Statement of

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on behalf of

Federal Public and Community Defenders

concerning the

Proposed Guideline Amendments

before the

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Federal Public and Community Defender Organizations exist to provide criminal defense and related services in federal court to persons financially unable to afford counsel. Defender organizations are established under the authority of 18 U.S.C. § 3006A and operate in some 60 federal judicial districts. Defender personnel appear before magistrate-judges, United States District Courts, United States Courts of Appeals, and the United States Supreme Court.

Federal Public and Community Defenders represent the vast majority of criminal defendants in federal court. We represent persons charged with frequently-prosecuted federal crimes, like drug trafficking, and with infrequently-prosecuted federal crimes, like murder. We represent persons charged with street crime, like assault and robbery, and with suite crime, like fraud and embezzlement.

Congress, in 28 U.S.C. § 994(o), has directed Federal Public and Community Defenders to "submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful." In addition, Congress has directed us to submit, at least annually, written comments on the guidelines and suggestions for changes in the guidelines.

We are pleased to comment upon the proposed amendments published by the Commission in the Federal Register on January 6, 1998. Before taking up the amendments seriatim, we have some general observations. First, the Commission has made significant strides toward greater openness in the amendment process. We commend the Commission for that progress. There is still a way to go, however. Closed meetings of the Commission to discuss guideline-related matters are not essential to the functioning of the Commission and generate uncertainty and suspicion -- especially because an interested party, the Department of Justice, through the Attorney General's representative on the Commission, participates in the closed meetings. We

hope that the Commission will soon begin conducting all of its guideline-related business in public.

The main item on the Commission's agenda this cycle is the proposed revision of the theft and fraud loss tables and the tax table. The purpose of the proposed revision is to impose harsher punishment on persons who commit theft, fraud, and tax offenses. The Commission has twice increased the punishment for such offenses, and we see no need for yet a third increase. There has been no showing that present levels of punishment are inadequate.

The Commission, in promulgating the initial set of guidelines, intentionally chose to increase the punishment for white-collar offenses over preguidelines punishment levels.[1] Two years later, the Commission again increased the punishment for white-collar offenses by amending the loss tables of the theft and fraud guidelines and the tax table of the tax guideline. The Commission's purpose was "to increase the offense levels for larger losses to provide additional deterrence and better reflect the seriousness of the conduct."[2]

Given this history, it should not be surprising that federal judges sentence white-collar offenders at the bottom of the applicable guideline range and depart downward (for other than substantial assistance) more frequently than upward.[3] In embezzlement cases, for example, courts sentence at the bottom of the range nearly twenty times as often as they sentence at the top of the

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[1]*See* U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 18 (June 18, 1987).

[2]U.S.S.G. App. C, amend. 99 (amending § 2B1.1). *See also id.* at amends. 154 (similar justification for amending § 2F1.1), 237 (similar justification for amending § 2T4.1).

[3]*See* U.S. Sentencing Commission, *1996 Sourcebook of Federal Sentencing Statistics*, at table 27.

range. The situation with fraud cases is not as dramatic; courts sentence at the bottom of the range about seven times as often as they do at the top of the range. Courts depart downward in fraud cases, for other than substantial assistance, about six-and-a-half times as often as they depart upward.[4]

This data is not derived from opinions offered in response to hypothetical questions, but from judicial behavior, from what federal judges actually do when confronted with the question of how long to send a real person to prison. Federal judges are not softies. They do not go out of their way to avoid imposing appropriate levels of punishment. If the facts and circumstances of the cases had called for greater punishment, there can be no doubt that federal judges would have imposed greater punishment. That the sentences were not greater suggests that the current guidelines call for levels of punishment that are appropriate, if not too high.

We believe that there is no need to make the theft, fraud, and tax guidelines harsher. If you do, the most likely result is that judges will continue to sentence at the bottom of the range and depart downward more often than upward. The difference will be that aggregate punishment will increase because the judges will be sentencing at the bottom of higher ranges and departing downward from a higher guideline sentence. There is nothing to be gained from further overcrowding federal prisons.

Amendment 1
Theft, Fraud, and Tax Loss Tables
(§§ 2B1.1, 2F1.1, 2T4.1)

Proposed amendment 1 sets forth two options for revising the loss tables of §§ 2B1.1 and 2F1.1 and the tax table of § 2T4.1. Both options would delete the more-than-minimal-planning

[4]*Id.*

enhancements of the theft and fraud guidelines and incorporate that enhancement into the loss tables one level at a time. Option 1 would incorporate the first level at $10,000 and the second level at $20,000. Option 2 would incorporate the first level at $2,000 and the second level at $5,000. Both options also would amend the tables to increase the enhancement for loss amounts over the enhancement currently provided. Option 1 would begin these severity increases at $40,000, while option 2 would begin them at $12,500.

We support neither option. As indicated in our general remarks, there is no need to make the theft, fraud, and tax guidelines harsher. We do support Commission action to make the definition of the term "loss" more comprehensive and easier to apply and to clarify the term "more-than-minimal planning." We believe that the Commission should act on both of these definitional matters regardless of whether the Commission decides to adjust the loss tables.[5] If the Commission decides to go forward with revising the loss tables, it is essential that the Commission first decide what is to be included in loss.

Proposed amendment 1 also sets forth an issue for comment concerning whether the Commission should prohibit downward departures based upon minimal planning and upward departures based upon more-than-minimal planning. We discuss the question of what should constitute the heartland of the guideline in our comments on proposed amendments 5(B) and (C). We think it unwise to limit a sentencing court's discretion to depart unless the Commission adopts the specific offense characteristic set forth in proposed amendment 5(B) and adopts, with modification, the specific offense characteristic set forth in proposed amendment 5(C).

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[5]Amendment 1(B) solicits comments about whether to add commentary addressing departures when the planning is minimal and more than minimal. We address that matter in our comments on proposed amendment 5(B).

Amendment 2
Guidelines that Refer to Theft and Fraud Loss Tables
(Chapter Two)

Proposed amendment 2 address chapter two guidelines that have enhancements based upon the loss tables of the fraud or theft guidelines. Proposed amendment 2 is premised upon adoption of one of the new loss tables. If the Commission decides not to adopt new loss tables -- the action we believe to be called for -- then the Commission need not address amendment 2 at all.

Proposed amendment 2(A) adds a new guideline, § 2X6.1 ("Reference Monetary Table"), that contain two tables that parallel the options in amendment 1, with a modification. The tables in amendment 2(A) do not build in the more-than-minimal-planning increases. If the Commission decides to adopt new loss tables, then we recommend that the reference monetary table be the loss table in the current fraud guideline. If the Commission adopts the option in amendment 2(A) corresponding to the option of amendment 1 that the Commission adopts, the Commission will be raising penalties for a number of offenses, and there has been no showing that the penalties for those offenses need to be increased.

Proposed amendment 2(B) would amend several guidelines that have more-than-minimal planning included in the base offense level or as a specific offense characteristic. Use of a reference monetary table set forth in proposed amendment 2(A) will increase the punishment for the offenses covered by those guidelines, even though there is nothing to suggest that those offenses currently are underpunished. For example, the first guideline set forth in amendment 2(B) is § 2B5.1 (offenses involving counterfeit bearer obligations of the United States). Commission data indicates that judges sentence at the bottom of the applicable guideline range

over half the time (52.6%) and sentence at the top of the range 11.4% of the time.[6] The situation is more dramatic with regard to § 2Q2.1 (offenses involving fish, wildlife, and plants), another guideline that would be affected by changing the table. Judges in environmental and wildlife cases sentence at the bottom of the applicable range 72.4% of the time and sentence at the top of the range in 1.0% of the time.[7] We recommend that the guidelines amended by proposed amendment 2(B) continue to use the loss table of the current fraud guideline.

Proposed amendment 2(C) sets forth three options for dealing with obscenity offenses that contain enhancements "if the offense involved distribution." The enhancement is based upon the retail value of the material, using the loss table in the fraud guideline, but in no event can be less than five levels. Option 1 would amend those guidelines to use the new guideline setting forth the reference monetary table. Option 2 would use the new loss table in the fraud guideline, thereby incorporating the increase for more-than-minimal planning. Option 3 would provide for a five-level enhancement for distribution and add to the commentary language suggesting an upward departure for large-scale commercial undertakings.[8]

If the Commission decides to revise the loss table in the fraud guideline, we recommend that the reference money table be the loss table in the current fraud guideline. Commission data

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[6]*See* U.S. Sentencing Commission, *1996 Sourcebook of Federal Sentencing Statistics*, at table 27.

[7]*Id.*

[8]The Commission has bracketed "five" in option 3, and the synopsis suggests that if the Commission adopts a new loss table the Commission will use the number of levels that correspond to a $40,000 loss. Under option 1 of proposed amendment 1, the enhancement would be eight levels. Option 2 of proposed amendment 1 does not have a category starting at $40,000. There is an eight-level enhancement under option 2 if the loss is more than $30,000 but not more than $70,000.

does not support a need for increasing punishment, especially the double increase that option 2 would bring about. Judges in obscenity and prostitution cases sentence at the bottom of the applicable guideline range nearly four times as often as at the top of the range (41.1% vs. 10.9%), and they depart downward for other than substantial assistance more than twice as often as they depart upward (16.6% vs. 6.9%).[9]

Amendment 2(D) sets forth four options for dealing with copyright infringement offenses, which are covered by § 2B5.3, and structuring offenses, which are covered by § 2S1.3. Amendment 2(D) is premised upon the Commission adopting new loss tables. Options 1, 1A, and 2 would rely upon the table in the new reference monetary table guideline, and options 3, 3A, and 4 would rely upon the fraud guideline. As indicated earlier, we believe that no action is required or appropriate. Commission data indicates that in money laundering cases courts sentence at the bottom of the applicable guideline range nearly five times as often as the bottom (37% vs. 7.8%) and that downward departures for other than substantial assistance occur ten times as often as upward departures (13.6% vs. 1.2%).[10] If the Commission decides to revise the loss table in the fraud guideline, we recommend that the guidelines amended by proposed amendment 2(D) continue to use the loss table in the current fraud guideline.

Amendment 2(E) sets forth four options for amending the trespass guideline, which was amended last cycle to use the fraud table to enhance if the offense involved "invasion of a protected computer resulting in a loss . . . ." That amendment has not been in effect long enough

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[9]*See* U.S. Sentencing Commission, *1996 Sourcebook of Federal Sentencing Statistics*, at table 27.

[10]*Id.*

to determine its impact, but there is nothing to indicate that the current level of punishment for such offenses is inadequate. If the Commission decides to revise the loss table of the current fraud guideline, we recommend that the trespass guideline continue to use the loss table in the current fraud guideline.

Amendment 2(F) would consolidate the theft and property destruction guidelines, § 2B1.1 and § 2B1.3. The purpose is to "mitigat[e] the necessity for reference to the proposed alternative monetary table." If the Commission adopts a new loss table for the theft guideline, the result of the consolidation will be to increase the penalty levels for property destruction offenses, even though there is nothing to suggest that current levels are inadequate. If the Commission decides to revise the loss table of the current theft guideline, we recommend that the property destruction guideline continue to use the loss table in the current theft guideline.

Amendment 2(G) would consolidate § 2C1.2 and § 2C1.6, "thereby mitigating the necessity for reference to the proposed alternative monetary table." We do not oppose the consolidation of §§ 2C1.2 and 2C1.6. Both have the same base offense level (seven) and both enhance the base offense level on the basis of the value of the gratuity. We do not believe that the consolidated guideline should use the loss table of the fraud guideline if the Commission revises that loss table. The result of using a new loss table would be to increase punishment when there is no evidence to suggest that current levels of punishment are inadequate.

The Commission has not reported data for gratuity offenses separately from bribery offenses, but has lumped together the data from both kinds of offenses.[11] A bribery offense is

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[11]*See id.* at A-8 (defining the primary offense category of bribery, which is used in compiling data set forth in table 27).

more aggravated than a gratuity offense because the unlawful payment in a bribery case is made for a *quid pro quo*, so the Commission's data might be skewed toward the high end. Nevertheless, the Commission's data for bribery cases indicates that sentences occur at the bottom of the applicable range nearly ten times as often as at the top (44.2% vs. 4.6%) and that downward departures for other than substantial assistance occur nearly ten times as often as upward departures (8.8% vs. 0.9%). If the guidelines are consolidated, we recommend that the consolidated guideline, like the guidelines it will replace, use the loss table of the current fraud guideline.

Amendment 3
Consolidation of Theft, Property Destruction, and Fraud Guidelines
(§§ 2B1.1, 2B1.3, 2F1.1)

Proposed amendment 3 indicates that "the Commission is considering and invites comment on" a proposal to create a single guideline for theft, property destruction, and fraud offenses. We believe that it would be unwise to consolidate the guidelines if the Commission, at the same time, is making substantive changes in the loss tables.

Like the Commission, we are concerned about prosecutors' charging decisions. Those charging decisions can have an impact now because the definition of loss in the theft and fraud guidelines is not the same. If the loss is the same, however, the problem is resolved because the theft and fraud guidelines otherwise are coordinated. Thus, although the base offense level for theft is lower than for fraud, the theft table calls for a greater enhancement for loss, so that the two guidelines produce the same offense level for the same loss.[12] Because of that, the

[12]Assume, for example, an offense involving more-than-minimal planning that caused a loss of $50,000. Under § 2B1.1, the base offense level is four, there is a seven-level enhancement under subsection (b)(1) for the loss, and there is a two-level enhancement under subsection

Commission, by clarifying the definition of loss and applying that definition to both the theft and fraud guidelines, will eliminate opportunity for prosecutorial abuse.[13]

Amendment 4
Definition of Loss
(§§ 2B1.1 and 2F1.1)

Proposed amendment 4, as published, would amend both the text of, and the commentary to, the theft and fraud guidelines. The amendment to the text adds a new specific offense characteristic that covers matters presently covered by commentary inviting upward departure. The amendment to the commentary sets forth two options for defining the term "loss" for the purposes of the theft and fraud guidelines. Both options are premised upon using a single definition for both guidelines. Since publication of the proposed amendments, we have received a revised version of that part of option 2 that defines loss. We will refer to that document as option 3.

I. New Specific Offense Characteristic.

We oppose the proposed new specific offense characteristic which provides for a two-level and a four-level enhancement for factors that the Commission currently deals with by

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(b)(4)(A) for the planning. The offense level under § 2B1.1 totals 13. Under § 2F1.1, the base offense level is six, there is a five-level enhancement under subsection (b)(1) for the loss, and there is a two-level enhancement under subsection (b)(2)(A) for the planning. The total offense level under § 2F1.1 is also 13.

[13]If the Commission clarifies the definition of loss, applying the definition to both the theft and fraud guidelines is a simple drafting matter. For example, the definition could be put in the commentary to the theft guideline, and the commentary to the fraud guideline could be amended to state that "for the purposes of this guideline [§ 2F1.1], the term 'loss' has the meaning set forth in application note _ to § 2B1.1." Alternatively, the commentary to § 1B1.1 could be amended to add a new application note setting forth a definition of loss for the purposes of §§ 2B1.1 and 2F1.1 (and for any other guideline for which the Commission determines the definition to be appropriate).

inviting upward departure. Upward departures occur infrequently in theft and fraud cases. Commission data indicates that in fiscal year 1996 the upward departure rate for theft and fraud was 1.4% and 1.3%, respectively.[14] The factors involved, therefore, either occur rarely or, when they do occur, nearly always are not significant enough to require a sentence above the applicable guideline range. In either case, it would be inappropriate to make those departure factors into specific offense characteristics.

When promulgating the initial set of guidelines, the Commission pointed out that its ability to craft the guidelines was limited by the data then available, but that "experience with the guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions." We do not find the requisite empirical basis for the proposed new specific offense characteristic.

II. Definition of loss.

A. Introduction. We are pleased that the Commission has responded to the comments last cycle and has taken seriously the need to define comprehensively what the term loss means. The Commission has indicated that the concept of loss is being used to measure two factors, harm to the victim and the defendant's culpability.[15] The theft and fraud guidelines contain

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[14]U.S. Sentencing Commission, *1996 Sourcebook of Federal Sentencing Statistics*, at table 27.

[15]"The value of the property stolen plays an important role in determining sentences for theft and other offenses involving stolen property because it is an indicator of both the harm to the victim and the gain to the defendant." U.S.S.G. § 2B1.1, comment. (backg'd). One of the changes to the commentary common to both options 1 and 2 of proposed amendment 7 (but not addressed by option 3, which is limited to the definition of loss) is to add to the background commentary this sentence: "Along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability."

provisions that are victim-harm oriented, like the enhancements for substantially jeopardizing the safety and soundness of a financial institution, §§ 2B1.1(6)(A) and 2F1.1(b)(6)(A), as well as provisions that are culpability-oriented, like the enhancement for misrepresentation of acting on behalf of a charity or a government agency, § 2F1.1(b)(3)(A), or for violating a judicial order, § 2F1.1(b)(3)(B).

Because of the dual purpose being served by the concept of loss, the loss calculation, for purposes of the theft and fraud guidelines, is not intended to produce a definitive calculation of the financial impact of the offense. Loss calculation under the fraud and theft guidelines is not an accounting exercise. Not every conceivable item of financial damage to the victim need be included because the goal is not a final accounting but a determination of the relative harm caused by the offense and the relative culpability of the defendant.

An important consideration in clarifying the concept of loss is the need for a definition that is straight forward and that will not complicate the determination of the guideline sentence. Another important consideration is the need for a definition, which will apply both to fraud and theft cases, that will not produce inconsistent results. The loss should be the same if the defendant steals the property or obtains the property by fraud.

B. Option 1. Option 1, in the words of the synopsis, "provides a dramatically simplified and shortened definition of loss." The adoption of option 1 will guarantee needless litigation by unsettling matters believed to be settled. It will be necessary to litigate whether the Commission's deletion of language expresses an intent to change policy. Why, after all, would the Commission delete language if the Commission did not want a change in policy -- or if the Commission did not intend that the courts decide for themselves what the policy should be? The adoption of option 1

would pass up an opportunity to provide uniformity among the circuits about matters where there are differences. Option 1, in our opinion, would be an abdication of the Commission's responsibility to define a concept that the Commission has developed for gauging the severity of theft and fraud offenses.

C. Options 2 and 3. (1) Introduction. We support the approach taken in options 2 and 3. We have some comments and suggestions about how those options deal with various issues, however.

(2) "Harm" vs. "economic harm." Options 2 and 3 both define "actual loss" to be the reasonably foreseeable harm resulting from defendant's relevant conduct. They define "intended loss" to be the harm intended to be caused by defendant and others for whose conduct the defendant is accountable under the relevant conduct rules. Option 3 uses the term "harm" in the definitions, while option 2 indicated an alternative formulation of "economic harm." We believe that the term "economic harm" is better. The loss table is constructed to provide an enhancement based upon dollar amounts. Because the definitions are used to derive a dollar amount to use in conjunction with that table, the harm must be quantifiable in dollars. The use of "economic harm" differentiates financial harm from other kinds of harm that an offense might cause and emphasizes that the harm must be able to be stated in dollar terms.

(3) "Reasonably foreseeable." The definition of actual loss requires that the harm be reasonably foreseeable. Reasonable foreseeability is an appropriate standard but can include consequential damages. We believe that the Commission should exclude consequential damages. As the Seventh Circuit has stated, excluding consequential damages "prevent[s] the sentencing

hearing from turning into a tort or contract suit."[16] Consequential damages are often highly speculative in nature. The determination of the amount of consequential damages can unduly protract the sentencing process.

(4) Time at which loss is measured. Option 2 measures actual loss at the time the offense is detected; option 3 measures loss at the time of sentencing. We believe that the appropriate time is the completion of the offense. The criminal law assumes that a theft or fraud offense is complete when the defendant has completed all of the elements of the offense. When that occurs, the victim has been deprived of property, and it would logically follow that the loss should be the value of the property at the time of the completion of the offense.

Using the date of sentencing makes little sense. Events that occur after detection of the offense, over which the defendant has no control, may increase or decrease the amount of loss. Because automobiles depreciate in value over time, a date-of-sentencing rule would mean that the longer a car thief keeps a car, the lower the loss. If the defendant's conduct causes a reduction in the worth of the property after the offense has been completed, the sentencing court, as option 2 provides, can appropriately include that additional damage as part of loss, for the reduction in the worth of the property reflects heightened culpability of the defendant.

(5) Intended loss. Option 3 defines intended loss to include harm that "would have been unlikely or impossible to accomplish . . . ." We believe that the standard should be, as suggested in option 2, harm that realistically could have occurred. While a defendant's intention is a component of the defendant's culpability, that intention should bear some relationship to reality.

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[16]United States v. Marlatt, 24 F.3d 1005, 1007 (7th Cir. 1994) (holding that current definition of loss does not include consequential damages).

Defendant A, who submits an $11,000 insurance claim on an automobile whose fair market value is $4,000, may be more culpable than defendant B, who files a claim for $4,000 on a $4,000 automobile, but defendant A is less culpable than defendant C, who files an $11,000 claim on an automobile worth $11,000. To treat defendants A and C the same would be inappropriate, especially because, as indicated above, there is no need to increase punishment. We believe that the guideline ranges are sufficiently wide to account for defendant A's inflated intention by sentencing defendant A at the top of the applicable guideline range determined by limiting the loss to what realistically could have occurred.[17] We urge the Commission to add the realistic-intention requirement set forth in brackets in option 2.[18]

(6) Fair market value. Both options 2 and 3 call for the use of the fair market value of the property that is unlawfully taken, appropriated, or damaged, but neither specifies what market is to be used. We recommend that the Commission specify that fair market value be determined by looking to the market in which the victim operates. If a truckload of electronic equipment is stolen from a retailer, the harm to the victim ordinarily is what it costs to replace that equipment in the market in which the victim customarily operates, the wholesale market. The loss, therefore, should be what it costs the retailer to get replacement equipment from a wholesaler, *i.e.*, the

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[17]While it could be argued that the loss attributable to defendant A should be set at $11,000, with the court sentencing at the bottom of the range to account for defendant A's inflated intention, that presumes that the sentences for defendants like defendant C fall at the top of the range. Commission data cited above indicates that most sentences in fraud and theft fall at the bottom of the range. Combining the data for theft and fraud offenses shows that 51% of the sentences fall at the bottom of the applicable guideline range. *See* U.S. Sentencing Commission, *1996 Sourcebook of Federal Sentencing Statistics*, at table 27.

[18]If the Commission decides against such a limitation, we believe that the Commission should include commentary that states that there is a basis for departure if the loss includes amounts that the defendant could not realistically have obtained.

wholesale price. The loss should not be determined by looking to the value of that electronic equipment on the retail market.

(7) Gain. Option 3 provides that gain to defendant (and others for whose conduct the defendant is accountable under the relevant conduct rules) can be used if the gain is greater than the loss or if loss is difficult or impossible to determine. We believe that this standard is too broad and that gain should be used only if loss is difficult or impossible to ascertain. For those relatively-infrequent situations where gain is greater than loss, the sentencing court can depart upward.

(8) Interest/opportunity costs. We support the first alternative (subdivision (D), entitled "Opportunity costs") in option 3, which excludes interest, anticipated profits, and other opportunity costs, but which invites an upward departure if the loss determined without those opportunity costs "substantially understate[s] the seriousness of the offense or the culpability of the defendant." Opportunity costs are often highly speculative and do not represent out-of-pocket loss to the victim. The victim has not lost anything tangible but has lost an opportunity. The opportunity, however, might not have worked out to the victim's financial benefit. The stock in which the victim would have invested, for example, might have declined in value or increased in value. Including opportunity costs as an element of loss will complicate the sentencing process and require something akin to speculation on the part of the sentencing court.

Bargained-for interest is a form of opportunity cost, although the opportunity lost -- the bargained-for interest -- is not as speculative as other forms of opportunity costs. Although the opportunity cost is not as difficult to calculate when dealing with bargained-for interest, the inclusion of bargained-for interest means that punishment is based, to some extent, upon the kind

of deal that has been negotiated, even though there is no difference in what the victims' out-of-pocket loss is. Should there be a difference in punishment between a defendant who defrauds another of $19,000 on a promise to repay that amount at 5% interest and a defendant who does the same thing but who promises repayment at 10%? If a defendant unlawfully takes property worth $19,000 from another, should it matter that the property taken was an automobile worth $19,000 (which then becomes the amount of the loss) or was taken by falsely obtaining a loan of $19,000 upon the promise to repay that amount at 8% interest?[19]

(9) Upward departures. We believe that the proposed commentary in option 3, entitled "Upward Departure Considerations," sets forth appropriate bases for upward departure. We suggest, however, that subdivision (F)(vii) be modified to account for §§ 2B1.1(b)(6)(A) and 2F1.1(b)(6)(A), which enhance if the offense substantially jeopardized the safety and soundness of a financial institution.

(10) Downward. We believe that the proposed commentary in option 3, entitled "Downward Departure Considerations," generally sets forth appropriate bases for downward departure. Subdivision (G)(iii) is confusing, however, because it appears to conflict with the earlier provision in option 3 that credits a defendant with economic benefits conferred upon the victim before the defendant knew or had reason to believe that the offense had been detected. The situation described in subdivision (G)(iii) is exactly that and therefore should not be a basis

[19]If the Commission decides to adopt the alternative that we support, then the Commission will have to modify the discussion of credits to indicate that interest payments are not to be credited when calculating loss. If interest is not a part of loss, then interest payments should not be used to reduce the amount of loss.

for departure.[20]

(11) Appropriate deference. Options 2 and 3 include a provision that "the [sentencing] court's loss determination is entitled to appropriate deference," a self-evident proposition that begs the question of what kind of deference. Congress has prescribed the standards of review that apply on appeal. Inclusion of this provision not only is unnecessary but is potentially harmful. Including such a statement with regard to determinations of loss under the fraud and theft guidelines implies that the Commission does not consider such deference due to other types of factual determinations by the sentencing court.

Amendment 5
Issues Related to Revision of Loss Tables
(§§ 2B1.1, 2F1.1, and 2T4.1)

Proposed amendment 5 "address[es] issues related and subsidiary to the revisions of the theft, fraud, and tax loss tables that increase penalties and build in the more-than-minimal-planning (MMP) enhancement." As indicated earlier, we oppose proposed amendment 1 because there is no need to increase penalties for theft and fraud offenses. The Commission has to take up proposed amendment 5 only if the Commission decides to revise the loss table. If the Commission does not adopt new loss tables, there is no need for the Commission to act on this proposed amendment.

Proposed amendment 5(A) would delete the more-than-minimal planning enhancement. If the Commission decides to adopt new loss tables, then the Commission has no choice but to adopt proposed amendment 5(A).

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[20]It may be that the phrase "prior to detection of the offense" should be "after detection of the offense and before sentencing."

Proposed amendment 5(B) would add a specific offense characteristic that would reduce the offense level by two levels if the offense involved limited or insignificant planning. The Commission's review of preguidelines sentencing practices led the Commission to conclude that one of the two most important factors determining punishment was "whether the offense was an isolated crime of opportunity or was sophisticated or repeated."[21] That conclusion led to the more-than-minimal-planning enhancement. The heartland of the theft and fraud guidelines currently is a minimal amount of planning, so those guidelines enhance if the planning exceeds minimal. If the Commission were simply to eliminate the more-than-minimal-planing enhancement, the question would be what is the new heartland of the guideline. To say that an offense with minimal planning should be treated the same as an offense with considerable planning would be to contradict the empirical findings of the Commission that the extent of the planning was one of the two most important factors in determining punishment. We believe that the Commission should provide that an offenses in which the planning is limited or inconsequential results in a two-level reduction or is a basis for a downward departure.

Proposed amendment 5(C) would add an enhancement of two levels if the offense involves sophisticated concealment. The commentary discussing "sophisticated concealment" needs to be revised somewhat. The basic definition of "sophisticated concealment" in the first sentence of the proposed commentary is not consistent with the ordinary meaning of the term "sophisticated." The dictionary defines "sophisticated" as "*very* complex or complicated."[22] The term "very" should be inserted before the term "complex" in the first sentence of the proposed

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[21]*See* U.S.S.G. § 2F1.1, comment. (backg'd).

[22]The American Heritage Dictionary 1166 (2d college ed. 1991) (emphasis added).

commentary.

The second sentence of the proposed commentary creates confusion and does not accurately describe the definition in the first sentence or the example in the third sentence of the proposed commentary. The second sentence reads, "This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect." Making the offense difficult to detect, whether by deliberately hiding assets, transactions, or both or by some other action, is going to occur in virtually every offense. The goal, after all, is not to be caught. The question is whether those efforts were complex or intricate. We recommend deletion of the second sentence of the proposed commentary.

Proposed amendments 5(B) and 5(C) should be acted on as a package and either adopted together or rejected together. If an enhancement is to be added to recognize offense conduct that goes beyond the norm, then there should be a reduction for offense conduct that does not rise to the norm. The Commission may not want to treat these two factors as specific offense characteristics and may wish instead to add commentary indicating that sophisticated concealment is a ground for upward departure and limited or insignificant planning is a ground for downward departure. We support that as an alternative to making those factors specific offense characteristics.

Amendment 6
Telemarketing Fraud
Issues for Comment

Proposed amendment 6 invites comment upon whether the guidelines provide adequate punishment for telemarketing offenses. Proposed amendment 6(A) seeks comment on whether

telemarketing fraud offenses should be treated differently from other fraud offenses and specifically whether § 2F1.1 should be amended to provide an increase of [2-8] levels "to correspond to the application of the statutory enhancement in 18 U.S.C. § 2326." Proposed amendment 6(B) seeks comment on whether the fraud guidelines adequately address offenses with multiple victims. Proposed amendment 6(C) seeks comment on "revictimization" offenses and whether § 3A1.1 should be amended to include as a "vulnerable victim" an "individual susceptible to the offense because of prior victimization." Proposed amendment 6(C) also seeks comment on whether to add specific offense characteristics to § 2F1.1 to address revictimization. Proposed amendment 6(D) seeks comment on whether to amend § 2F1.1 by replacing the encouraged departure in application note 10 with specific offense characteristics to address instances where "monetary loss inadequately measures the harm and seriousness of fraudulent conduct."[23] Proposed amendment 6(D) also seeks comment on whether certain specified grounds for departure in chapter 5, part K should be converted into specific offense characteristics. Proposed amendment 6(E), in response to the Senate version of pending telemarketing fraud legislation, seeks comment on whether to amend the guidelines to provide an enhancement for "sophisticated means." Proposed amendment 6(F) seeks comment on whether there are additional factors relating to telemarketing offenses that should be addressed by amending the guidelines.

The heartland of the fraud guideline is that the defendant has taken advantage of a victim by appealing to the victim's self interest, the desire to make money or increase wealth. Thus, § 2F1.1(b)(3)(A) requires a two-level enhancement if the defendant did not appeal to the victim's

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[23]We have commented upon the matters covered by proposed amendment 6(D) in our comments on proposed amendment 4.

self-interest but instead misrepresented the he or she was acting on behalf of a charity or a government agency. Commentary to the fraud guideline states that "[u]se of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives." [24] The commentary then goes on to make clear that appealing to a victim's desire to make money or increase wealth is the heartland of the guideline, stating that "[t]aking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct."[25]

As the testimony at the Commission's hearing illustrated, telemarketers do not appeal to the charitable impulse or trust in the institutions of government of the people they call. Telemarketers appeal to the self interest of the people they call – the heartland conduct of the fraud guideline. An enhancement based upon the fraud being a telemarketing offense would be inconsistent with the premise of the fraud guideline. Unless there is a factor that occurs in telemarketing cases that is not already accounted for in the guidelines, there is no basis for treating telemarketing fraud differently from other types of fraud offenses.

We recommend that the Commission defer action on telemarketing fraud. The Commission's hearing on the matter, at which the Department of Justice, the National Association of Attorneys General, and the American Association of Retired Persons testified, failed to demonstrate that there is a basis for amending the fraud guidelines to treat telemarketing fraud differently from other types of fraud. The guidelines already adequately account for the factors

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[24] § 2F1.1, comment. (backg'd).

[25] *Id.*

that the witnesses at that hearing identified as characteristic of telemarketing fraud.

One of the factors identified was the practice of reloading, contacting persons who previously had been victimized. If a person who previously has been victimized is thereby vulnerable, however, the vulnerable victim adjustment of § 3A1.1 applies.[26] Another factor identified was the large number of victims involved. A large number of victims, however, not only increases the amount of the loss, but also gives the sentencing court a basis for departing upward.[27]

A third factor identified at the hearing as characteristic of telemarketing fraud is the targeting of older victims. There is no good reason why age alone should be used to enhance the offense level. Age alone does not make a person unusually vulnerable, as the American Association of Retired Persons pointed out at the hearing. A person who is 60 years old can be just as capable as of protecting him- or herself from victimization as a person who is 30 years old. There must be something more than age involved, such as an impaired capacity to handle personal affairs, and to the extent that there is something more the vulnerable victim adjustment applies.

We do not think it necessary or appropriate to add enhancements based upon factors in 18 U.S.C. § 2326. Two of those factors turn upon the age of the victims, and as indicated above we do not believe that age alone is an appropriate basis upon which to enhance the offense level.

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[26]While it seems just as likely that a person who has been victimized will be more vigilant and less vulnerable when solicited a second time, there are undoubtedly persons who, in desperation, will seize at anything to get out of a financial hole and thus are unusually vulnerable within the meaning of § 3A1.1.

[27]A telemarketing fraud will invariably involve more-than-minimal planning as well as large numbers of victims. Under § 2F1.1(b)(1), either of those factors alone calls for a two-level enhancement. Application note 1 to the fraud guideline states that the presence of both factors is a basis for an upward departure.

The other factor in 18 U.S.C. § 2326 is that the offense was telemarketing fraud. To enhance simply because the fraud was telemarketing fraud, as we stated above, would be inconsistent with the heartland of the guideline.

Finally, we believe it unwise for the Commission to anticipate the enactment of a law by amending the guidelines on the basis that one House of Congress has passed a bill directing the amendment of the guidelines. The Commission should evaluate the proposal on its merits, not on the basis that Congress may sometime in the future enact the legislation. The bill that has passed one House, in this instance, would direct that the Commission add an enhancement for an offense that "involved sophisticated means, including but not limited to sophisticated concealment efforts, such as perpetuating the offense from outside the United States." This directive will be complied with if the Commission adopts proposed amendment 5(C) in the form of a specific offense characteristic. If the Commission believes that proposed amendment 5(C) should be a departure ground instead of a specific offense characteristic, we would urge the Commission to add commentary indicating that the factor is a basis for departure and to work with the appropriate persons on the Hill to convince Congress that a specific offense characteristic makes more sense. In candor, though, we do not believe that the telemarketing offenses described at the Commission's hearing can fairly be called sophisticated. Telephone calls were made to persons, who then were persuaded to send money to the telemarketers in the expectation that they, the victims, would make big money. To call that sophisticated does not comport with the ordinary meaning of the term "sophisticated."[28]

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[28]The American Heritage Dictionary 1166 (2d college ed. 1991) defines "sophisticated" to mean "very complex or complicated."

In short, we believe that the most effective way to combat telemarketing fraud is with educational programs like that being carried out by the American Association of Retired Persons.

Amendment 7
Circuit Conflicts

Amendment 7 seeks to resolve what the Commission has identified as nine circuit conflicts.

Part A – Aberrant Behavior

Chapter one, part A(4)(d) of the *Guidelines Manual* states that "[t]he Commission, of course, has not dealt with single acts of aberrant behavior that still may justify probation at higher offense levels through departures." Without guidance as to what the Commission contemplated as "single acts of aberrant behavior," the courts have come up with differing interpretations of that phrase. Proposed amendment 7(A) seeks to resolve the differences by deleting the above sentence and adding a new policy statement in chapter five, part K. The new policy statement would define "single acts of aberrant behavior" very narrowly to be a "spontaneous and thoughtless act." The definition would specifically exclude "a course of conduct composed of multiple planned criminal acts, even if the defendant is a first-time offender." We oppose the amendment because it is too restrictive and incompatible with the approach to departures in Koon v. United States, 116 S.Ct. 2035 (1996).

The proposed definition describes conduct that does not get prosecuted in federal court and deprives aberrant behavior of any real-world meaning. The defendant who, on the way out of a restaurant, sees an unattended purse and steals it, may get prosecuted in state court, but not in federal court. There are no reported cases using the narrow definition that have upheld a

downward departure based on aberrant behavior.

The Commission must have intended more than empty words when it stated that a single act of aberrant behavior was a basis for departure. We believe that the totality of the circumstances approach taken by the First, Ninth, and Tenth Circuits gives substance to the Commission's statement on aberrant behavior.[29]

> We think the Commission intended the word "single" to refer to the crime committed and not to the various acts involved. As a result, we read the Guidelines' reference to "single acts of aberrant behavior" to include multiple acts leading up to the commission of a crime. Any other reading would produce an absurd result. District courts would be reduced to counting the number of acts involved in the commission of a crime to determine whether a departure is warranted. Moreover, the practical effect of such an interpretation would be to make aberrant behavior departures virtually unavailable to most defendants because almost every crime involves a series of criminal acts.[30]

Unless the Commission intends to foreclose departure based on aberrant behavior by means of an unrealistic definition, the most appropriate test is that used by the First, Ninth, and Tenth Circuits. We support providing a more realistic framework for determining whether a departure for aberrant behavior is warranted. Thus, rather than focus on whether the offense involved a spontaneous, single act, the court should determine whether, looking at all of the circumstances, including the nature of the crime, the lack of substantial planning, and the motivation of the defendant, the defendant's offense resulted from truly aberrant behavior. The totality of circumstances test "achieves the uniformity in sentencing and district court discretion

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[29]*See* United States v. Grandmaison, 77 F.3d 355 (1st Cir. 1996); United States v. Takai, 941 F.2d 738 (9th Cir. 1991); United States v. Pena, 930 F.2d 1486 (10th Cir. 1991).

[30]Grandmaison, 77 F.3d at 563 (citation omitted).

the Guidelines were intended to strike."[31]

This totality of the circumstances test parallels the Supreme Court's approach to departures in *Koon.* After pointing out that the Sentencing Reform Act of 1984 left district courts with much of their traditional sentencing discretion, 116 S.Ct. at 2046, the Supreme Court stated that "[a] district court's decision to depart from the Guidelines . . . embodies the traditional exercise of discretion by a sentencing court."[23] The Court went on to state that

> [i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States District Judge.[24]

The obvious concern about a broad definition is whether the definition is used as a way to depart for any first-time offender. Routine aberrant-behavior departures have not occurred in those jurisdictions in which the broader definition is used. We see no reason why they will occur if the Commission adopts the broader definition.[25]

Part B - Misrepresentation with respect to Charitable Organizations

Section 2F1.1(b)(3)(A) calls for a two-level enhancement if the offense involved "a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or

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[31]*Id.*

[23]Koon, 116 S.Ct. at 2046.

[24]*Id.* at 2053.

[25]If the Commission adopts the broader definition, the Commission, out of caution, might want to include in the commentary a statement that the simple fact that the defendant is a first-time offender does not, in and of itself, qualify the defendant for a departure for aberrant behavior. We would not oppose such action by the Commission.

political organization, or a government agency . . . ." The enhancement recognizes the increased culpability of a defendant who takes advantage of a person's charitable impulse or faith in the institutions of government.

> Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives. . . . defendants who exploit victims' charitable impulses or trust in government create particular social harm.[26]

Proposed amendment 7(B) would revise § 2F1.1(b)(3) to call for an enhancement if the defendant (1) is an employee of a charitable, religious, or political organization or a government agency and uses that position "under false pretenses" to victimize an individual who is not an employee of the organization or agency; or (2) misrepresents that he or she is an employee or authorized agent of such an organization or agency. We oppose proposed amendment 7(B).

The Commission has cited two cases to illustrate the perceived conflict in the circuits. Not only are the cases not inconsistent, but the proposed amendment would not change the outcome in either.

In United States v. Marcum, 16 F.3d 599 (4th Cir. 1994), the defendant was the president of a charitable organization and had been convicted of mail fraud for skimming money from the gross proceeds of a bingo game meant to raise funds for the charity. He received a two-level enhancement under § 2F1.1(b)(3) because he "misrepresented to the public that he was conducting the bingo games wholly on behalf of LCDSA, a charitable organization. . . . Without his position of trust, he would not have had the opportunity to commit the crime for which he stands convicted." Because the enhancement was appropriate under present § 2F1.1(b)(3)(A), it

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[26]U.S.S.G. § 2F1.1, comment. (backg'd).

would also be appropriate under the version in proposed amendment 7(B).

In United States v. Frazier, 53 F.3d 1105 (10th Cir. 1995), the defendant, who was president of a nonprofit corporation, had been convicted of intentionally misapplying property and making false statements to a government agency. The defendant, on behalf of the corporation, received Department of Labor funding for job training for participants in the United Tribe Service Center. Instead of using the funds to provide job training, the defendant used the money to buy computers for the organization. The Tenth Circuit found that the enhancement in § 2F1.1(b)(3)(A) did not apply because "at no time during commission of the offense did Defendant appeal to the generosity and charitable or trusting impulses of his victim by falsely declaring that he had authority to act on behalf of an educational organization." This is the appropriate result under the present enhancement because the defendant did not "create particular social harm" by "exploit[ing] victims' charitable impulses or trust in government."[27] The new version of § 2F1.1(b)(3)(A) in proposed amendment 7(B) would not change the outcome because the victim of the offense was a government agency, not an individual.

The proposed amendment is unnecessary and is likely to result in confusion and unnecessary litigation. We oppose proposed amendment 7(B).

Part C - Violation of Judicial Process

Section 2F1.1(b)(3)(B) calls for a two-level enhancement if the offense involved "violation of any judicial or administrative order, injunction, degree, or process not addressed elsewhere in the guidelines . . . ." The enhancement recognizes the increased culpability of a defendant who persists in wrongful conduct after having been told by a judicial or administrative

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[27] *Id.*

body to desist in the conduct. As the commentary states, "A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies."[28]

Proposed amendment 7(C) presents two options to address a circuit conflict over whether filing fraudulent forms with a bankruptcy or probate court calls for an enhancement under § 2F1.1(b)(3)(B) for violation of a judicial order or process. Option 1(a) would revise the commentary in § 2F1.1 to state explicitly that the enhancement applies "if the offense involves a violation of a special judicial process, such as a bankruptcy or probate proceeding." Option 1(b) sets forth an alternative approach that adds commentary indicating that there is a basis for an upward departure if the offense involved violation of a "special judicial process, such as a bankruptcy or probate proceeding." Option 2(a) would limit the enhancement to conduct that involved "a fraud in contravention of a prior official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action." Option 2(b), as an alternative, would treat a violation of a judicial order as a ground for departure. We believe that the Commission should adopt one of the alternatives in option 2.

The background commentary to the fraud guideline quoted above indicates that the enhancement of § 2F1.1(b)(3)(B) reflects the increased culpability of a defendant who disobeys a judicial or administrative order to stop engaging in certain conduct. This is underscored by application note 5 to the fraud guideline. The example used in that note to illustrate the

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[28] *Id.*

application of the enhancement is of a defendant whose business had been enjoined from selling a dangerous product but who engaged in fraudulent conduct to sell the product.

The courts applying the enhancement to filing false forms in bankruptcy court have expanded the scope of the enhancement far beyond what the Commission originally intended. The appropriate course of action for the Commission, therefore, is to reiterate what the background commentary and application note 2 were intended to indicate -- that the enhancement applies to scofflaws, defendants who, in committing a federal offense, disobey a prior judicial or administrative-agency order not to engage in the kind of conduct that got them convicted of the federal offense.

It is not clear to us why bankruptcy and probate courts should be singled out for special consideration. One consequence of such a policy, as the First Circuit has pointed out, would be to increase the offense level in all bankruptcy frauds.[29] There is no evidence, however, that bankruptcy fraud is at present punished inadequately. The rationale for applying the enhancement to filing false forms in bankruptcy proceedings, as expressed in the cases, is that there is a standing order to fill out forms truthfully. Why should bankruptcy and probate courts be treated differently from other government agencies? Why does submitting a false form to a bankruptcy court deserve enhancement but submission of a false form (completed under penalty of perjury) to the NLRB or the FCC – or to a district court or court of appeals – does not?

We believe that the enhancement should be reserved for those defendants who, in the words of the First Circuit, "have demonstrated a heightened *mens rea* by violating a prior 'judicial

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[29] *See* United States v. Shadduck, 112 F.3d 523, 530 (1st Cir. 1997).

or administrative order, decree, injunction or process.'"[30] We recommend that the Commission adopt either alternative in option 2.

Part D - Grouping Failure to Appear Count with Underlying Offense

Under 18 U.S.C. § 3146(b), a sentence of imprisonment imposed for a failure to appear must run consecutively to the sentence imposed for any other offense. Section 3146(b) does not require a sentence of imprisonment. Section 3146(b) does require, however, that any sentence of imprisonment that is imposed must run consecutively to any other sentence of imprisonment to which the defendant is subject.

Application note 3 to § 2J1.6 states that a conviction of failure to appear (other than for service of sentence) is to be treated under § 3C1.1 as a willful obstruction of the underlying offense (the offense for which the defendant failed to appear). If that occurs, the failure-to-appear count must be grouped under § 3D1.2(c) with the underlying offense because the conduct in the failure-to-appear count is used to adjust the offense level for the underlying offense. Application note 3 indicates that in such a situation, the court must sentence within the applicable guideline range -- which encompasses both the failure-to-appear count and the underlying offense -- but that a portion of any term of imprisonment must be assigned to the failure-to-appear count and rub consecutively to the remainder of the term of imprisonment.[31]

The Fifth Circuit, in effect, has invalidated that methodology in that circuit, holding that

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[30]*Id.*

[31]The example in application note 3 is of a defendant subject to a guideline range of 30-37 months. The court decides that 36 months is the appropriate sentence. "[A] sentence of thirty months for the underlying offense plus a consecutive six months sentence for the failure to appear count would satisfy" the requirements of the guidelines and 18 U.S.C. § 3146(b). U.S.S.G. § 2J1.6, comment. (n.3).

the methodology conflicts with 18 U.S.C. § 3146(b).[32] "The guideline treatment of section 3146(b) would defeat the statutory intent that a failure to appear offense be considered separate and distinct from the underlying offenses, warranting a separate and distinct penalty."[33] What the Fifth Circuit seemed not to recognize was that the Commission *had* provided "a separate and distinct penalty" -- the two-level adjustment under § 3C1.1 for willful obstruction of justice. The consequence of the Fifth Circuit's decision is that a defendant can be penalized twice for the same conduct, once when the willful-obstruction adjustment is added to the offense level for the underlying offense and once when the court imposes a separate sentence for the failure-to-appear count.[34]

Proposed amendment 7(D) would amend commentary to explain that the Commission's methodology complies with statutory requirements. We support that part of proposed amendment 7(D). Proposed amendment 7(D) would also amend commentary to indicate that there is a basis for an upward departure if there were acts of obstruction other than the failure to

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[32]United States v. Packer, 70 F.3d 357 (5th Cir. 1995).

[33]*Id.* at 360.

[34]The district court in *Packer* had grouped together seven fraud offenses and calculated an offense level of 16, which with the defendant's criminal history category yielded a guideline range of 21-27 months. (The Fifth Circuit's opinion does not indicate if the district court added the two-level adjustment for willful obstruction, but there would seem to be no basis for the district court to have declined to do so.) The district court sentenced the defendant to a prison term of 27 months on the fraud offenses. The district court determined the offense level for the failure-to-appear count separately from the offense level for the fraud counts. That offense level, 12, combined with the defendant's criminal history category yielded a guideline range of 10-16 months. The district court imposed a prison term of 16 months on the failure-to-appear count, to run consecutively to the prison term on the fraud counts. The aggregate prison term, therefore, was 43 months, 16 months above the top of the applicable guideline range that the Commission intended apply to all eight counts (the seven fraud counts and the failure-to-appear count).

appear. We oppose that part of the proposed amendment as unnecessary. There is no basis for treating an obstruction for failure to appear any differently from another kind of willful obstruction.

Part E - Imposters and the Abuse of Trust Adjustment

Section 3B1.3 provides for a two-level increase in the offense level "if the defendant abused a position of public or private trust . . . ." Proposed amendment 7(E) would revise the commentary in § 3B1.3 to expand the scope of the adjustment. The new commentary would state that the enhancement for abuse of a position of trust applies to defendants "who provide sufficient indicia to the victim that they legitimately hold a position of public or private trust when, in fact, they do not." Proposed amendment 7(E) also invites comment on whether § 3B1.3 should be amended to state that the adjustment does not apply to an "individual who poses as an individual in a position of public or private trust."

The essence of a fraud offense is deception of the victim. This deception is accounted for in the base offense level for fraud, but the fraud guideline also identifies certain kinds of deception -- purporting to act on behalf of a charity or on behalf of a government agency -- that "create particular social harm."[35] Because they create particular social harm, those kinds of deception receive a two-level enhancement under the fraud guideline. Section 3B1.3, the abuse of trust guideline, identifies another category of deception that is deserving of enhancement, that practiced by persons who hold positions that ordinarily are subjected to less supervision than persons whose responsibilities are nondiscretionary in nature.[36]

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[35]U.S.S.G. § 2F1.1, comment. (backg'd).

[36]U.S.S.G. § 3B1.3, comment. (n.1).

Proposed amendment 7(E) would expand the scope of the adjustment. The adjustment now applies to persons who are more culpable because their insulated position gives them a relatively-secure way to commit the offense. As revised by proposed amendment 7(E), the adjustment would apply to any person who deceives a victim by misrepresenting his or her position -- conduct that is a part of the heartland of the fraud guideline. We oppose proposed amendment 7(E).

Part F - Instant Offense and Obstruction of Justice

Section 3C1.1 provides for a two-level increase "if the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." Proposed amendment 7(F) "addresses the circuit conflict regarding whether the term 'instant offense', as used in the obstruction of justice guideline, § 3C1.1, includes obstructions that occur in cases closely related to the defendant's case or only those specifically related to the 'offense of conviction.'"

Proposed amendment 7(F) presents three options to amend § 3C1.1. Option 1(a) would adopt a broad definition by defining "instant offense" to mean the "offense of which the defendant is convicted and any state or federal offense committed by the defendant or another person that is closely related to the offense of conviction." Option 1(b) would amend the guideline to provide that the adjustment applies if (A) the defendant's obstructive conduct took place during the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) the defendant's obstructive conduct related to the defendant's instant offense of conviction or a closely related offense. Option 2 would amend the commentary to state that the adjustment applies to obstructive conduct that "(A) occurred during the investigation, prosecution, or

sentencing of the defendant's instant offense of conviction, and (B) related solely to the defendant's instant offense of conviction." We do not believe that the obstruction enhancement should be a vehicle for sanctioning conduct as far removed from the offense that the defendant has been found guilty beyond a reasonable doubt of committing. We support option 2.

We believe that the Commission has already resolved the split in the circuits. The Commission last amendment cycle promulgated amendment 546, which revised the commentary to § 1B1.1 to define the term "instant offense."

> The term "instant" is used in connection with "offense," "federal offense," or "offense of conviction," as the case my be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (e.g., an offense before a state court involving the same underlying conduct).

Section 3C1.1 is not ambiguous and literally requires that the defendant's conduct obstruct the investigation, prosecution, or sentencing of "the violation for which the defendant is being sentenced . . . ." This is sound policy and the Commission should stand by it.

Part G - Failure to Admit Drug Use While on Pretrial Release

Proposed amendment 7(G) responds to a circuit conflict over whether the two-level adjustment for obstruction of justice applies if the defendant refuses to admit to using drugs while on pretrial release. The amendment would revise the commentary in § 3C1.1 to state specifically that "lying to a probation or pretrial services officer about drug use while on pretrial release" ordinarily does not warrant the adjustment, "although such conduct may be a factor in determining whether to reduce the defendant's sentence under § 3E1.1 (Acceptance of Responsibility)." We support that part of the amendment which would state that an adjustment for obstruction of justice is ordinarily not warranted for a false exculpatory statement about drug

use to a probation officer while on pretrial release. We oppose that part of the amendment that says that such conduct may provide grounds for denying an adjustment for acceptance of responsibility.

A false denial of drug use while on pretrial release should be no more material to sentencing than a false denial of guilt. Application note 1 to § 3C1.1 provides that "[a] defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision." As the Seventh Circuit has stated, "[w]e see no basis for distinguishing between statements made to probation officers and those made to pretrial service officers . . . ."[37]

The proposed amendment will maintain the spirit of the enhancement to ensure that a defendant is not penalized with an obstruction enhancement for incriminating statements that would not qualify as relevant conduct when such statements have no relation to the offense for which the defendant is being sentenced. Indeed, to allow punishment for denying drug use would only foster disparity. Material obstructive conduct, such as perjury, threatening witnesses, and hiding evidence, is hardly equivalent to lying about being a drug user. Finally, defendants on bail are routinely tested for drug use, and a positive test will often result in revocation of bail – whether or not the defendant admits to using drugs.

For these same reasons we oppose that part of the amendment that would amend the commentary to state that a false statement about drug use to a probation or pretrial service officer "may be a factor in determining whether to reduce the defendant's sentence under § 3E1.1

[37]United States v. Thompson, 944 F.2d 1331, 1348 (7th Cir. 1991).

(Acceptance of Responsibility)." Such an instruction would also conflict with commentary in § 3E1.1 that states that

> truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.[38]

Part H - Meaning of "Incarceration" for Computing Criminal History

Proposed amendment 7(H) presents two options to address whether the term "incarceration," as used in chapter four to determine a defendant's criminal history score, includes confinement in a community treatment center or halfway house following revocation of parole, probation, or supervised release. Option 1 would include as "incarceration" a revocation sentence of home detention, halfway house, or community treatment center. Option 2 would exclude nonprison sentences. We support option 2.

A defendant's placement in a community treatment center or halfway house can occur for a number of reasons. The defendant may recognize that he or she has a need for alcohol or drug counseling and consent to such placement to get help. The defendant may have no home to go to and be placed in a community treatment center or halfway house for that reason. Treating such a placement as imprisonment for purposes of calculating the criminal history score would be unfair and a disincentive to seek substance-abuse treatment.

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[38]U.S.S.G. § 3E1.1, comment. (n.1(a)) (emphasis added).

Further, equating "incarceration" with home detention or confinement in a halfway house or community treatment center would erase distinctions otherwise important in the guidelines. As noted in United States v. Latimer, 991 F.2d 1509, 1511-1517 (9th Cir. 1993), the Commission "repeatedly draws a sharp distinction between confinement in a community treatment center or halfway house and confinement in a conventional prison facility." Thus, §§ 4A1.1, 2P1.1, and 5C1.1 consider nonprison sentences as intermediate sanctions. To maintain this consistency, the Commission should adopt the proposed amendment in option 2.

Part I - Diminished Capacity

Section 5K2.13, p.s. states that there is a basis for a downward departure "if the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants . . . provided that the defendant's criminal history does not indicate a need for incarceration to protect the public." Proposed amendment 7(I) presents four alternatives in response to a circuit conflict on whether a defendant who commits a "crime of violence," as defined in § 4B1.2, is ineligible to receive a downward departure under § 5K2.13, p.s. for diminished capacity.

Option 1 would amend § 5K2.13, p.s. to restrict the departure for diminished capacity to a defendant whose offense was not a "crime of violence" as defined in § 4B1.2. Option 2 would revise § 5K2.13, p.s. to state that the determination of whether an offense is nonviolent should be based on the totality of the facts and circumstances of the offense. Option 3 would authorize a downward departure for diminished capacity for any offense unless

> (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat

> of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public.

Option 4 eliminates the restriction in § 5K2.13 that limits a diminished capacity departure to nonviolent offenses. We support option 4.

The sentencing court, consistent with *Koon*, should be able to look at all of the facts and circumstances to decide if a departure is warranted. The premise behind the current limitation to a conviction of a nonviolent offense is that every defendant convicted of a violent offense presents a serious threat to the safety of others. Not every defendant convicted of a violent offense, however, will present such a threat. We believe that federal judges are capable of determining if a defendant convicted of a violent offense but suffering from diminished capacity presents a serious threat to public safety. Federal judges are aware of the need to protect the public from dangerous individuals and can be trusted to exercise this discretion appropriately.

Amendment 7(A)
Grounds for Departure
(§ 5K2.0)

Proposed amendment 7(A) seeks comment on whether to amend § 5K2.0 to "incorporate the analysis and holding" of the decision in Koon v. United States, __ U.S. __, 116 S.Ct. 2035 (1996). We do not believe that it is necessary to amend § 5K2.0, p.s. to provide a digest of the Supreme Court's decision in *Koon*. The decision should speak for itself. We think that it would be appropriate to point out the decision and suggest adding the following as the final paragraph of the commentary to § 5K2.0, p.s.: "The Supreme Court has addressed the departure standard and review of departures in Koon v. United States, __ U.S. __, 116 S.Ct. 2035 (1996)."

Amendment 8
Homicide

(Chapter 2, Part A)

Proposed amendment 8 invites comment on whether and how to amend the guidelines applicable to homicide offenses. Proposed amendment 8(A) asks whether to amend § 2A1.2 (second degree murder) by increasing the offense level or adding specific offense characteristics. Proposed amendment 8(B) invites comment on whether § 2A1.3 (voluntary manslaughter) should be amended. Proposed amendment 8(C) invites comment on whether § 2A1.4 (involuntary manslaughter) should be amended. Proposed amendment 8(D) asks whether other related guidelines such as § 2A1.5 (conspiracy to commit murder) should be amended to ensure proportionality with any changes made to the other homicide guidelines.

Homicide offenses occur relatively infrequently within federal jurisdiction, and when they do the majority of them occur in Indian country.[39] Any Commission action to increase penalty levels for homicide offense will have a disproportionate impact upon Native Americans.

The Commission's data on manslaughter offenses indicates that although sentences fall at the bottom of the applicable range as often as at the top of the applicable range, downward departures (other than for substantial assistance) occur about three-and-a-half times as often as upward departures. Sentences for murder fall at the top of the applicable range more frequently than at the bottom of the range (18.9% vs. 11.3%), but downward departures (other than for substantial assistance) occur two-and-a-half times as often as upward departures. The mixed

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[39]The term "Indian country" is defined in 18 U.S.C. § 1151. *See also* 18 U.S.C. § 1162 ("State jurisdiction over offenses committed by or against Indians in the Indian country") (giving certain states jurisdiction "over offenses committed by or against Indians in the areas of Indian country listed opposite the State" in a table). Two offenses in the chapter of title 18 entitled "Indians," 18 U.S.C. ch. 53, modify the definition of Indian country for the purposes of those offenses. *See* 18 U.S.C. §§ 1154(c), 1156.

picture for murder offenses may result from the way in which certain murder offenses are scored.[40]

We believe that the Commission should defer action on proposed amendment 8 until the next amendment cycle. The distribution of the within-the-guideline sentences in manslaughter and murder cases, as well as the significant rate of downward departure (for other than substantial assistance) suggests that there might be factors affecting sentence severity that could be captured by specific offense characteristics. We believe that it would be helpful if the Commission were to visit districts in which there are a significant number of prosecutions, to learn first-hand about these cases. Federal Public and Community Defenders in those districts would be happy to assist the Commission in any way possible.

Amendment 9
Electronic Copyright Infringement
(§ 2B5.3)

Proposed amendment 9 seeks comment on how to amend the guidelines in response to a Congressional directive in the No Electronic Theft Act, Pub. L. 105-147. The amendment presents a proposal by the Department of Justice to revise § 2B5.3 (criminal infringement of

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[40]Sentences for murder include sentences imposed for first-degree murder, second degree murder, and conspiracy to murder with death resulting. U.S. Sentencing Commission, *1996 Sourcebook of Federal Sentencing Statistics* A-11.

It is not clear how the Commission treated sentences under 18 U.S.C. § 1111, which mandates a sentence of life imprisonment, and for which U.S.S.G. § 2A1.1 calls for an offense level of 43. If the defendant gets a three-level credit for acceptance of responsibility, the life sentence mandated by section 1111 can be at the top of the applicable range (if the defendant's criminal history category is III or higher) or an upward departure (if the defendant's criminal history category is I or II). If the defendant does not get credit for acceptance of responsibility or for another adjustment that reduces the offense level, the defendant's guideline range, regardless of the defendant's criminal history category, is life. The *1996 Sourcebook* does not indicate whether a life sentence in such a situation was categorized as a sentence at the bottom or the top of the applicable range – or whether the sentence was disregarded.

copyright or trademark) to include in the determination of the loss to the copyright or trademark owner "lost profits, the value of the infringed upon items, the value of the infringing items, the injury to the copyright or trademark owner's reputation, and other associate harms."

The copyright and trademark infringement guideline, § 2B5.3, currently enhances the base offense level of six based upon the "retail value of the infringing items." The Justice Department's proposal is to change that standard to the "loss to the copyright or trademark owner." The loss to the copyright or trademark owner generally should be less than the retail value of the infringing items if the copyright or trademark owner is not directly involved in the retail market. With prerecorded tapes, for example, where the copyright owner does not sell directly to the public, the loss to the copyright owner in a tape-pirating case would be what the copyright owner would have derived from the sale of legitimate tapes to distributors, a wholesale price.

We do not oppose the amendment.

Amendment 10
Property Offenses at National Cemeteries
(§ 2B1.1, § 2B1.3, § 2K1.4)

Proposed amendment 10 responds to the Veteran's Cemetery Protection Act of 1997, which directs the Commission to provide an enhancement of not less than two levels for any offense directed against the property of a national cemetery. The amendment would revise §§ 2B1.1, 2B1.3, and 2K1.4 to provide a two-level enhancement if the offense occurred in a national cemetery. We do not oppose the amendment.

Amendment 11
Prohibited Persons in Firearms Guideline
(§ 2K2.1)

Proposed amendment 11 consists of two parts. Proposed amendment 11(A) responds to

section 658 of the Treasury, Postal Service, and General Government Appropriations Act of 1997, which amended 18 U.S.C. § 922(d) to include in the definition of a prohibited person an individual who has been convicted of a misdemeanor crime of domestic violence. We do not oppose proposed amendment 11(A). The guideline definition of "prohibited person" should be consistent with the statutory definition.

Proposed amendment 11(B) responds to juvenile justice legislation reported by the Senate Judiciary Committee and currently pending before the Senate. That legislation directs the Commission to increase the offense level for firearms offenses to ensure that a person who transfers a firearm to a prohibited person receives the same base offense level as the transferee. We oppose proposed amendment 11(B). The Commission should not short-circuit the legislative process and amend the guidelines simply because a committee of Congress has reported legislation. The Commission was established to exercise independent judgment about sentencing policy. We believe that the Commission should defer action on this amendment so that the proposal can be studied further.

Amendment 12
Conditions of Probation and Supervised Release
(§ 5B1.3, § 5D1.3)

Proposed amendment 12 would revise the guidelines applicable to conditions of probation and supervised release. Proposed amendment 12(A) responds to section 374 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which amended 18 U.S.C. § 3563(b) to include as a discretionary condition of probation an order of deportation. Proposed amendment 12(B) would amend § 5D1.3 to remove the reference to "just punishment" as a consideration in imposing a curfew. Proposed amendment 12(C) would amend §§ 5B1.3 and

5D1.3 to indicate that the list of discretionary conditions of probation and supervised release are policy statements. We support the amendment.