabling technologies" as items such as semi-conductor chips that modify copyright protection systems, or "mod chips" installed in video game consoles, allow the users of these video game consoles to play an unlimited number of pirated copies of video games. The ESA notes that while many of the same individuals and enterprises that engage in the trafficking of mod chips also engage in software piracy, there is a trend where enterprises will offer to sell mod chips or modify consoles without engaging in copyright infringement, leaving an increasing number of individuals and enterprises subject only to charges of violating the DCMA[3]. The ESA believes the proposed amendment to enhance punishment is timely and could serve as a deterrence.

The ESA believes that Option 1 is the best approach since trafficking in circumvention devices results in more pirated software and Option 1 establishes a minimum sentencing level of 12 that will "provide a useful benchmark" for sentencing judges. Further, the ESA finds the Commission's approach to calculating infringement amount in Option 1 most attractive. However, the ESA fears that discerning the number of games a person with a mod chip would play and multiplying that by the retail value would be "a difficult and conjectural calculation" that would result in an infringement amount that is disproportionately low. The ESA suggests one modification to Option 1: that those who circumvent "access controls" in violation of section 1201(a)(2) of the DCMA also be covered by the proposed amendment.

[3]The Digital Millennium Copyright Act ("DCMA"), 17 U.S.C. §1201.

The ESA writes that Option 2[4] and 3 are problematic. Option 2 "understates the value" as it uses the retail value of the circumvention device, usually the price of only one legitimately purchased game, when the use of the device can facilitate dozens of infringements. The ESA relates that this option would not cover "culprits [...] who put piracy-enabling technologies into the hands of bootleggers." Option 3 suffers from the same calculation difficulties as Option 1, and the ESA writes that any use of Option 3 should also encompass section 1201(a)(2) as suggested in their comments regarding Option 1.

Downward Departure

The ESA suggests that no added provision for downward departure is needed as "in most cases" the infringement amount understates the seriousness of the offense.

Special Skill

The ESA writes to suggest that the Commission keep the enhancement for special skill. The ESA notes that "initial access" to protected content, as described in Application Note 4, does require "individuals with high technological skills."

[4] "Option 2" as discussed by the ESA was published in the Federal Register but was subsequently eliminated from consideration in response to commissioners' comments during the March Commission meeting. The current "Option 2" under consideration was formerly "Option 3" as addressed by the ESA in its letter to the Commission. Option 1 remains the same in both the ESA's public comment and current consideration.

6. Amendment No. 6: Terrorism

U.S. Department of Justice (DOJ)
Benton J. Campbell, Acting Deputy Assistant Attorney General and Chief of Staff

I. 18 U.S.C. § 2282B (Violence Against Navigational Aids)

The DOJ supports the 16-level base offense level proposed in the amendment to §2K1.4 (Arson; Property Damage by Use of Explosives) for offenses under section 2282B. It also favors the proposed alternative phrasing of the guideline at §2K1.4(a)(3), which describes the offense conduct, rather than referencing section 2282B.

II. 21 U.S.C. § 960a (Narco-Terrorism)

The DOJ supports the basic approach of calculating drug quantity first, then increasing the sentence to meet the statutory requirement of twice the mandatory minimum punishment. It strongly believes that a 6-level increase is preferable to a 4-level increase because the 6-level increase consistently doubles the sentence. Moreover, the 4-level increase would require the use of specific offense characteristics to "make-up" any shortcomings of the 4-level increase, which is an inappropriate use of specific offense characteristics and defeats the intent of Congress to treat narco-terrorism harshly. The DOJ states no strong preference on whether the new provision should be part of §2D1.1 or placed in a separate guideline (§2D1.14 (Narco-Terrorism)), as long as the results are the same.

The DOJ make the following suggestions: 1) eliminate all references to §2D1.1(a)(3) in the proposed §2D1.14 to eliminate the safety valve and mitigating role reduction; and 2) change the heading of §2D1.14 to (Narco-terrorism; ***attempt or conspiracy***) to make it consistent with the other guidelines under the §2D heading.

Federal Public and Community Defenders (FPD)
Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee

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

The FPD opposes both options for the new offense of narco-terrorism contained in the Commission's proposed amendment, believing they will result in: punishment in excess of the statutory requirement; punish the same conduct twice; and unjustifiably deprive a potentially deserving defendant of the mitigating role cap or a safety valve reduction.

Instead, the FPD suggests the Commission adopt one of the following alternative proposals.

Proposal 1: Noting the absence of a congressional directive to amend the guidelines for section 960a, the FPD proposes to allow §5G1.1(b) to operate. It believes this proposal will accomplish only what the statute requires: A term of imprisonment not less than twice the statutory minimum

that would otherwise apply under 21 U.S.C. § 841(b)(1).

Proposal 2: As an alternative to Proposal 1, the FPD offers the following separate offense guideline:

§2D1.14 Narco-Terrorism

(a) Base Offense Level

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

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

The FPD believes Proposal 2 implements section 960a's statutory requirements without the excessive punishment it associates with the Commission's proposed options. It also asserts that Proposal 2 avoids the double punishment for the same conduct that will occur under the Commission's options. Finally, the FPD states that it is not appropriate to exclude defendants convicted under section 960a from the mitigating role cap or the safety valve reduction, because Congress did not say to do so, and this proposal reflects that view.

B. Border Tunnels, 18 U.S.C. § 554

Responding to the question of increased offense levels for the new offense at 18 U.S.C. § 554 (Border tunnels) contained in the Commission's issue for comment, the FPD answers no, the offense levels should not be higher than those given in the Commission's proposed amendment. It concedes that it is difficult to tell how the proposed amendment will work in the field, but asserts that adding 4 levels to an offense such as alien smuggling, given the numerous increases under §2L1.1 (Alien Smuggling), is too high for the offense.

C. Aids to Maritime Navigation, 18 U.S.C. § 2282B

The FPD recommends that the base offense level under subsection (a)(3) apply "if the offense of conviction is 18 U.S.C. § 2282B," rather than "if the offense involved the destruction of or tampering with aids to maritime navigation."

D. Smuggling Goods into the United States, 18 U.S.C. § 545; Removing Goods from Customs Custody, 18 U.S.C. § 549

The FPD believes that the guidelines currently referenced for 18 U.S.C. §§ 545 and 549 are adequate given the new statutory maximums for these offenses. It cites the data given in the Commission's Quarterly Data Report for these offenses as evidence for this assertion.

E. Public Employee Insignia and Uniforms, 18 U.S.C. § 716

The FPD recommends the Commission take no action on this directive as a violation of section 716 is a Class B misdemeanor and the guidelines do not apply to Class B misdemeanors. It also recommends against making a violation of section 716 a Chapter Three enhancements as the offense is already subject to a 2-level enhancement for abuse of trust. *See* §3B1.3, comment (n.3). The FPD also recommends against making the offense subject to an upward departure because of the above cited Chapter Three adjustment, and in cases where the adjustment is not applicable, the court is free to vary from the guideline range.

7. **Amendment No. 7: Drugs (not including crack cocaine)**

U.S. Department of Justice (DOJ)
Benton J. Campbell, Acting Deputy Assistant Attorney General and Chief of Staff

I. **21 U.S.C. § 841(g) (Internet Sales of Date Rape Drugs)**

The DOJ supports Option 3 in the proposed amendment to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) for offenses involving section 841(g). It does so because: 1) Option 3 establishes a significant sentencing floor (29 levels), whereas Options 1 and 2 do not; 2) Option 3 provides a more appropriate enhancement (6-levels) than the smaller enhancements in Options 1 and 2 (2- or 4-levels); Option 3 provides a tiered approach, which the DOJ generally favors as a method to provide more stringent sentences for the most culpable and allows lesser sentences for less culpable individuals; and 4) Option 3 provides the appropriate 2-level enhancement for illegal distribution to an unauthorized purchaser, an enhancement similar to that which is applicable to those who use the Internet for mass marketing.

II. **21 U.S.C. § 860a (Consecutive Sentence for Manufacturing or Distributing, or Possessing with Intent to Manufacture or distribute, Methamphetamine on Premises where Children are Present or Reside)**

The DOJ supports Option 2 in the proposed amendment to §2D1.1 for offenses involving section 860a. It believes Option 2 establishes a tiered, measured response which properly punishes at a significant level offenders who manufacture methamphetamine in the presence of minors, while imposing a lesser level for defendants who distribute methamphetamine on a premise. The DOJ supports this option because: 1) Option 2 provides for a 6-level enhancement with a floor of 29 levels, very close to Option 1's 6-level enhancement with a floor of 30 levels; 2) where the government fails to show a risk of harm to a minor, Option 1 only provides for a "paltry" enhancement of 2-levels; and 3) under Option 1, all distribution cases would only be subject to a 2-level increase, when under Option 2 it would be a 3-level increase with a 15 level floor. The DOJ respectfully requests that, if Option 1 is adopted, that the 6-level enhancement with a 30 level floor be applicable to distribution, and possession with intent to distribute and manufacture cases to allow the government to obtain meaningful sentences for a broader range of cases.

Practitioners' Advisory Group (PAG)
David Debold & Todd Bussert, Co-Chairs

18 U.S.C. § 865 (Smuggling Methamphetamine or Methamphetamine Precursor Into the United States While Using Facilitated Entry Programs) and Issues for Comment 3(a-c)

The proposed amendment would add two levels in §§2D1.1(b)(5) and 2D.11(b)(5) if the defendant is convicted under 21 U.S.C. § 865. The PAG believes that Congress intended that those who abuse their facilitated entry privileges to import methamphetamine receive an

enhanced sentence. In the PAG's view, the Commission's handling of the enhancement is consistent with Congress's intention.

The Probation Officers Advisory Group (POAG)

The POAG recognizes the ease in application of the proposed 2-level enhancement at §2D1.1(b)(5) and §2D1.11(b)(5) for a defendant convicted of 21 U.S.C. § 865. If a reference regarding the use of a facilitated entry program for methamphetamine and methamphetamine precursor chemicals is made in Chapter Two or Three, the POAG requests that the Commission give a definition and/or example of the facilitated entry program.

The POAG prefers Option 2 versus Option 1 for 21 U.S.C. § 841(g). It notes that Option 1 may be easier to apply, but believes that Option 2 addresses the more serious conduct of distributing the drug knowing or having reason to believe it would be used to commit criminal sexual conduct. The POAG is concerned about Option 3 because in its view it could result in numerous objections in trying to differentiate between "knew" and "had reasonable cause to believe" that a drug would be used to commit criminal sexual conduct.

The POAG recommends Option 1 versus Option 2 for 21 U.S.C. § 860(a). The POAG believes that Option 1 provides straightforward application instructions, whereas Option 2 will prove more difficult to apply as the proposed SOCs at §2D1.1(b)(10)(D) are similar in nature and have the potential to be incorrectly applied.

Federal Public and Community Defenders (FPD)
Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee

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

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

In response to Issue for Comment 3(a), the FPD argues that an enhancement for a conviction under 21 U.S.C. § 865 (e.g., a "FASTPASS" violation) should not be more than two levels and there should not be a minimum offense level. The proposed amendment to §2D1.1(b)(5) would result in a four-level increase for any defendant who imports methamphetamine, is not a minor or minimal participant, and uses a facilitated entry program due to the additional enhancement under §2D1.1(b)(4).

In response to Issue for Comment 3(b), the FPD argues the proposed enhancement of a FASTPASS violation should not be expanded to reach defendants who are not convicted of methamphetamine-related offenses. The expanded enhancement would not meet Congressional intent of the statute to Combat Methamphetamine Epidemic Act of 2005 since the statute specifically applies only to defendants who use a facilitated entry program to commit offenses involving methamphetamine. The FPD claims that by requiring a conviction under Section 865,

the proposed enhancement should be properly limited to methamphetamine-related cases. It argues Congress has given clear intent under the statute to target only defendants who use facilitated entry programs to import methamphetamine, therefore the enhancement should not be expanded to include offenses involving other drugs.

In response to Issue for Comment 3(c), the FPD does not believe the Commission should amend §3B1.3 to require a two-level enhancement for FASTPASS offenses because it would amount to a double counting of the offense conduct in §§2D1.1 or 2D1.11 and §3B1.1. It believes a single increase in Chapter Two would be sufficient. The FPD argues the people authorized to use a facilitated entry program do not meet the special skill or have professional or managerial discretion within the meaning of §3B1.3. It claims facilitated entry programs do not reduce border requirements for participants but provided an administratively easier method for meeting those requirements. Therefore, the FPD opines that there is no basis for concluding that use of a facilitated entry program is equivalent to holding a position of trust or having a special skill.

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

In response to Issue for Comment 2 the FPD believes both proposals offered by the Commission to address sentencing defendants convicted under 21 U.S.C. §860a (e.g., Manufacturing, Distributing, or Possessing Methamphetamine on a Premises in which an individual who is under the age of 18 years is present or resides) are appropriately based on the offense of conviction rather than relevant conduct. The FPD also argues that both options are properly limited to the methamphetamine offenses addressed by Section 860a, rather than all drug offenses since the enhancements were not directed by Congress. The FPD does not see a justification in expanding §2D1.1(b)(8)(C) or the proposed Section 860a enhancements to apply to offenses involving any drug other than methamphetamine.

The FPD favors Option One because it focuses on the actual risk of harm to a minor from the manufacturing process and better reflects appropriate distinctions in culpability. It believes this Option addresses Congressional intent since it would result in significant increases where a minor is actually put at substantial risk by the manufacturing process. The FPD appreciates the variations permitted under Option One depending on the risk of harm applicable to the specific case.

The FPD opposes Option Two because it does not allow the courts to account for the risk of harm to the minor during sentencing for a conviction of Section 860a. Since Section 860a does not require actual presence of a minor or knowledge by the defendant of a minor's presence, the FPD argues the 29-level floor overstates the seriousness of the offense in many cases and has the potential to create unwarranted uniformity. It believes Option Two is too broad in assuming that manufacturing methamphetamine "poses an inherent danger to minors" in all cases.

The FPD makes an additional note regarding a proposed raise for ketamine sentences. The FPD claims section 860a does not address ketamine and should be reviewed in light of Section 841(g) instead.

II. Using the Internet to Distribute Date Rape Drugs, §2D1.1

In response to Issue for Comment 1, which proposed three options to address the new offense created by 21 U.S.C § 841(g) (using the Internet to Distribute a date rape drug), the FPD supports a variation of Option 2. The FPD opposes Option One and Three because they are overbroad and would create unwarranted disparity. The FPD argues the enhancements already available under §2D1.1 for unauthorized sales of date rape drugs over the internet and distribution of a controlled substance through mass marketing over the internet are sufficient; Option One would be redundant in light of the Commission's priority of guidelines simplification. The FPD opposes both Options One and Three because enhancements would be required for distributing a date rape drug to an unauthorized purchaser which is the basis of every drug distribution charge. Option Three, according to the FPD, would overstate the seriousness of the offense if a minimum sentence of 5 1/4 to 9 years for distributing a single unit of a drug over the Internet were accepted.

The FPD offers a variation of Option Two that does not include an enhancement for defendants convicted under Section 841(g)(1)(B) for distributing a rape drug to an unauthorized purchaser. The FPD proposes a two-level enhancement for defendants convicted under Section 841(g)(1)(A), the "criminal sexual conduct" reference because it reflects a defendant's increased culpability with the following language:

> If the defendant was convicted under §841(g)(1)(A), increase by 2 levels.

The FPD proposes alternate language to capture a distinction between the greater culpability of a defendant who acted with knowledge and the lesser culpability of a defendant who acted "with reasonable cause to believe." It suggests the following:

> If the defendant was convicted under § 841(g)(1)(A) and (i) knew that the date rape drug was to be used to commit criminal sexual conduct, add 3 levels, or (ii) had reasonable cause to believe that the drug would be used to commit criminal sexual conduct, add 1 level.

The FPD also argues against a cross reference to the criminal sexual abuse guidelines for defendants convicted under 21 U.S.C. § 841 (g)(1)(A) since these defendants did not commit criminal sexual abuse.

The FPD makes additional comments regarding ketamine within this discussion of changes to account for Section 841(g). The FPD argues the Drug Quantity Table cap of 20 should not be removed because it was not the intent of Congress to make ketamine sentences harsher. Without such a Congressional directive, the FPD argues, the Commission will be creating policy. However, if the Commission decides to remove the cap for convictions under Section 841(g) for ketamine offenses, the sentences should not be raised across the board. Instead the FPD would propose adding an application note to §2D1.1 stating:

> In any case in which a defendant is convicted of violating 21 U.S.C. § 841(g) by distributing ketamine, the Drug Quantity Table levels and quantities for Schedule III substances should not be used for purposes of determining the offense level. Instead, ketamine should be treated under the Drug Quantity Table as though it is a Schedule I or II Depressant for purposes of determine the offense level for the § 841(g) violation.

However, the FPD believes that any changes to the ketamine guideline is unnecessary.

8. Proposed Amendment No. 8: Immigration

U.S. Department of Justice (DOJ)
Benton J. Campbell, Acting Deputy Assistant Attorney General and Chief of Staff

§§2L1.1 & 2L2.1 Issues:

DOJ supports amending the tables under USSG §§2L1.1 & 2L2.1 in order to cover a broader and more discriminating approach to the escalating seriousness of offenses. DOJ favors Option 2 because it 1) better distinguishes levels of culpability in regards to the number of documents involved; and 2) provides greater offense level increases for large-scale smuggling and fraud offenses, which are becoming more common.

§2L1.2 Issues:

DOJ asserts that §2L1.2 is in "dire need of major change" and favors a variation of either Option 6 or Option 7. As a means of reducing litigation and using resources more efficiently, DOJ favors a shift away from the "categorical approach" under §2L1.2 that requires everyone involved in cases to parse through state and local laws. DOJ argues that the categorical approach of §2L1.2 encourages litigation over whether convictions qualify for enhancements and leads to inconsistent results across jurisdictions. A better method would be to use the length of sentence imposed for prior convictions, following the criminal history category approach already used under the guidelines. However, DOJ recommends leaving the categorical approach for the following specific offenses: murder, rape, child pornography offenses, sex offenses involving a child, or conspiracies/attempts to commit such offenses.

Base Offense Level Issues:

According to the DOJ, the base offense level for §2L1.1 can remain at 12 assuming that the Commission adopts either Option 1 or 2 to amend the table. Regarding §2L2.1, DOJ urges the Commission to raise it to 12 in order to match the base offense level for §2L1.1. For §2L2.2, the base offense level of 8 should be increased, especially for immigration document offenses, in order to account for the seriousness of the offense.

Judge Julie E. Carnes
Northern District of Georgia

Judge Carnes reiterates the point she made in a prior letter to the Commission regarding sentences under §2L1.2, that there should not be a "one-size-fits-all" guideline, but instead a proper guideline that will distinguish between alien defendants. She believes that any alien who ignores his deportation order and reenters the country is deserving of a greater sentence. Also, she states that the best way to predict future dangerousness is to examine a defendant's prior criminal history.

Judge Carnes offers the following executive summary of the points she made in her letter last year:

1. **A "Categorical" Approach, Utilized Properly, Is Sometimes the Best Way to Evaluate an Offender's Potential for Danger.**

Acknowledging that there are valid objections to some guidelines that have used the categorical approach, primarily the resulting severity level and lack of flexibility to examine the actual underlying offense conduct, Judge Carnes asserts that these objections do not apply to §2L1.2 as it now exists. She notes that not all cases result in an unduly harsh sentence and the sentencing judge can downwardly depart if she perceives the underlying offense is not as bad as the offense label might suggest.

2. **The Length of Sentence Imposed by a State System Is a Very Unreliable Proxy for Gauging Whether the Underlying Crime Was a Serious One.**

Judge Carnes notes that many state systems tend to do little more than process defendants and "spit them back out." She acknowledges that the resulting sentences tells little about the offense's seriousness and a reliance on the length of prior state sentence to determine the offense's severity yields far less valid results than would an examination of the underlying offense conduct. She cautions that use of the length of the prior offense should not be expanded to a guideline that is powered entirely by a consideration of the future danger posed by the offender as reflected by his past conduct. She reminds the Commission that it has itself abandoned this approach in other contexts.

3. **The Guidelines Should Provide an Enhancement for Defendants Who Have Multiple Deportations.**

The Judge believes that repeated reentry violations reflect a dogged determination to violate the law and reflect a need for additional deterrence. She believes an enhancement for multiple reentries is especially important if the Commission promulgates the proposed §2L1.2 amendment, which Judge Carnes believes will result in lowered sentences for reentry cases.

Practitioners' Advisory Group (PAG)
David Debold & Todd Bussert, Co-Chairs

The PAG notes that Commission has invited comment on its proposed amendments to §§2L1.1, 2L2.1, 2L1.2, and also comment on *Lopez v. Gonzalez*, 127 S. Ct. 625 (2006). The PAG agrees with the comments submitted on behalf of the FPD. With respect to proposed increases under §2L1.1 (for offenses involving the smuggling, transporting, or harboring unlawful aliens), the PAG feels any increase at present is unwarranted, and therefore it opposes both Option 1 and Option 2.

The PAG also opposes the proposed amendment to §2L2.1(for illegal trafficking in immigration-

related documents). The PAG feels that the proposed offense level increases are unwarranted because it questions the underlying premise that one document is, as a measure of offense seriousness, the equivalent of one illegal alien. The PAG suggests that the Commission study further the issue of the appropriate ration of documents to illegal aliens. In the interim, the PAG recommends that the Commission should allow the district courts to assess the actual and potential harm in each case based on its own facts. If variance or departure trends emerge from that process, the PAG suggests that the Commission could then assess whether the guidelines need to be amended.

The Probation Officers Advisory Group (POAG)

The POAG supports the replacement of the "categorical approach" with the "imprisonment imposed approach" as the measure of offense severity in Option 6 for §2L1.2. However, the POAG recommends a re-examination of the proposed imprisonment terms which trigger the increased offense levels. This recommendation centers on the concern that lower level imprisonment terms, specifically sentences of at least 60 days, may capture too many minor offenses for which the increases in the offense levels appear too severe, resulting in application disparity. The POAG also urges the Commission to avoid using "actual time served" as a measure of offense severity, as the records are not readily available and in many instances, unobtainable.

The POAG also recommends a modification of the language in Option 6, §2L1.2, comment. (n.1)(B)(iii), that would make it similar to the language found in §4B1.4, comment (n.1). The language in §4B1.4 language indicates that the time periods for counting prior sentences under §4A1.2 are not applicable when applying the SOCs.

Federal Public and Community Defenders (FPD)
Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee

1. §2L1.1 (Smuggling, Harboring, Transporting Aliens) -- Proposed enhancements based upon number of aliens.

   Option 1

The FPD objects to Option 1, which provides specific enhancements for offenses involving 101-300 aliens. It states that the enhancements lack legislative support, noting that legislation which would have directed the Commission to increase penalties associated with the number of aliens smuggled did not pass. The FPD also argues that since only 2% of §2L1.1 cases involve more than 100 aliens, it is appropriate to continue to allow the courts discretion to depart upward in cases involving significantly large numbers of aliens.

Option 2

The FPD objects to Option 2, which, in addition to prescribing specific enhancements for offenses involving 101-300 aliens, would increase enhancements for cases involving 16-24 and 50-99 aliens. The FPD argues that this Option would result in substantially higher sentences in a large percentage of §2L1.1 cases. The FPD argues that unlike Option 1, which is based in part on DOJ's concern that defendants who smuggle a large number of aliens receive higher punishment, the increases set forth in Option 2 lack any justification.

2. §2L2.1 (Trafficking in Immigration Documents) -- Proposed enhancements based upon number of documents.

Option 1

The FPD objects to Option 1 on the basis that it sees no justification for the fact that the proposed "number of documents" table at §2L2.1 parallels the "number of aliens" table at §2L1.1. It argues that the parallel tables, with a ratio of one document to one alien, overstate the harm in immigration document cases. It argues that the harm associated with trafficking in documents (which may be used primarily to gain otherwise lawful employment) is different in kind and degree from the harm primarily associated with alien smuggling (the potential for inhumane treatment of human beings). It argues that immigration document cases are further distinguishable from alien smuggling cases in that documents are much easier to transport in bulk, and may sometimes be obviously counterfeit. The FPD suggests that the Commission conduct a study to determine a more suitable alien to document ratio. Failing that, it argues that the Commission should trust the courts to measure the real harm involved in immigration document cases.

Option 2

The FPD objects to Option 2 for §2L2.1, arguing that, like Option 2 for §2L1.1, it "add[s] unnecessary specificity and complexity and essentially increas[es] sentences across the board." The FPD suggests that the Commission refrain from increasing penalties without supporting data and analysis, and study broader trends as law enforcement initiatives in this area play out over the coming years.

3. §2L1.2 (Unlawful Reentry)

The FPD makes several general comments regarding amendment of the reentry guideline. Those arguments are presented below. The FPD arguments concerning specific options under consideration (Options 1-7), and two additional proposals submitted by the FPD in response to Option 7 (Options 8-9), then follow.

General comments regarding amendment of §2L1.2

- Magnitude of the 16-level enhancement.

The FPD argues that the magnitude of the 16-level enhancement has never been justified by the Commission. It argues that this enhancement is greater than any other in the guidelines based on a prior conviction, and that it does not fairly correspond to the potential danger to the community presented by a defendant who is subject to the enhancement.

- The Commission should use "sentence served" instead of "sentence imposed."

The FPD argues that, where enhancements in §2L1.2 are based on the length of a prior sentence, the Commission should use "sentence served" rather than "sentence imposed." It states that "[g]iven the manifest disparity in state sentencing practices, 'sentence served' is a truer marker of culpability because it reflects the real deprivation of liberty intended by the state sentencing authority." The FPD observes that obtaining information to determine the actual sentence served would not be difficult, particularly since probation officers already obtain the information in order to determine recency under §4A1.1(e).

- The 16-level enhancement should be correlated to a prior sentence served of 10 years or more; the 12-level enhancement should be correlated to a sentence served of 5 years or more.

The FPD believes that the reentry guideline should be structured such that the resulting sentence for a reentry offense is slightly less than the sentence served on the prior conviction (slightly less because the offense of illegal reentry itself is not a violent or aggravated crime). Acknowledging that the 16-level enhancement may be appropriate in the most serious cases, the FPD argues that it should be reserved for prior sentences served of ten years or more. Applying the 16-level enhancement to a defendant whose prior sentence served was ten years yields a 77-96 month guideline range for a defendant in CHC VI (a sentence slightly less than the ten-year sentence served on the underlying conviction).

The FPD argues that the 12-level enhancement should be imposed on the basis of a prior sentence served of five years. Applying the 12-level enhancement to a defendant whose prior sentence served was five years yields a 41-51 month sentence for a defendant in CHC IV (again, a sentence slightly less than that served on the underlying conviction).

- The Commission should take fast-track programs into account by lowering the guideline range.

The FPD argues that, since Congress has approved fast-track programs, the Commission should "take them into account as it has done for mandatory minimum guidelines." That is, the Commission should recognize that the lower sentences resulting from fast-track programs reflect that the danger presented by reentry defendants is less than that currently assumed under §2L1.2. The FPD further argues that fast-track programs should be taken into account so as to eliminate

the disparity between sentences imposed in fast-track and non-fast-track districts.

- The decay factor should be incorporated into §2L1.2.

The FPD argues that the decay factor should be incorporated into §2L1.2 for two reasons. First, the FPD argues that for the sake of consistency and simplicity, prior convictions used as the bases for enhancement under §2L1.2 should first be subject to the Chapter Four criminal history rules (as are prior convictions under §2K2.1, for example). Second, the FPD argues that Congress's intent at 8 U.S.C. §1326(b) was to deter and increase punishment for aliens convicted of serious crimes who return to the United States and continue their illegal activities. Convictions that are so remote in time that they fail to count under Chapter Four do not connote continuing criminal activity, and bear no relationship to the defendant's reason for committing the reentry offense.

- Status and recency points should be excluded from §2L1.2 cases.

The FPD argues that status and recency points should not apply to a conviction which forms the basis for an enhancement under §2L1.2, as this amounts to a sentence driven by triple-counting the prior conviction.

- The Commission should add an application note suggesting bases for downward departures.

The FPD argues that if the Commission adopts a recommendation for upward departure where the categorical approach under-represents the severity of a defendant's prior record, then fairness dictates a corresponding recommendation that the court depart downward if the categorical approach over-represents severity.

Comments concerning specific amendment options.

Option 7

The FPD was provided with a copy of Option 7, and it has submitted comment on that proposal.

An over-arching objection the FPD lodges against Option 7 is that its penalty thresholds are at odds with those contemplated by Congress in pending immigration legislation (H.R. 1646 and S. 2611, which contain identical provisions for amending 8 U.S.C. §1326(b)). The FPD argues that, for example:

- a predicate for the twenty-year maximum in H.R. 1646 and S. 2611 is a prior felony conviction with a sentence imposed of at least 60 months; Option 7 sets a lower threshold of 48 months, and would not require the conviction to be for a felony;

- a predicate for the fifteen-year maximum in H.R. 1646 and S. 2611 is a prior

felony conviction with a sentence imposed of at least 30 months; Option 7 sets a lower threshold of 24 months, and would not require the conviction to be for a felony;

- the legislation enumerates five specific offenses as predicates for the twenty-year maximum, and does not distinguish among them in terms of severity; Option 7 adds additional enumerated offenses, and singles out national security and terrorism offenses for a higher (20-level) enhancement;

- a predicate for the ten-year maximum in H.R. 1646 and S. 2611 is a conviction for a prior felony; Option 7 requires an 8-level enhancement for a prior sentence of at least 12 months, but does not require that the conviction be for a felony.

In sum, the FPD argues that "Option 7 is more severe, more complex, and would cause greater disparity" than the immigration reform legislation pending in Congress.

Apart from concerns that Option 7 deviates from H.R. 1646 and S. 2611, the FPD offers further objections to Option 7.

First, it objects to the fact that Option 7 retains some enumerated offenses. This, it argues, will lead to resort to the categorical approach, particularly with the enumerated offense of "child sexual abuse." If the Commission seeks simplicity with this guideline, then the enumerated offenses should be eliminated altogether. The continued enumeration of offenses is unnecessary, argues the FPD, because if a prior offense was indeed serious, it would have received a 48-month sentence and would therefore receive the 16-level enhancement.

Second, the FPD argues that the "12 month" sentence length threshold for the 16-level enhancement (imposed under Option 7 for two prior sentences of at least 12 months) and 8-level enhancement (imposed under Option 7 for one prior sentence of at least 12 months) should instead be "more than 13 months." Otherwise, argues the FPD, the guideline will result in disparity because a 12-month sentence means different things in different jurisdictions (in some it may equate to a sentence of time-served; in some it may mean a ten-month sentence; in some it may be a reflexive sentence for a low-level offense with no discernable victim). The FPD argues that a threshold sentence of "more than 13 months" would be a meaningful cut-off, and would be consistent with the criminal history rules of Chapter Four.

Third, the FPD argues against the 8-level enhancement for three prior sentences of at least 90 days, and the 4-level enhancement for a prior sentence of at least 90 days. The FPD argues that this scheme runs counter to the treatment of misdemeanors in the current version of §2L1.2 (and in 8 U.S.C. §1326(b)), which requires enhancement for three misdemeanor convictions only if the convictions are for crimes of violence or drug trafficking offenses.

Next, the FPD argues that the Commission should add the term "felony" to modify convictions at §2L1.2(b)(1)(A)-(D), to avoid the disparity that would result from sweeping in misdemeanor offenses as bases for significant enhancements.

Finally, the FPD argues that if the Commission retains "terrorism" as an enumerated offense, the definition should be narrowed to delete reference to an offense that "involves or is intended to promote" terrorism. The FPD argues that a terrorism offense should be simply defined as "a 'Federal crime of terrorism' as defined in 18 U.S.C. § 2332b(g)(5)."

Defender §2L1.2 proposals: Options 8 and 9

The FPD has submitted two proposals in response to Option 7. Its latest proposal, "Option 9," addresses the concerns noted above. The FPD argues that Option 9 is more consistent with the penalty thresholds contemplated by Congress in H.R. 1646 and S. 2611. For example, the threshold penalty for the sixteen-level enhancement in Option 9 is a prior sentence of at least 60 months, and the threshold penalty for the 12-level enhancement is a prior sentence of at least 30 months.

Option 9 supplanted Option 8, which the FPD submitted earlier in the comment period after it was first given an opportunity to review Option 7 but before the introduction of H.R. 1646. Option 8 is similar to Option 7 in that it retains the 48-month sentence length threshold as a trigger for the 16-level enhancement, and the 24-month sentence length threshold as a trigger for the 12-level enhancement. Option 8 differs from Option 7 in that, with the exception of national security and terrorism offenses (which would trigger a 20-level enhancement), it eliminates altogether enumerated offenses as bases for enhancements. It further differs from Option 7 in that it raises the threshold sentence length of "at least 12 months" (which appears at Option 7 §2L1.2(b)(1)(B) and (D)) to "more than thirteen months;" eliminates "three prior sentences of at least 90 days" as a trigger for the 8-level enhancement; and establishes, as a basis for the 4-level enhancement, three prior sentences of at least 60 days.

Option 6

The FPD states that while Option 6 appears to simplify application of the guideline, "simplicity is not a substitute for fairness." The FPD objects to Option 6 on the primary basis that it retains large enhancements (which it argues have never been justified by policy or analysis), and that severe consequences flow from very short prior sentences (which it argues more often result from poverty rather than culpability).

Options 1 through 5; Defender 2006 proposed reentry guideline

The FPD reiterates the comments submitted last year concerning Options 1 through 5, and again draws the Commission's attention to the proposed reentry guideline that it submitted last year.

4. Issue for comment (*Lopez v. Gonzalez*)

The FPD argues that the Commission should take no action in response to *Lopez v. Gonzalez*. It argues that *Lopez* is consistent with other provisions in the guidelines that do not use simple possession of a controlled substance as a basis for enhancement (*e.g.*, the guidelines for felon in possession (§2K2.1) and career offender (§4B1.1)).

National Council of La Raza (NCLR)
National Immigration Project of the National Lawyers Guild (National Immigration Project)
Janet Murguia, President and CEO, National Council of La Raza
Dan Kesselbrenner, Executive Director, National Immigration Project

1. General Concerns

The NCLR and the National Immigration Project first express concern that the proposed options, which they believe would substantially increase the potential prison sentences for noncitizens convicted of illegally reentering the United States, are not dictated by new legislation or authoritative research and are out of sync with current legislative proposals. The NCLR and the National Immigration Project note legislation pending in both the House (H.R. 1645) and Senate (S. 2611) which would provide maximum statutory sentences of 20, 15, 10 and 2 years for illegal re-entry and limit imposition of the 20-year sentence to defendants who have:

-- a felony conviction for which a court sentenced the defendant to at least sixty months,
-- 3 felony convictions, or
-- a conviction murder, rape, kidnapping, a felony relating to slavery or peonage, or a felony relating to terrorism.

The NCLR and the National Immigration Project also note that Option 7 was not published in the Federal Register, and state that principles of good government and the obligations under 5 U.S.C.A § 553 made binding on the Sentencing Commission by 28 U.S.C.A. § 994(x) require that the Commission not amend §2L1.2 until it gives the entire public notice and the opportunity to comment on Option 7 and any other amendments that the Commission is considering

The NCLR and the National Immigration Project also assert that the proposed and existing penalties for illegal re-entry are disproportionate to the seriousness of the offense, comparing the 6-level enhancement a felon-in-possession receives for having a prior conviction for a crime of violence with the 8- and 16- level increases contained in Options 1-4. They state that the consequences are particularly problematic because the statutory definition of aggravated felony is broad.

The NCLR and the National Immigration Project recommend, instead, using the length of the sentence served by the defendant as the benchmark for determining the application of the enhancement. This, the NCLR and the National Immigration Project say, would reduce the uneven impact that flows from the variety of state sentencing schemes and promote a more uniform federal treatment of defendants charged with illegal reentry, and be consistent with *Lopez v. Gonzales*.

2. Commentary and Application Notes

With respect to the portion of each of the options which makes an enhancement applicable when the defendant was less than 18 years old if the law of the jurisdiction treated the defendant as an adult, the NCLR and the National Immigration Project recommend that the test be whether the

defendant would have faced mandatory treatment as an adult under the Federal Juvenile Delinquency Act. This, they say, would avoid disparities arising from differences in state laws.

With respect to the application notes, the NCLR and the National Immigration Project recommend that they include downward departure considerations such as the following: (1) extended length of residence in the United States, (2) the presence of family members in the United States who need them, and (3) the fear of persecution in their home country. They note cases from several circuits approving downward departures on such bases.

3. Specific Comments to Proposed Options

The NCLR and the National Immigration Project advocate the continued use of the categorical approach to determining whether an offense is an aggravated felony, noting that this is the Supreme Court's preferred method and stating that the government's concerns about the difficulties of proof are insufficient to overcome this.

The NCLR and the National Immigration Project state that Option 5 is fundamentally unfair because it puts the burden on the defendant, and further assert that it is inconsistent with Supreme Court precedent. Specifically, according to the NCLR and the National Immigration Project, the combined effect of *Leocal*, *Duenas-Alvarez*, and *Lopez* is that the Supreme Court intends for principles in *Shepard* and *Taylor* to apply to sentencing enhancements under §2L1.2.

4 Issue for Comment

In response to the question of what changes, if any, the Commission should make in light of *Lopez*, the NCLR and the National Immigration Project recommend (1) that the Commentary contain an exception to the enhancement for defendants whose aggravated felony is a misdemeanor under state law; or (2) that, in the event such felonies do trigger the enhancement, a six-level reduction should apply.

9. **Issue for Comment: Reductions In Sentence Based on BOP Motion (Compassionate Release)**

U.S. Department of Justice (DOJ)
Benton J. Campbell, Acting Deputy Assistant Attorney General and Chief of Staff

DOJ states that the Commission should not provide examples of "extraordinary and compelling reasons" that could justify a reduction in sentence. If the Commission elects to publish such examples, DOJ prefers that they be limited to medical conditions that limit an inmate's life expectancy to one year or less or that are "profoundly debilitating in nature."

DOJ also asserts that to provide examples broader than the previously mentioned extraordinary medical situations would invite inmate lawsuits designed "to compel the Department to exercise its authority under section 3582(c)(1)(A)(I)." DOJ envisions a world in which prisoners would seize upon Commission examples to launch "injunctive suits against the Department of Justice...and force the Bureau of Prisons to function as a *de facto* Parole Commission for this purpose."

Practitioners' Advisory Group (PAG)
David Debold & Todd Bussert, Co-Chairs

The PAG surveys the history of the BOP's compassionate release authority, and emphasize the continuity between the BOP's pre- and post-Sentencing Reform Act policies and regulations. The PAG also notes the BOP's provision, in 28 C.F.R. § 571.61, for petitions based on both medical and non-medical concerns.

The PAG agrees with those who stress that public safety concerns should always be factored into a decision to reduce a sentence, and that a satisfactory release plan should be a prerequisite to release. According to the PAG, however, Congress clearly contemplated a broad level of discretion to consider requests on behalf of prisoners ineligible for parole, as well as the BOP's traditionally flexible rules, which, for instance, permitted consideration of personal or family circumstances. In its view the Commission should not consider itself constrained by a cramped reading of 18 U.S.C. § 3582(c)(1)(A)(I).

The PAG also responds to the DOJ's July 14 letter urging the Commission to exercise restraint and expressing the view that the Commission's policy statements cannot appropriately be any broader than the Department's standards for filing such motions. The PAG express several concerns with this approach, including (a) the PAG's view that DOJ policies are necessarily subject to greater change over time than are Commission policy statements; (b) the PAG's view that limiting the policy statement to serious medical situations is inconsistent with the statutory command that a prisoner's rehabilitation be a permissible consideration; and (c) the PAG's view that the legislative history indicates that Congress intended the relief to be available for both medical and non-medical reasons.

The PAG also disagrees with the DOJ's proposals respecting the extent and terms of any reduction in sentence granted under this provision. According to the PAG, limiting the extent and terms of the release to those recommended by the DOJ would be inappropriate because, it says, the statute does not support such a constrained view of the courts' authority in these matters. This is especially true, the PAG says, in cases involving non-medical release.

The PAG also disagrees with the DOJ's assessment of proposals including broader discretion such as that submitted by the American Bar Association (ABA). The PAG believes that such proposals do not constitute a back door for prisoners who wish to escape the burden of determinate sentencing and that they would not undercut the purposes of a determinate sentencing system.

In response to the specific questions contained in the request for comment, the PAG states as follows:

> 1. A motion may be brought where there is a "fundamental change" in a prisoner's circumstances, whether or not that change could have been anticipated by the court at sentencing; a "fundamental change" may very well include a change in the law under which a sentence was determined.
>
> 2. "Extraordinary and compelling reasons" may relate to a prisoner's medical condition, or to a variety of non-medical circumstances. It continues to support the examples of "extraordinary and compelling reasons" in the ABA's proposed policy statement of July 2006.
>
> 3. More than one reason may be considered, and the reasons may be considered in combination. For example, in determining whether extraordinary and compelling reasons exist in a particular case, consideration of a prisoner's rehabilitation is appropriate, although it is not sufficient in and of itself to warrant sentence reduction. See 28 U.S.C. § 994(t) (rehabilitation "alone shall not be considered an extraordinary and compelling reason").
>
> 4. Section 1B1.13 should permit the BOP to determine, in a particular case, that an extraordinary and compelling reason exists for reducing the defendant's sentence, even if the reason is not covered by the examples provided in the application notes. Because motions based on non-specified reasons would be made by the BOP, there is no reason to fear that this power would be exercised in cases where a reduction is unwarranted.

In conclusion, the PAG urges the Commission to adopt the ABA proposed policy statement, attached to the letter.

Federal Public and Community Defenders (FPD)
Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee

The FPD states that the Bureau of Prisons (BOP) has applied the authority conferred upon it under 18 U.S.C. § 3582(c)(1)(A) in a much narrower set of circumstances than required by the literal language of that statute. The "extraordinary and compelling reasons" that could justify a reduction in sentence under Section 3582 are more varied than those -- terminal illnesses and devastating, chronic medical conditions -- heretofore relied upon by BOP. A "unilateral narrowing" of the situations in which BOP will make a Section 3582 motion "usurps authority delegated to the judicial branch, creating a Separation of Powers problem." Should the Commission confine its examples of "extraordinary and compelling reasons" to the purely medical reasons favored by the DOJ and the BOP, the FPD states that the Commission will be exacerbating this "Separation of Powers problem" and ignoring the intent of Congress.

The FPD joins the letter of the American Bar Association responding to the Commission's questions at the hearing on the topic of standards and examples for a motion for sentence reduction under section 3582(c)(1).

Families Against Mandatory Minimums (FAMM)

The FAMM agrees with all points raised by the Federal Public Community Defenders and emphasizes the legislative history of 18 U.S.C. § 3582(c)(1)(A), to wit: "the [Senate Judiciary] Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the dependent was convicted have been later amended to provide a shorter term of imprisonment." S. Rep. No. 98-225, at 55, (1984), reprinted in 1984 U.S.C.C.A.N. 3132, 3238-39 (emphasis added).

American Bar Association (ABA)

The American Bar Association (ABA) raises the same arguments as both the Federal Public and Community Defenders and the Families Against Mandatory Minimums while also emphasizing their disagreement with recent, restrictive rulemaking by the BOP that departs from "an unbroken line of regulatory policy dating back to 1980." The ABA asserts, like the FAMM and the Federal Defenders, that BOP's new, self-imposed restrictions on its authority under Section 3582 "are inconsistent with Congress' clear intention to allow sentence reduction in a broad range of extraordinary equitable circumstances." Finally, the ABA objects to the new BOP rulemaking as an attempt to preempt the "primacy of the policy-making role entrusted to the Commission by Congress under Section 994(t)."