
WRITTEN TESTIMONY

PUBLIC HEARING

March 19, 2001



UNITED STATES SENTENCING COMMISSION

Summary of Written Testimony Presented for the March 19, 2001 Public Hearing

Federal Public and Community Defenders

Jon Sands, Assistant Federal Public Defender, District of Arizona
Chair, Sentencing Guidelines Committee of the Federal and Community Defenders

Proposed Amendment 5 – Sexual Predators

The FPCD recommends that the Commission, before promulgating guideline amendments that will have a substantial impact on Native Americans, hear from Native Americans tribes, organizations, and individuals. The dynamic between Native Americans and the dominant society is complex. The FPCD suggests that the Commission hold hearings at least in South Dakota and New Mexico or Arizona before promulgating a pattern of activity and incest enhancement.

In fiscal 1999, 28 out of 36 defendants convicted of an age-differential sex offense were Native Americans.¹ The Native American defendants sentenced under §2A3.2 tend to have committed sexual acts that are truly consensual and would be legal but for the age disparity. Undue influence is rare. For such cases, a base offense level of 15 is appropriate. The FPCD believes that it would be inappropriate to disproportionately punish Native American sex offenders until they have had an opportunity for education and treatment. In an article relied upon by the United States Probation Office, *The American Indian Sexual Offender*, author Dewey Ertz emphasizes that Native American sex offenders, unlike pedophiles, are the most amenable to treatment and have the lowest rates of recidivism.

The congressional directives contained in the Protection of Children from Sexual Predators Act of 1998 were for the most part aimed at the internet sexual predator. These individuals who troll the internet to prey on children are a minority of the sexual offenders in the federal system. The FPCD believes that the guidelines should be written to deal with offenders who make up the majority of the sex-offense defendants in the federal court system—sadly, Native Americans. More egregious offenders can be dealt with as discussed below.

a. Pattern of Activity

If the Commission decides to proceed without hearings with the Native American community, the FPCD recommends promulgating the fourth option presented – an encouraged upward

¹See *id.* at 9, table 5.

departure for a defendant who commits repeated acts of sexual abuse of minors.

If the Commission adopts §4B1.5, the FPCD believes that it should only increase a defendant's criminal history category to not less than IV. The guidelines should distinguish between those defendants who have a criminal history category of IV or below and V and above. Since §4B1.5 will only apply to those defendants who are not already facing a mandatory life sentence, the Commission should adopt a departure provision that allows a court to depart when the application of the guideline significantly overstates the future risk to the community or the seriousness of the defendant's criminal history.

The FPCD has grave concerns about enhancements or departures that are based on psycho-sexual evaluations. Psycho-sexual evaluations often base a determination of the risk of recidivism upon inappropriate sentencing characteristics, such as age, education, and employment history. There is no national uniformity concerning the availability of testing or testing protocols. The FPCD argues that these generic psycho-sexual evaluations could lead to unwarranted sentencing disparities. The FPCD does agree that an individual's amenability to treatment in determining risk assessment for the purposes of sentencing is an appropriate consideration.

The FPCD recommends that §4B1.5 have the same §4A1.2(e) limitations as the career offender guideline (§4B1.1) as to the age of applicable convictions.

The FPCD also opposes the proposed sexual predator enhancement (§4B1.6). Section 4B1.6 would allow a five level enhancement, with a floor of level 30 or 32 (to be decided), if the court finds either that the defendant committed the crime as a part of a pattern of activity involving prohibited sexual conduct or that the defendant is a sexual predator. A sexual predator conclusion would be based upon the court's determination, under the totality of circumstances, that a defendant is likely to continue to engage in prohibited sexual conduct with minors in the future.

The FPCD believes that the sexual predator enhancement proposed in §4B1.6 would vitiate the requirement of proof beyond a reasonable doubt. The standard for determining sexual predator status would be totally subjective and result in inconsistent application of the guidelines. The FPCD believes that it is clear that a five level enhancement should be proved by clear and convincing evidence, not by a standard less than a preponderance of evidence. In practice, this standard would shift the burden from the prosecutor to the defendant to prove that he was not a sexual predator.

If the Commission adopts §4B1.6, §4B1.6(b), it should require a finding that the offense was committed as part of a pattern of activity and the defendant is a sexual predator. A requirement that both be found would limit some of the concerns of the sexual predator determination. Moreover, §4B1.6 should only be imposed on those sex offenders who have committed multiple acts of abuse with multiple victims.

Section 4B1.6 would result in disproportionate sentences among sexual offenders. For example, a five level increase in §2A3.1 would result in a level of 32 before the addition of any other specific offense characteristics. The impact in §2A3.1 is clearly disproportionate in comparison to its impact in other guidelines such as §2A3.2 and §2A3.4.

If the Commission chooses to impose a pattern-of-activity enhancement, the FPCD recommends option three—a chapter 2 specific offense characteristic in the sexual abuse guidelines. This would be consistent with the pattern of activity adjustment currently in §2G2.2. Moreover, it would eliminate the need for an arbitrary floor of 30 or 32 by allowing a tailored increase in each guideline. Furthermore, an increase of two levels would bring to the guidelines the proportionality sought by Congress.

The FPCD believes that any pattern of activity enhancement should be limited to defendants whose instant offense of conviction is a sex crime involving the sexual abuse of a child, not including trafficking or receipt of child pornography or possession of child pornography, and who have prior convictions for the sexual abuse of a minor. If the Commission does not limit pattern of activity to prior sex abuse convictions, the FPCD argues that the pattern of activity should require clear and convincing evidence of prior conduct involving the combination of two or more separate instances of prohibited conduct involving a minor different from the victim of the instant offense of conviction.

The FPCD opposes the proposed amendment to §5D1.2 that would require the maximum term of supervised release for sex offenses. While the Commission may encourage a maximum term of supervised release, the imposition of it should be left in the sound discretion of the sentencing court.

b. Grouping

The FPCD recommends that the Commission adopt option one – grouping counts covered by §2G2.2 (trafficking in material involving the sexual exploitation of a minor) and §2G2.4 (possession of materials depicting a minor engaged in sexually explicit conduct) under §3D1.2(d). Offenses sentenced under §2G2.1 (manufacturing of child pornography) would still be specifically excluded from grouping under §3D1.2.

Grouping offenses concerning the trafficking, receipt, and possession of child pornography under §3D1.2, subjects the offenses to the broader relevant-conduct rules of §1B1.3(a)(2). This would allow courts to consider images of child pornography that are outside those images listed in the count or counts of conviction. Furthermore, the court would not be required to identify the victim, a task that can be complex and time consuming (especially if the images were computer-generated or morphed). Grouping will alleviate the need for this determination while permitting the sentencing court to consider a wide range of conduct in determining the appropriate sentence.

The FPCD believes this approach will encourage greater uniformity in sentencing, discourage

sentencing manipulation by plea agreements, and promote judicial economy.

c. Enhancement for Transportation Offenses and Other Amendments

Base-offense level increase. The FPCD believes an increase in the base offense level for non-18 U.S.C. ch. 117 violations is unwarranted. In fiscal year 1999, approximately 78% of the non-18 U.S.C. ch. 117 defendants (28 out of 36 defendants) were Native Americans. If there has been no undue influence, an offense level 15, or 13 with acceptance of responsibility, is an appropriate sentence, especially given the dynamics of reservation life.

If the Commission concludes that there must be an increase for those individuals who commit an offense under 18 U.S.C. ch. 117 involving a sexual act, the FPCD would propose the following: base offense level of 21 for an offense under 18 U.S.C. ch. 117 involving a sexual act; a base offense level of 18 if the violation of 18 U.S.C. ch. 117 did not involve the commission of a sexual act; and a base offense level of 15 in all other cases. The majority of offenders under 18 U.S.C. ch. 117 would be subject to other enhancements in §2A3.2. The FPCD believes, therefore, that a three level across-the-board increase is neither necessary to comply with the directives of the protection of Children from Sexual Predators Act of 1998 nor warranted in terms of proportionality. It goes onto argue that if the Commission promulgates a pattern-of-activity enhancement or encouraged-departure commentary, the most dangerous offenders would be subject to that provision.

Incest enhancement. The FPCD opposes an incest enhancement in §§2A3.1, 2A3.2 and 2A3.4, because, they believe that it would amount to an enhancement for being a Native American. The FPCD opposes any enhancement that would have such a disparate impact upon the Native American community. The FPCD states that reservation incest cases are often some of the most complex in the federal system. In addition to the problems of poverty, isolation, and substance abuse on the reservation, there exists the problem of incest as learned behavior. Significantly, incest cases also involve defendants with the greatest amenability to treatment and the lowest chance for recidivism if afforded a competent treatment regime.

The FPCD believes the current proposals are too compartmentalized and are fundamentally flawed. Congress's major concern was to incapacitate pedophiles who seek out and prey on children. True pedophiles, individuals who prefer children as sexual partners, have a high risk of recidivism and need the greatest amount of treatment. The FPCD submits, however, that not all individuals, even those who, unfortunately, abuse multiple children, are pedophiles or unamenable to treatment.

The FPCD states that Commission's proposed amendments might allow Native American incest cases to be doubly enhanced (for pattern of activity and incest) based upon the same facts. If the Commission is committed to promulgating a pattern-of-activity enhancement and an incest enhancement without holding hearings with the Native American community, the FPCD strongly suggests that acts of incest be prohibited from being used to impose a pattern-of-activity

enhancement. Both pattern of activity and incest are used to enhance the sentence of individuals who engage in more than a one-time act of abuse. However, the dynamics of incest verses pedophilia are different. The guidelines should set up a tiered approach recognizing each individual harm, and sentencing each appropriately.

The FPCD believes that those individuals who engage in a non-incestual pattern of activity of abuse present the greatest danger to the community. Pedophiles are the individuals who would be most appropriately punished by the proposed §4B1.5 and §4B1.6. Individuals who commit repeated acts of incest with multiple family members should receive a greater sentence than an individual who only abuses one family member. However, since in the federal system the incest enhancement will be almost exclusively used on Native Americans, the Commission should keep in mind the particular needs and realities of the Indian Reservation. While Native Americans convicted of sexual acts involving incest may deserve a sentencing increase, they should not be on a higher, or even the same, tier as the predatory pedophile.

The FPCD argues that by removing acts of incest from being used to impose §4B1.5 and §4B1.6, the Commission could avoid the appearance of racism and discrimination against the Native American community. Some Native American defendants might be subject to those enhancements, but only when their actions were similar to the non-Native American defendants who were subject to those enhancements. For example, those Native American defendants who traveled outside of their family compounds on the reservation to abuse children in the general community would be subject to the same enhancements as those non-Native American defendants who travel across Interstate lines to abuse children. Those Native Americans who are isolated on the reservation and act inappropriately toward family members, often while intoxicated, should not and would not be subject to the same enhancements.

Proposed Amendment 6 – Stalking and Domestic Violence

The FPCD opposes any increase in the base offense level of §2A6.2. The apparent basis for the increase is that a stalking offense involving violation of a protective order and bodily injury should receive punishment equal to or greater than an offense covered by §2A6.1 (threatening or harassing communications) that involves violation of a protective order and conduct evincing an intention to carry out the threat. An increase to either level 16 or 18, however, would fail to maintain the necessary proportionality with the more serious, violent offense of aggravated assault, covered by §2A2.2 (base offense level of 15). Thus, a defendant who commits an aggravated assault that results in bodily injury, in violation of a protective order, receives an offense level of 19 ($15 + 2 + 2$) under §2A2.2, whereas a defendant who commits a stalking offense resulting in bodily injury in violation of a protective order would be subject to an offense level under §2A6.2 of 20, if a base offense level of 16 is set ($16 + 2 + 2$). The FPCD does not believe that there is a sound reason for an offense level for a stalking offense that is higher than

the offense level for a more serious aggravated assault offense.² Moreover, if a base offense level of 18 is set, a stalking offense involving violation of a protective order that *does not* resulting in bodily injury would be subject to a greater punishment ($18 + 2 = 20$) than an aggravated assault involving violation of a protective order that *does* result in bodily injury ($15 + 2 + 2 = 19$).

FPCD also argues that, in the interest of proportionality, §2A6.2 ought to include the same four-level reduction provided by §2A6.1(b)(4) to address those cases in which the offense involves a single instance evincing little or no deliberation.

Proposed Amendment 7 – Re-promulgation of Amendment 608 (Emergency Amendment Regarding Enhanced Penalties for Amphetamine and Methamphetamine Laboratory Operators as Permanent Amendment)

Proposed amendment 7, which would re-promulgate amendment 608, sets forth three options; the FPCD prefers the third. Option three assumes that the manufacturing process for amphetamine or methamphetamine necessarily creates a substantial risk of harm. Option three, therefore, would amend §§2D1.1 and 2D1.10 to call for the three- and six-level enhancements and the floors required by Congress if the offense involved manufacture of amphetamine or methamphetamine. The enhancements and floors would apply to manufacture of other controlled substances if the sentencing court finds a substantial risk of harm. Option three puts the substantial-risk enhancement in §2D1.1(b)(5) and makes it an alternative to the environmental-harm enhancement.

The FPCD opposes both options one and two because they call for double counting. Congress determined that a substantial risk of harm to human life required at least a three-level enhancement. Under options one and two, the enhancement under §2D1.1 is going to be five levels in virtually every instance – two levels under subsection (b)(5) for discharge or handling of a hazardous or toxic substance and three levels under subsection (b)(6) for a substantial risk to human life. The FPCD argues that option three appropriately recognizes that there should be a gradation in the enhancement based upon harm by making the substantial-risk enhancement an alternative to the discharge and handling enhancement.

Proposed Amendment 8 – Mandatory Restitution for Amphetamine and Methamphetamine Offenses

²Application note 2 to §2A6.2 reflects that the cross reference of subsection (c)(1) should apply if the resulting offense level is greater in a case involving more serious conduct. “For example, §2A2.2 (Aggravated Assault) most likely will apply pursuant to subsection (c) if the offense involved assaultive conduct in which injury more serious than bodily injury occurred or if a dangerous weapon was used rather than merely possessed.” However, §2A2.2 includes the same two-level increase for “bodily injury” set forth in §2A6.2(b)(1).

The FPCD does not oppose proposed amendment 8, which would amend §5E1.1(a)(1) to include a reference to 21 U.S.C. § 853(q).

Proposed Amendment 9 – Safety Valve

Proposed amendment 9 would amend the safety-valve provisions of §§5C1.2 and 2D1.1(b)(6). First, the amendment would add a new subsection to §5C1.2, stating that a defendant who meets the five criteria and who is subject to a mandatory minimum of at least five years, cannot have an offense level from chapters two and three of the *Guidelines Manual* that is less than level 17. Next, the amendment would amend §2D1.1(b)(6) to eliminate the requirement that the offense level be at least level 26, thus making the two-level reduction available to any defendant who meets the five criteria of §5C1.2.

The FPCD supports the second part of the amendment, which will help ameliorate the harshness of the drug penalties for defendants whom Congress has identified at the least culpable (those who meet the five criteria in §5C1.2). The FPCD opposes part one of the amendment as unnecessary and unsupported by logic or policy. Indeed, the FPCD believes that part one will result in an unjustifiable disparity of treatment.

The FPCD states that if part one is adopted, the Commission will be treating defendants differently solely on the basis of whether the defendant is subject to a mandatory minimum. Assume, for example, that a level-24 LSD defendant meets the five criteria of §5C1.2 and is entitled to reductions for minimal role and acceptance of responsibility. If that defendant is not subject to a mandatory minimum (because, for example, the government chooses to charge an offense under 21 U.S.C. § 841(a)(1) and (b)(1)(C)), the defendant's final offense level will be 15. If that defendant is subject to a five-year mandatory minimum (because the government chooses to charge under 21 U.S.C. § 841(a)(1) and (b)(1)(B)), the defendant's final offense level will be 17. In effect, then, the second defendant is being penalized more severely because of the prosecutor's charging decision.

Proposed Amendment 10 – Anhydrous Ammonia

Proposed amendment 10 would assign offenses involving anhydrous ammonia to §2D1.12 (unlawful possession, manufacture, distribution, or importation of prohibited flask or equipment; attempt or conspiracy) on the basis that the new crime is similar to other offenses referenced to §2D1.12. The FPCD does not oppose assigning the new offense to §2D1.12.

Proposed amendment 10 seeks comment about whether the two-level enhancement of §2D1.12(b)(1) is sufficient to account for the seriousness of attempting or intending to manufacture methamphetamine using anhydrous ammonia. The FPCD believes that the amendment as proposed, which will result in a two-level enhancement under §2D1.12(b)(1), is appropriate. Under the present guideline, an offense involving an attempt to manufacture

methamphetamine using anhydrous ammonia results in a 2-level enhancement under subsection (b)(2) because of a release into the environment of a hazardous or toxic substance. The Commission has thus determined that the hazardous or toxic nature of a substance calls for a two-level increase. The effect of amending subsection (b)(1) to cover anhydrous ammonia is to double the enhancement already applicable to an offense involving anhydrous ammonia. The FPCD's position is that there is no need for increasing the enhancement if anhydrous ammonia is involved.

The issue for comment also asks whether the seriousness of using anhydrous ammonia should be accounted for by an enhancement in §2D1.12(b)(1) of up to 10 levels or by an alternative method, such as a cross reference to §2D1.11 using a conversion to methamphetamine. The FPCD opposes cross-referencing from §2D1.12 to §2D1.1 using a conversion to methamphetamine from anhydrous ammonia. The FPCD does not know of an established conversion ratio based on any scientific or other reliable data that will specify the quantity of methamphetamine that could reasonably be expected to have been made from a given quantity of anhydrous ammonia. Absent such data, expected yield would have to be litigated case-by-case, which undoubtedly would protract sentencing proceedings, if for no other reason than the necessity to present expert testimony.

Proposed Amendment 11 – GHB

The FPCD agrees with the Commission that, given the statutory maximums, proportionality concerns dictate that the less serious Schedule III substances should not be sentenced comparably to those in Schedules I and II. Amendment 11 also would modify the chemical quantity table of §2D1.11 to include as a list I chemical the substance GBL, which is a precursor in the production of GHB. The FPCD does not oppose this part of the amendment.

Proposed Amendment 12 – Economic Crime Package

The FPCD is concerned that the economic crime package not be used as a vehicle for an across-the-board increase in punishment for the offenses covered by §§2B1.1, 2B1.3, and 2F1.1. The sentences for those offenses fall overwhelmingly below or at the bottom of the applicable guideline range. The FPCD stated that Commission data for FY 1999 indicates that 9.7% of fraud defendants received a downward departure for other than substantial assistance. Of those fraud defendants who did not receive a departure, 61.9% of them received a sentence at the bottom of the guideline range. The data is similar for larceny in FY 1999 – 7.0% of the defendants received a downward departure for other than substantial assistance, and 68.8% of the defendants who did not receive a departure were sentenced at the bottom of the guideline range. This pattern has held true over the years. Thus, the FPCD believes that there is no need – or justification – for an increase in penalties for the offenses covered by §§2B1.1, 2B1.3, and 2F1.1.

a. Consolidation of the theft, property destruction, and fraud guidelines into a new guideline

The FPCD supports consolidation of §§2B1.1, 2B1.3, and 2F1.1. Because the severity of the property offense is related principally to the economic harm caused, it makes sense that a single guideline be used to determine the offense level.

Additionally, the FPCD supports the elimination of the more-than-minimal planning enhancement. The FPCD also supports the proposed amendment's treatment of offenses involving several victims.

The FPCD noted that the newly merged guideline does not carry forth the rationale from the current guideline for a two-level enhancement if the offense was receiving stolen property and the defendant was "in the business of receiving stolen property." Although the amendment merging the guidelines does not indicate why the explanation was not added to §2B1.1, the FPCD stated that it seems unlikely that the Commission was repudiating the rationale.

Regarding the "in the business" enhancement, the Commission has opted for the totality approach, which is consistent with the originally-described purpose of the enhancement. FPCD does not oppose this, but they believe that proposed application note four should be modified to give a better indication of the activity at which the activity is aimed. The FPCD believes that the enhancement should not apply merely because the defendant sold what he or she stole. If selling what has been stolen is sufficient, then the enhancement will be applied in virtually every case. The FPCD suggests that proposed application note four state that the enhancement should not apply if the defendant only distributed goods that the defendant had unlawfully acquired.

The FPCD supports option one for proposed subsection (b)(14), which would apply if, as a result of the offense, the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions.

The FPCD supports proposed subsection (c)(3) without the bracketed language. The issue involved is really determining the applicable offense guideline. Under §1B1.1, that determination is made without reference to the offense level produced by the guideline. Therefore, the FPCD believes that the determination proposed under subsection (c)(3) should be made without reference to the offense level produced by the guideline.

Issue for comment one. The FPCD supports the current approach of the Commission, which is to treat an inchoate offense as less serious than a completed one. The FPCD recommends that the Commission carry forth the language from the last paragraph of current application note 2 from §2B1.1 and the language from current application note 10 from §2F1.1. The FPCD understands the concern that the method for determining the offense level in an inchoate offense be clear and relatively easy to apply. The current method requires several steps but is not unclear.

Issue for comment two. The FPCD favors reliance on departures for handling the destruction of, or damage to, unique or irreplaceable items of cultural heritage, archeological, or historical significance. Cases involving such conduct are relatively infrequent and a fixed enhancement

will be too little in some instances and too much in others. The FPCD stated that a scaled enhancement would be difficult. Finally, the FPCD believes it is best to see how sentencing courts deal with such cases before attempting to draft a specific offense characteristic.

b. Options for a new loss table for the proposed consolidated guideline and options for a new tax loss table

The FPCD does not believe that the Commission should revise the loss table. The increased punishment called for by the three published options is neither necessary, desirable, nor appropriate. The actual sentencing practices of federal judges demonstrate that the current level of punishment is more than adequate for economic crimes. Increasing the level of punishment simply means that federal judges will be departing downward from, or sentencing at the bottom of, higher guideline ranges. The likelihood is for an increase in the number of downward departures (for other than substantial assistance) and sentences at the bottom of the guideline range. None of the published options, in the FPCD's opinion, should be adopted. The table proposed by the Practitioners Advisory Group also would increase punishment levels, but the increases begin at higher loss amounts and are more modest than the increases in the published options.

Further, the FPCD states that adoption of a new loss table is not a prerequisite to consolidating the theft, property destruction, and fraud guidelines because either the current theft or fraud table will mesh with the proposed new guideline. Because the proposed consolidated guideline has a base offense level of six, the FPCD suggests using the loss table in the current guideline.

c. Revised definition of loss

The FPCD supports a comprehensive definition of loss. Even if the Commission decides not to consolidate the theft, property destruction, and fraud guidelines, there should be a single, comprehensive definition of loss applicable to those guidelines.

The FPCD stated that, though it does not support the inclusion of intended loss in the definition, if the Commission does decide to include intended loss, there needs to be some modification to proposed application note 2(A). Specifically, the use of passive voice in proposed application note 2(A) – “the pecuniary harm that was intended to result” – masks whether the test remains the defendant's subjective intention. The proposed commentary appears to be trying to hold a defendant accountable for the defendant's own intention and for the intention of others for whose *conduct* the defendant is accountable under the relevant conduct rules of §1B1.3. The FPCD believes it is inappropriate to attribute to the defendant the loss that another participant in the offense intended to inflict. A defendant should be held accountable only for the defendant's intention.

The FPCD also believes it would be good for the proposed commentary to note that “intended” means more than merely knowing something would result. The FPCD supports the suggestion

of the Practitioners Advisory Group that, if intended loss is to be considered, the standard should be “the pecuniary harm that the defendant purposely intended to cause.”

Additionally, the FPCD stated that they believe that, if intended loss is to be considered, the proposed commentary should address intended losses that cannot occur – the filing of an insurance claim for \$10,000 for a stolen car with a blue book value of \$5,000. The proposed commentary addresses the matter in bracketed language. The FPCD stated that while the bracketed language would work, it would be better if the proposed commentary also defined intended loss to be “the pecuniary harm that reasonable was intended to result” However, the bottom line is that the FPCD does not support the inclusion of intended loss.

Definition of “actual loss.” The FPCD stated that they prefer option one because option two does not place a limitation of reasonable foreseeability. However, the FPCD believes that there needs to be some sort of remoteness limitation on the loss for which a defendant is accountable. Virtually anything is reasonably foreseeable, so a reasonable foreseeability test does not really place a boundary on loss. The FPCD stated that some notion of legal causation must go along with but-for causation.

Time for measurement. The FPCD does not support either option for time of measurement. In the FPCD’s opinion, the time to measure loss is when the offense is committed. A time-of-detection rule has no apparent rationale and, in any event, is too subjective and invites litigation. Time of sentencing lacks a rationale other than ease of application. Time of sentencing, however, is preferable to time of detection because it is not subjective and therefore does not invite litigation. The FPCD believes that time of offense will usually be as easy to apply as time of sentencing.

Exclusion of interest. The FPCD supports option one because the inclusion of bargained-for interest would invite litigation. Furthermore, including interest rarely is likely to make a difference in punishment, and loss-determination for guideline purposes is not intended to be a precise accounting of the fiscal impact of the offense; therefore, there is little reason to require the additional work necessary to gather information about bargained-for interest.

Economic benefit conferred on victim. The FPCD supports the provision of proposed application note 2(c)(i) which excludes from loss “the value of the economic benefit the defendant or other persons acting jointly with the defendant transferred to the victim before the offense was detected.” The FPCD also suggests that, with respect to the proposed application note 2(C)(iii)(IV)(1), the de minimis language in the first bracket is better than the substantially different language in the second bracket.

Ponzi schemes. The FPCD supports option one as most consistent with the approach of the consolidated guideline. Option one, by not allowing a reduction in excess of the victim’s principal, ensures that one victim’s “profit” will not be used to reduce another victim’s loss.

Estimation of loss. Proposed application note 2(D) would state that the sentencing court “need only make a reasonable estimate of the loss.” The FPCD does not object to that part of the proposed commentary. But proposed application note 2(D) then goes on to state that “[t]he sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence.” The FPCD believes that this overstates the situation. They suggest that this sentence, and the next two, be deleted as unnecessary. If the sentences are to be retained, the FPCD recommends that “ordinarily” be inserted after “sentencing judge” in the second sentence of the first paragraph of proposed application note 2(d), quoted above.

Gain. The FPCD supports option four. The Commission’s focus is on harm to the victim. Only if that harm cannot reasonably be determined should the court look to gain. Options one, two, and three would require a determination of gain in every case sentenced under the consolidated guideline – unnecessary work, in the FPCD’s judgment, because in the vast majority of cases the loss to victims will exceed a defendant’s gain.

Downward departure. The FPCD supports the inclusion of proposed application note 2(G)(ii)(II), but suggests some modification. The proposed commentary would indicate that a court, in determining whether to depart downward, can consider that, “The loss significantly exceeds the greater of the [defendant’s] actual or intended [personal] gain, and therefore significantly overstates the culpability of the defendant.” The FPCD supports inclusion of the bracketed words, but believes that the sentence should be modified by deleting “and therefore” and inserting “or otherwise.”

Part D – 1-Level Increase in Several Guidelines that Refer to the Loss Table

The FPCD has no objection to this part of the proposed amendment if the Commission decides to adopt a new loss table.

Part E – Technical and Conforming Amendments

The FPCD has no objection to this part of the proposed amendment.

Part F – Circuit Conflict on the Calculation of Tax Loss

Part F adopts the approach of the Second and Seventh Circuits. The FPCD supports part F.

Proposed Amendment 13 – Aggravating and Mitigating Factors in Fraud and Theft Cases

The FPCD supports the Commission’s effort to find other factors that should affect the sentencing of economic crimes, and, in this instance, the FPCD prefers option two. The FPCD believes, however, that both options are problematic to the extent that they rely on factors already accounted for in calculating the offense level. For example, in determining if there is an “aggravating” or “significantly aggravating” circumstances (option one) or a “qualifying

aggravating factor,” both options call for consideration of the number of victims – a factor already accounted for in proposed §2B1.1(b)(2). Further, under each option the presence of that factor is not controlling. The court must consider the “intensity” of that factor (option one) or determine that the seriousness of the aggravating factors outweigh the mitigating effects of the mitigating factors. However, by determining that there will always be an enhancement if there are more than a specified number of victims (four in proposed §2B1.1), the Commission has determined for all cases that the factor is controlling. The result is that if an offense involves 50 victims, defendant A could receive only the four-level enhancement of proposed §2B1.1(b)(2), while defendant B – in an otherwise identical case involving 30 victims – could receive the four-level enhancement of proposed §2B1.1(b)(2) plus another two-levels for an aggravating factor (or four levels under option one for a significantly aggravating factor). The FPCD argues that no factor already accounted for by a specific offense characteristic should enter into the determination of whether there are “aggravating” or “significantly aggravating” circumstances (option one) or whether the qualifying aggravating factors outweigh the qualifying mitigating factors (option two).

Proposed Amendment 14 – Sentencing Table Amendment and Alternative to Sentencing Table Amendment

The FPCD supports option one – expanding Zones B and C of the sentencing table for criminal history categories I and II. This approach will give federal judges additional discretion to fashion a sentence that is most appropriate under all of the circumstances of the case. Option one, unlike option two, requires no additional work by the probation officer conducting the presentence investigation and does not involve additional fact-finding that could become the subject of an appeal. The FPCD believes that federal judges will not abuse the additional discretion afforded by option one but will exercise that discretion in a responsible manner.

Proposed Amendment 15 – Firearms Table

The FPCD recommends against promulgating proposed amendment 15. The synopsis of proposed amendment states that the amendment responds to a recommendation of the Bureau of Alcohol, Tobacco, and Firearms (ATF) to increase the penalties under §2K2.1 for offenses involving more than 100 guns. The FPCD believes that an increase is unwarranted, and that the present offense levels are, if anything, too high. In fiscal year 1999, more than three-quarters (76.3%) of the firearms cases were sentenced within the guideline range. Of those sentences, slightly more than half (51.3%) were at the bottom of the guideline range and another 10.1% were in the lower half of the guideline range. Downward departures occurred in 11% of the sentences, and upward departures in 1.2%. In other words, nearly half of all firearms sentences were at or below the bottom of the guideline range.

The synopsis states that, “According to the ATF, from 1995 through 1997, nearly a quarter of all defendants sentenced under §2K2.1 for trafficking in more than 50 firearms received sentences of less than one year, or no term of imprisonment whatsoever, despite the

encouraged upward departure provided in Application Note 15 to §2K2.1.” The FPCD argues that the unstated assumption behind that assertion is that the sentences were inappropriately lenient, but there is no evidence to support such an assumption. The FPCD believes that federal judges generally do not impose such sentences if they are not warranted, an indication that there must have been good reasons why those defendants received the sentences they did.

Proposed Amendment 16 – Prohibited Person Definition

The FPCD has no objections to adding a definition of the term “prohibited person” to the commentary in §2K1.3 (unlawful receipt, possession, or transportation of explosive materials) and §2K2.1 (unlawful receipt, possession, or transportation of firearms or ammunition)

The FPCD supports the second change, which would specify that a defendant’s status as a prohibited person for purposes of selecting the appropriate base offense level is to be determined as of the time of the commission of the instant offense. The reason a person’s status as a prohibited person is a factor in determining the base offense level is that an explosives or firearms offense committed by such a person is more dangerous to public safety than an offense committed by someone who is not a prohibited person. The focus, therefore, properly belongs on the time of commission of the offense.

Proposed Amendment 17 – Prior Felonies

Proposed amendment 17 would address a split among the circuits over the interpretation of the term “prior felony conviction(s)” as used in subsection (a) of each of §2K1.3 (unlawful receipt, possession, or transportation of explosive materials) and §2K2.1 (unlawful receipt, possession, or transportation of firearms or ammunition). The issue is whether the word “prior” means before commission of the instant offense or before sentencing for the instant offense. The rationale for using a prior felony conviction for a violent crime or a drug-trafficking crime is that a person with such a conviction is more dangerous to the public than a person who has no criminal conviction or who has a conviction for a misdemeanor or felony other than a crime of violence or drug-trafficking crime. If that is so, then the relevant time, for the purpose of determining punishment, is whether the defendant had such a conviction at the time the explosives or firearms offense was committed. The FPCD, therefore, supports the amendment.

Proposed Amendment 18 – Immigration

The FPCD supports the proposed amendment and recommends that the enhancement under proposed (b)(1)((A)(i) be 10 levels. The FPCD opposes both options one and two because they would introduce a category-of-offense approach that assumes that all offenses within a given category are of equal seriousness, an assumption that the FPCD believes to be inaccurate.

Until 1988, the maximum prison term for an illegal reentry offense was two years. The Anti-Drug Abuse Act of 1988 modified the law to increase the maximum prison term to 15 years if the

defendant was deported following conviction of an aggravated felony and 5 years if the defendant was deported following conviction of a felony other than an aggravated felony. The apparent congressional policy is that the seriousness of an illegal-reentry offense is directly related to the seriousness of an offense committed by the defendant before deportation. While Congress specially defined the term "aggravated felony" for purposes of the illegal reentry offense in 8 U.S.C. § 1101(a)(43), it has expanded the definition over the years to the point that nearly any felony is an aggravated felony. Not all of the offenses encompassed by the present definition of "aggravated felony" are of equal seriousness.

The FPCD believes that the aggravated-felony enhancement should be based on the actual seriousness of the aggravated felony. It states that scoring the prior offense using the *Guidelines Manual* may be the most accurate way to measure seriousness. It concludes, however, that this method would be impractical and would result in a uniform assessment of seriousness, making it the least desirable approach. The FPCD believes that the category-of-offense approach (used in option one) is the least accurate measure of seriousness because it mistakenly assumes that all defendants who commit a given category of offense have engaged in equally serious conduct.

The FPCD believes that the punishment meted out to a defendant is the most appropriate measure of seriousness. It looks at two methods of determining the punishment meted out: by sentence imposed and by time served. The FPCD concludes that time served is the better measure because time served is the actual punishment that has been meted out. The sentence is the maximum possible and very few defendants actually serve that maximum because of parole and

The Justice Department has raised two principal objections to using time served. One is the difficulty in determining the amount of time served, and the other is that "[o]vercrowding in state prisons may result in early releases in some cases and understate the seriousness of the offense." The FPCD does not find these reasons sufficient to reject the use of time served. It argues that there will be only one conviction for which time served will have to be computed in illegal reentry cases (the aggravated felony that triggers application of the 16-level enhancement). Furthermore, the FPCD thinks that the concern about early release for overcrowding overstates the impact of such early release upon time served generally. The remedy of wholesale early release to relieve overcrowding occurs rarely; it is not the norm, and can be accounted for adequately by departure.

The Justice Department also objects to the proposed amendment because it "fails to prevent creative bases for downward departure that have arisen, particularly in districts that do not have 'fast track' policies." There can be no doubt that downward departures are frequent in illegal reentry cases. But, the FPCD argues that it is the inherent unfairness of the current aggravated-felony enhancement that leads to the high rate of downward departures in illegal reentry cases. Scaling the enhancement on the basis of the seriousness of the aggravated felony obviates the need for "creative bases for downward departure" by directly addressing the unfairness problem.

Proposed Amendment 19 – Nuclear, Biological, and Chemical Weapons

The FPCD believes that the proposed amendment sufficiently addresses offenses relating to biological and chemical weapons and threats to use such weapons.

Proposed Amendment 21 – Miscellaneous New Legislation and Technical Amendments

The FPCD has no objection to this proposed amendment.

New York Council of Defense Lawyers (NYCDL)

Statement of Brian E. Moss

Brian Moss represents the New York Council of Defense Lawyers, an organization with more than 150 attorneys whose principal area of practice is the defense of criminal cases in Federal Court.

The members of the NYCDL join the Federal Public and Community Defenders (FPCD) in their statements regarding all proposed amendments other than those discussed below.

Proposed Amendment 12 – Economic Crime Package

The NYCDL supports the consolidation of the theft and fraud guidelines with a base offense level of six. The distinction between the crimes covered by the separate guidelines is frequently artificial and the true distinctions between theft crimes and fraud crimes can be addressed through enhancements and reductions. Therefore, the NYCDL urges the Commission to adopt Part A of the Package.

The NYCDL believes that it is desirable to provide a single definition of loss for all economic crimes. In doing so, they urge the Commission both to avoid a “one size fits all” rigidity and to avoid definitions that include sufficiently vague terms as to invite undesirable subjectivity.

The NYCDL suggests that the proposal to measure loss either at the time of sentencing or at the time when the offense was detected seems to ignore the differences between a theft offense and a fraud offense and the different variations of fraud offenses. The NYCDL supports using the time of sentencing as the fairer of the two proposals for fraud cases, they suggest that this approach may not be appropriate for theft cases where the stolen object appreciates over time (artwork) so that the time of the offense would be the more appropriate time for measurement. Further, given the subjectivity of fixing the time of detention, as evidenced by the complexity of Option 2, it is probably the least desirable of the three options.

The NYCDL express great concern about both options for the definition of “actual loss.” The notions of “reasonable foreseeability” in Option 1 and harm that “will result” in Option 2 create opportunities for subjective judgments of consequential damages that should be avoided. The NYCDL believes that so long as the sentencing of economic crimes is dependant primarily on the fraud table, the loss being measured should be the direct loss actually suffered by the victim and other factors should be addressed through the use of upward or downward departures.

The NYCDL opposes all three options to revise the fraud tables. This opposition derives from a belief that the harsher tables are trying to address a problem that does not exist. Economic crime defendants are not receiving the sentences they are receiving because the tables are too lenient. If that were the case, judges would utilize the upper end of the sentencing range more often our would be availing themselves of the opportunity to depart upward if the loss understates

culpability. Instead, defendants are receiving the sentences they are getting because defense lawyers and prosecutors are fashioning pleas that utilize the full scope of the Guidelines to create an offense level acceptable to the sentencing courts. NYCDL states that it is not for the Commission to decide that sentences being imposed for economic crimes are too lenient; that is the role of Congress.

Proposed Amendment 20 – Money Laundering

NYCDL stated that the money laundering amendment is a long overdue change that will rationalize both the charging and sentencing process. The proposed change will go a long way to changing an area of practice where the Guidelines tail is wagging the criminal law dog.

Proposed Amendment 14 – Sentencing Table Amendment and Alternative to Sentencing Table Amendment

The NYCDL urges the Commission to expand the range of both Zones B and C. Many defendants whose offense levels fall at 11 or 12 are receiving prison terms of a few months because of the requirement for Zone C that at least one-half of the sentence be served in prison. These terms are just long enough to cost defendants jobs and to deprive families of support without being long enough to satisfy any truly valid sentencing purpose.

Department of the Treasury
Internal Revenue Service
Charles O. Rosotti, Commissioner of Internal Revenue
Washington, D.C. 20224

In addition to IRS's comments on specific proposed amendments Charles Rosotti, Commissioner of Internal Revenue, wrote separately to express the Treasury's deep concern about some of the proposed amendments to the Guidelines. The Department of the Treasury stated that the "proposed amendments, particularly both options proposed in Amendment 14, Sentencing Table Amendment and Alternative to Sentencing Table Amendment, communicate to the American public that no matter how much you cheat on your taxes, you will not go to jail." These amendments clearly indicate that tax crimes are "less serious economic crimes." If adopted, these amendments will undermine their efforts to enforce tax laws.

The current proposal to expand Zones B and C of the sentencing table or to characterize certain tax crimes as "less serious economic crimes" is at odds with prior messages. Further, by reducing Zone D by 4 levels, the number of convicted tax offenders who may be sentenced to serve less than at least the minimum term in prison will increase dramatically.

Mr. Rosotti enclosed the Internal Revenue Service's Comments on the 2001 proposed amendments to the guidelines.

Proposed Amendment 12 – Economic Crimes Package

a. Tax Table

The IRS supports the option one Tax Table; this provides for a base offense level of six for tax loss amounts equal to or less than \$2,000. The IRS stated that option one is an appropriate reflection of the seriousness of tax offenses, provides a lower base offense level loss amount and achieves the current mandatory imprisonment offense level of thirteen at a lower loss amount than option two. Additionally, they noted that while the proposed amendment is silent on the issue, there is language in the synopsis of Amendment Twelve, Part B, which discusses using one loss table for theft, property destruction, fraud and tax crimes. The IRS strongly objects to this proposal because it is wholly at odds with long-standing policies that treat tax crimes as serious crimes, warranting higher penalties than theft, property destruction, and fraud crimes.

b. Computation of Tax Loss

Regarding the proposed amendment concerning the computation of tax loss, the IRS stated that adoption of this amendment would confer an unfair sentencing advantage to the convicted tax criminal because the totality of the criminal conduct is not adequately counted. Two separate crimes are committed when an offender executes a scheme to evade taxes or files false returns that affect two taxpayers: one crime arises from the evasion of tax by the corporation. The IRS recommends that because the crimes are separate, tax losses should be calculated separately and then added together to achieve the aggregate loss to the government. Evading one's individual

tax and evading corporate tax are separate violations, and the total tax loss should not be calculated as if only one offense was committed.

c. Definition of Tax Loss

Regarding the proposed amendment concerning the definition of tax loss, the IRS opposes adoption of an amendment that would exclude state and local tax loss from consideration. In the IRS's view, basing the sentence exclusively upon federal tax losses does not adequately take all relevant conduct into consideration.

The IRS does, however, support the amendment that would include interest and penalties in the definition of tax loss for evasion of payment cases, because it accurately reflects the total harm to the government in an evasion of payment case.

d. Grouping

The IRS opposes adoption of the amendment that mandates grouping tax offenses with other crimes committed in connection with the tax crimes. The amendment in its current form eliminates any incentive to charge a tax crime separately from the crime from which the income for the tax crime was derived. Although clarification is necessary on this issue because of the circuit conflict, this proposed amendment reaches the wrong conclusion. The proposed amendment requires that tax counts be grouped with counts relating to the source of funds that were the subject of the tax crimes. This resolves the circuit conflict in favor of the defendant, because it effectively eliminates the separate tax crime conduct and harm, and only holds the individual responsible for the underlying criminal conduct from which the income was derived.

e. Sophisticated Concealment

The IRS supports the amendment that would apply "sophisticated means" to the tax guideline to conform with the fraud guideline. This amendment would provide clarity and consistency in application. As recently as two years ago, §2T1.1 had a "sophisticated means" enhancement which was changed to "sophisticated concealment." The IRS has previously advocated the need for clarification to ensure consistent application of the two terms.

Proposed Amendment 14 – Sentencing Table and Alternative to Sentencing Table

The IRS strongly opposes adoption of either alternative detailed in the proposed amendment. Both options operate to undermine the goals served by criminal tax enforcement and should not be adopted.

a. Option One

If option one is adopted, expanding Zones B and C, imprisonment would not be required until an offense level of seventeen is established. In other words, option one of amendment fourteen would raise by eight-fold the amount of tax loss (and the amounts of income involved in the criminal scheme) that would be required before imprisonment would be mandatory, at least for the minimum term. This would dramatically reduce the number of tax criminals who would face

such a term of imprisonment for their offense and would seriously undermine the deterrent effect of the criminal tax laws.

b. Option Two

The IRS stated that option two would categorize a substantial number of tax crimes as “less serious economic crimes.” If a tax offender is not violent, does not use a firearm at the time of the tax offense, does not merit enhancements under §§2T1.1 and 2T1.4, has no prior criminal history, and volunteers to make restitution the offense level will be reduced by two. Although the specific offense adjustments in §§2T1.1 and 2T1.4 will operate to exclude some tax offenders from this adjustment, the fact that a first-time tax offender stands a good chance of being characterized by the guidelines as a “less serious economic offender” directly contradicts the Sentencing Commission’s philosophy that tax offenses are serious offenses. Additionally, the application of the adjustment also defeats any offense level increases in the proposed Tax Tables.

Proposed Amendment 20 – Money Laundering

The IRS supports this amendment because enhancing the guidelines for violations of 18 U.S.C. § 1956(a)(1)(A(ii) by one or two levels will assist the Service in combating the tax gap by reinforcing the message that tax crimes are serious.

The IRS also attached a chart comparing base offense levels under §2T4.1 for proposed options one and two and the current tax loss table:

Loss	2T4.1 – Current	2T4.1 – Option One	2T4.1 – Option Two
\$10,000.00	10	10	8
\$10,001.00	10	10	10
\$13,500.00	10	12	10
\$13,501.00	11	12	10
\$23,500.00	11	12	10
\$23,501.00	12	12	10
\$40,000.00	12	14	12
\$40,001.00	13	14	12
\$70,000.00	13	14	12
\$70,001.00	14	14	14
\$120,000.00	14	16	14

Bureau of Alcohol, Tobacco and Firearms (ATF)
Department of the Treasury

Proposed Amendment 15 – Firearms Table

Summary of testimony of John Malone, Assistant Director of Firearms, Explosives and Arson Directorate at the ATF:

Mr. Malone stated that he appreciates the opportunity to speak to the Commission about the proposed amendment to §2K2.1 because increasing the sentences for offenses involving large numbers of firearms is a critical part of the ATF's efforts to combat firearms trafficking and violence.

Though the ATF originally proposed option one, providing for an additional one-level increase for crimes involving 100 to 199 firearms and a two-level increase for crimes involving 200 or more firearms, the ATF supports both options one and two. However, they prefer option two for several reasons. First, it would provide for higher sentences than option one in certain cases involving less than 50 firearms. Second, option two would provide higher sentences than option one in all cases involving 100 or more firearms. Additionally, option two has the added benefit of diminishing some of the fact-finding required to determine how many firearms were involved in an offense (because it provides two-level rather than one-level increments).

Mr. Malone stated that the ATF views firearms trafficking as a serious harm which poses a large threat to the public safety and which must be punished accordingly. Trafficked firearms often are used in subsequent crimes, thereby threatening public safety. Therefore, shutting down a trafficker's activity is an ounce of prevention which yields several pounds of cure to the community. The proposed amendments, particularly option two, would provide an effective tool to combat trafficking in large numbers of firearms.

Mr. Malone described significant improvements in combating firearms trafficking. ATF's improved success in combating firearms trafficking in no way removes the need for the proposed amendments. Tougher sentences are a crucial tool in the ATF's attempt to prevent firearms trafficking by sending a strong message that such behavior will not be tolerated. Mr. Malone also stated that the ATF is pleased that the Department of the Treasury joins the ATF in supporting both options, and in particular option two. Mr. Malone concluded by thanking the Commission for the opportunity to speak about this very important issue.

The ATF's Director, Bradley A. Buckles, also submitted a letter in support of Mr. Malone's testimony and statement.

**Glen Boire, Esq., Executive Director
Center for Cognitive Liberty & Ethics**

Proposed Amendment 1 – Ecstasy

Background: Richard Glen Boire is the director of the Alchemind Society: The International Association for Cognitive Liberty. The Alchemind Society is a nonprofit, nonpartisan 501(c)(3) public education organization which seeks to foster cognitive liberty - the basic human right to unrestrained independent thinking, including the right to control one's own mental processes and to experience the full spectrum of possible thought. The Alchemind Society operates the Center for Cognitive Liberty & Ethics (CCLE), an educational law and policy center working in the public interest to protect and promote cognitive freedom and autonomy.

Because members of the Alchemind Society view the “so-called War on Drugs” as an attack on the mental autonomy and cognitive liberty of Americans, the Society opposes any drug law that makes otherwise law-abiding Americans criminals by punishing them for decisions they make about how to operate their own minds. The CCLE analogizes drug laws to censorship of books.

The CCLE opposes increasing penalties for MDMA. They submit that MDMA is not intrinsically dangerous or harmful to society, MDMA is virtually non-addictive, and that users of MDMA do not commit crimes to support a “habit.” MDMA does not produce violent behavior, and the state of mind it induces is generally accepting, empathetic, and insight-oriented. In fact, the CCLE argues that the greatest harm posed by MDMA is the distribution of other chemicals misrepresented as MDMA. Unsuspecting MDMA users are exposed to many risks by innocently ingesting an unknown substance. Increasing the punishments for genuine MDMA will encourage unscrupulous manufacturers and dealers to sell other drugs as “Ecstasy,” increasing this danger to unwary users.

If MDMA penalties are to be increased, the CCLE suggests that it would be more appropriate to increase the penalties for misrepresenting a chemical as MDMA. This scheme would minimize the individual and social harms presented by counterfeit MDMA, while the current proposal would exacerbate those same harms.

Lastly, the CCLE and the members of the Alchemind Society recommend that the Commission consider a wholesale revision of Part D of the Federal Sentencing Guidelines. They argue that the drug-equivalency scheme forces the Commission to make impossible comparisons between various drugs based on arbitrary equations. The CCLE and the Alchemind Society recommend abandoning the drug offense section of the Guidelines and replacing it with a simple drug enhancement, an “upward departure,” or a “specific offense characteristic” to be applied when a federal crime is committed under the influence of, or while in possession of, a controlled substance. Such a system would leave law-abiding citizen alone while increasing penalties for the those whose behavior after taking a drug causes some actual social harm.

Families Against Mandatory Minimums
Mary Price, General Counsel

Proposed Amendment 1 – Ecstasy

FAMM opposes increasing the penalties for ecstasy to the level proposed by the Commission. It believes that Commission's approach to drug equivalencies is arbitrary and unfounded. FAMM submitted a sampling of public comment, studies, and materials that have been sent to the Commission by various parties (ranging from individual doctors to the Department of Justice) to demonstrate that many of the conclusions presented in the Commission's Brief Report are in dispute. FAMM asks that the Commission recognize that the medical and scientific community is not of one mind about the dangers attendant on the use of MDMA and many in the community do not believe the drug to be as dangerous as heroin, methamphetamine, or even mescaline. Even the possible neurotoxic effects of MDMA, are disputed in the medical community.³ If the Commission is not convinced that penalizing MDMA at or above cocaine overstates the danger, then FAMM urges the Commission to refrain from increasing penalties to such a drastic extent in light of the fundamental disagreements about the effects of the drug. FAMM does not state where the equivalency should be set, simply that the dearth of agreement counsels against unfounded increases in the penalty.

In light of the concerns expressed about how Commission arrived at the proposed penalties and the lack of consensus on the effects of MDMA, FAMM makes the following recommendations:

1. Permit members of the public to attend what have heretofore been *ex parte* briefings by DEA, NIDA, and the Customs Service. In the alternative, make those briefing materials available to those members of the public who wish to comment on proposed drug guideline amendments. FAMM believes that casting sunshine on this process will improve it and is likely to result in a more informed and confident public.
2. Actively encourage and invite experts outside the Justice Department to address the Commission when considering information beyond its expertise. For example, NACDL had hoped to secure an invitation from the Commission for Dr. James P. O'Callaghan, but was unable to do so. An invitation was necessary because he works for another federal agency. Dr. O'Callaghan is the head of the Molecular Neurotoxicology Laboratory at the Centers for Disease Control, National Institute for Occupational Safety and Health. He has conducted research and written extensively on the subject of neurotoxicity and MDMA. He has concluded that no

³FAMM cites two papers that dispute the conclusion that MDMA causes brain damage: James P. O'Callaghan, Ph.D., head of the Molecular Neurotoxicology Laboratory at the Centers for Disease Control -- NIOSH, *Defining Neurotoxicity: Lessons from MDMA and Amphetamines* (attached under FAMM); and Charles S. Grob, *Deconstructing Ecstasy: The Politics of MDMA Research*, ADDICTION RESEARCH, Vol. 8, No. 6, pp. 549-88 (2000)(attached under NADCL).

definitive data exists so far indicating that MDMA and other substituted amphetamines are neurotoxic (*i.e.*, cause brain damage) to humans. The Commission would have benefitted from his testimony.

3. Revisit overall drug sentencing policy in light of the concerns raised by this proposed amendment. The Commission should use this opportunity to reassess the criteria for assigning penalty levels and judging relative penalties for different substances.

The Lindesmith Center – Drug Policy Foundation
William D. McColl, Director of Legislative Affairs

Proposed Amendment 1 – Ecstasy

While the Lindesmith Center - Drug Policy Foundation shares the desire of Congress and the Sentencing Commission for reducing the demand for MDMA, it believes that increases in penalties for MDMA are unnecessary and counterproductive. The Lindesmith Center argues that penalty increases are likely to have serious unintended consequences including: 1) increasing the number of adulterated MDMA pills sold to unsuspecting consumers, further endangering the lives of Americans who use MDMA; 2) creating a more competitive MDMA black market that will spawn more prohibition-related violence; and 3) subjecting more non-violent Americans to long prison sentences, further expanding our bulging two-million inmates prison system.

1) Adulterated MDMA: The Lindesmith Center argues that many, if not all, of the problems attributed to MDMA stem not from MDMA itself, but from the use of counterfeit drugs sold to unsuspecting buyers as MDMA. Common adulterants include caffeine, cocaine, speed and various over-the-counter drugs. Other drugs, such as PCP and ketamine, are commonly and fraudulently sold to users as MDMA. One of the most harmful adulterants is DXM (dextromethorphan), a cheap cough suppressant that can produce hallucinations when taken in a concentrated form. DXM inhibits sweating and when coupled with dehydrating activity, such as dancing, can cause heatstroke. Another dangerous drug often fraudulently sold as MDMA is PMA (paramethoxyamphetamine), an illegal drug that is vastly more potent and hypothermic than MDMA.

2) MDMA Black Market: The MDMA black market has traditionally been composed of relatively peaceful actors. But, the Lindesmith Center argues that tougher federal penalties could drive these actors out, while encouraging a more fiercely competitive MDMA black market, more risk-prone MDMA dealers, and greater levels of violence associated with the MDMA trade.

3) Effect on the Criminal Justice System: Because the government targets the “rave” culture in its fight against MDMA (even though most MDMA use occurs outside of raves), harsher MDMA penalties will result in more low-level, non-violent youths receiving very long prison sentences.

The Lindesmith Center points to numerous studies and historical evidence indicating the safe and effective therapeutic applications for MDMA. It also presents anecdotal evidence that some of the illegal MDMA use is accounted for by individuals seeking the drug's therapeutic and spiritual benefits.

The Lindesmith Center submits that there is a large body of scientific evidence that shows that MDMA offers certain users important therapeutic benefits, but that the scientific evidence on the drug's negative effects is mixed at best. The Lindesmith Center points out serious methodological shortcomings in heavily cited research on MDMA's effects on memory and cognitive skills, including failure to control for poly-drug use, level of drug use, and other variables, as well as failing to construct an ample control group. Medical professionals still do not understand the exact impact of MDMA on aspects of serotonin neuronal architecture, and there is disagreement as to what the long-term effects of MDMA could be in this area.

Lastly, the Lindesmith Center recommends that the Commission take into account the fact that MDMA is sold in a capsule/pill form, increasing the weight of the MDMA. Any increase in MDMA-related penalties should take the extra weight of the capsule into account so as to avoid overestimating the actual amount of MDMA involved.

Julie Holland, MD
Bellevue Hospital, New York City

Proposed Amendment 1 – Ecstasy

Julie Holland is a psychiatrist who works in the psychiatric emergency room at Bellevue Hospital. She will be testifying on behalf of the Lindesmith Center.

Dr. Holland recounts that at least three quarters of the patients she sees are exacerbating, if not causing, their psychiatric illness by using alcohol and cocaine. Less than one percent of these substance induced psychiatric disorders are due to MDMA. According the DAWN data, in 1999, 19 percent of all emergency room visits which mentioned a drug or alcohol-related cause listed alcohol as the reason for the visit. Seventeen percent of drug-related visits were due to cocaine. MDMA was reported in only 0.3 percent of incidents.

Dr. Holland reports that not only are MDMA related cases a small percentage of drug-related emergency room visits, but a large percentage of these cases are not life threatening. In a recent study conducted by the physicians at the medical emergency room of Bellevue Hospital, regional hospital ecstasy cases phoned in the New York City poison control center were analyzed. There were 191 cases reported during the years 1993 to 1999 inclusive. One hundred thirty nine cases (73%) were mild and experienced minor or no toxicity. The most commonly reported symptoms were increased heart rate (22%), agitation (19%), and nausea and vomiting (12%). Over seven years, only one ecstasy-related death was reported, which was due to hyperthermia. She also argues that hyperthermia is brought about only when the user engages in vigorous activity while

on the drug (e.g. dancing at raves).

Dr. Holland believes that MDMA is a unique drug and should be treated as such. She argues that MDMA is less likely to cause violence than alcohol, less addictive than cocaine or tobacco, and less deadly than heroin. Dr. Holland is also concerned that equating MDMA with heroin based on weight is inappropriate because the dosages are not similar. She reports that one gram of heroin yields approximately 200 doses while one gram of MDMA yields only five doses.

As a psychiatrist, she is particularly interested in the potential therapeutic benefits of MDMA. She reminds the Commission that before ecstasy was made an illicit drug, it was used by psychiatrists and psychotherapists as a catalyst to enhance the efficiency and outcome of psychotherapy sessions. Thousands of people underwent MDMA-assisted psychotherapy sessions in the seventies and eighties without medical complications. Furthermore, the DEA's administrative law judge Francis Young ruled in 1986 that MDMA should be placed on Schedule III because evidence indicated that it had serious medical uses and less potential for abuse than Schedule I drugs.

National Association of Criminal Defense Lawyers
Written Statement of Edward A. Mallett, President, NACDL

Proposed Amendment 1 – Ecstasy

The NACDL opposes the proposed amendment concerning ecstasy. Mr. Mallett stated that he finds the government's likely argument for increasing ecstasy sentences specious for a number of reasons. First, he remembers a time when the government prosecuted large-scale drug cases without the current inducements to provide substantial assistance. Mr. Mallett then recounted that a colleague once observed that now the government "turns" witnesses and creates crimes that might never have occurred but for the rewards they are paying witnesses under the guidelines. Apart from this change in law enforcement practices, the government has failed to offer convincing evidence that increased sentences are necessary and appropriate to the goal of increased cooperation. Mr. Mallett stated that the proposed guideline amendment would indiscriminately increase sentences for all participants in an ecstasy conspiracy, from the very least to the most culpable. Additionally, high-level traffickers already receive harsh sentences under the current ecstasy guidelines – and the incremental increase seems unlikely to affect their willingness to cooperate.

Mr. Mallett stated that despite the government's claims that significantly harsher penalties will "send a strong signal to those who would import or traffic in ecstasy," the most obvious impact will be on low-level offenders. He further stated that the new federal ecstasy defendants will be members of the youthful user population who underestimate the consequences of their minor involvement with distributors. Another group that will be disproportionately affected is the couriers, who the DEA reports can carry up to 20,000 tablets on their person and 50,000 tablets in specially designed luggage.

Mr. Mallett reported that several prosecutors, lawyers and judges whom he has asked what they think of raising ecstasy punishments to correspond with heroine or cocaine, responded that there are so many problems with excessive punishments that the premise is wrong. That is, heroine and cocaine punishments do more harm than good and should not be a standard of correct thinking.

In conclusion, Mr. Mallett stated that the relative popularity of various illegal drugs seems to rise in advance of legislative change, and every effort to eradicate the use of a new drug through legislation seems to be followed by the invention and mass consumption of some newer drug.

Mr. Mallett attached the profile for a woman, Amy Pofahl, who was convicted of conspiracy to import and distribute MDMA and sentenced to 24 years without parole.

NACDL: Statement of David E. Nichols, Ph.D.

Mr. Nichols is a professor of Medicinal Chemistry and Molecular Pharmacology at Purdue University. His written testimony is a re-submission of the letter he sent to the Commission on February 5, 2001, for public comment.

Proposed Amendment 1 – Ecstasy

David E. Nichols wrote to state that ecstasy is simply not similar in its hallucinogenic effect on the user to mescaline. Dr. Nichols stated that ecstasy has roughly twice the psychoactive potency by weight of mescaline. Thus, based on human dosage, the equivalency for one gram of MDMA should then be equal to 20 g of marihuana. Further, MDMA has only about 1/25th the potency of heroin. There is no basis either through potency considerations or through risk assessment to equate the harm of one gram of MDMA with one gram of heroin.

Dr. Nichols stated that he understands the concern regarding large numbers of adolescents who are apparently abusing ecstasy, and supports reasonable attempts to discourage this use, but is adamantly opposed to regulations that are not based on facts or science.

NACDL: Statement of Charles S. Grob, M.D.

Dr. Grob is the Director of the Division of Child and Adolescent Psychiatry at Harbor-UCLA Medical Center and is also a Professor of Psychiatry at the UCLA School of Medicine. His written testimony consists of a re-submission of the letter he and Gary L. Bravo submitted on February 5, 2001, as well as a paper he published in the Addiction Research medical journal.

Proposed Amendment 1 – Ecstasy

Dr. Grob both strongly opposes the proposed new sentencing laws for MDMA. He predicts that the proposed sentencing laws would result in targeting low-level dealers and users and not the high-volume traffickers for which the laws are intended.

Dr. Grob stated that MDMA is more equivalent to mescaline in its behavioral and pharmacological effects than it is to heroin. Additionally, MDMA's potential for physical and psychological addiction is low. MDMA also shows potential as an alternative treatment for conditions known to be refractory, or non-responsive, to conventional treatments, including individuals with end-stage cancer who have severe psychological distress and existential alienation and also for patients with chronic post-traumatic stress disorder.

Dr. Grob also submitted a paper he authored entitled "Deconstructing Ecstasy: The Politics of

MDMA Research.”⁴ In this paper, Dr. Grob calls for an open and comprehensive review of the existing state of knowledge regarding MDMA, from diverse perspectives. The outcome into such an inquiry should facilitate a more effective and salutary understanding and response to the condition confronting Euro-American medicine and culture. The paper discusses the social history of MDMA, neurotoxicity of MDMA, and the current status of MDMA.

⁴Charles S. Grob, *Deconstructing Ecstasy: The Politics of MDMA Research*, ADDICTION RESEARCH, Vol. 8, No. 6, pp. 549-88 (2000).

Rick Doblin, Ph.D.

President, Multidisciplinary Association for Psychedelic Studies (MAPS)

Proposed Amendment 1: Ecstasy

Mr. Doblin states two primary reasons for why he opposes any increases in the penalties for MDMA. First, enhanced penalties will increase the difficulties in obtaining FDA and DEA permission to conduct legitimate scientific research into the risks and benefits of the therapeutic use of MDMA as an adjunct to psychotherapy. Second, while MDMA does have its risks, as does any other drug or even any non-drug recreational activity, these risks have greatly exaggerated, particularly the risk of serious functional or behavioral consequences from MDMA neurotoxicity.

Mr. Doblin stated that he recently completed a dissertation on the regulation of the medical uses of Schedule 1 drugs, primarily MDMA and marijuana, for a Ph.D. in Public Policy from the Kennedy School of Government, Harvard University. Additionally, he recently participated as a subject in human spinal tap studies of MDMA neurotoxicity.

He stated that scientists associated with MAPS will submit a protocol to FDA in April, 2001 seeking permission to study the use of MDMA-assisted psychotherapy in the treatment of patients suffering from Post-Traumatic Stress Disorder (PTSD). This protocol, if approved, will be the first opportunity that scientists have had to study the therapeutic use of MDMA since DEA placed MDMA in Schedule 1 in 1985.

Mr. Doblin suggests that, historically, as the penalties for the non-medical uses of a drug are increased, political pressure develops to suppress or restrict research into the beneficial uses of that drug. This has been the case with heroin, marijuana and the psychedelics. There is also a tendency for government agencies and anti-drug groups to overestimate the risks of drugs that have been criminalized. Examples include the LSD chromosome damage scare, which was supposedly going to result in a generation of children born with birth defects to users of LSD, and the crack baby phenomenon, which was shown in later research to be vastly overstated. Mr. Doblin submits that the likely risks of MDMA neurotoxicity have also been dramatically exaggerated.