U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

March 12, 2012

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Saris:

On behalf of the Department of Justice, we submit the following comments on the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register on January 19, 2012. We thank the members of the Commission – and the Commission staff – for being responsive to many of the Department's sentencing policy priorities this amendment year and for working extremely hard in addressing all of the guideline issues under consideration. We look forward to continuing our work with the Commission during the remainder of the amendment year on all of the published amendment proposals.

* * *

TABLE OF CONTENTS

DEPARTMENT OF JUSTICE COMMENTS ON PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES AND ISSUES FOR COMMENT PUBLISHED IN THE FEDERAL REGISTER ON JANUARY 19, 2012

1. DODD-FRANK/FRAUD

Part A. Harm to Financial Markets

The Department of Justice supports the Commission's proposal to include a new prong to §2B1.1(b)(15) providing an enhancement of at least 6 levels if the "offense involved a significant disruption of a financial market or created a substantial risk of such a disruption." Such a provision would recognize that certain financial frauds will affect the integrity of the financial system. The deliberate falsification of the financial statements of certain financial firms, or the falsification of the assets on their balance sheets (*e.g.*, the valuation of credit default swaps such firms may have entered with other financial firms), for example, could result in dramatic disruption of the financial markets during and after the fraud period, and we believe such criminal conduct ought to be accounted for under the guidelines.

Should the Commission adopt this enhancement, it may wish to consider including an application note that defines the concept of a "disruption of a financial market" to ensure that it applies to offenses that create the possibility of severe collateral consequences to other financial firms or the proper functioning of credit, equity, commodities, or foreign exchange markets. Finally, the enhancement should be subject to Subdivision (D) of §2B1.1(b)(15), to ensure a minimum offense level of 24.

We do not believe implementing the enhancement as an upward departure would be in keeping with the intent of the Dodd-Frank legislation. Although the government would bear the burden of proving the application of the enhancement should it be included as a factor in §2B1.1(b)(15), most courts will place a higher burden on the government to prove this factor if added only as an upward departure provision.

Part B. Securities Fraud and Similar Offenses

1. Proposed Amendments to Sentencing Policy for Insider Trading – §2B1.4

The Commission proposes to amend §2B1.4 by adding two specific offense characteristics. First, the Commission proposes to create a two-level sophisticated means enhancement, coupled with a minimum offense level of 12 or 14 where the enhancement applies. Second, the Commission proposes to add a four-level enhancement for insider trading offenders who hold specified positions of trust, while exempting those offenders from application of the more general, two-level abuse of trust enhancement found at §3B1.3.

Although the first of these proposed enhancements would be of some use in distinguishing between isolated, opportunistic instances of insider trading and organized insider

trading schemes – rectifying a flaw in §2B1.4's current framework – the decision to borrow the concept of sophisticated means from elsewhere in guidelines will unnecessarily undermine the effectiveness of the new provision. The term "sophisticated means" is a familiar term in the context of the guidelines, and its existing definition is too narrow to carry the meaning that this enhancement requires. The term "organized scheme," which connotes planning and preparation, but is not necessarily limited to complexity or intricacy, is more appropriate to the purpose of the enhancement.

Under the rubric of abuse of trust, the second proposed provision would impose a 4-level enhancement on some, but not all, categories of professionals within the securities and commodities industries. This enhancement, however, conflates two different concepts and addresses neither with sufficient precision. On the one hand, to the extent the enhancement is meant to punish more severely those who abuse a position of trust in connection with committing an insider trading offense, the proposed provision is overly broad. Of the various classes of people identified in the enhancement, only officers and directors of publicly traded companies seem likely to breach a duty of trust in the course of an insider trading offense, and even then only if the trading is in shares of their own company (which is not a requirement for enhancement under the provision as currently drafted). On the other hand, to the extent the enhancement is meant to recognize that lengthier sentences are warranted when insider trading offenses are committed by securities and commodities industry professionals, as opposed to ordinary investors, the proposed provision is not written broadly enough, since the specified categories of individuals do not include all such professionals. For example, the proposed provision would not apply to various hedge fund professionals, who are neither investment advisors nor broker-dealers.

We recommend that the proposed amendments to §2B1.4 be revised in the following two ways. First, we recommend replacing the proposed 2-level enhancement for engaging in sophisticated insider trading with a 2-level enhancement for participating in an organized scheme to engage in insider trading. Second, we recommend replacing the proposed 4-level abuse of trust enhancement with (i) a 2-level enhancement where the defendant is a securities or commodities industry professional, and (ii) an application note that makes clear that the 2-level abuse of trust enhancement set forth at §3B1.3 shall be applied where a defendant (even one who has already received a 2-level enhancement pursuant to the proposed industry professional provision) breaches a duty of trust in connection with the commission of an insider trading offense. Each of these proposals is discussed below.

a. Replacing "Sophisticated Insider Trading" with "Organized Scheme to Engage in Insider Trading"

The guidelines do not presently distinguish between an insider trading defendant who generates a particular loss amount through isolated, fortuitous, or opportunistic activity, and an insider trading defendant who generates that same loss amount through more calculated, systematic efforts. During the recent sentencing hearing for defendant Emmanuel Goffer, United States District Judge Richard J. Sullivan highlighted the need for an enhancement that draws such a distinction. He said:

> Another factor I, of course, have to consider are the facts and circumstances of this crime. And we should remember that insider trading takes all different forms. Insider trading exists when someone gets a tip over the dinner table that they know is improperly obtained information and they trade somewhat impulsively on that. That will be, in some instances, insider trading that will land them under the sentencing guidelines. They would be looking at a guideline range comparable to yours. That's a type of insider trading. It is a crime, it will be punished.
>
> That type of insider trading is very different than what went on in this case. This was a deliberate scheme to procure inside information, privileged information from a law firm by bribing lawyers, corrupting them to breach their duties to their firm, to breach their duties to their firm's clients, and that was the purpose of this scheme. And it was pretty elaborate, involved secret phones, it involved IM messages that were designed to mislead. This was a pretty calculated and pretty long-term scheme that was designed to steal from law firm clients, information that was really valuable, worth millions of dollars, as it turned out. *That's a more serious crime than the first crime of insider trading I described, and the guidelines, as I said, are a blunt instrument and they don't really account for that.* But that has to be considered by a judge in deciding the seriousness of the offenses.

(10/7/11, Tr. 23-24)(emphasis added).

The Commission has proposed to address this need by borrowing the concept of sophisticated means from other parts of the guidelines. *See* USSG §§2B1.1(b)(10)(C) and 2T1.1(b)(2). This solution is not ideal. The term "sophisticated means" is already defined elsewhere in the guidelines to mean "especially complex or especially intricate offense conduct." *See* USSG §2B1.1, Application Note 8(B). That familiar and frequently applied definition, however, is too narrow to reflect the desired line between calculated insider trading and merely opportunistic insider trading. The Commission seems to have recognized as much by first adopting the preexisting definition of sophisticated means in its proposed application note to §2B1.4(b)(2), but then immediately seeking to expand that definition by directing sentencing judges to consider new factors – specifically, the number of transactions, the dollar value of the transactions, the number of securities involved, and the duration of the offense – that speak to the scope and regularity of the offense conduct, but not to its complexity or intricacy.

Asking judges to broaden their established understanding of sophisticated means in the solitary context of this guideline by considering additional factors that do not necessarily bespeak sophistication will undermine the effectiveness of the new provision. In particular, it is likely to generate unnecessary confusion and lead judges to resist applying the enhancement at all. A better approach than importing §2B1.1's concept of sophisticated means is to import §2B1.1's concept of an organized scheme. *See* USSG §2B1.1(b)(13) (providing for a 2-level enhancement for engaging in an "organized scheme" to steal or receive stolen goods). On its face, the term "organized scheme" conveys far more accurately the desired distinction between

considered, calculated, systematic, or sophisticated efforts to obtain and trade on inside information, and fortuitous or opportunistic instances of insider trading.

Accordingly, we recommend that the proposed §2B1.4(b)(2) be altered to state the following:

> If the offense involved an organized scheme to engage in insider trading, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

In addition, we recommend that the proposed Application Note 1 be revised to state the following:

> Application of subsection (b)(2) – For purposes of subsection (b)(2), an "organized scheme to engage in insider trading" means a scheme to engage in insider trading that involves considered, calculated, systematic, or sophisticated efforts to obtain and trade on inside information, as distinguished from fortuitous or opportunistic instances of insider trading.
>
> The following is a non-exhaustive list of factors that the court shall consider in determining whether subsection (b)(2) applies:
> (A) the number of transactions;
> (B) the dollar value of the transactions;
> (C) the number of securities involved;
> (D) the duration of the offense;
> (E) the number of participants in the scheme (although such a scheme may exist even in the absence of more than one participant);
> (F) the efforts undertaken to obtain material, nonpublic information;
> (G) the number of instances in which material, nonpublic information was obtained; and
> (H) the efforts undertaken to conceal the offense.

b. Replacing 4-Level "Positions of Trust" Enhancement with 2-Level "Industry Professionals" Enhancement and 2-Level Abuse of Trust Enhancement

In its proposed §2B1.4(b)(3), the Commission seeks to impose a 4-level enhancement where an insider trading defendant is an officer or director of a publicly traded company; a registered broker or dealer or a person associated with a broker or dealer; an investment advisor, or a person associated with an investment advisor; an officer or director of a futures commission merchant or an introducing broker; a commodities trading advisor; or a commodity pool operator. The provision appears to be derived from an identical provision found at §2B1.1(b)(18). In its synopsis of the proposed amendment, the Commission explains that this proposed provision is intended to create higher sentences for individuals who hold "listed positions of trust."

The unifying feature of the listed positions does not genuinely appear to be that insider trading offenses committed by such individuals inherently involve breaches of a duty of trust. Without question, an officer or director of a public company who engages in insider trading involving shares of his *own* company's stock (not a requirement under the proposed provision) abuses a position of trust. But an officer or director of a publicly traded company who engages in insider trading involving the securities of a different company breaches no obvious duty of trust; nor does, for example, an investment advisor or a broker-dealer who receives an illegal tip and acts on it.

Instead, the theme that unifies the various listed positions, and that warrants higher sentences for defendants who occupy those positions, is that all of those individuals engage professionally in buying, selling, issuing, or trading securities and commodities. Such individuals deserve higher sentences than ordinary investors for at least two compelling reasons. First, higher sentences imposed on such individuals will have a greater deterrent effect. Unlike ordinary investors, industry professionals are routinely presented with the opportunity to commit insider trading offenses, and, thus, higher sentences are needed to ensure that those temptations will not be acted upon. Industry professionals are also more likely to be deterred by the imposition of higher sentences on other industry professionals, since such professionals can be expected to be aware of and attuned to the sentences imposed on others within their own industry. Second, as a matter of punishment, higher sentences are warranted for industry professionals because such professionals are more familiar than ordinary investors with the rules prohibiting insider trading, and thus, their decision to willfully violate those rules is deserving of greater sanction.

In order to address the foregoing issue directly, the Commission should not borrow from an existing provision within §2B1.1 that serves a different purpose. Instead, the Commission should impose an enhancement upon any defendant who commits an insider trading offense while employed as an industry professional. Specifically, we recommend that the proposed §2B1.4(b)(3) be altered to state the following:

> If, at the time of the offense, the defendant was employed in a position that involved regular participation or assistance in creating, issuing, buying, selling, or trading securities or commodities, increase by **2** levels.

Altering the proposed enhancement in this manner has the advantage of sweeping in categories of individuals not identified in the provision as currently drafted, but who deserve the enhancement, including hedge fund professionals, and lawyers whose practices involve regular participation in securities transactions. An application note could provide a non-exclusive list of positions that would typically be covered (including corporate officers and directors), without invariably requiring application of the enhancement in each case (as, for example, with a corporate officer whose position does not involve regular participation or assistance in creating, issuing, buying, selling, or trading securities). Because, as set forth below, a separate 2-level enhancement already exists and would continue to be available where a defendant also abuses a position of trust, the proposed industry professional enhancement need only be 2 levels, rather than the 4 levels imposed by the Commission's proposed §2B1.4(b)(3).

Moreover, because (as discussed above) insider trading offenses by industry professionals may, but need not, involve abuses of trust, the 2-level abuse of trust enhancement provided by §3B1.3 should continue to apply where an insider trading offense involves an abuse of trust, just as a 2-level enhancement is imposed when any other offense involves an abuse of trust. Nothing about the proposed industry professional enhancement – which addresses distinct and independent concerns – should be seen to prevent application of an enhancement pursuant to §3B1.3 in an insider trading case where the offense involves an abuse of trust.

Accordingly, an application note should be added either to §2B1.4 or to §3B1.3, making clear that imposition of the industry professional enhancement does not preclude imposition of an abuse of trust enhancement under §3B1.3. In addition, because an officer or director of a publicly traded company almost invariably breaches a duty of trust when he or she commits an insider trading offense involving his or her own company's securities, the application note should specify that §3B1.3's enhancement should ordinarily be applied in that situation.

2. Calculation of Loss in §2B1.1

In securities fraud cases involving false statements to the market regarding a company whose stock is widely traded on the public markets, it is difficult to determine the precise loss suffered by each victim, given the number of shares held outstanding.[1] In such cases, a methodology is required to reasonably determine the loss among injured shareholders. The Commission has asked for comment on several methodologies recently applied by different courts in criminal sentencing in such securities fraud cases.

Two principles already reflected in the sentencing guidelines are relevant here. First, "actual loss" is defined by the guidelines as the "reasonably foreseeable pecuniary harm that resulted from the offense." USSG §2B1.1, Application Note 3(A)(i). Second, "the court need only make a reasonable estimate of the loss." *Id.* at Application Note 3(C). The estimate may be based on "the approximate number of victims multiplied by the average loss to each victim." *Id.* at Application Note 3(C)(iv).

Of the methodologies identified by the Commission in its Issue for Comment, the modified rescissory method – under which loss is based upon the average price of the security during the period that the fraud occurred and the average price of the security during a set period after the fraud was disclosed to the market – *see United States v. Brown*, 595 F.3d 498 (3d Cir. 2010); *United States v. Bakhit*, 218 F. Supp. 2d 1232 (C.D. Cal. 2002), and endorsed by the court in *United States v. Grabske*, 260 F. Supp. 2d 866 (N.D. Cal. 2002) – is the most faithful to the guidelines. This methodology identifies loss caused by the fraudulent statements, while attempting to minimize the effect of other significant intervening factors by using an average trading price during a set period *after* disclosure of the fraud.

[1] Many such cases involve corporate accounting fraud, which results from misstatements in the company's financial statements. It is possible, however, for misleading statements to be made regarding materially qualitative factors that do not necessarily arise from accounting fraud, such as the failure to disclose material risks.

Although this method "sacrifices some precision," in cases involving millions of traded shares, it best permits the court to "make a reasonable estimate of loss." *Bakhit*, 218 F. Supp. 2d at 1242; USSG §2B1.1, Application Note 3(C). As the court in *Bakhit* noted, using this methodology, "the Court can, without the aid of expert testimony or an extensive factual debate, calculate the loss based upon readily available information. The calculation is based upon objective trading data, easily obtained, that minimizes the speculation found in other proffered calculations." *Id.*

Another methodology for calculating loss in securities fraud cases involving false statements to the market is the simple market capitalization approach, under which loss is based upon the price of the security shortly before the disclosure and the price of the security shortly after the disclosure. *See, e.g., United States v. Moskowitz*, 215 F.3d 265, 272 (2d Cir. 2000). We believe this methodology is likely to be rejected by most courts, because it fails to "account for the actual price at which most holders purchased the company's shares," *United States v. Olis*, 429 F.3d 540, 547 (5th Cir. 2005), and thus likely overstates the loss caused by the defendant.

The Commission has also sought comments on the market-adjusted method – under which loss is based upon the change in value of the security, but excludes changes in value that were caused by external market forces. *See United States v. Rutkowske*, 506 F.3d 170, 179 (2d Cir. 2007); *Olis*, 429, F.3d at 546. *Rutkowske* and *Olis* rely on the Supreme Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005) (requiring loss causation to be clearly pled in civil securities fraud cases), to mandate the use of this method at sentencing in fraud-on-the-market corporate securities fraud cases. In *Dura Pharmaceuticals*, the Court held that a civil plaintiff could not allege reliance on an inflated market price caused by the defendant's misrepresentations to satisfy the pleading and proof requirements of a civil securities fraud claim; rather the Court held that the plaintiff must allege traditional loss causation. *Dura Pharmaceuticals*, 544 U.S. at 342-43, 346. In explaining its holding, the Court noted that a subsequent lower price at the time the plaintiff sold his shares could be attributed to intervening market factors as opposed to a previously inflated purchase price caused by the fraud. Significantly, however, the Court never suggested that the calculation of the loss for the entire civil class of injured shareholders required a methodology that identified and isolated loss caused by intervening market factors (as opposed to a modified rescissory method).

The Ninth Circuit has suggested that the application of *Dura Pharmaceuticals* is misplaced in the criminal sentencing context. *See United States v. Berger*, 587 F.3d 1038, 1043-44 (9th Cir. 2009) (noting that in "criminal sentencing," the amount of loss "that society as a whole suffered from the defendant's fraud" is relevant, and that a court need not determine the loss sustained by "a particular individual" victim). The Ninth Circuit also noted that Congress itself endorsed the use of a method for calculating average shareholder loss that did not require a determination of loss from intervening market events. *See id.* at 1045; *see also Grabske*, 260 F. Supp. at 873 (noting that the Private Securities Litigation Reform Act "mandates" use of the modified rescissory method that looks to the difference between the average purchase price and the average trading price in the period subsequent to the corrective disclosure).

Moreover, it is not clear that the loss causation requirement in the civil context in *Dura Pharmaceuticals* is consistent with the principle that "actual loss" includes "reasonably foreseeable pecuniary harms that resulted from the offense." *See* USSG §2B1.1, Application Note 3(A)(i). It is reasonably foreseeable that securities held by investors are subject to intervening market forces; therefore, corporate officers who induce investors to purchase or hold the securities of their companies based on false statements to the market should be held liable for the reasonably foreseeable consequences of falsely inducing such investment decisions. *See United States v. Kelley*, 2009 WL 19083, at *3 (2d Cir. Jan. 5, 2009).

Additionally, requiring an expert event study to calculate the effect of intervening market factors during the fraud period would be inconsistent with the guidelines principle that sentencing courts should be able to "make a reasonable estimate of loss." USSG §2B1.1, Application Note 3(C). It raises the related "prudential and political concern with relying too heavily on expert testimony." *Bakhit*, 218 F. Supp. 2d at 1240. As *Bakhit* noted, "[m]ost defendants do not have the resources to hire an independent expert and the government has similar financial constraints. . . . Allowing and encouraging expert calculation of loss brings sentencing proceedings one step closer to being a trial in all but name." *Id.*

Finally, we note the question by the Commission as to whether the loss calculation methodologies discussed above are appropriate in all securities fraud contexts. We do not believe that such methodologies should apply in insider trading cases, market manipulation cases involving thinly traded stocks (*e.g.*, "pump and dump" schemes), or investment fraud schemes (*e.g.*, "Ponzi schemes"). In most investment fraud schemes, all investor losses can be proximately attributable to the actions of the defendant. Moreover, all investors are victims of the fraudulent scheme. Thus, defendants should be held to account for the greater of all actual or intended losses to their victims. USSG §2B1.1, Application Note 3(A). For these reasons, we would also recommend that the Commission not disturb the application to §2B1.1 of Application Note 3(F)(iv) (prohibiting, for sentencing purposes, the off-setting of loss to some investors by the gain to some investors).

Similarly, in most market manipulation schemes involving thinly traded penny stocks, most investor losses arise directly from the misrepresentations of the defendants, whose fraudulent promotion of the stock triggers investor interest in an otherwise obscure penny stock and markedly drives up its price. That differs from most fraud-on-the-market cases involving widely traded stocks on the major exchanges, where many investment decisions of persons holding affected shares cannot be attributed directly to the defendant's misrepresentations and where a rise in the share price usually is not uniquely attributable to the fraud. At the same time, there may be some market manipulation schemes in which the stock continues to hold some value after disclosure of the fraud and is not entirely worthless. Thus, we would recommend that the Commission consider providing sentencing courts with the flexibility of using either the rescissory method in such cases, or, if appropriate based on the facts, assigning the greater of all actual or intended shareholder losses to the defendant (which could be determined by calculating the purchase price for all shares purchased during the period in which they were fraudulently promoted). *See Rutkoske*, 506 F.3d at 180 n.4 (suggesting that it would be appropriate to

"attribute the entire loss amount" to a defendant who "promoted worthless stock in worthless companies") (internal quotation marks omitted).

With respect to insider trading, we refer the Commission to our previous comments, *see supra,* and believe that courts should continue to look to the defendant's illicit gains as one of the relevant factors in sentencing.

3. Specific Provisions of §2B1.1

The Commission has asked whether to expand the scope of or increase the amount of the enhancements in §2B1.1(b)(15) and (b)(18). The Department believes that the limitation §2B1.1(b)(15)(C) imposed on the enhancements in §2B1.1(b)(15) should removed, as these offenses are so serious as to warrant the full effect of the enhancement.

Part C. Mortgage Fraud and Financial Institution Fraud

The Department supports the proposed amendments relating to mortgage fraud and financial institution fraud. These proposals would strengthen the government's efforts to bring to justice those who have participated criminally in undermining our economy and economic institutions, and who have victimized consumers. The amendments respond fully to the directive in § 1079(a)(2) of the Dodd-Frank Act in that they underscore the seriousness of these offenses, provide just punishment, will deter others through the use of imprisonment terms, and also better reflect the harmful effects of these crimes.

1. Change to Application Note 3(A) – Foreseeable Harm from Foreclosures

We believe the proposed amendment to include the lender's reasonably foreseeable foreclosure costs into the calculation of loss is appropriate. We note that the amendment would not include penalties imposed by a lender in connection with a default on a mortgage, which we do not believe should be counted as part of the true loss caused by a mortgage fraud. This proposed change will provide uniform application of a principle that some courts have already recognized. *See, e.g.*, *United States v. James*, 592 F.3d 1109, 1115 (10th Cir. 2010); *United States v. Medley*, 231 Fed. Appx. 299 (4th Cir. 2007).

We would recommend, however, that the Commission consider providing guidance on what the government must prove to show that the lending institution "exercised due diligence in the initiation, processing, and monitoring of the loan and the disposal of the collateral." We believe the government should be able to tender presumptive evidence from the lender of such due diligence to avoid needless litigation over the question of what constitutes "due diligence."

The proposed amendment also brings sentencing policy for mortgage fraud in line with the rules of construction for product substitution and other procurement frauds, and computer-related frauds, where these types of consequential damages are included in the calculation of loss. USSG §2B1.1, Application Note 3(A)(v)(I-III). Frauds related to mortgage loans involve the same types of foreseeable financial harms to the institutional victims.

2. Change to Application Note 3(E) – Valuation of Property Sold

We support the proposed amendment to Application Note 3(E)(ii), clarifying that the value obtained at a foreclosure sale would be the correct amount to credit against loss. This language would provide some measure of certainty, and avoid litigation over hypothetical values and speculative motivations of lenders to maximize revenue or dump properties at artificially low prices.[2]

This proposed change will also provide uniform application of a principle that some courts have already recognized. *See, e.g.*, *United States v. Mallory*, 709 F. Supp. 2d 455, 458-459 (E.D. Va. 2010), *aff'd*, 2012 U.S. App. LEXIS 1067 (4th Cir. 2012) (rejecting defendant's argument that he should get more credit against loss than his distressed foreclosure sales price, because the housing downturn was not reasonably foreseeable to him); *cited with approval*, *United States v. Turk*, 626 F.3d 743, 750-51 (2d Cir. 2010); *United States v. Napier*, 273 F.3d 276 (3d Cir. 2001) (where an actual foreclosure sales price exists, there is no reason normally to rely on appraisal value); *United States v. Anderson*, 216 Fed. Appx. 258 (3d Cir. 2007) (using actually realized resale price recognizing that the bank has incentive to maximize price of property sold); *cf. United States v. McKanry*, 628 F.3d 1010, 1019-20 (8th Cir. 2011) (using foreclosure recoveries and recognizing that a depressed sales price was reasonably foreseeable to the defendant).

3. Jeopardizing Financial Institution

The Department supports the addition of subpart (v) to Application Note 12(A) and (B), clarifying that in assessing whether the offense substantially jeopardized the safety and soundness of a financial institution, courts should apply the enhancement even if a government intervention prevented this result. If such harm was likely to result from the defendant's conduct, he should not be able to avoid the enhancement just because the ultimate consequence was avoided through government intervention. The guideline is intended to capture the risk of harm from the defendant's conduct, without rewarding him/her for the government's proactive measures to avoid that harm.

4. Assessing Fair Market Value Of Mortgaged Property

A special rule for determining fair market value of a mortgaged property where there has been no resale by the time of sentencing would be a valuable tool to resolve some thorny areas of conflict and litigation and provide needed guidance to the sentencing court. The proposal put forth for comment – using the most recent tax assessment value of the mortgaged property as *prima facie* evidence of the fair market value – provides a marker that is readily ascertainable. However, using it as *prima facie* evidence is not entirely appropriate. Real estate tax assessment

[2] In some cases, there will not be any third-party buyers at the foreclosure sale, and the lender may purchase the property at the foreclosure sale to be re-sold at a later time. In such circumstances, the collateral may not have "been disposed of at a foreclosure sale." The Commission may want to consider including the words "to a third-party buyer" after the phrase "disposal of the collateral" or "disposed of at a foreclosure sale" to address this circumstance.

practices vary widely across the country, and may be subject to legislative or other limits (caps). In some areas, tax assessments are artificially low for a variety of reasons, including laws or ordinances that prohibit increasing tax assessments by more than a certain percentage each period, or that limit increases for certain classes of owner-occupiers, such as the elderly; or assessment practices that keep the assessed value well below market value. In other parts of the country, assessed value for real estate tax purposes is in fact a fairly true indicator of fair market value. While the assessed value has the benefit of being easily found, it is not always a just statement of the value of a property.

A better test for market value, absent a sale of the property, is the use of comparable sales prices for similar properties, taking into account square footage, other property features (such as number of bathrooms and bedrooms), location, and condition. These figures are available through public sources. Other relevant factors would be the real estate tax assessed value; the changes in that value in the relevant times; and similar changes in sales price for comparably situated properties.

5. Other Issues for Comment and Proposals – Cases from War Zones

We recommend that the 2-level enhancement in §2B1.1(b)(10)(B) – for frauds committed largely overseas – should apply also to crimes of bribery, gratuities, kickbacks, and conspiracy to defraud by interference with governmental functions. Section 2B1.1(b)(10) enhances fraud penalties for three specific aggravating circumstances: (A) where the defendant relocated to avoid law enforcement or regulators; (B) where a substantial part of the fraud was committed from outside the United States; or (C) where the offense otherwise involved sophisticated means. Our experience with crimes occurring in Iraq, Afghanistan, and elsewhere where the United States is engaging in contingency operations, is that the commission of a substantial part of a fraud from outside the United States is indeed a particular harm deserving of an enhancement. These crimes take advantage of particular vulnerabilities in our financial and audit systems, as we deploy resources in war zones and to support peacekeeping and other nation-building efforts. In addition, these crimes often take advantage of the good will the United States extends to other countries, and of the particular mission of the United States as ambassador of free political systems and champion of human rights globally. These crimes are also more difficult to investigate and prosecute because of their overseas venue. Section 2B1.1(b)(10)(B) properly reflects these factors.

The guidelines remain deficient, however, in that they fail to incorporate the 2-level overseas enhancement for other crimes that commonly occur in foreign venues. For cases addressed under Part 2C of the guidelines (including bribery, gratuities, kickbacks, conspiracy to interfere with government functions, and conflicts of interest), committed in substantial part overseas, the same 2-level enhancement should apply. When committed overseas, particularly in a war zone, these crimes present the same aggravated harm as do frauds under §2B1.1, in that they affect the United States' efforts internationally in the same manner. Such crimes, when committed overseas, are also more difficult to investigate and prosecute. We urge the Commission to adopt a 2-level enhancement in Part 2C for crimes committed in substantial part from outside the United States.

Part D. Impact of Loss and Victims Tables in Certain Cases

The Commission has observed "relatively high rates of below-range sentences" in cases where the "impact of the loss table or the victims table (or the combined impact of the loss table and the victims table) may overstate the culpability of certain offenders."

The Department has also observed that the impact of the loss and victims tables in securities fraud cases involving fraudulent statements to the market can sometimes be disproportionate, and that as a result, some sentencing courts are departing downward dramatically from the guidelines. These departures, on occasion, have resulted in the imposition of sentences that do not sufficiently reflect the gravity of the offense. The Department agrees that attempts to alleviate the impact of the loss and victims tables in *certain* securities fraud cases may have the overall curative effect of guiding the sentencing courts to an offense level that still reflects the gravity of the offense.

The Department, however, does not agree that attempting to limit the impact of loss based on the amount of the defendant's gain (*see* Approach (A)) is appropriate in *any* securities fraud case, as these cases merit significant offense levels, even in the absence of immediate financial gain by the defendant. Some corporate executives, for example, are motivated to mislead investors for reasons other than personal financial gain, such as shielding the firm's reputation – and their own – from the consequences of disclosure about the firm's true financial condition. In such cases, the executive has not only misled investors, but he or she may have injured many people and threatened the integrity of the financial system by misleading investors, creditors, other financial firms and regulators about the financial solvency of his or her firm.

The limitations based on defendant gain in Approach (A) also do not take into account the foreseeable gain by co-conspirators who were able to earn significantly more than the defendant because of the defendant's role. In some securities fraud cases, co-conspirators may be motivated to aid each other in the commission of a fraud to promote a business or criminal relationship. For example, a defendant in a market manipulation case may assist another in promoting a fraudulent scheme without receiving immediate financial gain, in exchange for future assistance from his co-conspirator in another fraud. A corporate insider may be motivated to pass material inside information to others in anticipation of future financial benefits from the relationship with the tippees. A corporate executive may be willing to help executives in another company (such as a supplier) inflate their sales figures in exchange for future favors from the business relationship.

Additionally, Approach (A) raises the possibility that the government will find itself in protracted litigation during sentencing regarding the meaning of "the defendant's gain." For example, defendants could raise issues such as whether benefits received (*e.g.*, unvested stock options) should be attributed to the fraud, whether such benefits constitute "gain," and whether the defendant was aware of the potential financial benefit at the time he was engaged in the fraud (*e.g.*, the possibility of receiving a year-end bonus). The government anticipates that under Approach (A), these issues would frequently arise in corporate fraud cases, where benefits

received by executives engaged in securities fraud often turn on financial reporting issues related to the fraud (*e.g.*, inflated revenues that drive increased compensation for executives).

The Department also does not believe that Approach (B), which would limit the impact of the victim table if no victims were "substantially endangered" financially by the offense, is appropriate in investment schemes or market manipulation schemes. In such schemes, the conduct of the defendant is often so predatory as to warrant a significant offense level that recognizes not only the loss incurred by investors, but the fact that the defendant preyed on a significant number of individuals, whom, individually, may have suffered catastrophic losses relative to their financial situation.

With respect to fraud-on-the-market cases involving misstatements to the market, on the other hand, the Department agrees that the current guidelines scheme may disproportionately overstate the defendant's culpability, but does not agree that that Approach (B) is reasonably practicable. It would be extremely difficult for a court to determine that no victims were "substantially endangered" financially in cases involving millions of shares, some of which are held by institutions in state pension funds. Moreover, this approach would only result in an unwarranted exercise at sentencing about the meaning of "substantially endangered the solvency or financial security of at least one victim." For example, would this include a hedge fund that held 100,000 shares affected by the fraud but otherwise was generating substantial returns on its other investments?

The Commission also asks whether the "cumulative impact of the loss table and the victims table" should be limited (Approach (C)). For reasons stated above, we only believe that this approach should be considered in fraud-on-the-market corporate securities fraud cases. In those cases, the loss analysis is admittedly imprecise and spread across millions of shares and the loss table may result in a disproportionately high offense level. It would therefore seem appropriate in this limited set of cases to limit the impact of additional adjustment under the victims table, provided that the enhancement under the loss table is at least 14 levels.[3] We do not believe, however, that Approach (C) should apply to other guidelines that refer to the loss table in §2B1.1 without further study (*see* question 3 in Issues for Comment), as we are unaware of the loss table having a similarly disproportionate impact on the offense level as applied to those guidelines.

---

[3] We note that at least one court has stated that the victim enhancement should only be based on the number of victims whose loss amounts are included in the total calculation of the fraud. *See United States v. Skys*, __ F.3d ___, 2011 WL 650072 at *8 (2d Cir. 2011). We do not believe that this is consistent with the purpose of the victim enhancement, which recognizes that, in addition to total loss, the gravity of the offense is also determined by the number of victims preyed upon by the defendant. Thus, for example, a defendant may have victimized over 250 victims, but only 50 of them had losses so significant as to warrant inclusion in the estimated loss amount, with the rest of the sustained losses (even if significant to the individual victims) having a *de minimus* impact on the loss table. In such cases, failure to include the losses of the remaining 200 victims should not result in a windfall to the defendant that lets him avoid the consequences of the fact that he victimized 250 people. In other cases, a court may be unable to reasonably estimate loss and therefore must rely on the defendant's gain. In such cases, the rationale in *Skys* would also result in an unwarranted windfall to the defendant.

Part E. Additional Consideration for Securities Fraud Guidelines

The Department believes the Commission should further consider an additional mitigating role adjustment for persons engaged in a minimal role in securities fraud cases that permits a court to reduce the impact of the loss table in securities fraud cases if the case meets the following six criteria: (1) the defendant was not an officer or director of a public corporation, a registered broker or dealer, an investment advisor, a commodities trading advisor or a commodity pool operator; (2) the defendant was not providing legal, accounting or auditing services to the company whose securities were affected by the fraud at the time he was a participant in the fraud; (3) the defendant played a minimal role in the fraud; (4) the defendant did not profit from the fraud directly or indirectly (e.g., through the receipt of a bonus or stock option grant that was based on a company's falsely reported financial performance); (5) the case does not involve insider trading; and (6) the adjusted offense level is at least 24 before the special mitigating offense level adjustment may be considered (to ensure that this adjustment is used only to mitigate the potentially disproportionate effect of the loss table rather than to depart to probation routinely).

We believe a role adjustment along these lines would permit courts to avoid the disproportionate impact of the loss table in securities fraud cases on defendants whose role in the fraud may have been minimal and whose culpability is significantly below that of others in the scheme. The provision could be drafted to work in conjunction with §3B1.1 as an additional mitigating role offense level adjustment in qualifying securities fraud cases.

2. DRUGS

The Commission should amend the sentencing guidelines for drug trafficking, §2D1.1, to provide a specific reference for BZP, Benzylpiperizine, in the Drug Equivalency Tables in Application Note 10. In doing so, the Commission should use a marijuana equivalency for BZP that is one-tenth the equivalency for amphetamine ("actual").[4] The Department has no objection to the Commission proposal to add to the guideline for listed chemical offenses the "safety valve" adjustment which is now part of §2D1.1 and that implements congressional drug sentencing policy.

Part A. BZP

BZP is a synthetic designer drug often used in combination with 1-[3-(trifluoro-methyl)phenyl]piperazine (TFMPP), a noncontrolled substance, and other controlled and non-controlled substances. These combinations are promoted to young people as a substitute for 3,4-methylenedioxymethamphetamine (MDMA/"ecstasy") at raves and other all-night dance parties. BZP has no known medical use. It acts as a stimulant in humans and produces euphoria and cardiovascular effects, increasing the heart rate and systolic blood pressure. BZP is about one-

[4] The information contained in this section is derived from DEA data and research.

tenth as potent as amphetamine in producing these effects in subjects with histories of amphetamine dependence. Public health risks of BZP are similar to those of amphetamine.

1. BZP Production, Trafficking and Abuse

BZP is largely produced overseas. Illicit distribution of BZP in the United States involves smuggling bulk powder through drug trafficking organizations from foreign sources of supply. Most BZP is smuggled into the United States from Canada. U.S. drug trafficking organizations (DTOs) generally handle wholesale and retail distribution, and there have been instances of violence attributed to these DTOs. The bulk powder is mostly processed into capsules and tablets, and BZP tablets have turned up in a wide array of colors. The tablets bear imprints commonly seen on MDMA tablets such as crowns, hearts, butterflies, smiley faces or bull's head logos and are often sold as "ecstasy." BZP has also been found in powder or liquid form, packaged in small sizes and sold on the Internet.

BZP powder and pills can be ordered on the Internet from bulk chemical supply companies in China, Cameroon and Singapore. The legality of BZP and TFMPP varies by country and perpetuates the falsehood that this drug is a safe alternative to MDMA. Of particular concern is the seizure of BZP/TFMPP tablets in and around schools where their resemblance to candy or children's vitamins place young children at risk for accidental ingestion. As of February 2010, BZP combination tablets were sold for approximately $10 per pill at the retail level.

BZP is available as either base or the hydrochloride salt. The base form is a slightly yellowish-green liquid. The hydrochloride salt is a white solid. BZP base is corrosive and causes burns. The salt form of BZP is an irritant to the eyes, respiratory system and skin.

BZP may be abused alone for its stimulant effects; it is generally administered orally as powder, tablets, or capsules. Other routes of administration include smoking and snorting. Teenagers and young adults are the main abusers of BZP. The abuse of BZP causes a number of harmful health effects and has resulted in documented hospital emergency department admissions. Some of these admissions have been due to sharply increased body temperature that often results from BZP use.

BZP is sold as a substitute for ecstasy (MDMA), sometimes with and sometimes without the buyer knowing what he is purchasing. This increases the health risks to the buyer because he may be unaware of the effects associated with BZP. Drug substitutions, in general, present public health implications in addition to the risks associated with ingesting psychoactive substances.

The amount of BZP distributed in the United States is no longer small in comparison to MDMA distribution, as the Drug Enforcement Administration (DEA) had earlier reported in 2001. DEA data reflect that whereas over 380,000 tablets containing BZP were seized in 2007, by 2008 seizures had more than doubled to over 1 million tablets. By 2010, this number soared to nearly 2.2 million tablets. In comparison, MDMA seizures decreased during the same time

period. DEA data indicates that from January 2007 to December 2010, the quantity of analyzed tablets containing MDMA decreased from 3.7 million tablets to nearly 2.5 million tablets. Notably, in 2011, analysis of tablets containing either drug dropped significantly to 699,000 for BZP and 867,000 for MDMA.

In addition, BZP samples in state and local forensic laboratories around the country have substantially increased from 2007. Data reveal that in 2007, BZP accounted for less than one percent of analyzed club drugs, with less than 300 reports. By 2008, however, BZP was identified in over 5,000 exhibits, 14 percent of analyzed club drugs. This spike in 2008 placed BZP among the 25 most frequently identified drugs in the National Forensic Laboratory Information System, where it currently remains. After peaking in 2009 in over 13,750 exhibits, BZP dropped 45 percent to 7,500 in 2010 (18 percent of club drugs). Although data for 2011 are still being compiled, BZP reports are currently 19 percent of total analyzed club drugs.

2. The Chemical Structure of BZP and Its Effects

Substances regulated under the Controlled Substances Act (CSA) and referenced in §2D1.1 often share structural features, that is, core chemical structures that allow scientists to group substances into chemical classes such as phenethylamines, opiates, and tryptamines. It is the differences in these features that make the substances distinct. Among the controlled substances listed in §2D1.1, there are no other substances of the piperazines structural class which would include BZP.

Published scientific studies show that BZP has a stimulant effect on the central nervous system that is substantially similar to that of amphetamine, a CSA schedule II stimulant already referenced in the sentencing guidelines.

DEA has generally taken the position that BZP is one-tenth as potent as amphetamine. *See* DEA Office of Diversion Control's Drugs and Chemicals of Concern – BZP, May 2010 (available at http://www.deadiversion.usdoj.gov/drugs_concern/bzp_tmp/bzp_tmp.htm (2-6-2012)). However, some studies show that that BZP is between one-tenth and one-twentieth as potent as amphetamine. These studies measure different effects, including improvement of performance, subjective effects, or cardiovascular responses in humans, behavioral responses in animals.[5] The study most relevant to measuring abuse liability (*i.e.*, the likelihood that the substance will be abused) in humans reported a 10-fold difference between BZP and amphetamine. Campbell *et al.*, 1973 (J Clin Pharm 6: 170, 1973) (using a double-blind clinical study involving 18 subjects with a history of amphetamine dependence and comparing the

[5] For example, in the auditory vigilance test performed by Bye and colleagues [Bye *et al.*, 1973 (J Clin Pharm 6: 163, 1973)], BZP 50 mg and 100 mg significantly improved performance in this test similar to amphetamine 5.0 and 7.5 mg which calculates to approximately a 6 fold (50 mg BZP to 7.5 mg amphetamine) to 20 fold (100 mg BZP to 5 mg amphetamine) reduction in the potency of BZP compared to amphetamine. In another study that measured behavioral responses in animals, Fantegrossi and colleagues [Fantegrossi et al., 2005 (Drug Alcoh Dep 77:161, 2005)] demonstrated that BZP (at doses between 17 to 30 mg/kg) fully substituted for amphetamine in monkeys that were trained to discriminate amphetamine (1.0 mg/kg) from saline which calculates to between a 17 to 30 fold reduction in potency for BZP compared to amphetamine.

subjective, behavioral and autonomic effects – blood pressure, pupil size, heart rate – of 100 mg of BZP, 10 mg of amphetamine and a control). Subjects reported that the effects of 100 mg of BZP were similar to those of 10 mg amphetamine. This finding supports a marijuana equivalency for BZP of one-tenth that of amphetamine ("actual"). *See also* the discussion *infra* regarding the distinction between "actual" amphetamine and mixtures containing amphetamine.

3. BZP and Other Drugs in Combination

As noted above, BZP/TFMPP and other drug combinations are promoted and sold as a substitute for ecstasy. Many tablets sold as ecstasy contain a variety of substances in addition to or instead of MDMA. Other substances such as meta-chlorophenylpiperazine (mCPP), 4-methylenedioxyamphetamine (MDA), amphetamine, 4-bromo-2,5-dimethoxyphenethylamine (2C-B), methamphetamine, methylenedioxyethylamphetamine (MDEA), para-methoxyamphetamine (PMA), para-methoxymethamphetamine (PMMA), gamma-hydroxybutyric acid (GHB) or caffeine have been sold or promoted as ecstasy by drug sellers. It is important to keep in mind that the combination that is most prevalent today (*i.e.*, BZP/ TFMPP) may not be the same combination that is popular in the future.

The studies for the BZP/TFMPP combinations or BZP in combination with other substances are limited and inadequate with regard to the full characterization of behavioral effects of these drug combinations. The understanding of these substance combinations is at its infancy; therefore, caution is advised. We cannot speak with authority as to effects of BZP combinations and proportionalities at this time.

The available preliminary reports regarding BZP in combination with other psychoactive substances suggest that such combinations may elicit other psychoactive effects, like hallucinations, as well as the stimulant-like effects that are elicited by BZP. In a clinical study [Lin *et al.*, 2011 (Psychopharm 214: 761, 2011)] that used a standardized method to assess a drug's subjective effects, the combination of BZP and TFMPP (100 mg of BZP/30 mg of TFMPP oral ingestion) was found to induce subjective effects similar to those of amphetamine and MDMA.[6] We understand that some experts have testified to the effect that the combination of BZP and TFMPP is most closely analogous to MDMA, and that some sentencing courts have adopted this conclusion. As stated, we simply think that the scientific record to date is too thin to draw that conclusion. Conversely, there are ample published scientific studies showing that the pharmacological effects of BZP are similar to those of amphetamine. In light of the available scientific information, we believe the appropriate comparison for BZP, alone or in combination with TFMPP, is amphetamine.

4. Equivalency with Reference to "Actual" Versus Mixture Containing Amphetamine

We believe "amphetamine (actual)" – as compared to the "mixture or substance" – should be used as the preferred measure to compare the quantity of BZP involved in the offense.

[6] This study lacked direct comparators in that subjects were not exposed to MDMA or amphetamine.

The quantities tested in the studies on abuse liability, and the other scientific studies noted above, compare actual drug quantities, not mixtures. If these actual quantities cannot be ascertained in a given case, for example because the concentration of the seized drug sample has not been analyzed, or because there are no seized drugs to analyze, then the comparison should be between amphetamine mixture and the total weight (or estimate) of BZP involved in the offense.

Part B. "Safety Valve" Provision in §2D1.11

Part B of the proposed drug amendments would add to the guideline for listed chemical offenses[7] the "safety valve" adjustment which is now part of §2D1.1 and that implements congressional drug sentencing policy. The Department has no objection to this proposal.

The proposed guideline amendment would add a specific offense characteristic that parallels §2D1.1(b)(16) in the drug trafficking guideline for defendants who meet the criteria set forth at §5C1.2, the guidelines adaptation of the "safety valve."[8] The accompanying proposed application note states that the reduction applies without regard to the offense of conviction and that the offense level floor established at §5C1.2(b), for offenses carrying at least a five year statutory minimum sentence, does not apply. Chemical trafficking offenses do not carry a statutory minimum sentence.

The Department has no objection to adoption of these amendments. The five criteria set forth in §5C1.2(a) generally reflect the statutory criteria at 18 U.S.C. § 3553(f)(1)-(5) that are the basis for relief from *statutory minimum penalties* for certain non-violent, lower level cooperative offenders with minimal criminal history. This provision was adopted with bipartisan support in Congress, has been in effect for more than 16 years and has become an embedded feature of federal sentencing practice.

Federal statutes and guidelines provide for appropriate and reasonably severe sentences for certain listed chemical offenses, and many of these guidelines are calibrated to the quantity of controlled substances that could be manufactured using a given quantity of a given chemical. For example, the base offense level for chemical trafficking offenses involving 100 to 300 grams of pseudoephedrine is level 32, which is the same base offense level applicable to 50 to 150 grams of methamphetamine (actual). *See* USSG §§2D1.1(c)(4) (Drug Quantity Table), 2D1.11(d)(4).[9] The separate table for the three methamphetamine precursors assumes,

---

[7] The guideline covers, *inter alia*, violations of 21 U.S.C. §§ 841(c)(1)-(2) (possession of a listed chemical with intent to unlawfully manufacture a controlled substance and possession or distribution of a listed chemical knowing or having reasonable cause to believe that it will be used to unlawfully manufacture a controlled substance) and 960(d)(1)-(2) (importing or exporting a listed chemical with intent to manufacture a controlled substance in violation of the Controlled Substances Act or the Controlled Substances Import and Export Act and importing or exporting a listed chemical knowing or having reasonable cause to believe that it will be used to manufacture a controlled substance in violation of those laws).

[8] 18 U.S.C. § 3553(f)(1)–(5).

[9] This guideline was created by Amendment 611, effective May 1, 2001, and implemented section 3651 of Pub. L. 106-310, the Methamphetamine Anti-Proliferation Act of 2000. That section directed the Commission to set

conservatively in some cases, a 50 percent yield of methamphetamine (actual). *See* Amendment 611 (Reason for Amendment). We believe it is reasonable to apply the "safety valve" criteria to these offenses. While a substantial "discount" is built into the offense levels for many chemicals in the listed chemical sentencing tables – because of the likelihood that a lesser quantity of a controlled substance will actually be manufactured from the chemicals in a clandestine laboratory and the view that chemical trafficking offenses are less serious in themselves than drug trafficking offenses – such a discount is not applicable to the three most commonly trafficked methamphetamine precursor chemicals.

3. HUMAN RIGHTS

The Commission proposes a two-part amendment to the guidelines for cases involving human rights violations. The first part addresses cases in which a defendant is convicted of a "serious human rights offense," and the Commission has proposed two options. The Department supports Option 1, because we believe it more accurately addresses and accounts for the wide range of conduct involved in human rights offenses. The second part of the amendment addresses cases in which the defendant is convicted of immigration or naturalization fraud related to a human rights violation. The Department supports this proposed amendment but suggests that the definition of human rights violations be expanded. We also suggest a graduated approach be utilized with this amendment.

Part A. Human Rights Offenses

The Department fully supports an amendment to address serious human rights offenses. We believe it is necessary because genocide, torture, war crimes, and the recruitment or use of child soldiers are offenses that do not easily fit under current guidelines. Currently, there are no guidelines that specifically address genocide, torture, war crimes, or the recruitment or use of child soldiers;[10] rather, these offenses must be sentenced under other guidelines that do not necessarily address the conduct or the nature of the various human rights violations. For example, the applicable guideline for genocide is §2H1.1 (Offense Involving Individual Rights), which covers civil rights offenses. Genocide, however, is a particularly heinous offense that involves a specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group. Section 2H1.1 simply does not capture the distinct nature of genocide, nor do the offense levels provided in §2H1.1 necessarily fully address certain genocidal acts.

The Commission has proposed two options for addressing human rights offenses: an amendment to Chapter 2 (Option 1); or, in the alternative, an addition to Chapter 3 (Option 2). The Department supports Option 1 because we believe that it more accurately accounts for the wide range of conduct involved in human rights offenses.

---

penalties corresponding to the amount of methamphetamine that could reasonably be manufactured from a given quantity of ephedrine, pseudoephedrine, or phenylpropanolamine.

[10] Although §2H4.1 applies to child soldiers, it does not address the specific characteristics of the recruitment or use of child soldiers, and it is targeted instead to involuntary servitude and peonage.

Typically, where there is a range of conduct or offense characteristics, the guidelines provide for different base offense levels and various specific offense characteristics.[11] Similarly, Option 1 graduates enhancements along a range based upon specific aggravating factors likely to be present in a human rights case. By contrast, the proposed addition to Chapter 3, while better than the current state of the guidelines, uses a "one size fits all" approach that does not consider specific aggravating factors. We believe that a single level increase in the offenses level is inadequate to deal with the spectrum of human rights offenses. Option 1, by contrast, fills the gap that currently exists in the guidelines and properly addresses, for the most part, the various types of conduct likely to be encountered in a human rights case.

The Department agrees with the proposal to set the base offense level for serious human rights offenses, including genocide, torture, war crimes, and the recruitment or use of child soldiers, at 24, and at 18 for incitement to genocide. Level 24 corresponds with other serious criminal conduct and carries a guideline range of 51-63 months with no criminal history points.

Many human rights offenses will involve the specific offense characteristics set forth in the proposal, and we endorse their inclusion in the guideline. The Department recommends, however, that mental injury or pain and suffering be included in the specific offense characteristic proposed regarding physical injury. If our suggestion is adopted, the specific offense characteristic should read "severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions)."

The Department supports the Commission's proposal for an enhancement for those defendants who possessed a decision-making, command, or superior role at the time of the commission of the human rights offense. Limiting that enhancement, however, to "public official[s] [or military official[s]]," fails to capture individuals who command persons who commit human rights offenses but who may not be deemed an "official" (either because of insufficient rank or otherwise). Thus, the Department recommends that the specific offense characteristic read as follows: "If (A) the defendant was a public official or military official at the time of the offense; or (B) the defendant commanded individuals who committed the human

[11] For example, §2H1.1 (Offenses Involving Individual Rights), provides for three different base offense levels: 12, if the offense involved two or more participants; 10, if the offense involved either the use or threat of force against a person, or property damage or threat of property damage; and 6, otherwise. It also specifies an increase by 6 levels if the defendant was a public official at the time of the offense or if the offense was committed under color of law. Similarly, §2H4.1 (Peonage, Involuntary Servitude, Slave Trade, and Child Soldiers) provides for two base offense levels (22 or 18) and several different specific offense characteristics, depending upon whether the victim sustained any injury (increase of 4 levels if the injury was permanent or life-threatening and increase of 2 levels if the bodily injury was serious), whether there was a dangerous weapon involved (increase of 4 levels if a dangerous weapon was used, or increase of 2 levels if the weapon was brandished or threatened), whether a victim was held in peonage or involuntary servitude (increase of 3 levels if the period was more than one year, or 2 levels if the period was between 180 days and a year, or 1 level if the period was more than 30 days but less than 180 days), and whether any other felony offense was committed during the commission of the peonage or involuntary servitude offense. *See also* §2H2.1 (Obstructing an Election or Registration), which provides for the greater of three base offense levels, and §2J1.5 (Failure to Appear by Material Witness), which provides for a base offense level of 6, if the failure to appear was in connection with a felony matter, or 4, if the failure to appear involved a misdemeanor matter.

rights offense, increase by **6** levels." The foregoing proposed text reflects deletion of the Commission's (B) ("the offense was committed under color of law [or color of military authority]") because that language presumably would reach all those individuals who participated in a human rights offense committed under color of law or military authority, and not just those who might bear greater responsibility for the offense by virtue of their role or position, as this specific offense characteristic seems designed to capture.

Part B. Immigration and Naturalization Offenses Involving Human Rights Offenses

The Department supports the amendment proposed by the Commission but suggests the definition of "human rights violations" be expanded. We also suggest a graduated approach be utilized with this amendment.

1. Definition of "Human Rights Violation"

The Department believes the proposed definition of a "human rights violation" for purposes of this guideline amendment should be broadened. The proposed definition includes only genocide, torture, war crimes and use or recruitment of child soldiers. The Department believes that a broader definition of "human rights violation" should be used that would include extrajudicial killing under color of law.[12] In addition, the definition of "human rights violation" should make it clear that reference to the underlying statutes is a reference to the conduct committed and that the definition does not also incorporate the jurisdictional requirements set forth in the statute.

The Department recommends a three-tiered approach to adjustments in order to account for behavior not currently considered by the guideline section. We recommend one enhancement for those who lie about their own involvement in committing human rights violations; an enhancement for those involved in human rights violations involving a large number of victims; and an increase for those who lied about their membership in a military, paramilitary, or police organization that committed human rights violations (when the evidence does not prove they were personally involved in those violations). This three-tiered approach would account for the main types of human rights cases prosecuted as naturalization fraud or visa fraud.

---

[12] Extrajudicial killing, as defined in the Torture Victims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73, and codified at 28 U.S.C. § 1350 note (and also incorporated by reference in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638), "means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation." *United States v. Jordan*, 9:10-cr-80069 (S.D. Fla. 2010), aff'd, 43 Fed.Appx. 950 (11th Cir. 2011), a case previously analyzed by the Commission's staff, involved extrajudicial killing. Jordan had been attached to an elite special forces unit of the Guatemalan military that, in December 1982, was deployed to the small village of Dos Erres to search for suspected guerrillas and recover weapons that had been stolen in an ambush of a Guatemalan military convoy near the village. Members of the special forces unit interrogated the villagers about the guerrillas and the weapons and then proceeded to kill the men, women and children one by one, throwing many of the bodies into a dry well.

Our approach reflects the seriousness of the conduct the immigration lie concealed. We believe the range of offenses involving human rights violations cannot be fully accounted for with a single adjustment, as is being proposed for these offenses, since a single level adjustment does not deal with the full spectrum of human rights offenses. At one end of that spectrum, a defendant might conceal his or her membership or service in a military unit that committed human rights violations, though it could not be shown whether the defendant participated in the commission of those human rights violations. At the other end of the spectrum, a defendant might conceal the fact that he was a commander of a unit that massacred hundreds or even thousands of men, women and children. In between, of course, is a wide range of underlying conduct, as well as a wide range in the number of victims of that conduct. The Department believes that there is a qualitative difference – a difference the guidelines should recognize – between concealing participation in the persecution of an individual and concealing participation in a massacre of hundreds of innocent civilians. We therefore recommend the three-tiered approach, which graduates the increases.

We believe sentences for perpetrators of immigration and nationalization fraud who have lied about their involvement in human rights violations should begin at or near five years imprisonment. An offense level beginning at level 25 would achieve this result, producing a guideline range of 57-71 months at Criminal History Category I.[13] If such an offender lied about his involvement in an offense involving 50 or more victims, we suggest the offense level be increased by 5 levels to one at or near the maximum sentence – a guideline range of 97-121 months at Criminal History Category I.[14] In previous cases involving immigration and naturalization fraud prosecuted by the Department where evidence existed that the defendants covered up their own involvement in human rights violations, the trial courts have found that the guideline provisions for these offenses were inadequate to deal with the underlying facts of conviction. Our recommendation of a higher offense level for defendants who lied about their participation in human rights violations and accounting for the number of victims would produce sentences consistent with those the courts deemed appropriate.

The Commission's staff previously analyzed three cases (*Jordan*, *Boskic*, and *Graca Lopes*)[15] in which prosecutors brought immigration fraud statutes against individuals who had denied during the immigration process their membership in military organizations that were engaged in substantive human rights violations. In all of these cases, after the defendants lied during the immigration process, they later admitted committing serious human rights violations. The trial courts in each case found that the guideline provisions for §§ 1425 and 1546 were inadequate to deal with the underlying facts of conviction.

---

[13] The Commission's proposal for increases of 10-18 levels is in the same range, with a 14 level increase for §2L2.1 and a 17 level increase for §2L2.2, each producing a guideline range at level 25.

[14] Level 30 is only one level higher than the Commission's proposal for §2L2.1, but 6 levels higher than the high end for level §2L2.2.

[15] Jordan, a member of the Guatemalan military, admitted participating in the murder of the entire population of a Guatemalan village in 1982; Boskic, a member of the Army of the Republic of Srpska, admitted participating in executions that were part of the Srebrenica massacre in Bosnia in July 1995; Graca Lopes, a member of the Cape Verde military, admitted participating in the torture of prisoners at a correctional facility.

If our recommendation for an enhanced sentence for lying about membership in a military, paramilitary, or police unit that committed human rights violations (when the evidence does not prove they were personally involved in those violations) is accepted, we suggest that a modest increase would be appropriate. This increase would produce more appropriate sentences than those received in the majority of cases prosecuted thus far. In most of these cases, the defendants received either probationary sentences or sentences involving very short terms of incarceration. We do not think this is acceptable. The Department suggests that this type of lie warrants a prison sentence which is achieved by setting an offense level of 13. At level 13, for an offense involving one who lies about membership in an organization that committed human rights violations, the guideline range would be 12-18 months for an offender in Criminal History Category I.

The Commission staff has also reviewed approximately 22 cases from ten federal district courts that involved violations of either 18 U.S.C. §§ 1425 or 1546, which have been prosecuted throughout the country involving lying about membership in military organizations that committed human rights violations. Those cases have largely resulted in probationary sentences because the relevant guidelines sections, §§2L2.1 and 2L2.2, provide for a presumptive sentence of 0-6 months. These sentences did not adequately address the serious problem created by prospective immigrants when they falsely deny membership in a military organization, and where the U.S. Government believes that such an organization committed human rights violations.

2. Further Response to the Commission's Request for Comments

The Department believes there are unaccounted-for aggravating circumstances that warrant enhancement or an upward departure provision. These aggravating circumstances include: (1) if any victim sustained physical injuries (or, as we recommend, sustained mental pain or suffering); (2) if any victim was abducted, involuntarily detained or held in a condition of servitude; and (3) if any victim was sexually exploited.

Finally, we do not believe that the grant of amnesty by the country in which the human rights violation occurred generally warrants a reduction or downward departure. Sometimes, in furtherance of resolving a conflict or to promote reconciliation at the conclusion of a conflict in which gross human rights abuses were committed, countries will declare amnesties that permit all or some perpetrators of human rights violations to avoid any domestic consequences for their actions. Such amnesties are sometimes overturned months or years after their promulgation. Moreover, the terms of such amnesties are often difficult to interpret and become the subject of debate, litigation, and legislative action in the countries concerned.

4. SENTENCE IMPOSED" IN §2L1.2

The Commission has proposed an amendment to resolve a circuit conflict over the application of the term "sentenced imposed" in §2L1.2 (Unlawfully Entering or Remaining in the United States) when the defendant's original "sentence imposed" was lengthened after the defendant was deported. Of the two alternatives proposed, the Department favors Alternative B, which would provide that so long as the underlying conviction occurred before the deportation, a subsequent additional term of imprisonment for that offense would count regardless of whether it was imposed before or after the deportation. We believe Alternative B better reflects the purpose of §2L1.2 and treats defendants most consistently.

The amendment would add explanatory language to §2L1.2, which applies to offenders convicted of violating 8 U.S.C. §§ 1325(a) and 1326 (Unlawfully Entering or Remaining in the United States.) The guideline applies a 16-level enhancement if the defendant previously was deported or unlawfully remained in the United States after a felony conviction for, *inter alia*, "a drug trafficking offense for which the sentence imposed exceeded 13 months." If the sentence in such a case was for less than 13 months, the enhancement is 12 levels. The sentence imposed for a prior drug trafficking offense is intended to serve as a rough indicator of the seriousness of the prior offense, and thus the risk posed by such a defendant illegally entering the United States.

An application note to the guideline explains that the length of the "sentence imposed" includes any term of imprisonment given upon revocation of probation, parole or supervised release. Application Note 1(B)(vii). As an example, consider the hypothetical case of a defendant who is convicted of selling cocaine, and receives a six month county jail sentence, with two years' post-incarceration supervision. He is released after serving a six month term, and then, while on supervision, re-offends. His supervision is revoked, and he serves an additional 12 months in the county jail, at the end of which he is deported. If he thereafter returns to the United States and is convicted of unlawful entry, his guidelines calculation includes a 16-level enhancement for his prior offense, because the total term of imprisonment for his prior drug trafficking felony is 18 months. The Application Note includes the added imprisonment term after revocation because a "defendant who does not abide by the terms of his probation has demonstrated that he should not have been given probation in the first place." *United States v. Moreno-Cisneros*, 319 F.3d 456, 458 (9th Cir. 2003).

A circuit split developed on the question of how this subsection is to be interpreted when the defendant was convicted and sentenced to less than 13 months prior to deportation, but then returns to the United States, has his probation, parole or supervised release revoked, and ends up serving a total of more than 13 months' imprisonment on the prior conviction. Alternative A would provide that along with the underlying conviction, any revocation must occur before the deportation before any additional term of imprisonment would count toward the 13-month total. Alternative B would provide that so long as the underlying conviction occurred before the deportation, a subsequent additional term of imprisonment for that offense would count regardless of whether it was imposed before or after the deportation. We favor Alternative B, concluding that it better reflects the purpose of §2L1.2 and treats defendants most consistently.

Section 2L1.2 counts additional terms of imprisonment imposed after revocation of probation as included in the sentence for the underlying conviction both because that is the way such additional terms of imprisonment are typically treated under the law, *see, e.g.*, *United States v. Hidalgo-Macias*, 300 F.3d 281, 285 (2d Cir. 2002), and because, as the Ninth Circuit pointed out in the quote above, re-offending within the period of probation or supervised release indicates that the original sentence was too lenient, and the offender deserved a longer sentence to begin with. Given that fact, when assessing the weight the guidelines should give to a prior conviction, it makes no difference whether the defendant has his probation revoked before or after he has been deported. In either case, the additional term of imprisonment relates as a matter of law back to his original sentence, and in either case, he has demonstrated that his original sentence should have been higher, and that he is a more serious offender than an individual who received a sentence of less than 13 months and did not re-offend.

The cases considering this question are of little guidance here, because for the most part they endeavor simply to interpret the language of the existing guideline. However, one court raised a concern that should be addressed here. In *United States v. Bustillos-Pena*, 612 F.3d 863 (5th Cir. 2010), the court, in interpreting the existing guideline to require that the defendant's probation be revoked prior to deportation, expressed a concern that otherwise, the degree of the enhancement might be determined by whether the defendant who has reentered is discovered first by the state authorities or by the immigration authorities. *Id.* at 867-68. While there is some potential inequity given that possibility, we note that the same potential exists prior to the defendant's deportation, also depending on whether the criminal process or the immigration process moves with more alacrity. If an individual is released from state custody on probation and re-offends, then has his probation revoked and serves a term amounting to more than 13 months, and subsequently is deported and returns to the United States, he receives the 16-level enhancement. If, however, the immigration authorities discover him after he re-offends, but before the state revokes his probation, and the federal authorities promptly deport him, he would receive only the 12-level enhancement. In either case, the Fifth Circuit's concern with a disparity based on the happenstance of which authority moves more quickly is a possibility.

Another potential objection to Alternative B is that the revocation might be based solely on the illegal reentry. While it is likely that most individuals who reenter after deportation come to the attention of the authorities because they have committed some new offense other than merely reentering, some may have their probation revoked based solely on the reentry, and it could be objected that in that situation, the defendant is being doubly penalized for the illegal reentry. We believe that situation is unlikely to arise often, since an individual who has been identified as having illegally reentered the United States is unlikely to both have had his probation revoked and to have served additional time on the underlying conviction before the § 1326 proceeding. Beyond that, however, it does not seem inappropriate to punish an individual more severely for immediately returning illegally to the United States, while he is still on probation for another offense. In any event, to the extent that there is perceived inequity in a given case, it remains the fact that the guidelines are advisory, and a sentencing court is free to consider the sentencing factors in 18 U.S.C. § 3553(a) in determining an appropriate sentence.

5. CATEGORICAL APPROACH

The Commission invites comment on possible amendments to the guidelines' provisions specifying the types of documents that may be considered in determining whether a prior conviction fits within a particular category of crimes for purposes of sentencing enhancements. Option 1 would apply only to determinations under §2L1.2 (unlawfully Entering or Remaining in the United States), while Option 2 would apply throughout the Guidelines Manual in any case in which the nature of the prior conviction is a disputed factor. Both options have four sub-options (A through D), each specifying sources of information – beyond the fact of conviction and the statutory definition of the prior offense – that a court may look to in deciding whether a prior conviction is a proper basis for an enhancement.

We recommend the adoption of Option 2D, under which the sentencing court could consider a broader array of relevant, reliable information in deciding whether a prior conviction can be used for enhancement purposes under the guidelines. Option 2D would permit the use of (1) the four types of documents specified in *Shepard v. United States*, 544 U.S. 13 (2005)(the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, any explicit factual finding by the trial judge to which the defendant assented, and "some comparable judicial record of this information"); (2) "*any* uncontradicted, internally consistent parts of the record from the earlier conviction," *id.* at 31 (O'Connor, J., dissenting) (emphasis Justice O'Connor's); and (3) any other parts of the record from the prior conviction, provided that the information in such other parts of the record "has sufficient indicia of reliability to support its probable accuracy," USSG §6A1.3 (Resolution of Disputed Factors) (Policy Statement).

As the Commission points out, in determining whether a particular prior conviction can be used to enhance a sentence under the guidelines, lower courts have by analogy followed the "categorical approach" of *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard*, *supra.* In *Taylor* and *Shepard*, however, the Supreme Court was addressing a sentencing enhancement under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), for a prior conviction that is a "violent felony," as defined in 18 U.S.C. § 924(e)(2)(B). Because the guidelines are not interpreting § 924(e) and because they are advisory only, *see United States v. Booker*, 543 U.S. 220, 243 (2005), the Commission is free to adopt guidelines that operate in a manner different from the statutory scheme. We believe it should do so here.

Option 2D best comports with a district court's statutory duty to consider a defendant's criminal record – as well as the underlying conduct, if reliably proved – in determining his sentence under 18 U.S.C. § 3553(a). It also furthers the broad purposes of 18 U.S.C. § 3661, which 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 may receive and consider for the purpose of imposing an appropriate sentence." And it reflects the Supreme Court's "traditional understanding of the sentencing process" as "less exacting than the process of establishing guilt. As a general proposition, a sentencing judge 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may

consider, or the source from which it may come.'" *Nichols v. United States*, 511 U.S. 738, 747 (1994)(quoting *United States v. Tucker*, 404 U.S. 443, 446 (1972)). Even information about acquitted conduct may be considered for sentencing purposes, as long as it has sufficient indicia of reliability to support its probable accuracy. *United States v. Watts*, 519 U.S. 148, 157 (1997). *See also Pepper v. United States*, 562 U.S. ___, 131 S.Ct. 1229 (2011).

Limiting a sentencing court's consideration of relevant, reliable information about a prior conviction to the four types of judicial documents listed in *Shepard* unnecessarily hinders its ability to fulfill its statutory duties. These limits have also spawned substantial and unnecessary litigation about what constitutes a judicial record of information "comparable" to that contained in a charging document, a plea agreement or transcript of colloquy between judge and defendant in which the latter confirmed the factual basis for his plea, and an explicit factual finding by the trial judge to which the defendant assented. *See, e.g.*, *Snellenberger v. United States*, 548 F.3d 699 (9th Cir. 2008) (*en banc*) (challenge to use of California minute order and charging document to establish that prior conviction was for a "crime of violence" under USSG §4B1.2), *cert. denied*, 130 S. Ct. 1048 (2010). This litigation has been cited repeatedly by judges, probation officers, prosecutors and defense attorneys alike as the single biggest application issue under the guidelines. *See Transcripts of Sentencing Commission Regional Hearings*, available at www.ussc.gov.

We believe Option 2D is most consistent with the Supreme Court's jurisprudence, best effectuates congressional policy as set out in 18 U.S.C. § 3661, would most effectively address the single biggest application issue, and best serves the purposes of sentencing, including the goal of eliminating unwarranted disparities. For these reasons, we urge the Commission to adopt Option 2D.

6. DRIVING WHILE INTOXICATED

The Commission proposes amending §4A1.2 to clarify that convictions for Driving Under the Influence (DUI) or Driving While Intoxicated (DWI) are always counted, without regard to whether the conviction is a felony and without regard as to whether the conviction would otherwise have been excluded under §4A1.2(c)(1) or (2). The Department supports this change.

Several circuit courts had previously held that current Application Note 5 requires DWI and DUI convictions to be counted in criminal history score calculations, regardless of the exceptions in §4A1.2(c). However, a circuit split was created by the Second Circuit in *United States v. Potes-Castillo*, 638 F.3d 106 (2d Cir. 2011) which held the application note to be ambiguous. The Second Circuit read the Application Note to allow a DWI or DUI conviction to be excluded under §4A1.2(c)(1) but not §4A1.2(c)(2). The proposed language directly addresses the issues raised in *Potes-Castillo* and advises that this type of conviction "always" is counted, regardless of the exceptions in §4A1.2(c)(1) and (2).

The Department agrees with the proposed change. DUI and DWI convictions are serious offenses and should be regarded as such. The language will clarify the Commission's intent and eliminate the circuit split.

7. BURGLARY OF A NON-DWELLING

The Commission proposes three options to resolve differences among the circuits as to when the burglary of a non-dwelling qualifies as a crime of violence. We support Option 1, which would treat *all* burglaries as crimes of violence, because we believe that the burglary of *any* building "involves conduct that presents a serious potential risk of physical injury to another." §4B1.2(a)(2).

As the Commission notes in its Federal Register notice, several guidelines provide for an enhanced sentence if the defendant has previously committed a "crime of violence" – a term defined in various ways in the guidelines and in statute. The definition that has given rise to the circuit disagreements is set forth in §4B1.2(a), which provides that any state or federal offense punishable by a prison term exceeding one year is a "crime of violence" if it "(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Under this provision, the Second and Eighth Circuits have held that burglary of a commercial building is categorically a crime of violence. *See, e.g., United States v. Brown*, 514 F.3d 256, 264-267 (2d Cir. 2008); *United States v. Ross*, 613 F.3d 805, 809 (8th Cir. 2010). The Fourth, Tenth, and Eleventh Circuits have held that burglary of a non-dwelling is *per se* not a crime of violence. *See, e.g., United States v. Harrison*, 58 F.3d 115, 119 (4th Cir. 1995); *United States v. Smith*, 10 F.3d 724, 733 (10th Cir. 1993) (per curiam); *United States v. Spell*, 44 F.3d 936, 938-939 (11th Cir. 1995) (per curiam). The First, Fifth, Sixth, Seventh, and Ninth Circuits have held that whether burglary of a non-dwelling qualifies as a crime of violence turns on a case-specific inquiry. *See, e.g., United States v. Giggey*, 551 F.3d 27 (1st Cir. 2008) (*en banc*); *United States v. Turner*, 349 F.3d 833 (5th Cir. 2003); *United States v. Wilson*, 168 F.3d 916, 928 (6th Cir. 1999); *United States v. Hoults*, 240 F.3d 647, 651-652 (7th Cir. 2001); *United States v. Matthews*, 374 F.3d 872, 880 (9th Cir. 2004).

The Supreme Court's cases construing the very similar definition of "violent felony" in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B), support our position that all burglaries should be treated as crimes of violence. Under the ACCA, a "violent felony" includes a felony offense that is "burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). In *Taylor v. United States*, 495 U.S. 575 (1990), the Supreme Court held that "burglary" within that definition includes burglary of any building or other structure. In reaching that conclusion, the Court noted that burglaries of commercial buildings can sometimes "pose a far greater risk of harm to persons" than burglaries of dwellings. *Id.* at 594; *see also id.* at 585 (citing congressional testimony that a "professional commercial burglary" presents "a very serious danger to people who might be inadvertently found on the premises").

Contrary to the cases from the Fourth, Tenth, and Eleventh Circuits holding that the burglary of a non-dwelling is *per se* not a crime of violence, §4B1.2(a)(2)'s listing of "burglary of a dwelling," rather than "burglary," does not preclude other types of burglary from qualifying under that provision's residual clause. Those cases predate the Supreme Court's analysis of the ACCA's residual clause in *James v. United States*, 550 U.S. 192 (2007). In construing that clause, which is otherwise identical to §4B1.2(a)(2)'s residual clause, the Court stated that "the inclusion of a broad residual provision" indicates that the enumerated offenses are not intended to be an exhaustive list of the qualifying crimes. *James*, 550 U.S. at 200. The Court held in *James* that an offense – there, a Florida offense of attempted burglary – qualifies under the residual clause if it presents a degree of risk comparable to the risk presented by the enumerated offenses. *Id.* at 203. A "comparable" offense, for ACCA purposes, is one that is "roughly similar, in kind as well as in degree of risk posed, to the examples themselves." *Begay v. United States*, 553 U.S. 137, 142 (2008); *see also*, *Sykes v. United States*, 131 S. Ct. 2267, 2273 (2011) (relying on *James* in holding that Indiana's law against knowing or intentional vehicular flight from a law enforcement officer was a violent felony under ACCA; finding the risk created by such conduct to be "similar in degree of danger to that involved in arson" and greater than that ordinarily associated with burglary, which is itself "dangerous because it can end in confrontation leading to violence."). Burglary of a non-dwelling structure meets the *James* and *Begay* tests because it presents a comparable (and sometimes greater) risk than that presented by burglary of a dwelling.

The cases from the Fifth, Sixth, Seventh, and Ninth Circuits, holding that burglary of a non-dwelling may qualify as a crime of violence under §4B1.2(a)(2)'s residual clause depending on the circumstances of the particular case, also predate *James*. Although the First Circuit, in its post-*James* decision in *Giggey, supra*, came to the same conclusion, it took the case *en banc* in part because of "the absence of [ ] guidance" from the Commission, and because it saw "no sign" that the Commission would "resolve the ambiguity" that "has now existed for nearly twenty years regarding whether non-residential burglary is a career offender predicate." *United States v. Giggey*, 551 F.3d at 29. As for the ruling itself, while the First Circuit held that burglary of a non-dwelling does not categorically qualify as a crime of violence under the residual clause, it did hold that a non-generic burglary offense may so qualify depending not on the facts of a particular case, but on application of a categorical approach based on the elements of the offense, *id.* at 38, an issue that the parties had not briefed and that the court of appeals remanded for the district court to consider. On appeal following that remand, a panel of the First Circuit upheld the district court's finding that the Maine burglaries at issue did not qualify as crimes of violence – but, as the panel pointed out, the government had not sought reversal: instead, it had only urged the First Circuit to stay the appeal and to ask the Sentencing Commission to clarify whether non-dwelling burglary is a "crime of violence" for career offender purposes. *United States v. Giggey*, 589 F.3d 38, 42-43 (1st Cir. 2009). The First Circuit declined that request, noting the lack of authority for such a procedure and the lengthy process it would entail. *Id.* In short, the First Circuit's *en banc* decision in *Giggey* should not inhibit the Commission from adopting Option 1's approach to §4B1.2(a)(2)'s residual clause – the approach that, for the reasons stated, best reflects the Supreme Court's holding on the similarly worded residual clause in the ACCA.

Regarding the Commission's request for comment on whether it should make a parallel change to the definition of "crime of violence" applicable to §2L1.2 (Unlawfully Entering or Remaining in the United States), we recommend that the Commission do so.

Subsection (b)(1) of that guideline prescribes an enhancement for a defendant who "previously was deported, or unlawfully remained in the United States," after a single felony conviction for a variety of offenses (drug trafficking, firearms, child pornography, national security or terrorism, human trafficking, alien smuggling) ((b)(1)(A)-(D)), including after a felony conviction for a "crime of violence" ((b)(1)(A)(ii)), as well as after three or more misdemeanor convictions for "crimes of violence" or drug trafficking offenses ((b)(1)(E)). The guideline commentary defines "crime of violence" to mean any of twelve enumerated offenses, including "burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another." §2L1.2, Application Note 1(B)(iii). Thus, the residual clause in the application note's "crime of violence" definition ("or any other offense * * * that has as an element the use, attempted use, or threatened use of physical force against the person of another") differs from §4B1.2(a)(2)'s residual clause ("or otherwise involves conduct that represents a serious potential risk of physical injury to another") – indeed, it mirrors §4B1.2(a)(1)'s alternative "crime of violence" definition (any felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another").

It would make sense to conform the residual clause in the application note's "crime of violence" definition to §4B1.2(a)(2)'s residual clause, because the former does not easily fit two of the offenses enumerated in the application note – namely, burglary of a dwelling and statutory rape, neither of which ordinarily "has as an element the use, attempted use, or threatened use of physical force against the person of another." By contrast, both offenses readily qualify as crimes of violence under §4B1.2(a)(2)'s residual clause. An amendment could avoid unnecessary confusion – and the litigation such confusion generates.

8. MULTIPLE COUNTS (§5G1.2)

This Commission proposes to amend the guidelines to address a circuit split involving cases in which the defendant is sentenced on multiple counts of conviction, at least one of which involves a mandatory minimum sentence that is greater than the minimum of the otherwise applicable guideline range. Under §5G1.2, when at least one count in a multiple-count case involves a mandatory minimum sentence that affects the otherwise applicable guideline range the Fifth Circuit has held that the effect on the guideline range applies to all counts in the case. *United States v. Salter*, 241 F.3d 392, 395-96 (5th Cir. 2001). The Ninth Circuit has taken a different approach, holding that, in such a case, "a mandatory minimum count becomes the starting point for any count that carries a mandatory minimum sentence higher than what would otherwise be the Guidelines sentencing range," but "[a]ll other counts . . . are sentenced based on the Guidelines sentencing range, regardless of the mandatory minimum sentences that apply to other counts." *United States v. Evans-Martinez*, 611 F.3d 635, 637 (9th Cir. 2010); *see also, United States v. Kennedy*, 133 F.3d 53, 60-61 (D.C. Cir. 1998) (one of two counts carried a

mandatory sentence of life imprisonment; district court treated life imprisonment as the guidelines sentence for both counts; the court of appeals reversed, holding that the appropriate guidelines range for the other count was 262 to 327 months).

The proposed amendment generally adopts the approach followed by the Fifth Circuit. We support the amendment. Under §5G1.2(b), courts should determine the total punishment and impose that total punishment on each count, except to the extent otherwise required by law. When any count involves a mandatory minimum that restricts the defendant's guideline range, that guideline range should be restricted as to all counts. This is not only the simplest approach but it also best effectuates congressional intent in imposing the mandatory minimum sentence. We also agree with the Commission that in a case in which a defendant's guideline range was affected or restricted by a mandatory minimum penalty and the court is resentencing the defendant with the mandatory minimum no longer applicable, the court should recalculate the defendant's guideline range for purposes of the remaining counts without regard to the mandatory minimum penalty.

9. REHABILITATION

The Commission has proposed two possible amendments to §5K2.19 (Post Sentencing Rehabilitative Efforts) in response to *Pepper v. United States*, 131 S. Ct. at 1229. The Department has no objection to Option 1. We oppose Option 2.

As a general matter, we fully support efforts by offenders to rehabilitate themselves and to return to their communities as productive citizens. We strongly support the objective of turning offenders into law-abiding citizens that make valuable contributions to society. We are concerned, however, at the prospect of haphazardly discounting punishment for serious federal crimes based on gestures, some empty and some meaningful, taken by offenders after being caught for committing those crimes and characterized as "rehabilitation."

We continue to believe that in most circumstances, an offender's sentence should be based primarily on the crime he committed and his criminal history. Moreover, as a general matter, a defendant's first priority for recognizable post-arrest conduct should be to remedy the harm done to his victims. His own rehabilitation should be considered, if at all, only when a defendant has made real steps towards undoing the harm caused by his crime and has also made demonstrable efforts to make meaningful restorative contributions to society, including sharing with the government what he knows about his, and related, criminal activity. Conduct is restorative when defendant fully cooperates with the government and provides all relevant information of the crime; makes significant progress toward fulfillment of an agreement for, or order of damages to, the victim; makes significant progress towards fulfillment of a court sponsored agreement for, or an order of restitution to, the victim; makes progress to remedy the harm caused by the offense more generally; earns significant credit in an alternative to prison restitution program recognized by the Federal Bureau of Prisons; and makes significant progress toward the achievement of goals stated in pre-conviction or post-conviction contract recognized by a court or the Federal Bureau of Prisons.

With respect to the specific amendments being proposed by the Commission, Option 1 follows from the decision in *Pepper*, and we do not oppose it. We do oppose Option 2, which would rename §5K2.19 and authorize departures for rehabilitative conduct. We think the better way to recognize rehabilitative conduct is through prison credits administered by the Bureau of Prisons. The Department has proposed changes to existing prison credit law, and we are hoping those changes will be enacted soon. If enacted, the administration of credits will provide a uniform and rigorous method of translating rehabilitative efforts into sentence adjustments. If, however, the Commission chooses to move forward with Option 2, we believe the focus should be on restorative principles rather than simply rehabilitation, and that any defendant action that would warrant a reduced sentence would need to be rigorous and meaningful.

10. MISCELLANEOUS

Part A. Amendments related to Cell Phone Contraband Act of 2010

The Department supports the proposed amendments related to the Cell Phone Contraband Act. These amendments, at §2P1.2, would result in an enhanced penalty for contraband cell phones, consistent with the Act and title 18 U.S.C. § 1791.

The number of contraband cell phones found in federal prisons is increasing. In 2011, 3,411 cell phones were recovered from Bureau of Prisons institutions, and approximately 36% of those were found in secure facilities. Cell phones found in secure locations present significant security concerns. Many inmates possess the knowledge and motivation to use these contraband cell phones for criminal or illicit purposes, which might include witness and law enforcement intimidation, victim harassment, and continuing criminal enterprises beyond the detection of the Bureau's monitored telephone system.

Although cell phone contraband statutory criminal penalties are similar to the statutory penalties for alcoholic beverage, currency, or controlled substance contraband, the Department believes cell phone contraband is a more significant threat to institution and public safety and security than those items. We believe the risk presented by cell phone contraband is more analogous to risk presented by an object that might be used as a weapon or as a means to facilitate escape. As such, we support a base offense level of 13 for cell phone contraband (§2P1.2(a)(2)).

Part B. Amendments related to Prevent All Cigarettes Trafficking Act of 2009

As a preliminary matter, we note that a number of federally recognized tribal nations have expressed significant concerns about the Act's implications for tribal sovereignty and tribal treaties, and we suggest the Commission consider tribal input regarding appropriate sentences, as such sentences may affect tribal members and tribally licensed entities. We note further that the comments below reflect the Department's general views on sentencing for PACT Act offenses

and do not address the questions of whether or under what circumstances tribal sovereignty or particular tribal treaties might affect the appropriate sentence for tribal members or tribally licensed entities under the statute.

The Department of Justice has the following comments regarding the proposed guideline amendments related to the PACT Act.

We recommend referencing offenses under 15 U.S.C. § 377 to both §2T2.2 and §2T2.1. In addition, we believe it would be useful to add an application note to § 2T2.2 regarding 15 U.S.C. § 377 along the following lines:

If the violation is a regulatory one under 15 U.S.C. § 377, and there is no tax loss involved, apply this guideline. If there is a tax loss, apply §2T2.1.

We also recommend referencing 18 U.S.C. § 1716E offenses to §2T2.2.

Certain violations of 15 U.S.C. § 376, such as failure to register with the Bureau of Alcohol, Tobacco, Firearms and Explosives, or with States, and of 15 U.S.C. § 376a, such as shipping cigarette packages in violation of weight restrictions or failing to properly maintain specified records, are essentially regulatory offenses that will not result in any tax loss. For such violations, §2T2.2 is the appropriate guideline, as such violations are similar in nature to tobacco regulatory offenses under the Internal Revenue Code, 26 U.S.C. Chapter 52.

For substantive violations of the PACT Act resulting in tax losses, §2T2.1 should be applied. This guideline is keyed to the tax table in §2T4.1, which ties sentences to the amount of tax loss. This guideline is also used to determine sentences for similar violations under the Contraband Cigarette Trafficking Act, 18 U.S.C. Chapter 114. *See* §2E4.1 and §2T2.1, both of which reference §2T4.1.

We do not believe §2T2.2 should be used for substantive PACT Act violations that result in tax loss. As you are aware, this guideline is generally for regulatory misdemeanor offenses and rarely results in prison time. When Congress amended the Jenkins Act, 15 U.S.C. § 375 *et seq.*, as part of the PACT Act, the penalties for these crimes were increased from a 6-month misdemeanor to a 3-year felony. Congress intended to give prosecutors and the courts a powerful tool, with more substantial penalties, to combat illegal cigarette trafficking. However, if the guideline for substantive PACT Act offenses is given an offense level of 4, we believe congressional intent will be undermined and the PACT Act will not be the meaningful enforcement statute it was intended to be.

Part C. Amendments related to the Indian Arts and Crafts Amendments Act of 2010

The Department has the following technical comments regarding the proposed amendments to the statutory index regarding the Indian Arts and Crafts Amendments Act of 2010, on page 70 of the proposed amendments:

- 15 U.S.C. § 377 – the correct reference should be §2T2.2 which pertains to regulatory offenses (15 U.S.C. § 377 pertains to reports to be filed); §2T2.1 should be deleted (because 15 U.S.C. § 377 does not require payment of any taxes).

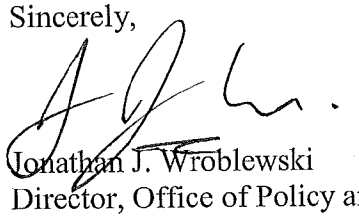
- 18 U.S.C. § 1716E – should reference only §2T2.2. This statute deals with regulations regarding non-mailability of certain tobacco products (note however, that there is one provision that provides for an exception upon filing of an affirmation that that taxes have been paid in certain circumstances (18 U.S.C. § 1716E(b)(5)(C)(III)), but this provision does not criminalize non-payment of the underlying taxes).

- 18 U.S.C. § 1158 – should reference only §2B5.3 because 18 U.S.C. § 1158 deals with trademark infringement. If the defendant fraudulently misrepresented counterfeit Indian arts and crafts, then he should be charged under § 1159 (which correctly references §2B1.1).

* * *

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to working further with you and the other Commissioners to refine the sentencing guidelines and to develop effective, efficient, and fair sentencing policy.

Sincerely,



Jonathan J. Wroblewski
Director, Office of Policy and Legislation

cc: Commissioners
Judy Sheon, Staff Director
Ken Cohen, General Counsel