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# UNITED STATES SENTENCING COMMISSION

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**WRITTEN TESTIMONY**

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**PUBLIC HEARING  
MARCH 23, 2000**



# WRITTEN TESTIMONY

## Public Hearing



March 23, 2000

UNITED STATES SENTENCING COMMISSION





United States Sentencing Commission  
PUBLIC HEARING AGENDA  
March 23, 2000

9:30 a.m. Opening Remarks by Chair Diana E. Murphy and Presentation to  
Fred W. Bennett, Past Chair of the Practitioners' Advisory Group

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PANEL ONE – Methamphetamine, Crack Cocaine Tab Number

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9:40 a.m. Julie Stewart 1  
*President*  
*Families Against Mandatory Minimums*

William Boman 2

Dr. Arthur Curry 3

*Members, Families Against Mandatory Minimums*

10:00 a.m. Q & A

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PANEL TWO – NET Act

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10:05 a.m. Robert M. Kruger 4  
*Vice President of Enforcement*  
*Business Software Alliance*

David C. Quam 5

*General Counsel*  
*International AntiCounterfeiting Coalition*

10:25 a.m. Q & A

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PANEL THREE – Cellular Telephone Cloning and Identity Theft

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10:30 a.m. Roseanna DeMaria 6  
*Senior Vice President, Business Security*  
*AT&T Wireless Services*



PANEL THREE – *continued*

Tab Number

Mary Riley  
*Assistant Special Agent in Charge*  
*U.S. Secret Service*

7

Greg Regan  
*Special Agent in Charge*  
*U.S. Secret Service*

7

10:50 a.m. Q & A

PANEL FOUR – Circuit Splits, Firearms

10:55 a.m. Jon Sands  
*Assistant Federal Public Defender, Phoenix, Arizona*  
*Federal Public and Community Defenders*

8

A.J. Kramer  
*Federal Public Defender, Washington, D.C.*  
*Federal Public and Community Defenders*

8

11:15 a.m. Q & A

PANEL FIVE – Multiple Topics: NET Act, Telemarketing Fraud,  
Sexual Predators, Identity Theft & Aberrant Behavior

11:20 a.m. James K. Robinson  
*Assistant Attorney General, Criminal Division*  
*U.S. Department of Justice*

9

Charles R. Tetzlaff  
*U.S. Attorney*  
*District of Vermont*

9

11:40 a.m. Q & A

## SUMMARY OF WRITTEN TESTIMONY

Julie Stewart, President

Families Against Mandatory Minimums Foundation (FAMM)

### **Amendment 4: Offenses Relating to Methamphetamine**

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







March 10, 2000

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

Re: Amendment #4: Commission Response to the Methamphetamine Trafficking  
Penalty Enhancement Act of 1998

Dear Judge Murphy and Commissioners:

We are writing on behalf of Families Against Mandatory Minimums Foundation (FAMM) to comment on proposed Amendment Number 4, which concerns the penalties for methamphetamine offenses. FAMM is a nonprofit, nonpartisan organization that conducts research, promotes advocacy, and educates the public regarding the excessive cost of mandatory minimum sentencing. This cost is not limited to public expenditures but includes the perpetuation of unwarranted sentencing disparities, disproportionate sentences, and the transfer of the sentencing function from the judiciary to the prosecution. Founded in 1991, FAMM has 30 chapters and 18,000 members nationwide. FAMM conducts sentencing workshops for its members, publishes a newsletter, serves as a sentencing clearinghouse for the media, and researches sentencing cases for pro bono litigation. FAMM does not advocate the legalization of drugs nor does it minimize the serious impact of drug trafficking or other crimes. All we ask is that the punishment fit the offense and the offender. As an alternative to mandatory sentences, FAMM supports sentencing guideline systems that are more sensitive to differences in culpability.

Unfortunately, the benefits of guidelines over mandatory sentencing have never been fully realized in the federal system. This is because statutory mandatory minimums directly and indirectly impede the guidelines' capacity to distinguish between offenders. Amendment Number 4, which contains two options for responding to the Methamphetamine Trafficking Penalty Enhancement Act of 1998, further diminishes the Guidelines' value as an accurate measure of culpability.

The 1998 Act lowers the quantities of methamphetamine necessary to trigger the 5- and 10-year mandatory minimum sentences to the controversial triggering quantities applicable to crack cocaine. As noted in the Methamphetamine Policy Team's report, the subject legislation issued no directives to the Commission. In sum, FAMM submits that amending the methamphetamine guidelines to reflect politically inspired mandatory minimums, rather than Commission expertise, will result in individuals spending more time in prison than is justified by the fundamental purposes of sentencing and will undermine the Guidelines' goal of disparity reduction.

As possible bases for the first two proposed amendments, the methamphetamine report submits three considerations: (1) the drug's current popularity, (2) consistency with past practice, and (3) political concerns. Because guideline amendment is not mandated, however, the Commission should only act if it determines that higher guideline sentences -- many exceeding the mandatory minimums -- are necessary to promote the purposes of sentencing: punishment, deterrence, incapacitation and rehabilitation. See 18 U.S.C. § 3553(a)(2), 28 U.S.C. §§ 991(b), 994(m).

*There is no evidence that methamphetamine offenses are under punished.*

Under the first amendment option, the Commission's report predicts that average methamphetamine sentences, second in severity only to crack, will increase 20% -- from 97 to 116 months. The crack cocaine regime provides a useful point of comparison. The overall severity of the crack cocaine guidelines (apart from the issue of race) underlies much of the criticism lodged against federal drug sentencing. Fulfilling its duty under the Sentencing Reform Act of 1984 to consider community views in developing the Guidelines, the Commission surveyed public attitudes toward federal sentences in 1993 and 1994. This survey revealed that respondents preferred punishments below the guideline ranges for crack offenders and also for higher-quantity drug traffickers. Peter H. Rossi & Richard A. Berk, U.S. Sentencing Comm'n, *A National Sample Survey, Public Opinion on Sentencing Federal Crimes* 80, 84 (1995). This suggests that the proposed amendments would widen the gap between actual sentencing policy and just punishment in the public's eyes.

A few examples of first-time offenders illustrate the severity of methamphetamine penalties (even prior to 1998 law) and the comparative increases under the proposed guideline amendments:

- Joyce Nelson is an addict whose abusive relationship with a methamphetamine cooker cost her more than seven years in prison. Even with a four-level reduction for her minimal role and a three-level reduction for acceptance of responsibility, she received an 87-month guideline sentence. She was finally released, but would still be incarcerated under the first proposed option, which would prescribe at least 108 months imprisonment. (No. CR92-00026M-002, W.D. Wash.).
- Linda Bear became involved in a methamphetamine conspiracy as a result of her own addiction, permitting a childhood friend to manufacture at her residence in exchange for personal-use quantities of the product. Her drug abuse was apparently connected to certain mental disorders and tragic events, like the deaths of her prematurely born child and her husband. Although her 46-month sentence pales in comparison to some federal drug sentences, her guideline range under the second proposed option would be 87-108 months. (No. 97-CR-171-016-C, N.D. Okla.).



- Loretta Fish received a 235-month sentence for her short-term, minor role in her boyfriend's methamphetamine business. Her involvement in the conspiracy lasted about six months, during which time she allowed the co-conspirators to use her car and her trailer home, acted as a lookout and relayed messages concerning drugs. Her offense level was 38, based on more than 15 kilograms of methamphetamine, a two-level reduction for minor role and a two-level obstruction of justice enhancement based on perjury. Since Loretta Fish's base offense level is 38 (which caps the Drug Quantity Table), her sentence would not change if based on the proposed amendments. (No. 93-00158-03, E.D. Pa.).

In light of the fact that more than 50% of federal methamphetamine defendants have little or no criminal history (U.S. Sentencing Comm'n, *1998 Sourcebook of Federal Sentencing Statistics* 72), the proposed amendments would yield an increased supply of anecdotes to illustrate the unnecessary severity of the drug trafficking guidelines. See, e.g., *Prisoners of Love* (Court TV television broadcast, Feb. 14, 2000); *The Early Show with Bryant Gumbel* (CBS television broadcast, Feb. 22, 2000) (including detailed accounts of harsh drug guideline sentences meted out on several first-time offenders; tapes on file with FAMM).

***Sentencers' use of ameliorative provisions and meth-mixture offense levels supports the conclusion that increased punishment is unwarranted.***

Disproportionate reliance on ameliorative provisions may also reflect that methamphetamine offenses are currently over punished (but does not necessarily point to widespread guidelines circumvention). Although further research is needed, methamphetamine prosecutions may snare a higher proportion of low-level offenders who legitimately qualify for the safety valve and mitigating role adjustments. Similarly, the apparent over-reliance on the meth-mix penalties, as opposed to the harsher meth-actual penalties, may be due more to confusion than circumvention; if true, this commends clarification rather than stream-lining of the guideline at the expense of greater proportionality. On the other hand, if excessive reliance on the meth-mix penalties is due to dissatisfaction with current penalty levels, eliminating the meth-actual scheme may yield no more than better-camouflaged "disparity," while the sentence increases under both proposals will no doubt exacerbate the disparity. In this regard, it is useful to note the already high rate of substantial assistance departures -- often branded the "black box" of federal sentencing -- for methamphetamine offenses.

***The deterrence rationale and other law enforcement considerations do not support increased sentences.***

The Sentencing Reform Act suggests that the Commission consider "the current incidence of the offense," but only to the extent relevant. 28 U.S.C. § 994(c). Inasmuch as the



amendment proposals are inspired by epidemiological studies regarding methamphetamine, the Commission may see fit to focus on whether increased guideline sentences are likely "to afford [additional] deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). Of course, most research suggests that severe sentences do not provide any additional deterrent effect over moderate sentences. Michael Tonry, *Sentencing Matters* 136-42 (1996).

Rather, there is reason to believe that adoption of lower triggering quantities will undermine effective federal law enforcement. The Attorney General, the Office of National Drug Control Strategy and the previous Sentencing Commission opposed the identical penalty scheme for crack cocaine as contrary to federal law enforcement priorities. U.S. Sentencing Comm'n, *Cocaine and Federal Sentencing Policy* 4-8 (1997). In like fashion, the penalty levels under consideration are apt to divert scarce federal law enforcement resources from large-scale trafficking to low-level offenders. According to the DEA, 5 grams of methamphetamine is worth a few hundred dollars at most (Drug Enforcement Administration et al., *The NNICC Report 1997: The Supply of Illicit Drugs to the United States* 68) -- hardly an amount indicating a serious trafficker -- yet agents and prosecutors will have the incentive to concentrate on these cases.

*Past practice should not impede evolution of the guidelines.*

The amendment proposals would merely compound the original Commission's imprudence in incorporating the statutory quantity thresholds and prescribing sentences in excess of the mandatory minimums. As many experts have observed, the Commission was not required to incorporate the drug quantity thresholds from the mandatory minimum statutes as anchors for drug sentencing calculations. See, e.g., Michael Tonry, *Sentencing Matters* 96-97 (1996) ("the commission's policies gratuitously raised sentences for drug offenders"); Stephen Schulhofer, *Excessive Uniformity -- And How to Fix It*, 5 Fed. Sent. R. 169 (1992) (Commission's decision to specify quantity-based sentences above the quantities triggering the 10-year mandatory minimum "goes beyond deference to congressional judgments."). In a report prompted by "anecdotal and empirical evidence suggesting that sentences for certain drug-trafficking defendants may be overly punitive," the Commission found that, among the states surveyed, the federal sentencing guidelines stand alone in their mandatory minimum-based approach to drug sentencing. U.S. Sentencing Comm'n, *Report of the Drugs/Role/Harmonization Working Group* 1, 50 (1992).

The methamphetamine report aptly frames the issue as follows: "Should no action be taken, the mandatory minimums established by Congress will trump the guidelines at sentencing but the impact of the Congressional increase will not be felt throughout the remainder of the Drug Quantity Table." The Commission, to its credit, has tolerated this trumping effect with respect to certain controlled substances (i.e., LSD and marijuana plants), and state sentencing commissions have adopted this approach. Michael Tonry, *Sentencing Matters* 96-97 (1996). In addition, this trumping effect occurs when the prosecutor files an information under 21 U.S.C. §

851, triggering an enhanced mandatory minimums for a drug offenders with one or more prior drug felonies. The Commission should also note that the safety valve diminishes the structural cliffs that the Commission sought to avoid by incorporating the mandatory minimums. In a recent year, the safety valve enabled 22% of drug defendants to receive guidelines-range sentences without regard to the mandatory minimum statutes. U.S. Sentencing Comm'n, 1998 *Sourcebook of Federal Sentencing Statistics* 79.

In conclusion, while congressional enactments and any underlying drug-use trends merit the Commission's attention, analysis of the statutory guideposts indicate that the proposed amendments will take the methamphetamine guidelines in the wrong direction. In contrast to other legislation, Congress did not direct that the Commission amend the sentencing guidelines to reflect the new quantity thresholds. See, e.g., Powder Cocaine Sentencing Act of 1999, S. Amdt. 2771 (to S. 625), 106th Cong. In the absence of specific statutory directives, guideline sentences should reflect the Commission's expert judgment, even if this entails some political risk. While the Commission does not operate in a political vacuum, "[i]f the commission refuses to take risks and simply reflects the views of the political agents to which it is ultimately responsible, it will accomplish nothing better than the legislature itself could in setting standards." Andrew von Hirsch & Judith Greene, *When Should Reformers Support Creation of Sentencing Guidelines?*, 28 Wake Forest L. Rev. 329, 337 (1993).

Thank you for considering our comments on this issue of great importance to the families of future methamphetamine prisoners.

Sincerely yours,



Julie Stewart  
President



Kyle O'Dowd  
General Counsel



## IMPORTANT NOTES





## SUMMARY OF WRITTEN TESTIMONY

### Amendment 1: Implementation of the No Electronic Theft Act

- Robert Kruger  
Business Software Alliance, Interactive Digital Software Association, Motion Picture Association of America, Recording Industry Association of America and Software & Information Industry Association

*BSA offers the following recommendations that reflect both relevant policy objectives and important institutional considerations regarding reformulating and refining the relevant guidelines themselves:*

- 1) The sentencing outcome of the amended guideline must be certain and predictable, without the option of "an open-ended departure to undo the sentence arrived at under the guideline." Qualifying the formula for calculating the economic value of the infringing activity with words like "usually" might lead to protracted sentencing hearings angling for an exception that "displaces adherence to the rule."*
- 2) An increase in the base offense level is appropriate to establish parity in the treatment of criminal copyright infringement and to create deterrence. A compensating increase in the base offense level for "more than minimal planning" is justified because most criminal copyright infringements involve planning - and execution - of an often extensive and sophisticated nature. The omission of this increase would result in unintentionally treating intellectual property offenses as less serious than the equivalent offenses of fraud or theft.*
- 3) The economic harm is not eliminated or necessarily mitigated if the infringer doesn't profit financially or charges a low price for the infringing articles. Adopting a guideline that focuses solely on the displaced sales equation overlooks harms indirect to copyright owners through reputational injury, through the destruction of legitimate channels of distribution and by contributing to an overall lack of respect for and adherence to intellectual property laws. Infringers who price their wares far below their competitors in the black market capture a larger share of the trade in pirated goods.*
- 4) The unique injury to the right-owner from pre-release product warrants separate treatment under the guidelines. The availability of infringing product prior to the commercial release of a work can cause significant lost*

sales and damage to the market. Often, the pre-released item is a reproduction of a work in progress that is not ready for market.

5) The determination of economic value should be based upon the retail price of the infringed-upon articles wherever digital or electronic reproductions are involved. Functionally, an unauthorized digital copy of a software program is no different than the legitimate article. This functional equivalence is the basis for including appropriate language in options that seek to treat "inferior goods" in a disparate manner.

6) The guidelines should empower courts to punish more severely those criminal copyright offenses that involve other dangerous criminal activity. The guidelines ought to attach greater criminal culpability to large scale, organized infringement, especially when it promotes or fosters other adverse societal consequences. We have supported including a special offense characteristic, such as that presently contained in Option 2 (as presented in both options papers made available to the public), that would increase the offense level where there is a risk of bodily injury to others.

Support for Option 4 of the Issue for Public Comments dated February 21, 2000 was again extended on behalf of the software, motion picture and recording industries. BSA believes that Option 4 most closely embodies the preceding principles, is most consistent with the institutional aims behind the sentencing guidelines, and is most faithful to the Congressional goal of achieving effective deterrence.

- The Honorable James K. Robinson, Asst. Attorney General, Criminal Division  
U.S. Department of Justice, Criminal Division (DOJ)

Of the three options published in the Federal Register" for comment, DOJ favors Option 2 because it (1) "directs the court to compare the retail prices of the infringing items with the retail prices of the infringed-upon items [which] comparison serves as a proxy for the difficult task of determining whether and to what extent the sale of an infringing item displaced the sale of an infringed-upon item. Displaced sales are a key component of loss but one that is practically impossible to calculate without the use of a proxy" (Statement of James K. Robinson, Assistant Attorney General at 1); (2) "best satisfies the aims of the guidelines to provide a fair sentencing, uniform sentencing in similar circumstances, and appropriately tailored sentences for the criminal conduct involved" (Statement of James K. Robinson, Assistant Attorney General at 2); and (3), as compared to the other options published for public comment, it provides the clearest guide to those involved in the sentencing process.

In regard to the recently prepared Option 4, DOJ notes it is a clear improvement



over the status quo and Options 1 and 3. However, it has several problems. First, the possible reduction in offense level where the quality of the or performance of the counterfeit item is substantially inferior to that of the infringed-upon item will produce many of the same litigation problems as Option 3 (e.g., litigation as to the quality of the different items). Moreover, this possible reduction rewards defendants who sell high-priced copies that are substantially inferior to the legitimate item even where the sale of the counterfeit may result in lost sales of the legitimate item. Another problem with Option 4 is its failure to include a specific offense characteristic for offenses that involve a reasonably foreseeable risk to public health and safety. If the Commission adopts Option 4, DOJ recommends that (1) it eliminate the comparative quality provision (in making this recommendation, DOJ emphasized its opinion that the price differential between the legitimate and counterfeit items is the best indicator of whether a counterfeit item displaced the sale of a legitimate item), and (2) include an enhancement for risk as proposed in Option 2.

- Jon Sands, Asst. Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

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

- David C. Quam, General Counsel  
International AntiCounterfeiting Coalition, Inc. (IACC)

Increasingly, many of the counterfeit products that have been sold present public health and safety risks, finance organized crime, and adversely impact the U.S. economy. The theft of intellectual property causes damage far beyond any one-time loss associated with a lost sale.

The difficulty facing the Commission is creating an amendment that incorporates

*both monetary loss and the harm caused to reputations and goodwill, lost productivity and jobs, and diminished consumer, wholesaler and retailer confidence in a brand. Measuring only pecuniary harm as represented by lost sales will understate the true damage caused by counterfeiters and pirates. IACC believes the only real deterrent to counterfeiting is the imposition of criminal penalties that result in actual jail time served.*

*The current guidelines for offenses under 18 U.S.C. §§2318, 2319, 2319A and 2320, do not adequately deter counterfeiting and piracy due to the high monetary thresholds required to impose meaningful sentences. The Commission should be mindful that changes in the Federal Sentencing Guidelines will also have an impact on U.S. efforts to encourage intellectual property protection abroad. With this in mind, the IACC respectfully urges the Commission to adopt changes to current Guideline 2B5.3 that are consistent with congressional directives, create a meaningful deterrent, and properly reflect the seriousness of the offenses of trademark counterfeiting and copyright piracy.*

*IACC recommends that the amendment adopted by the Commission embodies each of the following elements: (1) Offense levels based on the retail price of the infringed upon items multiplied by the quantity of items involved in the offense because the actual price more accurately reflects the injury to the intellectual property rights holder and provides greater certainty for prosecutors and courts in applying the guidelines; (2) Across the board enhancements for all intellectual property crimes to avoid favoring one form of intellectual property offense over another; (3) Increased levels for an offense involving conscious or reckless risk of serious bodily injury or death to account for counterfeit products that pose health or safety risks; (4) Recognition of the role of organized crime in counterfeiting and piracy.*

*IACC supports Option 4 as embodying the preceding elements except for one recommended change of combining specific offense characteristics (b)(2)(B) and (b)(2)(C) into a single inclusive SOC.*

*IACC's main criticism of Option 4 is the two level decrease SOC applied in cases involving "greatly discounted merchandise" and merchandise that is "substantially inferior." According to IACC, these provisions reward counterfeiters and pirates for selling inferior or greatly discounted merchandise. The IACC does not believe that copyright pirates making exact copies of popular software, music or videos should benefit from a two level decrease simply because they sell their products cheaply. Consequently, the IACC recommends that the Commission amend Option 4 to call for a 2 level decrease when the offense involved greatly discounted merchandise and the quality or performance of the infringing item was substantially inferior to the quality or performance of the infringed item.*





## IMPORTANT NOTES

## SUMMARY OF WRITTEN TESTIMONY

### Amendment 2: Temporary, Emergency Telemarketing Fraud Amendment

- The Honorable James K. Robinson, Asst. Attorney General, Criminal Division  
U.S. Department of Justice, Criminal Division (DOJ)

*DOJ first urges the Commission to take a comprehensive approach to addressing white collar crime in general during the next amendment cycle. It then states the following should be a high priority for the Commission: revision of the loss table in the fraud, theft, and tax guidelines to increase sentences based on high dollar losses, and revision of the definition of "loss."*

*DOJ urges the Commission to make the emergency telemarketing fraud amendments permanent because they are an important part of the Commission's efforts to improve sentencing in the areas of white collar crime, identity theft, and trademark and copyright infringement.*

*DOJ also urges the Commission to make conforming changes to the tax guidelines with respect to the enhancement for "sophisticated means." Because of its belief that the tax and fraud guidelines should be equivalent, DOJ believes the Commission should (1), as in the fraud guideline, substitute a broad form of "sophisticated means" for "sophisticated concealment" in the tax guideline and (2), again as in the fraud guideline, establish a floor offense level of 12 when the requisite level of sophistication is present in tax cases.*

- Jon Sands, Asst. Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

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

## SUMMARY OF WRITTEN TESTIMONY

### Amendment 3: Implementation of the Sexual Predators Act

#### Amendment 3A:

- The Honorable James K. Robinson, Asst. Attorney General, Criminal Division  
U.S. Department of Justice, Criminal Division (DOJ)

*DOJ supports the reference of Section 1470 violations to §2G3.1, the inclusion of a specific offense characteristic providing a penalty increase for the distribution of obscene material for the receipt or expectation of receipt of some non-pecuniary thing of value, and the published specific offense characteristic for distributing obscene material to a minor.*

*DOJ does not, at this time, support the elimination of the reference to the fraud table for cases involving distribution of obscene material for pecuniary gain because obscenity cases can be large scale and include significant profits.*

- Jon Sands, Asst. Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

*FPDO supports Amendment 7A and recommends that the enhancement for the retail value of the material under §2G3.1(b)(1) continue to use the loss table in the fraud guideline. Since the current enhancement is clear and allows for uniform increases for large-scale commercial enterprises, FPDO believes an encouraged upward departure for large-scale commercial enterprises would only result in increased litigation and sentencing disparities. FPDO however recommends two modifications to §2G3.1(b)(1)(B): (1) reduce the enhancement from five levels to three levels "to recognize individuals who engage in conduct that is significantly less harmful than conduct to which the five-level enhancement applies" (FPDO March 10, 2000 Statement submitted to the United States Sentencing Commission at 24); and (2) clarify that the proposed amendment to §2G3.1(b)(1)(B) is limited to "quid pro quo" transactions or understandings, not just to transactions in general.*

*FPDO supports §2G3.1(b)(1)(C) but recommends adjusting the age requirement from 18 to 16 years in order to make this guideline consistent with other sexual abuse guidelines. FPDO opposes an additional enhancement for distribution of*



*obscene matter that does not involve pecuniary gain, anything of value, or anything to a minor.*

**Amendment 3B:**

- The Honorable James K. Robinson, Asst. Attorney General, Criminal Division  
U.S. Department of Justice, Criminal Division (DOJ)

*DOJ believes it is appropriate to reference the new offense of transmittal of identifying information about a minor for criminal sexual purposes to §2G1.1. However, it is of the opinion that the Commission should consider whether the existing sentencing enhancements found in §2G1.1 are sufficient for violations of the new offense that involve in a minor actually being solicited or prohibited sexual activity actually occurs.*

- Jon Sands, Asst. Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

*FPDO supports Amendment 7B, but recommends an additional cross reference to §2A6.1 (Threatening or Harassing Communications) depending on the underlying conduct.*

**Amendment 3C:**

- The Honorable James K. Robinson, Asst. Attorney General, Criminal Division  
U.S. Department of Justice, Criminal Division (DOJ)

*DOJ believes that sentencing enhancements under §2G2.4(b)(2) should be based on the actual number of "images or visual depictions" of child pornography rather than the number of computer files, books or magazines because "it is the number of images that reflects the harm done by the offense, not the number of computer files within which the images are stored." (Statement of James K. Robinson, Assistant Attorney General, Criminal Division at 7.)*

- Jon Sands, Asst. Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

*FPDO supports Amendment 3C, but with a recommendation that the enhancement under §2G2.4(b)(2) not depend on the number of visual depictions because of the difficulty in quantifying the amount of visual depictions and their harm.*

### **Amendment 3D:**

- The Honorable James K. Robinson, Asst. Attorney General, Criminal Division  
U.S. Department of Justice, Criminal Division (DOJ)

*DOJ is in agreement with the intent behind Amendment 3D, but would expand this new enhancement of distribution for non-pecuniary gain to apply to any distribution of child pornography regardless of whether there was an expectation of receiving something in return.*

*DOJ also agrees that distribution for pecuniary gain warrants a greater increase than other distribution, but recommends that this should be reflected on the basis of enhancements for the retail value of the material.*

- Jon Sands, Asst. Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

*FPDO supports Amendment 7D but recommends that the Commission promulgate revisions set forth in Amendment 7A to §2G2.2(b)(2), based on the same reasons cited earlier by FPDO.*

### **Amendment 3E:**

- The Honorable James K. Robinson, Asst. Attorney General, Criminal Division  
U.S. Department of Justice, Criminal Division (DOJ)

*DOJ believes that (1) the computer enhancement should be triggered only when a computer is used to facilitate an offense involving a minor victim, and (2) the two enhancements (for use of a computer and misrepresentation of identity) should be separate, cumulative enhancements rather than a single enhancement, at least in some of the relevant guidelines such as §2A3.2.*

*DOJ further believes the Commission should seriously consider providing a similar misrepresentation enhancement in §§2G2.1 and 2G2.2.*

- Jon Sands, Asst. Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

*FPDO supports Part E and recommends a two level computer enhancement for any computer or Internet device used to locate children apply to victims over 16 years old. The Commission should also seek further clarification of what is*

meant by "misrepresentation of identity."

**Amendments 3F and 3G:**

- The Honorable James K. Robinson, Asst. Attorney General, Criminal Division  
U.S. Department of Justice, Criminal Division (DOJ)

*Acknowledging its agreement with the Commission's sentiment that the matters involved herein are complex and will, to a significant extent, require further study and consideration, DOJ believes there is one pressing concern that can and should be addressed during the current amendment cycle. That concern is sentencing policy for those convicted of violations of 18 U.S.C. § 2423 (transportation of minor with intent to engage in prohibited sexual conduct and travel with such intent). DOJ points out that sexual predators are more frequently using the Internet to contact and arrange to meet with child victims for purposes of prohibited sexual activity.*

*The fact that current sentencing policy treats such offenders in the same manner as traditional rape cases, coupled with DOJ's belief that such sentencing is "wholly inadequate" because this Internet-initiated activity is substantially more insidious and threatening than the heartland of traditional rape cases, leads DOJ to suggest that the Commission add several enhancements to §2A3.2. The enhancements envisioned by DOJ, which are in addition to the separate enhancements addressing use of a computer and misrepresentation of identity, "would likely address offenses that involve coercion (as that term is defined in §2G1.1) but not force or threat of force as well as offenses where there is a large age differential between the defendant and the victim." (Statement of James K. Robinson, Assistant Attorney General, Criminal Division, at 10.)*

*DOJ expects the Commission to consider "the other aspects of [Amendments 7F] and [7G], including the implementation of the directive for enhancements for engaging in a pattern of abusive or exploitative conduct, will be addressed as a top priority for the next amendment cycle." (Statement of James K. Robinson, Assistant Attorney General, Criminal Division, at 10.)*

- Jon Sands, Asst. Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

*No comment.*



## SUMMARY OF WRITTEN TESTIMONY

### Amendment 4: Offenses Relating to Methamphetamine

- William Boman (Private Citizen)

*Mr. Boman asks the Commission to use its power and authority to (1) reinstitute discussion and debate of the problems created by mandatory sentences and their impact on the sentencing guidelines, (2) refuse to implement politically expedient sentencing increases for methamphetamine and all other drugs, (3) not promulgate any amendments resulting in increased sentences for drug offenses until the conflict between mandatory sentences and guidelines can be resolved. His interest in this amendment is due to the incarceration of his niece on the charge of conspiracy to manufacture methamphetamine; he believes that his niece's sentence of almost twenty years was too severe.*

*Mr. Boman is a member of Families Against Mandatory Minimums Foundation (FAMM).*

- Dr. Arthur Curry (Private Citizen)

*This is a testimony from a private citizen asking the Commission to participate in rethinking the 1986 Anti-Drug Abuse Act in general and specifically the disparity between "powder" and "crack" cocaine sentencing laws. He acknowledged that the Commission had studied the crack and powder cocaine disparity and had made previous recommendations to change the disparity in sentencing, but Dr. Curry urges Commission again to reflect on its original recommendations regarding this disparity in order to make sentences for crack and powder cocaine equal.*

*Dr. Curry's interest in this amendment is due to the incarceration of his son for 19 years and 7 months for his son's minimal involvement in a drug conspiracy involving crack cocaine. Dr. Curry's son was offered a plea agreement to plead guilty to the conspiracy count and agree to work in an undercover capacity in connection with other criminal investigations but his son turned down the plea agreement. His son did not feel he was guilty and did not want to work undercover.*

*Dr. Curry is a member of Families Against Mandatory Minimums Foundation (FAMM).*

- Julie Stewart, President  
Families Against Mandatory Minimums Foundation (FAMM)

*FAMM opposes any amendments relating to methamphetamine. In doing so, FAMM*

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

- Jon Sands, Asst. Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

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

## SUMMARY OF WRITTEN TESTIMONY

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

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

*AT&T supports the approach embraced by Option 3 and applauds its clear attempt to address the rapidly changing criminal frontier of the millennium through a wide view of "access device" and a revisitation of loss amounts for sentencing. Option 3 comes closest to AT&T's view that sentencing for identity theft and access device creation-and-use must be based on broader principles than simply the amount of dollar loss. Indeed, dollar loss is an inappropriate measure altogether because it fails to consider the impact on the integrity of the system, consumer confidence in that system, and the privacy and rights of individuals. While supporting Option 3, AT&T urges the Commission to revisit identity theft from a holistic perspective. It is a significant threat to marketplace competition, the American consumer and our fundamental constitutional values of property and privacy. Increased sentencing penalties, with appropriate gradations based on constitutional values, for any criminal act where identity theft is part of the modus operandi would send a clear message of deterrence and zero tolerance.*

*Loss amounts have factored prominently in sentencing to measure the crime's impact and to determine the corresponding penalty. These amounts are necessary in traditional theft crimes. The amount of money lost in a clone phone call cannot even approximate the impact of that crime. When that clone phone call orders a murder, directs a kidnapping or manages a criminal enterprise with anonymity, the loss amount becomes irrelevant. The theft of an ESN/MIN combination is difficult to conceptualize from a conventional constitutional perspective because the ESN/MIN combination is not a tangible piece of property. The use of an average loss amount or a presumption cannot reflect the gravity of this crime's impact in the situation where a criminal has harvested hundreds of ESN/MIN combinations but had not used the cloned phones containing them at the time of arrest. This is not a victimless crime because the loss amount is zero. The intrusion of property and privacy rights is no less significant because the loss amount is zero. AT&T's view of identity theft is based on this perspective.*

*Neither Options 1 nor 2 consider the full impact of identity theft crimes on the individual and the economy. Both options recognize the broader notion of harm in the context of identity theft crimes by providing automatic enhancements and a minimum base level regardless of the actual monetary loss if the crime involves the use or possession of certain identification information. Neither option gives consideration to the effect of an*



*identity theft crime beyond the impact on a person's reputation or credit history. Of the two options, AT&T prefers Option 2 because it recognizes the impact of such a crime on the individual victim beyond monetary loss (i.e., loss of reputation and credit standing) even though consideration is not given to the effect of an identity theft crime beyond a person's reputation or credit history.*

- James K. Robinson, Assistant Attorney General, Criminal Division  
U.S. Department of Justice, Criminal Division (DOJ)

*DOJ favors Option 2 "because it addresses two areas in which we believe the sentencing guidelines are deficient: (1) harm to an individual's reputation or credit standing and related difficulties; and (2) the potential harms associated with producing multiple identification documents, false identification documents, or means of identification. Neither of these harms is reflected by the loss table in the fraud guideline, §2F1.1, and both were directly addressed by Congress in its directive to the Commission." (Statement of James K. Robinson, Assistant Attorney General, Criminal Division, at 10.)*

*DOJ believes that Option 2 would be improved by inserting "unlawful" before "production or transfer" to clarify that only the unlawful production or transfer of the documents would trigger the enhancement. DOJ is also of the opinion that it would make sense to include unlawful possession in this provision.*

*DOJ points out that, while Option 1 includes the important "breeder document" concept, there are problems with the application of Option 1.*

*DOJ believes the best approach would be to incorporate the "breeder document" concept of Option 1 into Option 2 as an alternative basis for the harm to reputation enhancement. However, because of the "overly complex" manner in which Option 1 is drafted, DOJ recommends that a simplified version of the concept be developed for purposes of including it in Option 2.*

*DOJ also believes that regardless of which Option is chosen, the base offense level should be 12 in order to reflect the seriousness of identity theft and fraud, and the resulting harm to individuals. A base offense level of 12, the same level as for frauds involving sophisticated means, assures that identity theft and fraud are treated at least as seriously as sophisticated frauds generally.*

- Jon Sands, Asst. Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

*FPDO recommends that the Commission not decide this matter at this time because there have not been enough prosecutions under this new offense to warrant a change in the*

guidelines. FPDO recommends, pending further study of the matter by the Commission, that the Commission treat the unauthorized use of identification means as a basis for upward departure.

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

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

- Greg Regan, Special Agent in Charge, U.S. Secret Service  
Department of the Treasury (TREASURY)

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

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

In regard to Option 2, TREASURY:

- (i) favors a floor of 12 because, with such, it will be more probable that



- defendants convicted of identity theft will be sentenced to incarceration; is of the opinion that the application notes should clarify that even when the stolen means of identification is used to defraud an institution or the government, the non-monetary harm to the individual to whom the identification rightfully belonged should be considered (TREASURY provides an example of such harm);*
- (iii) believes the proposed two-level increase in Option 2 for offenses involving 6 or more identification documents can be improved by (a) including "unlawful possession" of 6 or more documents as a condition triggering the increase, and (b) providing for specific additional increases, cumulative to the two-level increase, for cases involving specific numbers of identification documents or means rather than simply encouraging courts to depart upward in such cases (TREASURY provided examples of specific level increases, e.g., one-level increase for offenses involving more than 10 means of identification, two-level increase for cases involving more than 50, etc.); and*
- (iv) suggests an alternative basis, actually taken from Option 1, for the application of Option 2's two-level increase for harm to an individual's reputation or credit standing. This suggestion would result in the application of the increase "if the offense involved either (1) harm to an individual's reputation or credit standing, or inconvenience related to the correction of records or restoration of reputation [taken from Option 2]; or (2) the use of an individual's identifying information to create new identification documents or means of identification without the victim's knowledge or permission [taken from Option 1]." (TREASURY March 10, 2000 Letter to The Honorable Diana E. Murphy at 3.). TREASURY is willing to work with the Commission in determining whether this proposed combination of Options 1 and 2 is workable.*



## SUMMARY OF WRITTEN TESTIMONY

### Amendment 6: Implementation of the Wireless Telephone Protection Act

- Roseanna DeMaria, Senior Vice President, Business Security  
AT&T Wireless Services

*Options 1 and 2 of amendment 6, proposed to address the Wireless Telephone Protection Act, attempt to address the concern embodied in the law that AT&T raised earlier – the mere possession of equipment that has been configured to clone is equally as repugnant to the statute as the actual use of such devices. Option 2 is clearly preferable to Option 1, because it provides enhancements for the possession of equipment to produce any “access device” as defined in the statute and not just “cloning equipment.” This not only takes into account the possessory penalty of § 1029, but also the fact that “cloning” is not the only fraud crime faced by the wireless industry. Option 2 also accounts for the problem of persons who appropriate identification information such as an ESN/MIN in order to, among other things, remain anonymous in committing other crimes.*

*As a final point AT&T highlights that none of the proposals published on February 10, 2000 take into account the interrelationship between the two acts, Identity Theft Act and Wireless Telephone Protection Act. Only Option 3 reflects this interrelationship, and offers a combined Guideline. While Option 3 still conceptualizes the harm from these crimes too narrowly by focusing on monetary loss, it appropriately provides for a higher minimum penalty for those who violate the act without any direct monetary impact on any individual.*

*As a means of correcting this dependence on monetary loss in the determination of appropriate penalties, in addition to the enhancements proposed in Option 3, AT&T respectfully suggest that the Commission consider raising the Base Offense Level contained in § 2F1.1 from 6 to 8 (with a resulting minimum base level of 14 under § 2F1.1(b)(5) of Option 3) to reflect the seriousness of these violations both to the victims of such crimes as well as the telecommunications industry and the economy as a whole. Such a revision would also bring the potential penalties in § 2F1.1 more in line with those contemplated in other sections of the Guidelines that address consumer protection statutes.*

*The sentencing approach in Option 3 set forth above deserves support because it is forward-looking. Fundamental to this approach is a recognition that Identity Theft is a toxic gas that will expand to fit the container of existing technological opportunity. Accordingly, the sentencing view that contemplates all access devices is appropriate. Similarly, a view of loss that attempts to measure risk by expanding the minimum loss*

*rule and increasing the loss amount is meaningful, albeit limited.*

*AT&T refers to guideline sections 2N1.2 and 2Q1.2 as examples of how increases to base offense levels are permitted to account for greater harms beyond monetary losses. AT&T believes substantial increases above the proposed base level should be considered where the threat of or actual harm to privacy interests is great, even though monetary loss may not be quantifiable, e.g. wholesale harvesting of ESN/MIN combinations.*

*AT&T urge the United States Sentencing Commission to create a uniform approach to sentencing for crimes involving Identity Theft that reflects the degree of criminal intent and the resulting erosion of property and privacy values regardless of the crime charged.*

- Jon Sands, Assistant Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

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

- Mary Riley, Assistant Special Agent in Charge, U.S. Secret Service  
Department of the Treasury (TREASURY)

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

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

*Because neither of the proposed options addresses TREASURY's concern that the sentences provided for in §2F1.1 rely too heavily on proof of actual loss, TREASURY*

*urges "the Commission to adopt a specific offense characteristic that would assign an alternative minimum loss amount not just for stolen or fraudulent credit cards . . . but for cloned phones and certain other access devices . . . as well." (TREASURY March 10, 2000 Letter to The Honorable Diana E. Murphy at 4.)*

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

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





## IMPORTANT NOTES

## SUMMARY OF WRITTEN TESTIMONY

### Amendment 7: Offenses Relating to Firearms

#### Amendment 7A

- Jon Sands, Assistant Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

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

#### Amendment 7B

- Jon Sands, Assistant Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

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

#### Amendment 7C

- Jon Sands, Assistant Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

*FPDO supports Amendment 7C.*



#### **Amendment 7D**

- Jon Sands, Assistant Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

*FPDO supports Amendment 7D.*

#### **Amendment 7E**

- Jon Sands, Assistant Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

*FPDO supports Amendment 7E.*

#### **Amendment 7F - Issues for Comment**

- Jon Sands, Assistant Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

- Issue 1: *FPDO opposes the use of the statutory definition of "brandish" but feels that, if the Commission decides to use it, the inclusion of "displayed" is redundant. Adoption of the statutory definition would also require that the definition of "dangerous weapon" in the commentary to §1B1.1 be changed.*
- Issue 2: *FPDO opposes the inclusion in §2K2.4 of a cross-reference to the underlying offense.*
- Issue 3: *FPDO opposes treating section 924(c) offenses as instant offenses for purposes of the career offender guidelines.*

## SUMMARY OF WRITTEN TESTIMONY

### Amendment 8: Circuit Conflicts

#### Circuit Conflicts Generally

*No testimony submitted on this point.*

#### Amendment 8A - Aberrant Behavior Departure

- James K. Robinson, Assistant Attorney General, Criminal Division  
U.S. Department of Justice, Criminal Division (DOJ)

*DOJ urges the Commission "to preserve the guideline system through promulgating a narrow departure basis for aberrant behavior." (Statement of James K. Robinson, Assistant Attorney General, Criminal Division at 13). DOJ believes that departures on the ground of aberrant behavior should be available to only that small group of offenders whose criminal conduct is truly an aberration, i.e., a single act of aberrant behavior.*

*DOJ urges the Commission to adopt an amendment that reflects the view of the majority of courts to have addressed the issue (and as is reflected above). DOJ provides specific language for such an amendment. DOJ also notes that CLC provided language for a similar type of amendment; DOJ proposes that, if the Commission would rather use the language of the CLC, it delete the word "seemingly" from the phrase "spontaneous and seemingly thoughtless act" because the word is confusing.*

- Jon Sands, Assistant Federal Public Defender, Phoenix, ArizonaA.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

*FPDO supports an aberrant behavior departure predicated on a combination of factors approach rather than the mere singularity or spontaneity of the offense. FPDO recommends that the Commission draft a new policy statement that outlines factors courts should consider in determining aberrant behavior departures, and has provided a proposed basis for same.*

## **Amendment 8B - Drug Offenses Near Protected Areas**

- Jon Sands, Assistant Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

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

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

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

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

- Jon Sands, Assistant Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

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



## **Amendment 8D - Post-Sentencing Rehabilitation**

- Jon Sands, Assistant Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

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

## **Amendment 8E - Dismissed/Uncharged Conduct under Plea Agreement**

- Jon Sands, Assistant Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

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

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

## SUMMARY OF WRITTEN TESTIMONY

### Amendment 9: Technical Amendments Package

- Jon Sands, Assistant Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

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







## SUMMARY OF WRITTEN TESTIMONY

William Boman, Private Citizen

### **Amendment 4:      Offenses Relating to Methamphetamine**

*Mr. Boman asks the Commission to use its power and authority to (1) reinstate discussion and debate of the problems created by mandatory sentences and their impact on the sentencing guidelines, (2) refuse to implement politically expedient sentencing increases for methamphetamine and all other drugs, (3) not promulgate any amendments resulting in increased sentences for drug offenses until the conflict between mandatory sentences and guidelines can be resolved. His interest in this amendment is due to the incarceration of his niece on the charge of conspiracy to manufacture methamphetamine; he believes that his niece's sentence of almost twenty years was too severe.*

*Mr. Boman is a member of Families Against Mandatory Minimums Foundation(FAMM).*

**Testimony to the United States Sentencing Commission**  
**By William Boman**  
**March 23, 2000**

Good morning members of the United States Sentencing Commission. My name is Bill Boman and I thank you for the opportunity to testify before you today about an issue that is close to my heart. Although I am no expert in sentencing matters, I am an expert in loving my family members, even the ones who make mistakes. I am here because of my niece, Terri Christine Taylor who, at age 19, became entangled in a methamphetamine conspiracy that eventually cost her 19 years and seven months of her young life. Chrissy has already served 10 years in federal prison for her minor role in this offense. I am here today because I believe her sentence is far too long for so little involvement, and that the sentencing guidelines you are charged to administer should be reformed so that low-level offenders like Chrissy are not sentenced to "kingpin" time.

I would like to tell you a little about myself. I am the owner of Gulf Coast Parcel Company in Houston, Texas, an independently operated trucking and delivery business. I have owned the company since 1986 and have worked hard to achieve the American dream by building my business and supporting my family. I have been married to my wife Norma since 1954 and we have 3 children. My niece Chrissy and I have been extremely close since she was 15, when she and her mother moved to Texas. Chrissy was going through typical, turbulent teenage years and I tried hard to steer Chrissy in the right direction by giving her a job at my company, a place to stay and unconditional love and support. Although Chrissy did things I disapproved of, including dating men more than twice her age, I always tried to show her that she had other options, and a brighter future, than she believed she had.



At age 16, Chrissy began experimenting with drugs and quickly became addicted. By age 18, Chrissy was arrested three times for drug use and seemed to be spiraling out of control. I tried to get her into drug treatment and told her I would pay her tuition to beauty school, continue to give her a place to stay and let her keep her job if she would participate in the program. Around this time she became involved with a man who was 37 years old. Of course, the family disapproved of Chrissy's choice of boyfriends. I thought this was yet another stupid teenage decision that would also pass. In retrospect, I see just how wrong I was.

Chrissy's new boyfriend was a heavy user of methamphetamine. Chrissy's addiction escalated, and she became more and more distant. There were times when we didn't know Chrissy's whereabouts. It was very hard for me to watch Chrissy's life slowly dissolve before my eyes. I knew the boyfriend was no good for her. But Chrissy was 18, and in the eyes of the law she was an adult, so I resigned myself to the fact that, despite our best intentions, Chrissy was going to pursue a life of her choosing. This is where the nightmare really began.

Chrissy's boyfriend talked her into purchasing chemicals that could be used to make methamphetamine. He reasoned that the chemicals were completely legal, so they could not get in trouble. Chrissy believed him and made the trip to Mobile, where she entered the store and picked up the order of chemicals. They went back home to Houston and Chrissy resumed her life, once again working for my company. Several months later, Chrissy returned to Mobile and picked up another order of chemicals. When she got to the store, she found that she didn't have enough money to pay for the order. The

salesperson said he would subtract chemicals from the order so she could cover it. In fact, the salesperson was actually an undercover DEA agent operating a reverse sting from the chemical company's store. A few hours later, Chrissy and her boyfriend were pulled over on their way back to Houston and the chemicals were found. No other evidence or equipment pointing to drug manufacturing was discovered. However, Chrissy and her boyfriend were charged with conspiracy to manufacture methamphetamine.

If I knew then what I know now about the justice system, I would have forced Chrissy to plead guilty to the charges. How naïve we were to think that the facts of her case would be considered! Chrissy believed she was innocent because the chemicals alone were legal, and decided to take her case to trial. The prosecutor asked Chrissy to provide substantial assistance to the government for a sentence reduction, but she had no information to trade. I well remember my confidence in the greatest justice system in the world, and my family felt secure in the fact that the punishment would fit the crime. Indeed, we were thankful in some ways that Chrissy had received a "wake up call" she sorely needed.

I will never forget the day of her sentencing. I sat in court, surrounded by my family, while Chrissy stood before the judge and was sentenced to 19 years, seven months in federal prison. The judge explained there was no parole and that she would serve the full length of her sentence. It seemed like Chrissy shrunk before my eyes as I watched her being led away in leg irons and handcuffs. I thought I was dreaming, and

then I thought I was having a heart attack. And then I got mad, very mad, and began doing everything I could to try and see that justice was served for Chrissy.

Please do not misunderstand me: I do believe that Chrissy should have been punished. She needed help to free herself from her addiction and self-destructive behavior. But almost 20 years in prison? Our country often doesn't sentence rapists or murderers that severely! What I saw in the courtroom that day, and what I have learned about mandatory sentences and sentencing guidelines since, has made me doubt everything that I once cherished about the American justice system.

These days, sentencing reform seems like nobody's problem. Congress refuses to even look at mandatory sentences for fear of being labeled "soft on crime." Sentencing Commissions in years past have issued indictments of the conflicts caused by mandatory sentences and sentencing guidelines, and yet nothing substantial is done to address what's happening to tens of thousands of Chrissy Taylors across this country each day. Since I have been involved with FAMM, at least five major reports on the ineffectiveness of mandatory sentences have been released and have sunk like stones. One begins to wonder, in this democracy of ours, what a person has to do to see that bad policies are addressed and reformed for the good of the entire system.

I tell you all of this because a substantial part of Chrissy's sentence is guideline time. but also because you have the power and the authority to shape our nation's discussion of sentencing. You have the ability to revive discussion of the problems created by mandatory sentences and their impact on sentencing guidelines. You have the power to refuse to implement politically expedient sentencing increases for



methamphetamine and all other drug offenses. You have the power to declare a moratorium on sentence increases for drug offenses under the guidelines until the conflict between mandatory sentences and guidelines can be resolved. You can take the bull by the horns and foster real debate on these issues instead of silence.

The year 2000 marks Chrissy's tenth year in prison. In just a decade, we have seen our world revolutionized by technology and improved by a booming economy. While we've been enjoying the fruits of prosperity, Chrissy has also seen the world change. She has watched the number of inmates double, triple and quadruple in her prison. She has seen inmates with more culpable roles and information to trade for sentence reductions come and go. We are a different country now and Chrissy is a different person.

I too am a different person, and I don't expect anyone to change Chrissy's situation. But I still believe that we can change our system, if we have the strength of character to try. You are new Commissioners, and as such, sentencing is *your* problem. I urge you to leave your mark on the administration of justice by becoming the most vocal and active Sentencing Commission in the history of the United States. Thank you for your time.

## SUMMARY OF WRITTEN TESTIMONY

Dr. Arthur Curry, Private Citizen

### **Amendment 4: Offenses Relating to Methamphetamine**

*This is a testimony from a private citizen asking the Commission to participate in rethinking the 1986 Anti-Drug Abuse Act in general and specifically the disparity between "powder" and "crack" cocaine sentencing laws. He acknowledged that the Commission had studied the crack and powder cocaine disparity and had made previous recommendations to change the disparity in sentencing, but Dr. Curry urges the Commission to reflect again on its original recommendations regarding this disparity in order to make sentences for crack and powder cocaine equal.*

*Dr. Curry's interest in this amendment is due to the incarceration of his son for 19 years and 7 months because of his son's minimal involvement in a drug conspiracy involving crack cocaine. Dr. Curry's son was offered a plea agreement to plead guilty to the conspiracy count and agree to work in an undercover capacity in connection with other criminal investigations but his son turned down the plea agreement.*

*Dr. Curry is a member of Families Against Mandatory Minimums Foundation (FAMM).*





## IMPORTANT NOTES

**Testimony to the United States Sentencing Commission**  
**By Dr. Arthur Curry**  
**March 23, 2000**

Please allow me to thank you for this opportunity to testify before the Commission.

I consider it extremely significant that you understand first why I am *not* here. It is not my intent to point fingers or criticize judges and prosecutors, nor mock the Judiciary system of our country. My sole purpose today is to present my son's case to you as an example of why we must rethink the 1986 Anti-Drug Abuse Act in general and specifically the disparity that exists between "powder" and "crack" cocaine sentencing laws.

In passing this Act, we have forced prosecutors to demonstrate their toughness on drugs and drug offenders by the number of convictions they get. This has meant, in many cases, referring cases normally heard in state courts to federal court, changing trials to a more favorable location for convictions, and using minor participants in an undercover capacity relative to other criminal investigations.

I must admit to you, however, that I am frustrated and sometimes angered by a democratic system that I defended and promoted as a soldier in Vietnam, as an educator, as a parent, and as a black male in America. I was raised to believe that this system worked for everyone, regardless of race, gender, age, or religion. Now for the first time in my life when I need to use that system, I have found it almost impossible to get an audience with any elected representative.

My son, Derrick A. Curry, was arrested on December 5, 1990, at the age of 19 and charged with one count of possession with intent to distribute crack cocaine, and one count of conspiracy to distribute crack cocaine. He is the youngest of three children and my only son. His oldest sister is an accountant in Chicago and the other a recent graduate of Carnegie-Mellon in Pittsburgh.

A complete background check was done by the F.B.I. and no evidence was found to support the contention that he was a major drug dealer. He owned no car; he drove an old Citation that belonged to his mother. He had no money and like most college students borrowed gas money routinely from his mother and me. He had no jewelry. He had no arrest record, nor any involvement with the law prior to this incident. On the other hand, despite having an I.Q. of 80, he was a second year student at Prince George's Community College working toward, of all things, a degree in criminal justice.

The F.B.I. had conducted an investigation involving twenty-eight individuals for over five years. By the prosecutors' own records, my son was a minor participant who was only involved the last six months of the investigation.

During the ensuing months, he was offered a plea agreement that called for him to plead guilty to the conspiracy count and agree to work in an undercover capacity in connection with other criminal investigations, in addition to other terms and conditions. In exchange, it would be recommended to the court that he be sentenced to 15 years. My son turned down the plea agreement for two reasons. He did not feel that he was guilty and he did not want work undercover.

Because of the large number of individuals involved and other legal implications, Derrick was tried separately. He also was the only one of the original twenty-eight defendants found guilty of the conspiracy. One can't help but wonder with whom did he conspire?

My son was sentenced on October 1, 1993, to 19 years and 7 months. However, he would have received a 10-year sentence, at best, if it was powdered cocaine. Then, not long after my son was sentenced, I read a commentary in the *Washington Post* written by federal prosecutor Jay Apperson. In it, Apperson described the subjective practices that exist when prosecutors decide who to charge, what to hold the individual accountable for, and whether or not to accept substantial assistance, or cooperation. According to the article, a woman was sentenced to 10 years in prison for her involvement in a drug conspiracy. After deciding later to cooperate, she served only 18 months. Does fairness, justice and equality of the law depend solely on the prosecutor one receives?

I must admit to you that I too sat and watched former President Bush address the nation on the drug problem. Without the facts, I too believed that crack was the worst evil to confront our nation – that something had to be done. Now we have the facts and something still must be done. With the facts, how can the penalty for crack be 100 times greater than that of powdered cocaine? Without powder cocaine there is no crack.

Past Sentencing Commissions have studied the crack and powder cocaine disparity and have recommended that the disparity be changed. I urge you to reflect on the original recommendations of the Sentencing Commission in this matter. Make sentences for crack and powder cocaine equal to current sentences for powder cocaine.

I am hopeful that you, as new Commissioners, will wipe the slate clean and finally resolve the nagging and unjust disparity between powder and crack cocaine. In addition, I hope that your solution will be retroactive – not only to aid my son, but to rebuild Americans' confidence in our justice system.





## IMPORTANT NOTES

## SUMMARY OF WRITTEN TESTIMONY

Robert Kruger for

Business Software Alliance, Interactive Digital Software Association,  
Motion Picture Association of America, Recording Industry Association of America,  
and Software & Information Industry Association

### Amendment 1: Implementation of the No Electronic Theft Act

*BSA offers the following recommendations that reflect both relevant policy objectives and important institutional considerations regarding reformulating and refining the relevant guidelines themselves:*

- 1) The sentencing outcome of the amended guideline must be certain and predictable, without the option of "an open-ended departure to undo the sentence arrived at under the guideline." Qualifying the formula for calculating the economic value of the infringing activity with words like "usually" might lead to protracted sentencing hearings angling for an exception that "displaces adherence to the rule."*
- 2) An increase in the base offense level is appropriate to establish parity in the treatment of criminal copyright infringement and to create deterrence. A compensating increase in the base offense level for "more than minimal planning" is justified because most criminal copyright infringements involve planning - and execution - of an often extensive and sophisticated nature. The omission of this increase would result in unintentionally treating intellectual property offenses as less serious than the equivalent offenses of fraud or theft.*
- 3) The economic harm is not eliminated or necessarily mitigated if the infringer doesn't profit financially or charges a low price for the infringing articles. Adopting a guideline that focuses solely on the displaced sales equation overlooks harms indirectly to copyright owners through injury to reputation, through the destruction of legitimate channels of distribution and by contributing to an overall lack of respect for and adherence to intellectual property laws. Infringers who price their wares far below their competitors in the black market capture a larger share of the trade in pirated goods.*
- 4) The unique injury to the right-owner from pre-release product warrants separate treatment under the guidelines. The availability of infringing product prior to the commercial release of a work can cause significant lost sales and damage to the market. Often, the pre-released item is a reproduction of a work in progress that is not ready for market.*

5) The determination of economic value should be based upon the retail price of the infringed-upon articles wherever digital or electronic reproductions are involved. Functionally, an unauthorized digital copy of a software program is no different than the legitimate article. This functional equivalence is the basis for including appropriate language in options that seek to treat "inferior goods" in a disparate manner.

6) The guidelines should empower courts to punish more severely those criminal copyright offenses that involve other dangerous criminal activity. The guidelines ought to attach greater criminal culpability to large scale, organized infringement, especially when it promotes or fosters other adverse societal consequences. We have supported including a special offense characteristic, such as that presently contained in Option 2 (as presented in both options papers made available to the public), that would increase the offense level where there is a risk of bodily injury to others.

Support for Option 4 of the Issue for Public Comments dated February 21, 2000 was again extended on behalf of the software, motion picture and recording industries. BSA believes that Option 4 most closely embodies the preceding principles, is most consistent with the institutional aims behind the sentencing guidelines, and is most faithful to the Congressional goal of achieving effective deterrence.



TESTIMONY OF ROBERT M. KRUGER ON BEHALF OF THE BUSINESS  
SOFTWARE ALLIANCE, THE INTERACTIVE DIGITAL SOFTWARE  
ASSOCIATION, THE MOTION PICTURE ASSOCIATION OF AMERICA, THE  
RECORDING INDUSTRY ASSOCIATION OF AMERICA AND THE SOFTWARE &  
INFORMATION INDUSTRY ASSOCIATION

BEFORE THE UNITED STATES SENTENCING COMMISSION  
MARCH 27, 2000

Thank you for the opportunity to testify on the amendments to the sentencing guidelines currently being considered by the Commission pursuant to the directive contained in the "No Electronic Theft Act of 1997," Pub. L. 105-147 (The NET Act).

I am Robert M. Kruger, Vice President of Enforcement at the Business Software Alliance (BSA), a trade association whose members include the leading publishers of productivity software in the United States. I am testifying today on behalf of BSA and four other associations that share a common interest in protecting the copyrights of their members against infringement:

- The Interactive Digital Software Association (IDSA), whose members publish more than 90% of the entertainment software sold in the U.S.
- The Motion Picture Association of America (MPAA), whose members produce approximately 90% of filmed entertainment in the theatrical, television and home video markets
- The Recording Industry Association of America (RIAA), whose members produce over 90% of the legitimate sound recordings, records, CDs and audio tapes sold in the U.S. and
- The Software Industry & Information Association (SIIA), the principal trade association for the software and digital content industry.

The individuals behind the businesses that make up these associations create some of the most useful, productive, entertaining and valued products in the world. In recent years, their collective output has become America's fastest-growing economic asset, representing 4.3% of the annual gross domestic product (GDP). Together, the software, motion picture and recording industries make greater value-added contributions to our nation's economy and employ more individuals than any other manufacturing sector and rank first in foreign sales and exports. Artists, performers, programmers, consumers, taxpayers, wage-earners, entrepreneurs, investors, music lovers, film buffs and many, many others all benefit from the continued economic vitality of the U.S. copyright community.

But these benefits -- and the future of these industries -- have been placed at risk by the increasing incidence and scope of intellectual property crime. Piracy has long plagued the copyright community, depriving creators of a return on their investment and stifling growth by destroying the incentives for the creation of new works. In recent years, however, the problem has grown much more severe as technological advances have dramatically increased the ability to reproduce and distribute copyrighted works. Physical distribution channels have been invaded by sophisticated counterfeiting operations, a growing number of which involve organized -- and dangerous -- criminal elements. On the Internet, auction site vendors, web site operators and pirate groups distribute unauthorized copies of copyrighted works on a scale that threatens to dwarf the estimated \$20-\$22 billion in revenue lost to piracy by "traditional" means each year.

Much has been done to address this problem through education, technological measures, civil enforcement and other means. There is, however, a public policy consensus, reflected in the NET Act directive, that the deterrence attainable through criminal prosecution is an essential component of an effective solution. In order to achieve compliance with this country's copyright laws, the public must understand and expect that meaningful sanctions will be imposed against those who engage in activities that rise to the level of criminal violations of the law.

With so much at stake, our associations have endeavored to be fully responsive as Congress and the Commission have sought our input on enhancing the sentencing guidelines. We have testified to our experience before Congress and, in letters dated January 26, 2000 and March 10, 2000, submitted written comments to the Commission on the various options for amending the guidelines under consideration. As those options have been reformulated and refined, our views have reflected several basic principles that we believe are consistent with both the relevant policy objectives and the important institutional considerations underlying the guidelines themselves:

- The sentencing outcome under the amended guideline must be certain and predictable. The inclusion of a provision that would allow for an open-ended departure to undo the sentence arrived at under the guideline -- such as that contained in certain options under consideration -- would be at odds with these objectives. Similarly, qualifying the methodology for arriving at the economic value of the infringing activity with words like "usually" might well lead to protracted sentencing hearings in which angling for an exception displaces adherence to a rule.
- An increase in the base offense level is appropriate to establish parity in the treatment of criminal copyright infringement and to create deterrence. Under the existing guidelines, there is no adjustment available to account for the higher level of criminal culpability that accompanies other offenses involving "more than minimal planning." This omission results in unintentionally treating intellectual property offenses as less serious than equivalent offenses in the fraud or theft area even though their economic impact is at least equally adverse. A compensating increase in the base offense level is justified by the fact that most criminal copyright infringements involve planning -- and execution -- of an often extensive and sophisticated nature.



- The economic harm is not eliminated or necessarily mitigated if the infringer doesn't profit financially or charges a low price for the infringing articles. We acknowledge that there is not always a one-to-one relationship between market displacement and the distribution of infringing articles. It is, however, perverse to assume that the lower a good is priced, the less likely it will displace a sale. Indeed, it may be more logical to assume that infringers who price their wares below those of their competitors in the black market actually capture a larger share of the trade in pirated goods. Moreover, the sale of pirated product can harm copyright owners indirectly, through reputational injury, through the destruction of legitimate channels of distribution and by contributing to an overall lack of respect for and adherence to intellectual property laws. Adopting a guideline that focuses solely on the displaced sales equation overlooks these harms and may fall short of providing the deterrence recognized by Congress as critical to this undertaking.
- The unique injury to the right-owner from pre-release product warrants separate treatment under the guidelines. As we have noted previously, unauthorized reproduction, distribution, performance or display of a copyrighted work prior to the time that the owner is prepared to release that product into the open market works a distinctive harm to the copyright owners. The availability of infringing product prior to the commercial release of a work can cause significant lost sales and damage to the market. Often, the pre-released item is a reproduction of a work in progress that is not ready for market.
- The determination of economic value should be based upon the retail price of the infringed-upon articles wherever digital or electronic reproductions are involved. Whatever special treatment should be given to infringing articles that are inferior in quality to genuine goods, the guidelines should embody the recognition that there is a technological identity between the quality of genuine goods and infringing works that are digitally or electronically reproduced. Functionally, an unauthorized digital copy of a software program is no different than the legitimate article. This functional equivalence is the basis for the suggestions we have made to include appropriate language in options that seek to treat "inferior goods" in a disparate manner.
- The guidelines should empower courts to punish more severely those criminal copyright offenses that involve other dangerous criminal activity. The guidelines ought to attach greater criminal culpability to large scale, organized infringement, especially when it promotes or fosters other adverse societal consequences. The increased involvement of organized criminal elements in copyright infringement presents one such scenario. Accordingly, we have supported the inclusion of a special offense characteristic, such as that presently contained in Option 2 (as presented in both options papers made available to the public), that would increase the offense level where there is a risk of bodily injury to others. Such an adjustment might, for example, come into play where the offenders are using weapons in the course of their activities.

We continue to believe that, modified in minor respects, Option 4 – as presented in the paper provided by the Commission staff on February 21 –most closely embodies these principles, is most consistent with the institutional aims behind the sentencing guidelines and is most faithful to the Congressional goal of achieving effective deterrence.

We appreciate the extent to which the Commission, and in particular its staff, has invited the copyright community, as direct victims of intellectual property crime, to share its experiences and insights throughout its consideration of this important matter. We hope we have been of assistance to the Commission as it seeks to complete its work. We stand ready to answer questions and to continue to assist the Commission in any way possible.







**SUMMARY OF WRITTEN TESTIMONY**  
**David C. Quam, General Counsel**  
**International AntiCounterfeiting Coalition, Inc. (IACC)**

**Amendment 1:      Implementation of the No Electronic Theft Act**

*Increasingly, many of the counterfeit products that have been sold present public health and safety risks, finance organized crime, and adversely impact the U.S. economy. The theft of intellectual property causes damage far beyond any one-time loss associated with a lost sale.*

*The difficulty facing the Commission is creating an amendment that incorporates both monetary loss and the harm caused to reputations and goodwill, lost productivity and jobs, and diminished consumer, wholesaler and retailer confidence in a brand. Measuring only pecuniary harm as represented by lost sales will understate the true damage caused by counterfeiters and pirates. IACC believes the only real deterrent to counterfeiting is the imposition of criminal penalties that result in actual jail time served.*

*The current guidelines for offenses under 18 U.S.C. §§2318, 2319, 2319A and 2320, do not adequately deter counterfeiting and piracy due to the high monetary thresholds required to impose meaningful sentences. The Commission should be mindful that changes in the Federal Sentencing Guidelines will also have an impact on U.S. efforts to encourage intellectual property protection abroad. Sentencing guidelines that fail to provide strong penalties under U.S. law will undermine the Government's efforts abroad and provide trading partners with a basis to argue that the United States itself lacks the political will to impose strict penalties.*

*The IACC respectfully urges the Commission to adopt changes to current Guideline 2B5.3 that are consistent with congressional directives, create a meaningful deterrent, and properly reflect the seriousness of the offenses of trademark counterfeiting and copyright piracy. IACC recommends that the amendment adopted by the Commission embodies each of the following elements: (1) Offense levels based on the retail price of the infringed upon items multiplied by the quantity of items involved in the offense because the actual price more accurately reflects the injury to the intellectual property rights holder and provides greater certainty for prosecutors and courts in applying the guidelines; (2) Across the board enhancements for all intellectual property crimes to avoid favoring one form of intellectual property offense over another; (3) Increased levels for an offense involving conscious or reckless risk of serious bodily injury or death to account for counterfeit products that pose health or safety risks; (4) Recognition of the role of organized crime in counterfeiting and piracy.*

*IACC supports Option 4 as embodying the preceding elements except for one recommended*

*change of combining specific offense characteristics (b)(2)(B) and (b)(2)(C) into a single inclusive SOC.*

*IACC's main criticism of Option 4 is the two level decrease SOC applied in cases involving "greatly discounted merchandise" and merchandise that is "substantially inferior." According to IACC, these provisions reward counterfeiters and pirates for selling inferior or greatly discounted merchandise. The IACC does not believe that copyright pirates making exact copies of popular software, music or videos should benefit from a two level decrease simply because they sell their products cheaply. Consequently, the IACC recommends that the Commission amend Option 4 to call for a two level decrease when the offense involved greatly discounted merchandise and the quality or performance of the infringing item was substantially inferior to the quality or performance of the infringed item.*



# **Testimony of David C. Quam, General Counsel to the International AntiCounterfeiting Coalition, Inc., before the United States Sentencing Commission**

**March 23, 2000**

On behalf of the 180 members of the International AntiCounterfeiting Coalition, Inc. ("IACC") let me thank you for holding this hearing and giving us the opportunity to testify. My name is David Quam and through the firm Powell, Goldstein, Frazer and Murphy LLP, I serve as General Counsel to the Coalition.

The IACC would like to commend the Commission and its staff for the work it has done on this issue and express its support for proposed Option 4. Although the IACC recommends a slight modification to Option 4, we believe that this approach best captures the complexities associated with trademark and copyright crimes while complying with the directive set forth in the No Electronic Theft Act ("NET Act").

## **I. Background**

The IACC is a non-profit trade association formed to advocate for the effective protection and enforcement of intellectual property rights in the United States and abroad. Comprised of more than 180 members, including manufacturers, business trade associations and professional service firms, the IACC is the largest organization dedicated solely to combating trademark counterfeiting and copyright piracy.

Our members represent a cross-section of industry ranging from auto, apparel, and luxury goods manufacturers, to pharmaceutical, consumer product, software, and entertainment companies. Consumers who purchase the products of IACC members use trademarks and trade names to identify the source of the goods and provide assurances with regard to quality, safety and reliability. Counterfeiting and piracy undermines consumer expectations by stealing the intellectual property and underlying reputations of legitimate manufacturers to sell inferior products for quick profits.

### **A. The Importance of Adequate Protection for Intellectual Property**

For the past several years Congress and the Administration have used legislation and international trade negotiations to underscore the importance of providing effective and adequate protection of intellectual property rights. Legislatively, Congress passed a series of bills including the Anticounterfeiting Consumer Protection Act<sup>1</sup> to enhance intellectual property protections and provide additional weapons to fight counterfeiting and piracy, and the NET Act<sup>2</sup> to address the growing problem of online infringements.

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<sup>1</sup> Pub. L. 104-153 (1996).

<sup>2</sup> Pub. L. 105-147 (1998).

Congress also took steps to protect against the dilution of famous trademarks<sup>3</sup> and to recognize intellectual property rights in disputes over Internet domain names.<sup>4</sup> The importance of intellectual property is also a driving force behind the aggressive stance taken by the United States Trade Representative in dealing with U.S. trading partners around the globe.

The attention given to intellectual property issues is due in large part to a growing awareness of the harm counterfeit and pirated goods pose to consumers, industry, and the economy. In 1982, counterfeiting cost the U.S. an estimated \$5.5 billion.<sup>5</sup> Today, the problem has become an epidemic, generating losses of over \$200 billion in the United States<sup>6</sup> and more than \$350 billion worldwide.<sup>7</sup>

This explosive growth has been accompanied by a migration in the availability of counterfeits and pirated goods from traditional locations like city streets, flea markets, swap meets, and sports stadiums to suburbs, strip-malls, and the shelves of leading retail stores. Increasingly, many of these counterfeit products present public health and safety risks, finance organized crime, and adversely impact the U.S. economy. The following examples illustrate the extent of the problem:

1. Health and Safety: Head and Shoulders shampoo and counterfeit-labeled infant formula, which represent serious public health and safety risks, were found in retail stores. Other examples of dangerous counterfeits include food products, pharmaceuticals, children's toys, airplane and automotive parts, and eyewear.
2. Organized Crime: Law enforcement officials recently broke up a Los Angeles-based software piracy ring controlled by three Chinese organized crime groups. They seized millions of dollars worth of counterfeit Microsoft software, as well as plastic explosives, TNT, shotguns, handguns, and silencers. In a separate case, police in New Jersey seized thousands of counterfeit designer handbags that were being used to further a drug trafficking scheme--heroin was stitched into the lining of the counterfeit handbags.<sup>8</sup>
3. Impact on the Economy: Counterfeiters and pirates do not pay taxes. New York City alone loses over \$400 million a year in lost sales and excise taxes due to the

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<sup>3</sup> "Trademark Amendments Act of 1999," Pub. L. 106-43.

<sup>4</sup> "Intellectual Property and Communications Omnibus Reform Act of 1999," Pub. L. 106-113.

<sup>5</sup> United States International Trade Commission, 1982.

<sup>6</sup> Michael Finn, *Foiling Counterfeiters*, TRADEMARKS AM., April 1994.

<sup>7</sup> *Countering Counterfeiting*, International Chamber of Commerce, Counterfeiting Intelligence Bureau, April, 1997, at 13.

<sup>8</sup> In testimony before the International Trade Subcommittee of the House International Relations Committee on October 13, 1999, Customs Commissioner Kelly stated:

"Our investigations have shown that organized criminal groups are heavily involved in trademark counterfeiting and copyright piracy. They often use the proceeds obtained from these illicit activities to finance other, more violent crimes. These groups have operated with relative impunity. They have little fear of being caught - for good reason. If apprehended, they face minimal punishment. We must make them pay a heavier price."



sale of counterfeit goods and the U.S. Customs Service estimates that hundreds of thousands of Americans lose their jobs every year due to counterfeiting and piracy. Small legitimate retailers and entrepreneurs also suffer as they are forced to compete with companies and retailers selling illegal low-cost fakes.

Our members, manufacturers of some of the best known products in the world, collectively invest billions of dollars in developing, testing, manufacturing, marketing and advertising goods and services to ensure that their products are safe, reliable, and meet high quality standards. Those who counterfeit trademarked goods or willfully infringe copyrighted works are stealing not only sales, but also a rights-holder's investment in creativity, time, capital, and labor. In other words, the theft of intellectual property causes damage far beyond any one-time loss associated with a lost sale. The difficulty facing the Commission is creating an amendment that incorporates both monetary loss and the harm caused to reputations and goodwill, lost productivity and jobs, and diminished consumer, wholesaler and retailer confidence in a brand. Any attempt to judge the severity of counterfeiting or piracy by measuring only pecuniary harm as represented by lost sales will necessarily understate the true damage caused by counterfeiters and pirates.

The IACC and its members maintain that the only way to effectively deter counterfeiting is to assure that counterfeiters receive jail time for their actions. Stringent criminal penalties are necessary because the nature of counterfeiting and piracy as illicit underground operations do not lend themselves to civil enforcement. Actual damages are difficult to prove because offenders operate in cash and keep very few records. Indeed, most counterfeiters and pirates treat civil damage awards and fines as merely the cost-of-doing-business. The only real deterrent to counterfeiting is the imposition of criminal penalties that result in actual jail time served.

#### B. Establishing Effective Guidelines

The current guidelines for offenses under 18 U.S.C. §§2318, 2319, 2319A and 2320, do not adequately deter counterfeiting and piracy due to the high monetary thresholds required to impose meaningful sentences. The difficulties experienced by members of the IACC in obtaining federal enforcement on account of the nominal penalties currently imposed pursuant to the Guidelines is well-documented. Congress recognized this shortcoming and the need to increase the actual length of sentences awarded for trademark and copyright offenses when it directed the Commission to enhance penalties associated with such crimes.

Changes in the Federal Sentencing Guidelines will also have an impact on U.S. efforts to encourage intellectual property protection abroad. The United States is the leading advocate of stronger, more effective and deterrent penalties for intellectual property violations internationally. Through the use of domestic trade law provisions like the Special 301<sup>9</sup> and multilateral tribunals such as the World Trade Organization, the

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<sup>9</sup> See, 19 U.S.C. §2242.

United States works to persuade trading partners to strengthen their national laws to combat and deter counterfeiting and piracy. The United States' ability to effectively advocate for changes abroad is directly effected by the strength of its own laws. Sentencing guidelines that fail to provide strong penalties under U.S. law will undermine the Government's efforts abroad and provide trading partners with a basis to argue that the United States itself lacks the political will to impose strict penalties.

The IACC, therefore, respectfully urges the Commission to adopt changes to current Guideline 2B5.3 that are consistent with congressional directives, create a meaningful deterrent, and properly reflect the seriousness of the offenses of trademark counterfeiting and copyright piracy.

## **II. Recommendations**

The Commission put forth four alternative proposals for amending Section 2B5.3. Ultimately, the IACC recommends that the Commission adopt an amendment that embodies each of the following elements:

1. Offense levels based primarily on the retail price of the infringed upon items multiplied by the quantity of items involved in the offense. Reliance upon the actual price of legitimate product, instead of the value of the infringing, more accurately reflects the injury to the intellectual property rights holder, and provides greater certainty for both prosecutors and the Courts in applying the guidelines, thereby advancing one of the key objectives of the Sentencing Commission.
2. Across the board enhancements for all intellectual property crimes. Any amendment should not favor one form of intellectual property over another.
3. Increased levels for offenses involving conscious or reckless risk of serious bodily injury or death. Cases involving products that pose health and safety risks warrant increased punishment.
4. Recognition of the role of organized crime in counterfeiting and piracy. High profits and low risks continue to attract organized crime groups to counterfeiting and piracy.

Using these criteria, the IACC supports Option 4 with one recommended change: combine specific offense characteristics (b)(2)(B) and (b)(2)(C) into a single inclusive SOC.

The IACC's main criticism of Option 4 stems from the inclusion of "greatly discounted merchandise," and "substantially inferior" as SOCs that separately result in a 2 level decrease. The IACC is concerned that these provisions only serve to reward counterfeiters and pirates that sell substantially inferior merchandise (as distinct from marginally inferior merchandise) at substantially reduced prices (instead of marginally discounted prices).



If the Commission wishes to make a distinction between classes of infringing items based on price and quality, it should do so by considering both characteristics as a whole. Price alone may be an indicator that goods are false, but if the infringing products are of decent quality, they may translate into a one-for-one sales loss that is properly captured without a 2 level decrease. Likewise, poor quality may call into question the authenticity of a product, but if counterfeiters and pirates find that they can sell cheap knock-offs at higher prices, they most certainly will. Finally, digital technology now allows for near perfect reproduction of some works. The IACC does not believe that copyright pirates making exact copies of popular software, music or videos should benefit from a 2 level decrease simply because they sell their products cheaply. Consequently, the IACC recommends that the Commission amend Option 4 to call for a 2 level decrease when the offense involved greatly discounted merchandise and the quality or performance of the infringing item was substantially inferior to the quality or performance of the infringed item.

### **III. Conclusion**

The IACC commends the Commission for its hard work in devising a guideline to capture the many nuances of intellectual property crimes. Trademark counterfeiting and copyright piracy are serious crimes. They discourage creativity, devalue investment, harm reputations, and often defraud consumers. Limited law enforcement resources and minimal penalties, however, have made criminal enforcement of intellectual property rights a low priority at the federal level. The enhancements proposed by the Commission in Option 4 will help to encourage prosecutions and, more importantly, deter future counterfeiting and piracy.



## 6

## SUMMARY OF WRITTEN TESTIMONY

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

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

*AT&T supports the approach embraced by Option 3 and applauds its clear attempt to address the rapidly changing criminal frontier of the millennium through a wide view of "access device" and a revisitation of loss amounts for sentencing. Option 3 comes closest to AT&T's view that sentencing for identity theft and access device creation-and-use must be based on broader principles than simply the amount of dollar loss. Indeed, dollar loss is an inappropriate measure altogether because it fails to consider the impact on the integrity of the system, consumer confidence in that system, and the privacy and rights of individuals. While supporting Option 3, AT&T urges the Commission to revisit identity theft from a holistic perspective. It is a significant threat to marketplace competition, the American consumer and our fundamental constitutional values of property and privacy. Increased sentencing penalties, with appropriate gradations based on constitutional values, for any criminal act where identity theft is part of the modus operandi would send a clear message of deterrence and zero tolerance.*

*AT&T points out that loss amounts have factored prominently in sentencing to measure the crime's impact and to determine the corresponding penalty. These amounts are necessary in traditional theft crimes. The amount of money lost in a clone phone call cannot even approximate the impact of that crime. When that clone phone call orders a murder, directs a kidnapping or manages a criminal enterprise with anonymity, the loss amount becomes irrelevant.*

*The theft of an ESN/MIN combination is difficult to conceptualize from a conventional constitutional perspective because the ESN/MIN combination is not a tangible piece of property. The use of an average loss amount or a presumption cannot reflect the gravity of this crime's impact in the situation where a criminal has harvested hundreds of ESN/MIN combinations but had not used the cloned phones containing them at the time of arrest. This is not a victimless crime because the loss amount is zero. The intrusion of property and privacy rights is no less significant because the loss amount is zero. AT&T's view of identity theft is based on this perspective.*

*Neither Options 1 or 2 consider the full impact of identity theft crimes on the individual and the economy. Both options recognize the broader notion of harm in the context of identity theft crimes by providing automatic enhancements and a minimum base level regardless of the actual monetary loss if the crime involves the use or possession of certain identification information. Neither option gives consideration to the effect of an identity theft crime*



beyond the impact on a person's reputation or credit history. Of the two options, AT&T prefers Option 2 because it recognizes the impact of such a crime on the individual victim beyond monetary loss (i.e., loss of reputation and credit standing) even though consideration is not given to the effect of an identity theft crime beyond a person's reputation or credit history.

#### **Amendment 6:      Implementation of the Wireless Telephone Protection Act**

*Options 1 and 2 of amendment 6, proposed to address the Wireless Telephone Protection Act, attempt to address the concern embodied in the law that AT&T raised earlier – the mere possession of equipment that has been configured to clone is equally as repugnant to the statute as the actual use of such devices. Option 2 is clearly preferable to Option 1, because it provides enhancements for the possession of equipment to produce any "access device" as defined in the statute and not just "cloning equipment." This not only takes into account the possessory penalty of § 1029, but also the fact that "cloning" is not the only fraud crime faced by the wireless industry. Option 2 also accounts for the problem of persons who appropriate identification information such as an ESN/MIN in order to, among other things, remain anonymous in committing other crimes.*

*As a final point AT&T points out that none of the proposals published on February 10, 2000 take into account the interrelationship between the two acts, Identity Theft Act and Wireless Telephone Protection Act. Only Option 3 reflects this interrelationship, and offers a combined Guideline. While Option 3 still conceptualizes the harm from these crimes too narrowly by focusing on monetary loss, it appropriately provides for a higher minimum penalty for those who violate the act without any direct monetary impact on any individual.*

*As a means of correcting this dependence on monetary loss in the determination of appropriate penalties, in addition to the enhancements proposed in Option 3, AT&T respectfully suggest that the Commission consider raising the Base Offense Level contained in § 2F1.1 from 6 to 8 (with a resulting minimum base level of 14 under § 2F1.1(b)(5) of Option 3) to reflect the seriousness of these violations both to the victims of such crimes as well as the telecommunications industry and the economy as a whole. Such a revision would also bring the potential penalties in § 2F1.1 more in line with those contemplated in other sections of the Guidelines that address consumer protection statutes. AT&T refers to guideline sections 2N1.2 and 2Q1.2 as examples of how increases to base offense levels are permitted to account for greater harms beyond monetary losses. AT&T believes substantial increases above the proposed base level should be considered where the threat of or actual harm to privacy interests is great, even though monetary loss may not be quantifiable, e.g. wholesale harvesting of ESN/MIN combinations.*

*The sentencing approach in Option 3 set forth above deserves support because it is forward-looking. Accordingly, the sentencing view that contemplates all access devices is appropriate. Similarly, a view of loss that attempts to measure risk by expanding the*

*minimum loss rule and increasing the loss amount is meaningful, albeit limited. We urge the United States Sentencing Commission to create a uniform approach to sentencing for crimes involving Identity Theft that reflects the degree of criminal intent and the resulting erosion of property and privacy values regardless of the crime charged.*



## IMPORTANT NOTES





**AT&T Wireless Services**

**Testimony Before**

**The United States Sentencing Commission**

**Identify Theft Act**

**&**

**Wireless Telephone Protection Act**

**Roseanna DeMaria  
Senior Vice President  
Business Security**

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## **Technological Convergence Warrants Uniform Sentencing Irrespective of the Technology Used For Theft or Access**

Thank you for the opportunity to share with you our views of the proposed sentencing options for the Identity Theft Act and the Wireless Telephone Protection Act. These 1998 acts provided a proactive approach to the evolving criminal of the millennium who relentlessly capitalizes on technology for illicit purposes to victimize the American consumer and industry. We support the approach embraced by Option 3 and applaud its clear attempt to address the rapidly changing criminal frontier of the millennium through a wide view of "access device" and a revisitation of loss amounts for sentencing. Option 3 comes closest to our view that sentencing for Identity Theft and access device creation-and-use must be based on broader principles than simply the amount of dollar loss. Indeed, dollar loss is an inappropriate measure altogether because it fails to consider the impact on the integrity of the system, consumer confidence in that system, and the privacy and rights of individuals. Quite simply, the future demands a better measurement tool than monetary loss. While we support Option 3, we urge the United States Sentencing Commission to revisit Identity Theft from a holistic perspective. It is a significant threat to marketplace competition, the American consumer and our fundamental constitutional values of property and privacy.

We respectfully submit that the current marketplace is exploding with competition and technological convergence to birth multiple generations of products and services for the American consumer. This explosion has been encouraged by the FCC and aggressively pursued by the telecommunications industry. This is the context for the Internet explosion along with all Internet-related services. E-commerce brings to us a new, ubiquitous approach to all transactions, both consumer and business. On-line trading and on-line banking will change the landscape for financial institutions. The convergence of voice and data through wireless and broadband will similarly change the way we conduct our lives. These areas are but a portion of the landscape. For this landscape to grow and advance the consumer must have confidence in it. Identity Theft exponentially threatens that confidence and undermines our basis constitutional values.

As a result of this technological convergence, there needs to be a uniform approach to penalizing Identity Theft. It is irrelevant whether the access proliferating the Identity Theft is from a mobile terminal, a fixed computer, or an ATM - the problem is the same - the security of the experience is threatened because of the compromise of constitutional property and privacy values. Consumer confidence will be irreparably harmed. The criminal capitalizes on these technological opportunities to maintain anonymity through Identity Theft. Just as technological development advances at the speed of Internet time, the criminal of the millennium advances equally fast. Despite Congress' best efforts to keep pace with this criminal, it will never be able to legislate at Internet speed. Accordingly, the criminal has an advantage.

To date, Congress has aggressively focused on proscribing technology-specific crimes. Uniform to those crimes is one, robust approach, namely: the rapid evolution and proliferation of Identity Theft across technologies in pursuit of anonymity to commit other crimes. The penalty for this criminal methodology must be consistent in its message to all crimes. The impact of this crime on consumer confidence, and ultimately on value in the marketplace, cannot be overstated. This can be done in the sentencing approach as opposed to sentencing focused on each, individual,



technology-specific statute. Increased sentencing penalties, with appropriate gradations based on constitutional values, for any criminal act where Identity Theft is part of the modus operandi would send a clear message of deterrence and zero tolerance.

The future is here for this criminal approach. Presently, we are seeing the growth of Identity Theft. The Federal Trade Commission recently initiated a toll free hotline for Identity Theft calls. This hotline is already logging 400 calls a week. The Federal Trade Commission is forecasting an annual call volume of 200,000 calls a year. Similarly, the General Accounting Office reports an increase in inquiries to the Trans Union credit bureau's Fraud Victim Assistance Department from 32,235 in 1992 to 522,922 in 1997. The Social Security Administration Office of the Inspector General conducted 1,153 social security number misuse investigations in 1997 as compared to the 305 investigations conducted in 1996. 81% of these cases involved Identity Theft. Similarly, recent evidence suggests that organized Chinese fraud rings are currently turning to hacking techniques and Internet theft to obtain identity information through compromising credit and identity databases as opposed to more traditional methods. The trend on this changing criminal frontier is clear. Identity Theft is the franchise player on the criminal team of the future.

The emergence of cloning in the wireless industry taught us that criminals were interested in "anytime anywhere" communications when anonymity was involved. Prior to cloning the criminal used Identity Theft through subscription fraud to obtain a anonymous wireless usage. Unlike traditional theft of services, the majority of these criminal "customers" were not interested in stealing service. They were interested in anonymous usage to ply their illicit trades and evade law enforcement detection. The industry loss numbers profoundly demonstrate the scope of this criminal demand. In 1995 that demand reached its height at 3.8% of industry revenue. These numbers are relevant because they reflect the massive size of the criminal demand. While cloning has steadily decreased and is de minimus in the face the industry's technological solutions, the criminal demand remains. That demand is reflected in the current proliferation of Identity Theft. This conclusion is profoundly demonstrated by the above statistics.

Loss amounts have factored prominently in sentencing to measure the crime's impact and to determine the corresponding penalty. These amounts are necessary in traditional theft crimes. The above-described changing criminal frontier requires a different view. The amount of money lost in a clone phone call cannot even approximate the impact of that crime. When that clone phone call orders a murder, directs a kidnapping or manages a criminal enterprise with anonymity, the loss amount becomes irrelevant. While 3.8% of industry revenue is a significant number, it also does not reflect the complete impact of the 1995 cloning hemorrhage. Every time a customer becomes a cloning victim, their property and privacy rights are violated, and their confidence in technology is shaken. The theft of an ESN/MIN combination is difficult to conceptualize from a conventional constitutional perspective because the ESN/MIN combination is not a tangible piece of property. The invasion of privacy, however, becomes even greater because of this fact.

Accordingly, we submit that the quantification of the damage in an Identity Theft crime is adversely impacted from a loss amount analysis because the latter is measuring a clearly quantifiable commodity - dollars. Far more than dollars is lost in Identity Theft. The use of an average loss amount or a presumption cannot reflect the gravity of this crime's impact in the situation where a criminal has harvested hundreds of ESN/MIN combinations but had not used the cloned phones containing them at the time of arrest. This is not a victimless crime because the loss



amount is zero. The intrusion of property and privacy rights is no less significant because the loss amount is zero. Our view of Identity Theft is based on this perspective

Moreover, the dependency on monetary loss amounts to determine offense levels does not conform with the notion that there need not be a direct "victim" (i.e., a person/entity which suffers a quantifiable monetary loss) in order for certain behavior to constitute a violation of either the Identity Theft Act or the Wireless Telephone Protection Act. For example, the mere possession of the specialized equipment necessary to clone a wireless telephone can constitute a violation of § 1029, regardless of the fact that there is arguably no tangible "victim" in a case where a phone is not actually cloned. See 18 U.S.C. § 1029(a)(9). In revising 18 U.S.C. § 1029 in 1998, Congress recognized that cloning had become a pervasive problem that justified a revision of the statute to strengthen the power of federal authorities to prosecute such crimes. These revisions included the removal of the "intent to defraud" requirement in connection with the use, production, custody, or control of a cloning device because, in practice, such intent requirement impeded the efforts of law enforcement to prevent, among other things, the cloning of telecommunications devices. H.R. Rep. No. 418, 105th Cong., 2nd Sess. 1998, 1998 U.S.C.C.A.N. 36-1.

Options 1 and 2 of amendment 5, intended to address the Identity Theft Act, recognize this broader notion of harm in the context of Identity Theft crimes by providing automatic enhancements and a minimum base level regardless of the actual monetary loss if the crime involves the use or possession of certain identification information. While this is certainly a step in the right direction, both options still fail to consider full impact of Identity Theft crimes on the individual and the economy. Option 2 is clearly preferable, as it recognizes the impact of such a crime on the individual victim beyond monetary loss (i.e., loss of reputation and credit standing). Even this option does not consider the effect of an Identity Theft crime beyond those on a person's reputation or credit history. As I indicated above, when a person's identifying information is appropriated, his or her confidence in the ability of the telecommunications industry and the Government to protect his or her property and privacy interests is also severely damaged, regardless of the impact on credit history or other such records. Cf. 114 Cong. Rec. S3019-03, S3020 ("Wireless fraud is not a victimless crime. It strikes at the heart of technology that is improving the safety, security and business productivity of the entire Nation."). This broader harm is not accounted for in either option.

Options 1 and 2 of amendment 6, proposed to address the Wireless Telephone Protection Act attempt to address the concern, embodied in the law, that I raised earlier: the mere possession of equipment that has been configured to clone, is equally as repugnant to the statute as the actual use of such devices. Option 2 is clearly preferable to Option 1, because it provides enhancements for the possession of equipment to produce any "access device" as defined in the statute and not just "cloning equipment." This not only takes into account the possessory penalty of § 1029, but also the fact that "cloning" is not the only fraud crime faced by the wireless industry. Option 2 also accounts for the problem of persons who appropriate identification information such as an ESN/MIN in order to, among other things, remain anonymous in committing other crimes. By incorporating such use, the Commission has implicitly recognized the concern expressed by Congress when revising the Wireless Telephone Communications Act in 1998 -- that cellular telephone fraud is not perpetrated just to sell cloned telephones, but rather to advance other criminal actions:



As significant as is the loss of revenue to the wireless telephone industry, cellular telephone fraud poses another, more sinister, crime problem. A significant amount of the cellular telephone fraud which occurs in this country is connected with other types of crime. In most cases, criminals used cloned phones in an effort to evade detection for the other crimes they are committing. This phenomena is most prevalent in drug crimes, where dealers need to be in constant contact with their sources of supply and confederates on the street.

H.R. Rep. No. 418, 105th Cong., 2nd Sess. 1998, 1998 U.S.C.C.A.N. 36-1.

This last point - the misappropriation of ESN/MIN information that qualifies both as identification information under the Identity Theft Act and an access device under the Wireless Telephone Communications Act - highlights another fundamental problem with both of the options under the proposed amendments 5 and 6. None of the proposals published on February 10, 2000 take into account the interrelationship between the two acts. In defining what constitutes a "means of identification" for the purposes of § 1028, Congress specifically included "telecommunication identifying information or access device (as defined in section 1029(e))." 18 U.S.C. 1028(d)(3)(D) (emphasis added). Only Option 3 reflects this interrelationship, and offers a combined Guideline. While Option 3 still conceptualizes the harm from these crimes too narrowly by focusing on monetary loss, it appropriately provides for a higher minimum penalty for those who violate the act without any direct monetary impact on any individual.

As a means of correcting this dependence on monetary loss in the determination of appropriate penalties, in addition to the enhancements proposed in Option 3, we respectfully suggest that the Commission consider raising the Base Offense Level contained in § 2F1.1 from 6 to 8 (with a resulting minimum base level of 14 under § 2F1.1(b)(5) of Option 3) to reflect the seriousness of these violations both to the victims of such crimes as well as the telecommunications industry and the economy as a whole. Such a revision would also bring the potential penalties in § 2F1.1 more in line with those contemplated in other sections of the Guidelines that address consumer protection statutes.

For example, § 2N1.2 of the Guidelines - which addresses the giving of false information about or threatening to tamper with consumer products - provides for a base offense level of 16. Actual tampering that results in the risk of bodily injury has a base level of 25. The base level for violations under the Identity Theft Act and Wireless Telephone Protection Act, in contrast, is 6 (when taking into account the departures set forth in Option 3), even though both Acts are designed in part to protect broader consumer interests. Similarly, § 2Q1.2 - which concerns mishandling even minimal amounts of hazardous or toxic substances, or failure to keep accurate records - has a base offense level of 8, the level which we propose be applied to § 2F1.1. Substantial increases above the proposed base level should be considered where the threat of or actual harm to privacy interests is great, even though monetary loss may not be quantifiable, e.g. wholesale harvesting of ESN/MIN combinations.

The sentencing approach in Option 3 set forth above deserves support because it is forward-looking. Fundamental to this approach is a recognition that Identity Theft is a toxic gas that will expand to fit the container of existing technological opportunity. Accordingly, the sentencing view that contemplates all access devices is appropriate. Similarly, a view of loss that

attempts to measure risk by expanding the minimum loss rule and increasing the loss amount is meaningful, albeit limited. These changes are only a first step. The reality of the changing criminal frontier of the millennium is that we must recognize that Identity Theft is in the critical path of success for technology and value to the consumer. Identity theft has always threatened our constitutional values of property and privacy. In the current state of technological convergence, however, this threat is exacerbated to a crisis-level. It must be contained and deterred, or it will undermine the explosion of value to the consumer provided by marketplace competition, the Internet and its attendant-related services. This crime will erode our constitutional framework in a manner that we have never experienced before.

We urge the United States Sentencing Commission to create a uniform approach to sentencing for crimes involving Identity Theft that reflects the degree of criminal intent and the resulting erosion of property and privacy values regardless of the crime charged. It is an aggravating factor that warrants special treatment. The promise of convergence and new technology will never be realized if consumers don't accept it due to fear that their identity and the most personal aspects of their lives are at risk. Sentencing that recognizes this harm as well as the other costs is appropriate and necessary to prevent and deter future criminal behavior and to reflect the gravity of the offense for which the criminal has been convicted. The changing criminal frontier demands it, our constitutional values mandate it, and the American consumer deserves nothing less.







## SUMMARY OF WRITTEN TESTIMONY

Greg Regan, Special Agent in Charge, U.S. Secret Service  
Mary Riley, Assistant Special Agent in Charge, U.S. Secret Service  
Department of Treasury (TREASURY)

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

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

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

*In regard to Option 2, TREASURY:*

- (i) favors a floor of 12 because, with such, it will be more probable that defendants convicted of identity theft will be sentenced to incarceration;*
- (ii) is of the opinion that the application notes should clarify that even when the stolen means of identification is used to defraud an institution or the government, the non-monetary harm to the individual to whom the identification rightfully belonged should be considered (TREASURY provides an example of such harm);*
- (iii) believes the proposed two-level increase in Option 2 for offenses involving 6 or more identification documents can be improved by (a) including "unlawful possession" of 6 or more documents as a condition triggering the increase, and (b) providing for specific additional increases, cumulative to the two-level increase, for cases involving specific numbers of identification documents or means rather than simply encouraging courts to depart upward in such cases (TREASURY provided examples of specific level increases, e.g., one-level increase for offenses involving more than 10 means of identification, two-level increase for cases involving more than 50, etc.); and*
- (iv) suggests an alternative basis, actually taken from Option 1, for the application of Option 2's two-level increase for harm to an individual's*

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

**Amendment 6:      Implementation of the Wireless Telephone Protection Act**

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

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

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

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

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



## IMPORTANT NOTES

Lined area for taking notes.





DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C.

UNDER SECRETARY

March 10, 2000

The Honorable Diane E. Murphy  
Chair, U.S. Sentencing Commission  
One Columbus Circle, NE  
Suite 2-500 South  
Washington, D.C. 20002-8002

Dear Judge Murphy:

I write to provide Treasury's comments on two amendment proposals that the U.S. Sentencing Commission recently published in the Federal Register for public comment. The first amendment proposal concerns identity theft and responds to a legislative directive in the Identity Theft and Assumption Deterrence Act of 1998, Pub. L. 105-318. The second proposal also responds to a legislative directive, in the Wireless Telephone Protection Act, Pub. L. 105-172, and directs the Commission to provide an "appropriate" penalty for offenses involving the cloning of wireless telephones.

We believe that stronger penalties are warranted for identity theft and the cloning of wireless telephones. The incidence of both crimes is on the rise. The security of private communications and commercial transactions over the Internet is undermined by criminals who exploit this new technology to steal identities, social security numbers, credit card numbers, and other individual means of identification. In addition, criminals increasingly use cloned cell phones to conceal their identities and avoid detection when conducting drug deals, illegal weapons sales, and other serious crimes. Provided below are our more detailed comments addressing each of the amendment proposals separately.

Identity Theft

Our consideration of the guideline amendment options on Identity Theft are guided by two overriding concerns. First, because the length of sentences under the applicable fraud guideline, USSG §2F1.1, is largely dependent upon the monetary loss amount, the guideline does not adequately account for the significant non-monetary harms suffered by victims of identity theft, including loss of reputation, inconvenience, and destroyed credit standing. Second, §2F1.1 fails to provide greater penalties for identity thieves who produce, transfer, or unlawfully possess multiple means of identification. For instance, an individual who illegally obtains 20 social security numbers matched to named individuals, and then uses them to create false driver's licenses, generally should be punished more severely than someone who illegally possesses a single social security number.

We think that Option 2 in the Sentencing Commission's proposed amendments addresses these concerns in a simple and direct manner. It provides a two-level increase, and a

minimum offense level of either 10 or 12, if "the offense involves harm to an individual's reputation or credit standing, inconvenience related to the correction of records or restoration of an individual's reputation or credit standing, or similar difficulties." Of the two alternatives for minimum offense level, we favor a floor of 12 because it makes more likely that individuals convicted of identity theft will be sentenced to incarceration.

Additionally, we believe the Application Notes should make clear that even where the stolen means of identification is used to defraud an institution or government agency, a court should consider the non-monetary harm caused to the individual to whom the means of identification rightfully belonged. For example, a court should impose a two-level increase in "tax refund scams" where an identity thief files a false tax return using the name and social security of another, in order to obtain a quick tax refund. Although the real owner of the social security number may not suffer any quantifiable financial loss, he suffers significant harm nonetheless. When he files his own legitimate tax return two months later, he will encounter, at the very least, significant inconvenience and personal embarrassment in trying to sort the matter out with the appropriate tax authority.

Option 2 also provides a two-level increase if "the offense involved the production or transfer of 6 or more identification documents, false identification documents, or means of identification . . . ." We think this provision can be improved in two ways: First, by including "unlawful possession" of 6 or more identification documents as a condition triggering the two-level increase; and second, by providing an additional increase, cumulative to the two-level increase, for cases involving specified numbers of identification documents or means of identification. For example, this latter enhancement could provide an additional one-level increase for offenses involving more than 10 means of identification or identification documents; two levels for more than 25; three levels for more than 50; and four levels for more than 100. We believe that providing explicit increases for multiple means of identification is preferable to the other alternative raised by the Commission, i.e., encouraging courts to depart upward in such cases. Upward departures are rare, even when encouraged by the Guidelines, and they may not lead to equal treatment of like conduct among districts.

Addressing the identity theft amendment proposal in Option 1, we support its intent but are concerned with its application. We fully support a two-level increase for offenses involving "the use of any identifying information of an individual victim to obtain or make any unauthorized identification means of that individual victim." This provision is aimed at punishing conduct in which a victim's identifying information is used to create new documents in the individual's name, such as credit cards, but the victim remains unaware of the violation until well after his reputation or credit rating is destroyed. The victim is more helpless to protect himself than the average victim of credit card fraud, who generally can protect himself from personal financial loss by closely scrutinizing his monthly bill and notifying his financial institution of unauthorized purchases. This type of fraud deserves greater punishment.



However, while supporting its intent, we are concerned that Option 1, as drafted, may be overly confusing in application. For instance, the new term "unauthorized identification means" is defined as "any identifying information that has been obtained or made from any other identifying information without the authorization of the individual victim whose identifying information appears on, or as a part of, that unauthorized identification means." This definition is confusing, and we are concerned that courts may have difficulty distinguishing the meaning of this new Guideline term ("unauthorized identification means") from the statutory term "means of identification."

That said, we would support an attempt to work this provision into Option 2 if it could be simplified and clarified. Specifically, it could serve as an alternative basis for applying Option 2's existing two-level increase for harm to an individual's reputation or credit standing. In other words, we suggest that Option 2's two-level increase apply if the offense involved either: (1) harm to an individual's reputation or credit standing, or inconvenience related to the correction of records or restoration of reputation; or (2) the use of an individual's identifying information to create new identification documents or means of identification without the victim's knowledge or permission. We are willing to assist the Commission in determining whether this combination of Option 1 and 2 is workable.

#### Telephone Cloning

We have two principal concerns with the current guideline applicable to telephone cloning offenses (USSG §2F1.1). First, the guideline's sentence enhancements are overly weighted toward proof of actual financial loss, and therefore do not adequately account for the fact that financial loss is often very difficult to determine in cases involving the use or possession of cloned telephones and cloning equipment. Second, the guideline does not provide sentence enhancements for the use or possession of cloning equipment and other device making equipment.

This latter concern seems to have been shared by the Commission in earlier versions of the Guidelines. Prior to November 1, 1993, Application Note 11 to §2F1.1 encouraged courts to enhance the sentences for "the use or possession of device making equipment . . . in a manner similar to the treatment of analogous counterfeiting offenses under Part B of this Chapter." Counterfeiting offenses involving the possession of counterfeiting devices or manufacturing equipment receive a six-level sentence enhancement, to an adjusted offense level of 15. USSG §2B5.1(b)(2). As of November 1, 1993, however, Application Note 11 was amended to delete any reference to device making equipment. Little or no explanation was given for this significant deletion.<sup>1</sup> We think an important

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<sup>1</sup>The only written explanation for the amendment was the Commission's accompanying statement that it was "clarifying Application Note 11 and conforming the phraseology in this application note to that

principle was lost.

Of the two options, we feel that Option 2 more fully restores this principle and better addresses our concerns generally. Option 2 provides a two-level enhancement for offenses involving any "device-making equipment," and broadens the statutory definition of device-making equipment (found in 18 U.S.C. §1029(e)(6)) to include the cloning hardware and software described in 18 U.S.C. §1029(a)(9). We favor the two-level increase over the "presumptive loss amount" alternative because it will guarantee a set increase in offense level across the full range of loss amounts.

Neither Option 1 nor Option 2, however, address our concern that the sentences provided in §2F1.1 are too heavily contingent upon proof of actual financial loss, particularly in regard to offenses involving the use and possession of cloned phones. We therefore urge the Commission to adopt a specific offense characteristic that would assign an alternative minimum loss amount not just for stolen or fraudulent credit cards, see §2B1.1 (minimum loss amount of \$100 per credit card), but for cloned phones and certain other access devices (e.g., mobile phone identification numbers) as well.

The current \$100 minimum loss amount for credit cards in §2B1.1 is, in our view, simply inadequate. Based on the investigative records and experience of the U.S. Secret Service, the average loss caused by fraudulent credit cards and cloned cellular telephones in most cases exceeds \$1,000. We therefore recommend that the Commission provide a minimum loss amount of at least \$1,000 per access device. Thus, in fraud cases where the actual loss is difficult to ascertain or is less than \$1,000 per credit card or cloned phone, courts would instead assign a minimum loss amount of \$1,000 per access device when determining sentence enhancements under the monetary loss table in §2F1.1.

In addition, we encourage the Commission to provide for increased penalties when a cloned wireless telephone is used in connection with other criminal activity. In our view, use of a cloned phone represents a degree of sophistication and additional planning (i.e., to conceal identity) that warrants greater punishment. Thus, we support a two-level enhancement for this type of conduct in §2F1.1.

\* \* \* \*

In conclusion, we strongly support changes to the fraud guideline that provide stronger sentences for offenses involving identity theft and the cloning of wireless telephones. Treasury's law enforcement bureaus, in particular the United States Secret Service and IRS Criminal Investigations, give high priority to these crimes and devote substantial

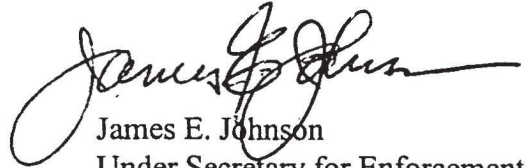
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used elsewhere in the guidelines " USSG App. C, Amendment 482.



resources to their investigation and prosecution. Their efforts will be aided by changes to the Sentencing Guidelines that ensure appropriate penalties for these crimes. We hope that our comments on the individual amendment proposals will aid the Commission in its future deliberations.

Sincerely,



James E. Johnson  
Under Secretary for Enforcement

cc: Eric Holder  
Deputy Attorney General

## **SUMMARY OF WRITTEN TESTIMONY**

Jon Sands, Assistant Federal Public Defender, Phoenix, Arizona  
A.J. Kramer, Federal Public Defender, Washington, D.C.  
Federal Public and Community Defender Organization (FPDO)

### **Amendment 1: Implementation of the No Electronic Theft Act**

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

### **Amendment 2: Temporary, Emergency Telemarketing Fraud Amendment**

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

### **Amendment 3: Implementation of the Sexual Predators Act**

#### **Amendment 3A:**

*FPDO supports Amendment 7A and recommends that the enhancement for the retail value of the material under §2G3.1(b)(1) continue to use the loss table in the fraud guideline. Since the current enhancement is clear and allows for uniform increases for large-scale commercial enterprises, FPDO believes an encouraged upward departure for large-scale commercial enterprises would only result in increased litigation and sentencing disparities. FPDO however recommends two modifications to §2G3.1(b)(1)(B): (1) reduce the enhancement from five levels to three levels "to recognize individuals who engage in conduct that is significantly less harmful than conduct to which the five-level enhancement applies" (FPDO March 10, 2000 Statement submitted to the United States Sentencing Commission at 24); and (2) clarify that the proposed amendment to §2G3.1(b)(1)(B) is limited to "quid pro quo" transactions or understandings, not just to transactions in general.*

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

**Amendment 3B:**

*FPDO supports Amendment 7B, but recommends an additional cross reference to §2A6.1 (Threatening or Harassing Communications) depending on the underlying conduct.*

**Amendment 3C:**

*FPDO supports Amendment 3C, but with a recommendation that the enhancement under §2G2.4(b)(2) not depend on the number of visual depictions because of the difficulty in quantifying the amount of visual depictions and their harm.*

**Amendment 3D:**

*FPDO supports Amendment 7D but recommends that the Commission promulgate revisions set forth in Amendment 7A to §2G2.2(b)(2), based on the same reasons cited earlier by FPDO.*

**Amendment 3E:**

*FPDO supports Part E and recommends a two level computer enhancement for any computer or Internet device used to locate children apply to victims over 16 years old. The Commission should also seek further clarification of what is meant by "misrepresentation of identity."*

**Amendments 3F and 3G:**

*No comment.*

**Amendment 4:      Offenses Relating to Methamphetamine**

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



mandatory minimums.

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

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

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

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

**Amendment 6: Implementation of the Wireless Telephone Protection Act**

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

**Amendment 7: Offenses Relating to Firearms**

**Amendment 7A**

*FPDO opposes Amendment 7A and strongly believes that the guideline definition of "brandish" under §1B1.1 should not be replaced with the statutory definition of*



*“brandish” developed by Congress. The Commission should not unsettle the law by replacing a definition that applies to a broad range of offenses. The current definition has worked well since the guidelines were first promulgated and should not be replaced with a definition drafted for the limited purpose of a specific offense.*

#### **Amendment 7B**

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

#### **Amendment 7C**

*FPDO supports Amendment 7C.*

#### **Amendment 7D**

*FPDO supports Amendment 7D.*

#### **Amendment 7E**

*FPDO supports Amendment 7E.*

#### **Amendment 7F - Issues for Comment**

- Issue 1: *FPDO opposes the use of the statutory definition of “brandish” but feels that, if the Commission decides to use it, the inclusion of “displayed” is redundant. Adoption of the statutory definition would also require that the definition of “dangerous weapon” in the commentary to §1B1.1 be changed.*
- Issue 2: *FPDO opposes the inclusion in §2K2.4 of a cross-reference to the underlying offense.*
- Issue 3: *FPDO opposes treating section 924(c) offenses as instant offenses for purposes of the career offender guidelines.*

#### **Amendment 8: Circuit Conflicts**

## **Circuit Conflicts Generally**

*No testimony submitted on this point.*

## **Amendment 8A - Aberrant Behavior Departure**

*FPDO supports an aberrant behavior departure predicated on a combination of factors approach rather than the mere singularity or spontaneity of the offense. FPDO recommends that the Commission draft a new policy statement that outlines factors courts should consider in determining aberrant behavior departures, and has provided a proposed basis for same.*

## **Amendment 8B - Drug Offenses Near Protected Areas**

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

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

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

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

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

#### **Amendment 8D - Post-Sentencing Rehabilitation**

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

#### **Amendment 8E - Dismissed/Uncharged Conduct under Plea Agreement**

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

#### **Amendment 9: Technical Amendments Package**

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







Statement of the

Federal Public and Community Defenders

submitted to the

United States Sentencing Commission

March 10, 2000

Submitted by  
Jon Sands  
Assistant Federal Public Defender  
Phoenix, Arizona



## TABLE OF CONTENTS

Introduction . . . . .	1
Amendment 1 (Implementing NET Act) . . . . .	4
Amendment 2 (Repromulgation of Telemarketing Fraud Amendment) . . . . .	21
Amendment 3 (Implementing Prevention of Children from Sexual Predators Act of 1998) . . . . .	22
Amendment 4 (Implementing Methamphetamine Trafficking Penalty Enhancement Act of 1998) . . . . .	37
Amendment 5 (Implementing Identity Theft and Assumption Deterrence Act) . . . . .	45
Amendment 6 (Implementing Wireless Telephone Protection Act) . . . . .	58
Amendment 7(Firearms Amendments) . . . . .	64
Amendment 8 (Circuit Conflicts)	
Part A (Aberrant Behavior) . . . . .	74
Part B (Choice of Offense Guideline) . . . . .	83
Part C (Bankruptcy Fraud) . . . . .	102
Part D (Postconviction Rehabilitation) . . . . .	110
Part E (Sentencing If Plea Agreement Calls for Dismissal of Counts) . . . . .	124
Amendment 9 (Technical and Conforming Amendments) . . . . .	130

## INTRODUCTION

Federal Public and Community Defender Organizations, which operate under the authority of 18 U.S.C. § 3006A, exist to provide criminal defense services to defendants in federal criminal cases who are unable to afford counsel. Defender Organizations now operate in more than 70 federal judicial districts. We appear before magistrate-judges, United States District Courts, United States Courts of Appeals, and the United States Supreme Court.

Federal Public and Community Defenders represent the vast majority of criminal defendants in federal court. We represent persons who are charged with often-prosecuted offenses, like drug trafficking and fraud, as well as persons who are charged with infrequently-prosecuted federal crimes, like sexual abuse. We represent persons charged with street crime, like murder, and persons charged with suite crime, like embezzlement.

Congress has directed in 28 U.S.C. § 994(o) that certain entities, including the Federal Public and Community Defenders, “submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful.” In addition, that provision directs us to submit, at least annually, written comments on the guidelines and suggestions for changes in the guidelines. The Federal Public and Community Defenders are pleased to comment upon the proposed amendments published by the Commission, but before turning to the specific proposals, we have several general observations.

Congress did not intend the Sentencing Reform Act of 1984 to divest federal judges of their sentencing discretion. Congress did not view the purpose of sentencing guidelines, and other provisions enacted by that legislation, to be to turn federal judges into calculators. The congressional goal was not to do away with discretion, but to guide it. “The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.”<sup>1</sup> The Supreme Court underscored this in *Koon*:

It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.<sup>2</sup>

The Commission must keep this in mind when evaluating the proposed amendments, particularly amendments related to departures. As the Supreme Court stressed in *Koon*, “A district court’s decision to depart from the Guidelines . . . embodies the traditional exercise of discretion by a sentencing court.”<sup>3</sup> We hope that when the Commission takes up proposals that relate to departures, the Commission will decide to

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<sup>1</sup>S. Rep. No. 98-225, 98th Cong., 1st Sess. 52 (1983).

<sup>2</sup>*Koon v. United States*, 518 U.S. 81, 113, 116 S.Ct. 2035, 2053 (1996).

<sup>3</sup>518 U.S. at 98, 116 S.Ct. at 2046.

draft language that helps federal judges to exercise sentencing discretion rather than language that denies them sentencing discretion. We believe that federal judges can be trusted to exercise discretion wisely.

The manner in which federal judges have been exercising sentencing discretion is noteworthy. Federal judges are sentencing at the bottom of the guideline range and below the guideline range far more often than they sentence at the top of the guideline range or above. The Commission's own data shows that, of the cases in which sentence is imposed within the guideline range, the sentence is at the bottom of the range 60.3% of the time and is at the top of the range 15.3% of the time.<sup>4</sup> When it comes to departing, leaving aside the 19.3% of the cases in which there is a substantial-assistance departure, sentencing courts depart below the guideline range 17 times as often as they depart above the guideline range.<sup>5</sup> This means, to us at least, that the federal judges who impose sentence find the guideline ranges to be too high. Whenever there is an increase in the guideline ranges, a consequence is that sentences falling at the bottom of the guideline range are higher than before and departures will have to be greater to get to the sentence that the departing court believes to be appropriate. Regrettably, most of the proposals under consideration will drive the guideline ranges even higher.

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<sup>4</sup>U.S. Sentencing Comm'n, 1998 Sourcebook of Federal Sentencing Statistics 59 (table 29). The 1998 Sourcebook is the most recent Sourcebook available.

<sup>5</sup>*Id.* at 51 (figure G). Downward departures for other than substantial assistance occur in 13.6% of the cases; upward departures occur in 0.8% of the cases.



We believe that the Commission made the correct decision in limiting the number of proposed amendments it would take up during this cycle. The members of the Commission took office last Fall, at a time when the Commission in years past had done a considerable amount of work on amendments for the next cycle. There was simply not enough time available for the Commission to undertake work on a large number of proposed amendments and still do the kind of job that the members of the Commission want to do, and that Congress and the bench and bar expect the Commission to do. Despite having limited the number of proposed amendments it would take up, the Commission is confronted with a large number of issues to look at. Many of the issues are not ripe for resolution. Many are peripheral to the main thrust of the proposed amendment and seem to derive from a penchant to resolve, at once, every issue for all time. In that regard, we would remind the Commission of Mr. Justice Holmes' observation that the life of the law has not been logic, but experience. We urge the Commission to resolve those matters on which it must act and those matters for which there is sufficient research and information to enable the Commission to make informed choices that reflect experience.

## **AMENDMENT 1**

Amendment 1 sets forth three options for implementing the No Electronic Theft

(NET) Act.<sup>6</sup> Section 2(g) of the NET Act directs the Commission to ensure that the guideline range of a crime against intellectual property is “sufficiently stringent” to deter such a crime. In addition, section 2(g) directs that the guidelines “provide for the consideration of the retail value and quantity of the items with respect to which the intellectual property offense was committed.” The Federal Public and Community Defenders recommend that the Commission adopt option 3 with some changes.

### Three Examples

For purposes of simplifying comparisons, we will use three examples throughout our comments on amendment 1. One example involves a case in which there is pecuniary gain to the defendant but no pecuniary loss to the direct victim. A second example involves a case in which there is no pecuniary gain to the defendant but there is a pecuniary loss to the direct victim. A third example involves a case in which there is both pecuniary gain to the defendant and pecuniary loss to the direct victim.

In the first example, a street vendor sells counterfeit copies of a Rolex watch that has a manufacturer’s suggested retail price of \$3,000 but that is generally discounted and can readily be purchased for \$2,400. The street vendor sells 125 counterfeit copies for \$20 each, making the vendor’s gross pecuniary gain \$2,500. For reasons discussed below, there is no pecuniary loss to Rolex.

In the second example, an internet surfer pays \$50 to a legitimate retailer for a

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<sup>6</sup>Pub. L. No. 105-147, 111 Stat. 2678 (1997).

software program. That program is widely available, and the purchase price paid by the public averages \$50 per copy. The internet surfer makes it available on the internet for downloading without cost, and 50 people download the program. The price paid for a downloaded copy of the program is zero, and the internet surfer has no pecuniary gain. For reasons discussed below, the manufacturer (the copyright owner of the software program) has sustained a pecuniary loss.

In the third example, a compact-disk pirate has access to sophisticated equipment that permits her to make high-quality copies of compact disks. She makes copies of a copyrighted audio disk that retails generally for \$13 and sells 200 of them at \$5 each. The seller has a gross pecuniary gain (\$1,000), and the manufacturer (the copyright owner of the audio disk) has sustained a pecuniary loss.

### Background

The Commission addresses offenses involving criminal infringement of a copyright or trademark in § 2B5.3. That guideline has a base offense level of level 6, which is increased by using the loss table in the fraud guideline. The amount calculated under § 2B5.3 is "the retail value of the infringing items."<sup>7</sup> The goal of the formula in § 2B5.3 is not to determine the pecuniary "loss" caused by the offense or the pecuniary gain to the defendant from the offense, although that can be the effect of the formula.

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<sup>7</sup>The "infringing items" are "the items that violate the copyright or trademark laws (not the legitimate items that are infringed upon)." U.S.S.G. § 2B5.3, comment. (n.1).

The formula in § 2B5.3 does not use the *price* of the infringing items, but the retail value of those items. The retail value of the infringing items may or may not be equivalent to the price of those items or to the price of the infringed items. The retail value of the infringing items and the price of the infringing items are the same in the watch example. The value of a counterfeit copy of that Rolex watch is not the retail value of a legitimate Rolex watch. The value is what the item (a counterfeit copy) actually sold for in the marketplace – in this instance \$20, the price paid to the defendant. The retail value of the infringing items in the watch example, therefore, is \$2,500 (125 items times the value of \$20 per item). The gross pecuniary gain to the defendant is also \$2,500.

In the compact-disk example, the retail value of the infringing item is the same as the retail price of the infringed item. Because of the high quality of the illegitimate compact disks, the retail value is what an authentic compact disk actually sold for in the marketplace, the retail price of \$13 per disk. The retail value of the infringing items, therefore, is \$2,600 (200 disks times \$13, the retail value of a disk). The gross pecuniary gain to the defendant is less than the \$2,600 retail value of the infringing items – \$1,000 (200 disks times \$5, the price for which the defendant sold a disk).

Similarly, in the software program example, the retail value of the infringing item is the same as the price of the infringed item. The price paid by the downloaders of the infringing program is zero (it costs nothing to download from the internet). The retail value of each infringing item (the downloaded program) is \$50, what it would have cost



in the marketplace to have obtained a legitimate copy of the program. Thus, the retail value of all the infringing items \$2,500 (50 copies times \$50, the retail value of a program). The pecuniary gain to the defendant is zero.

The retail value of the infringing items formula will overstate the pecuniary loss to the direct victim, usually by a substantial amount. This is true for two reasons. First, not every person who bought an illegitimate item would have bought the real thing. Second, the victim's pecuniary loss is not the victim's gross gain from the items that would have been sold. The victim had costs (such as manufacturing and marketing costs) in producing the item. The victim's pecuniary loss is gross gain minus those costs.

The watch example illustrates the first reason. The 125 persons who bought a counterfeit copy of the Rolex watch undoubtedly believe that they are not getting the real item. In all likelihood, those persons do not have the means or desire to pay the full amount for the real Rolex watch, and none of them would have. Although the retail value of the infringing items is \$2,500, because none of the buyers would have bought the real thing, Rolex has not suffered a pecuniary loss.

In both the software-program and compact-disk examples, however, at least some of the persons obtaining the illegitimate item would have bought the real thing. The higher the percentage of persons who would have done so, the greater will be the pecuniary loss. In addition, the profit per item will affect the pecuniary loss. The greater the profit per item, the higher the pecuniary loss.

Assume that the manufacturer of the software program spends \$25 a copy to develop, produce, and market the program. The net pecuniary gain (profit) to the manufacturer of the software program, therefore, is \$25 per copy sold. If every person who downloaded the program without cost would have bought a legitimate version of the program, the manufacturer of the program would have had a profit (net pecuniary gain) of \$1,250 (50 items times \$25 profit per item). The pecuniary loss to the manufacturer caused by the offense, therefore, is \$1,250, the profit the manufacturer would have made from the sale of 50 copies of the program. If instead only 40 downloaders would have bought the program, the manufacturer's lost profit is \$1,000 (40 items times \$25 profit per item) and the pecuniary loss to the manufacturer is \$1,000. If, as probably is the case generally, the profit percentage is not that high, the pecuniary loss is lower. Thus, if the profit per item is \$10, the manufacturer's lost profit (the pecuniary loss to the manufacturer) would be \$500 (50 items times \$10 profit per item) if all 50 downloaders would have bought the program and \$400 if 40 downloaders would have bought the program (40 items times \$10 profit per item).<sup>8</sup>

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<sup>8</sup>The results are the same in the compact disk example. If 90% of the price of a compact disk goes to produce and market the disk, the profit per disk is \$1.30 (10% of \$13). If all of the buyers of the illegitimate disk would have bought the real thing – an unlikely assumption given the price difference between the illegitimate and legitimate disks – the pecuniary loss to the manufacturer would be \$26 (200 items time \$1.30). If half of the buyers of the illegitimate disk would have bought the real disk, the manufacturer lost 100 sales (50% of 200 illegitimate items). The pecuniary loss to the manufacturer in that circumstance would be \$13 (100 items times \$1.30).

## The Options

### Option 1

Option 1 would replace the current formula with a general formula and a special formula for use with convictions under 18 U.S.C. § 2319A (unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances). The general formula would be “the retail value of the infringed items multiplied by the quantity of infringing items . . . .” In the watch example, that formula yields the amount of \$300,000 (125 illegitimate items times the retail value of \$2,400).<sup>9</sup> In the software-program example, the formula yields \$2,500 (50 illegitimate items times \$50), and in the compact-disk example, the formula yields \$2,600 (200 illegitimate items times \$13). For offenses under 18 U.S.C. § 2319A, option 1 retains, but rewords, the current formula.<sup>10</sup>

### Option 2

Option 2 also proposes a general formula and a special formula for offenses under 18 U.S.C. § 2319A. The general formula is similar to the general formula in option 1, except that “average retail price” is used instead of retail value, which equates to average

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<sup>9</sup>Option 1 retains the concept of “retail value” from the current guideline. Thus, even though the real watches have a retail price of \$3,000 each, that is not their retail value because the real watches generally can be bought, legitimately, for \$2,400.

<sup>10</sup>Offenses under 18 U.S.C. § 2319A involve unauthorized (“bootlegged”) sound recordings of live musical performances for which there has been no commercial release of a legitimate recording of the performance. The general formula will not work in such a case because there is no “infringed item” and therefore no “retail value of the infringed items.”



retail price. The result under the general formula in option 2, therefore, would mirror the result under the general formula in option 1. The special formula for offenses under 18 U.S.C. § 2319A is the price of the infringing item times the number of infringing items, the same formula as in option 1.

Option 2 also would add two new enhancements. One enhancement would add two levels “if the offense involved online electronic infringement,” and the other would add two levels (with a floor of level 13) “if the offense involved a reasonably foreseeable risk to public health or safety.” Finally, option 2 would provide for a two-level reduction (but not to lower than level 6) if (1) the offense was not committed for commercial purpose or private financial gain, or (2) the general formula is used and “the offense involved greatly discounted merchandise.”

The formula in option 2 yields the same results as the formula in option 1. In the watch example, the amount calculated is \$300,000. In the software-program example, the amount calculated is \$2,500, and in the compact-disk example the amount calculated is \$2,600. The two-level reduction in option 2 for “greatly discounted merchandise” would apply in the watch example.<sup>11</sup>

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<sup>11</sup>The formula in option 2, like the formula in option 1, greatly overstates the harm from the offense in the watch example. There has been no pecuniary harm to Rolex or others and, as discussed later, no unquantifiable harm (such as injury to Rolex’s reputation). The two-level reduction in option 2 does not adequately adjust for the overstatement of the harm from the offense that results from the formula. Using the defendant’s gross pecuniary gain (\$2,500) would result in a one-level increase from the fraud table. Using the amount determined by option 2’s formula – \$300,000 – results in



### Option 3

Option 3, unlike its options 1 and 2, would increase the base offense level from level 6 to level 8. Option 3 would require the sentencing court to calculate the “infringement amount,” which new commentary would define as “the approximate pecuniary harm to the copyright or trademark owner caused by the offense.” New commentary would set forth a general formula and a special formula for calculating that amount.

The general formula would apply in four types of cases – cases in which (1) the infringing item is substantially identical to the infringed-upon item in quality and performance (as in the software-program and compact-disk examples); (2) the retail value of the infringing item is difficult to determine without unduly complicating or prolonging sentencing or is impossible to determine; (3) the offense involves illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511; and (4) “the government provides sufficient information to demonstrate that the retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than does the retail value of the infringing item.” The general formula would be “the retail value of the infringed item, multiplied by the number of infringing items.”

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an eight-level increase from the fraud table. Deducting two levels for “greatly discounted merchandise” makes the net effect of the fraud table increase six levels. The result is that the vendor in the watch example is treated as if he had obtained \$70,000 to \$120,000 (the amounts that yield a six-level increase under the fraud table).

New commentary would define “infringed item” to mean “the copyrighted or trademarked item with respect to which the crime against intellectual property was committed.” The definition of “infringing item” is retained from the current guideline.

The special formula would apply to offenses under 18 U.S.C. § 2319A and to other offenses not covered by the general formula. The special formula is “the retail value of the infringing item, multiplied by the number of infringing items” (the current formula).

In the software-program example, the general formula results in an infringement amount of \$2,500 (50 infringing items times \$50, the retail value of an infringed item). The general formula results in an infringement amount in the compact-disk example of \$2,600 (200 infringing items times \$13, the retail value of an infringed item).

The special formula is used to calculate the infringement amount in the watch example because the quality and performance of the counterfeit watches are not “identical to, or substantially indistinguishable from, the infringed item.” The special formula results in an infringement amount of \$2,500 (125 infringing items times \$20, the retail value of an infringing item).

Option 3 also seeks comment upon four possible enhancements and one possible reduction. The enhancements would increase the offense level by two levels for (1) distributing an infringing item before the infringed item has been commercially released; (2) the purchaser believed the item purchased was the real thing; (3) “the offense involved the manufacture, importation, or uploading of infringing items” (which would call for the

increase with a floor of level 12); and (4) “the offense involved the conscious or reckless risk of serious bodily injury” (which would call for the increase with a floor of level 13).

The reduction – of two levels (but not to a level below either level 6 or level 8 (to be decided)) – would apply if the offense was not committed “for commercial advantage or private financial gain.” The Commission seeks comment upon whether any or all of these specific offense characteristics should be adopted even if the Commission chooses option 1 or 2.

The following chart shows the relationship in the three examples between pecuniary loss, gross pecuniary gain to the defendant, and the amount to be used in applying the fraud table that is derived from the formulas in the present guideline and in each of options 1, 2, and 3.

	Watch	Software	CD
Direct pecuniary loss	0	\$1,250	\$26
Gross gain to defendant	\$2,500	0	\$1,000
Current guideline	\$2,500	\$2,500	\$2,600
Option 1	\$300,000	\$2,500	\$2,600
Option 2	\$300,000	\$2,500	\$2,600
Option 3	\$2,500	\$2,500	\$2,600

## Our Recommendations

### The Formula

Congress has directed the Commission to ensure that the guidelines “provide for consideration of the retail value and quantity of the items with respect to which the crime against intellectual property was committed” (i.e., the infringed-upon item). In evaluating the three proposed formulas, we have considered whether each formula produces a result that fairly indicates the harm from the offense, as well as whether the formula is likely to be difficult to apply. With regard to the latter consideration, we are satisfied that all three of the proposed formulas will not be unduly difficult to apply.

With regard to fairness of result, each of the three proposed formulas yields an amount that at least equals and can significantly overstate the gross pecuniary gain to the defendant. Each of the three proposed formulas yields an amount that overstates – sometimes to a considerable degree – the pecuniary loss to the direct victim.

It is clear, however, that the complete harm from an offense may not be fully reflected by either the gross pecuniary gain to the defendant or the pecuniary loss to the direct victim. As the Commission’s staff report has noted, however,

it is difficult to establish a simple, generally applicable rule that will accurately and fully measure the harm caused by the wide variety of offenses sentenced under guideline § 2B5.3. The economists with whom the Team spoke agreed that, even in the context of civil litigation concerning the narrower issue of pecuniary damage



to a particular property holder, measuring the amount of damage is an inexact science. No simple formulas exist, and courts routinely hear time-consuming, conflicting and highly technical expert testimony. The practical realities of the sentencing process necessitate a simpler, more easily workable approach.<sup>12</sup>

We believe that option 3 is the most sharply-focused of the three options and best accounts for the harm that is not readily quantifiable. Option 3, although nuanced, is straightforward and not difficult to apply.

There is no difference among the options in their treatment of the software and compact-disk examples – cases in which there has been an actual pecuniary loss to the copyright or trademark owner. The options differ in their treatment of the watch example, in which there is no pecuniary loss to the copyright or trademark owner. Both Options 1 and 2 grossly exaggerate both the pecuniary loss to the direct victim and the gross pecuniary gain to the defendant. There is no need for overstating either the pecuniary loss or the gross pecuniary gain because in this kind of offense the unquantifiable harm is virtually nil. The street vendor has not deprived Rolex of any sales, so there is little, if any, harm to others (such as the people who supply materials to Rolex, the workers at the Rolex factory, and the shipping company that Rolex uses to send its watches to wholesalers and retailers). There would seem to be little, if any, harm

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<sup>12</sup>U.S. Sentencing Comm'n, Policy Development Team Report, No Electronic Theft Act 19 (Feb. 1999).

to Rolex's reputation among those who are able to buy a Rolex watch. Indeed, the watch example offense is probably the kind of offense of least concern to those who sought the legislation. Option 3's treatment of such cases is the most realistic and fair.

#### Base Offense Level and Specific Offense Characteristics

Option 3 would both increase the base offense level (from level 6 to level 8) and add four new enhancements. We believe that the general, across-the-board increase in the base offense level is not justified. The proposed new enhancements, for the most part, are focused and increase punishment for conduct deserving of additional punishment.

The reason given in the request for comments for the increase in the base offense level is to bring § 2B5.3 "more in line with the fraud guideline, § 2F1.1. Both guidelines have a base offense level of level 6; however, the fraud guideline contains a 2-level enhancement for more than minimal planning, which applies in a great majority of fraud offenses." The analogy to a fraud offense, however, is inapt. The person who pays \$20 for a \$3,000 Rolex watch has not been defrauded. Neither has the person who downloads, at no cost, a software program that sells for \$50. Those persons are not innocent victims. The analogy to fraud is appropriate if the defendant deceives the buyer into thinking that the item being purchased is authentic and not a counterfeit copy. There is a specific enhancement proposed for such conduct for such circumstances, and that enhancement takes care of the matter more directly and fairly.

The analogy to the more-than-minimal-planning enhancement in the fraud

guideline also is inapt. We think that the better analogy is to the enhancement for the use of sophisticated means that formerly was in the tax-evasion guideline and was added (as a temporary, emergency amendment) to the fraud guideline by amendment 587. The concept of more-than-minimal planning is broad and has been troublesome to the Commission. The Commission has defined the term "more than minimal planning" to mean "more planning than is typical for commission of the offense in a simple form. . . . 'More than minimal planning' is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune."<sup>13</sup> The congressional concern with copyright and trademark infringement has not been so much that wrongdoers have engaged in repeated acts over a period of time. Rather, the concern seems to have been more that the widespread availability of computers and high-end electronic equipment increases the risk to copyright and trademark owners and makes offenses more difficult to detect.<sup>14</sup>

The proposed new enhancements address directly important congressional concerns about infringement cases. If they are added to § 2B5.3, an increase in the base offense level would be redundant, unnecessary, and not justified on policy grounds.

We find the proposed two-level enhancement in option 3 for distributing an

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<sup>13</sup>U.S.S.G. § 1B1.1, comment. (n. 1(f)).

<sup>14</sup>See U.S. Sentencing Comm'n, Policy Development Team Report, No Electronic Theft Act 18-19 (Feb. 1999).



infringing item before the commercial release of the infringed items to be appropriate.

Such activity can cause lost sales of a magnitude that cannot be gauged with accuracy and also may harm the reputation of the owner of the intellectual property.<sup>15</sup> We do not object to the two-level enhancement (with a floor of level 13) if the offense involved the conscious or reckless risk of serious bodily injury. We expect that the enhancement will be applicable infrequently.

We believe that the enhancement for manufacturing, importing, or uploading infringing items is appropriate. The enhancement recognizes that manufacturers and importers are more culpable than sellers and that the widespread use of computers increases the risk of harm to the owners of intellectual property. We believe that this enhancement is appropriate. However, if there is to be an enhancement for manufacturing, importing, or uploading, then there should be a reciprocal reduction (or an encouraged departure) for an offense not committed for commercial advantage or private financial gain.

We believe that the proposed enhancement of two levels if the purchaser of an infringing item actually believed that the item was authentic should be reduced to one level. There would seem to be two bases for that enhancement. The first basis is lost

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<sup>15</sup>For example, the infringing item may be an early version of a video game that has bugs that the manufacturer removed from later versions. Nevertheless, reports of the game's poor performance circulated by those who obtained the early version may harm the reputation of the company putting out the legitimate version of the game and make people reluctant to buy the later version, even though the bugs have been fixed.



sales of the infringed item. A buyer who is seeking the authentic item, but is deceived into buying a counterfeit, obviously would have bought the authentic item.<sup>16</sup> The second basis is that the buyer is not complicit in the offense and may be harmed as well, harm that is not otherwise captured by the guideline. The buyer of the \$20 Rolex watch or a person who downloads a free copy of a software program that is sold commercially for \$50 knows something illegal is afoot – they are neither innocent nor victims (especially in the case of the downloaders). That the downloaders cannot get upgrades or technical support from the manufacturer for lack of proof of purchase is not particularly troublesome. The downloaders knew that there was something questionable about the deal, and in any event did not pay anything for the copy of the program downloaded.

We believe that the lost sales are adequately accounted for by the formula and do not require an extra boost in the offense level. As indicated earlier, the amount calculated will be higher the greater the percentage of persons who would have bought the real item. Even if every deceived buyer would have bought the authentic item, the formula in option 3 adequately captures the lost sales because the retail value of the infringed item is used.<sup>17</sup>

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<sup>16</sup>See U.S. Sentencing Comm'n, Policy Development Team Report, No Electronic Theft Act 25-26 (Feb. 1999) (discussing palmed-off goods).

<sup>17</sup>Assume, for example, that a defendant sells 500 copies of a video tape of a motion picture, which is sold by legitimate commercial retailers at an average price of \$15. The copies are of high quality, and the defendant markets the infringing copies as authentic. The defendant charges \$14 per copy. All of the buyers of the defendant's tapes believe that what they are buying is legitimate, and they would have paid an extra dollar to get a legitimate tape had they known that what they were buying was not a

We think that the second basis – harm to an innocent buyer – is not otherwise captured by the formula or other proposed enhancements, but we think that that factor is better accounted for by a one-level enhancement – or in the alternative by adding commentary indicating that an upward departure would be warranted.

We recommend that the Commission adopt option 3 with our suggested changes. Option 3 would not present unusual problems in application, and it produces a result that best reflects the actual harm from and infringement offense.

## AMENDMENT 2

Amendment 2 would repromulgate as a permanent amendment the provisions of amendment 587, which the Commission promulgated as a temporary amendment under the authority of section 6 of the Telemarketing Fraud Prevention Act of 1998, Pub. L. No. 105-184, 112 Stat. 520. The Federal Public and Community Defenders do not agree with all of the changes made by amendment 587, and we believe that the Commission should revisit that amendment. The Commission, however, has not undertaken the work necessary to enable it to make an informed reevaluation of amendment 587. The

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legitimate tape. The gross pecuniary gain to the defendant is \$7,000 (500 infringing copies times the \$14, the price at which the defendant sold a copy). Assuming that the profit for an authentic tape is \$2 per tape, the actual pecuniary loss to the owner of the copyright on the tape is \$1,000 (500 copies times \$2 profit per item). The infringement amount under option 3 is \$7,500 – more than seven times the pecuniary loss.

Commission's options, therefore, are to (1) repromulgate amendment 587 or (2) fail to comply with the congressional mandate. Under the circumstances, the Commission has no choice but to repromulgate amendment 587.

### AMENDMENT 3

Amendment 3 responds to the Protection of Children from Sexual Predators Act of 1998.<sup>18</sup> Sections 502 through 507 of that Act give a number of directives to the Commission.

#### Part A

Part A of amendment 3 responds to the creation of the a offense, 18 U.S.C. § 1470, which prohibits the transfer of obscene materials to minors.<sup>19</sup> Part A also responds to a directive to clarify the term "distribution of pornography," so the distribution enhancement applies for both monetary remuneration and non-pecuniary interest.<sup>20</sup>

Part A would list § 2G3.1 in the Statutory Index as the offense guideline recommended for an offense under section 1470. Part A also would modify the distribution enhancement in § 2G3.1(b)(1) to apply if the distribution was (1) for

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<sup>18</sup>Pub. L. No. 105-314, 112 Stat. 2974.

<sup>19</sup>*Id.* at § 401, 112 Stat. 2979.

<sup>20</sup>*Id.* at § 506, 112 Stat. 2981.

pecuniary gain; (2) for the receipt or expectation of receipt of anything of value, but not for pecuniary gain; or (3) to a minor. Finally, part A would add a two-level enhancement to § 2G3.1(b)(1) that applies if the offense involved the knowing transfer of obscene materials to a minor to persuade, induce, entice, coerce, or facilitate the transport of, that minor to engage in prohibited sexual conduct.

An issue for comment asks whether § 2G3.1(b)(1) should continue to use the loss table in the fraud guideline. We recommend that the enhancement continue to use the loss table. The current enhancement is clear and allows for uniform increases for large-scale commercial enterprises. A graduated punishment with increases for the most serious offenders is a proper function of the guidelines. The proposed encouraged upward departure for large-scale commercial enterprises could result in increased litigation and sentencing disparities.

The proposed § 2G3.1(b)(1)(B) would apply to distribution for the receipt or expectation of receipt of a thing of value (but not for pecuniary gain) and is consistent with the congressional directive.<sup>21</sup> We do not oppose § 2G3.1(b)(1)(B), but we recommend that the Commission make two modifications to it.

First, we recommend that proposed § 2G3.1(b)(1)(B) be modified to call for a three-level enhancement, instead of a five-level enhancement. We think that a three-level enhancement if the distribution is for value other than pecuniary gain is better policy.

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<sup>21</sup>*Id.*



Proposed § 2G3.1(b)(1)(B) is intended to apply broadly and will apply to individuals who engage in conduct that is significantly less harmful than the conduct to which the five-level enhancement of proposed § 2G3.1(b)(1)(A) applies. Proposed § 2G3.1(b)(1)(A) applies if the defendant has distributed for profit. For proposed § 2G3.1(b)(1)(B) to apply, the defendant only needs an expectation that "anything of valuable consideration" will be received. Individuals who have exchanged a few pictures in a quid pro quo transaction should not receive the same enhancement as a defendant who is selling pictures for profit. The Commission can recognize the difference by changing the five-level enhancement in proposed § 2G3.1(b)(1)(B) to a three-level enhancement.

Our second recommendation is that it should be made clear that proposed § 2G3.1(b)(1)(B) is limited to quid pro quo transactions or understandings. We therefore recommend that the commentary to § 2G3.1 be amended to state that a quid pro quo transactions must be shown in order for the enhancement of § 2G3.1(b)(1)(B) to apply. This would reduce unnecessary litigation and indicate that the enhancement requires proof of more than a hope of receiving something of value. Thus, if there is an understanding that "I will give you my pictures if you give me yours," the enhancement will apply. If the defendant gave the pictures with unilateral hope of possibly receiving pictures from the recipient in the future, the enhancement would not apply.

Our recommendation could be effectuated by modifying the proposed definition of the term "distribution for the receipt, or the expectation of receipt, of a thing of value, but

not for pecuniary gain.” We suggest deleting “transaction” from that definition and inserting in lieu thereof “quid pro quo transaction or understanding.” The following shows the proposed definition with our modification (new text in italic):

“‘Distribution for the receipt, or the expectation of receipt, of a thing of value, but not for pecuniary gain’ means any *quid pro quo transaction or understanding*, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. ‘Thing of value’ means anything of valuable consideration.”

Our proposed modification would clarify, but not limit, the intended broad application of proposed § 2G3.1(b)(1)(B).

We do not oppose proposed § 2G3.1(b)(1)(C), which responds to the enactment of the new offense in 18 U.S.C. §1470. A five-level increase for any distribution to an individual below the age of consent with an additional two-level increase if the distribution was to induce the individual to engage in prohibited.

Proposed § 2G3.1(b)(1)(C) applies to distribution to a minor, which proposed new commentary would define as “an individual who has not attained the age of [18] years.” The brackets indicate that the Commission is seeking comment on the appropriate age to use in the definition. We believe that the appropriate age to use is 16, the age of consent.<sup>22</sup> Making proposed § 2G3.1(b)(1)(C) applicable to individuals under the age of

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<sup>22</sup>See 18 U.S.C. §§ 2241(c), 2243(a), (c), 2244(a), 2246(1)(D).

sixteen would avoid the confusion of whether to apply the two-level enhancement for distribution to entice the minor to engage in "prohibited sexual conduct," if the sixteen or seventeen year old can legally consent to the conduct and the conduct would not be a federal crime. Limitation the enhancement to minors under the age of 16 years also would be consistent with the application of other sexual-abuse guidelines. For example, § 2A3.1(b)(2) and § 2A3.4(b)(1) both have increases for sexual abuse when the victim is under 16 years of age. While it may still be a crime to distribute obscene material to an individual who is more than 16 years of age, the harm to the teenager, who is of the age of consent, would be minimal in comparison to the distribution of a younger child.

We recommend that the Commission adopt the proposed definition of the term "minor" using the age of 16. If the Commission adopts our recommendation, the proposed definition would read: "‘Minor’ means an individual who has not attained the age of 16 years." Adoption of that definition will eliminate confusion and unnecessary litigation, promote uniformity within the guidelines, and reduce unwarranted disparities in sentencing.

An issue for comment in part A asks whether there should be an additional enhancement in proposed § 2G3.1(b)(1) to apply to distribution of obscene matter that does not involve distribution (1) for pecuniary gain, (2) for anything of value, or (3) to a minor. We oppose adding such an enhancement. Given the intended broad application of proposed § 2G3.1(b)(1), an additional enhancement for any distribution of obscene matter



between adults would be tantamount to raising the base offense level of § 2G3.1. A simple exchange between adults without the expectation of any gain or getting anything of value in return is currently appropriately accounted for in the guidelines.

#### Part B

Part B of amendment 3 invites comment on whether and how the Commission should amend the guidelines to cover a new offense that prohibits the use of the mail or any facility or means of a interstate commerce knowingly to transmit identifying information about a minor with intent to entice, encourage, offer, or solicit anyone to engage in prohibited sexual activity (18 U.S.C. § 2425). Part B would amend the Statutory Index to list § 2G1.1 (promoting prostitution or prohibited sexual conduct) as the guideline ordinarily applicable to an offense under 18 U.S.C. § 2425. We do not oppose doing that.

Section 2G1.1 contains three cross references, and many of the offenses that begin at § 2G1.1 end up being sentenced under another offense guideline. We recommend adding a fourth cross reference, which would take the sentencing court to § 2A6.1 (threatening or harassing communication) if the underlying conduct is not intended to induce sexual activity but to threaten or harass the victim or victim's family. For example, during a neighborhood feud, the defendant posted information on the internet about a neighbor's minor daughter and her fictional willingness to perform illegal sex acts. The defendant's intention was to harass the neighbor's family, not to foster illegal



sexual activity with the daughter. In such a situation, § 2A6.1 would be the more appropriate guideline.

### Part C

There is a two-level enhancement under § 2G2.4(b)(2) “if the offense involved possessing ten or more . . . items, containing a visual depiction . . . .” Part C of amendment 3 would amend the commentary to § 2G2.4 (possession of child pornography) to clarify if an individual computer file is “item” for purposes of the enhancement in § 2G2.4(b)(2). The proposed amendment is consistent with the existing case law, and we do not oppose promulgating the amendment as drafted.

Part C also seeks comment upon whether to base the enhancement of § 2G2.4(b)(2) upon the number of visual depictions. We believe the Commission should not do so. As a practical matter, it would be difficult to quantify the amount of visual depictions and their harm. How would an enhancement compare “visual depictions” in a book or magazine to those in a film or video tape? Additionally, ten “visual depictions” from ten separate sexual acts would represent a greater harm than a hundred “visual depictions” from one sexual act. How many “visual depictions” are on a 15-minute film? Would a 20-minute film of one sexual act with one child be counted less than a 15-minute film with three different sexual acts and four children? Given these inherent difficulties, we believe the current clear guideline is the best approach. If the sentencing court determines that a guideline sentence is inadequate, the sentencing court can weigh the

type and quantity of the items and the number of sex acts and "visual depictions" involved and depart.

#### Part D

Part D of amendment 3 addresses the congressional directive to clarify that the term "distribution of pornography" applies to the distribution of pornography for both pecuniary gain and any nonpecuniary interest.<sup>23</sup> The proposed amendment modifies the distribution enhancement in the pornography trafficking guideline, § 2G2.2(b)(2), to apply if the distribution of child pornography was (1) for pecuniary gain; (2) for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain; or (3) to a minor. Part D also would add a two-level enhancement if the offense involved the knowing transfer of child pornography to a minor to persuade, induce, entice, coerce, or facilitate the transport of, that minor to engage in prohibited sexual conduct.

For the reasons stated in our comments on part A, we do not oppose the addition of an enhancement for the distribution of child pornography for the receipt or the expectation of the receipt of a thing of value, but not for pecuniary gain. Again for the reasons stated in our comments on part A, we recommend that § 2G2.2(b)(2)(B) be modified. We believe the commentary to § 2G2.2 should be modified in the same way that we suggested modifying the commentary to § 2G3.1, to clarify that the enhancement

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<sup>23</sup>Protection of Children from Sexual Predators Act of 1998, § 506, Pub. L. No. 105-314, 112 Stat. 2981.

applies only to quid pro quo understandings or transactions. The enhancement would then apply in the cases that most concern Congress and the courts, the bartering of child pornographic material. We agree that the child pornographic material is a “thing of value” and if received in a bartered exchange for other child pornographic material, an enhancement should apply.

Also for the reasons stated in our comments on part A, we believe that § 2G2.2(b)(2)(B) should be a three-level enhancement. Those defendants who engage in the distribution of child pornography for profit, the heartland of § 2G2.2(b)(2)(A), are more pernicious than individuals who are simply trading pictures, the heartland of § 2G2.2(b)(2)(B). The guidelines should reflect the graduated harm to society.

For the reasons stated in our comments on part A, there should not be an additional enhancement for an adult who transfers child pornography and receives or expects to receive nothing in return. The simple transfer of child pornography between adults with no expectation of gain is already appropriately accounted for in § 2G2.2. The proposed additional enhancement would be tantamount to an increase of the base offence level because all defendants would be subject to at least one enhancement under § 2G2.2(b)(2).

We believe, for the reasons set forth in our comments on part A, that § 2G2.2(b)(2)(C), the proposed five-level enhancement for the distribution of pornography to a minor, should be limited to distribution to individuals who are not at least 16 years old. An enhancement for distribution to individuals under the age of 16 would be

consistent with other enhancements in the sexual abuse guidelines and with the age of consent. Society has recognized the increased maturity of individuals who are 16 and 17 year old – they can work, operate automobiles, and consent to engage in sex. Thus, the transfer of child pornography to a 16- or 17-year old, by itself, does not warrant a five-level increase. Additionally, the two-level increase for the distribution of child pornography to entice a child to engage in prohibited sexual conduct is only appropriate if the child is not yet 16 years old. If the definition of minor uses age 18, the definition will be inconsistent with the offenses in 18 U.S.C. ch. 109A (sexual abuse), which do not proscribe consensual sex with an individual who is at least 16 years old. Our proposed modification would eliminate confusion and be consistent to other sexual abuse enhancements in the guidelines.

We also believe, again for reasons set forth in our comments on part A, that the cross reference to the fraud guideline should not be deleted from § 2G2.2(b)(2)(A). Section 2G2.2(b)(2)(A) addresses the problem of large-scale distribution for profit. The current cross reference is clear and applies a uniform, graduated penalty that increases with the size of the illegal operation.

#### Part E

Part E of amendment 3 responds to the congressional directive to provide for an "appropriate enhancement if the defendant used a computer with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child of an age specified in the



applicable provision of law . . . to engage in any prohibited sexual activity.”<sup>24</sup> Part E also responds to a congressional directive that calls for an appropriate enhancement “if the defendant knowingly misrepresented the actual identity of the defendant with the intent to persuade, induce, entice coerce, or facilitate the transport of a child of an age specified in the applicable provision of law . . . to engage in any prohibited sexual activity.”<sup>25</sup>

Part E would add a two-level enhancement in the sexual abuse guidelines, § 2A3.1 through § 2A3.4, and the prostitution and promotion of prohibited sexual conduct guideline, § 2G1.1. That enhancement would apply in either of two circumstances. First, the enhancement would apply if the offense involved the use of a computer, or other means, to contact the minor electronically, to persuade, induce, entice, coerce, or facilitate the transport of a minor to engage in prohibited sexual conduct. Second, the enhancement would apply if the offense involved the knowing misrepresentation of a criminal participant’s identity, to persuade, induce, entice, coerce, or facilitate the transport of a minor to engage in any prohibited sexual conduct. The enhancement as proposed in part E treats these two factors as alternative grounds for applying the enhancement. The description of part E, however, indicates that the Commission “could chose to provide separate cumulative enhancements for these two types of offense conduct.”

The proposed enhancement for use of a computer is in direct response to a

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<sup>24</sup>*Id.* at § 503, 112 Stat. 2980.

<sup>25</sup>*Id.* at § 504, 112 Stat. 2981.

congressional directive. As noted in the staff report, the legislative history indicates that one of the main purposes of the Act was to increase the punishment for child stalking on the internet.<sup>26</sup> Congress was greatly concerned about the increased access to children provided by computer links to the internet.<sup>27</sup> The core purpose of the enhancement is to increase punishment for pedophiles who troll the internet for victims.

We do not oppose a two-level enhancement if a computer or other internet access device is used to locate children. The computer has facilitated their molestation in such circumstances. However, the proposed enhancement is too broad. As written, the enhancement would apply to the 19-year old who calls his 14-year old girlfriend to tell her his parents are out of the house and to come over, and to the 20-year old soldier who emails his 15-year old girlfriend. Congress did not intend for the enhancement to apply for simply using a telephone or when the individuals already know each other. Congress was concerned with the older defendant, who uses the internet to meet and gain access to a child.

For the reasons stated in our comments on parts A and D, any enhancement for use of a computer or other internet access device should not apply when the victim is more than 16-years old. This would be consistent with the age of consent otherwise recognized in

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<sup>26</sup>Sexual Predators Act Policy Team, U.S. Sentencing Comm'n, *Sentencing Federal Sexual Offenders: Protection of Children from Sexual Predators Act of 1998*, at 36 (Jan. 24, 2000).

<sup>27</sup>*See id.*

18 U.S.C. ch. 109A (sexual abuse). Due to the increased maturity and mobility of individuals who are 16- and 17-years old, the computer does not provided a greater access to older teenagers. They can drive, shop, play, and work on their own. Younger children tend to be home bound and under greater adult supervision. Thus, the computer provides increased access to young children that was not available before the advent of the internet.

We do not oppose a two-level enhancement for knowingly misrepresenting identity with the requisite intent, if that is an alternative basis for application of the enhancement. We believe the proposed language is ambiguous, however, because it does not define misrepresentation of identity with particularity.

The enhancement for misrepresentation of identity should only apply if the defendant makes an affirmative misrepresentation that is material. For example, it is common on the internet for individuals not to use their actual names but to go by pseudonyms. Such pseudonyms, because they are known in the relevant community as not being an actual representation of identity, should not be deemed a knowing misrepresentation. Likewise, a misrepresentation of description should call for application of the enhancement only if it is misleads the other party as to identity. For example, a 45-year old man identifying himself as a 15-year old boy should receive enhancement. A 25-year old man who describes himself as muscular, but who is actually flabby, should not receive the enhancement. We will be happy to work with the

Commission to develop language that appropriately describes the conduct that should be covered by the enhancement.

For the above reasons, we recommend that proposed §§ 2A3.1(b)(6), 2A3.2(b)(2), 2A3.3(b)(1), 2A3.4(b)(4), and 2G1.1(b)(4) be modified to state as follows (language we suggest be deleted is struck through; suggested new language in *italic*):

If *with intent* to persuade, induce, entice, coerce, or facilitate the transport of, a minor to engage in prohibited sexual conduct, the offence involved: (A) the use of a computer, or other *internet access device*, to communicate with ~~the~~ *such minor*, or (B) the knowing misrepresentation of a participants identity, increase by [2] levels.

We also recommend the definition of "minor" use 16 as the age. If the Commission adopts our recommendation, the definition would read: "'Minor' means an individual who has not attained the age of 16 years." Adoption of that definition will eliminate confusion and unnecessary litigation, promote uniformity within the guidelines, and reduce unwarranted disparities in sentencing.

We believe that using a computer and misrepresentation of identity are both directed at the same problem – gaining access to children. For that reason, we believe they should not be cumulative enhancements. For example, under the rape guideline, § 2A3.1, there is no additional harm if a defendant use a computer and misrepresented his identity because that guideline already accounts for nonconsensual sex and the defendant



is already receiving an enhancement for his means of access to the victim.

If the Commission decides to make the enhancement cumulative, the only offense for which there might be justification is an offense covered by § 2A3.2. Only in § 2A3.2 is it possible for the use of computer and the misrepresentation of identity to address different harms and without double counting. If the misrepresentation of identity affected the issue of consent in a § 2A3.2 case, but not to the extent of making the offense a rape covered by § 2A3.1, an increased sentence may be appropriate. We believe, however, that such cases are better dealt with by way of departure. We believe that a single enhancement with alternative grounds for applying the enhancement is the better policy.

Part E seeks comment on whether the misrepresentation of identity should be added to the enhancement in § 2G2.1(b)(3) that applies if a computer is used to solicit a minor's participation in sexually explicit conduct to produce sexually explicit material. It would seem to be a logical, consistent, and appropriate application of the guidelines and response to the congressional directives to do so. However, the use of a computer basis should be limited to using the computer to entice the child and not to creating the sexually explicit material. An enhancement for the knowing misrepresentation for a participant's identity would not be appropriate, consistent, or logical if it were added § 2G2.2, the guideline for trafficking in material involving the sexual exploitation of a minor. By definition, offenses sentenced under § 2G2.2 involve the trafficking of child pornography, not the inducing, enticing, coercing, persuading, or facilitating the transportation of a

child to engage in prohibited sexual conduct. The proposed enhancement of § 2G2.2(b)(2)(C), which would require a seven-level increase for any distribution of child pornography to a child with the intent to induce, entice, or persuade that child to engage in prohibited sexual conduct, will adequately punish those individuals who distribute child pornography with prurient intent to children.

#### **AMENDMENT 4**

Amendment 4 contains two options for responding to the Methamphetamine Trafficking Penalty Enhancement Act of 1998.<sup>28</sup> That Act reduced the quantity of actual methamphetamine and methamphetamine mixture that triggers both the five- and ten-year mandatory minimum prison terms. The Federal Public and Community Defenders support option 1.

#### **Background**

Shortly after Congress established a guideline-based sentencing system in the Sentencing Reform Act of 1984, and even before the Commission had drafted the initial set of guidelines, Congress enacted five- and ten-year mandatory-minimum penalties for drug-trafficking offenses.<sup>29</sup> These penalties applied to certain drugs, such as cocaine,

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<sup>28</sup>Pub. L. No. 105-277, div. E, § 2, 112 Stat. 2681-759.

<sup>29</sup>Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207-2.

heroin, and marijuana, and were based on the quantity of “a mixture or substance containing a detectable amount” of the drug. Thus, the mandatory-minimum penalties enacted by Congress were determined by congressional evaluation of two factors, the nature of the drug (it takes 500 grams of cocaine to qualify for a five-year mandatory minimum but only 100 grams of heroin) and the quantity of the mixture (one grams of LSD qualifies for a five-year mandatory minimum, and 10 grams qualifies for a ten-year mandatory minimum).

Congress did not require that the Commission adopt the congressional evaluation of either the relative severity of the drugs or the amount of punishment to be assigned to a given amount of a drug. The Commission was not prevented from introducing another factor – purity of the drug (a factor that the Parole Commission had used, and continues to use, when deciding release dates for persons convicted of drug offenses).<sup>30</sup> The Commission, however, when constructing the drug quantity table, decided to use the congressional factors and the congressional evaluations of relative severity and quantity.<sup>31</sup>

The Commission set at offense level 26 the quantity of a mixture containing a given drug that was subject to a five-year mandatory minimum. Thus, for example, the drug quantity table assigns offense level 26 to an offense involving 500 grams of a

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<sup>30</sup>See 28 C.F.R. § 2.20.

<sup>31</sup>See U.S.S.G. § 2D1.1, comment. (backg'd). See generally Ronnie M. Scotkin, *The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses*, 26 Crim. L. Bull. 50 (1990).



mixture containing cocaine. For a criminal history category I offender, that results in a guideline range of 63-78 months. The Commission set at offense level 32 the quantity of a mixture containing a given drug that was subject to a ten-year mandatory minimum. The drug quantity table, therefore, assigns offense level 32 to an offense involving 10 grams of LSD. For a criminal history category I defendant, that results in a guideline range of 121-151 months. Using the starting points of offense levels 26 and 32, and the quantities assigned to those levels, the Commission expanded the table upwards and downwards to provide for offenses that involved greater or lesser quantities of the drug.<sup>32</sup>

The Commission, as noted above, could have taken a different approach. The Commission could have developed an empirically-based guideline. After gathering data and information from a wide variety of sources, the Commission – free from the emotions and passions of the political arena – could have independently determined the appropriate factors to us to determine the severity of a drug-trafficking offense.

The statutory penalty structure for methamphetamine, enacted in 1988 – unlike the statutory penalty for all other drugs except PCP – distinguishes between

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<sup>32</sup>For drugs for which Congress did not enact a mandatory minimum, the Commission set offense levels using the congressional factor of the weight of a mixture or substance containing that drug. The Commission assigned offenses levels to some such drugs by their relationship to drugs for which there was a mandatory minimum. Schedule I and II hallucinogens were treated like LSD, for example. For a drug not dealt with in that manner, the Commission considered the nature of the other substances in the drug's category, the drug's potential for abuse, and the statutory maximum. *See id.* at 54-55.



methamphetamine and methamphetamine mixtures.<sup>33</sup> For methamphetamine, only the quantity of pure methamphetamine is used to determine if the mandatory minimum applies; with the latter, the quantity of the mixture containing the methamphetamine is used.<sup>34</sup> The following chart shows the mandatory-minimum quantities as originally established in 1988.<sup>35</sup>

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<sup>33</sup>Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6470(g), 102 Stat. 4378. See 21 U.S.C. § 841(B)(1)(a)(iv), (b)(iv) (PCP penalties).

<sup>34</sup>For example, assume that a mixture weighing 100 grams contains methamphetamine of 25% purity. For purposes of determining if a mandatory minimum applies, the court would use 100 grams of a methamphetamine mixture and 25 grams of methamphetamine.

In 1990, Congress became concerned about “ice,” a crystalline form of methamphetamine that typically was 80-90% pure and could be smoked. The Crime Control Act of 1990, Pub. L. No. 101-647, § 2701, 104 Stat. 4912, directed the Commission to increase punishment for offenses involving ice. The Commission responded by treating ice as pure methamphetamine, even though ice is not pure methamphetamine. U.S.S.G. App. C, amend. 370.

<sup>35</sup>Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6470(g), 102 Stat. 4378. The chart shows the ten-year quantity for a methamphetamine mixture as one kilogram, even though the Anti-Drug Abuse Act of 1988, by mistake, sets 100 grams as the ten-year quantity. The Crime Control Act of 1990, Pub. L. No. 101-647, § 1202, 104 Stat. 483, corrected the mistake by changing 100 grams to one kilogram. (The caption of § 1202 of the Crime Control Act of 1990 is “Correction of an Error Relating to the Quantity of Methamphetamine Necessary to Trigger a Mandatory Minimum Penalty.”)

### Methamphetamine Quantities Originally Triggering Mandatory Minimum

	5-year Mandatory	10-year Mandatory
Actual Methamphetamine	10 grams	100 grams
Methamphetamine Mixture	100 grams	1 kilogram

Congress revised the methamphetamine penalties in the Methamphetamine Trafficking Penalty Enhancement Act of 1998 by reducing the quantity that triggers the mandatory minimums.<sup>36</sup> This chart shows the mandatory-minimum quantities after the change made by that Act:

### Methamphetamine Quantities Now Triggering Mandatory Minimum

	5-year Mandatory	10-year Mandatory
Actual Methamphetamine	5 grams	50 grams
Methamphetamine Mixture	50 grams	500 grams

For purposes of the drug quantity table, the Commission has distinguished between “methamphetamine” and “methamphetamine (actual).” The term “methamphetamine” does not have the statutory meaning of pure methamphetamine but means a mixture or substance containing methamphetamine. The term “methamphetamine (actual)” means

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<sup>36</sup>Pub. L. No. 105-277, div. E, § 2, 112 Stat. 2681-759.

pure methamphetamine. For example, a 100 gram mixture of 20% pure methamphetamine constitutes, for guideline purposes, 100 grams of methamphetamine and 20 grams of methamphetamine (actual).<sup>37</sup> As noted above, the Commission places at level 26 the minimum quantity necessary to trigger a five-year mandatory minimum and at level 32 the minimum quantity necessary to trigger a ten-year mandatory minimum. This chart shows how the guidelines presently treat methamphetamine quantity:

Guideline Quantities for Offense Levels Corresponding to Mandatory Minimums

	Level 26	Level 32
Actual Methamphetamine	10 grams	100 grams
Methamphetamine Mixture	50 grams	500 grams

The guidelines, therefore, already use statutory quantities for mixture containing methamphetamine. The guidelines, however, do not use the statutory quantities for pure methamphetamine.

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<sup>37</sup>Because the statutory terms and the guideline terms differ, there can be confusion unless the context in which the term is used is specified. For example, 25 grams of “methamphetamine” means, for statutory purposes, 25 grams of pure methamphetamine and means, for guideline purposes, 25 grams of a mixture containing methamphetamine.

## Our Recommendations

### The Options

Amendment 4 has two options. Option 1 would amend the drug quantity table to conform the actual methamphetamine quantity to the levels set by the Methamphetamine Trafficking Penalty Enhancement Act of 1998. Option 2 would significantly alter the treatment of methamphetamine by requiring that the quantity for all methamphetamine offenses be based upon actual methamphetamine. For cases in which the purity is unknown or undeterminable, option 2 would presume a standard purity that would be set forth in the commentary.<sup>38</sup>

Option 1 brings the guidelines into harmony with the statutory provisions and is the simplest way to comply with the congressional mandate. Option 2 would abandon the congressional distinction between pure methamphetamine and methamphetamine mixtures. If adopted, option 2 will produce situations in which the guideline sentence will be trumped by the mandatory minimum.<sup>39</sup> In addition, option 2 requires the Commission to formulate a presumptive purity for cases in which the purity is unknown

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<sup>38</sup>Option 2 would continue to treat ice as if 100% pure methamphetamine.

<sup>39</sup>For example, the defendant is accountable for a 50 gram mixture containing methamphetamine at a 5% purity. Under option 2, the quantity used is 2.5 grams (5% of 50), which yields an offense level of 20. Assuming that there are no adjustments and the defendant is in criminal history category I, the applicable guideline range would be 33-41 months. Under 21 U.S.C. § 841(b)(1)(B)(viii), however, the mandatory minimum is 60 months because 50 grams of a methamphetamine mixture is involved.



or cannot be determined – no easy task. Should there be a single national standard, representing the average purity of all methamphetamine seized throughout the country? Should there be a standard by judicial circuit, by judicial district, by region of the country, or by state, representing the average purity of all methamphetamine seized within that area? Any of those approaches will under-punish defendants in areas where the purity is highest and over-punish defendants in areas where purity is lowest. In computing the average, how far back should the Commission (or court) look – 6 months, one year, three years, or more? Should the standard be to presume that the purity is the same as the purity of any mixture for which the purity is known and for which the defendant is accountable and look only to another standard if the purity is unknown for the entire quantity for which the defendant is accountable?

We believe that the Commission should adopt option 1. However, we also believe that the Commission ought to undertake a comprehensive reexamination of the drug quantity table and reconsider whether the drug quantity table should be tied to the congressionally-determined quantities that trigger mandatory minimums.

#### Issue for Comment

It is difficult to comment about the need to change the drug equivalency table in § 2D1.11 with respect to phenylacetone/P2P possessed for manufacturing methamphetamine. Nothing in the *Guidelines Manual* explains how the present ratio was set and how the ratio for phenylacetone/P2P possessed for manufacturing

methamphetamine should relate to the ratios for actual methamphetamine and methamphetamine mixture.<sup>40</sup> The same is true with respect to the chemicals listed in the chemical equivalency table of § 2D1.11. We do not see a need at this time to recalculate the equivalencies for phenylacetone/P2P possessed for manufacturing methamphetamine in the drug equivalency table of § 2D1.1 or to change the chemical quantity table of § 2D1.11 for chemicals listed in that table that are used to manufacture methamphetamine.

## AMENDMENT 5

Amendment 5 presents two options for implementing the Identity Theft and Assumption Deterrence Act of 1998<sup>41</sup> and several issues for comment.

### Background

The Identity Theft and Assumption Deterrence Act of 1998 amended 18 U.S.C. § 1028 (fraud and related activity in connection with identification documents and information). Section 1028(a)(7) makes it an offense knowingly to transfer or use, without authorization, another person's "means of identification," with intent to commit,

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<sup>40</sup>At present, one gram of actual methamphetamine is equivalent to 10 kilograms of marijuana, one gram of methamphetamine mixture is equivalent to 2 kilograms of marijuana, and one gram of phenylacetone/P2P (when possessed for manufacturing methamphetamine) is equivalent to 416 grams of marijuana. If option 1 is adopted, the actual methamphetamine equivalency for one gram becomes 20 kilograms of marijuana.

<sup>41</sup>Pub. L. No. 105-318, 112 Stat. 3007.

or to aid the commission of, a federal offense or a state felony.<sup>42</sup> A "means of identification" is defined in section 1028(d)(3) to be, in essence, personal data about an individual.<sup>43</sup> Thus, it is an offense for A to use B's personal data (such as name, social security number, and date of birth) to obtain a credit card in B's name with the intention of using that credit card to make purchases that A will not pay for. By providing B's personal data to the credit card issuer A has used, without authorization, a "means of identification."<sup>44</sup>

The Act directs the Commission to "review and amend" the guidelines "to provide an appropriate penalty for each offense under" 18 U.S.C. § 1028.<sup>45</sup> The Act also directs the Commission, in carrying out this task, to consider seven specific factors, as well as "any other factor that the United States Sentencing Commission considers to be appropriate."<sup>46</sup>

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<sup>42</sup>Enacted by *id.* at § 3.

<sup>43</sup>"[T]he term 'means of identification' means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual . . ." 18 U.S.C. § 1028(d)(3). The definition lists as examples a name, social security number, date of birth, fingerprint, and an electronic serial number or other number or signal identifying a specific telecommunications instrument or account. *Id.*

<sup>44</sup>The credit card is a means of identification under 18 U.S.C. § 1028(d)(3) because it contains information (name and account number) that can be used, in conjunction with other information, to identify a specific individual.

<sup>45</sup>Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, § 4(a), 112 Stat. 3007.

<sup>46</sup>*Id.*



The offense guideline applicable to violations of section 1028 is § 2F1.1, the fraud guideline, which has a base offense level of 6. Of the seven separate enhancements in the fraud guideline, the ones that would seem to be applicable to nearly all identity-theft offenses are the enhancements for loss (from one to 18 levels), for more-than-minimal planning or defrauding more than one victim (two levels), and for use of sophisticated means (two levels with a floor of level 12).

### The Options

#### Option 1

Option 1 would add a new enhancement to the fraud guideline. The enhancement – two levels with a floor of levels 10-13 (the level to be decided) – would apply in two circumstances. The first circumstance is that the offense involved use of “identifying information” of an “individual victim” to make an “unauthorized identification means” of that victim. The option defines “identifying information” to be “means of identification” as that term is used in section 1028 – i.e., personal data about another person. The option defines “unauthorized identification means” to be “any identifying information that has been obtained or made from any other identifying information without the authorization of the individual victim whose identifying information appears on, or as part of, that unauthorized identification means.”<sup>47</sup> This enhancement would apply to A in the above

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<sup>47</sup>There may be a problem with the definition as presently drafted. The definition seems to contemplate that the unauthorized identification means is something tangible (the information must appear “on, or as part of,” something), but nothing tangible is



example because A, without authorization, used B's personal data to get an unauthorized identification means (the credit card).

The second circumstance in which the enhancement applies is if the offense involved possession of five (number to be decided) or more "unauthorized identification means." This enhancement would apply to A in the above example if A had obtained five credit cards by using the personal data of other persons without authorization.

Option 2 also would add commentary indicating that "an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense." The new commentary sets forth two examples. One is that the individual victim is wrongly arrested or denied a job because of the defendant's offense, and the other is that the defendant made numerous unauthorized identification means of a single individual victim, to the extent that the defendant "essentially assum[ed] and liv[ed] under that victim's identity."

#### Option 2

Option 2 would add two new enhancements to the fraud guideline. The first new enhancement – two levels with a floor of 10 or 12 (to be decided) – applies if the offense involved (A) harm to an individual's reputation or credit standing, inconvenience related

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mentioned in the definition. We think the intended definition probably is something like "*a tangible item that contains* any identifying information that has been obtained or made from any other identifying information without the authorization of the individual victim whose identifying information appears on, or as part of, that unauthorized identification means."

to the correction of records or restoration of an individual's reputation or credit standing, or similar difficulties; and (B) the harm, inconvenience, or difficulties were "more than minimal." The proposed new commentary does not define "more than minimal" but does state that "neither an individual's speculation about potential harm to his or her reputation or credit standing nor a single, negative credit entry that was corrected in a short time would qualify for the 2-level adjustment under this subsection, but a showing of multiple, negative credit entries or a poor credit rating would."

The other new enhancement – two levels – applies if the offense involves the production or transfer of six or more "identification documents," "false identification documents," or "means of identification." That enhancement does not apply, however, if the offense level is enhanced for loss. The option does not define "identification document" and "means of identification," but those terms are defined in section 1028. We assume that the statutory definition would apply.<sup>48</sup> An "identification document" is a document issued by a government that is of a type commonly accepted for the purpose of identifying an individual – a driver's license, for example.<sup>49</sup>

The new commentary does not define the term "false identification document" and neither does section 1028. The lack of a definition in the new commentary renders the

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<sup>48</sup>If the Commission were to adopt this option, we suggest that commentary be added either specifically adopting the statutory definition or providing a different definition for use with the fraud guideline.

<sup>49</sup>18 U.S.C. § 1028(d)(2).

term ambiguous. Does the term “false” mean that the item wrongly purports to be something issued by a government (e.g., a card containing truthful personal data that someone has constructed to look like a state driver’s license) or that the information contained on something actually issued by a government is not true (e.g., defendant A uses B’s name, address, and other personal information to obtain from the state a driver’s license that uses A’s picture but contains B’s personal information).<sup>50</sup>

### Recommendations

#### The Options

We do not believe that the Commission should decide the matter at this time. There does not appear to have been many prosecutions under this new offense, so there is little real-world experience for the Commission to draw from. Drafting a guideline under these circumstances may create problems down the road that could be avoided by waiting a bit to learn about the cases being brought.<sup>51</sup>

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<sup>50</sup>The definition of “identification document” in section 1028(d)(2) centers on the issuer of the document; indeed, the definition does not require that the information on the identification document be truthful or accurate. A driver’s license issued to someone that contains the wrong address and date of birth, for example, is still an identification document under section 1028(d)(3). We believe that the term “false identification document” probably should be understood to mean something that purports to have been issued by a government but has not been. If the Commission adopts this option, the meaning of the term “false identification document” should be clarified.

<sup>51</sup>The money-laundering guideline is an example of what should be avoided. The Commission formulated the money laundering guidelines with certain expectations.

The relatively high base offense levels for money laundering were premised on the



This concern is enhanced in this instance because one of the new enhancements in option 2 – harm to reputation – applies not only to identity-theft offenses, the offenses that the Identity Theft and Assumption Deterrence Act of 1998 is concerned with. The enhancement potentially applies to most offenses sentenced under the fraud guideline. We are not aware of the need for such a sweeping enhancement.

We believe the appropriate action in this instance is to postpone final action on the identity-theft changes to the text of the fraud guideline so that the Commission can study the matter further. Congress, however, must be assured that the Commission is not ignoring the congressional mandate. We recommend, if the Commission decides to defer action on enhancements to the fraud guideline, that the Commission, as an interim measure, add encouraged-departure language to the commentary to the fraud guideline. The language would be tailored to offenses under section 1028(a)(7). We suggest: “If the defendant is convicted under 18 U.S.C. § 1028(a)(7) and that offense results in harm not

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Commission’s anticipation that prosecutors would address “money laundering activities [that] are essential to the operation of organized crime,” and would apply the money laundering sentencing guidelines to those offenses where the financial transactions “encouraged or facilitated the commission of further crimes” or were “intended to . . . conceal the nature of the proceeds or avoid a transaction reporting requirement.”

U.S. Sentencing Comm’n, Report to the Congress: Sentencing Policy for Money Laundering Offenses, including Comments on Department of Justice Report 3-4 (Sept. 18, 1997). The Commission, unfortunately, found that its expectations did not come to pass. “[M]oney laundering sentences are being imposed for a much broader scope of offense conduct, including some conduct that is substantially less serious than the conduct contemplated when the money laundering guidelines were first formulated.” *Id.* at 7.



adequately taken into account by the guidelines, an upward departure may be warranted.”

If the Commission does not decide to study the matter further, the Federal Public and Community Defenders prefer option 1 and recommend that the Commission make the floor for the enhancement level 10. We also recommend that the number of unauthorized identification means be set at five. The enhancement in option 1 would focus on offenses that involve manufacturing – the approach taken in the proposed amendment to phone-cloning offenses – and on offenses in which the conduct indicates that there is trafficking going on. We think that focus is appropriate.

Both options 1 and 2 seek to enhance for the larger-scale offenses, but option 1 does so more effectively. Option 1 targets those who manufacture unauthorized means of identification and those who possess five or more unauthorized means of identification. Option 2 not only sweeps too broadly but also is not as well-drafted. For example, option 2 would call for a two-level enhancement if the offense involved the transfer of six or more means of identification. A person who applies for a driver’s license provides personal data (such as name, address, and date of birth) to the state employee empowered to issue the license. Each item of information would seem to be a “means of identification” (a name, number, or other information that “alone or in conjunction with any other information, [may be used] to identify a specific individual”). If so and if the person provides six items of personal data, there has been a “transfer” of six “means of identification” – thereby qualifying for application of the enhancement – even if that

transfer leads to the acquisition of only one driver's license. This is not the kind of activity that should qualify for a two-level enhancement.

We oppose the other enhancement in option 2, which adds two levels and sets a floor of level 10 or 12 (to be decided) if the offense involves more-than-minimal harm to reputation or credit standing or more-than-minimal inconvenience related to correcting records. In our judgment, this enhancement also sweeps too broadly. The enhancement is not limited to identity-theft offenses, but would apply to all fraud offenses. The Identity Theft and Assumption Deterrence Act of 1998 did not call for an across-the-board increase in fraud sentences, and the Commission has published nothing suggesting that there is a need for such an enhancement for all fraud offenses. Regrettably, every fraud offense can have an unfavorable impact on the victim's reputation and credit standing. Even if the victim's pecuniary loss is minimal so that there is no impact on the victim's credit standing, the victim's reputation may suffer because the victim fell for a scam that most people saw through.<sup>52</sup>

#### Issues for Comment

Our general observation about all of the issues for comment in amendment 5 is that the Commission needs more data about identity-theft cases before drafting an identity-theft enhancement. We repeat our earlier recommendation that the Commission continue

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<sup>52</sup>The use of "more than minimal" is also unfortunate. It sets a very low standard that, given the experience with "more than minimal planning," will be applied with great frequency – not just in identity-theft offenses but in all fraud offenses.

to study identity theft and, as an interim step, add encouraged departure language to the commentary to the fraud guideline.

The first issue for comment is directed at option 1. The issue presented is whether there should be an additional enhancement for the number of victims involved.<sup>53</sup> We believe that the number of unauthorized identification means is a better measure than the number of victims and that the Commission should wait and see what the experience is with the enhancement before doing anything else. The enhancement in the form presented in option 1 may work satisfactorily, but if it does not, the Commission can modify it in a future cycle.

The second issue for comment is whether an enhancement similar to that in option 1 should be added to the theft, money laundering, or tax fraud guidelines. We think that it would be premature to add a similar enhancement to those guidelines.

The applicable offense guideline in Appendix A for a section 1028 offense is the fraud guideline. Although that designation in Appendix A is not dispositive (at least at present), we would expect the fraud guideline to be the starting point in nearly every instance. Some identity-theft offenses may end up in other guidelines. The commentary to the fraud guideline, for example, indicates that § 2L2.1 or § 2L2.2, which deal with immigration offenses, can be used for a section 1028 offense if "the primary purpose of

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<sup>53</sup>The enhancement under option 1 applies if the offense involved "possession of [5] or more unauthorized identification means." All five of the unauthorized identification means can be of one individual.



the offense involved the unlawful production, transfer, possession, or use of identification documents for the purpose of violating, or assisting another to violate, the laws relating to naturalization, citizenship, or legal resident status . . . .” Further, there may be an atypical case that would justify the sentencing court, under §1B1.2 selecting another offense guideline.

We do not believe that the theft, money laundering, or tax fraud guidelines will be used for a section 1028 offense frequently enough to justify adding an identity-theft enhancement to those guidelines. The sentences under the money laundering guideline are sufficiently long, in any event, that there should be little concern about the severity of punishment for a defendant convicted of money laundering as well as identity theft.

The third issue for comment is whether the Commission, in lieu of amending chapter two, should add a chapter three adjustment that would apply in every instance when there has been unauthorized use of an “identification means.” We think a chapter three adjustment does not respond to the congressional concern as well as option 1. Option 1 is preferable because the Commission has attempted, as best it can given what is known, to tailor option 1 to the characteristics of identity-theft offenses prosecuted under section 1028.

The fourth issue for comment is whether, in lieu of amending chapter two, the Commission should add to chapter five an encouraged departure for unauthorized use of a identification means. We believe that an encouraged departure would comply with the



congressional mandate, at least as an interim step. As indicated above, we believe this to be the appropriate course of action at the present time. Because we view the encouraged departure language as an interim step, we think that it would be better to put the language in the commentary to the fraud guideline.

The fifth issue for comment relates to presumed loss. Should the presumption that the loss from a stolen credit card is \$100 be revised to (1) increase the amount and (2) cover any "access device"? The term access device is defined in 18 U.S.C. § 1029 (e)(1) to mean

any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument).

This matter is barely tangential to the congressional directive in the Identity Theft and Assumption Deterrence Act of 1998, and we recommend that the Commission make neither change.

The loss presumption is used in the theft guideline to set a floor and is used only if

there is no other way to determine the intended loss.<sup>54</sup> We believe that the determination of intended loss is best left to the sentencing court's discretion. The goal is to determine as accurately as possible the amount of loss intended. What was intended must be inferred from all of the facts and circumstances considered under the relevant conduct rules. The presumed amount is used only if the preponderance of the evidence does not indicate a greater amount. We believe that the amount presently used as the presumed loss is appropriate for all purposes.

The sixth issue for comment concerns whether there should be an offense-level enhancement if the defendant has been convicted previously of a similar offense. We recommend against such an enhancement. The proper place for consideration of prior criminal conduct is in determining the criminal history score and in determining if there should be a departure under § 4A1.3 based upon the adequacy of the criminal-history category. The scoring of criminal history in chapter four is largely determined by the likelihood of recidivism.<sup>55</sup> We believe it would be unfair double counting to include an

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<sup>54</sup>"The loss includes any unauthorized charges made with stolen credit cards, but in no event less than \$100 per card." U.S.S.G. § 2B1.1, comment. (n. 4).

<sup>55</sup>See U.S.S.G. ch. 4, pt. A, intro. comment. ("The specific factors included in § 4A1.1 and § 4A1.3 are consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior. While empirical research has shown that other factors are correlated highly with the likelihood of recidivism, *e.g.*, age and drug abuse, for policy reasons they were not included here at this time"). See also U.S. Sentencing Comm'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 42 (June 18, 1987) ("The criminal history score used in the guidelines is comprised of five items that address the frequency, seriousness, and recency

enhancement in the offense guideline for prior convictions of a nature similar to the instant offense.

## AMENDMENT 6

Amendment 6 offers two options in response to a directive in the Wireless Telephone Protection Act.<sup>56</sup> Amendment 6 also sets forth several issues for comment.

### Background

The Act directs the Commission to “review and amend” the guidelines, “if appropriate,” to provide “an appropriate penalty for offenses involving the cloning of wireless telephone (including offenses involving an attempt or conspiracy to clone a wireless telephone).”<sup>57</sup> The Commission must consider a number of specified factors, as well as “any other factor that the Commission considers to be appropriate.”<sup>58</sup>

Every cellular telephone has two identifying numbers, the ESN and the MIN. The ESN is the electronic serial number programmed into the telephone by the manufacturer

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of the defendant’s prior criminal history. . . . The particular elements that the Commission selected have been found empirically to be related to the likelihood of further criminal behavior and also are compatible with the purposes of just punishment”).

<sup>56</sup>Pub. L No. 105-172, § 2(e), 112 Stat. 53 (1998).

<sup>57</sup>*Id.* at § 2(e)(1).

<sup>58</sup>*Id.* at § 2(e)(2).

and cannot lawfully be changed. The MIN (mobile identification number) is the telephone number assigned to the cellular telephone by the wireless carrier and can be changed by the carrier. A cell phone, when turned on, broadcasts the ESN and MIN, in part to enable the wireless carrier to bill for the use of the cell phone. If the ESN and MIN are captured, they can be programmed into another cell phone, thereby creating a clone of the “authentic” cell phone (the cell phone from which the numbers were taken). Whoever has the cloned cell phone can then use it to make calls that will be billed to the account of the authentic cell phone.

The statutory provision used to prosecute cloned cell phone cases is 18 U.S.C. § 1029 (fraud and related activity in connection with access devices). Appendix A lists § 2F1.1, the fraud guideline, as the offense guideline ordinarily applicable to offenses under section 1029.

### The Options

Amendment 6 sets forth two options. Option 1 would add a two-level enhancement to the fraud guideline that applies in either of two circumstances. First, the enhancement applies if the offense involved use or possession of “cloning equipment.” Cloning equipment means, in essence, equipment used to capture the ESN and MIN.<sup>59</sup> Second, the

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<sup>59</sup>Option 1 adds commentary defining “cloning equipment” to mean “any hardware, software, mechanism, or equipment that has been, or can be, configured to insert or modify any telecommunication identifying information . . . so that [the cloned cell phone] may be used to obtain telecommunications service without authorization.”



enhancement applies if the offense involved the manufacture or distribution of a "cloned telecommunications instrument." Option 1 defines that term to mean "a telecommunications instrument that has been unlawfully modified, or into which telecommunications identifying information has been unlawfully inserted, to obtain telecommunications service without authorization." As so defined, the term might be broader than a wireless telephone, which is what the Wireless Telephone Protection Act was concerned about. The explanation does not indicate a reason for applying the enhancement to more than wireless telephones. If the Commission adopts option 1, we recommend that the definition be modified so that the enhancement applies only if the offense involved a cloned wireless telephone.

Option 2 is broader than option 1. Option 2 would add a two-level enhancement to the fraud guideline if the offense involved the possession or use of "device-making equipment" or the distribution of a "counterfeit access device." Under option 2, device-making equipment means, in essence, equipment designed or primarily used for making an access device or a counterfeit access device.<sup>60</sup> Option 2 specifically states that "device making equipment" includes equipment used to capture the ESN and MIN as well as equipment used to intercept wire or electronic communication illegally.<sup>61</sup> An access

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<sup>60</sup>Option 2 incorporates the definition of device-making equipment in 18 U.S.C. § 1029(e)(6).

<sup>61</sup>The proposed commentary refers to a "scanning device" as defined in 18 U.S.C. § 1029(e)(8). The definition in 18 U.S.C. § 1029(e)(8), however, is of the term "scanning

device is a card, code, account number, electronic serial number, mobile identification number, personal identification number, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or other thing of value. A counterfeit access device is a fake access device. Thus, the enhancement in option 2 would apply to possession or use of more than just cell-phone cloning equipment. There are no reasons given for why option 2 expands beyond the mandate of the Wireless Telephone Protection Act.

### Recommendation

We recommend that the Commission adopt option 1. The Commission's first step in this area, we believe, should be to track the statute. Expansion beyond the statutory requirements can be considered in another cycle.

The first issue for comment is whether "the use of a presumptive loss amount or a presumptive loss increase is preferable to the specific offense characteristics proposed in Option One." The reason suggested for a presumptive loss amount or a presumptive loss increase is that the applicability of the enhancement in option 1 "would have to be (at least potentially) considered in every case sentenced under this guideline (i.e., over 6,000 cases in FY 1998) . . . ." We think that the use of a presumptive loss amount or a presumptive loss increase would be unwise.

To begin with, the suggestion that the applicability of the enhancement in option

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receiver."

1 might have to be considered in some 6,000 cases is misleading. The enhancement would only be seriously considered in those cases involving convictions under 18 U.S.C. § 1029. The enhancement can be passed right over in other cases. The Commission's own data establishes that cell-phone cloning cases are a minuscule percentage of the 6,000 fraud cases.<sup>62</sup>

The goal in determining loss should be to calculate, as nearly as possible, the actual loss that was inflicted or the loss that was intended to be inflicted. A presumptive amount is a fiction unrelated to the facts and circumstances of the case. Assume, for example, that the case involves unused ESN/MIN pairs. The initial question has to be whether the defendant intended to use them. If not, then a presumptive amount would only serve to overstate the seriousness of the offense.<sup>63</sup> If the intention was to use the ESN/MIN pairs, then the question becomes what was the loss intended from using them.

The determination of intended loss is best left to the sentencing court's discretion, perhaps with some guidance by the Commission. The actual conduct involved in the case would seem to be the best starting place. If the actual loss caused by the defendant was

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<sup>62</sup>See Economic Crimes Policy Team, U.S. Sentencing Comm'n, *Cellular Telephone Cloning: Final Report* 6-7 (Jan. 27, 2000) (analysis of a 50% random sample of all cases with at least one conviction under section 1029 "yielded 47 cases involving cellular fraud").

<sup>63</sup>Given the government's burden of persuasion (preponderance), ordinarily it will be very hard for a convicted defendant to convince a sentencing court that he or she did not intend to use the ESN/MIN pairs that had not been used.



\$500 per cloned phone and the defendant had unused ESN/MIN pairs to clone additional 20 phones, the starting point for determining the loss intended from those additional phones would be \$10,000 (20 times \$500). If the government can show that the defendant had begun modestly, averaging \$100 per cloned phone, but in the last several weeks before being arrested had increased that to \$750 per cloned phone, then the sentencing court would have a basis for determining that the intended loss from the 20 additional ESN/MIN pairs was \$15,000 (20 times \$750). If the defendant can show the reverse, that the initial average was \$750 but the recent average was \$100, then the sentencing court would have a basis for determining that the intended loss was \$2,000 (20 times \$100). If that sort of calculation is not appropriate, then the matter should be left to the sound discretion of the sentencing court.

Most of the other issues for comment either have been commented upon already or else raise issues that would require the Commission to go far beyond the scope of the Wireless Telephone Protection Act. We do not think that the Commission is in a position to make the kinds of decisions required by such issues, and we recommend that the Commission defer acting on them. We believe that the Commission should limit itself to carrying out faithfully what the Wireless Telephone Protection Act calls for.



## AMENDMENT 7

Amendment 7 would make a number of changes in the guidelines relating to firearms. The amendment is prompted by legislation enacted in late 1998 that amended 18 U.S.C. § 924(c).<sup>64</sup> The amendment has five parts, and we will discuss them seriatim.

### Background

Until November 13, 1998, section 924(c) made it an offense to use or carry a firearm during and in relation to a crime of violence or drug trafficking crime. The penalty depended upon (1) the type of weapon and (2) whether the defendant previously was convicted under section 924(c). The punishment set forth in section 924(c) was unusual in three ways. First, the punishment prescribed was both the minimum and the maximum (providing, for example, that a person convicted of the least severe form of the offense “shall . . . be sentenced to imprisonment for five years”). Second, a prison term was mandated. Third, the prison term had to run consecutively to “any other term of imprisonment” imposed on the defendant.

Congress, effective November 13, 1998, revised both the definition of the section 924(c) offense and the punishment prescribed for a section 924(c) offense. The definition of the offense was modified to include possessing a firearm as well as carrying and using a firearm. In addition, the punishment was revised in several ways. First, the punishment

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<sup>64</sup>Pub. L. No. 105-386, 112 Stat. 3469 (Nov. 13, 1998).

was made dependent upon the nature of the involvement of the firearm, as well as upon the type of weapon and a prior conviction under section 924(c). Second, the penalty provisions were amended to set forth a minimum but no maximum (section 924(c)(1)(A)(i), for example, provides that an offender “be sentenced to a term of imprisonment of not less than 5 years”). Third, a new punishment variable was added – the manner in which the weapon was involved. Specifically, the punishment for brandishing a firearm was set at a prison term of “not less than 7 years,” and the term “brandish” was defined for the purposes of section 924(c).

The Commission has treated a section 924(c) offense as a functional equivalent of an enhancement for using, brandishing, discharging, or possessing a firearm. Thus, the offense guideline applicable to a section 924(c) conviction, § 2K2.4, provides that “the term of imprisonment is that required by statute.” Further, the Commission has provided that when imposing a sentence for a section 924(c) conviction in conjunction with a sentence for an underlying offense, “any specific offense characteristic for the possession, use, or discharge of an explosive or firearm . . . is not to be applied in respect to the guideline for the underlying offense.”<sup>65</sup> The purpose of that provision is to prevent unfair double counting.<sup>66</sup>

#### Part A – Definition of “Brandish”

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<sup>65</sup>U.S.S.G. § 2K2.4, comment. (n.2).

<sup>66</sup>*Id.* at comment. (backg’d).

Part A of amendment 7 proposes to replace the current guideline definition of “brandish” in the commentary to § 1B1.1 with the new statutory definition in section 924(c)(4). We recommend that this not be done.

The Commission has defined the term “brandish” to mean “that the [dangerous] weapon was pointed or waved about, or displayed in a threatening manner.”<sup>67</sup> The statutory definition is that brandish means “to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.”

The principal difference between the two definitions is whether the object must be seen by the victim. By specifying that the object be pointed, waved, or displayed, the guideline definition requires that the object be visible. The statutory definition requires only that the presence of the object be made known. That can be accomplished without the object being visible, however. For example, the defendant can tell the other person that she has a gun in her purse.<sup>68</sup> The defendant, however, must actually have a gun or else there can be no violation of section 924(c).

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<sup>67</sup>U.S.S.G. § 1B1.1, comment. (n. 1(c)).

<sup>68</sup>This statement would not qualify as brandishing under the guideline definition even if it was the defendant’s intent to frighten the other person. To be brandishing under the guideline definition, if the pistol itself is not visible, then what appears to be the pistol must be visible. If, for instance, the defendant had the pistol in her coat pocket and the pistol created a visible bulge, the pistol itself would not be visible, but something that appeared to be the pistol would be. Under the guideline definition, a mere claim to have a weapon does not qualify as brandishing.



Congress developed the statutory definition of brandish for use with a particular offense, an offense that requires the *actual* presence of a *real* firearm. The actual presence of a real firearm justifies a definition that does not require another person actually to see the firearm during the offense.

The guideline definition of brandish is used throughout chapter 2 in connection with a wide variety of offenses involving a wide variety of objects that can be used to injure someone. Replacing the guideline definition of brandish with the statutory definition would create a technical problem because of the guideline definition of “dangerous weapon.” The guideline definition of dangerous weapon is “an instrument capable of inflicting death or serious bodily injury.”<sup>69</sup> The guideline definition of dangerous weapon also provides that “[w]here an object that *appeared* to be a dangerous weapon was brandished, displayed or possessed, treat the object as a dangerous weapon.”<sup>70</sup> The use of “appeared” means that the object itself must somehow be visible, either directly (as when the object is displayed) or by inference (the bulge in the coat pocket that resembles a pistol). The statutory definition of brandish, however, does not require visibility; all the defendant has to do is make the presence of the object known for the purpose of intimidation. A defendant who, for the purpose of intimidation, claims to have a pistol in her purse has brandished within the statutory definition, even if there is nothing

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<sup>69</sup>U.S.S.G. § 1B1.1, comment. (n. 1(d)).

<sup>70</sup>*Id.* (emphasis added).



about the appearance of the purse that indicates that there is a pistol in the purse.

The Commission's definition of brandish has been used for over 13 years, ever since the initial set of guidelines was promulgated, and a significant body of case law interpreting the term has developed. We believe it would be a mistake to scrap the current guideline definition and replace it with a definition developed for a particular offense. We recommend that the Commission retain the current guideline definition of brandish.<sup>71</sup>

Part B – § 2K2.4 (Term “Required by Statute”)

Part B of amendment 7 would amend § 2K2.4 “to clarify that the ‘term required by statute’ [as used in that guideline] . . . is the minimum term specified by the statute.” Part B would also add commentary dealing with upward departures. Finally, there is an issue for comment about whether there should be a cross-reference to the underlying offense (if the guideline range for that offense is greater than the minimum required by 18 U.S.C. § 924(c)).

The offense guideline applicable to violations of 18 U.S.C. § 924(c) currently provides that “the term of imprisonment is that required by statute.” That formulation works with both the old and new versions of section 924(c). The old section 924(c) called for a single penalty (“shall . . . be sentenced to imprisonment for five years”), so there was no ambiguity in the reference to the term “required by statute.” New section 924(c)

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<sup>71</sup>If the Commission does not adopt the statutory definition for use in the guidelines, the statutory definition will still be used in determining the minimum sentence that section 924(c) requires.

prescribes a minimum but no maximum (“be sentenced to a term of imprisonment of not less than 5 years”). The new formulation does not render current § 2K2.4 ambiguous. All that new section 924(c) *requires* is the minimum term. New section 924(c) *authorizes*, but does not require, a sentence above the minimum. Nevertheless, the change to the text of § 2K2.4 can do no harm, and we support it.

We do not support all of the proposed changes to the commentary as written, however. We suggest keeping the first two sentences of the new commentary and placing them in the Background note. The remainder of the commentary is inappropriate, as well as unhelpful and confusing.

To begin with, the proposed commentary is confusing because the interplay between the third and fourth sentences in the proposed new commentary is unclear. The factors in the fourth sentence seem to be applicable only in the circumstances described in the third sentence. The proposed new commentary, however, does not say so directly.

The five factors in the fourth sentence of the proposed commentary are encouraged departure grounds. A sentencing court can depart if one of the factors is present unless the applicable offense guideline has taken that factor into account, in which case the sentencing court may depart if the factor is present to a degree beyond that contemplated by the offense guideline.<sup>72</sup> We consider this to be inappropriate. The Commission – correctly in our view – considers a section 924(c) conviction to be, in effect, a weapon

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<sup>72</sup>See *Koon v. United States*, 518 U.S. 81, 94-95, 116 S.Ct. 2035, 2045 (1996).

enhancement. As such, a departure for a section 924(c) should be encouraged only to the extent that a departure is warranted for a weapon enhancement in the underlying offense (the offense during and in relation to which the firearm was possessed, carried, or used). Thus, for example, if the guideline for the underlying offense does not encourage a departure if the offense involved a stolen firearm or a firearm with an obliterated serial number (factor (B) in the proposed new commentary), then it is inappropriate for § 2K2.4 to provide for an encouraged departure if there were no conviction of that underlying offense. We think the same thing is true with respect to all of the other factors in the fourth sentence.

We suggest deleting all of the proposed commentary after the second sentence. As a general matter, we think it preferable to wait to see how sentencing courts actually sentence under new section 924(c). We think that the Commission should learn from the sentencing practices of federal judges before drafting encouraged-departure language.

#### Part C – Application of Weapon Enhancement

Part C of amendment 7 addresses application note 2 of § 2K2.4, which provides that an enhancement for possessing, using, or discharging a weapon in the guideline for the underlying offense is not to be applied if the defendant is convicted of both the underlying offense and a section 924(c) offense. Part C amends that application note to preclude application of an enhancement for brandishing a weapon in the guideline for the underlying offense if the defendant is convicted of both the underlying offense and a



section 924(c) offense. We support that amendment.

As we noted above, the Commission considers a section 924(c) offense to be a functional equivalent of an enhancement for using, discharging, or possessing a weapon. To avoid unfair double counting, the Commission requires the sentencing court to use the section 924(c) penalty instead of the weapon enhancement.<sup>73</sup>

When an offense guideline has an enhancement for possessing, using, or discharging a weapon, that enhancement applies only once, no matter how many guns are involved. Assume that defendant A is convicted on counts I and II of distributing cocaine, and during the count I distribution possessed a pistol. The sentencing court, applying the weapon enhancement of the drug-trafficking guideline, § 2D1.1(b)(1), would add two levels to A's offense level. If A had possessed the pistol during the count II distribution as well, the enhancement would still be two levels. The enhancement is not doubled because a gun was possessed on two separate occasions.<sup>74</sup> Because the Commission treats a

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<sup>73</sup>In the great majority of cases, the mandatory prison term called for by section 924(c) will be greater than the additional prison time called for by a weapon enhancement, even a seven-level enhancement for discharging a firearm – especially now that Congress has increased the penalties under section 924(c).

<sup>74</sup>The enhancement also would not be doubled if there had been two different weapons. In the example in the text, the enhancement would be two levels, not four, if A had possessed a rifle during the count II distribution. Similarly, assume that defendant L and codefendant M each brandish a gun during a robbery. L's enhancement under § 2B3.1(b)(2)(C) is five levels. Even though L is accountable for M's conduct under the relevant conduct rules, L's enhancement under § 2B3.1(b)(2)(C) is still five levels. The enhancement does not double because of the second gun brandished by M.



section 924(c) offense as the functional equivalent of a weapon enhancement, the same principle should apply when § 2K2.4 is applied. If, in addition to the count I and II cocaine distribution convictions, A is convicted of a section 924(c) offense for which the underlying offense is the count I distribution, A should receive the additional punishment called for by § 2K2.4 and the offense level should not be enhanced under § 2D1.1(b)(1) if A possessed a during the count II distribution. To do so would be inconsistent with treating § 2K2.4 as a weapon enhancement. We believe that the proposed new commentary makes this point effectively and recommend its adoption by the Commission.

#### Part D – Career Offender Guideline

Part D of amendment 7 amends §§ 2K2.4 and 4B1.2 to provide that a conviction under section 924(c) is not an instant offense for purposes of the career offender guideline. We support the amendment.

Section 2K2.4 is sui generis. The sentence under § 2K2.4 must "be imposed independently."<sup>75</sup> The defendant's criminal history category need not be calculated to determine sentence under § 2K2.4 because a defendant's criminal history is not germane to determining a sentence under § 2K2.4. Although an offense guideline in chapter two of the *Guidelines Manual*, § 2K2.4 does not have a base offense level. The Commission considers § 2K2.4 to be the functional equivalent of an enhancement for possession, use, or discharge of a firearm, but § 2K2.4 does not operate as an enhancement to the offense

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<sup>75</sup>U.S.S.G. § 5G1.2(a).

level calculated for another offense.<sup>76</sup> When there is more than one count of conviction, the grouping rules of chapter three, part D of the *Guidelines Manual* do not apply to the section 924(c) offense.<sup>77</sup>

We support the amendment, even though it would mean that a section 924(c) offense is the only offense that is a career-offender predicate offense but not a career-offender instant offense. The unique nature of the offense and its integration into the guidelines justifies this treatment.

#### Part E – Technical and Conforming Amendments

Part E of amendment 7 makes technical and conforming changes to two guidelines to conform those guidelines to new section 924(c). We support Part E.

#### Issues for Comment

The first issue for comment is whether, if the statutory definition of brandish is adopted (which we recommend against), the Commission should delete “displayed” from

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<sup>76</sup>Another unique chapter two guideline, § 2J1.7, which applies to an offense under 18 U.S.C. § 3147, does operate as if a specific offense characteristic. Under 18 U.S.C. § 3147, a consecutive term of imprisonment (with no minimum term specified) is required if a defendant is “convicted of an offense committed while released” on bail. Section 2J1.7, which directs the sentencing court to “add 3 levels to the offense level for the offense committed while on release as if this section were a specific offense characteristic contained in the offense guideline for the offense committed while on release.” To comply with the consecutive-term mandate of 18 U.S.C. § 3147, application note 2 to § 2J1.7 directs the sentencing court to “divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement” and designate that the latter runs consecutively.

<sup>77</sup>U.S.S.G. § 3D1.1(b):

weapon enhancements that apply if a weapon was “brandished, displayed, or possessed.” We agree that, as a matter of logic, the term “displayed” would be redundant. However, we point out again that if the statutory definition is adopted, there is a problem with the definition of dangerous weapon that the Commission would have to address..

The second issue for comment is whether § 2K2.4 should be a cross reference to the guideline applicable to the underlying offense if there has been no conviction for the underlying offense. We oppose such a change as unnecessarily complicating what is now a straight-forward guideline.

The third issue for comment is whether a section 924(c) conviction should be an instant offense for career-offender guideline purposes. We oppose such a change, which would require extensive revision of the guidelines.

### **AMENDMENT 8(A)**

The Commission has requested comment upon “whether for purposes of downward departure from the guideline range a ‘single act of aberrant behavior’ (Chapter 1, Part A § 4(d)) includes multiple acts occurring over a period of time.”

#### Background

A sentencing court must impose a sentence called for by the guidelines unless there is “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately

taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that” called for by the guidelines.<sup>78</sup> The Supreme Court addressed a sentencing court’s authority to depart from the guidelines in *Koon v United States*.<sup>79</sup> Although the Sentencing Reform Act of 1984 “made far-reaching changes in federal sentencing,”<sup>80</sup> the Act left a District Court with “much of its traditional discretion . . . .”<sup>81</sup> In fact, the Supreme Court pointed out, “A district court’s decision to depart from the Guidelines . . . embodies the traditional exercise of discretion by a sentencing court.”<sup>82</sup> The Court further pointed out that:

It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.<sup>83</sup>

#### Single Act of Aberrant Behavior

Chapter one, part A(4)(d) of the *Guidelines Manual* states that “[t]he Commission,

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<sup>78</sup>18 U.S.C. § 3553(b).

<sup>79</sup>518 U.S. 81, 116 S.Ct. 2035 (1996).

<sup>80</sup>518 U.S. at 92, 116 S.Ct. at 2043-44.

<sup>81</sup>518 U.S. at 98, 116 S.Ct. at 2046.

<sup>82</sup>518 U.S. at 98, 116 S.Ct. at 2046.

<sup>83</sup>518 U.S. at 113, 116 S.Ct. at 2053.



of course, has not dealt with single acts of aberrant behavior that still may justify probation at higher offense levels through departures.” The *Manual* nowhere elaborates on that statement, leaving its meaning somewhat ambiguous. Without guidance as to what the Commission contemplated as “single acts of aberrant behavior,” the Circuits have come up with differing interpretations of that phrase. Several Circuits have interpreted the phrase to require a “spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning . . . .”<sup>84</sup> Other Circuits have used a broader interpretation and look to the totality of circumstances.<sup>85</sup>

The narrower interpretation renders the Commission’s statement in chapter one, part A(4)(d) virtually empty. We are unaware of a reported case applying the narrower

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<sup>84</sup>United States v. Carey, 895 F.2d 318, 325 (7th Cir.1990). *Accord* United States v. Marcello, 13 F.3d 752, 760-61 (3d Cir.1994); United States v. Glick, 946 F.2d 335, 338-39 (4th Cir. 1991); United v. Williams, 974 F.2d 25, 26-27 (5th Cir. 1992); United States v. Garlich, 951 F.2d 161, 164 (8th Cir. 1991); United States v. Withrow, 85 F.3d 527 (11th Cir. 1996).

<sup>85</sup>United States v. Grandmaison, 77 F.3d 555, 560-64 (1st Cir. 1996) (“determinations about whether an offense constitutes a single act of aberrant behavior should be made by reviewing the totality of the circumstances”); Zecevic v. U.S. Parole Comm’n, 163 F.3d 731 (2d Cir. 1998) (“We adopt the view . . . that aberrant behavior is conduct which constitutes ‘a short-lived departure from an otherwise law-abiding life,’ and that the best test by which to judge whether conduct is truly aberrant is the totality test”); United States v. Takai, 941 F.2d 738 (9th Cir. 1991) (“We look to the totality of the circumstances in determining whether there were single acts of aberrant behavior by the defendants that justify a departure”); United States v. Pena, 930 F.3d 1486, 1494-96 (10th Cir. 1991) (defendant attempted to smuggle drugs hidden in car; her “behavior here was an aberration from her usual conduct, which reflected long-term employment, economic support for her family, no abuse of controlled substances, and no prior involvement in the distribution” of drugs).

standard that has sustained a downward departure based on aberrant behavior. The focus of that approach is on whether the offense involved a spontaneous, single act – something that occurs only rarely.<sup>86</sup> The First Circuit has stated that this approach produces an “absurd result . . . counting the number of acts involved in the commission of a crime to determine whether a departure is warranted. . . .”<sup>87</sup> We agree. Counting the number of acts is *not* “the traditional exercise of discretion by a sentencing court” in which the court considers “every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” We believe that the Commission must have intended more than empty words when it wrote that a single act of aberrant behavior is a basis for departure.

The language of chapter one, part A(4)(d) of the *Guidelines Manual* makes a single act of aberrant behavior, however defined, an encouraged departure.<sup>88</sup> It does not follow

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<sup>86</sup>The person who, on an impulse while leaving a restaurant, steals an unattended purse from a table may get prosecuted in state court, but not in federal court.

<sup>87</sup>*Grandmaison*, 77 F.3d at 563 (such an approach would “make aberrant behavior departures virtually unavailable to most defendants because almost every crime involves a series of criminal acts”).

<sup>88</sup>*Koon* identifies four categories of factors that can bear on a departure decision. They are (1) a factor that the Commission has identified as a basis for departure (an encouraged factor); (2) a factor that the Commission has discouraged as a basis for departure (discouraged factor); (3) a factor that the Commission has forbidden as a basis for departure (prohibited factor); and (4) a factor not addressed by the Commission (an unmentioned factor). *Koon v. United States*, 518 U.S. 81, 95, 116 S.Ct. 2035, 2045 (1996).

that departures for aberrant behavior based upon more than a single act are forbidden. Indeed, the Supreme Court pointed out in *Koon* that “the Commission chose to prohibit consideration of only a few factors, and not otherwise to limit, as a categorical matter, the considerations that might bear upon the decision to depart.”<sup>89</sup> The *Guidelines Manual* contains no prohibition on departing for a defendant’s aberrant behavior manifested by more than a single act. The *Manual* also contains no language discouraging such a departure. That factor, therefore, is unmentioned and under *Koon* the sentencing court retains discretion to depart even if the aberrant behavior is manifested by more than a single act.<sup>90</sup>

Unfortunately, matters seem to have polarized and the analysis seems to end if it is determined that the aberrant behavior was manifested by more than a single act, no matter how that term is defined. We believe that the best course of action for the Commission is to address aberrant behavior departures more fully. We suggest that the language in chapter one, part A(4)(d) be deleted and that a new policy statement in chapter five, part K

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<sup>89</sup>518 U.S. at 94, 116 S.Ct. at 2045.

<sup>90</sup>The standard of review for such a departure – which would, in *Koon* terminology, be based upon an unmentioned factor – would be different from the standard of review for a departure based upon an encouraged factor. The standard for the former is whether the factor “is sufficient to take the case out of the Guideline’s heartland,” while the standard for the latter is whether the applicable guideline already takes the factor into account. 518 U.S. at 96, 116 S.Ct. at 2045. Even if the encouraged factor is taken into account, the sentencing court nevertheless can depart “if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present.” 518 U.S. at 96, 116 S.Ct. at 2045.



be added.

In so doing, the Commission, we believe, should be mindful of the Supreme Court's view of the role of the District Court, vis-a-vis the Court of Appeals, in sentencing. "District courts have an institutional advantage over appellate courts in making these sorts of determinations [i.e., departures], especially as they see so many more Guidelines cases than appellate courts do. . . ."<sup>91</sup> If that is true of District Courts vis-a-vis Courts of Appeals, we think it is also true of District Courts vis-a-vis the Commission.<sup>92</sup>

A new policy statement should seek, in harmony with *Koon*, to spell out considerations appropriate for a sentencing court to consider in deciding whether to depart for aberrant behavior. A new policy statement, in other words, should seek to foster the "traditional exercise of discretion by a sentencing court," in which the sentencing court "consider[s] every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."<sup>93</sup> The goal, we believe, should be to guide the discretion of District

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<sup>91</sup>*Koon v. United States*, 518 U.S. 81, 99, 116 S.Ct. 2047 (1996).

<sup>92</sup>In a sense, the Commission "sees" every case sentenced because it collects data about every case sentenced. The Commission, however, does not "see" a case in the same manner that a District Court does. The District Court deals with real human beings, observes their demeanor, and far knows more details about the case than the summary information provided to the Commission.

<sup>93</sup>*Koon v. United States*, 518 U.S. 81, 98, 113, 116 S.Ct. 2035, 2045, 2053 (1996).



Courts rather than to deprive them of discretion.

The obvious concern with a departure for aberrant conduct is that a first-time offender should not be able to qualify for an aberrant-behavior departure simply because it is the person's first offense. This is a legitimate concern that a new policy statement must address.<sup>94</sup> Another legitimate concern is with offenses that cause physical harm to another. We think that the concern is best handled by trusting in the discretion of District Courts. Attempting to draft language to prohibit a departure for injury will, we fear, result in an overly-broad prohibition that excludes from consideration defendants who should not be excluded. The concept of "crime of violence," for example, encompasses offenses that do not result in physical harm or in a serious threat of physical harm. A defendant who hands a note to a teller that says "Give me your cash, this is a robbery," has committed a crime of violence. The other facts of the case (e.g., the defendant was of diminutive stature, the defendant was not armed, the teller was not frightened, and the defendant was

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<sup>94</sup>Circuits applying the broader standard have been careful to point out that a departure is not available just because the defendant is a first offender. *See United States v. Grandmaison*, 77 F.3d 555, 564 (1st Cir. 1996) (concerns that the standard "ensures every first offender a downward departure from their Guidelines-imposed sentence are without foundation. As the Ninth Circuit explained in *United States v. Dickey*, 924 F.2d 836 (9th Cir. 1991), 'aberrant behavior and first offense are not synonymous.'"); *Zecevic v. U.S. Parole Comm'n*, 163 F.3d 731, 735 (2d Cir. 1998) ("The totality standard is not a blanket rule that anyone with no prior criminal record will automatically be entitled to a downward departure because an absence of criminal convictions is but one of several factors the court must consider"). Those Circuits have not seen aberrant-behavior departures become routine for first offenders.

arrested before the teller had handed over any money) may suggest that a downward departure would be appropriate because the defendant did not present a serious risk of harm to anyone.

The Commission saw this sort of problem in the diminished capacity policy statement, § 5K2.13. That policy statement made diminished capacity an encouraged departure but only in the case of a “non-violent offense.”<sup>95</sup> However, diminished-capacity defendants will commit crimes that are classified as a crime of violence, but not be a serious threat to public safety. The term “non-violent offense” precluded what was otherwise an appropriate departure. A diminished-capacity defendant may not in fact have presented a serious threat to public safety, but the sentencing court was precluded from departing under § 5K2.13.

The Second Circuit, in a comprehensive opinion, has identified the factors that have been taken into consideration by courts considering aberrant-behavior departures. The factors that have been considered include

the degree of spontaneity and amount of planning inherent in the defendant’s actions are not dispositive but merely are among the several factors courts consider in determining whether the defendant’s conduct may properly be termed aberrant

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<sup>95</sup>Some courts interpreted the term “non-violent offense” to mean “crime of violence” (which is a term defined in the career offender guidelines) and others looked to all of the facts and circumstances of the case to determine if the offense was nonviolent. For a brief discussion, see U.S.S.G. App. C, amend. 583.

behavior. . . . Among the other factors courts have considered as part of the totality test are (1) the singular nature of the criminal act; (2) the defendant's criminal record; (3) psychological disorders from which the defendant was suffering at the time of the offense; (4) extreme pressures under which the defendant was operating, including the pressure of losing his job; (5) letters from friends and family expressing shock at the defendant's behavior; and (6) the defendant's motivations for committing the crime. . . . Courts adopting the totality test have also considered mitigating factors such as the level of pecuniary gain the defendant derives from the offense; the defendant's charitable activities and prior good deeds; and his efforts to mitigate the effects of the crime . . . as well as the defendant's employment history and economic support of his family . . . .<sup>96</sup>

We think that the Second Circuit's excellent summary can serve as a guide to the drafting of a new policy statement. We suggest that the Commission consider the following:

**§5K2.13. Aberrant Behavior (Policy Statement)**

- (a) The court may sentence below the applicable guideline range if the facts and circumstances of the case indicate that the defendant's offense was aberrant behavior. In determining whether the defendant's offense was aberrant behavior, the court shall consider the nature and circumstances of the offense and the history and

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<sup>96</sup>*Zecevic v. U.S. Parole Comm'n*, 163 F.3d 731, 735 (2d Cir. 1998).



characteristics of the defendant. The factors that the court may consider in making that determination include (1) the singular nature of the offense; (2) the degree of spontaneity and amount of planning that went into the offense; (3) the defendant's criminal record; (4) the defendant's employment history and activities in the community; (5) whether the defendant suffered from a psychological disorder at the time of the offense, and the nature and extent of any such disorder; (6) the pressures under which the defendant was operating; (7) the defendant's motivation for committing the offense; (8) the opinion of family, friends, and others who know the defendant concerning the defendant's behavior; and (9) the defendant's efforts to mitigate the effects of the offense.

#### **AMENDMENT 8(B)**

The Commission has asked for comment upon “whether the enhanced penalties in § 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals) apply only when the defendant is convicted of an offense referenced to that guideline or, alternatively, whenever the defendant's relevant conduct included drug sales in a protected location or involving a protected individual.” The cases holding



that § 2D1.1 applies based upon a defendant's relevant conduct have incorrectly interpreted the guidelines, especially § 1B1.2. The Federal Public and Community Defenders, therefore, recommend that the Commission amend application note 1 to § 1B1.2 explicitly stating that the sentencing court cannot consider relevant conduct beyond the conduct set forth in the count of conviction in the charging document. Our suggested amendment is set forth at the end of our comments on Amendment 8(B).

### Background

The Commission confronted a number of basic questions when it began to consider drafting the initial set of guidelines. As the Commission has stated,

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ("charge offense" sentencing). . . .<sup>97</sup>

The Commission initially attempted to develop a pure real-offense system, but rejected that approach as impracticable and risking a return to wide disparity.<sup>98</sup> The Commission

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<sup>97</sup>U.S.S.G. ch. 1, pt. A(4)(a).

<sup>98</sup> The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence

then developed a system “closer to a charge offense system,” but containing “a significant number of real offense elements.”<sup>99</sup>

The blended system adopted by the Commission uses both the offense of conviction and real offense conduct, but at different stages in determining the guideline sentencing range.<sup>100</sup> In the first stage, the sentencing court selects the applicable offense guideline by using the offense of conviction. In the second stage, the sentencing court uses the real offense conduct (“relevant conduct” in guideline terminology) to apply the offense guideline, as well as the adjustment guidelines in chapter three of the *Guidelines Manual*.

The determination at the first stage is controlled by § 1B1.2.<sup>101</sup> Section 1B1.2(a)

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of hosts of adjudicated ‘real harm’ facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable. In the Commission’s view, such a system risked return to wide disparity in sentencing practice.

*Id.*

<sup>99</sup>*Id.*

<sup>100</sup>See William W. Wilkins & John M. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495, 497-500 (1990); Stephen G. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 11-12 (1988).

<sup>101</sup>See *United States v. McCall*, 915 F.2d 811, 814-15 (2d Cir. 1990); *United States v. Aderhold*, 87 F.3d 740, 743-44 (5th Cir. 1996); *United States v. Jackson*, 117 F.3d 533 (11th Cir. 1997); William W. Wilkins & John M. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495, 497-500 (1990); Stephen G. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 11-12 (1988).

directs the sentencing court to select the offense guideline of chapter two that is “most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted).”<sup>102</sup> The Commission has included a statutory index in Appendix A “to assist in this determination.”<sup>103</sup> The statutory index, therefore, is not determinative. The legal standard does not call for determining the offense guideline listed in Appendix A, but for determining the offense guideline “most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted).”

The Commission has not explained why it has not made the listing in Appendix A determinative. In part, the reason must be practicality – a statutory provision may set forth more than one offense, so that the statutory index will list more than one offense guideline.<sup>104</sup> The statutory index cannot be determinative when that occurs, and there must

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<sup>102</sup>As the Eighth Circuit has stated, “Under § 1B1.2(a) the court determines which guideline is most applicable to the ‘offense of conviction.’ Thus, it selects the guideline solely by ‘conduct charged in the count of the indictment or information of which the defendant was convicted.’” *United States v. Street*, 66 F.3d 969, 979 (8th Cir. 1995).

<sup>103</sup>U.S.S.G. § 1B1.2, comment. (n.1). *See* U.S.S.G. § 1B1.1(a) (sentencing court to determine “the applicable offense guideline section from Chapter Two. See § 1B1.2 (Applicable Guidelines). The Statutory Index (Appendix A) provides a listing to assist in this determination.”).

<sup>104</sup>For example, 18 U.S.C. § 1702 makes it an offense to “take” mail matter from an “authorized depository;” take mail matter “from any letter or mail carrier;” or open mail matter before delivery “with design to . . . pry into the business or secrets of another.” Appendix A lists three offense guidelines, § 2B1.1 (theft), § 2B3.1 (robbery),



be a legal standard for choosing among the listed guidelines. In part, the reason probably is that the sentencing court is better able than the Commission to determine the offense guideline that best suits the particular offense that has been charged. The Commission makes determinations in the abstract about general classes of conduct; the sentencing court is confronted with specific allegations in the charging documents and can determine if the offense guideline intended for the typical case under the statute is appropriate for the case at hand.

Once the sentencing court has determined the applicable offense guideline, the real offense conduct comes into play. Under § 1B1.3(a), the court uses the defendant's relevant conduct to apply the offense guideline and the adjustment guidelines of chapter three of the *Guidelines Manual*. Section 1B1.3 excludes all chapter one guidelines from its scope. Section 1B1.3(a), by its express terms, applies only to determinations under chapters two and three of the *Guidelines Manual*, and § 1B1.3(b), again by its express terms, applies only to determinations under chapters four and five of the *Guidelines Manual*.<sup>105</sup>

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and § 2H3.3 (obstructing correspondence).

<sup>105</sup>See *United States v. Crawford*, 185 F.3d 1024, 1028 (9th Cir. 1999) ("The government, however, argues that, pursuant to U.S.S.G. § 1B1.3(a), school proximity may be considered as 'relevant conduct' in selecting the applicable offense guideline section. We disagree. Section 1B1.3(a) does not envision consideration of 'relevant conduct' in ascertaining which offense guideline to apply, but rather only in choosing among various base offense levels in the chosen guideline and in making adjustments to the offense level.").



§ 2D1.1 and § 2D1.2

The “basic” drug-trafficking offenses are set forth in 21 U.S.C. §§ 841 and 960. Section 841(a)(1), for example, makes it an offense knowingly or intentionally to distribute a controlled substance, except as otherwise authorized by law. The Commission has designated § 2D1.1 as the offense guideline applicable to offenses under sections 841 and 960.<sup>106</sup> Drug-trafficking offenses involving protected locations and protected individuals are set forth in 21 U.S.C. §§ 859, 860, and 861. Section 860(a), for example, makes it an offense to distribute a controlled substance within 1,000 feet of a public elementary school. The Commission has designated § 2D1.2 as the offense guideline applicable to drug-trafficking offenses under sections 859, 860, and 861.<sup>107</sup>

The issue over which there has been a split in decisions arises when a defendant is convicted of a basic drug-trafficking offense – a violation of 21 U.S.C. § 841(a), for example – but a portion of the defendant’s relevant conduct takes place in a protected location. Four Circuits – the Fourth, Fifth, Ninth, and Eleventh – have held that § 2D1.1 should be used.<sup>108</sup> Two Circuits – the Third and Sixth – have held that § 2D1.2 may be

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<sup>106</sup>Both U.S.S.G. Appendix A and the statutory provisions note to § 2D1.1 indicate that the offense guideline applicable to a violation of 21 U.S.C. § 841 or § 960 is § 2D1.1.

<sup>107</sup>Both U.S.S.G. Appendix A and the statutory provisions note to § 2D1.2 indicate that the offense guideline applicable to a violation of 21 U.S.C. §§ 859, 860 or 861 is § 2D1.2.

<sup>108</sup>*United States v. Locklear*, 24 F.3d 641, 646-49 (4th Cir. 1994); *United States v. Chandler*, 125 F.3d 892 (5th Cir. 1997); *United States v. Crawford*, 185 F.3d 1024 (9th Cir. 1999); *United States v. Saavedra*, 148 F.3d 1311, 1314-16 (11th Cir. 1998).

used.<sup>109</sup>

The issue confronting the sentencing court when the defendant has been convicted of a drug trafficking offense is, what offense guideline is “most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted).” As noted above, the relevant conduct rules of § 1B1.3 do not apply to this determination.

A straight-forward application of § 1B1.2(a) requires a sentencing court to use § 2D1.1 when the defendant has been convicted under 21 U.S.C. § 841 or § 960, even if a portion of the defendant’s relevant conduct occurred in a protected location or involved a protected person. Where the trafficking occurred and whether the offense involved a protected person are not elements of an offense under either of those provisions. The Commission has designated § 2D1.1 as the offense guideline applicable to violations of sections 841 and 960.<sup>110</sup> Unless the charging document sets forth allegations that indicate

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<sup>109</sup>United States v. Robles, 8 F.3d 814 (3d Cir. 1993) (unpub.), *affirming* 814 F. Supp. 1249 (E.D. Pa. 1993); United States v. Clay, 117 F.3d 317 (6th Cir. 1997). The Commission indicates that the Eighth Circuit has taken this position in United States v. Oppedahl, 998 F.2d 584 (8th Cir. 1993), a view shared by the First Circuit, *see* Locklear, 24 F.3d at 647, the Ninth Circuit, *see* Crawford, 185 F.3d at 1026, and the Eleventh Circuit, *see* Saavedra, 148 F.3d at 1317. We believe, for reasons set forth later, that *Oppedahl* has been mischaracterized and addresses a different issue.

<sup>110</sup>*See* United States v. Locklear, 24 F.3d 641, 648 (4th Cir. 1994) (“we do not doubt that the Sentencing Commission could, if it chose, enhance the sentence of a defendant convicted of a drug-related crime if commission of the crime was aided by the use of a juvenile by defining the use of a juvenile as a specific offense characteristic . . . . We believe that, as currently constituted, section 2D1.2 is intended not to identify a

that the offense of which the defendant has been convicted is atypical of drug-trafficking offenses, § 2D1.1 is the most applicable guideline.

The Third Circuit (in an unpublished decision) and the Sixth Circuit, however, have reached a contrary result.<sup>111</sup> We find the opinions in both cases to be unpersuasive because they are based on a faulty premise. Both Circuits assumed – incorrectly – that the sentencing court could look to relevant conduct when selecting the offense guideline. The Third Circuit summarily affirmed a District Court’s use of § 2D1.2.<sup>112</sup> The District Court had argued that, because of the relevant-conduct rules of § 1B1.3, “a court must look beyond the charged conduct to determine the appropriate sentence.”<sup>113</sup> The District Court neither cited nor discussed § 1B1.2, and did not explain what authorized the use of relevant conduct to determine the applicable offense guideline. The Sixth Circuit likewise seemed to assume that the sentencing court could use relevant conduct in determining the applicable offense guideline.

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specific offense characteristic which would, where applicable, increase the offense level over the base level assigned by section 2D1.1, but rather to define the base offense level for violations of 21 U.S.C. §§ 859, 860 and 861”); *United States v. Saavedra*, 148 F.3d 1311, 1318 (“§ 2D1.2 is the offense guideline that sets the punishment for violations of 21 U.S.C. § 860. Saavedra was not convicted of this crime, and he may not be sentenced as if he were.”).

<sup>111</sup>*United States v. Robles*, 8 F.3d 814 (3d Cir. 1993) (unpub.), *affirming* 814 F. Supp. 1249 (E.D. Pa. 1993); *United States v. Clay*, 117 F.3d 317 (6th Cir. 1997).

<sup>112</sup>*Robles*, 8 F.3d 814 (unpub.).

<sup>113</sup>*Robles*, 814 F. Supp. at 1252.



Thus, while § 2D1.2 certainly applies to offenses like those described in 21 U.S.C. §§ 859, 860, and 861, where the involvement of minors or proximity to their schools is an element of the offense, it also applies in cases involving conviction for other offenses (including convictions under 21 U.S.C. § 841), if the conduct of the offender brings him within the scope of § 2D1.2.<sup>114</sup>

Neither the Third nor the Sixth Circuits has any authority to support their assumptions that the relevant conduct rules apply to selecting the applicable offense guideline. As the Eleventh Circuit has correctly pointed out, using relevant conduct to determine the applicable offense guideline under § 1B1.2 “ignore[s] the fact that the concept of relevant conduct does not come into play until the correct offense guideline has been selected.”<sup>115</sup>

The Eighth Circuit has decided a case in which the defendant was convicted of conspiring to distribute a controlled substance, an offense to which § 2D1.1 now applies.<sup>116</sup> The District Court, however, used § 2D1.2 to sentence the defendant. Thus, it appears that the Eighth Circuit has sided with the Third and Sixth Circuits and in opposition to the Fourth, Fifth, Ninth, and Eleventh Circuits.

In reality, however, that is not the case. At the time the defendant was sentenced,

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<sup>114</sup>Clay, 117 F.3d at 319 (footnote omitted). The Sixth Circuit footnoted that sentence with a quotation from application note 1 to § 1B1.3. *Id.* at n.5.

<sup>115</sup>United States v. Saavedra, 148 F.3d 1311, 1316 (11th Cir. 1998).

<sup>116</sup>United States v. Oppedahl, 998 F.2d 584 (8th Cir. 1993).



the offense guideline applicable to drug-trafficking conspiracies was § 2D1.4, which provided that “the offense level shall be the same as if the object of the conspiracy or attempt had been completed.”<sup>117</sup> Thus, the sentencing court had to determine the offense guideline applicable to the object of the conspiracy. That determination, although similar to a determination under § 1B1.2, was being made in the context of applying a chapter two guideline, so the sentencing court was not limited to considering the elements of the offense of conviction. Indeed, § 1B1.3(a) *requires* the sentencing court to consider the defendant’s relevant conduct when applying a chapter two guideline. In the Eighth Circuit case, the defendant’s relevant conduct included trafficking within 1,000 feet of a school.<sup>118</sup> Consequently, the District Court was correct to apply § 2D1.2, and the Eighth Circuit properly affirmed. The Eighth Circuit case did not involve application of § 1B1.2, and thus is not germane to the issue over which the Fourth, Fifth, Ninth, and Eleventh Circuits are in conflict with the Third and Sixth Circuits.

What is at stake in the conflict between those groups of Circuits is the integrity of the guideline structure. The cases from the Third and Sixth Circuits are wrong as a matter of guideline application. If the Commission is to preserve the integrity of the guideline

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<sup>117</sup>The Commission deleted § 2D1.4 effective November 1, 1992. U.S.S.G. App. C, amend. 447. We have examined a copy of the indictment and judgment order in *Oppedahl*. The indictment alleges an offense committed between July 1990 and February 20, 1992. The District Court imposed sentence on September 25, 1992. Section 2D1.4 was in effect at both times.

<sup>118</sup>*Oppedahl*, 998 F.2d at 586.

structure, the Commission must make clear that it rejects the approach taken, and results reached, in those cases.

### Appendix A

The Commission, at the request of the Department of Justice, has asked for comment upon a proposal to amend Appendix A, “if the Commission were to choose to clarify that the enhanced penalties in § 2D1.2 only apply in circumstances in which the defendant is convicted of an offense referenced to that guideline in the Statutory Index (Appendix A).” The proposal would require that the sentencing court “apply the offense guideline referenced for the statute of conviction listed in the Statutory Index (unless the case falls within the limited exception for stipulations set forth in § 1B1.2 (Applicable Guidelines)) and that courts may not decline to use the listed offense guideline in cases that could be considered atypical or outside the heartland.” We oppose this attempt to diminish judicial discretion.

The Justice Department is concerned about two cases involving money-laundering convictions. We will focus on one of them, the *Smith* case.<sup>119</sup> *Smith* held that the fraud

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<sup>119</sup>United States v. Smith, 186 F.3d 290 (3d Cir. 1999).

The other case is *United States v. Hemmingson*, 157 F.3d 347 (5th Cir. 1998). We will not discuss *Hemmingson* in detail because the case involves a conclusion by the Fifth Circuit that a downward departure was justified based upon the District Court’s determination that “the offenses did not fall within the heartland of the money-laundering guideline, § 2S1.1 . . . .” *Hemmingson*, 157 F.3d at 360. The similarity to *Smith* arises because the District Court in *Hemmingson* used the fraud guideline to structure the departure. The case simply affirms that the sentencing court can depart if the case is

guideline (§ 2F1.1), rather than the money-laundering guideline (§ 2S1.1) should be used to sentence a defendant convicted of money laundering under 18 U.S.C. § 1956. The Justice Department's inclusion of the *Smith* case in amendment 8(B) suggests that the Justice Department considers the decision in *Smith* to be another example of using the wrong legal standard to select the offense guideline.<sup>120</sup>

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outside of the heartland. An Eighth Circuit case also involved a departure that relied upon the fraud guideline in a money-laundering case. *United States v. Woods*, 159 F.3d 1132 (8th Cir. 1998). *See n. –, infra.*

<sup>120</sup>The Justice Department also cites *United States v. Brunson*, 882 F.2d 151 (5th Cir. 1989). It is not clear why *Brunson* is cited. *Brunson* simply reaffirms that relevant conduct cannot be used to determine the applicable offense guideline – the point we argue above.

The District Court in *Brunson* had used § 2C1.1 ("Offering, Giving, Soliciting or Receiving a Bribe; Extortion Under Color of Official Right") to determine the offense level of a defendant convicted of an offense under 18 U.S.C. § 215 because the defendant was an assistant district attorney in addition to being a director of a bank. Appendix A listed § 2B4.1 ("Bribery and Procurement of Bank Loan and Other Commercial Bribery") for a violation of 18 U.S.C. § 215. The charging document alleged that the defendant "was a director and attorney of the bank, that he corruptly solicited and demanded sexual favors from Grayson for himself and others, in exchange for which he would be influenced concerning repayment of Grayson's overdrawn checking account." *Brunson*, 882 F.2d at 153. The government argued that the atypicality language of the commentary to Appendix A justified the District Court's use of § 2C1.1, but the Fifth Circuit disagreed.

It is not completely clear to us under what circumstances the Commission contemplated deviation from the suggested guidelines for an "atypical case." Given the emphatic statutory requirement that the "court shall apply the offense guideline section . . . most applicable to the offense of conviction," the commentary cannot have the effect urged upon us by the government. Section 1B1.2(a). The government's interpretation of this commentary would give the district court, in choosing the offense guideline, the discretion to disregard the



The defendants in *Smith* had been convicted of several counts, including fraud, interstate transportation of stolen property, and money laundering, arising from an embezzlement and kickback scheme.<sup>121</sup> All counts were put into a single group, a decision not appealed by either party.<sup>122</sup> In determining the offense level for the group, "the sentencing judge was deeply concerned about which guideline to apply and whether to depart. After an extended hearing and with obvious reluctance, he concluded that the money laundering guideline should apply as opposed to that for fraud and that there should be no departure."<sup>123</sup>

The Third Circuit reversed.<sup>124</sup> The Third Circuit pointed out that the introductory commentary to Appendix A states that, "If, in an atypical case, the guideline section indicated for the statute of conviction is inappropriate because of the particular conduct involved, use the guideline section most applicable to the nature of the offense conduct charged in the count of which the defendant was convicted. (See § 1B1.2.)." The atypicality standard requires consideration of a particular guideline's heartland.

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conduct essential to conviction and base its selection on some other conduct.

Brunson, 882 F.2d at 157.

<sup>121</sup>Smith, 186 F.3d at 293.

<sup>122</sup>*Id.* at 297.

<sup>123</sup>*Id.*

<sup>124</sup>The Court of Appeals reviewed the determination de novo because "[t]he initial choice of guideline . . . is a question of law subject to plenary review." *Id.* at 297.

A sentencing court may be required to perform a "heartland" analysis in two different circumstances – the first, during the initial choice of the appropriate guideline; the second, in the context of a departure request. Although these situations arise at different stages of the sentencing process, and are distinguishable to that extent, the "heartland" analysis remains identical.<sup>125</sup>

Therefore, the Court of Appeals concluded, "we must first determine what conduct the Sentencing Commission considered to fall within the 'heartland' of the money laundering guideline."<sup>126</sup>

The Third Circuit reviewed the development of the money laundering guideline and the Commission's Report to the Congress: Sentencing Policy for Money Laundering Offenses, including Comments on Department of Justice Report (Sept. 18, 1977), as well as the legislative history of the legislation disapproving a proposed amendment to the money-laundering guideline. The Third Circuit concluded that "the Sentencing Commission itself has indicated that the heartland of U.S.S.G. § 2S1.1 is the money laundering activity connected with extensive drug trafficking and serious crime."<sup>127</sup> With regard to the case at bar, the Court of Appeals concluded, "That is not the type of conduct implicated here. . . . The money laundering activity, when evaluated against the entire

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<sup>125</sup>Smith, 186 F.3d at 298.

<sup>126</sup>*Id.*

<sup>127</sup>*Id.* at 300.

course of conduct, was an ‘incidental by-product’ of the kickback scheme. . . . The root of the defendants’s activity in this case was the fraud on GTECH.”<sup>128</sup>

There is nothing in the opinion to indicate that the Third Circuit, in addressing the choice of guideline issue, used conduct other than the offense conduct charged in the counts of conviction. Had the Court of Appeals done so, of course, that would have been error. The Justice Department may disagree with the Third Circuit about what constitutes the heartland of the money-laundering guideline, but the Third Circuit had to make a determination about that guideline’s heartland to apply the correct legal standard.

The application of the correct legal standard, however, does not always result in the use of a guideline that produces punishment less harsh than the punishment produced by the offense guideline listed in Appendix A. Two cases, one from the Ninth Circuit and one from the Second Circuit, illustrate this. In the Ninth Circuit case, the defendant had been convicted of violating 21 U.S.C. § 333.<sup>129</sup> The statutory index listed § 2N2.1 (violation of statutes dealing with food, drug, and cosmetics) as the applicable offense guideline, but the District Court used the fraud guideline, § 2F1.1.<sup>130</sup> The defendant’s offense level under § 2N2.1 would have been 6 (the guideline at that time had a base offense level and no specific offense characteristics). The defendant’s offense level under

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<sup>128</sup>*Id.* (quoting from *United States v. Henry*, 136 F.3d 12, 20 (1st Cir. 1998)).

<sup>129</sup>*United States v. Cambra*, 933 F.2d 752 (9th Cir. 1991).

<sup>130</sup>*Id.* at 754-55.



§ 2F1.1 was more than twice that.<sup>131</sup> Pointing out that the defendant “had plead[ed] guilty to two counts alleging an intent to defraud,” the Ninth Circuit sustained the District Court’s use of the fraud guideline.<sup>132</sup>

In the Second Circuit case, the defendant had been convicted under 18 U.S.C. § 641 of theft of government property.<sup>133</sup> The statutory index lists the theft guideline, § 2B1.1, for that offense, but the District Court used § 2J1.2 (obstruction of justice) instead.<sup>134</sup> The defendant’s offense level under § 2B1.1 was very low – level 5; the defendant’s offense level under the obstruction guideline was level 18.<sup>135</sup> The Court of

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<sup>131</sup>Depending upon the date of the offense, either 7 or 9 levels were added based upon a loss of \$500,000. *Id.* at 756. The opinion does not indicate whether any other specific offense characteristics in the fraud guideline were applied.

<sup>132</sup>*Id.* at 755. In a later case, *United States v. Hopper*, 177 F.3d 824 (9th Cir. 1999), *cert. denied* \_\_ U.S. \_\_, 2000 WL 197666, 197667, 197668 (Feb. 22, 2000), the Ninth Circuit again approved a District Court’s use of a guideline that produced a greater offense level than the guideline listed in Appendix A for the offense of conviction. The District Court used § 2J1.2 to sentence defendants, who were tax protesters convicted of obstructing proceedings before the I.R.S. under 18 U.S.C. §§ 371 and 1505.

According to the Statutory Index, defendants convicted of violating § 1505 normally be sentenced under § 2J1.2. In this case, however, the district court looked at the overt acts taken by Appellants and held that § 2J1.2 did not “address the seriousness of the defendants’ conduct.” We agree.

*Id.* at 832.

<sup>133</sup>*United States v. Elefant*, 999 F.3d 674 (2d Cir.1993).

<sup>134</sup>*Id.* at 676.

<sup>135</sup>*Id.*

Appeals affirmed the District Court. Quoting the commentary in Appendix A about an atypical case, the Second Circuit stated that

we understand the exception described in Appendix A to cover those cases, probably few in number, where the conduct constituting the offense of conviction also constitutes another, more serious offense, thereby rendering the offense conduct not typical of the usual means of committing the offense of conviction.

The information to which [defendant] pled guilty described his conduct, in part, as "contact[ing] certain targets of the investigations and reveal[ing] to those targets confidential information concerning the ongoing investigation." . . . we cannot find that the District Judge was clearly erroneous when he concluded that [defendant's] conduct was not typical of theft of government property.<sup>136</sup>

The suggestion that a sentencing court be required to use the offense guideline listed in Appendix A inappropriately diminishes judicial discretion and does not address the real problem illustrated by the *Smith* case. The standard applicable to selecting the offense guideline, we believe, ought to result in the sentencing court using the offense guideline that best fits the offense of which the defendant has been convicted.<sup>137</sup> The

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<sup>136</sup>*Id.* at 677.

<sup>137</sup>Requiring the sentencing court to use the guideline listed in Appendix A, moreover, will not guarantee the Department of Justice the result it probably seeks – sentencing of defendants convicted of money laundering within the guideline range determined under the money laundering guidelines. A sentencing court may depart from that guideline range. In *United States v. Woods*, 159 F.3d 1132, 1134-36 (8th Cir. 1998), for example, the Eighth Circuit approved a downward departure in a case in which the

sentencing court, considering the offense alleged in the charging documents, is in a better position than the Commission to determine which offense guideline best fits the offense of conviction.

The factor that controlled the outcome in the *Smith* case was the determination by the Court of Appeals that the offense of conviction did not fall within the heartland of the money-laundering guideline. The defendant in *Smith* argued that the evidence was insufficient to support their convictions for money laundering, but the Third Circuit sustained the convictions.<sup>138</sup> That the Justice Department may disagree with the Third Circuit's heartland determination does not mean that the Third Circuit's determination is wrong, any more than the defendants' disagreement with the determination on the sufficiency of the evidence means that the Third Circuit's determination of that issue is wrong.

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defendant had pleaded guilty to bankruptcy fraud and money laundering. The defendant "moved for a departure from the money-laundering guideline . . . arguing that the case presented factors that took it outside the 'heartland' of money-laundering cases, and that the appropriate level for sentencing should take into account § 2F1.1, the guideline for the underlying offense, bankruptcy fraud." *Id.* at 1133. The District Court agree and sentenced accordingly, and the government appealed. The Court of Appeals affirmed. "[W]e do not believe the deposit of the check by Ms. Woods into her husband's account, or their obtaining of the cashier's checks, constitutes serious money-laundering conduct as contemplated by the Sentencing Commission for punishment under the money-laundering guidelines." *Id.* at 1136.

<sup>138</sup>United States v. Smith, 186 F.3d 290, 294-95 (3d Cir. 1999) ("All in all, although Smith and Dandrea have provided us with forceful arguments, we cannot say that the jury verdict lacked sufficient support in the record").



The main thing that the *Smith* case illustrates, in our view, is that the continuing problems with the money-laundering guidelines. We recommend that the Commission make revision of those guidelines a matter of high priority.

#### Suggested Amendment

The first paragraph of application note 1 to § 1B1.2 is amended by adding at the end thereof the following:

"The determination of the applicable offense guideline is not a determination made on the basis of the defendant's relevant conduct under § 1B1.3. Rather, that determination is made on the basis of the nature of the offense conduct set forth in the count of conviction."

Changes made by recommended amendment (new language in italic):

1. This section provides the basic rules for determining the guidelines applicable to the offense conduct under Chapter Two (Offense Conduct). As a general rule, the court is to use the guideline section from Chapter Two most applicable to the offense of conviction. The Statutory Index (Appendix A) provides a listing to assist in this determination. When a particular statute proscribes only a single type of criminal conduct, the offense of conviction and the conduct proscribed by the statute will coincide, and there will be only one offense guideline referenced. When a particular statute proscribes a variety of conduct that might constitute the subject of different

offense guidelines, the court will determine which guideline section applies based upon the nature of the offense conduct charged in the count of which the defendant was convicted. *The determination of the applicable offense guideline is not a determination made on the basis of the defendant's relevant conduct under § 1B1.3. Rather, that determination is made on the basis of the nature of the offense conduct set forth in the count of conviction.*

#### AMENDMENT 8(C)

The Commission has asked for comment upon whether the enhancement in § 2F1.1(b)(4)(B) “applies to falsely completing bankruptcy schedules and forms.” Several Circuits have held that the enhancement applies,<sup>139</sup> and two Circuits have held that the enhancement does not apply.<sup>140</sup> One Circuit, in dictum, has indicated that the enhancement does not apply to filing false accounts in a state probate court, but the

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<sup>139</sup>The Commission identifies six Circuits: *United States v. Saacks*, 131 F.3d 540, 543-46 (5th Cir. 1997); *United States v. Michalek*, 54 F.3d 325, 330-33 (7th Cir. 1995); *United States v. Lloyd*, 947 F.2d 339 (8th Cir. 1991); *United States v. Welch*, 103 F.3d 906, 907-08 (9th Cir. 1996); *United States v. Messner*, 107 F.3d 1448, 1457 (10th Cir. 1997); *United States v. Bellew*, 35 F.3d 518 (11th Cir. 1994).

The Sixth Circuit has also held that the enhancement applies. *United States v. Guthrie*, 144 F.3d 1006, 1010-11 (6th Cir. 1998).

<sup>140</sup>*United States v. Shaddock*, 112 F.3d 523, 528-30 (1st Cir. 1997); *United States v. Thayer*, 1999 WL 1267728 (3d Cir. Dec. 28, 1999).

reasoning in that case indicates that the Circuit would also conclude that the enhancement does not apply to bankruptcy schedules and forms.<sup>141</sup> The Federal Public and Community Defenders recommend that the commentary to § 2F1.1 be amended to state that the enhancement does not apply to falsely completing bankruptcy schedules and forms. Our suggested amendment is set forth at the end of our comments on Amendment 8(C).

#### Background

The enhancement of § 2F1.1(b)(4)(B) applies “if the offense involved . . . violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines . . . .” The Commission has not expressly stated the purpose of the enhancement, but we understand the purpose of the enhancement to be to impose greater punishment upon a person who continues fraudulent activities after a court or administrative tribunal has directed that those activities be discontinued. Many states have a means whereby the Attorney General or dissatisfied consumers, customers, or the like can seek to have a person cease and desist from deceptive, misleading, dishonest, or fraudulent practices. A person who has been ordered to discontinue such practices but who nonetheless continues to engage in them is more culpable, and deserves greater punishment, than a person whose practices have not previously been challenged and ordered discontinued. The application of the enhancement to violations of administrative orders as well as judicial orders, and the examples in application note 6, underscore this

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<sup>141</sup>United States v. Carrozzella, 105 F.3d 796, 799-802 (2d Cir. 1997).



understanding of the purpose of the enhancement.<sup>142</sup>

Of the Circuits upholding application of the enhancement to falsely completed bankruptcy schedules and forms, one Circuit does so on the basis that there has been a violation of a "judicial order."<sup>143</sup> The other Circuits upholding application rely upon the term "judicial . . . process."<sup>144</sup>

The First Circuit rejected application of the enhancement because the language of the enhancement and commentary "plainly indicates that the enhancement was meant to apply to defendants who have demonstrated a heightened *mens rea* by violating a prior

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<sup>142</sup>The example in the second sentence of application note 6 refers to a party to "prior proceeding" and "prior order or decree." The third sentence of that application note indicates that the enhancement applies to "a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product . . . ."

The Background commentary also underscores our understanding, stating that "[a] defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

<sup>143</sup>*United States v. Bellew*, 35 F.3d 518, 520-21 (11th Cir. 1994) ("concealment of assets in a bankruptcy proceeding amounts to a violation of a 'judicial order' within the meaning of the guideline") (concluding that the Bankruptcy Rules and Official Forms constitute a judicial order). An interpretation that the Bankruptcy Rules and Official Forms constitute a judicial order seems strained, at best.

<sup>144</sup>*See, e.g., United States v. Guthrie*, 144 F.3d 1006, 1010 (6th Cir. 1998) ("the term 'judicial process' as used in § 2F1.1(b)(4)(B) includes bankruptcy proceedings").

‘judicial or administrative order, decree, injunction or process.’”<sup>145</sup> The Third Circuit, the most recent Circuit to address the issue, agreed with the First Circuit.<sup>146</sup> The Third Circuit addressed the argument that a bankruptcy proceeding constitutes a “judicial . . . process” by relying on a Second Circuit case that held the enhancement inapplicable to filing false accounts in a probate court.<sup>147</sup> The Second Circuit noted that the enhancement applies to a “violation” of judicial process, not to an “abuse” of judicial process:

“Violation” strongly suggests the existence of a command or warning followed by disobedience. This analysis in turn suggests that the term “process” – the command or warning violated – is used, not in the sense of legal proceedings generally, but in the sense of a command or order to a specific party, such as a summons or execution issued in a particular action. . . . This narrower reading of Section 2F1.1(b)(4)(B) is also consistent with the general practice – known as *ejusdem generis* – of construing general language in an enumeration of more specific things in a way that limits the general language to the same class of things enumerated.<sup>148</sup>

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<sup>145</sup>United States v. Shadduck, 112 F.3d 523, 530 (1st Cir. 1997). The Seventh Circuit, in a case at about the same time as United States v. Michalek, 54 F.3d 325, 330-33 (7th Cir. 1995), seems to agree. See United States v. Gunderson, 55 F.3d 1328, 1332-33 (7th Cir. 1995) (“We agree” with defendant’s argument that, based upon the commentary, § 2F1.1(b)(4)(B) “is designed to apply when a defendant has had a previous warning.” *Id.* at 1333 (quoting defendant).

<sup>146</sup>United States v. Thayer, 1999 WL 1267728 (3d Cir. Dec. 28, 1999).

<sup>147</sup>*Id.*

<sup>148</sup>United States v. Carrozzella, 105 F.3d 796, 800 (2d Cir. 1997).

### Recommendation

We believe that the First, Second, and Third Circuits are correct in their interpretation of the enhancement. The decisions from the Circuits upholding use of the enhancement suggests that those Circuits believe bankruptcy fraud to be a particularly aggravated form of fraud deserving of greater punishment.<sup>149</sup> Whether bankruptcy fraud is deserving of greater punishment than other forms of fraud is a policy decision for the Commission to make, however – a decision, we believe, that the Commission has not yet made. Further, we do not believe that the case for punishing bankruptcy fraud more severely than other forms of fraud is very strong.

The Circuits that apply the enhancement to bankruptcy fraud have justified treating bankruptcy fraud more severely than other forms of fraud by simply stating the purpose of bankruptcy and describing bankruptcy fraud, apparently assuming that the rationale for treating bankruptcy fraud more severely is self-evident. The Sixth Circuit, for example, has stated:

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<sup>149</sup>In *United States v. Saacks*, 131 F.3d 540, 543-44 (5th Cir. 1997), for example, the Court of Appeals observed that

in neither § 2F1.1 nor any other section of the Guidelines is there either a base offense level or an enhancement provision for bankruptcy fraud as such. Consequently, were we to stop with the general sentencing provisions for fraud, we would fail to make any distinction between the most pedestrian federal fraud offense and bankruptcy fraud with all of its implications of a scheme to dupe the bankruptcy court, the trustee, and the creditor or creditors of the debtor, i.e., the entire federal system of bankruptcy.



Bankruptcy fraud undermines the whole concept of allowing a debtor to obtain protection from creditors, pay debts in accord with the debtor's ability, and thereby obtain a fresh start. When a debtor frustrates those objectives by concealing the very property which is to be utilized to achieve that purpose, the debtor works a fraud on the entirety of the proceeding. By obtaining protection from creditors and, at the same time, denying them of their lawful and equitable due, a debtor violates the spirit as well as the purpose of bankruptcy. This artifice strongly supports increasing the perpetrator's sentence for committing fraud upon the very source of his financial refuge and salvation.<sup>150</sup>

That statement describes what occurs, but does not indicate how what occurs makes bankruptcy fraud deserving of greater punishment than other forms of fraud. A factor not mentioned by the Sixth Circuit, but sometimes mentioned, is that a bankruptcy fraud can involve a large number of victims.<sup>151</sup>

We do not find the rationale for treating bankruptcy fraud more severely to be self-evident. The factors identified do not, in a meaningful way, distinguish bankruptcy fraud from other forms of fraud. A fraud always will betray faith, trust, or confidence. A person

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<sup>150</sup>United States v. Guthrie, 144 F.3d 1006, 1010-11 (6th Cir. 1998).

<sup>151</sup>See United States v. Saacks, 131 F.3d 540, 544 (5th Cir. 1997) ("If we imagine, for example, some simple fraud with a federal nexus implicating one defrauder's attempt to defraud two individuals . . . for a targeted amount of \$70,000 . . . our hypothetical defrauder would be sentenced under precisely the same offense level as Saacks, whose skulduggery directly affected the federal bankruptcy system and thus some seventy-five creditors, a bankruptcy trustee, and a bankruptcy judge").

seeking to get something from the Department of Veterans' Affairs who files false forms (seeking a greater payment than that to which the person is entitled, for example) has also committed fraud upon that person's source of financial assistance. That false filing also frustrates the public purpose behind the payment, by (potentially, at least) diverting funds that would otherwise be used to carry out the public purpose. That a large number of victims may be involved does not differentiate a bankruptcy fraud from any other large-scale fraud.

We see no reason to give especially-severe treatment to bankruptcy fraud. The guidelines already deal with bankruptcy fraud in an appropriate manner. The Commission has determined – correctly, we believe – that a fraud offense should be punished principally on the basis of the economic harm caused to the direct victims. That approach can result in a defendant receiving greater punishment for filing false bankruptcy forms and schedules and thereby causing a loss of \$205,000 than for committing perjury in a United States District Court proceeding in an attempt to win several million dollars in a civil action.<sup>152</sup>

#### Suggested Amendment

The Federal Public and Community Defenders therefore recommend that the

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<sup>152</sup>For the bankruptcy fraud, the defendant's offense level under § 2F1.1 would be 16 (base offense level of 6, plus 8 levels for the amount of loss, plus 2 levels for either more-than-minimal planning or a scheme to defraud more than one victim). For the perjury, the defendant's offense level under § 2J1.3 would be 12 (or 15 if the perjury resulted in a substantial interference with justice).

following new paragraph be added at the end of application note 6:

Subsection (b)(4)(B) does not apply on the basis of filing a false document of any kind with a federal, state, or local court.

As amended, application note 6 would read as follows (new language in italic):

6. Subsection (b)(4)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. If it is established that an entity the defendant controlled was a party to a prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in § 2J1.7 (Offense Committed while on Release)) or a violation of probation (addressed in § 4A1.1 (Criminal History Category)).

*Subsection (b)(4)(B) does not apply on the basis of filing a false document of any kind with a federal, state, or local court.*



## AMENDMENT 8(D)

The Commission has asked for comment upon "whether sentencing courts may consider post-conviction rehabilitation while in prison or on probation as a basis for downward departure at resentencing following an appeal." Seven Circuits have held that such postconviction rehabilitation is a basis for such a departure.<sup>153</sup> Only one Circuit has held that such postconviction rehabilitation is not a basis for such a departure.<sup>154</sup> The Federal Public and Community Defenders agree with the majority of Circuits.

Since *Koon v. United States*,<sup>155</sup> all the Circuits that have considered the matter agree

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<sup>153</sup>The Commission identifies *United States v. Core*, 125 F.3d 74, 76-79 (2d Cir. 1997) *cert. denied* \_\_ U.S. \_\_, 118 S.Ct. 735 (1998); *United States v. Sally*, 116 F.3d 76, 79-81 (3d Cir. 1997); *United States v. Brock*, 108 F.3d 31 (4th Cir. 1997) (involving postconviction rehabilitation) (overruling *United States v. Van Dyke*, 895 F.2d 984 (4th Cir. 1989), a decision written by the then-Chair of the Sentencing Commission, Judge William W. Wilkins, holding that postoffense rehabilitation was not a basis for departing) (per Wilkins, C.J.); *United States v. Rudolph*, 190 F.3d 720, 722-28 (6th Cir. 1999); *United States v. Green*, 152 F.3d 1202, 1206-08 (9th Cir. 1999); *United States v. Rhodes*, 145 F.3d 1375, 1378-82 (D.C. Cir. 1998).

The Tenth Circuit also has approved such a departure. *United States v. Roberts*, 1999 WL 13073 (10th Cir. Jan. 14, 1999) (unpub.) (relying on *United States v. Whitaker*, 152 F.3d 1238 (10th Cir. 1998), a postoffense rehabilitation case that held that "*Koon* allows exceptional efforts at drug rehabilitation to be considered as a basis for a downward departure from the applicable guideline sentence because these efforts were not expressly forbidden as a basis for departure by the Sentencing Commission").

<sup>154</sup>*United States v. Sims*, 174 F.3d 911 (8th Cir. 1999).

<sup>155</sup>518 U.S. 81, 116 S.Ct. 2935 (1996).

that *postoffense* rehabilitation can justify a downward departure.<sup>156</sup> Even the Circuit that holds that postconviction rehabilitation is not a basis for a downward departure has held that postoffense rehabilitation is a basis for a downward departure.<sup>157</sup> *Postconviction* rehabilitation is simply a subcategory of postoffense rehabilitation and should be treated no differently from postoffense rehabilitation.<sup>158</sup>

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<sup>156</sup>See *United States v. Brock*, 108 F.3d 31 (4th Cir. 1997) (per Wilkins, C.J.) (holding that prior decision "that post-offense rehabilitation can never form a proper basis for departure has been effectively overruled by *Koon*. The Sentencing Commission has not expressly forbidden consideration of post-offense rehabilitation efforts; hence, they potentially may serve as a basis for departure"); *United States v. Kapitzke*, 130 F.3d 820 (8th Cir. 1997); *United States v. Whitaker*, 152 F.3d 1238 (10th Cir. 1998) ("We conclude that *Koon* allows exceptional efforts at drug rehabilitation to be considered as a basis for a downward departure from the applicable guideline sentence because these efforts were not expressly forbidden as a basis for departure by the Sentencing Commission." (overruling *United States v. Ziegler*, 39 F.3d 1058, 1061 (10th Cir. 1994))).

<sup>157</sup>In *United States v. Kapitzke*, 130 F.3d 820 (8th Cir. 1997), the Eighth Circuit applied a *Koon* analysis and concluded that "because the acceptance of responsibility guideline takes postoffense rehabilitation efforts into account, departure under section 5K2.0 is warranted only if the defendant's efforts are exceptional enough to be atypical of cases in which the acceptance of responsibility reduction is usually granted." *Id.* at 823.

<sup>158</sup>As the Third Circuit has observed, "post-conviction rehabilitation efforts are, by definition, post-offense rehabilitation efforts and hence should be subject to at least equivalent treatment under the Guidelines." *United States v. Sally*, 116 F.3d 76, 80 (3d Cir. 1997). See also *United States v. Core*, 125 F.3d 74, 77 (2d Cir. 1997) ("We see no significant difference between the post-offense rehabilitation that we found in *Maier* to furnish a legally permissible grounds for departure and rehabilitation achieved in prison between imposition of the original sentence and resentencing.") (referring to *United States v. Maier*, 975 F.2d 944 (2d Cir. 1992)); *United States v. Rudolph*, 190 F.3d 720, 723 (6th Cir. 1999) ("an inconsistency would arise if courts permitted departures for post-offense rehabilitation but prohibited departures for post-sentence rehabilitation"); *United States v. Green*, 152 F.3d 1202, 1208 (9th Cir. 1998) ("Like the Second Circuit, we cannot ascertain any meaningful distinction between post-offense and post-sentencing

While it may be desirable to amend the *Guidelines Manual* to make clear that postconviction rehabilitation is an unaddressed factor, we do not recommend that the Commission do so. Situations in which such a departure might occur arise infrequently, and only one Circuit has found that the sentencing court lacks authority to depart.

The Supreme Court set forth the method of analyzing whether a departure is permissible in the *Koon* case.<sup>159</sup> The initial step in the *Koon* analysis is to determine if the Commission has prohibited a departure based upon the factor relied upon.

[A] federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor. If the answer to the question is no – as it will be most of the time – the sentencing court must determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline.<sup>160</sup>

The initial inquiry, then, is whether the Commission has forbidden reliance on postconviction rehabilitation. We agree with the former Chair of the Commission, Chief Judge Wilkins of the Fourth Circuit, that “The Sentencing Commission has not expressly  

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rehabilitation”).

<sup>159</sup>*Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035 (1996).

<sup>160</sup>*Id.* at 109, 116 S.Ct. at 2051. “[T]he Commission chose to prohibit consideration of only a few factors, and not otherwise limit, as a categorical matter, the considerations which might bear upon the decision to depart.” *Id.* at 94, 116 S.Ct. at 2045.



forbidden consideration of post-offense rehabilitation efforts; thus, they potentially may serve as a basis for departure.”<sup>161</sup>

The next step in the *Koon* analysis is to determine into which category the factor fits – (1) a factor identified by the Commission as a basis for departure (an “encouraged” factor); a factor for which the Commission discourages departure (a “discouraged” factor); and (3) a factor not mentioned by the Commission.<sup>162</sup> The availability of a departure depends upon the factor’s category.<sup>163</sup> Like Chief Judge Wilkins, we conclude with regard

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<sup>161</sup>United States v. Brock, 108 F.3d 31, 35 (4th Cir. 1997). The District of Columbia Circuit concluded that

*Koon* identifies only race, sex, national origin, creed, religion, and socioeconomic status . . . lack of guidance as a youth . . . drug or alcohol abuse . . . and personal financial difficulties and economic pressures upon a trade or business . . . as prohibited under the Guidelines. . . . Obviously, postconviction rehabilitation is not one of these prohibited factors, nor have we found any other provision of the Guidelines, policy statements, or official commentary of the Sentencing Commission prohibiting its consideration.

United States v. Rhodes, 145 F.3d 1375, 1378 (D.C. Cir. 1998).

<sup>162</sup>*Koon v. United States*, 518 U.S. 81, 95 116 S.Ct. 2035, 2045 (1996).

<sup>163</sup>For an encouraged factor,

the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. . . . If a factor is unmentioned in the Guidelines, the court must, after considering the “structure and theory of both relevant individual guidelines and the Guidelines taken as a whole,” . . . decide whether it is sufficient to take the case out of the Guidelines’s

to postconviction rehabilitation that

[b]ecause the acceptance of responsibility guideline takes such efforts into account in determining a defendant's eligibility for that adjustment, however, post-offense rehabilitation may provide an appropriate ground for departure only when present to such an exceptional degree that the situation cannot be considered typical of those circumstances in which an acceptance of responsibility adjustment is granted.<sup>164</sup>

The one Circuit that holds that postconviction rehabilitation is not a basis for departure – the Eighth Circuit – argues that *Koon* does not control the determination of whether postconviction rehabilitation is a proper basis for departure.<sup>165</sup> The opinion states:

While there is language in *Koon* that can be taken to support [defendant's] argument, its context disqualifies it for application to the present situation. Cases cannot be read like statutes. *Koon* addressed the matters that a district court may

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heartland.

*Koon v. United States*, 518 U.S. 81, 95, 116 S.Ct. 2035, 2045 (1996) (citations omitted) (quoting from *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993)).

<sup>164</sup>*Brock*, 108 F.3d at 35. The Fourth Circuit had previously held that a downward departure could not be based on postconviction rehabilitation. *United States v. Van Dyke*, 895 F.2d 984, 986-87 (4th Cir. 1990). *Brock* held that *Koon* required overruling *Van Dyke*.

<sup>165</sup>*United States v. Sims*, 174 F.3d 911, 912 (8th Cir. 1999) ("We do not think that *Koon* is controlling here").

properly consider in departing from the guidelines at an original sentencing. The Court never addressed the question of whether post-sentencing events might support a departure at a resentencing because that matter was not before it.<sup>166</sup>

The opinion, therefore, does not do a *Koon* analysis of the matter but rather looks to policy considerations to conclude that a departure is not possible. First, the opinion argues that permitting a departure would create disparity because “a few lucky defendants, simply because of a legal error in their original sentencing, receive a windfall in the form of a reduced sentence for good behavior in prison.”<sup>167</sup> Second, the opinion states that “it may well be that the Sentencing Reform Act precludes a sentencing court from considering post-conviction rehabilitation at sentencing,” citing that Act’s abolition of parole and vesting of the power to award good-time credit in the Bureau of Prisons.<sup>168</sup>

All aspects of this rationale – that *Koon* is inapplicable, that permitting departure

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<sup>166</sup>*Id.*

<sup>167</sup>*Id.* at 913.

<sup>168</sup>*Id.* The use of the phrase “it may well be” suggests that the Court of Appeals was not entirely convinced that the Sentencing Reform Act precludes a departure for postconviction rehabilitation. The argument that the Sentencing Reform Act precluded a departure was advanced more assertively by the dissent in the earlier case of *United States v. Rhodes*, 145 F.3d 1375, 1384 (D.C. Cir. 1998) (“I think the very passage of the Sentencing Reform Act of 1984 . . . implicitly precludes a district court from considering post-conviction behavior in imposing sentences”) (Silberman, J. dissenting). The dissent in *Rhodes*, however, agreed with the opinion in that case that “the Sentencing Guidelines do not address the question presented – whether a district court may consider a prisoner’s post-conviction conduct when it resentences a prisoner following an appeal.” *Id.*



for postconviction rehabilitation will create disparity, and that Congress intended to preclude such departures – are unpersuasive. The assertion that *Koon* does not apply seems mostly *ipse dixit*. A complete resentencing is no different in kind or legal effect from an "original sentencing." Both are governed by 18 U.S.C. § 3553(b), which requires the sentencing court to impose a sentence called for by the guidelines unless there is present in the case a factor that the Sentencing Commission has not adequately considered. It is true – but not particularly significant – that *Koon* did not specifically address "whether post-sentencing events might support a departure at a resentencing." *Koon*, however, did address departures and the principles applicable to evaluating them, and there is no basis for concluding that departure principles applicable at an original sentencing is not applicable at a resentencing. *Koon* also did not specifically address whether postoffense rehabilitation would justify a departure, but that has not prevented the Eighth Circuit from using a *Koon* analysis to conclude that such rehabilitation does justify a departure.<sup>169</sup>

The disparity rationale is also unpersuasive. To begin with, the Sentencing Reform

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<sup>169</sup>United States v. Kapitzke, 130 F.3d 820 (8th Cir. 1997). "When assessing whether the Sentencing Commission adequately considered a potential basis for departure, courts focus on whether the factor is addressed by the Guidelines, policy statements, or official commentary." *Id.* at 822 (citing *Koon*). The Eighth Circuit next described the four types of factors and the justification needed for each to support a departure, citing *Koon*. The Eighth Circuit then analyzed the case "[w]ith these principles in mind," *id.*, deciding that "[b]ecause the acceptance of responsibility guideline takes postoffense rehabilitation efforts into account, departure under section 5K2.0 is warranted only if the defendant's efforts are exceptional enough to be atypical of cases in which the acceptance of responsibility reduction is usually granted," *id.* at 823.

Act of 1984 did not seek to end all disparity, only disparity that is unwarranted. Thus, 18 U.S.C. § 3553(a)(6) sets forth as a purpose of sentencing the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct.”<sup>170</sup> Likewise, 28 U.S.C. § 991(b)(1)(B) states that a purpose of the Sentencing Commission is to “establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . .”<sup>171</sup> We agree with the District of Columbia Circuit that

[a]ny disparity that might result from allowing the district court to consider post-conviction rehabilitation . . . flows not from [defendant] being “lucky enough” to be resentenced, or from some “random” event . . . but rather from the reversal of his section 924(c) conviction. . . . Distinguishing between prisoners whose convictions are reversed on appeal and all other prisoners hardly seems “unwarranted.”<sup>172</sup>

Further, as the Sixth Circuit has pointed out,

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<sup>170</sup>18 U.S.C. § 3553(a) was enacted by Sentencing Reform Act of 1984, Pub. L. No. 98-473, title II, § 212(a)(2), 98 Stat. 1989.

<sup>171</sup>28 U.S.C. § 991 was enacted by Sentencing Reform Act of 1984, Pub. L. No. 98-473, title II, § 217(a), 98 Stat. 2017. *See also* 28 U.S.C. § 994(f) (directing the Commission, in promulgating guidelines, to give “particular attention to the requirements of subsection [*sic*] 991(b)(1)(B)”).

<sup>172</sup>*United States v. Rhodes*, 145 F.3d 1375, 1381 (D.C. Cir. 1998).

[w]hile it may seem "fair" to allow all rehabilitated defendants to plead their case, the approved practice of permitting departures for post-offense rehabilitation has already introduced unfairness and disparity into the granting of downward departures: one defendant may have no chance to rehabilitate himself before sentencing (e.g., his case might rapidly proceed to trial and sentence), whereas another defendant might face lengthy (yet constitutionally acceptable) pre-trial and pre-sentence delays that permit her to avail herself of many rehabilitative services before her sentencing. Allowing post-sentence departure will probably encourage attempts at rehabilitation (or at least attempts at appearing rehabilitated), so perhaps a utilitarian calculus supports the departure.<sup>173</sup>

We would only add that it does not seem to serve the ends of justice to say that if we cannot be fair to every defendant who is rehabilitated, then we will be fair to none of them.

Finally, to our knowledge, no provision of the Sentencing Reform Act of 1984 or other law expressly precludes departures for postconviction rehabilitation.<sup>174</sup> The Eighth Circuit's argument, therefore, is that the Act, by abolishing parole and vesting in the Bureau of Prisons the authority to administer good-time credit, implies that Congress intended to preclude departures for postconviction rehabilitation. That argument fails for

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<sup>173</sup>United States v. Rudolph, 190 F.3d 720, 724 (6th Cir. 1999).

<sup>174</sup>"[N]either the [Sentencing Reform] Act nor any other provision of law we have found explicitly bars consideration of post-conviction rehabilitation." United States v. Rhodes, 145 F.3d 1375, 1379 (D.C. Cir. 1998).



two reasons. First, that implication is inconsistent with express language of the Sentencing Reform Act of 1984. Second, the provisions of the Act relied upon – abolition of parole and vesting in the Bureau of Prisons the authority to administer good-time credit – do not support that implication.

To start, the Sentencing Reform Act expressly provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."<sup>175</sup> This express provision is inconsistent with an intention to preclude consideration of postconviction rehabilitation.

Further, the inference that Congress intended that abolition of parole preclude all departures for postconviction rehabilitation is weak – but, if true, would also to preclude departures for postoffense rehabilitation, which (as noted above) even the Eighth Circuit permits.<sup>176</sup> As the District of Columbia Circuit has pointed out, "Congress ended parole largely to remedy significant problems flowing from the fact that district court sentences for terms of imprisonment were generally open-ended, with the United States Parole

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<sup>175</sup>Sentencing Reform Act of 1984, Pub. L. No. 98-473, title II, § 212(a)(1), 98 Stat. 1987 (reenacting 18 U.S.C. § 3577 as 18 U.S.C. § 3661). The Commission interprets this provision in § 1B1.4 to mean that a sentencing court, in determining (1) where within the applicable guideline range to sentence or (2) whether a departure is warranted, "may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law."

<sup>176</sup>United States v. Kapitzke, 130 F.3d 820 (8th Cir. 1997).

Commission actually determining an offender's date of release."<sup>177</sup> The Sentencing Reform Act established a sentencing system in which federal judges determine sentence length. We agree with the District of Columbia Circuit that

[a]llowing district courts to depart from the Guidelines for post-conviction rehabilitation implicates none of the concerns that primarily led Congress to abolish parole. There will be no mystery about the sentences defendants will serve because sentences that take account of post-conviction rehabilitation will be entirely determinate. And because the same district court that imposed the initial, erroneous sentence will impose the second, correct sentence, such sentences pose no risk of judicial second-guessing.<sup>178</sup>

The inference that Congress, by vesting in the Bureau of Prisons the authority to administer good-time credit, intended to preclude departures for postconviction rehabilitation fares no better than the abolition-of-parole inference. Good-time credit is awarded for satisfactory behavior – obeying institutional rules and not getting in trouble – behavior that does not, in and of itself, demonstrate a person's rehabilitation.

While considerations that inform the Bureau of Prisons' exercise of discretion in awarding good time credits . . . may parallel some factors sentencing courts could weigh for post-conviction rehabilitation departures, awards of good time credits

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<sup>177</sup>United States v. Rhodes, 145 F.3d 1375, 1379 (D.C. Cir. 1998).

<sup>178</sup>*Id.* at 1380.

differ from post-conviction departures in several important respects. For one thing, good time credits simply reduce time served for behavior expected of all prisoners . . . while departures based on rehabilitation alter the very terms of imprisonment; indeed, prisoners receiving departures at resentencing will remain eligible for future good time credits.<sup>179</sup>

Although not cited or discussed by the Eighth Circuit, 28 U.S.C. § 994(t), it might be argued, supports an inference that Congress intended to preclude downward departures for postconviction rehabilitation. A sentencing court is authorized by 18 U.S.C. § 3582(c)(1)(A)(i) to reduce a sentence that is a final judgment. There must be a motion made by the Director of the Bureau of Prisons, and the sentencing court must find that “extraordinary and compelling reasons warrant such a reduction.” Section 994(t) provides that the Commission,

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<sup>179</sup>*Id.* The Sixth Circuit rejected an argument that because the Commission, when drafting the guidelines, was aware of how good-time credit is administered, the Commission adequately considered rehabilitation and thereby precluded departure for postconviction rehabilitation.

We agree that the Commission was presumably aware of [18 U.S.C.] § 3624(b). But it does not follow that the Commission intended to bar sentencing courts from considering rehabilitation in prison as a basis for departure. Furthermore, as good time credit under § 3624(b) ordinarily starts accruing during service of sentence, i.e. after the imposition of the sentence, and the issue of departure arises at sentencing, there is little logical support for the inference that the Commission would have considered the means of earning good time credit relevant to the issues affecting what sentence would be imposed.

United States v. Core, 125 F.3d 74, 78 (6th Cir. 1997).



in promulgating policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

We do not find convincing an argument that section 994(t) precludes a downward departure for postconviction rehabilitation, for several reasons. First, the language of section 994(t) is directed at the Commission, not at sentencing courts. Section 994 of title 28 describes the powers of the Commission. The sentencing court's authority to impose sentence derives from 18 U.S.C. § 3553. Section 994(t), therefore, does not limit the discretion of a sentencing court. Second, section 994(t) addresses a proceeding that is not the functional equivalent of a sentencing. The purpose of a sentencing is to determine, and impose, what is the appropriate punishment under all of the facts and circumstances of the case. The purpose of a proceeding under section 2582(c)(1)(A) is to determine if the appropriate punishment should be reduced. Third, Congress has not eliminated rehabilitation as a purpose of sentencing, although Congress was skeptical that rehabilitation could occur in a prison context.<sup>180</sup> When rehabilitation does occur in that

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<sup>180</sup> 18 U.S.C. § 3553(A)(2)(D) specifically identifies rehabilitation as a purpose of sentencing. Congress rejected arguments eliminate rehabilitation as a purpose of sentencing. *See* S. Rep. No. 98-225, 98th Cong., 1st Sess. 76 (1983). 18 U.S.C. § 3582(a) directs a sentencing court, when considering sentence, to consider the factors set forth in 18 U.S.C. § 3553(a), "recognizing that imprisonment is not an appropriate means

context, therefore, the congressional skepticism, a judgment formulated in the abstract but which may be correct in many instances, has been overridden by what the defendant has actually been able to achieve.

The goal of our sentencing system is not to deprive federal judges of all discretion at sentencing. As the Supreme Court stated in *Koon*,

[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.<sup>181</sup>

The Sentencing Reform Act of 1984 may have narrowed the scope of judicial sentencing discretion, but the Act did not – and did not intend to – eliminate that discretion entirely.<sup>182</sup>

The legislative history of that Act indicates that “[t]he purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.”<sup>183</sup> We urge the Commission not to narrow judicial discretion.

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of promoting correction and rehabilitation.”

<sup>181</sup>*Koon v. United States*, 518 U.S. 81, 113, 116 S.Ct. 2035, 2053 (1996).

<sup>182</sup>“We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States district judge.” *Koon*, 518 U.S. at 113, 116 S.Ct. at 2053.

<sup>183</sup>S. Rep. No. 98-225, 98th Cong., 1st Sess. 52 (1983).

## AMENDMENT 8(E)

The Commission has asked for comment upon "whether a court can base an upward departure on conduct that was dismissed or uncharged as part of a plea agreement in the case." The Circuits are divided over this question, we believe, because of a lack of specificity in § 6B1.2(a), p.s. The Federal Public and Community Defenders recommend the addition of language to § 6B1.2(a), p.s. that would foster and facilitate plea agreements. Our suggested amendment is set forth at the end of our comments on amendment 8(E).

Under § 6B1.2(a), p.s., if there is a plea agreement that includes a commitment by the government to dismiss a charge or not to bring a charge, a sentencing court "may accept the agreement if the court determines . . . that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines." Neither the policy statement nor its commentary indicates whether the sentencing court is to make this determination on the basis of (1) the guideline range applicable to the remaining charges or (2) the maximum possible sentence available if the court were to depart upward from the applicable guideline range. If the former is the correct meaning, then acceptance of the plea agreement would foreclose an upward departure based upon conduct in the dismissed or uncharged offenses.



Because the Commission's intention is not clear, the Circuits have divided over whether it is possible for a sentencing court to depart upward based upon conduct covered by charges that were dismissed or not brought pursuant to a plea agreement.<sup>184</sup> Several Circuits have held that such a departure is permissible, although not all of them have discussed the impact of § 6B1.2(a), p.s.<sup>185</sup> Other Circuits have held that such a departure is not permissible<sup>186</sup>

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<sup>184</sup>There can be no doubt that, in the absence of a plea agreement, a sentencing court can base an upward departure on conduct covered by charges that were dismissed or never brought. 18 U.S.C. § 3661 provides that a sentencing court can consider, without limitation, any information about the background, character, and conduct of the defendant. The Commission, in § 1B1.4, has interpreted this provision to govern when the sentencing court is deciding (1) where within the applicable guideline range to sentence, and (2) whether to depart.

<sup>185</sup>The Commission cites cases from six Circuits. Of the six cases cited, three discussed § 6B1.2(a), p.s. *United States v. Baird*, 109 F.3d 856 (3d Cir. 1997); *United States v. Ashburn*, 38 F.3d 803 (5th Cir. 1994); *United States v. Cross*, 121 F.3d 234 (6th Cir. 1997).

The other three cases cited did not discuss § 6B1.2(a), p.s. *United States v. Figaro*, 935 F.2d 4, 6-8 (1st Cir. 1991); *United States v. Kim*, 896 F.2d 678 (2d Cir. 1990); *United States v. Big Medicine*, 73 F.3d 994 (10th Cir. 1995). A close reading of two of these three cases indicates that they may be of limited value in analyzing this issue. The defendant in *Figaro* pleaded guilty, but the opinion does not state whether that plea was pursuant to a plea agreement. The defendant in *Big Medicine* did plead guilty pursuant to a plea agreement, but, for reasons spelled out in the opinion, the Tenth Circuit expressly concluded that, "We therefore need not address *Big Medicine's* argument that a court cannot consider in its sentencing decision charges dismissed as part of a plea agreement." *Big Medicine*, 73 F.3d at 997 n.5.

<sup>186</sup>The Commission cites cases from three Circuits: *United States v. Ruffin*, 997 F.2d 343 (7th Cir. 1993); *United States v. Harris*, 70 F.3d 1001 (8th Cir. 1995); *United States v. Faulkner*, 952 F.2d 1066 (9th Cir. 1991); *United States v. Castro-Cervantes*, 927

Because the question that has divided the Circuits is what the Commission intended § 6B1.2(a), p.s. to mean, the Commission should clarify its intention. The policy choice confronting the Commission is to what extent the Commission wishes to foster and facilitate the negotiation of pleas.

Pleas of guilty play an important role in the federal criminal justice system. The most-recently available Commission data is that more than 93% of federal cases are disposed of by plea of guilty.<sup>187</sup> While not all guilty pleas are the result of plea negotiation, a significantly large number of them are. Plea negotiation is a legitimate and necessary part of the federal criminal justice system.

Plea agreements are reached because each side gets something. A defendant usually gets a lesser sentence, and the prosecutor usually gets a guaranteed conviction plus the certainty of some punishment. Each side also gives up something, however. A defendant may believe that she has a good defense and is 90% certain of winning if the case were to go to trial. If she reaches a plea agreement, she gives up the opportunity to walk away from a trial as a free person. She may be willing to do so because there is a chance, even if only 10%, that she will be convicted, in which case she would be exposed to a significantly-longer sentence. The prosecutor in the case foregoes the chance to

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F.2d 1079 (9th Cir. 1991). We would not cite *Ruffin* for the proposition that a district court cannot depart in a case in which counts are dismissed pursuant to a plea agreement.

<sup>187</sup>U.S. Sentencing Comm'n, 1998 Sourcebook of Federal Sentencing Statistics 20 (Fig. C).

convict her of an offense that yields greater punishment. The prosecutor may be willing to do so because the case against the defendant is not strong and he also believes that there is only a 10% chance of conviction.

The defendant's principal concern in negotiating a plea is exposure – what is the likely sentence if a plea is negotiated. There is little incentive to negotiate a plea if the resulting sentence will not be significantly different from the sentence if the defendant is convicted after a trial. There will, of course, always be a difference if there is only one charge. A plea of guilty ordinarily will trigger a reduction of two or three levels under § 3E1.1 for acceptance of responsibility. A plea agreement in such circumstances is not necessary for the defendant to get something by pleading guilty. The matter is not so easy, however, if there is more than one charge or if the two- or three-level reduction is not a sufficient incentive to a defendant.

The ability of a sentencing court to depart upward based upon conduct in charges that have been dismissed or not brought pursuant to a plea agreement generates uncertainty for a defendant and makes it harder for a defendant to determine the extent of his or her exposure. Suppose a defendant in criminal history category I is charged with three counts of robbery. The applicable offense level, before credit for acceptance of responsibility, is 28, yielding a guideline range of 78-97 months if the defendant goes to trial and 57-71 months if the defendant pleads guilty to all three counts. If the plea agreement calls for the government to dismiss two of the counts, the offense level will be



reduced by three levels, which, together with the three-level reduction for acceptance of responsibility yields a guideline range of 41-51 months. If the sentencing court can go no higher than 51 months, the defendant probably will find this an attractive offer. If the court can depart upward, the defendant's exposure becomes uncertain. What is the likelihood that the court will depart upward – 33%, 50%, 80%? If the court decides to depart, how great will the departure be?<sup>188</sup> Those questions make it difficult to evaluate a plea offer and inevitably will cause some plea negotiations to fail.

A defendant can know his or her exposure with certainty if there is a plea entered under Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure. Such a plea ordinarily requires the court to impose an agreed-upon sentence, if the court accepts the plea.<sup>189</sup> In our experience, Rule 11(e)(1)(C) pleas are not generally available.

Because of the need for certainty, we believe that § 6B1.2(a), p.s. should require the sentencing court to determine if the applicable guideline range permits imposition of a sentence that adequately reflects the seriousness of the actual offense conduct. This policy enables a defendant to determine exposure with reasonable certainty – the sentence will be

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<sup>188</sup>Under 18 U.S.C. § 3742(f)(2), the extent of the departure must be reasonable. While we would argue that it would be unreasonable to impose a sentence in excess of 71 months – the defendant's maximum exposure had the defendant pleaded to all three counts without a plea agreement – it is not certain what a court would determine. Any sentence in excess of 71 months would make a mockery of the plea agreement.

<sup>189</sup>We use the term "ordinarily" because a Rule 11(e)(1)(C) plea does not necessarily have to specify the ultimate sentence. Such a plea can specify a range, for example, or that the defendant is entitled to credit for acceptance of responsibility.

within the applicable guideline range. The sentencing court can protect against a plea agreement that would result in an inappropriately lenient sentence by rejecting the plea.<sup>190</sup>

#### Suggested Amendment

The Federal Public and Community Defenders recommend that the first sentence of § 6B1.2(a), p.s. by deleting “remaining charges adequately reflect” and inserting in lieu thereof “guideline range applicable to the remaining charges adequately reflects”.

As amended, § 6B1.2(a) would read as follows (new language in italic, deleted language struck-through):

- (a) In the case of a plea agreement that includes the dismissal of any charges or an agreement not to pursue potential charges [Rule 11(e)(1)(A)], the court may accept the agreement if the court determines, for reasons stated on the record, that the ~~remaining charges adequately reflect~~ *guideline range applicable to the remaining charges adequately reflects* the seriousness of the actual offense behavior and that accepting the agreement will not

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<sup>190</sup>An inappropriately lenient sentence would be one in which the defense attorney has been able to take advantage of an inexperienced or unsophisticated assistant United States Attorney. Quite frankly, our experience has been that plea agreements result in inappropriately lenient sentences only rarely. By and large, United States Attorneys’ offices are staffed with qualified attorneys and have a review mechanism in place to ensure that the less experienced prosecutors are not taken advantage of. What might appear to be a lenient sentence nearly always is the result of a dispassionate evaluation of all of the circumstances of the case by the United States Attorney’s office.

undermine the statutory purposes of sentencing or the sentencing guidelines.

*Provided*, that a plea agreement that includes the dismissal of a charge or a plea agreement not to pursue a potential charge shall not preclude the conduct underlying such charge from being considered under the provisions of § 1B1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted.

#### AMENDMENT 9

Amendment 9 sets forth five technical and conforming amendments to various guidelines and commentary. We have examined them and do not consider them controversial. We support adoption of them.





## IMPORTANT NOTES

Lined area for notes.

## **SUMMARY OF WRITTEN TESTIMONY**

James K. Robinson, Assistant Attorney General  
Charles R. Tetzlaff, U.S. Attorney, District of Vermont

### **Amendment 1: Implementation of the No Electronic Theft Act**

*Of the three options published in the Federal Register" for comment, DOJ favors Option 2 because it (1) "directs the court to compare the retail prices of the infringing items with the retail prices of the infringed-upon items [which] comparison serves as a proxy for the difficult task of determining whether and to what extent the sale of an infringing item displaced the sale of an infringed-upon item. Displaced sales are a key component of loss but one that is practically impossible to calculate without the use of a proxy" (Statement of James K. Robinson, Assistant Attorney General at 1); (2) "best satisfies the aims of the guidelines to provide a fair sentencing, uniform sentencing in similar circumstances, and appropriately tailored sentences for the criminal conduct involved" (Statement of James K. Robinson, Assistant Attorney General at 2); and (3), as compared to the other options published for public comment, it provides the clearest guide to those involved in the sentencing process.*

*In regard to the recently prepared Option 4, DOJ notes it is a clear improvement over the status quo and Options 1 and 3. However, it has several problems. First, the possible reduction in offense level where the quality of the or performance of the counterfeit item is substantially inferior to that of the infringed-upon item will produce many of the same litigation problems as Option 3 (e.g., litigation as to the quality of the different items). Moreover, this possible reduction rewards defendants who sell high-priced copies that are substantially inferior to the legitimate item even where the sale of the counterfeit may result in lost sales of the legitimate item. Another problem with Option 4 is its failure to include a specific offense characteristic for offenses that involve a reasonably foreseeable risk to public health and safety. If the Commission adopts Option 4, DOJ recommends that (1) it eliminate the comparative quality provision (in making this recommendation, DOJ emphasized its opinion that the price differential between the legitimate and counterfeit items is the best indicator of whether a counterfeit item displaced the sale of a legitimate item), and (2) include an enhancement for risk as proposed in Option 2.*

### **Amendment 2: Temporary, Emergency Telemarketing Fraud Amendment**

*DOJ first urges the Commission to take a comprehensive approach to addressing white collar crime in general during the next amendment cycle. It then states the following should be a high priority for the Commission: revision of the loss table in the fraud, theft, and tax guidelines to increase sentences based on high dollar losses, and revision of the definition of "loss."*



*DOJ urges the Commission to make the emergency telemarketing fraud amendments permanent because they are an important part of the Commission's efforts to improve sentencing in the areas of white collar crime, identity theft, and trademark and copyright infringement.*

*DOJ also urges the Commission to make conforming changes to the tax guidelines with respect to the enhancement for "sophisticated means." Because of its belief that the tax and fraud guidelines should be equivalent, DOJ believes the Commission should (1), as in the fraud guideline, substitute a broad form of "sophisticated means" for "sophisticated concealment" in the tax guideline and (2), again as in the fraud guideline, establish a floor offense level of 12 when the requisite level of sophistication is present in tax cases.*

### **Amendment 3: Implementation of the Sexual Predators Act**

#### **Amendment 3A:**

*DOJ supports the reference of Section 1470 violations to §2G3.1, the inclusion of a specific offense characteristic providing a penalty increase for the distribution of obscene material for the receipt or expectation of receipt of some non-pecuniary thing of value, and the published specific offense characteristic for distributing obscene material to a minor.*

*DOJ does not, at this time, support the elimination of the reference to the fraud table for cases involving distribution of obscene material for pecuniary gain because obscenity cases can be large scale and include significant profits.*

#### **Amendment 3B:**

*DOJ believes it is appropriate to reference the new offense of transmittal of identifying information about a minor for criminal sexual purposes to §2G1.1. However, it is of the opinion that the Commission should consider whether the existing sentencing enhancements found in §2G1.1 are sufficient for violations of the new offense that involve in a minor actually being solicited or prohibited sexual activity actually occurs.*

#### **Amendment 3C:**

*DOJ believes that sentencing enhancements under §2G2.4(b)(2) should be based on the actual number of "images or visual depictions" of child pornography rather than the number of computer files, books or magazines because "it is the number of images that reflects the harm done by the offense, not the number of computer files within which the images are stored." (Statement of James K. Robinson, Assistant Attorney General, Criminal Division at 7.)*

**Amendment 3D:**

*DOJ is in agreement with the intent behind Amendment 3D, but would expand this new enhancement of distribution for non-pecuniary gain to apply to any distribution of child pornography regardless of whether there was expectation of receiving something in return.*

*DOJ also agrees that distribution for pecuniary gain warrants a greater increase than other distribution, but recommends that this increase should be reflected on the basis of enhancements for the retail value of the material.*

**Amendment 3E:**

*DOJ believes that (1) the computer enhancement should be triggered only when a computer is used to facilitate an offense involving a minor victim, and (2) the two enhancements (for use of a computer and misrepresentation of identity) should be separate, cumulative enhancements rather than a single enhancement, at least in some of the relevant guidelines such as §2A3.2.*

*DOJ further believes the Commission should seriously consider providing a similar misrepresentation enhancement in §§2G2.1 and 2G2.2.*

**Amendments 3F and 3G:**

*Acknowledging its agreement with the Commission's sentiment that the matters involved herein are complex and will, to a significant extent, require further study and consideration, DOJ believes there is one pressing concern that can and should be addressed during the current amendment cycle. That concern is sentencing policy for those convicted of violations of 18 U.S.C. § 2423 (transportation of minor with intent to engage in prohibited sexual conduct and travel with such intent). DOJ points out that sexual predators are more frequently using the Internet to contact and arrange to meet with child victims for purposes of prohibited sexual activity. The fact that current sentencing policy treats such offenders in the same manner as traditional rape cases, coupled with DOJ's belief that such sentencing is "wholly inadequate" because this Internet-initiated activity is substantially more insidious and threatening than the heartland of traditional rape cases, leads DOJ to suggest that the Commission add several enhancements to §2A3.2. The enhancements envisioned by DOJ, which are in addition to the separate enhancements addressing use of a computer and misrepresentation of identity, "would likely address offenses that involve coercion (as that term is defined in §2G1.1) but not force or threat of force as well as offenses where there is a large age differential between the defendant and the victim." (Statement of James K. Robinson, Assistant Attorney General, Criminal Division, at 10.)*



*DOJ expects the Commission to consider "the other aspects of [Amendments 7F] and [7G], including the implementation of the directive for enhancements for engaging in a pattern of abusive or exploitative conduct, will be addressed as a top priority for the next amendment cycle." (Statement of James K. Robinson, Assistant Attorney General, Criminal Division, at 10.)*

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

*DOJ favors Option 2 "because it addresses two areas in which we believe the sentencing guidelines are deficient: (1) harm to an individual's reputation or credit standing and related difficulties; and (2) the potential harms associated with producing multiple identification documents, false identification documents, or means of identification. Neither of these harms is reflected by the loss table in the fraud guideline, §2F1.1, and both were directly addressed by Congress in its directive to the Commission." (Statement of James K. Robinson, Assistant Attorney General, Criminal Division, at 10.)*

*DOJ believes that Option 2 would be improved by inserting "unlawful" before "production or transfer" to clarify that only the unlawful production or transfer of the documents would trigger the enhancement. DOJ is also of the opinion that it would make sense to include unlawful possession in this provision.*

*DOJ points out that, while Option 1 includes the important "breeder document" concept, there are problems with the application of Option 1.*

*DOJ believes the best approach would be to incorporate the "breeder document" concept of Option 1 into Option 2 as an alternative basis for the harm to reputation enhancement. However, because of the "overly complex" manner in which Option 1 is drafted, DOJ recommends that a simplified version of the concept be developed for purposes of including it in Option 2.*

*DOJ also believes that regardless of which Option is chosen, the base offense level should be 12 in order to reflect the seriousness of identity theft and fraud, and the resulting harm to individuals. A base offense level of 12, the same level as for frauds involving sophisticated means, assures that identity theft and fraud are treated at least as seriously as sophisticated frauds generally.*

**Amendment 8: Circuit Conflicts**

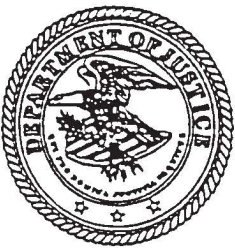
**Amendment 8A - Aberrant Behavior Departure**

*DOJ urges the Commission "to preserve the guideline system through promulgating a narrow departure basis for aberrant behavior." (Statement of James K. Robinson, Assistant Attorney General, Criminal Division at 13).*



*DOJ believes that departures on the ground of aberrant behavior should be available to only that small group of offenders whose criminal conduct is truly an aberration, i.e., a single act of aberrant behavior.*

*DOJ urges the Commission to adopt an amendment that reflects the view of the majority of courts to have addressed the issue (and as is reflected above). DOJ provides specific language for such an amendment. DOJ also notes that CLC provided language for a similar type of amendment; DOJ proposes that, if the Commission would rather use the language of the CLC, it delete the word "seemingly" from the phrase "spontaneous and seemingly thoughtless act" because the word is confusing.*



# Department of Justice

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STATEMENT

OF

JAMES K. ROBINSON  
ASSISTANT ATTORNEY GENERAL  
CRIMINAL DIVISION

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

PROPOSED SENTENCING GUIDELINE AMENDMENTS

MARCH 23, 2000

We appreciate the opportunity to appear before you to discuss proposed amendments to the sentencing guidelines published for comment in the Federal Register in December, 1999, and January and February, 2000. Our comments will focus on Amendment 1, implementation of the No Electronic Theft Act; Amendment 2, re-promulgation of the temporary, emergency telemarketing fraud amendments as permanent amendments; Amendment 3, implementation of the Sexual Predators Act; Amendment 5, implementation of the Identity Theft and Assumption Deterrence Act; and Amendment 8, the circuit conflict involving aberrant behavior. We addressed the other proposed amendments in a letter dated March 10 to the Sentencing Commission.

#### AMENDMENT 1 - IMPLEMENTATION OF THE NO ELECTRONIC THEFT ACT

The Sentencing Commission published a notice last December seeking comment on three options for temporary, emergency amendments to the guideline on criminal infringement of copyrights and trademarks, § 2B5.3, 64 Federal Register 72129. The Department of Justice submitted formal comments in response to these proposals in January. As we have indicated, we appreciate the Commission's longstanding efforts to draft an amendment that will carry out the directive in the "No Electronic Theft Act of 1997," ("NET Act"), Pub. L. 105-147. Under the Act the Commission must ensure that the applicable sentencing guideline range is sufficiently stringent to deter crimes against intellectual property and that the guidelines provide for consideration of the retail value and quantity of the items with respect to which such offenses are committed.

The difficult challenge the Commission faces is to promulgate a guideline amendment that captures the loss caused by criminal trademark and copyright violations, but to do so in a way that is both consistent with the NET Act directives and relatively simple to apply. We addressed this challenge in our prior comments on the three options published by the Commission.

To summarize our earlier comments, while the three options published in the Federal Register provide varying degrees of improvement over the current guidelines, we favor Option 2 over the other two options suggested. Option 2 directs the sentencing court to compare the retail prices of the infringing items with the retail prices of the infringed-upon items. This comparison serves as a proxy for the difficult task of determining whether and to what extent the sale of an infringing item displaced the sale of an infringed-upon item. Displaced sales are a key component of loss but one that is practically impossible to calculate without the use of a proxy. Under Option 2 if the court determines that the price of an infringing item is less than 10% of the price of the infringed-upon item (or another



percentage the Commission chooses to reflect the likelihood of displaced sales), then the court applies a downward adjustment. Option 2 best satisfies the aims of the sentencing guidelines to provide a fair sentencing scheme, uniform sentencing in similar circumstances, and appropriately tailored sentences for the criminal conduct involved. Finally, it provides the clearest guidance to prosecutors, probation officers, defense counsel and the courts, compared to the other published options.

Like Option 2, Option 1 would establish a sentencing enhancement based on the value of the legitimate items for all copyright and trademark cases. However, Option 1 provides that the court may depart down (or up) if the pecuniary harm inflicted by the violation is substantially overstated (or understated), as the case may be. Although Option 1 appears on its face to be easy to apply, in practice it will provide scarce guidance to the courts and entail the risk of great sentencing disparity through the frequent use of departures from the applicable guideline range.

Option 3 is different from the other two published options and bases the sentence on the "infringement amount," which is the retail value of either the infringed item or the infringing item, depending upon the nature of the offense and the proof available. It provides a higher base offense level than the other published options, as well as several enhancements for specific offense characteristics. While this option provides several improvements over the status quo and Option 1, it is very complex and could require a sentencing mini-trial in many otherwise clear-cut cases. One of the biggest decisions facing the sentencing court under Option 3 would be whether to base the sentence on the price of the legitimate item or the counterfeit. In this respect the "quality and performance" of the counterfeit, as compared to the legitimate, item would be an issue that could consume much court time at sentencing. Moreover, Option 3 would likely unnecessarily limit the use of the infringed-upon value as a measure of harm, contrary to the spirit of the NET Act directive.

The Commission staff has recently offered a new proposal, Option 4, which is similar to Option 2 but adds a new component. Like Option 2, Option 4 would allow a decrease of 2 levels if the offense were committed for other than a commercial purpose or if it involved greatly discounted merchandise. The new component present in Option 4, however, is also to allow this reduction where the "quality or performance of the infringing item was substantially inferior to the quality or performance of the infringed item . . . ." Option 4 also differs from Option 2 by starting with base offense level 8, rather than level 6, and by

omitting a specific offense characteristic for offenses that involve a reasonably foreseeable risk to public health or safety.

Option 4 is a clear improvement over the status quo and over Options 1 and 3. However, the possible reduction in offense level where the quality or performance of the counterfeit item is substantially inferior to that of the legitimate item will produce many of the same litigation problems as Option 3. Option 4 makes a reduction in offense level available on alternative bases - price differential or quality disparity between the legitimate and counterfeit items. Because the price differential in most cases will be easier to determine than the quality disparity between the items, a defendant will likely raise quality grounds for a reduction in sentence only where the price of the counterfeit is substantial enough that, taken alone, a basis for sentence reduction would not exist. In such a case under Option 4, the parties would be forced into difficult positions. The defendant would seek to prove that his or her own infringing item was of poor quality and to show that the victim's item was of high quality. The prosecutor, on the other hand, would be left to extol the high quality of the defendant's infringing item and to denigrate the quality of the victim's infringed-upon item. One can hardly expect victims to assist prosecutors in this aspect of the sentencing process, and the prospect that a prosecutor may need to attack the quality and performance of the infringed-upon product may dissuade victims from coming forward in the first instance.

Option 4 would, thus, have the perverse effect of rewarding defendants who sell high-priced copies that are substantially inferior to the legitimate item, even where the copies may otherwise likely result in lost sales of the legitimate item - e.g., where the consumer is duped. Such a reward to defendants is inconsistent with the fact that the harm to the legitimate manufacturer's reputation is increased in such cases.

Aside from producing the undesirable results outlined, Option 4 would also generate unneeded litigation. Defendants will argue aspects of comparative quality that could mire sentencing courts in fact-intensive details relating to this issue, including the manufacturing methods used and historic customer satisfaction, among other areas of inquiry - whether or not the copy was likely to displace sales of the legitimate item.

For purposes of the sentencing guidelines, the price differential between the legitimate and counterfeit items remains the best indicator of whether a counterfeit item displaced the sale of a legitimate item. A counterfeit with a very low price, relative to that of the legitimate item, would not likely



displace a sale of the latter. By contrast, a higher-priced copy would be more likely to do so. Since consumers are often unaware of the inferior quality of a counterfeit and may, indeed, believe they are purchasing the legitimate item, comparative quality should not enter into the equation. Although price differential is not a perfect model, it functions well as an estimator of displaced sales without burdening the court, prosecutors, defense counsel, and others with difficult factual inquiries that threaten to overwhelm the sentencing process. We suggest that if the Commission adopts Option 4, it eliminate the comparative quality provision.

The second problem with Option 4 is its failure to include a specific offense characteristic for offenses that involve a reasonably foreseeable risk to public health or safety. A defendant who sells counterfeit airplane parts that pose such a risk commits a more serious offense than one who sells counterfeit T-shirts. Unlike Option 2, which provides a 2-level increase, Option 4 treats a similar factor (the conscious or reckless risk of serious bodily injury) simply as a basis for upward departure. This treatment is inadequate since it does not compel a judge to provide an adjustment. By contrast, the fraud guideline provides a 2-level increase and a floor of level 13 for offenses that involve the conscious or reckless risk of serious bodily injury. United States Sentencing Commission, Guidelines Manual § 2F1.1(b)(6) (1999). Thus, we recommend that if the Commission adopts Option 4, it include an enhancement for risk as proposed in Option 2.

In short, we urge the Commission to adopt emergency and permanent amendments for trademark and copyright violations along the lines described so that the resulting penalties will be sufficient to deter these crimes.

#### **AMENDMENT 2 - REPROMULGATION OF TEMPORARY, EMERGENCY TELEMARKETING FRAUD AMENDMENT**

Before addressing the specifics of the proposal on telemarketing fraud, we urge the Commission to take a comprehensive approach to addressing white collar crime in general in the next amendment cycle. While it is true that the Commission is considering amendments that will affect several types of white collar offenses, including identity theft and cellular cloning, there are other offenses that will be unaffected by these more narrowly focused amendments. Thus, revision of the loss table in the fraud, theft, and tax guidelines to increase sentences based on high dollar losses should be a high priority for the Commission. In addition, the



Commission should make necessary revisions to the definition of "loss" in order to resolve a number of troublesome issues. The Department would be pleased to offer its assistance in this important endeavor.

The Commission has proposed repromulgating as a permanent amendment the emergency telemarketing fraud amendments contained in Amendment 587, effective November 1, 1998. These amendments were promulgated in response to the Telemarketing Fraud Prevention Act of 1998, Pub. L. No. 105-184. The emergency amendments broadened the "sophisticated concealment" enhancement that had been adopted earlier in 1998 in the fraud guideline, § 2F1.1, to cover "sophisticated means" involved in an offense. These amendments also increased the enhancement in the vulnerable victim guideline, § 3A1.1, for offenses that impact a large number of vulnerable victims.

We urge the Commission to make the emergency telemarketing fraud amendments permanent. They are an important part of the Commission's efforts to improve sentences for white collar crimes, along with its work in such other areas as identity theft and trademark and copyright infringement. The temporary amendments focus on important enhancements needed in sentencing those who use sophisticated means to commit their offenses or who aim their crimes against a large number of vulnerable victims. Along with the permanent amendment adopted in 1998 providing an enhancement for offenses committed through mass marketing, see § 2F1.1(b)(3) and Amendment 577, the emergency amendments send a message that telemarketing and other mass marketing fraud will result in substantial penalties.

We also urge the Commission to make conforming changes to the tax guidelines, §§ 2T1.1, 2T1.4, and 2T3.1, with respect to the enhancement for "sophisticated means." As indicated, the Commission adopted two sets of fraud amendments in 1998. The original one, adopted before enactment of the Telemarketing Fraud Prevention Act, provided an enhancement for "sophisticated concealment" in the fraud guideline. Amendment 577. In that amendment the Commission also substituted "sophisticated concealment" in the tax guidelines for "sophisticated means . . . used to impede discovery of the existence or extent of the offense" (or similar language). In amending the language in the tax guidelines, the Commission indicated its "primary purpose . . . to conform the language of the current enhancement for 'sophisticated means' in the tax guidelines to the essentially equivalent language of the new sophisticated concealment enhancement provided in the fraud guideline." Id. The Commission now seeks to make permanent an amendment to substitute a broad form of "sophisticated means" for

"sophisticated concealment" in the fraud guideline, but does not seek a conforming amendment to the tax guidelines. This new action almost insures that a court will construe "sophisticated concealment" in the tax guidelines more narrowly than "sophisticated means" in the fraud guideline. We continue to believe that the two guidelines should be equivalent and agree with the Commission's original intent to conform the tax and fraud guidelines with respect to sophisticated offenses.

Moreover, unlike the fraud guideline's sophisticated means enhancement, the tax guidelines' sophisticated concealment provision does not provide for a floor level of 12. We can discern no reason why fraud cases should be treated as more serious than tax offenses where a certain level of sophistication is involved. The Commission should make a corresponding amendment to the tax guidelines not only to provide the broader "sophisticated means" language in tax offenses in place of "sophisticated concealment" but also to establish a floor offense level of 12 when the requisite level of sophistication is present in tax cases.

#### AMENDMENT 3 - IMPLEMENTATION OF THE SEXUAL PREDATORS ACT

##### (A) Prohibiting Transfer of Obscene Materials to a Minor

This proposed amendment and the issues for comment address the new offense, at 18 U.S.C. § 1470, of transferring obscene material to a minor. We support the published, proposed amendment, which would reference section 1470 violations to § 2G3.1 of the guidelines. We believe it is appropriate to include, as the published proposed amendment does, a specific offense characteristic providing a penalty increase for distributing obscene material for the receipt or expectation of receipt of some non-pecuniary thing of value. Further, we support the published, proposed specific offense characteristic for distributing obscene material to a minor, which itself includes an additional penalty increase when such distribution was intended to facilitate prohibited sexual activity with a minor. Because obscenity distribution cases can be large scale and can include significant profits, we do not at this time support eliminating the reference to the fraud table for cases involving distribution of obscene material for pecuniary gain.

##### (B) Prohibiting Transmittal of Identifying Information About a Minor for Criminal Sexual Purposes

This issue for comment addresses the new offense, at 18 U.S.C. § 2425, of prohibiting the knowing transmittal, by mail



or facility of interstate commerce, of identifying information about a minor for criminal sexual purposes. We believe that it is appropriate to reference this new offense to § 2G1.1 of the guidelines. Further, we think the Commission should consider whether the existing enhancements in § 2G1.1 are sufficient for violations of the new offense that result in a minor actually being solicited or worse when prohibited sexual activity actually occurs.

(C) Clarification of the Term "Item" in the Enhancement in § 2G2.4 for Possession of 10 or More Items of Child Pornography

The proposed amendment and issue for comment address how to define an "item of child pornography" for purposes of the enhancement in § 2G2.4(b)(2) and how such items ought be quantified for purposes of the enhancement. We believe the sentencing enhancements at § 2G2.4(b)(2) relating to a large amount of child pornography ought to be based on the number of "images or visual depictions" of child pornography rather than the number of computer files, books, or magazines. We believe the seriousness of the offense is better measured by the number of images involved in the offense because the number of images correlates with the amount of victimization resulting from the offense. For example, a case involving a single computer file containing images of hundreds of children is far graver, we believe, than one involving three computer files each containing a single image. This is true because in the former, many more children are victimized by the crime. It is the number of images that reflects the harm done by the offense, not the number of computer files within which the images are stored.<sup>1</sup> As a result, we believe the number of images or visual depictions ought to be the basis for the enhancement.

(D) Directives Relating to Distribution of Pornography for Pecuniary and Non-Pecuniary Interests

The proposed amendment and issue for comment address the statutory directive to clarify that distribution of pornography applies to the distribution of pornography for both monetary remuneration and non-pecuniary interests. The Commission proposes to retain the current enhancement in guideline § 2G2.2 relating to distribution for pecuniary gain but to add an alternative enhancement for distribution "for the receipt, or expectation of receipt, of a thing of value, but not for

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<sup>1</sup>It should be noted that recently Congress amended Chapter 110 of title 18, United States Code, to include "images of child pornography" (see 18 U.S.C. § 2552A).



pecuniary gain . . . ." We would broaden this new enhancement to apply to any distribution of child pornography, whether or not there was an expectation of receiving something in return.

Any distribution of child pornography substantially magnifies the seriousness of the offense by increasing the victimization of the child involved. Guideline § 2G2.2 covers not only trafficking in child pornography but receipt in violation of 18 U.S.C. § 2252(a)(2). Since the same guideline section covers both receipt and trafficking offenses, the section should distinguish the lesser harm of receipt from the greater one of furthering the sexual exploitation of the child victim by virtue of the distribution of his or her image to others. While there is certainly a difference between marketing child pornography as a business and distributing pornography for other purposes, the seriousness of distributing pornography regardless of the purpose warrants some adjustment. We would agree, however, that distribution for pecuniary gain warrants a greater increase than other distribution but that this should be reflected on the basis of enhancements for the retail value of the material.

(E) Directive to Provide Enhancements for Use of a Computer and the Misrepresentation of the Defendant's Identity

The proposed amendments and issues for comment would implement the two statutory directives to provide an enhancement when the offense involved the use of a computer and an enhancement when the offense involved the misrepresentation of a person's identity. We believe, first, that the computer enhancement ought to be triggered only when a computer is used to facilitate an offense involving a minor victim, and second, that the two enhancements ought to be separate, cumulative enhancements - at least in some of the relevant guidelines, including § 2A3.2 (statutory rape) - rather than a single enhancement.

In congressional hearings leading up to the passage of the Act, witnesses testified how computers have greatly facilitated sex offenses involving children by making it significantly easier for offenders to initiate communication and then develop an ongoing relationship with the child victim. Whether the offense involves misrepresentation or not, the use of the computer reduces the need for face-to-face contact between the adult and the child. Separately, misrepresenting oneself to facilitate a sex crime is insidious and makes the sexual act more likely to occur. This is so whether or not a computer is used in the offense. In face-to-face contacts, defendants have misrepresented themselves, for example, as professional

photographers and have lured children to engage in sexual activity and the production of child pornography. As a result, we believe the two enhancements (for computer use and misrepresentation) should be separate and cumulative, at least in some of the relevant guidelines. Further, we think the Commission ought to seriously consider providing a similar misrepresentation enhancement in §§ 2G2.1 and 2G2.2. See United States v. Hatney, 80 F.3d 458 (11<sup>th</sup> Cir. 1996).

(F) and (G) Enhancements for Chapter 117 Offenses and for Sex Offenses Involving a Pattern of Abusive or Exploitative Activity

These issues for comment address numerous matters involving the congressional directive regarding Chapter 117 offenses generally and the directive to add enhancements for a pattern of abusive or exploitative activity. As the Commission indicated when it voted to publish these issues, the matters involved here are complex and will, to a significant extent, require additional study and consideration. However, we believe there is one pressing concern that can and should be addressed in the current amendment cycle.

As we have indicated in Commission meetings, as expressed by witnesses in congressional hearings, and as detailed in the Commission's own report on the Sexual Predators Act, the most pressing concern surrounding sentencing policy for child sex crimes involves sentencing policy for those convicted of violations of 18 U.S.C. § 2423 (transportation of a minor with intent to engage in illegal sexual activity and travel with intent to engage in a sexual act with a juvenile) and other similar offenses. Predators are increasingly using the Internet to contact, engage, and ultimately to have sex with children. Because current sentencing policy treats such offenses in the same way as traditional statutory rape cases, the resulting sentences, we believe, are wholly inadequate. Such Internet cases and section 2423 cases generally are substantially more insidious and threatening than the heartland of traditional statutory rape cases and as such demand prompt action by the Commission.

We have worked with the Commission staff over the last several weeks to develop some concrete proposals on how to address this pressing problem. We look forward to continuing this work through the remainder of the amendment cycle. For now, we believe generally that the Commission can address the problem by adding several enhancements to § 2A3.2 of the guidelines (statutory rape). The enhancements we are considering are in addition to the separate enhancements we believe are appropriate



for defendants who use a computer to facilitate the crime or who misrepresent themselves. These additional enhancements would likely address offenses that involve coercion (as that term is defined in § 2G1.1) but not force or threat of force as well as offenses where there is a large age differential between the defendant and the victim.

We would expect that consideration of the other aspects of parts (F) and (G), including the implementation of the directive for enhancements for engaging in a pattern of abusive or exploitative conduct, will be addressed as a top priority in the next amendment cycle.

#### **AMENDMENT 5 - IMPLEMENTATION OF THE IDENTITY THEFT AND ASSUMPTION DETERRENCE ACT**

Amendment 5 presents two options for implementing the Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318. The Act directed the Commission to "provide an appropriate penalty for each offense under section 1028 of title 18, United States Code." Id., § 4(a). The Act also directed the Commission to consider various factors, including the extent to which the number of victims involved in the offense, "including harm to reputation, inconvenience, and other difficulties resulting from the offense," and the "number of means of identification, identification documents, or false identification documents" involved in the offense, are "an adequate measure for establishing penalties under the Federal sentencing guidelines." Id., § 4(b)(1) and (2).

We favor Option 2 because it addresses two areas in which we believe the sentencing guidelines are deficient: (1) harm to an individual's reputation or credit standing and related difficulties; and (2) the potential harms associated with producing multiple identification documents, false identification documents, or means of identification. Neither of these harms is reflected by the loss table in the fraud guideline, § 2F1.1, and both were directly addressed by Congress in its directive to the Commission.

Victims of identity theft and fraud often suffer harm to reputation or credit standing and inconvenience when, for example, the offender obtains identifying information and uses it to obtain goods or services in the victim's name, whether or not the victim ultimately suffers direct monetary loss. In some cases the victim does not know that his identity has been used by someone else for an extended period of time, until the victim begins receiving bills resulting from the offender's purchases.



Such a victim may face great inconvenience in convincing creditors that he was not the person who rented an apartment or arranged for a telephone line. In the meantime bills begin to accumulate, and the victim's credit standing suffers while he or she attempts to correct the situation and restore his or her reputation. Option 2 addresses these harms with a 2-level increase and floor of 10 or 12, except where the harms of this nature are only minimal. It also recognizes that in extreme cases an upward departure from the applicable guideline range would be warranted, such as where an individual's identity is completely taken over by another or where the type of harm identified in Option 2 occurs to a significant number of individuals.

Option 2 also addresses the problem of those who manufacture or transfer identification documents, false identification documents, or means of identification. Such persons who traffic in these documents and means of identification may not themselves use their false documents or means of identification to purchase goods and services in the name of the person whose identity is stolen. Thus, these producers and traffickers would not be subject to an increased offense level on the basis of the loss table in the fraud guideline. However, the potential harm they create can be great since each false document or means of identification can be misused by those who obtain it. Option 2 provides a 2-level increase to capture this harm.

We believe Option 2 would be improved by inserting the word "unlawful" before "production or transfer" to clarify that only the unlawful production or transfer of six or more identification documents, false identification documents, or means of identification qualify for the enhancement. It would also make sense to include unlawful possession in this provision.

Option 1 has a somewhat different focus from Option 2. The former provides for a 2-level increase and a floor (ranging from level 10 to 13) where the offense involved the use of an individual victim's identifying information to obtain or make an "unauthorized identification means" of that victim or where the offense involved the possession of five or more "unauthorized identification means." We believe that this option presents an important concept but is problematic in its complexity and its likely failure to capture harm to reputation in some cases.

The concept that we find important is the enhancement for the use of identifying information to obtain or make further means of identification without authorization - that is, to breed other means of identification. For example, a person who obtains some else's social security number and uses it to acquire a

credit card in that person's name creates serious harm to the individual whose name and social security number were used. The latter may not become aware of the offense for some time and, thus, would be unable to prevent the use of the credit card. However, we do not believe that this concept alone always captures the harm the offense causes to the individual victim's reputation or credit standing or the inconvenience he or she must endure in order to correct the situation. For example, a person who uses a stolen credit card or multiple credit cards to make purchases, but who does not breed documents, can quickly build up debt for the credit card owner and affect his or her credit standing.

We believe the best approach would be to graft the "breeder document" concept of Option 1 onto Option 2 as an alternative basis for the enhancement relating to harm to reputation. Thus, a 2-level enhancement or the applicable floor would apply if either the offense involved the breeding of means of identification or if it caused harm to reputation or credit standing or the related harms outlined in Option 2.

While we would recommend melding Options 1 and 2 together, Option 1 as drafted is overly complex. For example, the term "unauthorized identification means" incorporates within it the new term "identifying information," which itself is defined to mean "means of identification" as that term is used in the identity fraud and theft statute, 18 U.S.C. § 1028(d)(3). Thus, we recommend that a simplified version of the concept in Option 1 be developed for purposes of combining it with Option 2.

We also believe that, whichever option is adopted, the floor offense level should be level 12. Such an offense level reflects the seriousness of identity fraud and theft and the resulting harms to individuals. Moreover, given the level 12 floor applicable to frauds that involve sophisticated means, § 2F1.1(b)(5), an equal floor for identity theft assures that it is treated at least as seriously as sophisticated frauds generally.

#### AMENDMENT 8 - CIRCUIT CONFLICT CONCERNING ABERRANT BEHAVIOR

The first of the circuit conflicts on which the Commission has sought comment addresses aberrant behavior. The current Chapter One language sets forth a basis for departure by stating that the Commission has not dealt with "the single acts of aberrant behavior that still may justify probation at higher offense levels through departures." While some courts have interpreted this language narrowly, United States v. Marcello,



13 F.3d 752 (3d Cir. 1994), others have taken an expansive view that considers the "totality of the circumstances," United States v. Grandmaison, 77 F.3d 555 (1<sup>st</sup> Cir. 1996).

We urge the Commission to clarify that an aberrant-behavior departure basis should have narrow scope. We recognize the appropriateness of departure for a small class of offenders whose criminal conduct is truly an aberration - i.e., those who have engaged in a single act of aberrant behavior, rather than a pattern of illegal conduct. If the Commission is silent or adopts an expansive view of aberrant behavior, some courts will thwart the guidelines by granting departures despite multiple, illegal acts by defendants for whom crime has become a pattern. This practice could constitute a serious threat to the guidelines system, particularly in the case of offenders in Criminal History Category I. We are also concerned that a broad basis for departure could erode recent improvements in the guidelines and several under consideration that affect white collar offenses, where many defendants could claim that their criminal acts were aberrational, even where such acts were multiple in nature and occurred over an extended period of time.

We urge the Commission to adopt an amendment in this area that reflects the view of a majority of the circuits. Such an amendment should read as follows:

If the offense consisted of a single act of aberrant behavior, a downward departure may be warranted. A "single act of aberrant behavior" means one act that was spontaneous and involved little or no thought, rather than one that was the result of planning or deliberation; it does not mean a course of criminal conduct composed of multiple acts. A departure on this basis [ordinarily] is not warranted if the defendant has any criminal history points.

The formulation of the Criminal Law Committee submitted to the Commission on March 10 would be another reasonable approach, except that we would delete the word "seemingly" from the phrase "spontaneous and seemingly thoughtless act" since "seemingly" is confusing.

In short, we urge the Commission to preserve the guideline system through promulgating a narrow departure basis for aberrant behavior.

The Department would be pleased to assist the Commission in developing and refining guideline amendments for promulgation by May 1. I would be pleased to answer any questions you may have.