

Statement of
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on behalf of
Federal Public and Community Defenders

concerning the
Proposed Guideline Amendments, Part II

March 28, 1997

Amendment 1
(§ 2D1.1)

Amendment 1 would repromulgate as a permanent amendment the emergency amendment to § 2D1.11 promulgated by the Commission in February. The amendment would raise the penalties for list I chemicals by two levels and increase from level 28 to level 30 the top of the chemical quantity table for list I chemicals. This amendment is in response to a specific Congressional directive in the Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237. We do not oppose promulgating Amendment 1 as a permanent amendment.

Amendment 2
(§§ 2L1.1, 2L2.1, 2L2.2, 2H4.1)

Amendment 2 would repromulgate as permanent amendments several emergency amendments the Commission approved on March 19, 1997. On February 4, 1997, we submitted to the Commission our comments on these amendments. We do not oppose repromulgating the version of the amendments that the Commission adopted on March 19, 1997.

Amendment 3
(§ 2L1.2)

Amendment 3 would implement section 321 and 334 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Section 321 of that Act amends the definition of the term "aggravated felony" in 8 U.S.C. §1101(a)(43), and section 334 of that Act requires the Commission to amend the guidelines to reflect amendments made by sections 130001 and 130009 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 2023, 2030.

Congress initially defined the term "aggravated felony" in 1988 to mean murder, drug trafficking, and illegal trafficking in guns or explosives. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4469 (enacting 8 U.S.C. § 1101(A)(43)). Since then, the

definition has become complex and broad. For example, a fraud offense is an aggravated felony if the loss to the victim exceeds \$10,000, and receipt of stolen property is an aggravated felony if the court imposed a prison term of one year, suspended execution of the prison term, and placed the defendant on probation for one year. The result is that the label "aggravated felony" is not a reliable way to identify defendants who are deserving of greater punishment.

The unfairness of using an unreliable indicator is heightened by the drastic consequences that § 2L1.2 imposes -- a 16-level enhancement if the defendant has been deported after having been convicted of an aggravated felony. For a defendant in criminal history category II, the effect of this enhancement is to increase the guideline range from 4-10 months to 57-71 months. The unfairness is further heightened by the double counting that occurs. The aggravated felony also counts towards the defendant's criminal history score.

Amendment 3 would revise § 2L1.2 to call for a 16-level enhancement if the defendant had been deported after "conviction . . . for a crime of violence or controlled substance offense [and such conviction was punishable by more than five years imprisonment]," and a [10, 12]-level enhancement if the conviction was for any other aggravated felony. We believe that, if the Commission adopts the proposal, the bracketed language should be included. The statutory maximum is way to distinguish serious offenses from less serious offenses.

We believe that using the statutory maximum to distinguish between the more serious and less serious offenses is preferable to including all crimes of violence and controlled substance offenses. We also believe, however, that the statutory maximum is still too rough a measure of severity. A defendant may be convicted of a drug trafficking offense that has a 20-year maximum prison term but, because the offense was the sale of a small amount of marijuana, receive probation.

That defendant is less dangerous than a defendant who receives a prison term of 15 years for the sale of three kilograms of heroin or a prison term of 20 years for manslaughter.

We believe that the prison term served by the defendant is a better measure of actual severity than the statutory maximum.¹ The Commission can implement this measure rather easily and without complicating matters by utilizing the criminal history scoring. We suggest that the Commission adopt the following provision:

If the defendant previously was deported after a criminal conviction, or if the defendant unlawfully remained in the United States following a removal order issued after a criminal conviction, increase as follows (if more than one applies, use the greater):

- (1) if the conviction was for a crime of violence or controlled substance offense for which the defendant receives 3 criminal history points under § 4A1.1(a), increase by 16 levels;
- (2) if the conviction was for (A) a crime of violence or controlled substance offense for which the defendant receives 2 criminal history points under § 4A1.1(b) or (B) an aggravated felony, other than a crime of violence or controlled substance offense, for which the defendant receives 3 criminal history points under § 4A1.1(a), increase by 8 levels;
- (3) if the conviction was (A) for (i) an aggravated felony, other than an aggravated felony described in subdivisions (1) and (2), or (ii) any other felony for which the defendant receives 3 criminal history points under § 4A1.1(a), or (B) three or more misdemeanors that were either crimes of violence or

¹Another possible approach might be to measure the severity on the basis of other statutory or guideline indicators of severity. For example, federal drug laws call for mandatory minimums based upon quantity. A prior drug trafficking offense might qualify the defendant for a 16-level enhancement if the quantity of drugs involved in the prior offense were sufficient to trigger a ten-year mandatory minimum sentence. We do not advocate such an approach because we believe that such an approach would unduly complicate application of this guideline.

controlled substance offenses, for each of which the defendant receives 2 criminal history points under § 4A1.1(B), increase by 4 levels.

Amendment 4
(Appendix A -- statutory index)

Amendment 4 would amend the statutory index to add two new offenses enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Amendment 4 would list § 2H2.1 (obstructing an election or registration) as the offense guideline applicable to the new offense of voting by aliens (18 U.S.C. § 611). Amendment 4 would list § 2A2.4 (obstructing or impeding officers) as the offense level applicable to the new offense of "high speed flight from immigration checkpoint" (18 U.S.C. § 758). We do not oppose the amendment.

Amendment 5
(§ 3C1.2)

Section 3C1.2 currently provides for a two-level enhancement "[i]f the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." Amendment 5, requested by the Department of Justice, would add a mandatory minimum offense level -- that is, where the enhancement applies and after adding two points, "if the resulting offense level is less than [18-20], increase [the level] to [18-20]." We oppose this amendment.

The enhancement would apply only to 0.3 percent of defendants sentenced each year. See, e.g., U.S. Sentencing Comm'n, 1995 Annual Report 74; U.S. Sentencing Comm'n, 1994 Annual Report 69. Moreover, the base offense level for the type of case in which the enhancement is most commonly applied, robbery, see U.S. Sentencing Comm'n, 1993 Annual Report 89, 103 (34 of 91 cases in which enhancement applied were robbery cases), is already at or above the proposed

minimum level, U.S.S.G. § 2B3.1(a) (setting base offense level for robbery at 20). More importantly, for those cases that would be below the proposed mandatory minimum, the current two-level enhancement already represents a proportionally larger increase in offense level than it does for offenses that start at a relatively high level, such as robbery. The Commission has provided no justification for implementing such a disproportionate additional increase.

Amendment 6
(interstate stalking; harassing communications)

The proposals in amendment 6 are cumbersome and complex and if adopted, would impose significant and unwarranted policy changes. The synopsis of this amendment states that the proposals incorporate in the guidelines several new federal offenses. In our view, however, every one of the proposals in amendment 6 is flawed and would unnecessarily increase the difficulty in applying the guidelines. We urge the Commission to take a less sweeping and more reasonable approach to addressing the new federal offenses.

This past November, Congress enacted several new offenses that involve threatening or harassing behavior. Section 1069 of the National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201 makes interstate stalking (18 U.S.C. § 2261A) a federal offense:

Whoever travels across a State line or within the special maritime and territorial jurisdiction of the United States with the intent to injure or harass another person; and in the course of, or as a result of, such travel places that person in reasonable fear of the death of, or serious bodily injury . . . to, that person or a member of that person's immediate family . . . shall be punished as provided in section 2261 of this title.

The maximum penalties range from five years to life, depending on whether and to what degree the victim is injured.

Section 502 of the Telecommunications Act of 1996, Pub. L. 104-104, adds several new telephone call offenses to 47 U.S.C. § 223. The new offenses (47 U.S.C. § 223(a)(1)(C)-(E)), which have a maximum prison term of two years, make it a crime for a person to--

(C) make a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications;

(D) make or cause the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

(E) make repeated telephone calls or repeatedly initiate communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication.

In response to these new offenses, the Commission has published for comment a two-part amendment. Part A of amendment 6, consists of two options that would significantly alter the operation of several guidelines, including the statutory index. Part B requests comment on how to address the new offenses.

The new harassing telephone calls and stalking offenses are different from other offenses covered by the guidelines of chapter 2, part A. The harm in these offenses is ongoing or continuous. These offenses are unlikely to be prosecuted with any frequency in federal court. In the long run, a separate guideline may be the most appropriate way to incorporate these new offenses. In the short term, however, the current version of § 2A6.1 (threatening communications) should suffice to cover the few cases that occur. If § 2A6.1 does not adequately address the circumstances of a particular case, the court may depart.

should be amended. The Commission may decide that a separate guideline for stalking may be more appropriate than revising existing guidelines or the Commission may decide that no amendment is necessary. The proposed revisions would unnecessarily complicate the application of § 2A2.3 and 2A6.1.

We believe that the existing version of § 2A6.1 (threatening communications) should adequately cover the new harassing communications offenses. Because the offenses call for a maximum of only two years imprisonment, we would suggest providing a reduction if the offense did not involve an intent to carry out a threat.

The new offenses typically involve repeated instances or continuing conduct. For this reason, the offenses are not easily accommodated under any guideline in chapter two part A. We would advise against establishing a special exception to the relevant conduct rules just to accommodate these offenses. If it is necessary to amend the guidelines to cover these offenses, then the applicable guideline should be listed under § 3D1.2(d) as offense behavior that is "ongoing and continuous in nature." Otherwise, an unusual number of repeated instances can be handled by a departure.

We oppose revising the definition of aggravated assault. We are unaware of any documented instance where the application note inhibited sufficient punishment of an assault involving a weapon.

Amendment 7
(Chapter 2, parts B and F)

Amendment 7 of part II would amend five guidelines in chapter 2, parts B and F, and the statutory index to respond to changes in law enacted by the Economic Espionage Act of 1966, Pub. L. No. 104-294, 110 Stat. 3488.

Section 101 of the Economic Espionage Act of 1966 enact a new offense, captioned economic espionage (18 U.S.C. § 1831), that punishes theft of, or receipt of a stolen, trade secret, obtaining a trade secret by fraud, and unauthorized duplication of a trade secret. The defendant must intend or know that the offense will benefit a foreign government, foreign instrumentality, or foreign agent, terms defined in 18 U.S.C. § 1839 (also enacted by the Economic Espionage Act of 1966). The maximum prison term for an economic espionage offense is 15 years.

Amendment 7 would amend § 2B1.1 (larceny, embezzlement, and other forms of theft; receiving, transporting, transferring, transmitting, or possessing stolen property) by adding a new specific offense characteristic designated subsection (b)(7). Subsection (b)(7) would provide that if the offense involved misappropriating a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, "increase by [2] levels." We do not oppose the amendment.⁴

Section 201 of the Economic Espionage Act of 1966 amended 18 U.S.C. § 1030 (fraud and related activity in connection with computers). Amendment 7 would add an application note to § 2B1.1 stating that, for an offense under 18 U.S.C. § 1030(e)(2)(A) or (B), loss includes "the

⁴Amendment 7 would amend the statutory Index to indicate that § 2B1.1 is the offense guideline for offenses set forth in 18 U.S.C. § 1831 and § 1832 (theft of trade secrets, also enacted by section 101 of the Economic Espionage Act of 1966), but would not amend the statutory provisions note at the end of § 2B1.1 to list § 1831 and § 1832. We believe that the statutory provisions note to § 2B1.1 should also be amended. Similarly, amendment 7 would amend the Statutory Index to indicate that § 2B3.2 is the offense guideline for a violation of 18 U.S.C. § 1030(a)(7). While amendment 7 would also add a sentence to the background note to § 2B3.2 stating that guideline applies to "offenses under 18 U.S.C. § 1030(a)(7) involving a threat to impair the operation of a 'protected computer,'" amendment 7 would not amend the statutory provisions note to § 2B3.2. We believe that amendment 7 should also amend the statutory provisions note to § 2B3.2.

reasonable cost to the victim of conducting a damage assessment, restoring the system and data to their condition prior to the offense, and any lost revenue or costs incurred due to interruption of service." We do not oppose the amendment.

Amendment 7 would also add two application notes addressing grounds for departure. New application note 16 would indicate that an upward departure may be warranted "in cases involving theft of information from a 'protected computer,'" if the defendant sought the stolen information to further a broader criminal purpose.⁵ We oppose this language as vague and unhelpful.

New application note 15 would indicate that an upward departure may be warranted if loss "does not fully capture the harmfulness of the conduct" The new application note gives as an example the theft of personal information that involves a substantial invasion of a privacy interest. U.S.S.G. § 2F1.1 currently contains a similar application note. We believe that the Commission should defer action on new application note 15 and take it up when the Commission begins work on amendment 18 in part I of the proposed amendments. Loss as determined under § 2B1.1(b)(1) -- and § 2F1.1(b)(1) -- may not adequately reflect the harm of the offense, but not only because loss can understate the harm of the offense. Loss so determined can also overstate the harm. New application note 15 should be more balanced and reflect that reality, as should application note 10 to § 2F1.1.

Amendment 7 would amend § 2B1.3 and § 2F1.1 to provide that a defendant convicted under 18 U.S.C. § 1030(a)(4) or (5) receive a prison term of at least six months. These amendments are

⁵The proposed application note does not define the term "protected computer," but 18 U.S.C. § 1030(e)(2) does. If the Commission intends to adopt that definition, the proposed application note should be modified to say so.

in response to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 805(c), 110 Stat. 1305. We question the wisdom of mandatory minimum sentences restricting the discretion of judges to fashion an appropriate punishment, but the Commission has no choice in the matter. We do not oppose the amendment.

Finally, amendment 7 would amend § 2B3.2 to add a new specific offense characteristic calling for an enhancement of the offense level using the fraud loss table "if the offense involved invasion of a protected computer resulting in a loss" We recommend that the Commission not act on this part of amendment 7. This matter should be considered after this cycle as a part of the consideration of the issues involved in amendment 18 in part I. There are a number of questions that need to be addressed. If the protected computer trespassed upon is a federal government computer, does the enhancement of § 2B3.2(b)(1) apply? If the defendant committed the offense at home, where he or she keeps a weapon, does the Commission intend that the enhancement of § 2B3.2(b)(2) apply? By its literal terms, that enhancement would apply, but computer trespassing is different from trespassing upon real property. A first offense under 18 U.S.C. § 1030(a)(3) carries a maximum prison term of one year. Use of the loss table may result in all first offenders under that provision receiving the statutory maximum.

**Amendment 8
(flunitrazepam)**

Amendment 8 consists of two parts in response to the Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. No. 104-305, which directs the Commission to "review and amend, as appropriate, the sentencing guidelines for offenses involving flunitrazepam." The Act increases the maximum penalty for offenses involving flunitrazepam. For violations of 21 U.S.C.

§ 841, the Act raises the maximum penalty for flunitrazepam from three-years imprisonment to five-years imprisonment for thirty milligrams and twenty-years imprisonment for one gram. The Act also revises 21 U.S.C. § 959 (import and export) to provide a maximum penalty of twenty-years imprisonment for offenses involving any quantity of flunitrazepam. The Act increases the penalty for simple possession of flunitrazepam to three years.

Part A

Part A presents two options to amend § 2D1.1 (drug trafficking) and § 2D2.1 (simple possession) to address offenses involving flunitrazepam. Both options would revise § 2D1.1 to treat flunitrazepam as a Schedule I and II depressant. Under option one, the base offense level for simple possession of flunitrazepam in § 2D2.1 would remain at level four. Option Two would amend § 2D2.1 to provide a base offense level of eight if the substance possessed is flunitrazepam. We oppose Option Two and do not oppose Option One.

Because the maximum prison term for a flunitrazepam offense is twenty years, it makes sense to treat flunitrazepam like Schedule I and II depressants, which have a maximum prison term of twenty years. We oppose that part of Option Two, however, that would treat simple possession of flunitrazepam as equivalent to possession of heroin or crack and much more seriously than possession of any Schedule I or II depressant. The proposed revision of § 2D2.1 would result, in some cases, in sentencing simple possession of flunitrazepam more harshly than trafficking flunitrazepam. Under the proposed amendment, a trafficking offense involving less than 250 units of flunitrazepam would yield an offense level of six, while simple possession of that same amount would result in an offense level eight.

Part B

Part B seeks comment on how the guidelines should incorporate "date rape" and related crimes. The Drug-Induced Rape Prevention and Punishment Act enacted a new federal offense of "date rape," codified at 21 U.S.C. § 841(b)(7):

Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18, United States Code (including rape), against an individual, violates subsection (a) by distributing a controlled substance to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18, United States Code.

"Date rape" is essentially a state law crime and is unlikely to be prosecuted with any frequency in federal court. We suggest that at this time the Commission not amend the guidelines to incorporate this new offense. The Commission will be in a better position to determine whether and what type of amendment is necessary after there have been some cases prosecuted in federal court.

Amendment 9 (methamphetamine)

Amendment 9 consists of two parts in response to certain parts of the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237.

Part A

Part A would respond to sections 101, 201, and 209 of the Act. Section 101 revises 21 U.S.C. § 959 (manufacture or distribution for purpose of unlawful importation) to make it unlawful to manufacture or distribute a listed chemical. Section 201 of the Act revises 21 U.S.C. § 844 to make it unlawful "for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person . . . if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business

in the manner contemplated by his registration.” Section 209 of the Act corrects the spelling of certain precursor chemicals.

Part A would amend § 2D2.1 (unlawful possession) to provide a base offense level of 4 “if the offense involved a list I chemical.” In addition, part A would amend the statutory index to include § 2D1.11 (listed chemicals) as an applicable guideline for violations of importation offenses under 21 U.S.C. §§ 959 and 960(d)(7).

We do not oppose part A.

Part B

Part B invites comment in response to section 203 of the Act, which revises 21 U.S.C. § 843(d) to provide up to ten years imprisonment for a violation of 21 U.S.C. § 843(a)(6) or (7) (possession, manufacture or distribution of certain laboratory equipment) if the offense is committed with intent to manufacture or to facilitate the manufacture of methamphetamine. Section 203 directs the Commission to amend the guidelines “to ensure that the manufacture of methamphetamine in violation of section 403(d)(2) of the Controlled Substances Act . . . is treated as a significant violation.” Part B requests comment on how to respond to this directive and specifically, on whether there should be an additional enhancement in § 2D1.12 (prohibited flask or equipment) “if the equipment is used to manufacture methamphetamine.”

We believe that § 2D1.12, the guideline currently applicable to violations of 21 U.S.C. § 843(a)(6) - (7), treats those offenses as a significant violation. The new offense requires an intent to manufacture methamphetamine, and § 2D1.12 provides a cross reference to § 2D1.1, “if the offense involved unlawfully manufacturing a controlled substance, or attempting to manufacture a controlled substance.” The cross-reference should ensure a guideline range at or above the statutory

maximum of ten years. If the resulting sentence is inadequate, the government can prosecute the offense as an attempt to manufacture under 21 U.S.C. § 846, for which the statutory maximum is twenty years. Such cases would be sentenced under § 2D1.1.

Amendment 10
(§§ 2D1.1 and 2D1.11)

Amendment 10 consists of five parts in response to sections 301 and 303 of the Comprehensive Methamphetamine Control Act of 1996. Section 301 of the Act directs the Commission to amend the guidelines "to provide for increased penalties" for offenses involving methamphetamine and to "submit to Congress explanations therefor and any additional policy recommendations for combating methamphetamine offenses." Section 303 directs the Commission to "determine whether the Sentencing Guidelines adequately punish" certain offenses in the Controlled Substance Act (specifically, 21 U.S.C. §§ 841(d), 841(g)(1), 843(a)(6), and 843(a)(7) which result in violations of subsection (d) or (e) of section of the Solid Waste Disposal Act; section 103(b) of the Comprehensive Environmental Response, Compensation and Liability Act; section 301(a), 307(d), 309(c)(2), 309(c)(3), 311(b)(3), or 311(b)(5) of the Federal Water Pollution Control Act; or 49 U.S.C. § 5124 (violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material)).

Parts A through D of Amendment 10 would increase the guideline penalties for methamphetamine offenses. Part A would revise the drug quantity table. Part B would raise the penalties for importation offenses involving methamphetamine. Part C would provide new penalties for environmental harm caused by manufacturing methamphetamine. Part D would state explicitly that manufacturers may be subject to a special skill adjustment. We believe that before

implementing any of these changes, the Commission should undertake a comprehensive study of methamphetamine offenses and their sentencing.

The Congressional directive to increase the guideline penalties for methamphetamine offenses is a part of the latest craze in the current political arena. We trust that the Commission will maintain its role as an independent body committed to a reasoned and rational sentencing policy, and will resist responding impulsively to the political concerns of Congress.⁶ Implicit in the Congressional directive is an assumption that the current penalties are not stringent enough. The Commission, as the federal agency entrusted to ensure rational sentencing policy, is best qualified to determine whether this assumption is correct, and if so, what specific changes are called for. For this reason, we believe that the Commission's initial response to the directive should be to gather the facts upon which sound policy judgments can be based.

Part A

Part A would increase the penalty for methamphetamine offenses by revising the drug quantity table in § 2D1.1. The proposal would reduce by one-half the current quantities of methamphetamine required for each offense level in the table. Thus, for a base offense level of 26, the quantity of methamphetamine would be reduced from "at least 100 G but less than 400 G of Methamphetamine" to "at least 50 G but less than 200 G of Methamphetamine." Part A would also amend the drug equivalency table by increasing two-fold the quantity of marijuana listed as equivalent to a particular amount of methamphetamine. For instance, the amount of marijuana equivalent to one gram of methamphetamine would be increased from one kilogram to two

⁶There is a parallel to the crack cocaine hysteria that produced swift legislation resulting in unfair and unwise sentencing policy. The Commission is to this day attempting to remedy that problem.

kilograms. Finally, part A would amend application note B to state “[i]n the case of a mixture or substance containing PCP or methamphetamine, if the purity of the mixture or substance can be determined and exceeds ten percent, then the weight of the actual controlled substance in the mixture shall be used to determine the offense level. In any other case involving a mixture or substance containing PCP or methamphetamine, use the weight of the mixture containing PCP or methamphetamine to determine the offense level.”

We oppose Part A. The synopsis of Part A states that the increased guideline penalties would have “the same effect on methamphetamine guideline penalties that would have occurred if Congress had passed legislation to reduce by half the quantities to trigger the mandatory minimum penalties under 21 U.S.C. § 841.” Congress considered and rejected that proposal. We fail to understand the rationale for increasing the penalties based on legislation that was never enacted. We suggest that before increasing the penalties for methamphetamine, the Commission come up with a rational explanation for the extent of any such increase. We believe that the Commission should conduct a comprehensive study of the methamphetamine offenses to determine whether, relative to other drugs, methamphetamine offenses are being treated too leniently.⁷ Once that question is answered, the Commission will be in a better position to determine how to provide more appropriate punishment.

Part B

Part B of amendment 10 presents three options (“either as an alternative or an addition to Part A”) to amend § 2D1.1 to include an enhancement for offenses involving the importation of

⁷The drug trafficking guideline already treats methamphetamine offenses differently from other controlled substances. The determination of the base offense level of a methamphetamine offense takes into account the purity of the drug by differentiating between methamphetamine and methamphetamine (actual).

methamphetamine or precursor chemicals. Option One would revise § 2D1.1 to provide a two-level increase "if the offense involved the importation of methamphetamine, or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully." Option Two would amend § 2D1.1 to provide a two-level increase if "(A) the offense involved the importation of methamphetamine [or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully,] and (B) the defendant [is subject to an adjustment under § 3B1.1 (Aggravating Role)][is not subjected to an adjustment under § 3B1.2 (Mitigating Role)]." Option Three would amend the commentary to § 2D1.1 to state that an upward departure may be warranted "if the offense involved the unlawful importation of methamphetamine, or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully. . . . [particularly if the defendant had an aggravating role in the offense under § 3B1.1 Aggravating Role]."

We realize that Congress has directed the Commission to increase the penalties for importation offenses involving methamphetamine, but, in our view, sound policy does not require an increase. We do not understand why importing methamphetamine is any more serious than manufacturing methamphetamine in this country. The vast majority of defendants who are arrested for importing are low-level mules or couriers. Their sentences are already too high. Frequently couriers and mules are poor people without a future who bring drugs into the United States for a fee that has no relation to the street-value of what they bring in. They generally are unaware of the scope of the drug enterprise they are assisting or even the identity of the participants. A simple enhancement for importing will inevitably result in even greater sentences for these least culpable offenders. The enhancement as set forth in Option One is too broad and would unfairly increase the

punishment of those who deserve a reduced rather than an increased sentence, and we therefore oppose it. We also oppose the departure instruction in Option Three because it could result in disparate sentencing. The problem with Option Three is that the proposed commentary provides no guidance as to what type of importation offense would warrant a departure.

We suggest that to comply with the directive, the Commission, as part of the study of methamphetamine offenses, identify those factors that would justify an enhancement for importation. For example, the market-oriented approach Congress has taken to punishing drug offenses suggests that the leaders of methamphetamine-importing organizations are probably most deserving of increased punishment. The exploitation of desperate and despairing individuals who become mules or couriers only makes drug kingpins more deserving of punishment. Although we believe the enhancement for importation is greatly at odds with sound policy, we suggest that the Commission adopt the least onerous alternative in Option Two which would read: "If (A) the offense involved the importation of methamphetamine and (B) the defendant is subject to an adjustment under § 3B1.1, increase by two levels."

Part C

Part C presents two options to amend the drug guidelines ("either as an alternative or an addition to Part A") to provide an enhancement if the offense caused "environmental damage associated with the manufacture of methamphetamine." Option One would amend § 2D1.1 (unlawful manufacturing, importing, exporting, or trafficking; attempt or conspiracy), § 2D1.11 (distributing, importing, exporting, or possessing a listed chemical; attempt or conspiracy), § 2D1.12 (prohibited flask or equipment; attempt or conspiracy), and § 2D1.13 (structuring chemical transactions or creating a chemical mixture to evade reporting or record keeping requirements;

presenting false or fraudulent identification to obtain a listed chemical; attempt or conspiracy) to provide an increase of [2-6] levels "if the offense involved a discharge or emission into the environment of a hazardous or toxic substance or created a substantial risk of environmental harm."

Option Two would amend the commentary to §§ 2D1.1, 2D1.11, 2D1.12, and 2D1.13 to state that an upward departure may be warranted "if the offense involved a discharge or emission into the environment of a hazardous or toxic substance or created a substantial risk of environmental harm."

We oppose both options.

We believe that manufacturing offenses that create a significant risk of serious environmental harm (at least in this country) occur too infrequently to warrant adding a specific offense characteristic. We believe that a departure would best address the rare instance when such a risk is created. The manufacture of methamphetamine always produces some waste that contains toxic substances. An increased sentence should be reserved for those cases where the toxic or hazardous substance poses a substantial risk of serious environmental harm.

Part D

Part D would amend the commentary to § 2D1.1 and § 3B1.3 (abuse of position of trust or use of special skill) to state that drug manufacturers ("cooks") may be subject to an enhancement under § 3B1.3. Part D also offers an option that would delete that part of § 3B1.3 that states that a sentence may not be enhanced for both use of a special skill and aggravating role. We oppose the amendment.

We believe that the revised commentary is unnecessary and conflicts with existing commentary on the definition of special skill. Not all drug manufacturing takes a significant amount of skill. For instance, converting cocaine powder into crack cocaine or free-base cocaine requires

neither much skill nor much training. The definition of "special skill" in the existing guideline is sufficient to alert a court that it may adjust a sentence when the manufacturing process involves some degree of sophistication.

We also oppose deleting the prohibition against adjusting a sentencing for both use of a special skill and aggravating role. There has been no justification for changing the existing policy to prevent double-counting.

Part E

Part E requests comment on three issues relating to punishing methamphetamine offenses. We believe that the issues can best be resolved after a comprehensive study of methamphetamine cases. As indicated above, we urge the commission to conduct such a study.

Amendment 11 (Indexing of New Offenses)

Part A

Part A of amendment 11 would add offenses created under the Health Insurance Portability and Accountability Act of 1996 to the statutory index contained in Appendix A.

1. The offense guideline applicable to a violation of 18 U.S.C. § 1347, the new offense of health care fraud (punishable by a maximum of ten years in prison (20 years if the violation results in serious bodily injury, and life imprisonment if the violation results in death)) would be the fraud guideline, § 2F1.1. We do not oppose this change.

2. The offense guideline applicable to violations of 18 U.S.C. § 669, the new offense of "theft or embezzlement in connection with health care" (punishable by a maximum of ten years in prison) would be the fraud guideline, § 2F1.1. We oppose this portion of amendment 11.

The new offense, entitled by Congress "theft or embezzlement in connection with health care" and placed in chapter 31 (embezzlement and theft) of title 18, United States Code, punishes "[w]hoever knowingly and willfully embezzles, steals, or otherwise without authority converts to the use of any person other than the rightful owner, or intentionally misapplies any of the moneys, funds, securities, premiums, credits, property, or other assets of a health care benefit program" with up to ten years in prison. The appropriate guideline for this offense is § 2B1.1, covering larceny, embezzlement, and other forms of theft, not § 2F1.1. Cf. 18 U.S.C. § 1347 (new offense entitled "Health care fraud," placed in chapter 63 (mail fraud) of title 18, United States Code, and violations of which to be sentenced under U.S.S.G. § 2F1.1, see Proposed Amendments, Pt. II, amendment 11(A)(1)).

3. The offense guideline applicable to a violation of 18 U.S.C. § 1035, the new offense of "false statements relating to health care matters" (punishable by a maximum of five years in prison) would be the fraud guideline, § 2F1.1. We do not oppose this change.

4. The offense guideline applicable to a violation of 18 U.S.C. § 1518, the new offense of "obstruction of criminal investigations of health care" (punishable by a maximum of 5 years in prison) would be the guideline for obstruction of justice, § 2J1.2. We do not oppose this change.

Part B

Part B of amendment 11 addresses changes made by the Omnibus Consolidated Appropriations Act for Fiscal Year 1997.

1. Section 648 of the Appropriations Act increased the statutory maximum term of imprisonment for 18 U.S.C. §§ 474 and 474A (counterfeiting offenses) from 12 years to 25 years by reclassifying these offenses from Class C offenses to Class B offenses. Section 474, covering the

possession, use, manufacture, or sale of counterfeiting equipment, is presently addressed by § 2B5.1. Section 474A, covering the possession of special paper or counterfeit deterrents, is not listed in the statutory index. Part B(1) of amendment 11 would reference § 474A to § 2B5.1. We do not oppose this change.

2. Section 648 also created a new offense involving fictitious obligations, that is, obligations that are completely made up but used as if real (e.g., Monopoly money used instead of currency), as opposed to being copies of real obligations (i.e., counterfeit). This offense also criminalizes the use of the mail, wire, radio, or other electronic communication to transfer the fake instruments. To be convicted, a defendant must have committed the offense with the intent to defraud. Part B(2) of amendment 11 would reference the new offense, 18 U.S.C. § 514, to the fraud guideline, § 2F1.1. We do not oppose this change.

Amendment 12
(Guidelines incorporating loss table of § 2F1.1)

Amendment 12, which would amend ten guidelines that rely on the loss table of § 2F1.1 to determine the offense level, is dependent upon the Commission's approval of amendment 18 in part I of the amendments published by the Commission for public comment. We recommend that the Commission take no action on amendment 12.

Amendment 18 in part I raises complicated and important issues about defining and calculating loss. We have recommended that the Commission postpone action on amendment 18 and take up the issues raised by that amendment after completion of work on this cycle's amendments. Because amendment 12 in part II is dependent upon Commission action on amendment 18 in part I, we make the same recommendation for amendment 12.