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INTRODUCTION

Chairman Hinojosa, distinguished members of the Commission, thank you for allowing me the opportunity to testify. I am honored to once again be appearing before this Commission. Today I will discuss sentencing proposals arising as a result of the Identity Theft Penalty Enhancement Act of 2004 and the Anabolic Steroid Control Act of 2004. I appreciate the Commission's attention to these important issues.

I. IDENTITY THEFT

A. Introduction

Identity theft is a critically important issue. A survey conducted by the Federal Trade Commission ("FTC") in 2003 indicated that almost ten million Americans have been victim of some form of identity theft within the past year. The FTC estimates losses to business and financial institutions from identity theft to be \$47.6 billion dollars each year. Additional costs to individual consumers are estimated to be approximately \$5 billion.<sup>1</sup> For four years in a row the FTC reports that identity theft

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<sup>1</sup> See [http://www.javelinstrategy.com/reports/documents/2005\\_Javelin\\_Strategy\\_Research\\_Identity\\_Fraud\\_Survey\\_Sample\\_Complimentary\\_Report.pdf](http://www.javelinstrategy.com/reports/documents/2005_Javelin_Strategy_Research_Identity_Fraud_Survey_Sample_Complimentary_Report.pdf).

has been the most prevalent consumer complaint received.<sup>2</sup>

In response to this significant problem, Congress enacted the Identity Theft Penalty Enhancement Act (the “Act”).<sup>3</sup>

The Department appreciates the opportunity to comment on proposed guidelines changes with respect to identity theft. As will be discussed in this testimony, the Department agrees with adding the proposed § 2B1.6 for Aggravated Identity Theft and broadening § 3B1.1 to include abuse of position. The Department disagrees with a proposed Application Note which would cause abuse of position not to be penalized for defendants convicted of Aggravated Identity Theft. The Department also opposes a proposed amendment to § 2B1.1(b)(10) which would limit its application to defendants “convicted” of 18 U.S.C. §§ 1028(a)(5), 1028(a)(7) or 1029(a)(4) instead of defendants “involved” in those crimes. With respect to defendants convicted of multiple counts under 18 U.S.C. § 1028A, the Department suggests that the Commission issue guidance to assist courts in exercising their discretion.

#### B. Aggravated Identity Theft

The Act, at section 2, creates the crime of Aggravated Identity Theft which is codified at 18 U.S.C. § 1028A. Section 1028A(a)(1) prohibits the unauthorized transfer, use, or possession of a means of identification of another person during, or in relation to, certain enumerated fraud offenses. This section carries a two-year mandatory sentence. A second criminal offense § 1028A(b)(1), prohibits the unauthorized transfer, use, or possession of a means of identification of another person during, or in relation to, enumerated terrorism crimes. This provision carries

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<sup>2</sup> “National and State Trends in Fraud and Identity Theft,” Appendix C (2001-2004), [www.consumer.gov/idtheft/stats.html](http://www.consumer.gov/idtheft/stats.html).

<sup>3</sup> Pub.L. 108-275, 118 Stat. 831 (July 15, 2004).

a five-year mandatory sentence.

The published proposal includes a new guideline, §2B1.6, for the new offense of Aggravated Identity Theft. The Department supports the proposed §2B1.6. The proposed guideline provides that the “guideline sentence is the term of imprisonment required by the statute.” This is consistent with the mandatory penalty provisions in § 1028A and is consistent with §2K2.4 (Use of a Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), which applies to a statute carrying a mandatory consecutive term of imprisonment and provides that the “guideline sentence is the term of imprisonment required by statute.”<sup>4</sup>

The Commission also proposes an Application Note prohibiting the application of any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense. The Department agrees that the proposed Application Note is appropriate to avoid double counting. A similar Application Note follows §2K2.4, and a consistent Application Note is appropriate with respect to the proposed § 2B1.6.

### C. Abuse of Position

In §5(b)(1) of the Act, Congress provided:

B. Requirements – In carrying out this section, the United States Sentencing Commission shall do the following:

- (1) Amend U.S.S.G. section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) to apply to and punish offenses in which the defendant received or abused the authority of his or her position in order to obtain unlawfully or use without authority any means of identification, as defined in section 1028(b)(4) of Title 18, United States Code.

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<sup>4</sup> See 18 U.S.C. §§ 844(h), 924(c)(1), and 929.

The published proposal amends the Application Note to § 3B1.3 to include “a defendant who uses his or her position in order to obtain unlawfully, or use without authority, any means of identification . . .” The Department supports this proposal. All defendants – including clerks and similar employees – who abuse their position by stealing others’ identities should be punished for the abuse of trust, notwithstanding their lack of managerial discretion or whether the conduct significantly facilitated the commission or concealment of the offense. The Department also suggests that the Application Note provide a variety of examples demonstrating this. The Department would be pleased to provide draft language to the Commission staff.

Congress’ intent to broaden the applicability of §3B1.3 is clear. Section 5(b)(1) of the Act specifies that the Commission should “amend” §3B1.3. Also, §5(b)(1) describes the current §3B1.3 as “abuse of trust or use of special skill” and directs that it be amended to apply where “the defendant exceeds or abuses the authority of his or her position . . .” Thus, §3B1.3 should be expanded to apply not only to abuse of positions of trust and use of special skill, but also to misuse of position where the misuse of position is in the course of an identity theft.

Congress’ concern about employees who misuse their position in order to assist in identity theft is apparent in the legislative history of the Act. The House Report explains §5(b)(1) as follows:

The first amendment also included a directive to the United States Sentencing Commission to require that the Federal Sentencing Guideline Sec. 3B1.3 (Abuse of Position of Trust or Use of Special Skill) be amended to apply to employees or directors who use access to information at their place of business to commit identity theft or fraud. This amendment will help address the problem of insiders who use their employment position to commit fraud or help others commit fraud. It will allow judges to apply additional penalties to these individuals under

the sentencing guidelines.

The amendment, then, should “help address the problem of insiders who use their employment position to commit fraud or help others commit fraud,” and “allow judges to apply additional penalties to these individuals under the sentencing guidelines.”

Many of the specific cases discussed in the House Report<sup>5</sup> also demonstrate the congressional concern for misuse of position:

(1) The Report discusses a case from Long Island where the defendant was “using his position at a company that provided computer software and hardware to banks and lending companies to access consumer credit information from three credit reporting agencies.”

(2) The Report discusses a case from Atlanta involving fraudulent social security cards where “the cards were supplied by a Social Security Administration clerk in exchange for \$70,000 in payoffs.”

(3) The Report discusses *United States v. Amry*. “Amry, in which the defendant, using a skimmer to obtain credit card data from members of the health club, provided stolen names, social security numbers, and credit card information of at least thirty people . . . .”

(4) The Report discusses *United States v. Seheller*, in which a financial institution employee who provided a friend with customer account information.

(5) The Report discusses *United States v. Maxfield*, in which a defendant who was “able to obtain the false social security number through his employment at an auto dealership.”

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<sup>5</sup> House Report on H.R 1731, Identity Theft Penalty Enhancement Act, Pub. L. 108-528.

Congress is concerned with employees who misuse their position in order to aid identity theft for good reason. As shown above, it is a prevalent and dangerous practice. Further, the consumer has no way to protect himself or herself from such identity theft.

The Department disagrees with proposed the Application Note that would provide that the abuse of position enhancement would not apply to defendants who are convicted of Aggravated Identity Theft under § 1028A. The Act makes it clear that Congress had two concerns. One was Aggravated Identity Theft, for which Congress provided a two-year penalty. Second was misuse of position, for which Congress separately provided that there should be an enhancement for misuse of position. The proposed Application Note would undercut congressional intent because it would not distinguish identity offenses involving an abuse of position from other identity offenses. Moreover, section 1028A(b)(3) specifies that a court “shall not in any way reduce” the sentence for the predicate offense to take into account that there will be a sentence under 1028A.

A hypothetical illustrates how §3B1.1 and §1028A would logically be applied in the same case. If a group of four defendants (A, B, C, and D) conspired to commit immigrations offenses, all four would be guilty of the underlying immigration offense. Suppose defendant D’s contribution to the scheme was to obtain false identification cards for the illegal aliens and that D obtained real names and numbers for the cards by stealing items from victims’ mail boxes. In that scenario, all four defendants would be guilty of the underlying immigration offense, and defendant D would also be guilty of Aggravated Identity Theft. There was no misuse of position, so §3B1.1 would not apply in that case. On the other hand, suppose defendant D obtained the names and numbers by misusing his position as a clerk at the Department of Motor Vehicles. In that case, the defendant’s use of his position gave him a special

ability to aid in the commission of the immigration crime. Pursuant to §5(b)(1) of the Act, the guidelines on the underlying offense for that defendant should be enhanced under §3B1.1 because he misused his position. Moreover, that defendant committed Aggravated Identity Theft and pursuant to §1028A(b)(2) his sentence for Aggravated Identity Theft should run consecutive to the sentence on the underlying immigration offense. Finally, pursuant to §1028(b)(3), the sentencing court should “not in any way reduce” the sentence on the immigration offense because the defendant was also convicted of Aggravated Identity Theft. The hypothetical shows how §3B1.1 and §1028A address two separate harms, and the language of the Act shows Congress perceived them to be separate.

D. Section 2B1.1(b)(10)

The published proposal would also amend § 2B1.1(b)(10) and the corresponding Application Note to authorize a two-level enhancement for a defendant “convicted of an offense under 18 U.S.C. § 1028(a)(5), (a)(7), or 1029(a)(4).” The Department opposes this amendment, which would significantly narrow the applicability of the enhancement. Currently, § 2B1.1(b)(10) applies to those “involved” in certain identity theft-related crimes. The amendment should not be restricted to defendants who are “convicted” of certain identity theft-related crimes. Rather, it should apply if the underlying offense “involved” the unauthorized transfer, possession or use of another person’s means of identification (except for Aggravated Identity Theft which already includes an enhancement). Similar, provisions in § 2B1.1 apply to defendants whose crimes “involved” additional conduct and are not restricted to those defendants “convicted” of the additional conduct.<sup>6</sup> There is no reason to treat identity theft more restrictively than vehicle

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<sup>6</sup> *E.g.*, § 2B1.1(b)(3) (Theft from the person of another); § 2B1.1(b)(4) (Receiving stolen property); § 2B1.1(b)(6) (Damage to property of national cemetery); § 2B1.1(b)(8) (applying to certain

theft, securities violations, damage to national cemeteries, or receiving stolen property, for example.

The Department further disagrees with the proposed change to § 2B1.1(b)(10) because, by restricting its application to conduct covered only by 18 U.S.C. §§ 1028(a)(5), 1028(a)(7) and 1029(a)(4), the change would substantively reduce the application of that section. For example, the current § 2B1.1(b)(10)(C)(ii) covers “the possession of 5 or more means of identification that unlawfully were produced from . . . another means of identification.” This conduct is similar to the conduct prohibited by section 1028(a)(3) of “knowingly possess[ing] with intent to use . . . five or more identification documents (other than those issued lawfully for the use of the possessor) . . . .” For another example, the current § 2B1.1(b)(10)(B)(ii) reaches “the production or trafficking of any . . . (ii) authentication feature. . . .” Section 1028(a)(8) is similar and punishes whoever “knowingly traffics in false authentication features . . . .” However, the proposed amendment to 2B1.1(b)(10) would remove conduct violating §§ 1028(a)(3) and 1028(a)(8) from its application.

#### E. Multiple Counts

The Commission also seeks comment regarding the possibility of a defendant being convicted of multiple counts of Aggravated Identity Theft. The Act, at §2(a), provides that a term of imprisonment for Aggravated Identity Theft can run concurrently with another term for Aggravated Identity Theft imposed at the same time:

[A] term of imprisonment imposed on a person for a violation of this section may, in the discretion of the court, run concurrently, in whole or

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misrepresentations); § 2B1.1(b)(11) (Vehicle theft); § 2B1.1(b)(15) (Violations of securities of commodities law); *but see* § 2B1.1(b)(7) (“If (A) the defendant was convicted on an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means.”).



in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28.

Section 1028A is slightly different from 18 U.S.C. §§ 844(h), 924(c), and 929(a), because § 1028A(b)(4) allows for the possibility that more than one § 1028A sentence can run concurrently while 18 U.S.C. §§ 924(c)(1)(D)(ii), 929(b), and 844(h) prohibit concurrent sentences.

Multiple sentences of imprisonment are also addressed in § 5G1.2 (Sentencing on multiple counts of conviction), § 1A1.1, Application Note 4(e) (Multi-Count convictions), and 18 U.S.C. § 3584. Section 3584(b) provides that in determining whether sentences are to run concurrently or consecutively a court “shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in § 3553(a).”

Because § 1028A(b)(4) allows concurrent sentences, the Commission should offer courts guidance in this regard. The Department would suggest that concurrent § 1028A sentences are usually inappropriate when:

- a. The offenses are remote from each other in time,
- b. The offenses are remote from each other in place,
- c. The offenses are separated by an intervening arrest,
- d. The offenses involve at least one different co-conspirator or aider and abettor,
- e. The offenses involved unusually extensive harm to victims or an unusual number of victims which has not otherwise been taken into account by the guidelines,

- f. The offenses would not be grouped under § 3D1.2, or
- g. The underlying predicate offenses are materially different schemes.

Finally, the Department notes that multiple sentences under § 1028A can be imposed to be partially concurrent with each other, § 1028A(b)(4), and that courts can use this method to fashion an appropriate sentence.

## II. ANABOLIC STEROIDS

### A. Introduction

The Anabolic Steroid Control Act of 2004, Public Law 108-358 (October 22, 2004) (“ASCA”), directs that the Commission “consider amending the Federal Sentencing Guidelines to provide for increased penalties with respect to offenses involving anabolic steroids in a manner that reflects the seriousness of such offenses and the need to deter anabolic steroid trafficking and use . . . .”<sup>7</sup> The Commission has solicited comments, and I appreciate this opportunity to testify on behalf of the Department.

The Commission should increase the sentencing guidelines for steroid offenses particularly in view of the fact that although steroids are a Schedule III controlled substance<sup>8</sup>, under the current sentencing guidelines steroids are treated more leniently than other Schedule III controlled substances.

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<sup>7</sup> ASCA § 3.

<sup>8</sup> Anabolic steroids are synthetic drugs that mimic the actions of the primary male sex hormone, testosterone and anabolic steroids are Schedule III controlled substances. 21 U.S.C. § 812(c)-Schedule III(e); 21 C.F.R. § 1308.13(f). The maximum penalty for a Schedule III controlled substance offense under 21 U.S.C. § 841 is five (5) years, or 10 years if the person has a prior felony drug offense conviction. 21 U.S.C. § 841(b)(1)(D); 21 U.S.C. § 960(b)(4) (5 year maximum term of imprisonment for import violations).

The sentencing guidelines currently treat anabolic steroids differently than other Schedule III controlled substance pharmaceuticals. Notes (F) and (G) to the Drug Quantity Table in § 2D1.1 provide:

- (F) In the case of . . . Schedule III substances (except anabolic steroids) . . . one “unit” means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one “unit” means 0.5 ml.
- (G) In the case of anabolic steroids, one “unit” means a 10 cc vial of an injectable steroid or fifty tablets. All vials of injectable steroids are to be converted on the basis of their volume to the equivalent number of 10 cc vials (e.g., one 50 cc vial is to be counted as five 10 cc vials).

The Drug Equivalency Table under § 2D1.1 establishes one unit of a Schedule III substance to be equivalent to one gram of marijuana. In the Drug Quantity Table, § 2D1.1(c), offenders responsible for 40,000 or more units of Schedule III substances receive a maximum base offense level of 20. There is no reason for anabolic steroids to be singled out to be treated more leniently than other Schedule III drugs.

#### B. History of the Steroid Exception

The history of the guideline pertaining to anabolic steroids reveals that there is no particular reason for steroids to be treated more leniently than other Schedule III drugs. At the time steroids were initially controlled in the Anabolic Steroid Act of 1990<sup>9</sup>, there was no indication that steroids should be treated more leniently than other Schedule III drugs. At the time, in Amendment 369, the Commission provided that a “unit” for steroids sentencing would mean “a 10 cc. vial of injectable steroid or fifty tablets.” The Commission’s reasoning was that “[b]ecause of the variety of substances involved, the Commission has determined that a measure based on quantity unit, rather than weight, provides the most appropriate measure of the scale

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<sup>9</sup> Pub.L. 101-647.

of the offense.”<sup>10</sup> On November 1, 1995, Amendment 517 to the guidelines became effective which implemented the current “unit” based system for the remaining Schedule III controlled substances. At that time a “unit” of a Schedule III drug was calculated to be “one pill, capsule or tablet . . . if the substance is in liquid form, one unit equals 0.5 grams.” However, the definition of “unit” for steroids remained at 50 pills or 10 ccs.

While it is true that steroids when used illegally are frequently used in amounts greater than what would be prescribed by a physician, this does not provide a reason to distinguish steroids from other Schedule III drugs. Other Schedule III drugs when abused, hydrocodone for example, are also used in much higher doses than what a physician would prescribe. Further, the *Physician’s Desk Reference*, Thompson PDR 58<sup>th</sup> Ed. 2004, shows that therapeutic doses of anabolic steroids are consistent with therapeutic doses of other Schedule III controlled substances. Also, when sold illicitly, steroids are typically priced per pill or per injectable amount. Thus, it is logical to define a “unit” of steroids to be 1 pill, tablet, or capsule; or 0.5 ml of liquid.

### C. Seriousness of Steroids Offenses

In considering the need to “reflect [] the seriousness of such offenses,”<sup>11</sup> the Commission should change the definition of “unit” to be commensurate with other Schedule III drugs. The health risks of steroid use are at least as severe. When Congress held a hearing in considering the ASCA in 2004, former professional boxer Robert Hazelton testified that he had had to have both legs amputated as a result of his steroid use.<sup>12</sup> In the hearings held by Congress last month, Denise Garibaldi

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<sup>10</sup> U.S.S.G., Appendix C, Amendment 369.

<sup>11</sup> ASCA § 3.

<sup>12</sup> Testimony before the House of Representatives, Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, Washington, D.C., March 16, 2004, reported in

testified that her son, Ron, committed suicide due to depression resulting from steroid use.<sup>13</sup> In that same hearing Donald M. Hooton testified about his son, Taylor, also committed suicide as a result of steroid use.<sup>14</sup>

The scientific evidence regarding the significant health dangers associated with steroid use is overwhelming.<sup>15</sup> Steroid users can experience heart disease, liver disease, and stroke. Male users may experience shrinking of testicles, reduced sperm count, infertility, baldness, development of breasts, and increased risk for prostate cancer. Female users may experience menstrual abnormalities, deepening of voice, shrinkage of breasts, male pattern baldness, and an abnormal increase in sex drive, acne, body hair, and clitoris size. Also, younger users are at risk of permanently halting bone growth prematurely. Other health dangers include HIV/AIDS or hepatitis which can be contracted through sharing contaminated needles. Illegal use of anabolic steroids is also associated with a variety of adverse psychiatric effects including extreme mood swings ranging from mania to depression, suicidal thoughts and behaviors, and marked aggression.<sup>16</sup>

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HR3866.

<sup>13</sup> Testimony of Denise A. Garibaldi, Ph.D., March 15, 2005. Prepared testimony before the Committee on Government Reform, United States House of Representatives.

<sup>14</sup> Prepared testimony of Donald M. Hooton, before the Committee on Government Reform, United States House of Representatives, March 17, 2005.

<sup>15</sup> Prepared testimony of Norma D. Volkow, M.D., Director of the National Institute on Drug Abuse, National Institutes of Health, United States Department of Health and Human Services, before the Committee on Government Reform, United States House of Representatives, March 17, 2005. Other sources detailing health risks from steroid use include *Anabolic Steroid Abuse*, a Research Report issued by the National Institute on Drug Abuse, MIH Publication No. 00-3721, Revised April 2000.

<sup>16</sup> Prepared testimony of Kirk J. Brower, M.D., March 17, 2005, before the Committee on Government Reform, United States House of Representatives.

Societal trends show that additional action is necessary with respect to steroids:

(1) The Centers for Disease Control has reported that steroid use by high school students more than doubled from 1991 to 2003. In 1991, 2.7% of high school students reported use of steroids at least once in their lifetime, and by 2003 it was up to 6.1%.<sup>17</sup> The National Institute of Drug Abuse, through its *Monitoring the Future Survey*, also reports that steroid use has more than doubled. Surveys of twelfth grade students showed that those reporting use of steroids in the past 30 days increased from 0.6% in 1992 to 1.6% in 2004.<sup>18</sup>

(2) Among high school students, the perception that steroids are harmful has materially decreased. According to the National Institute on Drug Abuse, in 1992, 71% of high school seniors perceived steroids to be harmful, but that had fallen to 56% by 2004.<sup>19</sup>

(3) Steroids are easily available. In 2004, 43% of high school seniors rated steroids “fairly easy” or “very easy” to obtain.<sup>20</sup>

These trends of increased use, increased availability, and decreased perception of harmfulness are disturbing. However, increasing the effective penalties would have a positive effect on all three trends. The increased penalty itself would make an important public statement.

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<sup>17</sup> Youth Risk Behavior Survey conducted by the Centers for Disease Control, cited by Nora D. Volkow, Director, National Institute on Drug Abuse.

<sup>18</sup> *Monitoring the Future Survey*, conducted by the National Institute on Drug Abuse, [www.monitoringthefuture.org/data](http://www.monitoringthefuture.org/data), Table 3.

<sup>19</sup> *Monitoring The Future Survey* conducted by the National Institute on Drug Abuse, [www.monitoringthefuture.org/data](http://www.monitoringthefuture.org/data), Table 7.

<sup>20</sup> *Monitoring The Future Survey* conducted by the National Institute on Drug Abuse, [www.monitoringthefuture.org/data](http://www.monitoringthefuture.org/data), Table 13.

In many respects, the distribution and use of illegal steroids is very similar to other types of illegal drug use. Transactions are arranged to avoid law enforcement attention, transactions between individuals are virtually always in cash, code names are used, participants are careful to avoid surveillance and to avoid openly discussing the transactions on the telephone. Distributors sometimes keep a firearm to help them protect their “stash” of drugs and/or cash. Street level users try to find suppliers further up the chain of supply to “cut out the middle man” and obtain the drugs at a lower price.

In considering the “need to deter anabolic steroid trafficking,”<sup>21</sup> the Commission should increase the “unit” measurement for steroids. Steroid use is more deterrable than other drug crimes because steroid users use steroids essentially to further a hobby of body building or to improve athletic performance. If users perceive a more serious law enforcement risk, there would be a material disincentive to use steroids.

#### D. Conclusion – Steroids

For all of these reasons, then, steroids should be treated the same as other Schedule III controlled drugs. This Commission should amend Notes (F) and (G) to the Drug Quantity Table in § 2D1.1 so that a “unit” of steroids is defined to be one pill, capsule, or tablet and if the substance is in liquid form, one “unit” should mean 0.5 ml.

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<sup>21</sup> ASCA § 3.

## CONCLUSION

Let me say again how much I appreciate the Commission's time and attention on these important issues. The Department stands ready to assist the Commission in any way.

I will be glad to answer any questions.