Testimony of

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Judge Hinojosa and members of the Commission. My name is David Debold and I am currently in private practice at the law firm of Gibson, Dunn & Crutcher, LLP here in Washington D.C. I have been invited to testify today in my capacity as Co-Chair of the Practitioners' Advisory Group to the Commission. On behalf of fellow co-chair Todd Bussert and the other members of that standing advisory group, it is always a pleasure to offer our input on matters being considered by the Commission. We have recently sent the Commission two letters, one dealing with Section 1B1.13 – governing motions for reduction in sentence based on extraordinary and compelling circumstances – and the other dealing with the balance of the proposed amendments and issues for comment this amendment cycle.

My testimony today will be limited to five of the categories addressed in our letters: Transportation; Intellectual Property, the PATRIOT Act (also referred to in some of the materials as Terrorism); Drugs; and the Telephone Records and Privacy Protection Act (dealing with pretexting).

Before I begin with the first of these five topics, I wanted to make a general observation that puts our comments in context. A common thread in our comments on the proposed amendments is an effort to simplify – or at least hold the line when it comes to the complexity of – the guidelines.

A slight digression will help to explain what we mean by this and why it is important. When the Commission sought input on its priorities for the 2007 cycle, one of our suggestions was for the Commission to update the Manual to take account of the *Booker* decision,[1] which renders the Guidelines advisory. We were not asking for major structural changes when we made that suggestion. Instead, there are places in the Manual – especially chapters 5H, 5K and 6 – where the failure even to mention the advisory nature of the Guidelines after *Booker* gives a reader the misleading impression as to the ability of the courts to sentence above or below the guideline range.

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[1] *United States v. Booker*, 543 U.S. 220 (2005).

Although the Commission chose not to update the Manual in this cycle to account for *Booker*, the reality is that the Guidelines are now one factor among several that a court must consider before imposing sentence. It has long been the view of the members of our group – and the view of many other practitioners and commentators – that over the years the Commission has given a false sense of precision in the Guidelines by, among other things, building in myriad offense characteristics and other adjustments that appear to account for relevant sentencing factors. The effort has generated a false sense that the Guidelines *do* account for every relevant factor in a given case and, perhaps more importantly, the false sense that they account for how these multiple factors should interact to generate a final sentencing range. Some, including Justice Breyer, have identified this as a false precision.

Whether it was right for the Commission to embark on such a venture before *Booker*, it should be clear that in a post-*Booker* world a much simpler Guidelines Manual would better promote the dual and complementary goals of treating like cases alike and avoiding the like treatment of cases that are not alike. Our comments to proposals during this cycle are informed by this view that the Commission should avoid adding provisions that complicate calculation of the Guidelines and attempt to account for factors that frequently can be considered by a judge when deciding, instead, whether to sentence above or below the applicable range.

TRANSPORTATION[2]

Appropriateness Of Sentence Enhancement For Convictions Under 18 U.S.C. §§ 659 or 2311 (Section 307(c) of PATRIOT Act)

Congress has directed the Commission to determine whether a sentence enhancement is appropriate for convictions under 18 U.S.C. §§ 659 or 2311. Accordingly, the Commission requests comment on whether the two-level enhancement under § 2B1.1(b)(4) should be expanded to include cases where the defendant was convicted under § 659. It should not. The current enhancement under § 2B1.1(b)(4) is narrowly tailored to those defendants who were *in the business of* receiving and selling stolen property. Application Note 5 lists a number of factors to consider in distinguishing these more culpable "professional" purveyors of stolen property from those who merely receive or sell stolen property without being in the business of doing so. In that respect, note 5 parallels the criminal livelihood provision, § 4B1.3, in recognizing that one who makes a living out of criminal conduct is more culpable than one whose conduct is less involved. The proposed amendment would eliminate the distinction because § 659 applies to a very broad range of conduct, including every theft from an interstate shipment and every receipt or sale of such stolen items. For the same reason it would be inappropriate to impose the enhancement for those convicted under §§ 2312 or 2313. Those statutes criminalize the transportation, sale or receipt of stolen motor vehicles without any distinction between those who, for example, receive a single stolen vehicle and those who are "in the business" of committing such violations.

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[2] The comments and recommendations set forth below on these topics largely track the language of our letter to the Commission dated March 14, 2007.

Similarly, the suggestion in Option 2 of expanding § 2B1.1(b)(11) to those convicted under § 659 should be rejected. That enhancement of two levels, with a floor of 14, is currently reserved for those whose offense "involved an organized scheme" to steal vehicles or vehicle parts. As noted above, § 659 is not limited to those involved in such organized schemes, nor is it limited to offenses involving vehicles or vehicle parts.

Adequacy Of § 2Q1.2 For New Aggravated Felony Under 49 U.S.C. § 5124 (Request For Comment 1)

The Commission seeks comment on whether the penalties are adequate under § 2Q1.2 for this new offense, which applies to the release of a hazardous material causing bodily injury or death. There is no need to enhance the penalties under this provision. For a conviction under this statute involving a repetitive discharge, the top of the guideline range is 71 months (approximately six years). A judge would be able to impose a higher sentence in those cases where the other § 3553(a) factors weigh in favor of a sentence above the guideline range. The guideline already encourages an upward departure where death or serious bodily injury results. We are unaware of data showing that death or serious bodily injury is occurring in enough cases to make the addition of an enhancement necessary. If any change is made to account for actual bodily injury or death, as opposed to the risk of such outcomes, a minimum offense level would properly account for that factor.

Cross Reference or Specific Offense Characteristic For Trespasses Committed With Intent to Commit Another Offense (Request For Comment 2)

The Commission seeks comment on whether trespasses committed with the intent to commit other offenses should be punished more severely through a cross reference or, instead, a specific offense characteristic. The PAG opposes cross references to other guidelines in the absence of a jury finding that warrants using the more severe provision. There are serious due process concerns when the more severe Chapter Two guideline is used based on judicial findings alone. A modest specific offense characteristic is the preferred approach because it prevents a fact not found by the jury from converting a conviction for one offense into the functional equivalent of a conviction for one that was not charged and found by the jury.

Bribery Affecting Port Security (Request for Comment 3)

The Commission requests comment on whether the new offense of bribery affecting port security, 18 U.S.C. § 226, should be referenced to § 2C1.1 and, if so, whether the cross reference is sufficient to punish bribery with the intent to commit an act of terrorism. Alternatively, it suggests adding a specific offense characteristic. PAG believes that § 2C1.1 is the appropriate guideline for 18 U.S.C. § 226 because it provides the same starting point for all bribery offenses. An enhancement in that guideline to account for the intent to commit an act of terrorism is preferable to a cross reference. Such a provision would be more in line with the goal of simplifying the guidelines and would better ensure that the enhancement – which can significantly change the sentence range – is based on convicted conduct. Finally, if an enhancement is adopted, there should be clear guidance that § 3A1.4 does not apply because it would account for precisely the same offense characteristic.

INTELLECTUAL PROPERTY RE-PROMULGATION

The Commission has asked for comment on Congress's directive to determine whether the infringement amount definition in § 2B5.3 is adequate for certain offenses. Various options are proposed for measuring the infringement amount. The PAG believes Option 1 – which would give every trafficking case under 17 U.S.C. § 1201(b) a minimum of 12 offense levels – is premature. The experience with this offense is still developing, and there is no relevant case law. There is not yet any reason to think the guideline as it stands, including its provision that allows for upward departures, will be insufficient to capture the seriousness of trafficking cases under § 1201(b). And Option 3 is too complex to be applied reliably: it is not at all clear what is meant by "the price a person legitimately using the device … would have paid" in the context of a copy control circumvention device. The PAG believes that Option 2 is the simplest to apply and should be adopted.

There are two issues for comment, and the PAG agrees with the responses and recommendations made by the Federal Public and Community Defenders. First, the PAG believes there should be a downward departure provision in § 2B5.3 to deal with cases where the infringement amount overstates the offense's seriousness. Given the rapidly-changing technology involved, the guideline should provide flexibility. Just as other guideline sections allow for upward and downward departures in appropriate cases, so too should § 2B5.3. Second, the PAG supports the deletion of Application Note 3 and believes the special skill enhancement should not be required in every instance of initial access. Again, given the complexity and ever-changing nature of the relevant technologies, the PAG believes that significant flexibility in the guidelines, particularly in the short term, is desirable so as to permit accumulation of more sentencing data and experience under sections 1201 and 1204.

TERRORISM/PATRIOT ACT

Narco-terrorism

In response to the new crime of Narco-Terrorism enacted at 21 U.S.C. § 960a, the Commission has proposed referencing either § 2D1.1 (Option 1), or an entirely new guideline § 2D1.14 (Option 2). First, we agree with the Defenders that the current guidelines already adequately account for this new offense through § 3A1.4. We also agree that if the Commission chooses to make any changes it should use Option 2, which would treat the new offense in a manner similar to the sale of drugs within 1,000 feet of a school. *See* § 2D1.2. We are concerned about the broad reach of the statute. It would apply, for example, to a defendant who knew some of the drug proceeds would make their way to a person who had previously engaged in a terrorist act but for whom there was no realistic likelihood of terrorist acts in the future. As a result, we do not support a categorical disqualification from eligibility for the lower sentences available under § 2D1.1(a)(3) and §2D1.1(b)(9). In addition, the Commission should add an Application Note to § 2D1.14 stating that the enhancement under § 3A1.4 does not apply. The four [or six] level enhancement proposed under § 2D1.14 already accounts for the fact that justifies the § 3A1.4 enhancement – an intent to promote terrorism.

Border Tunnels And Passages (And Request For Comment 2)

In response to the congressional directive to promulgate or amend guidelines for persons convicted of offenses involving tunnels, the Commission has proposed new guideline: § 2X7.1. The new guideline provides a base offense level of 8 or 9 for defendants convicted under 18 USC § 554(b) (permitting the construction of a tunnel on one's property), 16 for defendants convicted under 18 U.S.C. § 554(a) (constructing or financing the construction of a tunnel) and 4, plus the

underlying offense level for a minimum combined offense level of 16, for a violation of 18 U.S.C. § 554(c) (using a tunnel to unlawfully smuggle an alien, goods, controlled substances, weapons of mass destruction or a member of a terrorist organization). The PAG opposes the four-level increase to the offense level for the underlying offense. In immigration offenses, in particular, this could lead to very significant increases for those with an already high offense level – an increase disproportionate to the added culpability of using a tunnel rather than other means of illegal entry. In response to the second request for comment, we also see no reason to increase the other penalties beyond those proposed.

Adequacy Of Punishment For Smuggling Offenses (Request For Comment 1)

The Commission asks whether the current guidelines provide sufficient punishment for violations of 18 U.S.C. §§ 545 and 549. The sole basis cited for raising this issue is the recent increase in the statutory maximum for each offense. But in the absence of either an explicit directive from Congress that the guidelines are too low or data gathered from prior sentencings demonstrating that judges have frequently needed to exceed the current guidelines, the Commission should not increase the guidelines. There may be unusual cases where the higher statutory penalty gives the courts the ability to impose a sentence above the current norm, but that is no reason to increase the sentences for the heartland of cases prosecuted under those statutes.

Displaying insignias and uniforms (Request for Comment 3)

The PAG agrees with the Federal Public and Community Defenders that the appropriate response to the congressional directive regarding offenses committed while wearing or displaying insignia and uniform is to, at most, provide an application note recognizing the directive but explaining that the guidelines do not apply to Class B or C misdemeanors.

DRUGS

18 U.S.C. § 865 and Issues for Comment 3(a)-(c)

The PATRIOT Act created a new offense – 21 U.S.C. § 865, "Smuggling Methamphetamine or Methamphetamine Precursor Into the United States While Using Facilitated Entry Programs." It provides a new mandatory consecutive sentence of not more than 15 years for any drug offense involving smuggling of methamphetamine or any listed chemical while using a facilitated entry program.

The proposed amendment would add two levels in §§ 2D1.1(b)(5) and 2D.11(b)(5) if the defendant is convicted under 21 U.S.C. § 865. The proposal includes an application note instructing judges on how to impose the sentences under section 865 consecutively.

Congress intended that those who abuse their facilitated entry privileges to import methamphetamine receive an enhanced sentence. In our view, the Commission's handling of the enhancement is consistent with Congress's intention.

Issue for Comment 3(a) asks whether the enhancement should exceed two levels and whether the offense should trigger a separate base offense level. The PAG opposes both courses. The two-level enhancement in the proposed amendment is in line with other enhancements that punish relatively comparable harms, such as use of an aircraft (§ 2D1.1(b)(2)) or use of mass marketing (§

2D1.1(b)(5)). Providing more than two levels would dwarf the enhancements for comparable harms and we can discern no justification for doing so. Indeed, increased enhancements are inconsistent with enhancements for conduct that is arguably more serious, such as the two levels provided for gun possession (§ 2D1.1(b)(1)), or for distribution in a prison (§ 2D1.1(b)(3)). Moreover, importers of actual methamphetamine already face stiff sentences, comparable to those for crack cocaine, and their sentences are enhanced under § 2D1.1(b)(4) by two levels. The real effect of the proposed two-level enhancement is thus a four-level enhancement for all facilitated entry abusers, save those who receive a mitigating role adjustment under § 3B1.2. *See* § 2D1.1(b)(4)(B).

Issue for Comment 3(b) asks whether the Commission should extend the facilitated entry enhancement to importation of all drugs under 21 U.S.C. §§ 960 and 963. The PAG opposes this suggestion. We see no reason that justifies extending this enhancement to other than methamphetamine. To our knowledge there is no reason to assume that the practice of using facilitated entry programs to import drugs is so widespread that it warrants a special enhancement beyond the special case of methamphetamine. Congress certainly has not identified it as a concern and explicitly limited enhanced penalties to methamphetamine importers. *See* 151 Cong. Rec. H11279-01, H11309 (Dec. 8, 2005) (The provision "creates an added deterrent for anyone who misuses a facilitated entry program to smuggle methamphetamine or its precursor chemicals.")

In Issue for Comment 3(c), the Commission asks if it should amend § 3B1.3, Abuse of Position of Trust or Use of a Special Skill, to include offenses that involve a facilitated entry program. The PAG opposes this suggestion. It is difficult to see how facilitated entry offenders fit the abuse of trust or special skill parameters. As Application Note 1 states, the public or private trusts that triggers section 3B1.3 is a position of trust "characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference)." Thus, for example, while bank tellers or hotel clerks are trusted to safeguard currency and other valuables, they are excluded from the guideline due to their lack of professional or managerial discretion. *Id.* Those who use the facilitated entry program bear no resemblance to the offenders contemplated in § 3B1.3. The program serves not only the interests of the frequent border crosser, but also of the government. The program shortens the long lines and delays by permitting easier access to individuals who provide information in advance that assists the government in administering border crossings. Facilitated entry program users enjoy no special relationship of trust nor do they employ any special skill. They are in fact subject to the same level of inspection as is any border crosser, but the time the inspection takes is shortened because the user has provided much of the information ahead of time. *See* U.S. Customs and Border Patrol, *Secure Electronic Network for Travelers Rapid Inspection (SENTRI)* (available at http://www.cbp.gov/xp/cgov/travel/frequent_traveler-/sentri/sentri.xml).

Section 3B1.3 would have to be significantly rewritten to accommodate these sorts of offenses. The PAG sees no need to do so.

<u>18 U.S.C. § 860a</u>

The PATRIOT Act also added 21 U.S.C. § 860a, "Consecutive Sentence for Manufacturing or Distributing, or Possessing with Intent to Manufacture or Distribute, Methamphetamine on Premises Where Children are Present or Reside." The Act provides for a consecutive mandatory term of not more than 20 years' imprisonment for possession with intent to distribute, or manufacture methamphetamine on premises where a minor is present or resides. Two options are presented.

Proposed Option 1. Congress directed the Commission in 2000 to enhance sentences for defendants whose manufacturing conduct creates a substantial risk of harm to a minor or incompetent. The Commission complied and in § 2D1.1(b)(8)(C) provides a six-level enhancement (minimum of level 30) for the harm.

Proposed Option 1 sets out a two-level enhancement where the methamphetamine manufacturing is punishable under 21 U.S.C. § 860a but does not pose a substantial risk of harm as already contemplated by § 2D1.1(b)(8)(C). Otherwise, and as currently provided in § 2D1.1(b)(8)(C), a six-level enhancement (minimum of level 30) applies.

The PAG recommends option one. It utilizes the current enhancement to address the risks posed to minors, while providing an appropriately smaller enhancement where the activity does not pose such a risk. This is sound, punishing significantly more severely the more culpable manufacturer whose activity creates a substantial risk to minors, while still additionally penalizing conduct conducted in places where children are present or reside, as Congress intended.

Proposed Option 2 creates a two-tiered penalty enhancement. It proposes a six-level enhancement (and floor of level 29) for manufacture where a minor is present or merely resides. It proposes a three-level enhancement (and floor of level 15) for distribution or possession with intent to distribute methamphetamine where a minor is present or resides. The PAG opposes this option in light of the adequacy of the existing six-level and two-level enhancements provided in Option 2.

Option 2 contains penalties that are overbroad and dwarf existing enhancements that punish similar – and in some cases – greater harms. For example, the proposed three-level enhancement for possession with intent to distribute in the residence of a minor could be applied when no minor is present (and has not been present for some time) and when no drug distribution ever took place. Clearly the enhancement is unduly harsh in such cases. Moreover, the enhancement, of its own and when compared to others, is disproportionate. For example, it is greater than the enhancement for defendants who possessed drugs in a school zone, § 2D1.2 (two levels), possessed a firearm in connection with a drug trafficking offense, § 2D1.1(b)(1) (2 levels), or who distributed drugs in a juvenile detention facility (§ 2D1.1(b)(3) (2 levels)).

The Commission also seeks comment on whether the enhancement for risk of substantial harm to a minor should be based on relevant conduct. The PAG opposes basing the enhancement on other than convicted offenses under the statute. Doing otherwise exposes a defendant to a six-level enhancement in unwarranted circumstances. For example, applying the relevant conduct rule, a defendant who never manufactured methamphetamine, but received and distributed it, could be subject to a six-level enhancement due to the conduct of a co-conspirator, whose manufacturing posed a substantial risk of harm to a minor, or following Option 2, where no risk is present whatsoever. Such an enhancement would also be applied under a preponderance of the evidence standard. The PAG can discern no justification for such an outcome; it offers no discernable deterrent to defendants who traffic methamphetamine but do not manufacture it, and it punishes defendants for harm neither intended nor risked.

The pernicious effects of applying the enhancement for relevant conduct are even more pronounced when the proposals move away from substantial risk of harm from the manufacture of methamphetamine to risks attendant to possession with intent to distribute methamphetamine or any other drug. There is simply no real offense involved in such a scenario and the underlying purposes of the relevant conduct rules are not served by this approach. Furthermore, in light of the

Commission's stated intention to re-examine the relevant conduct rules, it is particularly unwise to increase their impact at this time.

The issue for comment further asks if the enhancement should be broadened to include simple distribution of methamphetamine or even possession with intent to distribute methamphetamine to the extent the distribution of methamphetamine poses a substantial risk of harm. And the Commission asks whether the enhancement should be further expanded to include all drugs. We oppose these constructions.

Congress, in 2000, recognized a special danger attendant to methamphetamine manufacturing. The nature of the chemicals involved, the risks of their combinations and the dangers posed by their disposal all trigger special concerns that are simply not implicated when already manufactured methamphetamine, or any other drug, is present. The Commission drafted guidance in Application Note 20 addressing factors such as the quantity of chemicals and hazardous or toxic substances, the manner of their disposal, the extent of the operation and the location of the lab. Such a nuanced examination is an appropriate approach for courts to take in making a determination of whether an operation poses the accepted risks. Presence of the end product does not trigger them. If such an enhancement were adopted, it is an easy step to apply the same penalty in the case of simple possession of the drug, making drug addicts who keep their drugs on the premises liable for extreme sentences because their minor children reside with them. This approach is excessive, unnecessary and unsupported by any evidence.

Furthermore, Congress has not seen fit to expand this protection. Congress, in 2000 and again in 2006, could have addressed an enhancement for simple possession or possession with intent to distribute methamphetamine. It did not. Similarly, Congress could have expanded the reach of the substantial risk of harm to a minor to include manufacture or possession of all other drugs, but it has not. The Commission does not present any support for an option that would be used to increase already significant sentences for drug defendants.

Similarly, we know of no evidence supporting any increased risk of substantial risk of harm to a minor that would be posed by the mere presence of already manufactured methamphetamine or any other drug. In the case where a defendant's conduct with respect to a controlled substance poses a substantial risk of harm to a minor, the judge may exceed the top of the guideline range.

21 U.S.C. § 841(g)

Issue for Comment 1 concerns three proposed approaches to enhancements intended to account for convictions under 21 U.S.C. § 841(g), which, pursuant to Section 201 of the Adam Walsh Act, prohibits the knowing use of the Internet to distribute a date rape drug to any person knowing or with reasonable cause to believe either that the drug would be used in the commission of criminal sexual conduct or that the person is not an authorized purchaser as defined by the statute. As an initial matter, we offer three observations.

First, § 841(g)(1)(B) criminalizes the use of the Internet to distribute a date rape drug to an unauthorized purchaser. For guidelines purposes, this provision is superfluous; all offenses within Section 2D1.1 involve, in one form or another, the distribution of drugs to unauthorized purchasers. There is no support or justification for an "unauthorized purchaser" enhancement exclusive to convictions under § 841(g)(1)(B).

Second, Section 2D1.1(b)(5) [or 2D1.1(b)(6) under proposed changes] already provides a two-level increase whenever a controlled substance is distributed through mass marketing by means of an interactive computer service. This enhancement encompasses the use of the Internet (i.e., websites) for mass promotion of sale of date rape and other drugs. In other words, Section 2D1.1(b)(5) already affords an increased penalty for what might be characterized as an aggravated § 841(g) offense, wherein a defendant's offense conduct involves extensive or far-reaching Internet use.

Third, in enacting § 841(g), Congress expressed no intent as to specific enhancements or penalties, aside from increasing the statutory maximum for ketamine offenses in one, limited circumstance (see below). Accordingly, the Commission should act judiciously and consistent with existing guidelines and policy. In particular, enactment of § 841(g) does not support adoption of the type of minimum base offense level (floor) proposed in Option 3. Indeed, the Commission should move away from such stringency.

With the foregoing in mind, the PAG submits an alternate amendment:

9. If the defendant was convicted under § 841(g)(1)(A) and (i) had reasonable cause to believe that the drug would be used to commit criminal sexual conduct, add 1 level, or (ii) knew that the date rape drug was to be used to commit criminal sexual conduct, add 2 levels.

This approach satisfies several considerations. For one, it distinguishes the degrees of culpability established by § 841(g)(1)(A). It also advances the aim of consistency within the guidelines. Section 2D1.1(e) makes cross-reference to § 3A1.1(b) when a defendant is found to have used a controlled substance to facilitate commission of a sexual offense. Inasmuch as a defendant who actually uses the controlled substance is subject to no greater than a two-level enhancement, a defendant who violates § 841(g) should be subject to comparable penalties — a consideration that, standing alone, undermines the unduly harsh proposal set forth in Option 3. Finally, in view of the additional two levels for aggravated use of the Internet under § 2D1.1(b)(5) [or (b)(6)], a defendant convicted under § 841(g)(1)(A) would effectively be subject to a three- or four-level increase in his base offense level. In spite of general disfavor with judicial inquiry into a defendant's state of mind when determining offense levels, the PAG believes this proposal tracks the purpose conveyed in the language of 21 U.S.C. § 841(g) and is sufficiently straightforward that it will not complicate plea negotiations.

Ketamine

Although not listed in the Issues for Comment, the PAG is concerned about the apparent mistaken premise upon which the Commission proposes amendment to the offense levels for ketamine offenses. Because ketamine is a Schedule III controlled substance, the Drug Quantity Table currently provides a maximum offense level of 20. Citing 21 U.S.C. § 860(a) for the proposition that Congress has raised the statutory maximum for ketamine offenses from five to 20 years, the Commission proposes to lift the Quantity Table ceiling/cap for ketamine. However, § 860(a) concerns methamphetamine; it is silent as to ketamine. The only increase in the statutory maximum for ketamine offenses is where a defendant is convicted under 21 U.S.C. § 841(g). Indeed, Congress has expressed no intent, nor otherwise directed, that the Commission create penalties for ketamine separate from those for other Schedule III controlled substances.

The PAG believes that the enhancements designed to reflect convictions under 21 U.S.C. § 841(g) are sufficient to achieve congressional ends and that the guidelines for ketamine offenses do not require amendment. Concurrently, we recognize the apparent interest in eliminating the ceiling/cap for ketamine-related offenses to reflect the one scenario where the statutory maximum is higher. We, therefore, submit that the appropriate approach is an Application Note, such as:

> In any case in which a defendant is convicted under 21 U.S.C. § 841(g) for distributing ketamine, ketamine should not be treated as a Schedule III substance. Rather, the Drug Quantity Table for Schedule I or II Depressants should be used. This means that for ketamine offenses under 21 U.S.C. § 841(g), a maximum level of 20 does not apply, as it does for other ketamine offenses.

This approach, which eliminates the need for additional listings in the Drug Quantity and Drug Equivalency Tables, advances the aim of simplification while satisfying the debatable end sought to be achieved.

TELEPHONE RECORDS AND PRIVACY PROTECTION ACT (PRETEXTING)

For the new statute criminalizing, among other things, the fraudulent acquisition and disclosure of confidential telephone records, the PAG believes the appropriate guideline is § 2H3.1, which the Commission has proposed expanding to cover disclosure of certain personal information. We understand that consideration is also being given to use of § 2B1.1, but that provision is not as good a fit. The harm from unauthorized access to telephone records is principally an invasion of privacy. As reflected in Congress's findings, telephone records ("call logs") may reveal the names of a telephone user's doctors, public and private business relationships, business associates and more. *See* Pub. L. 109-476, § 2. The privacy interest at stake does not readily equate to a dollar amount, nor would it be practical for courts to try to translate the injury into pecuniary harm. Section 2H3.1 provides a higher base offense level than § 2B1.1 (9 versus 6) to account for the harm caused in the absence of pecuniary loss.

In the event the new telephone records offense is committed in its aggravated form – usually with the intent to further the commission of another crime – the cross reference will frequently direct the application of a higher offense level. We believe, consistent with the Sixth Amendment implications of the statutory sentence enhancements, that the Commission should require a conviction under either subsection (d) or (e) for the cross reference to apply. Under subsection (e), the court is *required* to impose some additional period of imprisonment of up to five years (although no particular amount of prison time is specified). Subsection (d) contains a similar requirement: an additional prison term of up to five years, a fine up to double the normal statutory maximum, or both. The Commission already takes this "offense of conviction" approach for violations of 21 U.S.C. §§ 859, 860 and 861, which deal with aggravated forms of drugs offenses, such as those occurring within 1,000 feet of a school. *See* § 2D1.2. Consistent with the approach used in § 3C1.3 for imposition of the sentence enhancement in 18 U.S.C. § 3147, we recommend an application note explaining that some portion of the total sentence determined under 18 U.S.C. § 3553(a) be apportioned to the consecutive enhancement under subsection (d) or (e).

It would be premature to add specific offense characteristics to § 2H3.1. To maintain consistency with the Commission's goal of simplifying the Guidelines, the better approach is to let courts vary from the guideline range in those cases where the base offense level does not adequately account for an aggravating or mitigating circumstance. If it turns out that certain circumstances are

resulting in variances in a large number of cases, the Commission can then consider whether a new specific offense characteristic is appropriate.

On a related note, we understand that the President's Task Force on Identity Theft is proposing an expanded definition of "victim" under § 2B1.1 that would include persons who suffer non-monetary harm, such as invasion of privacy, damage to reputation and inconvenience. This proposed definitional expansion is terribly ill-advised. Section 2B1.1 is already complicated enough without requiring courts to identify the number of non-monetary-harm victims, as well as to assess the extent to which the offense has harmed them in such a non-monetary manner. The proposed definition is sufficiently broad and vague that it could conceivably require courts to count as victims any person who is required to testify as a witness before the grand jury or at trial. Even the larger categories of persons who are interviewed, or entities from which the government subpoenas or otherwise requests records, during the course of an investigation would surely have a claim of being "inconvenienced" by the offense.

The proposed expansion of the definition is also unnecessary. The guideline already contains Application Note 19, which encourages courts to sentence above the range if the loss amount understates the seriousness of the offense. It specifically mentions cases where the harm is invasion of privacy. Absent some indication that courts have needed to vary from the guideline in a sizeable number of cases to account for non-monetary harms, the Commission should not further complicate this provision.

Finally, the proposed definition could have the unintended consequence of greatly expanding the number of persons to whom the Crime Victims' Rights Act applies. *See* 18 U.S.C. § 3771. If the courts are required to identify and consider as victims, for Guidelines purposes, those persons who incur non-monetary harm, including "inconvenience," they may very well determine that the Commission's approach justifies considering such persons "victims" for purposes of the Act. If so, persons who suffered no harm other than inconvenience would have to be accorded a number of rights at and before sentencing, including the right to be heard, the right to confer with the prosecutor, the right to file a motion in the district court asserting their rights, and the right to file a petition for mandamus if the district court denies the relief the victim has sought. The Commission should not send the courts down the road of either greatly expanding the scope of the Act or creating a glaring and confusing inconsistency between who is a victim under the Guidelines and who is a victim under the Act.

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As I mentioned at the outset, the Practitioners Advisory Group welcomes the opportunity to offer its views, which we believe are shared by many defense counsel, on the Commission's proposed amendments and issues for comment. I am happy to take your questions on these issues.