



U.S. Department of Justice

Washington, D.C. 20530

MARCH 16, 1992

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

This is in response to the publication by the Sentencing Commission of proposed amendments to the sentencing guidelines. At the public hearing on the proposed amendments, we testified and submitted a written statement on a number of important issues. However, our statement did not address all areas of concern. The following addresses other areas of significant concern to the Department.

Amendment 1(A) \$1B1.3. Relevant Conduct

Amendment 1(A) more clearly defines relevant conduct and moves language regarding jointly undertaken activity from the commentary to the guideline. We generally support the proposed revision of the guideline in that we believe it will add clarity to the provision. However, the proposed commentary changes are problematic in several respects.

First, the Commission proposes to provide new guidance on what constitutes jointly undertaken activity. The proposal states that the court may consider any explicit or implicit agreement. However, it then indicates by way of example that a factor to be considered in determining what qualifies as jointly undertaken criminal activity is whether the defendant "benefited directly, or expected to benefit directly, from the conduct of others that occurred prior, contemporaneous, or subsequent to the defendant's joining the criminal activity" Application Note 1. This concept of direct benefit appears in several other places in the proposed commentary and is the only explicit example provided of a relevant conduct factor to be considered in reaching a determination concerning the scope of jointly undertaken activity.

We are concerned that the proposed language will frequently make the scope of jointly undertaken criminal activity turn on too narrow a standard -- whether there has been direct benefit to the defendant. Courts may construe the direct benefit language

to require monetary gain to the defendant. However, benefits may accrue to the defendant in indirect ways. For example, the defendant's employer or organization may gain from the offense. In savings and loan fraud many executives have engaged in large-scale fraudulent transactions designed to deceive federal regulators into believing that their institutions were solvent when they were not. The benefit of the unlawful activity may be indirect to the organization in the form of averting regulatory action, rather than direct in the form of profits either to the organization or the defendant. A further example of indirect benefits can be seen in antitrust conspiracies where unlawful conduct by an individual defendant may benefit his or her organization or employer through increased profits and the individual only indirectly through continued employment. The same is true of drug cartels, in which a low-level participant may benefit the drug conspiracy through his jointly undertaken criminal activity to make illegal sales and himself only indirectly through continued participation in an ongoing organization or protection from competitors not involved in the defendant's organization. We urge deletion of the direct benefit concept from the commentary.

We also recommend that illustration g in Application Note 1 be revised because it currently indicates that a street-level drug dealer who knows of other dealers in the area who share a common source of supply with him is not engaged in a jointly undertaken criminal activity with them. It may be true in some circumstances that such a street-level dealer is not jointly engaged with other dealers, but this is not necessarily the case. We recommend that the second sentence be revised to read:

The defendant is not accountable for the quantities of drugs sold by the other street-level drug dealers if they merely shared a common source of supply and there is no other evidence of joint activity.

The remainder of the illustration should be deleted because it may suggest that sharing of resources and profits is the only scenario in street-level drug dealing that qualifies as jointly undertaken activity. We think it is preferable to delete these examples than to attempt to give a more complete list because the courts may read too much intent into the failure of the illustration to include a particular scenario.

In addition, it would be helpful to include in the commentary an indication that while the changes are meant to clarify the scope of relevant conduct, they are not intended to provide a windfall to the leaders or organizers of an illegal activity. The latter may direct others in ongoing criminal activity but not actually jointly undertake any direct participation in any particular criminal act. It would appear that this type of criminal involvement should be covered by

proposed §1B1.3(a)(1)(A), rather than (B), which discusses jointly undertaken criminal activity. However, this application to the leader or organizer of a criminal activity should be clarified.

Another useful addition to the commentary would be an example related to unlawful gang-related activities. Such an example could foster appropriate uniformity in sentencing in gang-related crimes.

Amendment 1(B) §1B1.3. Relevant Conduct

This amendment adds an application note to describe "common scheme or plan" and "same course of conduct." While we generally favor the amendment, there are several problems. First, we believe it would be ill-advised to include a specific time period, such as the 120 days included in the proposal, as applicable to the term "same course of conduct." The proposed language recognizes the difficulty with any specific time period and states that the 120-day period is only a general and not absolute standard. Nevertheless, we can envision conduct by sophisticated offenders aimed at avoiding the consequences of treatment under the specified time period as well as unnecessary disputes over the exact timing of the conduct.

Finally, we also recommend amendment of the application note to address conduct that preceded the statute of limitations period. Because the issue is not now clear, the commentary should state: "Conduct that is part of the same course of conduct or common scheme or plan as the offense of conviction is relevant for purposes of sentencing under §1B1.3(a)(2) even though it occurred prior to the statute of limitations period for the offense of conviction."

Amendment 2(B) §1B1.8. Use of Certain Information

The proposed amendment would provide that when a defendant agrees to cooperate with the government by providing information about his own unlawful activities and as part of the agreement the government agrees that self-incriminating information provided will not be used against him, then the information shall not be used in determining the applicable guideline range. Currently, a defendant must provide information about the unlawful activities of others to receive the benefit of this provision.

We object to the proposed amendment. In most cases it will encourage pleas only from defendants who fear that the government eventually will learn of their other criminal conduct from coconspirators or others. Such persons would seek to escape punishment by confessing early and would have little incentive to provide information about the unlawful activities of others. We

see no reason to reward a defendant by excluding incriminating evidence in the guideline calculation simply because he tells the government what he has done. The acceptance of responsibility guideline addresses this concern.

Amendment 3 §1B1.12. Juveniles

Amendment 3 adds a new policy statement regarding persons sentenced under the Federal Juvenile Delinquency Act. It provides that the guidelines do not apply but that they may be used as a starting point in sentencing the juvenile. It further provides that sentences for juveniles that are above the range that would apply to an adult should be justified by specific reasons but that sentences below the range "may be appropriate."

As written, the policy statement seems to be an invitation to sentence juveniles at lower than the guideline sentence that would apply to an adult offender convicted of the same offense. The justification seems to be the offender's youth. However, many juveniles are close to adult age when they commit offenses, and others engage in conduct that constitutes a serious offense when committed by an adult. We believe that the policy statement should take a more neutral approach and provide that the guidelines should be used as a starting point but that a sentence above or below the range that would apply to an adult may be appropriate in a particular case. The policy statement should encourage justification for sentencing outside the range in either direction.

Amendment 4(A) §2A3.2. Criminal Sexual Abuse of a Minor;
§2A3.4. Abusive Sexual Contact

The proposed amendments add cross references to the guidelines for criminal sexual abuse of a minor and abusive sexual contact. The proposed cross references would require application of the guidelines for more serious sexual abuse offenses if the offense involved such conduct. We favor the proposed amendments since they foster a real-offense approach to sentencing. However, there is a technical problem with current guideline §2A3.1 and the proposed amendments that should be corrected.

Under current statutes there is no longer a federal offense described as "assault with intent to commit criminal sexual abuse." The conduct described by this phrase is now encompassed within the crime of aggravated sexual abuse under 18 U.S.C. §2241(a) and the crime of sexual abuse under 18 U.S.C. §2242(1). Both of these statutes include sexual abuse accomplished by force or threat and attempts to commit sexual abuse by force or threat. In recognition of this, the offense under 18 U.S.C. §113(b) of "assault with intent to commit any felony" now specifically

excludes felonies under chapter 109A, which are the sexual abuse felonies set forth in 18 U.S.C. §§2241 and 2242.

For this reason we suggest that the title to guideline §2A3.1 be revised to omit the phrase "assault with intent to commit criminal sexual abuse." A title such as "Criminal Sexual Abuse and Aggravated Criminal Sexual Abuse or Attempt to Commit Such Acts" would include the same conduct, more accurately reflect the current statutes, and be parallel to the titles for §§2A3.2 and 2A3.3. We also suggest that the now obsolete phrase "assault with intent to commit criminal sexual abuse" be omitted from the text of the proposed guideline amendments where it appears.

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Amendment 5 §2B1.1; 2F1.1. Fraud, Theft and Embezzlement

Proposed amendment 5 would change the larceny and fraud tables, guideline §2B1.1 and §2F1.1, by eliminating the specific offense characteristic of "more than minimal planning" and building the two-level increase into the loss tables. The proposal also provides three alternative loss tables. The Commission also requests comment on conforming changes to other "loss tables," specifically noting the tax loss table in guideline §2T4.1.

We strongly oppose the elimination of the two-level upward adjustment for fraud offenses for "more than minimal planning." The Department prosecutes many fraud cases sentenced under guideline §2F1.1 in which there is no dollar loss associated with the crime. These cases arise under 18 U.S.C. §1028, for example, involving false identification documents. In other cases, such as antitrust or fraud charging mislabeling or other types of misrepresentation, it is impossible to assign a figure for economic loss.

Losses are extremely difficult to document and are thus unaccounted for in many cases due to defendants' successful efforts to hide the scope of illegal activity. Losses are frequently underestimated in odometer and food and drug fraud cases, for example, because of the effort required to quantify them. These characteristics are shared by many fraudulent schemes which involve poor records and an obscure paper trail but include many victims.

In addition, the Department often prosecutes individuals involved in financial or other fraud schemes and property crimes which simply do not result in large monetary losses but which, by virtue of the defendants' involvement in repeated transactions over an extended period to time, would fall within the definition of "more than minimal planning." Particularly if a defendant is caught early in a fraud scheme before substantial losses are amassed, it may be impossible to establish a significant loss

from the fraud, but eminently feasible to show the extent of "planning".

Moreover, as a conceptual matter, we agree with the background to guideline §2B1.1 that "[p]lanning and repeated acts are indicative of an intention and potential to do considerable harm. Also, planning is often related to increased difficulties of detection and proof." These factors often occur in public corruption cases, and warrant application of a specific offense characteristic apart from the dollar value of the money involved in the scheme. Simply stated, complex schemes to defraud often warrant harsher treatment than simple ones. The flexibility in application that may result from this additional characteristic is desirable in allowing the government and the court to distinguish between complex and simple schemes that often require different sentences even if similar amounts of loss are involved. The extent of planning of a fraudulent scheme is an excellent measure of a defendant's culpability. Thus, we urge that the "more than minimal planning" specific offense characteristic be retained.

In our experience the "more than minimal planning" adjustment has not been difficult to apply in practice. If "more than minimal planning" is not always applied uniformly by the courts, we recommend clarifying commentary and more examples, rather than elimination of the enhancement.

Although the Commission's proposed loss tables purport to take into account the elimination of the two-level increase for "more than minimal planning," a careful review of the tables shows that they do not fully incorporate this adjustment, particularly at the lower and middle sections of the table. At most, the new tables seem to be approximately one level higher than the current tables in mid-range loss amounts. This effectively represents a one-level reduction over current guideline calculations. Many cases, such as food and drug and odometer fraud, for example, which typically involve losses less than \$20,000 and which in the past have virtually always received increases for "more than minimal planning," would lose one offense level under the structure of the new loss tables. The lower end of the loss table is also often implicated in corruption cases where the dollar amount may not be large or readily determinable. Such cases warrant increased sentences, not the decreases that apparently would result from the proposed amendment.

The tables also appear to contain a slower increase in levels in the moderate range of frauds -- \$200,000 to \$3,000,000. In our view, these proposed tables fail to punish fraud adequately in the moderate range, the most common sort of fraud.

The Department opposes adoption of any of the three "alternative" loss tables. The first loss table set out in the proposed amendment appears to build the two-level increase into the table as quickly as possible, while the three alternative tables do not seem to raise offense levels at all, despite the elimination of the "more than minimal planning" adjustment. Thus, these alternatives require greater losses than the first proposed loss table to reach similar offense levels, an undesirable result.

Moreover, we strongly favor the one-level increase tables as opposed to the broader two-level increase alternative. By broadening the range of the loss between offense levels and providing that the offense levels increase in increments of two, the two-level table reduces the impact of the table on many of those defendants at the lower end of the table. In our experience there has been only limited litigation over the difference between one loss level and the next. To the contrary, by increasing the amount of the loss by two offense levels at a time, alternative table three could result in an increase in litigation over precise dollar amounts.

A large number of the Department's tax cases fall at the lower end of the tax loss table. Thus, any change in the larceny and fraud tables which might impact on the tax loss table and reduce the impact at the lower end of the scale would adversely affect our criminal tax enforcement effort. Accordingly, we strongly urge the adoption of tables with one-level rather than two-level increments for tax as well as for fraud offenses.

With respect to the Commission's request for comments on comparable changes to other loss tables (and, specifically, the §2T4.1 tax table), we urge that if the larceny and fraud tables are increased, the tax table also be increased. There is no reason why tax and other comparable offenses should be treated any less seriously than larceny and fraud offenses.

Amendment 9 §2N2.1. Food and Drugs

The Commission has proposed two options for amending the food and drug guideline. The first converts an instruction currently in an application note to a cross reference regarding offenses committed in furtherance of other offenses. The second option expands the current guideline, which currently provides a base offense level of 6 and no specific offense characteristics. The second option provides enhancements for prior convictions under the Federal Food, Drug and Cosmetic Act, violations of a judicial or administrative order, and public health risks. In addition, it includes the cross reference in Option 1.

We urge the Commission to adopt Option 2 with the modification recommended below. A major purpose of the Federal

Food, Drug and Cosmetic Act is to protect the public health by insuring pure foods and drugs. Although violations of the Act may cause a risk of injury or illness, the current guideline, §2N2.1, fails to recognize this risk. The creation of a public health risk by a violation of a statute aimed at preserving the public health should not require the government to argue for an upward departure; this factor should be built into the guideline. Without a specific offense characteristic recognizing the health risk created by the improper distribution of medical drugs, foods, or biological products, the guideline fails to assure a sentence that would serve the punishment, deterrence, and other purposes of sentencing.

The proposed guideline also recognizes that defendants with prior food and drug convictions should receive an enhanced sentence, as should those who violate a judicial or administrative order. We believe this feature is necessary because the Federal Food, Drug and Cosmetic Act (FFDCA) treats second offenses that would otherwise be misdemeanors as felonies. However, a defendant with a prior misdemeanor conviction under the FFDCA is unlikely to score above criminal history Category I. Thus, the enhancement for prior FFDCA convictions would not result in double counting, except in rare cases.

While we urge the Commission to adopt Option 2, we recommend a modification in the proposed cross reference (which is identical in both options). It arguably would change existing law in a manner adverse to the effective prosecution of FFDCA offenses. The Commission indicates that the cross reference was added in an effort to make the language of guideline §2N2.1 conform to that of other guidelines; it does not appear that an adverse impact on cases involving fraud was intended.

The FFDCA distinguishes between misdemeanors and felonies on the basis of intent rather than on the basis of other acts associated with the offense. Violations committed with "intent to defraud or mislead" are felonies under 21 U.S.C. §333(a)(2). The same violations committed with less than this level of intent are misdemeanors under the FFDCA. The current food and drug guideline is only intended to apply to regulatory misdemeanors. Felony cases require application of other relevant guidelines. Application Note 2 to §2N2.1 currently accomplishes this result by providing as follows:

If the offense involved theft, fraud, bribery, revealing trade secrets, or destruction of property, apply the guideline applicable to the underlying conduct, rather than this guideline.

Because intent to defraud or mislead is an element of a felony violation, numerous courts have held that the fraud guideline, §2F1.1, applies to food and drug felony cases. In

upholding the use of the fraud tables for FFDCA felonies, two courts of appeals have specifically relied on the commentary of §2N2.1 cited above. United States v. Cambra, 933 F.2d 752, 755 (9th Cir. 1991); United States v. Arlen, 947 F.2d 139, 146-47 (5th Cir. 1991).

The new amendments (in both options) propose replacing the cited commentary with the following language:

If the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline, apply that other offense guideline if the resulting offense level is greater than that determined above.

This new language would arguably require proof that the violation being sentenced was committed in furtherance of a separate and distinct fraud in order for the fraud guideline to apply. Under this interpretation of the new language, the fraudulent intent constituting an element of the violation being sentenced would not be sufficient for the fraud guideline to apply. The effect of this new language would, therefore, be to add an onerous burden for the government, because the fraud guideline may be held to apply only if the government proved involvement in a collateral fraud. The proposed cross reference to §2N2.1 would arguably take away the favorable court decisions cited above.) ?

To avoid what appears to be an unintended result in converting an instruction in commentary to a cross reference in the food and drug guideline, we propose the following cross reference:

If the offense involved fraud, apply §2F1.1 if the resulting offense level is greater than that determined above. If the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline, apply that other offense guideline if the resulting offense level is greater than that determined above.

Such a change would preserve for guideline purposes the present reference to fraud as an element of a food and drug felony offense.

Amendment 10 §2Q1.2. Mishandling of Hazardous or Toxic Substances

Amendment 11 §2Q2.1. Fish, Wildlife, and Plants

Enclosed are detailed comments prepared by our Environment and Natural Resources Division regarding Amendments 10 and 11.

Amendment 12 §2S1.3; §2S1.4. Money Laundering and Monetary Transaction Reporting

Amendment 12 would significantly change the treatment of violations of 26 U.S.C. §6050I, which requires persons engaged in a trade or business who receive \$10,000 or more in cash in one transaction (or a series of related transactions) to report the receipt of those funds by filing form 8300 with the Internal Revenue Service. Sentencing for the willful failure to file a form 8300 (26 U.S.C. §7203) would be transferred from guideline §2S1.3 to §2S1.4 and the filing of a false form 8300 (26 U.S.C. §7206(1)) transferred from guideline §2T1.3 to §2S1.4. These changes create a number of problems which raise serious concerns. In our view, the better approach would be to sentence these violations under guideline §2S1.3. Set forth below is our proposed guideline language for your consideration.

Upon reflection, we question the premise underlying the proposal that "[c]ertain violations of 26 U.S.C. §7203 and 7206 are more closely comparable to violations covered by §2S1.4 . . . than to the guidelines presently referenced to these violations." Rather, we believe that violations relating to form 8300 are more similar to currency transaction report (CTR) violations (reporting requirements for financial institutions under 31 U.S.C. §5313, now sentenced under guideline §2S1.3) than to currency and monetary instrument report (CMIR) violations (covered under §2S1.4). The CTR and form 8300 provisions are complementary: a financial institution engaging in a cash transaction greater than \$10,000 must file a CTR; a trade or business receiving more than \$10,000 in cash must file a form 8300. In both cases it is a criminal offense to structure or to attempt to structure a transaction for the purpose of evading the reporting requirements. CMIR requirements, in contrast, are imposed on a person (as opposed to a financial institution or a business) who transports more than \$10,000 in cash into or out of the United States, and there are no structuring provisions with respect to CMIR violations.

We strongly support raising the base offense level for the willful failure to file a form 8300 from 5 to 9, as proposed. The present base offense level of 5 in guideline §2S1.3 for willful failure to file a form 8300 is much too low to properly reflect the provisions of the Anti-Drug Abuse Act of 1988 (Pub. L. 100-690), which increased the maximum term of imprisonment for failure to file a form 8300 to five years (26 U.S.C. §7203). (Other violations of 26 U.S.C. §7203 are punishable by not more than one year in prison.) As presently drafted, willful failure to file a form 8300, without more, is sentenced at the same level under guideline §2S1.3 as any other willful violation of 26 U.S.C. §7203 is under guideline §2T1.2 when there is no tax loss. Thus, whatever approach the

Commission decides to adopt, it is critical that the base offense level be raised to at least 9.

We also support raising the offense level for filing a false form 8300 from 6 to 9, as proposed. It is important, in our view, that failure to file form 8300 and filing a false form 8300 be assigned a higher offense level than under the current guidelines. While the filing of false forms 8300 is a problem, the failure to file forms 8300 is as large a law enforcement problem.

The proposed amendment would also result in a decrease in the offense level for willful failure to file a form 8300 from 13 to 9 if the defendant structured transactions to evade reporting requirements. The base offense level is 13 under guideline §2S1.3 if the defendant structured. There is no similar provision in guideline §2S1.4. Because 26 U.S.C. §6050I explicitly includes structuring as one of the activities prohibited by the section, we do not believe this provision can be eliminated.

Our proposal below would include both the willful failure to file form 8300 and the filing of a false form 8300 in guideline §2S1.3. It provides a base offense level of 9 for both offenses, consistent with the Commission's proposal in amendment 12. This amendment would also retain the base offense level of 13 presently found in guideline §2S1.3 if the defendant structured transactions to evade reporting requirements.

§2S1.3 Failure to Report Monetary Transactions; Willful Failure to File Form 8300; Filing False Form 8300; Structuring Transactions to Evade Reporting Requirements

(a) Base Offense Level:

(1) 13, if the defendant:

(A) structured transactions to evade reporting requirements; or

(B) knowingly filed, or caused another to file, a report (other than a Form 8300) containing materially false statements; or

(2) 9, if the defendant either failed to file a Form 8300 or filed a false Form 8300; or

(3) 5, otherwise.

In order to avoid confusion, we suggest that language be included in the commentary to make clear that offenses under the structuring provision in section 6050I(f)(1) are to be sentenced at offense level 13.

We recognize that the above proposal allows certain inconsistencies in the treatment of CTR's and Forms 8300 to remain. Since the Commission did not propose guideline amendments in a manner that would permit correction of all inconsistencies this amendment cycle, we recommend that the Commission address these further inconsistencies next year.

Amendments 13 and 14 §2T1.1-4. Tax Offenses

The Department supports proposed amendment 13, a series of amendments which will dramatically impact sentencing in criminal tax cases by consolidating the tax guidelines and ensuring that the amount of loss calculations are the same for all guidelines in the chapter. Tax loss computations should be simpler and more uniform under the new approach, and use of the "applicable tax rate," rather than the 28% (or 34% for corporations) will give a closer approximation of "tax loss" should tax rates changes. In addition, the specific inclusion of new guideline §2T1.1(a)(2) (providing an alternative level of 6 where the offense is not tax-loss driven) should be helpful in such cases.

As a related change to the above proposal, we suggest that the Commission renumber the tax guidelines to eliminate the gaps that will ensue from the deletion of guidelines §2T1.2, §2T1.3 and §2T1.5.

While the proposed change to guideline §2T1.4, involving the creation of one two-level specific offense characteristic by combining guideline §§2T1.4(b)(1) and (b)(2), will adversely impact on a small number of our tax cases, we do not object to it. The Commission's proposal is careful to continue to limit the inapplicability of the §3B1.3 (Abuse of Position of Trust or Use of Special Skill) adjustment to only the second prong of the proposed specific offense characteristic (two-level adjustment if the defendant was in the business of preparing or assisting in the preparation of tax returns), thus continuing the availability of such an adjustment when the defendant committed the offense as part of a pattern or scheme from which he derived a substantial portion of his income, as is the case under the current guidelines.

The proposed changes in guideline §2T1.9 are designed to clarify the conditions under which the specific offense characteristics of guideline §2T1.9 are applicable and to clarify the relationship between the loss calculation under guideline §2T1.4 and §2T1.9. We have no objections to these proposals, but believe that some other changes are necessary.

First, we recommend that the Commission delete the phrase "as applicable" from guideline §2T1.9(a)(1). That phrase has caused confusion as sentencing courts have struggled to determine whether guideline §2T1.1 (Tax Evasion) or §2T1.4 (Aiding, Assisting, Counseling, or Advising Tax Fraud) applies. In some situations, the view has been expressed that neither guideline applies and use of a base offense level of 10 is appropriate.

In fact, use of the phrase "as applicable" is inappropriate as neither of the offenses covered by guideline §2T1.1 (26 U.S.C. §7201) and §2T1.4 (26 U.S.C. §7206(2)) is applicable to the type of conspiracy covered by guideline §2T1.9. That guideline covers conspiracies to defraud the United States by impeding and impairing the Internal Revenue Service. The object of such a conspiracy is not the violation of a particular statutory provision, such as 26 U.S.C. §7201 or §7206(2). (Indeed, if the object of a conspiracy is to violate a particular provision of the Internal Revenue Code, the sentence would appear to be more properly imposed under §2X1.1.) Consequently, to direct a court to determine whether guideline §2T1.1 or §2T1.4 applies is to require it to engage in a hopeless exercise. The most a sentencing court should be directed to do is to select the guideline (§2T1.1 or §2T1.4) for the underlying offense which most nearly approximates the harm which would have resulted had the conspirators succeeded in impeding and impairing the Internal Revenue Service. Language should be added to the Commentary to guideline §2T1.9 to guide the sentencing court in this regard. The deletion of "as applicable" and the insertion of additional commentary language will make clear that a court is not required to find that either guideline §2T1.1 or §2T4.1 applies in order to refer to those guidelines in calculating the base offense level under guideline §2T1.9.

We also suggest that the phrase "fraudulent tax schemes" be added to proposed Application Note 4 after "the marketing of fraudulent tax shelters." Not all fraudulent tax schemes are tax shelters, and in our view "schemes" is a broader and more appropriate term.

The Department considers proposed amendment 14, the enhancement for tax offenses related to illegal narcotics activity, an important priority and urges its enactment in this amendment cycle. We note that if the Commission adopts proposed amendment 13, which would combine several of the tax guidelines and eliminate guideline §2T1.2, §2T1.3 and §2T1.5, this drug amendment would have to be made only to guideline §2T1.1(b)(1) and §2T1.4(b)(1).

Amendment 15 §3A1.4. Terrorism

Amendment 15 would provide a Chapter Three enhancement of three levels for any felony, whether committed within or outside

the United States, that involves or is intended to promote international terrorism. We strongly support this provision and urge the Commission to amend the guidelines to increase the penalties for terrorist actions. Such actions involve, for example, explosives, kidnapping, and weapons offenses, passport violations, murder, and robbery. This change in the guidelines is needed because the current "terrorism" departure, \$5K2.15, does not require the courts to take terrorism into account in sentencing.

Amendment 16(B) \$3B1.1. Aggravating Role; \$3B1.2. Mitigating Role

A number of changes are proposed regarding role in the offense. Our major concern is that many of the changes proposed may create more problems than they solve. Because the proposals try to provide a great deal of guidance on relatively minor points, they will generate much litigation and may not achieve the purpose of reducing unwarranted disparity. In short, we believe that the Commission may be trying to achieve too much in these proposals and that this is an area in which judicial interpretation of broader standards is appropriate.

An example of the attempt to provide too much direction is the proposed language specifying that an enhancement for role in the offense should not apply if the defendant, who otherwise would merit a mitigating role reduction, exercised limited supervision over a limited number of participants. For example, an offloader of a single shipment who supervised other offloaders should not receive an enhancement for aggravating role, according to the proposal. The amendments also provide that a minor role adjustment would be appropriate for a person who qualifies for a minimal role adjustment but for his supervision of other participants.

We oppose this amendment. A manager of others should neither generally qualify for a reduction nor be barred from the increases provided. The suggestion that the offloader would otherwise be a minimal participant assumes that specific categories of offenders by "job description" should dictate applicability of the adjustments for role in the offense. However, the nature of the task performed is only one factor to be considered in our view. If the defendant supervises others, he is not "otherwise" a minimal participant, regardless of the tasks he performs. A drug organization can only operate with a hierarchy. A person with leadership responsibility in the hierarchy, even low-level leadership, is more culpable than a lone player, not less culpable, as the proposal indicates.

The current guideline allows the judge to determine to what extent an offloader qualifies for an enhancement or a reduction without specific direction. We believe that the provision should

continue to operate as it now does and that appropriate arguments will be made to the courts to help guide their application of the relevant adjustments.

Amendment 17(A) §3B1.1. Aggravating Role

Amendment 17(A), concerning aggravating role in the offense, may bring about unintended results. For example, the proposal provides that for a three-level increase the defendant must have been a "manager or supervisor of at least four other participants in a criminal activity." The current guideline provides that the defendant must have been a manager or supervisor and the activity must have involved four others. Direct supervision of four others is not currently required. Thus, under the proposed revision it may be more difficult to prove that a defendant's activity warrants a three-level enhancement than it is under the current guideline. Even the proposed four-level increase for organizers or leaders does not require supervision of a specified number of other participants, but rather organization of the criminal activity that involved four others. The reason for the change in language in the three-level enhancement is not clear.

Another problem is that the proposal deletes language that currently makes the enhancement applicable if the criminal activity was "otherwise extensive," regardless of the number of participants. We oppose this change. There are many circumstances in which a defendant recruits only a few people but operates through a larger network of unknowing participants, such as in the fraud example in current Application Note 2. The impact of this change would be particularly great in white-collar offenses in which the defendant uses the unknowing services of others. We see no reason to delete the current "otherwise extensive" language, and no reason is offered. We assume that it reflects an attempt to provide clear-cut rules in this area, and we believe that the attempt is flawed. Judges can identify "otherwise extensive" criminal activities and should be allowed to do so.

We also oppose the proposed addition of language to Application Note 1 providing that if an undercover agent is recruited by a defendant to participate in illegal activity, and that agent brings in additional undercover agents, only the first would be counted as a participant. This addition is inappropriate in cases in which the defendant asks the undercover agent to obtain others to assist in the offense or where it is necessary to bring in others by virtue of the function requested by the defendant of the undercover agent.

Amendment 18 §3B1.2. Mitigating Role

Amendment 18 would delete the current three-level decrease for roles between minor and minimal. We urge the Commission to

retain this feature because of the need to recognize that roles are not clear-cut in many cases.

In addition, Amendment 18 would provide significantly more favorable treatment to many defendants. For example, proposed note 7 would practically guarantee a role reduction for drug transporters. We believe such persons are critical to drug operations and the ultimate success of their distribution activities. No built-in reduction should be guaranteed for them. Moreover, the proposed commentary in Amendment 18(B) on the appropriateness of downward departure for minimal participants is also unwise. It will invite a great degree of disparity for similarly situated defendants. The guidelines provide an appropriate reduction for minimal participants. An invitation to depart downward will erode the guidelines in this area.

The Commission has asked whether a defendant who otherwise merits a mitigating role adjustment should be prevented from receiving it where he has not been held responsible for a greater quantity of controlled substances than that in which he actually trafficked. We strongly urge the Commission to adopt a rule against mitigating role adjustments in such a case. Some courts grant a role reduction while others do not in the case of a courier whose relevant conduct is the quantity of drugs he is actually carrying because no greater amount can be proven (despite the belief that the defendant is part of an organization). Attached is a proposal that would clarify how such a rule would operate. We believe that this change recognizes that a role reduction should not be possible when the measure of the defendant's involvement in the offense is not increased by the conduct of others. That is, he is not a minor or minimal participant as to his own conduct. Such a defendant should be treated like an individual who is not part of an organization and be held responsible for what he transports without mitigation for role in the offense.

Amendment 19 §2D1.1. Limitations on Sentence for Drug Defendants Who are Minor or Minimal Participants

Amendment 19 proposes several alternative limitations on the sentences applicable to minor or minimal participants in controlled substance offenses. We strongly oppose the creation of these artificial limitations on sentence. We understand that the concern is that low-level participants, including couriers, are viewed by some as receiving excessive sentences. As explained above, however, we strongly believe that a defendant should be held responsible at the very least for the quantity of drugs he or she possesses or deals in directly. With the limitations proposed, a courier may receive a sentence that would reflect only a portion of the quantity he or she transports. Thus, the guidelines would create an incentive for minor or minimal participants to deal in, or facilitate dealing in, large

quantities of controlled substances not reflected in the sentence. In addition, the proposals would decrease the incentive for low-level participants to provide substantial assistance in the investigation or prosecution of others. At a time when drug trafficking and associated violent crime threaten the well being of our nation, such a sentencing result would be extremely ill-advised.

Moreover, a number of the "caps" proposed would produce initial offense levels that would be overridden by applicable mandatory minimum sentences. As a result, offenders involved in drug offenses of very different magnitudes would receive the same sentence -- namely, the mandatory minimum. This scheme would thwart the goal of proportionality in sentencing and create additional tension between currently applicable mandatory minimum provisions and the guidelines.

If, despite our objections, the Commission decides to adopt some form of limitation as proposed, it should at the very least assure that the limitations adopted provide guideline sentences no lower than the 10-year mandatory minimum level provided by statute for large-quantity offenses when such offenses involve substances subject to mandatory minimum provisions. The Commission should also assure that a defendant's sentence is not limited to a level that does not reflect the full extent of his personal involvement in the offense. In addition, the limitations should apply only to minimal participants who are in Criminal History Category I.

Amendment 22 Chapter Three, Part D. Multiple Counts

The Commission has solicited comment on amendment of the multiple count rules. We believe several amendments are needed.

The multiple count rules present problems in their failure to increase the sentence for certain harms that result in conviction. This failure has become an increasing problem in cases in which counts are grouped because one count embodies conduct that is treated as a specific offense characteristic in the guideline applicable to another of the counts. Guideline §3D1.2(c). The problem arises when counts are grouped under this rule but the count that has such a specific offense characteristic carries a lower offense level than the offense level applicable to the group of closely related counts.

For example, the tax evasion guideline, §2T1.1(b)(1), includes a specific offense characteristic that provides that if the defendant failed to report or to correctly identify the source of income exceeding \$10,000 from criminal activity, a two-level increase results. Assuming there were also a count of conviction for drug offenses, the grouping rule cited above would operate to group the tax evasion and drug counts. The offense

level for the count of conviction relating to the drug offenses is likely to exceed the offense level for the tax evasion count. Therefore, the offense level for the group of closely related counts would be that for the drug offense, and the tax evasion count would drop out of the guideline calculation. The grouping rule in effect nullifies the tax evasion count for sentencing purposes, and a defendant convicted of both drug and tax offenses is sentenced no more severely than a defendant convicted of a drug offense alone.

The basis for the grouping of the two counts was that the tax evasion offense level was increased because of the illegal drug activity. This grouping rule protects against double counting when the offense guideline including the specific offense characteristic relating to another count of conviction is the highest offense level of the group of closely related counts. However, by operating to prevent double counting in some circumstances, it prevents the counting of an offense at all in other circumstances. Defendants who commit two distinct offenses should be punished more severely than those who commit only one.

The adoption of Amendment 14, which would provide greater enhancements than currently available for illegal drug activity or money laundering, will serve to alleviate the problem of disappearing impact for tax offenses in many narcotics/tax prosecutions. However, it will not eliminate it in all such cases, and will have no added effect on other offenses. Moreover, if Amendment 14 is not adopted, the problem will remain in most, if not all, cases in which tax and drug offenses are grouped.

We recommend an amendment of guideline §3D1.4 to provide that where offenses are grouped under §3D1.2(c) (because one offense is treated as a specific offense characteristic of another offense), the combined offense level should be increased by the number of offense levels assigned to the specific offense characteristic to the extent the latter is not reflected in the offense level for the group of closely related counts.

Another problem under the guidelines results from the operation of the guideline relating to the determination of the combined offense level, §3D1.4. This guideline instructs the user to disregard any group of closely related counts that is nine or more levels less serious than the group with the highest offense level. Thus, when counts of conviction include serious offenses and significantly less serious ones, the lesser ones do not contribute toward the sentence. A tax count and a drug count (not grouped under the grouping rule discussed above under the current guidelines because the amount of income produced from the drug activity did not exceed \$10,000) would produce a sentencing range identical to a drug count alone if the offense levels for the two offenses were nine or more levels apart. Similarly, a

drug count and a theft count relating to a relatively small theft would result in a sentencing range no different from the range that would result from the drug count alone if the two offense were nine or more levels apart. The guidelines should not, in effect, encourage criminal activity by failing to punish it even if it is less serious than the major count of conviction. The less serious offense may carry a substantial offense level and should affect the sentencing range.

To address this problem, we recommend that the Commission amend guideline §3D1.4 by deleting subsection (c) and by amending subsection (b) to read as follows:

Count as one-half Unit any Group that is 5 or more levels less serious than the Group with the highest offense level.

This amendment would assure that all groups of closely related counts of conviction contribute toward the sentence. Groups that are 9 or more levels less serious than the group with the highest offense level would count toward the combined offense level to the same extent that groups that are 5 to 8 levels less serious now count -- that is by one-half unit.

Another problem with the multiple count rules is the absence of grouping rules for fines where one of the counts of conviction carries a fine not established by guideline §5E1.2 -- such as an antitrust offense -- and another count has a fine established by guideline §5E1.2. -- such as a fraud offense. The antitrust guideline, §2R1.1, sets fines as a percent of the volume of commerce, not as a function of offense level, for both individuals and organizations. The multiple count rules in Chapter Three only address how to group offense levels, not how to group fines when the fines for some counts or groups are based on offense levels and the fines for others are not. This issue has arisen in cases involving individual defendants but will also arise in cases involving organizations.

For example, when an antitrust and fraud count are grouped together, as typically occurs when bid-rigging and mail fraud counts based on the rigged bids are charged in the same indictment, the guidelines provide that the offense level for the group is the offense level for the most serious of the counts. However, the guidelines provide no direction on whether to impose a fine according to the offense that has the highest offense level, or the highest fine provided by any count to be grouped. We believe that the Commission should direct the latter result in this situation.

Amendment 23 §3E1.1. Acceptance of Responsibility

The Commission has proposed a number of changes to the guideline on acceptance of responsibility. Our general view is that there is not a sufficient basis for rewriting the guideline.

We oppose Option 2, which would provide a three-level reduction for defendants whose offense level is 30 or greater. This approach would grant a greater benefit to defendants convicted of the most serious offenses. The guideline system establishes proportional increases and reductions. If offenders at high offense levels need a greater percentage reduction than those at low offense levels, the integrity of the entire system of enhancements and reductions is called into question. We believe this proposed change would be an unwise step for the Commission to take.

We also oppose Option 3. First, we disagree with the proposal to provide an explicit downward adjustment for acceptance of responsibility for a nolo plea. The distinguishing feature of a nolo pleas is that the defendant who enters one declines to accept responsibility for the offense. We believe it is important to encourage guilty pleas, rather than nolo pleas, and providing a reduction for the former but not the latter will foster this result. We also oppose the proposed three-level reduction. It will have the effect in many cases, particularly in white collar offenses, of simply increasing the commonly granted two-level adjustment for acceptance of responsibility to a three-level adjustment. Finally, we oppose rewarding a defendant who goes to trial to preserve legal issues. Such a defendant should enter, or at least seek to enter, a conditional plea under Rule 11, Federal Rules of Criminal Procedure. Moreover, proposed Application Note 2 would allow an acceptance-of-responsibility reduction for a defendant who challenges the government on an issue that directly addresses determining "factual guilt" (i.e., absence of intent) as an example of a reason for proceeding to trial unrelated to determining guilt. Such a defendant does not warrant the reduction for acceptance of responsibility any more than one who proceeds to trial with the intent of showing that he was not the perpetrator of the crime.

We also oppose Option 4 on many of the same grounds noted above with regard to Option 3. In addition, we object to it because it allows a three-level reduction for defendants who proceed to trial. This reduction would fail to encourage guilty pleas.

If any changes are made, we believe they should be limited to commentary changes discussing the effect of conditional pleas as a means for a defendant to preserve legal issues. In addition, addressing the issue of acceptance of responsibility

for relevant or related conduct is also an appropriate modification.

Amendment 27 §§4B1.1 and 4B1.2. Career Offenders

Amendment 27 proposes a number of changes to the career offender guidelines that would substantially erode their effect. We oppose these revisions. The career offender guidelines are mandated by the Sentencing Reform Act, which requires the Commission to assure that the guidelines specify a term of imprisonment at or near the maximum term authorized for any defendant 18 years or older convicted of a felony crime of violence or controlled substance felony who has previously been convicted of two or more such prior felonies. 28 U.S.C. §994(h). In some cases the results are harsh, but the present guideline accurately reflects the will of Congress that persons who fit this description be subject to a sentence at or near the highest sentence allowed by law. We believe that the career offender provision serves not only the punishment and incapacitation purposes of sentencing, but also the goal of general deterrence.

Most of the proposals in Amendment 27 seek to avoid the requirements of the career offender statute cited above. For example, under Amendment 27(A), Option 1, the maximum term of imprisonment to which the defendant should be subject to sentencing under the career offender provision would be artificially reduced. The proposed amendment directs that the statutory maximum for purposes of the career offender provision is the maximum term authorized for the offense of conviction before the maximum has been increased by a sentencing enhancement statute applied because the defendant has one or more prior convictions. We strenuously oppose this proposal since the maximum term of imprisonment authorized must be the level authorized for the defendant being sentenced, not another defendant with a different criminal background. To the extent there is a need for clarification, we recommend adoption of Option 2.

We also oppose Amendments 27(B), (D), (E), and (F). Amendment (B) would count a prior offense under the career offender provisions if it was punishable by imprisonment for more than two years. While we do not have strong policy objections to this proposal, we are concerned that it would violate the applicable statutory provision. A felony for purposes of title 18, United States Code, is an offense punishable by more than one year of imprisonment. See 18 U.S.C. §3559(a)(5). This provision was enacted as part of the Sentencing Reform Act, along with the career offender provision, cited above. We believe that when Congress used the term "felony" in the career offender provision, 28 U.S.C. §994(h), it meant an offense punishable by more than one year of imprisonment (at least for any federal offense).

We also oppose Amendment (D), which seeks comment on whether the Commission should identify certain categories of crimes of violence that would be considered "lesser" crimes of violence for purposes of the career offender guideline. Such offenses should not be excluded as predicate offenses. Moreover, modifying the career offender provision to provide lower sentences for offenders convicted of such crimes is problematic because many of the sentences now provided are "near" the statutory maximum, rather than "at" it. That is, lowering sentences would result in sentences less than "near" the statutory maximum, particularly after the reduction for acceptance of responsibility. Lowering these sentences for a lesser category of persons who qualify as career offenders could seriously undermine the applicable statute.

Amendment (E) would allow courts to count two prior felony convictions as only one for purposes of the career offender guideline if, although not consolidated for trial or sentencing, they could have been consolidated for trial as joinable offenses. Similar but unconnected offenses may be joined under Rule 8, Federal Rules of Criminal Procedure. Thus, for example, an offender convicted of two separate bank robberies would have these count as only one prior conviction under the proposed amendment. However, such a defendant is precisely the type Congress included in the career offender provision, which is aimed at those with two or more prior convictions. The Commission should reject this proposed artificial limitation on the career offender guideline.

Amendment (F) would count prior convictions only if they resulted in conviction and sentencing prior to the next qualifying offense under the career offender guideline. This treatment of prior offenses would provide a windfall to defendants who commit several criminal acts before they are sentenced and is inconsistent with the career offender statutory provision.

Amendment 28(A) Chapter Five Part A. Criminal History Category Zero

We strongly oppose the creation of a criminal history Category Zero. It would potentially revise the guidelines in a substantial way and alter the Commission's previous judgments about appropriate sentencing levels for all crimes. With respect to white collar offenders, who are unlikely to have a prior criminal history, a new Category Zero would seriously undermine the sentences currently available and send an unfortunate message to would-be offenders that their criminal activity will be tolerated to a greater extent than it has been under the guidelines.

Amendment 30 §5E1.2. Fines for Individual Defendants

Amendment 30 would delete the current provision authorizing a fine up to the statutory maximum when the applicable statute authorizes a fine greater than \$250,000 or a fine for each day of violation. In place of the statutory maximum for such offenses, the proposed amendment would substitute specified dollar amounts.

We strongly oppose this amendment. Where applicable statutes authorize fines higher than \$250,000 or fines for each day of violation, Congress seems to have expressed the view that fines take on a special importance as a sentencing tool. The current guideline reflects the intent of Congress that fines be available in substantial amounts for such offenses as certain environmental violations, bank fraud, major fraud against the United States, and certain controlled substance offenses. We have not been aware of any particular problems that exist with the current guideline structure in this regard. Moreover, the Commission has provided no explanation of how it chose the maximum guideline fine levels proposed for these and other offenses. In our view the current guidelines correctly treat these offenses as unusual ones in which Congress has deemed high fines appropriate and in which judges should have discretion to impose a fine, above a minimum set forth, based on factors particular to the case. The Commission has provided guidance on what factors should influence this discretion in guideline §5E1.2(d) and (e). Finally, reducing the currently available statutory maximum to an arbitrary dollar level sends a negative message to the public with regard to especially serious offenses.

Amendment 33 Chapter Five Part H. Specific Offender Characteristics

The Commission has proposed a number of revisions to policy statements. We opposed the proposal regarding "lack of youthful guidance" and "history of family violence" in our statement before the Commission at the public hearing. We also oppose the other proposed amendments.

The first change is to permit ordinarily irrelevant offender characteristics to be considered for departure purposes if such factors, "alone or in combination, are present to an unusual degree and are important to the sentencing purposes in the particular case." We strongly oppose this amendment, which could seriously erode the guidelines by inviting departures for almost any offender characteristic. If such a policy statement were in place, a determination by the Commission that it had adequately considered a particular factor and that departure on the basis of this factor is inappropriate would have no meaning. In short, the amendment invites the return of unwarranted disparity in sentencing.

We oppose proposal (B) for several reasons. First, it allows departures for "young and naive" defendants and in our view could cause many of the same problems that departures based on "lack of youthful guidance" would cause. Many offenders are young and naive but, nevertheless, know and understand the basic prohibitions provided in the criminal law. Moreover, the suggestion that home confinement may be the appropriate punishment for such young defendants is misguided. These defendants are precisely the ones who may require a traditional form of punishment because of the failure of the home environment to prevent their unlawful conduct.

Finally, proposal (D) asks whether the Commission should authorize downward departures where a court finds that the defendant's advanced age (e.g., 60 or older) has reduced the defendant's risk of recidivism, provided the defendant serves a substantial portion of his sentence, is not a major drug trafficker, and has no current or past history of violent offenses. Incapacitation and recidivism are not the only sentencing considerations. Reducing a sentence on the basis of a supposed reduced risk of recidivism overlooks the punishment and general deterrence purposes of sentencing articulated in the Sentencing Reform Act. For example, in many white collar cases a major goal of sentencing is general deterrence. We believe that fear of imprisonment is a significant deterrent for many white collar offenders, regardless of age, who may otherwise consider unlawful activity. In addition, many antitrust defendants are over age 60 and have participated in ongoing offenses for years, along with other generations of individuals. The older offenders are often the most culpable of the co-defendants prosecuted. The goals of punishment, deterrence, and incapacitation are critical for such offenders. Finally, leaders of drug cartels may learn of the benefits of employing older persons for lesser roles, just as they have exploited children. The proposed exclusion for "major drug traffickers" would not apply to such low-level drug participants.

Amendment 35(C) Chapter Six. Sentencing Procedures and Plea Agreements

The Commission has asked for comment on whether it should amend the guidelines to provide that conduct on which a defendant is acquitted but which has been established by a preponderance of the evidence may be used in (1) determining the offense level, (2) selecting a sentence within the guideline range, and (3) as a basis for upward departure. We recommend in favor of an amendment authorizing all such uses. The fact of acquittal should not by itself exclude consideration of the conduct in question. A jury's finding that the government did not prove the existence of a fact beyond a reasonable doubt should not bar the government from proving that fact under the lower preponderance standard at sentencing. Most courts of appeals have held that

judges at sentencing may rely on evidence of a defendant's conduct relating to charges on which the defendant was acquitted at trial. United States v. Mocciola, 891 F.2d 13, 16-17 (1st Cir. 1989); United States v. Rodriguez-Gonzalez, 899 F.2d 177, 180-182 (2d Cir.), cert. denied, 111 S. Ct. 127 (1990); United States v. Ryan, 866 F.2d 604, 608-609 (3d Cir. 1989); United States v. Isom, 886 F.2d 736 (4th Cir. 1989); United States v. Juarez-Ortega, 866 F.2d 747, 749 (5th Cir. 1989); United States v. Duncan, 918 F.2d 647, 652 (6th Cir. 1990), cert. denied, 111 S. Ct. 2055 (1991); United States v. Fonner, 920 F.2d 1330, 1332-1333 (7th Cir. 1990); United States v. Dawn, 897 F.2d 1444, 1449-1450 (8th Cir.), cert. denied, 111 S. Ct. 389 (1990); United States v. Averl, 922 F.2d 765 (11th Cir., 1991); but see United States v. Brady, 928 F.2d 844 (1991). Of course, if the acquitted conduct relates to a separate offense that is excluded from consideration under relevant conduct because the offense in question is sentenced on an offense-of-conviction, rather than a real-offense basis (such as robbery), the acquitted conduct should generally not increase the sentence.

Amendment 37 §1B1.5. Interpretation of References to Other Offense Guidelines

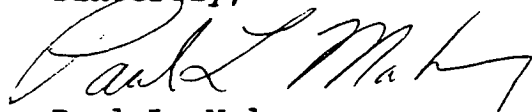
Guideline §1B1.5 provides that a sentencing guideline's reference to another guideline refers to the entire guideline, including the base offense level plus all applicable specific offense characteristics and cross references. The Commission has asked for comment on whether the commentary to this provision should be amended to clarify how the guidelines are to be applied when a Chapter Two offense guideline references another guideline.

Guideline §1B1.5 does not describe how the commentary pertaining to the initial Chapter Two guideline is to be treated even though failure to follow an interpretation in guideline commentary could constitute an incorrect application of the guideline subject to appeal. For example, guidelines §2E5.2 (theft from an employee benefit plan) and §2E5.4 (theft from a labor union) simply cross reference and apply guideline §2B1.1 for larceny and theft generally. The application notes for the former guidelines expressly direct that the Chapter Three upward adjustment for abuse of position of trust "will apply" if the defendant is a fiduciary of a benefit plan and "would apply" if the defendant is a union officer. However, no such explicit direction is given in the guideline or commentary for §2B1.1 (larceny generally), to which §§2E5.2 and 2E5.4 refer. The initial guideline commentary's direction clearly should be given effect. Yet, the commentary notes for §1B1.5 direct simply that Chapter Three adjustments are "to be determined in respect to that other [i.e., the cross referenced] offense guideline." §1B1.5, Application Note 2. Consequently, we recommend an amendment which provides that the commentary in the initial

guideline also should be followed unless clearly inconsistent with the scheme of the cross-referenced guideline.

We appreciate your consideration of these important matters and would be pleased to offer our assistance to the Commission in its efforts to address our concerns.

Sincerely,

A handwritten signature in dark ink, appearing to read "Paul L. Maloney". The signature is fluid and cursive, with the first name "Paul" and last name "Maloney" clearly distinguishable.

Paul L. Maloney
Senior Counsel for Policy
Criminal Division

Enclosures

COMMENTS OF THE ENVIRONMENT & NATURAL RESOURCES DIVISION

I. Proposed Amendment 10: Section 2Q1.2 Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification

Proposal: Section 2Q1.2(b) is amended by inserting the following at the end: "Do not apply this adjustment if an adjustment from (b)(1) applies."

RECOMMENDATION: Reject the proposed amendment and analyze this issue in an overall review of environmental guidelines 2Q1.2 and 2Q1.3.

The proposed amendment is intended to address concerns about "double-counting" in Part 2Q1.2 of the Sentencing Guidelines, which governs most environmental crimes involving hazardous substances. The term "double-counting" is used in this context to refer to the use of an element of an offense as a specific offense characteristic. The argument is made that if an essential element of an offense is also included as an offense characteristic enhancement, it is double counted since as an element of the offense, it is already accounted for as part of the base level offense. We find this argument flawed in several respects. First, the methodology complained of here, called "double-counting," occurs throughout the sentencing guidelines.¹ Unless the Commission intends to eliminate this methodology throughout the guidelines, addressing it only in the context of environmental crimes has no apparent justification. Second, "double-counting" does not occur in every offense under Part 2Q1.2. The proposed amendment erroneously presumes that every violation involving a release into the environment also involves a permit violation. To the contrary, a significant number of environmental crimes involving releases into the environment do not also involve permit violations.²

¹ For example, the use of false information to obtain explosives is covered by guideline 2K1.3, but the use of false information is also a specific offense characteristic for that guideline. Criminal sexual abuse under 18 U.S.C. § 2241 requires use of force or threat of force, yet those factors constitute a specific offense characteristics under § 2A3.1(b)(1).

² In Parts 2Q1.2 and 2Q1.3 the Commission has covered a broad array of environmental crimes. Some of these crimes involve actual releases, but not permits; some involve permits, but not releases; some include both factors; and some involve neither. The following violations are examples of each category:

1. The knowing discharge of a flammable pollutant into a sewer system in violation of the Clean Water Act, Act, 33 U.S.C. §§ 1317(d) and 1319(c)(2)(A), would
(continued...)

There are other concerns with this proposal as well. First, the proposed amendment provides an approach that is at best inartful: it would lower offense levels in many cases where "double-counting" may be absent; it would retain higher offense levels in many cases where "double-counting" may be present. We therefore recommend that the Commission reject the proposed amendment, and suggest that the advisory group chaired by Commissioners Nagle and Gelacak consider the various arguments concerning double-counting as part of their review of the guidelines governing environmental crimes.

Second, if the Commission were to adopt the proposed amendment, adjusted offense levels in cases involving release of hazardous pollutants would decrease because the (b)(4) permit enhancement would no longer apply -- unless the Commission offset that decrease by raising the (b)(1) enhancement for release of

2 (...continued)

constitute a release not requiring a permit. Offense characteristic (b)(1) would apply; (b)(4) would not.

2. The knowing storage of hazardous wastes without a permit in violation of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d)(2), would not involve a release. Offense characteristic (b)(4) would apply; (b)(1) would not.

3. The knowing removal of asbestos during demolition without wetting it first would be a violation of the Clean Air Act, 42 U.S.C. § 7413(c)(1), even though it would involve neither a permit nor a release. Neither (b)(1) nor (b)(4) would apply.

4. The knowing disposal of a hazardous waste in violation of the Resource Conservation and Recovery Act would involve a permit violation. Both (b)(1) and (b)(4) would apply.

All of these violations are felonies. Other examples could easily be drawn from each of the four categories. More environmental prosecutions fall into the fourth category, but that reflects the fact that releases without permits or in violation of permits are viewed as more serious and, therefore, higher priority cases. The fact that (b)(1) and (b)(4) do not apply together in every case is significant in judging whether they constitute improper double-counting. Where two or more related characteristics do not apply to every violation covered by a guideline that situation does not constitute impermissible double-counting. See United States v. Goolsby, 908 F.2d 861, 864 (11th Cir. 1990).

hazardous pollutants. Likewise, if the Commission were to adopt the proposed amendment, adjusted offense levels in cases involving release of hazardous pollutants would be lower than adjusted offense levels in cases involving ordinary pollutants -- unless the amendments were duplicated in Part 2Q1.3. As a result, the Commission would need to adopt at least four amendments, not just one, to eliminate the permit enhancement in discharge cases without lowering adjusted offense levels and upsetting the overall balance of Part 2Q. These issues demand the review and analysis that only can occur as part of a thorough and informed review of Part 2Q.

Third, even from the perspective of whether it eliminates so called "double-counting" in the guidelines, the amendment is flawed, because it does not address all instances where "double-counting" may occur. Specifically, it eliminates only the permit enhancement in release cases. The possibility of "double-counting" would still exist where defendants commit permitting violations that do not involve a release into the environment. At the same time, the proposed amendment assumes that permit enhancement would never be appropriate in release cases. But a defendant who fails to obtain a permit so as to try to avoid all regulation may be more culpable than a defendant who exceeds a permit requirement. Likewise, a defendant who knowingly exceeds a permit requirement may be more culpable than a defendant without such knowledge. The proposed amendment therefore, reduces the penalty for some environmental violations, but serves no interest well in the debate over double-counting.

The proposed amendment would prohibit application of Section 2Q1.2(b)(4) (violation of a permit or failure to have a permit) whenever Section 2Q1.2(b)(1) (actual release of a contaminant to the environment) applies. In addition to seeking comment on the proposed amendment, the Commission has requested public comment as to whether (1) the enhancements under Section 2Q1.2(b)(1) should be greater and (2) any amendments to Section 2Q1.2 should be duplicated in Section 2Q1.3 (which governs most environmental crimes involving non-hazardous pollutants).

We urge that the Commission reject the proposed amendment to Part 2Q1.2 of the Sentencing Guidelines. We recommend that the advisory group chaired by Commissioners Nagle and Gelacak address this matter during its review of the environmental sentencing guidelines. We believe that analysis will demonstrate that the concerns about "double-counting" are unfounded, and that the proposed amendment is not an improvement. We look forward to working with the Commission as it undertakes the important task of reevaluating environmental guidelines 2Q1.2 and 2Q1.3.

II. Proposed Amendment 11: Section 2Q2.1 Specially Protected Fish, Wildlife, and Plants; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife and Plants

1. Proposed Amendment to Section 2Q2.1(b)(1)

Proposal: Section 2Q2.1(b)(1) is amended by deleting "involved a commercial purpose" and inserting in lieu thereof "was (A) committed for pecuniary gain or (B) involved a pattern of similar violations."

Additional Issue for Comment - Number 2: When the specific offense characteristic in section 2Q2.1(b)(1) is applicable, should the magnitude of the increase in levels be greater? If so, should there be a three-level or a four-level increase?

RECOMMENDATION: Section 2Q2.1(b)(1) is amended by inserting "pecuniary gain or" immediately after "involved."

Our recommendation retains the existing language in Section 2Q2.1(b)(1), yet sweeps up a portion of the proposal as well. By doing so, we seek to avoid the under-inclusion that has plagued this specific offense characteristic. By combining both pecuniary gain and commercial purpose in one subsection, we hope to avoid any narrow interpretations of this specific offense characteristic that miss the mark.

We have not included here proposed subsection (b)(1)(B), "a pattern of similar violations." As discussed, infra, we recommend adoption of "more than minimal planning" as a new specific offense characteristic in subsection (b)(4) and recommend that this phrase be incorporated there.

By combining the phrases "commercial purpose" and "pecuniary gain" into one specific offense characteristic, offenses properly covered by it will include both sport hunters who use the services of paid guides to hunt big game animals illegally or those who illegally kill or injure wildlife found depredating domestic animals or crops. Both are recurring problems. Like other offenses now falling within this specific offense characteristic, these, too, are driven by the pursuit of gain or profit, and thus, properly should be subject to this aggravating factor.

We are not recommending any additional offense level increases for this characteristic in place of the current two-level increase. Any increase now may unduly weight this characteristic. The other proposals, if adopted, provide more balance. This is not to say, however, that this characteristic is unimportant. In fact, most offenses occur within the ambit of "commercial purpose" and are driven by the desire for pecuniary gain. Live wildlife and wildlife products are becoming increasingly scarce and correspondingly more valuable. Sophisticated networks of illegal international trade exist today that were nonexistent ten years ago. For instance, black or

grizzly bears are poached routinely now to supply gall bladders to foreign dealers who pay exorbitant prices for them. Similarly, aviculturists and bird fanciers have created a huge demand for parrots and macaws that is satisfied by clandestine worldwide smuggling schemes.

It is not surprising then, that the primary law enforcement agency enforcing federal wildlife statutes (and most of the offenses covered by Section 202.1), the U.S. Fish and Wildlife Service, states that one of its primary objectives is "to uncover major commercial activities involving illegal trade of protected wildlife and wildlife products." U.S. Fish and Wildlife Service, Division of Law Enforcement, FY 1988 Annual Report, p. 1. The U.S. Fish and Wildlife Service ("Service") further states that "the Service considers the most serious violations to be large-scale commercialization of wildlife." FY 1988 Annual Report at 2. Next, the Service finds that "another serious category of wildlife violations is the illegal importation of wildlife into the United States for commercial purposes." Ibid.

Congress, too, has recognized the harm caused by a commercial activity, and uses it as one means to distinguish felony from misdemeanor offenses. See, e.g., Lacey Act Amendments of 1981 ("Lacey Act"), 16 U.S.C. 3373(d)(1)(B); Migratory Bird Treaty Act, 16 U.S.C. 707(b).

2. Proposed Amendment to Section 202.1(b)(2).

Proposal: Section 202.1(b)(2) is amended by inserting "(A)" immediately before "involved" and by inserting "or (B) otherwise created a significant risk of infestation or disease transmission potentially harmful to humans, fish, wildlife, or plants" immediately following "law."

RECOMMENDATION: Adopt the proposed amendment published by the Commission.

We find this amendment well-founded. It complements the quarantine provision and closes any loopholes that may exist. For instance, offenses involving contaminated products, like shellfish harvested from contaminated beds that cause various diseases in humans now would be included. Formerly, since no quarantine was required for such shellfish products, someone who intentionally harvested and later sold shellfish from contaminated beds was never subject to any aggravating sentencing factors based upon the risk of harm. As proposed, that omission would be rectified.

3. Proposed Amendment to Section 202.1(b)(3)(B).

Proposal: Section 202.1(b)(3)(B) is amended by deleting "a quantity of fish, wildlife, or plants that was substantial in

relation either to the overall population of the species or to a discrete subpopulation" and inserting in lieu thereof "(i) marine mammals that are listed as depleted under the Marine Mammal Protection Act (as set forth in 50 CFR 216.15), (ii) fish, wildlife, or plants that are listed as endangered or threatened by the Endangered Species Act (as set forth in 50 CFR part 17, or (iii) fish, wildlife, or plants that are listed as endangered in appendix I to the Convention on International Trade in Endangered Species of Wild Fauna or Flora (as set forth in 50 CFR part 23)".

RECOMMENDATION: Section 2Q2.1(b)(3)(B) is amended by deleting "a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to discrete subpopulation" and inserting in lieu thereof "any of the following types or amounts of fish, wildlife, or plants: species listed as endangered or threatened by the Endangered Species Act; species listed as Appendix I to the convention on International Trade in Endangered Species of Wild Fauna or Flora; depleted stocks of marine mammals; or a quantity of fish, wildlife, or plants that was significant in relation to the overall population of the species, to any subspecies, or to a distinct population segment."

This amendment involves a revision of an existing specific offense characteristic in Section 2Q2.1 that is troublesome. Section 2Q2.1(b)(3)(B) now states: "If the offense involved a quantity of fish, wildlife, or plants that was substantial either to the overall population of the species or to a discrete subpopulation, increase by 4 levels."

We believe the language in the original version of the guidelines was intended to include any offense involving fish, wildlife, or plants listed as endangered or threatened under the Endangered Species Act (as set forth in 50 CFR Parts 17, 222, or 227) or as "Appendix I" under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (the international treaty equivalent of an endangered listing implemented through the Endangered Species Act) (as set forth in 50 CFR Part 23), and offenses involving substantial quantities of other fish, wildlife, or plant species. While these were the broad categories sought to be included, neither the language of the specific offense characteristic nor the Commentary conveyed this message.

As a consequence, this specific offense characteristic has been narrowly interpreted and rarely applied. Prosecutors are reluctant to seek enhancement under this provision for offenses involving endangered, threatened, or Appendix I animals or plants, and the courts have followed suit. The gravamen of the provision as it is now written is that the offense must involve either a substantial number of animals, even when those animals

are endangered or threatened species, or the loss of a significant member of a nearly extirpated population. Therefore, population dynamics are important (often requiring the proof of expert witnesses) and the characteristic itself has been infrequently applied at sentencing. We know of only a handful of instances where it was used. One court applied it to a violation of the Endangered Species Act involving the unlawful killing of a grizzly bear in Wyoming, an area with a remnant population of grizzly bears. See United States v. Brad A. Baxendale, Nathan P. Sponsel and Keith M. Grant, No. CR 89-054-K (D. Wyo. Oct. 10, 1989). Another court did so only where the offense involved two New Mexico ridged-nosed rattlesnakes, a threatened species, illegally collected from a total worldwide population of 54. See United States v. William Frank Meyers, No. CR 5-89133-PVT (N.D. Cal., Nov. 1988) and United States v. John Jeffrey Boundy, No. 89-20104 RFP (N.D. Cal. Jan. 18, 1989). Finally, the enhancement has applied to the unlawful possession of a sexually mature female Kemp's Ridley sea turtle by a group of shrimp fishermen. See United States v. Hung Van Tran, Duc Quang Nguyen and Binh Van Nguyen, 765 F. Supp. 356, 358 (S.D. Tex. May 17, 1991), appeals docketed, Nos. 91-2605, 2606, 2572 (5th Cir. 1991).

This four level enhancement, however, has not been uniformly applied even when the same or similar animal species were involved. For instance, it was not sought where a defendant was convicted of illegally collecting over 100 green and loggerhead sea turtle eggs from nests on the beach at Jupiter Island, Florida because the experts available would not conclude that this number was "substantial" (but would have found it "significant"). See United States v. James Edward Bivens, Case No. 88-14016-CR-PAINE (S.D. Fla., Aug. 21, 1989).

Now, virtually all violations of the Endangered Species Act that do not involve a commercial purpose, particularly those where endangered or threatened animals are killed illegally, are offenses for which the guidelines provide no enhancement. This interpretation misses the mark and cannot be the one intended for that specific offense characteristic. Our recommended revision permits the sentencing court to rely in many instances on administrative determination already made under conservation statutes about the conditions of a particular species rather than reduce the sentencing hearing to a battle of expert opinions about population dynamics.

Furthermore, the term "substantial" itself should be replaced. We urge that the term "significant" be used as a substitute. The new term permits the specific offense characteristic to be applied where the offense involves less than a "substantial" quantity, but nonetheless is properly characterized as "significant." As now used, the term "substantial" denotes the relationship of the quantity involved in the offense to a known population. Unfortunately, not all

wildlife populations are quantified and experts often are unable to state an opinion when such information is unavailable.

The term "significant," as used in § 2Q2.1(b)(3)(B), would include a quantity that is likely to make a difference to the ability of a species or a subpopulation of a species to sustain itself at or near maximum sustainable quantities. Thus, a quantity may be significant either because it is a substantial portion of the overall population or discrete subpopulation (*i.e.*, formerly described as "substantial") or because the individual animals involved were qualitatively important to the species' ability to sustain itself. For example, killing one or two adult males or females of a given species may be significant even though a quantitatively "substantial" proportion of the total population or discrete subpopulation is not involved.

Finally, arguments for enhancement of offenses involving endangered, threatened, or Appendix I species are equally compelling for depleted stocks of marine mammals protected by the Marine Mammal Protection Act. See 16 U.S.C. 1362(1), 1372(b), and 50 C.F.R. Parts 18 or 216. Offenses involving animals from such depleted stocks should be eligible for enhancement as well under this provision.

Our recommendation incorporates minor editorial changes into the proposal by deleting citations to the Code of Federal Regulations and rewording the description of the subsection's coverage. The citations to the Code of Federal Regulations were incomplete, potentially confusing or restrictive, and therefore troublesome. The Commentary itself identifies the source statutory provisions and should be sufficient.

4. Proposed Amendment to Section 2Q2.1(b).

Additional Issue for Comment - Number 1: Should an additional specific offense characteristic be added, providing for a two-level increase if the offense involved more than minimal planning? If so, should the increase be an alternative to, or in addition to, the increase for the specific offense characteristic in section 2Q2.1(b)(1)?

RECOMMENDATION: Section 2Q2.1(b) is amended by inserting the following as paragraph (b)(4).

- (4) If the offense involves more than minimal planning or a pattern of similar violations, increase by 2 levels.

We recommend that the Commission add "more than minimal planning" as part of another specific offense characteristic, a recommendation that draws upon a number of other guidelines for inspiration. Such a 2-level enhancement for more than minimal

planning appears in guidelines found in Chapter 2, Parts B (Offenses Involving Property) and F (Offenses Involving Fraud and Deceit). This enhancement recognizes that beyond the actual amount of loss, the severity of the offense requires us to look at whether or not the crime was an isolated one of opportunity or was sophisticated or repetitive. As you know, the term "more than minimal planning" is defined in the Commentary to Section 1B1.1. Of course, the adjustments found in Chapter 3 of the guidelines, such as defendant's aggravating or mitigating role in the offense are unaffected and would remain as separate adjustments following a determination of whether or not a specific offense characteristic, such as "more than minimal planning," applies to the offense.

As the Commentary to Section 2F1.1, the fraud and deceit guideline, states:

The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm. A complex scheme or repeated incidents . . . are indicative of an intention and potential to do considerable harm. In pre-guidelines practice, this factor had a significant impact, especially in [offenses] involving small losses. Accordingly, the guideline specifies a 2-level enhancement when this factor is present.

This commentary is equally applicable to offenses under Section 2Q2.1. Therefore, the guideline found there also needs to distinguish, for instance, between the opportunistic one-time smuggler who stashes contraband wildlife items in a bag before crossing the border and the ring of sophisticated wildlife traffickers who smuggle their live contraband wildlife into the U.S. through a worldwide network.

Similarly, the hunter who shoots an eagle because he happens to see it while hunting ducks and the profiteer who slaughters an eagle to supply the black market with a carcass, feathers and talons (worth less than \$2,000) engage in a qualitatively different crime. Section 2Q2.1 as now promulgated (unlike Section 2F1.1) fails to draw that distinction and treats each of these offenders alike.

We also recommend moving the phrase "pattern of similar violation" from paragraph (b)(1) to paragraph (b)(4). As you know, there are proposals to delete "more than minimal planning" as a specific offense characteristic elsewhere. See 57 Fed. Reg. 90, 94. While we support its inclusion here, if the phrase should be deleted from the guideline vernacular, then a "pattern of similar violations" standing alone can act as a substitute. While we would prefer the combination of the two, since the terms

are not mutually inclusive, our proposal provides the Commission with the flexibility to deal with the "more than minimal planning" specific offense characteristic without undermining Section 2Q2.1.

5. Proposed Revisions to Commentary

Proposal: The Commentary to section 2Q2.1 is amended by inserting in the appropriate place the following:

"Application Notes:

1. An offense 'committed for pecuniary gain' includes market transactions, barter transactions, and activities designed to increase gross revenue or reduce losses (e.g., when a farmer destroys migratory birds to prevent their consumption of cereal grains).
2. For purposes of subsection (b)(2), the quarantine requirements include those set forth in 9 CFR part 92, and 7 CFR chapter III.
3. For purposes of subsection (b)(3)(A), 'market value' may be determined from any reliable information available."

RECOMMENDATION: The Commentary to Section 2Q2.1 is amended by inserting in the appropriate place the following:

The term "commercial purpose" in Section 2Q2.1(b)(1) includes, but is not limited to: all activities involving the actual or intended purchase or sale of fish, wildlife, or plants; all activities involving the actual or intended take, receipt, acquisition, possession, transportation, or transfer of fish, wildlife, or plants in the pursuit of gain or profit; and all conduct facilitating such activities. Museums, zoological parks, and scientific or educational institutions open to the general public for a fee or donation, whether or not established, maintained, or operated as a governmental service or privately endowed and organized are included.

The term "pecuniary gain" includes market transactions, barter transactions, and activities designed to increase gross revenue

or reduce losses (e.g., when a farmer destroys migratory birds to prevent their consumption of cereal grains).

If the Commission adopts our recommendation to include both commercial purpose and pecuniary gain in subsection (b)(1), then both terms should be defined in the Commentary. We recommend adoption of the proposed definition of "pecuniary gain" and offer an equally broad definition of "commercial purpose."

RECOMMENDATION: The Commentary to Section 2Q2.1 is amended by inserting in the appropriate place the following:

The federal quarantine laws and regulations to which paragraph (b)(2) applies are set forth, inter alia, in Title 9, Code of Federal Regulations, Part 92 and Title 7, Code of Federal Regulations, Chapter III. State quarantine laws are applicable as well.

Our recommendation adopts much of the proposed language, but further specifies that quarantine laws need not necessarily be federal ones. State quarantine laws also qualify for considerations as well. Since the statutory provisions cited do not include quarantine laws per se, a brief description of the applicable quarantine laws referred to in Section 2Q2.1(b)(2) also should avoid any confusion about the kinds of quarantine laws incorporated here.

RECOMMENDATION: The Commentary to Section 2Q2.1 is amended by inserting in the appropriate place the following:

"Market value" may be determined at sentencing from any reliable information available and is not limited to the fair market value or bargained for price of the fish, wildlife, or plants. It may include replacement of restitution costs, or acquisition and preservation (i.e., mounting) costs and requires a case-by-case determination. So-called "contingent valuation methods" measuring aesthetic or non-use loss, however, are inappropriate to measure market value.

We agree that there is a need to address "market value" determination in the Commentary, but find the proposal falls far short of exploring the intricacies presented by that phrase.

Both the courts and prosecutors alike often become exasperated when they try to determine "market value" under the

guidelines. For example, in United States v. Asper, 753 F. Supp. 1260, 753 F. Supp. 1289 (M.D. Penn.) (Dec. 13, 1990), aff'd 941 F.2d 1203 (3rd Cir. 1991), a two-week sentencing hearing was required to establish the applicable guideline sentencing range, including a determination of the market value of mounted wildlife trophies under Section 2Q2.1. We hope that our proposed commentary to the guideline will avoid the need for a lengthy sentencing hearing to determine market value.

Neither Section 2Q2.1 of the sentencing guidelines, nor its accompanying commentary, defines the term "market value." However, Section 2Q2.1(b)(3)(A) specifically references Section 2F1.1 (Fraud and Deceit) to determine the appropriate level for adjustment of the offense level. Paragraph 7 of the commentary to Section 2F1.1 references yet another guideline, Section 2B1.1 (for the definition of value). Paragraph 2 of the commentary to this Section 2B1.1 provides in part:

"Loss" means the value of the property taken, damaged, or destroyed. Ordinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim
 (emphasis added)

Similarly, Paragraph 8 of the commentary to Section 2F1.1 indicates that the amount of the loss need not be exact or precise, "The district court need only make a reasonable estimate of the range of loss given the available information." Paragraph 8 of the commentary to Section 2F1.1 concludes by stating, "The offender's gross gain from committing the fraud is an alternative estimate that ordinarily will understate the loss."

In United States v. Wilson, 900 F.2d 1350 (9th Cir. 1990), the Ninth Circuit held that where market value is difficult to ascertain, a district court may use any reasonable method to measure the loss under Section 2F1.1 and is not limited to a strict market valuation of loss:

A strict market approach measures only the gain to the defendant while virtually ignoring the harm suffered by the victim. See United States v. Verkwitt, 619 F.2d 649, 658 (7th Cir. 1980) In light of these considerations and the Guidelines' provision for other methods of valuation, we reject a strict market valuation approach under the Guidelines and reiterate that "where goods

have no readily ascertainable market value, any reasonable method may be employed to ascribe an equivalent monetary value to the items." Drebin, 557 F.2d at 1331 (quoting United States v. Lester, 282 F.2d 750, 755 (3rd Cir. 1960), cert. denied, 364 U.S. 937, 81 S.Ct. 385, 5 L.Ed.2d 368 (1961)).

900 F.2d at 1356. (emphasis added). Accord, United States v. Pennington, 940 F.2d 670 (9th Cir. 1991) (court not bound by price paid by wildlife enforcement agent for eagles; court may use any reasonable method to measure the loss). See also United States v. Pemberton, 904 F.2d 515 (9th Cir. 1990) (rejecting defendant's argument that appropriate measure of value of stolen drawings he illegally possessed was what drawings were worth to him - zero).

Thus, the commentaries to sections 2B1.1. and 2F1.1 of the Guidelines and Wilson, Pemberton and Pennington point to the conclusion that the district court is not bound by the bargained for price or the value to the defendant in determining the amount of the loss or market value. The district court should be free to determine the amount of the loss or market value from any reliable information. The court should have considerable latitude to consider such values as liquidated damages, replacement costs, restitution, or other civil monetary values established by the states under various conservation laws. Also, guided hunts for trophy or other game animals themselves raise a host of unique valuation issues and the court should be free to consider the defendant's guide fees, license fees, transportation, lodging, shipping and taxidermy costs when determining market value.

Market value, however, cannot be determined using aesthetic loss. These values, often expressed as contingent or non-use values, would ask the court to determine value without resort to some quantifiable measure. Mere diminution in the aesthetic value of the environment is insufficient for determining market value.

Proposal: The commentary to section 2Q2.1 captioned "Background" is amended by deleting "involved a commercial purpose" and inserting in lieu thereof "was committed for pecuniary gain," and by deleting "species exceeded \$2,000 or the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the population of the species or to a discrete subpopulation of the species" and inserting in lieu thereof "fish, wildlife, or plants exceeded \$2,000, or involved certain endangered, threatened, or depleted species."

RECOMMENDATION: The Commentary to Section 2Q2.1 captioned "Background" is amended by inserting "pecuniary gain or"

immediately following "involved" and immediately before "a commercial purpose" and by inserting "or where the offense involved more than minimal planning or a pattern of similar violations" immediately following "as required by law" and by deleting "species exceeded \$2,000 or the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the population of the species or to a discrete subpopulation of the species" and inserting in lieu thereof "fish, wildlife, or plants exceeded \$2,000, or involved certain endangered, threatened, protected, or depleted species".

The proposal and our recommendation are nearly identical. Our recommendation, however, captures the broader coverage we propose for subsection (b)(1) and a new subsection (b)(4).

III. Issue for Comment 22: Chapter Three, Part D -- Multiple Counts

RECOMMENDATION: Section 3D1.2 is amended by inserting "Section 2Q2.1" in the appropriate place on the list found in Section 3D1.2(d).

Under Section 3D1.2(d), when the offense is one that requires grouping of multiple counts, then all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction are used to determine a defendant's relevant conduct. Section 1B1.3(a)(2). Under Section 3D1.2(d), counts are grouped together, "when the offense level is determined largely on the basis of the total amount of harm or loss . . . or some other measure of aggregate harm" (Emphasis added). Section 2Q2.1 is neither specifically included nor excluded from the operation of that subsection; therefore, "a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level." Section 3D1.2(d).

Section 2Q2.1 should be listed as offense for grouping under Section 3D1.2(d) because the offense level is in fact largely determined by some measure of aggregate harm. Section 2Q2.1 is modeled after Section 2F1.1., an offense specifically listed for grouping under Section 3D1.2(d). Both have a base level of six (6) and derive additional offense levels through a specific offense characteristic based upon monetary amounts. See Sections 2F1.1(a), (b)(1), 2Q2.1(a), and (b)(3)(A). The only difference between these two specific offense characteristics is that one focuses upon "loss" and the other upon "market value." Id.

Unfortunately, this interpretation is not uniformly shared at sentencing when the guidelines are applied. When significant "market values" are involved, then a correspondingly significant portion of the total offense level results from that specific offense characteristic and, the offense level is then "largely determined" by the aggregate harm or loss. Conversely, this analysis has been used with low market values near or at the threshold levels for additional offense levels to claim that the offense level is no longer determined largely on the basis of aggregate market value; since the basis offense level itself comprises more than half of the total offense level. This ambiguity can be eliminated simply by stating that Section 3D1.2(d) applies to Section 2Q2.1.

Such an interpretation will insure nationwide uniformity and comport with most recent interpretations of relevant conduct. As the Fifth Circuit has noted:

One of the clear purposes of § 1B1.3 of the guidelines is to include different transactions that are relevant to the charged conduct, particularly if they are part of a "common scheme or plan." United States v. Woolford, 896 F.2d 99, 104 (5th Cir. 1990). To accord with this purpose, we have consistently interpreted relevant conduct broadly. See, e.g., United States v. Paulk, 917 F.2d 897, 883-94 (5th Cir. 1990); United States v. Mourning, supra, 914 F.2d at 706.

United States v. Smallwood, 920 F.2d 1231, 1237 (5th Cir.), reh'g denied en banc, 927 F.2d 602 (5th Cir. 1991).

The Fifth Circuit also recently cited with approval several other circuit court opinions describing the interplay between the sections focusing on relevant conduct:

For a general explanation of the interplay between sections 1B1.3(a) and 3D1.2(d), see United States v. Blanco, 888 F.2d 907, 909-11 (1st Cir. 1989). See also United States v. White, 888 F.2d 490, 497 (7th Cir. 1989) ("Putting § 1B1.3(a)(2) together with § 3D1.2(d) produces the conclusion that when the Guidelines provide tables that cumulate the amount sold or stolen, any acts that "were part of the same course of conduct or common scheme or plan as the offense of conviction" should be included in the computation of the amount on which the offense level depends, whether or not the

defendant was convicted of selling or stealing these additional amounts.").

United States v. Ponce, 917 F.2d 841, 843 n.1 (5th Cir. 1990),
cert. denied, ____ U.S. ____ (1991).

A summary of our recommendations for Section 2Q2.1 is attached along with a "redlined" copy of Section 2Q2.1 with our proposed changes. Enclosures 1 and 2.

Enclosures

ENCLOSURE 1

RECOMMENDATION: Section 2Q2.1(b)(1) is amended by inserting "pecuniary gain or" immediately after "involved."

RECOMMENDATION: Section 2Q2.1(b)(2) is amended by inserting "(A)" immediately before "involved" and by inserting "or (B) otherwise created a significant risk of infestation or disease transmission potentially harmful to humans, fish, wildlife, or plants" immediately following "law."

RECOMMENDATION: Section 2Q2.1(b)(3)(B) is amended by deleting "a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to discrete subpopulation" and inserting in lieu thereof "any of the following types of amounts of fish, wildlife, or plants: species listed as endangered or threatened by the Endangered Species Act; species listed as Appendix I to the convention on International Trade in Endangered Species of Wild Fauna or Flora; depleted stocks of marine mammals; or a quantity of fish, wildlife, or plants that was significant in relation to the overall population of the species, to any subspecies, or to a distinct population segment."

RECOMMENDATION: Section 2Q2.1(b) is amended by inserting the following as paragraph (b)(4).

- (4) If the offense involves more than minimal planning or a pattern of similar violations, increase by 2 levels.

RECOMMENDATION: The Commentary to Section 2Q2.1 is amended by inserting in the appropriate place the following:

The term "commercial purpose" in Section 2Q2.1(b)(1) includes, but is not limited to: all activities involving the actual or intended purchase or sale of fish, wildlife, or plants; all activities involving the actual or intended take, receipt, acquisition, possession, transportation, or transfer of fish, wildlife, or plants in the pursuit of gain or profit; and all conduct facilitating such activities. Museums, zoological parks, and scientific or educational institutions open to the general public for a fee or donation, whether or not established, maintained, or

operated as a governmental service or privately endowed and organized are included.

The term "pecuniary gain" includes market transactions, barter transactions, and activities designed to increase gross revenue or reduce losses (e.g., when a farmer destroys migratory birds to prevent their consumption of cereal grains).

RECOMMENDATION: The Commentary to Section 2Q2.1 is amended by inserting in the appropriate place the following:

The federal quarantine laws and regulations to which paragraph (b) (2) applies are set forth, inter alia, in Title 9, Code of Federal Regulations, Part 92 and Title 7, Code of Federal Regulations, Chapter III. State quarantine laws are applicable as well.

RECOMMENDATION: The Commentary to Section 2Q2.1 is amended by inserting in the appropriate place the following:

"Market value" may be determined at sentencing from any reliable information available and is not limited to merely the fair market value or bargained for price of the fish, wildlife, or plants. It may include replacement of restitution costs, or acquisition and preservation (i.e., mounting) costs and requires a case-by-case determination. So-called "contingent valuation methods" measuring aesthetic or non-use loss, however, are inappropriate to measure market value.

RECOMMENDATION: The Commentary to Section 2Q2.1 captioned "Background" is amended by inserting "pecuniary gain or" immediately following "involved" and immediately before "a commercial purpose" and by inserting "or where the offense involved more than minimal planning or a pattern of similar violations" immediately following "as required by law" and by deleting "species exceeded \$2,000 or the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the population of the species or to a discrete

subpopulation of the species" and inserting in lieu thereof "fish, wildlife, or plants exceeded \$2,000, or involved certain endangered, threatened, protected, or depleted species".

RECOMMENDATION: Section 3D1.2 is amended by inserting "Section 2Q2.1" in the appropriate place on the list found in Section 3D1.2(d).

ENCLOSURE 2

2. CONSERVATION AND WILDLIFE

§ 2Q2.1. Specially Protected Fish, Wildlife, and Plants; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

- (1) If the offense involved *pecuniary gain* or a commercial purpose, increase by 2 levels.
- (2) If the offense (A) involved fish, wildlife, or plants that were not quarantined as required by law, or (B) otherwise created a significant risk of infestation or disease transmission potentially harmful to humans, fish, wildlife, or plants, increase by 2 levels.
- (3) (If more than one applies, use the greater):
 - (A) If the market value of the fish, wildlife, or plants exceeded \$2,000 increase the offense level by the corresponding number of levels from the table in § 2F1.1. (Fraud and Deceit); or
 - (B) If the offense involved [a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to a discrete subpopulation] any of the following types or amounts of fish, wildlife, or plants: species listed as endangered or threatened by the Endangered Species Act; species listed as Appendix I to the Convention on International Trade in Endangered Species of Wild Fauna or Flora; depleted stocks of marine mammals; or a quantity of fish, wildlife, or plants that was significant in relation to the overall population of the species, to any subspecies, or to a distinct population segment, increase by 4 levels.

- (4) If the offense involved more than minimal planning or a pattern of similar violations, increase by 2 levels.

Commentary

Statutory Provisions: 16 U.S.C. §§ 668(a), 707(b), 1174(a), 1338(a), 1375(b), 1540(b), 3373(d); 18 U.S.C. § 545. For additional statutory provision(s); see Appendix A (Statutory Index).

Background: This section applies to violations of the Endangered Species Act, the Bald Eagle Protection Act, the Migratory Bird Treaty Act, the Marine Mammal Protection Act, the Wild Free-Roaming Horses and Burros Act, the Fur Seal Act, the Lacey Act, and to violations of 18 U.S.C. § 545 where the smuggling activity involved fish, wildlife, or plants. Enhancements are provided where the offense involved pecuniary gain a commercial purpose, where the fish, wildlife, or plants were not quarantined as required by law, or where the offense involved more than minimal planning or a pattern of similar violations. An additional enhancement is provided where the market value of the [species exceeded \$2,000 or the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the population of the species or to a discrete subpopulation of the species] fish, wildlife, or plants exceeded \$2,000, or involved certain endangered, threatened, protected, or depleted species.

For purposes of subsection (b)(1), the term "commercial purpose" all activities involving the actual or intended purchase or sale of fish, wildlife, or plants; all activities involving the actual or intended take, receipt, acquisition, possession, transportation, or transfer of fish, wildlife, or plants in the pursuit of gain or profit; and all conduct facilitating such activities. Museums, zoological parks, and scientific or educational institutions open to the general public for a fee or donation, whether or not established, maintained, or operated as a governmental service or privately endowed and organized are included. The term "pecuniary gain" includes market transactions, barter transactions, and activities designed to increase gross revenue or reduce losses (e.g., when a farmer destroys migratory birds to prevent their consumption of cereal gains).

The federal quarantine laws and regulations to which paragraph (b)(2) applies are set forth, inter alia, in Title 9, Code of Federal Regulations, Part 92 and Title 7, Code of Federal Regulations, Chapter III. State quarantine laws are applicable as well.

"Market value" may be determined at sentencing from any reliable information available and is not limited to merely the

fair market value or bargained for price of the fish, wildlife, or plants. It may include replacement or restitution costs, or acquisition and preservation (i.e., mounting) costs and requires a case-by-case determination. So-called "contingent valuation methods" measuring a aesthetic or non-use loss, however, are not appropriate methods to measure market value.

Proposed amendment to § 3B1.2:

- § 3B1.2(c) No mitigating role adjustment under this section shall be applied to a defendant whose offense level is determined in part by reference to the drug quantity table in § 2D1.1 or the chemical quantity table in § 2D1.1 where the relevant conduct for the drug or chemical amounts consists only of the drugs or chemicals in the defendant's actual possession.

Commentary

1. This section applies only when a defendant is convicted of an offense for which the drug quantity table in § 2D1.1 or the chemical quantity table in § 2D1.1 is applicable and the relevant conduct consists exclusively of the amount of drugs or chemicals in the defendant's actual possession. Because the actual possession of drugs or chemicals is essential to drug or chemical trafficking, no mitigating adjustment is available to the defendant when the relevant conduct of the drug or chemical amounts consists of only the drugs or chemicals in the defendant's actual possession. This provision prevents a mitigating adjustment for a courier or mule when the only drug or chemical amounts which can be proved are the amounts in the actual possession of the defendant, regardless of the number of other participants.
2. This provision should not result in a mitigating adjustment for other participants simply because actual possession of drugs or chemicals is limited to one person. For example, if two persons agree to carry drugs or chemicals between cities; but, at the time of arrest, only one of the persons is in actual possession of drugs or chemicals, the defendant in constructive possession is not entitled to a mitigating adjustment. Similarly, when one person provides the money to purchase drugs or chemicals intended for later distribution, that person is not entitled to a mitigating role adjustment simply because the drugs or chemicals are discovered in the actual possession of another person. In the examples, each defendant is equally culpable and neither deserves a mitigating adjustment.
3. When the relevant conduct for the drug or chemical amounts consists of drug or chemical amounts greater than the amount in the defendant's actual possession, a mitigating role is possible. In no event, however, may a defendant receive a mitigating adjustment which lowers the offense level below that applicable for the amount of drugs or chemicals in the defendant's actual possession

Reason for Amendment: This amendment clarifies that a courier or mule cannot receive a mitigating adjustment when the amount of drugs or chemicals within the scope of relevant conduct is only the amount of drugs or chemicals in the defendant's actual possession.