reserve fund to provide services and compensation to victims of terrorism and mass violence. OVC funds were used to supplement the Oklahoma State Crime Victims Compensation Program, and to fund a variety of assistance provided to the families and victims of the bombing of the Murrah building throughout the trial process. OVC funds continue to support mental health services for both victims and first responders.

SEC. 5023. AMENDMENT TO THE CRIME VICTIMS WITH DISABILITIES ACT.

As enacted, section 5 of the Crime Victims with Disabilities Act (Pub. L. 105-301 -- Oct.27,1998) requires the inclusion of these new statistics in the National Crime Victimization Survey within six months of the study to be conducted under section 4. This substitute section 5 would allow the Bureau of Justice Statistics an additional six months and direct it to experiment and pretest the results of the section 4 study before it must include such data in the Survey.

SEC. 5024. EXPANDED JURISDICTION OVER CHILD BUYING AND SELLING OFFENSES.

This section would expand federal jurisdiction under 18 U.S.C. 2251A, a statute which punishes by not less than twenty years' incarceration the buying or selling of children in relation to the production of child pornography. Currently, under subsection (c), there is federal jurisdiction if the actor or the child traveled in interstate or foreign commerce in the course of the offense, or if the offense took place "in any territory or possession of the United States." The proposed amendment would add the term "commonwealth" to "territory or possession" so as to clearly cover the Commonwealth of the Northern Mariana Islands, and would also add coverage of conduct occurring in the special maritime and territorial jurisdiction of the United States. There is no apparent reason why such jurisdiction was not included when the statute was passed in 1988. The proposed amendment would remedy this unwarranted gap.

SUBTITLE D – HEALTH CARE FRAUD AND ABUSE.

SEC. 5031. ATTORNEY GENERAL INJUNCTION AUTHORITY.

Under existing law (18 U.S.C. § 1345(a)(1)(C)), Federal prosecutors are able to obtain injunctive relief in connection with a wide variety of Federal health care offenses. This authority has proven to be extremely valuable in putting a halt to fraudulent behavior. Unfortunately, however, such relief is not available in connection with kickback offenses under section 1128B of the Social Security Act (42 U.S.C. § 1320a-7b) ("Criminal penalties for acts involving Medicare or State health care programs"). This is a serious omission. Because of the large amounts of money involved in these kinds of cases, it is essential that the Attorney General have the authority to enjoin kickback schemes while they are in progress. The draft bill would permit the Attorney General to do so.

SEC. 5032. ATTORNEY GENERAL AUTHORITY TO SEEK CIVIL PENALTIES.

Section 1128B of the Social Security Act (42 U.S.C. § 1320a-7b) establishes criminal penalties for kickback offenses committed against federal health care programs, such as Medicare and CHAMPUS. There is, however, no direct civil penalty applicable to such offenses. As a consequence, an attorney for the government is forced in cases of this nature to do nothing or pursue criminal charges – quite possibly in a case that, while meriting government action, might not be appropriate for criminal prosecution. The proposal would permit the Attorney General to bring civil actions against wrongdoers under the anti-kickback provisions of the Social Security Act. Civil penalties are, particularly important to successful prosecution of health care fraud cases, since the complex business arrangements that are often employed in connection with kickback schemes often make it difficult – or impossible – to demonstrate the necessary <u>scienter</u> needed to sustain a crime.

SEC. 5033. GRAND JURY DISCLOSURE.

Under existing law, an attorney for the government may not, as a general matter, disclose matters that occur before a Federal grand jury. A violation of this non-disclosure requirement (set forth in Rules 6(e) of the Federal Rules of Criminal Procedure) is punishable as contempt of court. An overriding objective of this prohibition is to protect the integrity of criminal investigations by limiting opportunities to intimidate witnesses, destroy documents or otherwise obstruct justice. The prohibition is also important in protecting the rights and reputations of persons who appear before grand juries.

In 1989, Congress created an exception to Rule 6(e) when it enacted 18 U.S.C. § 3322 ("Disclosure of Certain Matters Occurring Before Grand Jury") (enacted as section 964 of the "Financial Institutions Reform, Recovery, and Enforcement Act of 1989," (Pub. L. 101-73). Under 18 U.S.C. § 3322(a), an attorney for the government who is privy to grand jury information involving a <u>criminal</u> violation of the Federal banking laws may disclose that information to another attorney for the government for use in connection with <u>civil</u> actions commenced to enforce the banking laws. In enacting this provision, Congress recognized that, in this important class of cases, in which both criminal and civil actions are routinely brought against wrongdoers, and in which large amounts of money are at stake, the Rule 6(e) restriction on disclosure needlessly complicated investigations in complex financial institution fraud cases.

The draft bill would merely extend the existing Rule 6(e) exception to Federal health care offenses, as defined in 18 U.S.C. § 24. Enactment of this provision would not make available information to civil prosecutors that is not already available to them. Rather, it would simplify information sharing and would enhance the government's ability to investigate wrongdoing. Such a provision would be very important for the effectiveness of our overall health care anti-fraud effort. In particular, by facilitating the sharing of information between criminal investigators and civil prosecutors, this proposal would enable prosecutors to proceed more quickly and efficiently to recover losses to Federal health care programs, such as Medicare, Medicaid, CHAMPUS, and the Federal Employees

Health Benefits Program and to prevent wrongdoers from dissipating illegally obtained assets before appropriate action to recover the government's losses can be taken.

SEC. 5034. AUTHORIZED INVESTIGATIVE DEMAND PROCEDURES.

Under section 248 of the Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104-191) (enacting new 18 U.S.C. § 3486), the Attorney General or her designee is authorized to issue an administrative subpoena in connection with an investigation relating to a "Federal health care offense." Under 18 U.S.C. § 24, a "Federal health care offense" is defined to include only <u>criminal offenses.</u> In civil cases, however, the Department's attorneys must rely on subpoenas issued by the Office of the Inspector General (OIG) of the Department of Health and Human Services (which are issued only to OIG agents assigned to a particular case) or upon civil investigative demands (which must be signed personally by the Attorney General). This constitutes a serious limitation on our ability to investigate civil health care fraud cases in an effective and efficient manner. As a consequence, this provision would make it clear that the Attorney General or her designee (<u>e.g.</u>, a duly authorized Assistant United States Attorney) would be permitted to issue an administrative subpoena in connection with any health care fraud case, criminal or civil, thus greatly facilitating our ability to pursue wrongdoers.

SEC. 5035. STUDY AND REPORT ON HEALTH CARE FRAUD SENTENCES.

Section 5035 directs the United States Sentencing Commission to review and possibly amend the sentencing guidelines with respect to health care fraud offenses. The provision requires the Commission to ensure that the guidelines reflect the serious harms associated with such fraud and to consider providing for increased penalties in appropriate circumstances. The Commission's review also must assure that the guidelines assure reasonable consistency and account for any circumstances that might justify departures from the guidelines. The provision also directs the Commission, by December 31, 2000, to submit a report to Congress on any changes to sentencing policy it has made relating to health care fraud, and to include any recommendations with respect to retention or modification of current statutory penalty levels.

SEC. 5036. PROVISIONS PROTECTING THE INTERESTS OF FALSE CLAIMS ACT MATTERS IN BANKRUPTCY PROCEEDINGS.

<u>Certain actions not stayed by bankruptcy proceedings</u>. The commencement or continuation of an action under 31 U.S.C. §§ 3729-3733 shall not be stayed by section 362(a)(1), (a)(2), (a)(3) and (a)(6) or under section 105(a) of Title 11, United States Code.

This subsection serves to codify judicial interpretation of the "police power" exception to the automatic stay provision in the Bankruptcy Code. The Bankruptcy Code's automatic stay provision prevents the commencement, continuation, enforcement or collection of a judicial, administrative, or other claim against the debtor or the recovery of a prepetition claim against a debtor, regardless of whether the assets involved are property of the debtor's estate. 11 U.S.C. § 362(a). Section 105(a) of Title 11 authorizes a bankruptcy court to fashion orders necessary to further the substantive provisions of the Bankruptcy Code. Those accused of defrauding the government sometimes threaten or commence bankruptcy proceedings in an effort to deter the government from pursuing them further under the False Claims Act, in hopes that the bankruptcy proceeding will somehow derail the government's efforts to recover money taken from it through fraud. However, the Bankruptcy Code exempts from the automatic stay actions by the government that are exercises of the "police" or "regulatory" powers. 11 U.S.C. § 362(b)(4). Although actions under the civil False Claims Act, 31 U.S.C. § 3729 et seq., are not expressly exempted by this provision, it has been held that since the False Claims Act and other fraud-based statutes have a police and regulatory function to deter fraud, actions by the United States under such statutes come within the intended scope of the exemption. See, e.g., In re Commonwealth Companies, Inc., 913 F.2d 518 (8th Cir. 1990). To deter future litigation over this issue, this provision would amend the Bankruptcy Code so that it expressly exempts False Claims Act actions from the automatic stay provision.

Certain Debts not Dischargeable in Bankruptcy. No debt owed to the United States for violating 31 U.S.C. § 3729 et seq. or under a compromise or other agreement resolving such a debt shall be discharged under Title 11, United States Code.

The general rule is that all monetary claims against an individual are "discharged" after the bankruptcy court confirms a plan of reorganization in a Chapter 7 or Chapter 11 bankruptcy proceeding. However, there are exceptions to this rule, and if a claim is not discharged, the claimant may continue to pursue collection of the debt after bankruptcy. See 11 U.S.C. § 524 (describing the effects of discharge.) At present, False Claims Act debts, which are not based on a showing of intent to defraud, ca n be treated inconsistently under the exceptions to the dischargeability provisions. For example, several courts have held that debts will be held nondischargeable under 11 U.S.C § 523(a)(2)(A), a provision that concerns debts arising from fraud, only if the debtor had an "intent" to defraud. See , e.g., Mayer v. Spanel Int'l. , Ltd., 51 F.3d 670 (7th Cir.), cert. denied, 516 U.S. 1008 (1995). Likewise, some courts have held that 11 U.S.C. § 523(a)(6), which provides an exception for debts arising from "willful and malicious injury," requires proof that the debtor knew his conduct would automatically or necessarily cause the creditor's injury, see, e.g., In re Scarlata, 979 F.2d 521, 526 (7th Cir. 1992), a standard which is similar to an "intent" standard. And, while 11 U.S.C. § 523(a)(7) render fines and penalties nondischargeable, that provision likely would not render the single damages portion of a False Claims Act debt nondischargeable. Indeed, one court has held that no portion of a False Claims Act debt is nondischargeable under 11 U.S.C. § 523(a)(7) since the treble damage remedy is compensatory in nature. See In re Stelweck, 86 B.R. 833 (Bankr. E.D. Pa. 1988), aff'd on other grounds, 108 B.R. 488 (E.D. Pa. 1989).

The proposed provision would provide for consistent treatment of False Claims Act debts against individuals as nondischargeable in bankruptcy proceedings..

Repayment of Certain Debts Considered Final. No transfer on account of a debt owed to the United States for violating 31 U.S.C. § 3729 et seq. or under a compromise or other agreement resolving such a debt shall be avoided under sections 544, 545, 547, 548, 549, 553(b) or 724(a) of Title 11, United States Code.

As a general matter, a debtor that was "insolvent" at the time it settled a False Claims Act case under current law may recoup or "avoid" the settlement payment if the transfer was made within the 90 day period before the debtor petitioned for bankruptcy, unless the transfer was intended to be and was a contemporaneous exchange for new value given to the debtor. The courts have adopted different views on the issue of whether a release of claims is considered "new value" given to the debtor. By providing that False Claims Act debts may not be avoided in bankruptcy proceedings, this provision would in effect make clear that a release of False Claims Act liability is "new value" given to a debtor.

SEC. 5037. EXTENDING ANTI-FRAUD SAFEGUARDS TO THE FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM.

This section would extend important anti-fraud safeguards to the Federal Employees Health Benefit Program (FEHBP). The FEHBP is the largest employer-sponsored health care program in the United States, spending more than $17 billion in taxpayer funds on health care benefits for federal employees. Unfortunately, when Congress extended powerful anti-fraud safeguards to the Medicare and Medicaid programs -- including strong anti-kickback provisions, enhanced civil money penalty provisions, and new tools to exclude dishonest providers from certain federal health care programs -- in the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Congress explicitly excluded the FEHBP from these safeguards. There is no sound policy justification for such an exclusion, and this section would remove this unwarranted exclusion

SEC. 5038. PREVENTING AND PUNISHING ABUSE AND NEGLECT OF ELDERLY AND OTHER RESIDENTS IN NURSING HOMES AND RESIDENTIAL HEALTH CARE FACILITIES.

Protecting elderly and disabled Americans from abuse and neglect is one of the Administration's highest priorities. While most nursing home operators and employees are honest and law abiding, too many vulnerable nursing home residents are subjected to serious abuse and neglect. Moreover, federal law currently provides inadequate remedies to deter, prevent, and punish widespread abuse and neglect in federally funded nursing homes and other residential health care facilities.

This section would create new federal criminal and civil penalties against any individual or organization that engages in a pattern of violations of federal laws, regulations or rules or state laws governing the health, safety or care of patients in residential health care facilities where at least one such violation results in physical or mental harm to a resident. For criminal penalties to attach, the violations constituting the pattern must be committed knowingly and willfully. Significantly, the scienter attaches to the violations that constitute the pattern rather than to the pattern itself. This section would also authorize the Attorney General to impose civil money penalties for patterns of violations resulting in harm, and to obtain injunctive and other equitable relief to prevent or enjoin violations of the new statute.

A number of important terms are defined in the new 18 U.S.C. 1348. Residents of residential health care programs, who frequently are totally dependent on the program's staff for basic health and safety needs, are particularly vulnerable to abuse and neglect. Therefore, the term "residential health care facility" is defined broadly to include skilled and unskilled nursing facilities, mental health and mental retardation facilities, and other facilities or programs that provides health care services in a residential setting and that receives more than $10,000 in any calendar year from a federal health care program., including Medicaid.

The statute also defines "pattern of violations" or "pattern of knowing and willful violations" to mean multiple violations of a single law, regulation or rule or single violations of multiple laws, regulations or rules, that are widespread, systemic, repeated, similar in nature, or result from a policy or practice. For example, a widespread group of violations, even if not the result of a common policy or practice or not involving the same or similar law, regulation, or rule, would be covered by the new statute. On the other hand, one or more isolated violations that do not rise to the level of a "pattern" would not be covered. The terms "pattern of violations" and "pattern of knowing and willful violations" are meant to incorporate an element of proportionality so that the number of violations required to establish a pattern within an entity operating numerous facilities across the country would be greater than the number of violations required for a single facility. The terms also are meant to incorporate an element of severity so that a lesser number of violations would be required if the harm was severe.

SUBTITLE E – CONSUMER FRAUD

SEC. 5041. BLOCKING TELEMARKETING SCAMS.

Throughout the 1990s, telemarketing fraud has been one of the most pervasive and problematic forms of white-collar crime. Whether purporting to offer substantial sweepstakes prizes, investment opportunities, purchases of foreign lottery chances, or the opportunity to donate to supposedly charitable causes, fraudulent telemarketers, operating in the United States and Canada, have victimized many thousands of people. Many of these victims lose thousands of dollars; some ultimately lose their life savings.

In addition, fraud schemes are increasingly taking advantage of the global access afforded by the Internet to expand their reach to prospective victims worldwide: for example by putting up a Web site or participating in chat rooms to attract victims to a fraudulent investment or business opportunity. Internet Fraud Watch, a project of the National Consumers League, reported that in 1998 it had received more than 7,700 complaints from consumers about online frauds. In addition, the Securities and Exchange Commission reportedly receives approximately 300 complaints a day about online securities schemes. One of the most frequently reported is a form of market manipulation known as "pump and dump" schemes. These schemes -- which typically use various devices to mislead online investors into putting large amounts of funds into speculative, thinly traded, or shell companies — often resort to a variety of Internet-related communications, such as Web sites, communications in chat rooms, and E-mail, to further their market manipulations. Finally, law enforcement agencies and consumer groups are seeing increasing evidence that large-scale fraudulent operations are turning to the Internet as a medium where they believe they can operate more freely than traditional methods of mass communication, such as mail or telemarketing, allow. Consumers, for example, are now reporting unsolicited E-mails from what appear to be Nigerian-based fraud schemes, which had relied heavily on mass mailings to potential victims before the U.S. Postal Inspection Service had become so successful in identifying and destroying large volumes of those mailings.

In short, it is becoming increasingly clear that the success of future large-scale fraudulent operations, whether conducted by one person or many, will ultimately depend largely on reliable access to electronic communications, whether through long-distance telephony, the Internet, or both. Although any criminal can use a pay telephone to contact an individual victim, the larger and more profitable telemarketing schemes typically require continuing service at a fixed location so that solicitors can work regular shifts to contact prospective victims. For this reason, when the United States-Canada Working Group on Telemarketing issued its report in November, 1997, on cross-border telemarketing fraud, it recommended that both governments examine the regulation of telephone services and consider options that would permit the denial of telephone services (whether by terminating service within a country or blocking particular calls from one country to the other) to persons engaging in telemarketing fraud.[6]

At present, federal law contains only one provision that specifically authorizes the termination of telephone service. Subsection 1084(d) of Title 18, United States Code, authorizes a common carrier subject to the jurisdiction of the Federal Communications Commission to discontinue or refuse the leasing, furnishing, or maintaining of a "wire communication facility" (a term broadly defined in 18 U.S.C. § 1084),[7] after reasonable notice to the subscriber, if a federal, state, or local law enforcement

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[6] *See* UNITED STATES-CANADA WORKING GROUP ON TELEMARKETING FRAUD, UNITED STATES-CANADA COOPERATION AGAINST CROSS-BORDER TELEMARKETING FRAUD at 19 (1997).

[7] As used in Chapter 50 of Title 18, United States Code (which includes section 1084), the term "wire communication facility" means "any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission

agency notifies the common carrier in writing that the facility is being used or will be used "for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of federal, state, or local law. Subsection 1084(d) also provides that no damages, penalty, or forfeiture, civil or criminal, may be found against any carrier for any act done in compliance with any notice that it receives from a law enforcement agency. Finally, it states that nothing in section 1084 shall be deemed to prejudice the right of any person affected by the discontinuance or refusal of the facility to secure an appropriate determination, as otherwise provided by law, in a federal court or in a state or local tribunal or agency, that the facility should not be discontinued or removed, or should be restored.

Although a main purpose of section 1084 was to aid in the suppression of organized gambling activity, such as bookmaking, *see* H.R. Rep. No. 967, 87th Cong., 1st Sess. (1961), *reprinted in* 1961 USCCAN 2631, 2631-32, the language of subsection 1084(d) is broad enough to encompass the use of the telephone for gambling-related information when criminal activity other than bookmaking is involved. For example, a number of fraudulent telemarketing operations contact prospective victims and offer them the opportunity to purchase chances in foreign lotteries. In at least one case, the Washington State Attorney General has successfully invoked subsection 1084(d) to have telephone companies deny telephone service to a lottery telemarketing operation based in British Columbia.

Subsection 1084(d), however, is clearly not broad enough to authorize the blocking or termination of telephone service for a subscriber who is engaging in any form of telemarketing fraud that does not involve gambling or wagering information. While federal and state law enforcement authorities have had considerable success in recent prosecutions of telemarketing schemes, broader authority is needed to enable common carriers and Internet service providers to block or terminate service to numbers or identities used by participants in fraud schemes without fear of civil liability for that blocking or termination. The proposed legislation would address that need.

This section would amend Chapter 113A of Title 18 — the chapter providing for enhanced sentencing and restitution in telemarketing fraud-related cases -- to create a new section 2328. Subsection (a) of the proposed section 2328 would authorize a federal court to order electronic communications services, such as carriers of telephone service subject to the jurisdiction of the Federal Communications Commission and Internet service providers, to block or terminate service to a telephone number, or to terminate service to any other subscriber number or identity (terms used in the Electronic Communications Privacy Act, 18 U.S.C. § 2701 et seq.), if two requirements are met. First, the court must find probable cause to believe that a person is committing or about to commit an offense listed in section 2326 in chapter 117A (i.e., 18 U.S.C. § 1028, 1029, 1341, 1342, 1343, or 1344, or a conspiracy to commit such an offense) in connection with the conduct of telemarketing (as that latter term is defined in 18 U.S.C. § 2325), and in furtherance of that offense is using the number or

of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission."

identity that is to be blocked or terminated. Second, the court must also determine that such an order is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the application is made. Because a number of the telephone numbers used to commit telemarketing fraud are located outside the United States and are serviced by foreign electronic communication services, Subsection (a) would enable the court to direct, with respect to telephone numbers only, that U.S.-based electronic communication services block those numbers so that they would not succeed in reaching telephone numbers located in the United States.

Subsection (a) also states that such order may be temporary or permanent, and may include provisions authorizing the electronic communication service to resume service to the telephone number or other subscriber number or identity specified in the order if that number or identity has been reassigned to another subscriber. This latter provision is intended to ensure that an electronic communication service will not be required to seek modification of the court's order if it chooses to reassign the number or identity to a subscriber other than persons involved in the fraudulent scheme that had used that number or identity. Subsection (a) further specifies that the order shall be served on an electronic communication service by delivering a copy to the service's principal place of business, and shall be served on a subscriber by (1) delivering a copy to the subscriber personally, (2) leaving a copy at the subscriber's principal place of business with some person of suitable age and discretion then employed therein or at the subscriber's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or (3) mailing a copy to the subscriber's last known address. In instances where it is not practicable to effect personal service or service at the subscriber's dwelling or business (e.g., where the subscriber is located outside the United States), mailing may be the only effective means of service on the subscriber.

The language of proposed subsection (a) is not intended to preempt the field with respect to common carriers' authority in any respect. Thus, common carriers or other electronic communication services would retain any common-law rights they may have to terminate a service used for illegal purposes. *See Delaware Sports Service v. Diamond State Tel. Co.*, 241 F. Supp. 847 (D. Del. 1965), *aff'd per curiam*, 355 F.2d 929 (3d Cir.), *cert. denied*, 385 U.S. 817 (1966).

Subsection (b) of the proposed section 2328 states that subsequent to the issuance of an order pursuant to subsection (a), any person whose service has been blocked or terminated may move that court to quash or modify the order. It further provides that the movant shall have the burden of proof to show good cause for quashing or modification of the order. To ensure that the movant has an appropriate opportunity for due process, this subsection further states that the court shall proceed as soon as practicable to the hearing and determination of such a motion. Because federal prosecutors are likely to seek an order under subsection (a) in connection with an application for a search warrant pursuant to Rule 41 of the Federal Rules of Criminal Procedure, or at the time an indictment is returned against one or more individuals, subsection (b) distinguishes between situations prior to and after indictment. It states generally that a proceeding under this subsection is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against any person to whom the court's finding of probable cause in subsection (a) relates, discovery is governed by the Federal Rules of Criminal Procedure.

Subsection (c) of the proposed section 2328 states that no cause of action shall lie in any court against any electronic communication service, its officers, employees, agents, or other specified persons for taking any action, or providing information, facilities, or assistance for such action, in accordance with the terms of a court order under section 2. This provision is based on similar provisions relating to providers of wire or electronic communications service in 18 U.S.C. §§ 1084(d) and 2703(e).

Subsection (d) of the proposed section 2328 states that for purposes of the proposed section 2328, the term "electronic communication service" has the definition which is given that term in section 2510 of title 18.

Subsection (b) of section 5041 would amend the definition of "telemarketing" in section 2325 of title 18 to bring interstate or international "electronic communications" as well as telephone calls within the scope of Chapter 113A. This amendment would have two significant effects. First, it would ensure that federal courts could issue court orders pursuant to the proposed section 2328 not only for fraudulent conduct that involved telemarketing through traditional conversations by telephone, but also for fraudulent conduct that involved the same kinds of conduct as traditional telemarketing but that was conducted largely or wholly through the Internet. Second, it would enable federal courts, in sentencing defendants in fraud cases that use mass-marketing methods, to apply the same kinds of sentencing enhancements in Internet fraud cases that are now applicable in the federal Sentencing Guidelines to traditional telemarketing fraud.

Subsection (c) of section 5041 would amend the table of sections in Chapter 113A to include the new catchline for the proposed section 2328.

SUBTITLE F – PENSION-WELFARE AND LABOR-MANAGEMENT RACKETEERING ACT

These proposals, in sections 5051-60 of the bill, are primarily designed to enhance federal criminal law enforcement in connection with employee pension benefit plans and other forms of retirement arrangements. The proposals also are directed at increasing protection for employee welfare benefit plans and collective bargaining relationships on which working people depend for wages and other employment-related benefits, including health care.

SEC. 5051. FRAUD IN RELATION TO RETIREMENT ARRANGEMENTS.

This section enacts a new offense in Chapter 63 of Title 18 of the United States Code which punishes "Retirement Fraud." The proposed legislation would directly prohibit criminal frauds that are intended to loot retirement savings, including both employee pension benefit plans covered by title I of

Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, et seq., and other tax-favored retirement arrangements such as individual retirement plans, tax-sheltered annuities, and tax qualified plans for non-employees, including those covering self-employed individuals. Such retirement savings present a rich target for criminal frauds since they represent a significant pool of assets that cannot be expended until retirement and that are under the control of individuals with varying degrees of sophistication. The statute would also enhance the protection afforded to employee pension benefit plans subject to title I of the ERISA. Section 5052 would create a new cause of action whereby the Attorney General may bring a civil suit to impose a civil penalty on conduct which constitutes a violation of section 1348, or conspiracy to violate section 1348, in those cases where a civil penalty could not be imposed under existing law in regard to employee pension benefit plans subject to title I of ERISA.

BACKGROUND

On May 15, 1997, the Attorney General and the Secretary of Labor jointly announced a continuing initiative against the abuse of pension and retirement funds. As part of that initiative the Attorney General explained that greater emphasis would be placed on criminal enforcement and coordinated efforts by federal agencies against such abuses. The Secretary of Labor stated that although most pension plans are well-managed and financially safe, some unscrupulous persons see those plans as ripe targets to siphon off the hard-earned retirement money of American workers. As a result of efforts taken during the 8 months prior to the announcement of the initiative, for example, the Attorney General and the Secretary reported that monitored federal investigations had resulted in charges or convictions against 109 individuals in 70 cases nationwide involving more than $90 million in pension plan losses.

In addition to the Criminal Division of the Department of Justice and various United States Attorneys' and state criminal prosecutors' offices, several federal investigative and regulatory agencies participated in the initiative. The latter included the Federal Bureau of Investigation, the Internal Revenue Service, the Securities and Exchange Commission, the Inspector General's Office of Investigations within the Department of Labor, and the Department of Labor's Pension and Welfare Benefits Administration, which had launched a national enforcement project in November 1995 to reduce the misuse of contributions to so-called 401(k) pension plans. In addition to the abuse of employee pension benefit plans regulated by title I of ERISA, which are protected to a degree by specific federal criminal statutes punishing theft, kickbacks and false statements (18 U.S.C. §§ 664, 1027, and 1954), a review of criminal abuses directed at retirement monies of non-employees disclosed fraudulent abuses which could not be addressed by those statutes.

For example, a series of investigations by the Securities and Exchange Commission in the last several years have identified deliberate efforts by promoters of fraudulent investments to target retirement savings. In several cases the promoters of fraudulent investments included with their deceptive sales literature documents that enable a prospective investor to transfer IRA accounts to a "friendly" IRA administrator. Generally, the promoters established a relationship with the IRA administrator in advance and obtained assurances that the administrator would accept the offered investment in an IRA or other retirement account. In addition, salesmen offering such investments claimed that the very fact that the investments were available for investment in IRA accounts was evidence of the safety of the investment.

Criminal frauds of that type may sometimes be prosecuted under the criminal provisions of the federal securities laws. There are risks, however, in relying on those laws to reach all frauds that may be directed at retirement savings accounts. For example, some promoters of fraudulent investments investigated by the SEC deliberately structured their investments in an effort to avoid the jurisdiction of the federal securities laws.

The business of handling IRA accounts itself presents an opportunity for the unscrupulous to defraud persons of their IRA savings. IRS regulations require that an IRA trustee be either one of several types of regulated persons (e.g. a bank, insurance company, regulated investment company) or a person approved by the IRS in accordance with its regulations to act as a "nonbank trustee." However, the Securities and Exchange Commission has identified several firms that are not subject to any regulatory oversight or supervision that are in the business of administering IRA and other self-directed retirement accounts. They do so by establishing an agreement with a Bank that nominally acts as trustee, but which delegates all responsibility for maintaining the books and records identifying the ownership of customer funds to the unregulated Administrator. In addition, the Administrator is given authority to deposit and disburse funds in the accounts established for IRA funds at the trustee Bank. With no oversight or inspection, there is no mechanism that will in the ordinary course detect misappropriation of IRA savings by the Administrator. Since funds may not be called for until account holders reach retirement age, a shortfall may well go undetected for decades.

Between 1994 and May 1997, the Commission brought more than 22 cases seeking the return of more than $160 million to defrauded IRA investors. In one case, the Commission alleged that over a period of 14 years such an Administrator misappropriated more than $124 million from retirement accounts that it controlled. In a civil enforcement action against that IRA Administrator the Commission successfully invoked jurisdiction under the federal securities laws. However, depending on the particular facts, such an effort may not always succeed. For example, misappropriation of cash assets that are not provided in connection with the purchase or sale of a security, or that are held by an Administrator that does not possess the indicia of a statutory broker, may be found to be outside the jurisdiction of the federal securities laws.

Moreover, the Attorney General's initiative against pension abuse and the United States Department of Labor's enhanced enforcement effort directed at so-called 401(k) plans, the fastest growing segment of employee pension plans with assets of more than $600 billion, demonstrated that employee pension plans are frequently at risk of abuse by employers that loot their workers' retirement plans in order to keep struggling companies afloat or finance other unauthorized expenditures.

In the case of employees' own contributions which are withheld from employees' wages by an employer, the employer's failure to remit such monies to the plan and conversion of such funds to his own use is punishable under existing law as embezzlement. See United States v. Grizzle, 933 F.2d 943 (11th Cir. 1991) (holding that unpaid employee contributions can be considered assets of the benefit plan and no longer property of the employer once withheld from employees' wages pursuant to Department of Labor regulations interpreting ERISA). In the case of an employers' failure to contribute monies or matching contributions on behalf of his employees, however, the employer's contribution may not be treated as property of the plan subject to prosecution for larceny unless the employer has agreed to treat the unpaid contributions as plan property under the terms of his contract or is otherwise subject to a statutory duty to pay over monies owed to the plan. See United States v. Panepinto, 818 F.Supp. 48 (E.D.N.Y. 1993), aff'd without opinion, 28 F.3d 103 (2d Cir. 1994) (holding that whether employer was subject to a statutory duty to pay the plan and larceny prosecution for non-payment turned on whether or not the employer's labor contract expressly surrendered all legal interest in the amounts owed to the plan once employees performed work which triggered the employer's duty to pay the plan). Accord, United States v. Lasky, 967 F.Supp. 749 (E.D.N.Y. 1997) (trust document cross-referenced in labor contract vested property interest in the plan). See also United States v. LaBarbara, 129 F.3d 81 (2d Cir. 1997) (upholding conviction of employer which failed to contribute monies owed under a collectively bargained contract for multi-employer plans which ERISA expressly requires payment by statute). But compare, Young v. West Coast Indus. Relations Ass'n, Inc., 763 F.Supp. 64, 74-76 (D.Del.), aff'd, 961 F.2d 1570 (3d Cir 1992)(holding that an employer's contractual obligation to pay contributions on behalf of employees was insufficient to create plan assets in the hands of the delinquent employer).

Moreover, the use of the mails or interstate wire transmissions in furtherance of schemes to defraud employee benefit plans in violation of the mail or wire fraud statutes (18 U.S.C. §§ 1341 and 1343) may be incidental and unnecessary to some fraud schemes. For example, the conviction of persons who engage in mail frauds of the type first upheld in United States v. S & Vee Cartage Co., 704 F.2d 914 (6th Cir. 1983), cert. denied, 464 U.S. 935 (1983), depends on the existence of a mailed document in furtherance of the scheme to defraud the employee plan. In that case the mail fraud statute punished the employers' concealment of their scheme to defraud the plans of contributions on behalf of employees, which were owed under a labor contract, because the employers mailed false financial statements to the plans which understated the true number of employees covered by the contract and the number of hours worked by employees on which obligations to fund the plan were based. If the statements had been hand-delivered to the plan administrator, federal prosecution of the fraud on the plan would have been frustrated.

In the case of employee benefit plans that are maintained by employers which manage the employee benefit plans in-house without the assistance of outside administrators, the likelihood that mailings and commercial transmissions of matters in furtherance of the scheme is diminished. For example, in United States v. LaBarbara, 129 F.3d 81, 85 (2d Cir. 1997), the court of appeals reversed the mail fraud conviction of a benefit plan trustee because the government's evidence of a requisite mailing was insufficient to negate the possibility that documents used in furtherance of the fraud against the plan had been hand-delivered.

Section 1348(a). Operative Elements

The new retirement fraud offense described in proposed section 1348(a) would enhance the protection for participants and beneficiaries of employee pension benefit plans and other retirement arrangements by punishing deceitful schemes directed at the deprivation of property under the control or custody of the retirement arrangement or of "any . . . other person in connection with the establishment or maintenance of a retirement arrangement." For example, the statute would enable the prosecution of an employer or other plan sponsor who sought to actively conceal its failure to contribute monies on behalf of employee-participants in an employee pension plan whether or not such contributions could be prosecuted under the federal larceny statute covering such plans (18 U.S.C. § 664) or as a violation of the mail or wire fraud statutes (18 U.S.C. §§ 1341 and 1343). Under the new retirement fraud statute, the plan sponsor who actively misleads plan administrators or employee-participants about its failure to pay plan contributions, by misstating the number of employees or amount of work triggering the obligation to pay, for example, could be successfully prosecuted for retirement fraud whether or not it then held property of the plan under its control for purposes of a larceny prosecution or documents had been deposited in the mails or with a commercial carrier for delivery to the plan or its participants.

Proposed Section 1348(a) would proscribe the defrauding of any retirement arrangement or other person in connection with the establishment or operation of a retirement arrangement without proof that the scheme was accompanied by a foreseeable use of a mailing, communication by commercial carrier, or interstate wire transmission in furtherance of the scheme and artifice to defraud, as is now required for proof of mail or wire fraud (18 U.S.C. §§ 1341 and 1343) involving similar schemes. Because retirement savings and their investment have a significant and continuing impact on interstate and foreign commerce, it is believed that their protection from criminal fraud should not be dependent on a criminal actor's use of the mails, communications by commercial carrier, or interstate wire transmissions in order to accomplish the fraud. Such channels of commerce may be only incidental to accomplishment of the scheme to defraud. Moreover, because frauds directed at retirement arrangements and the individuals who participate in them generally have substantial effects on interstate and foreign commerce by reason of their repetition and aggregate effect on the economy, just as transactions involving the financial institutions protected by the existing bank fraud statute (18 U.S.C. § 1344) do, the proscribed offenses fall within the category of crimes based on the Commerce Clause of the Constitution where the "de minimis character of individual instances arising under [the] statute is of no consequence." See United States v. Lopez, 514 U.S. 549, 554 (1995)(where "a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under [the] statute is of no consequence").

Congress has already enacted a similar anti-fraud statute which protects employee health plans and other health care benefit programs without requiring proof of a mailing, communication by commercial carrier, or interstate wire transmission in furtherance of the scheme and artifice to defraud in violation of the Health Insurance Portability and Accountability Act (HIPAA) of 1996 (18 U.S.C. § 1347). Furthermore, with the exception of cases in which retirement arrangements have been misrepresented as tax qualified in order to further the fraudulent scheme, the retirement arrangements protected by the statute would be subject to the Internal Revenue Code and based on the Federal Government's taxation powers in the Constitution.

Proposed section 1348(a) also reaches deceptive schemes to defraud victims of "honest service" described in 18 U.S.C. § 1346 because section 1346 applies to any offense within Chapter 63 of Title 18 United States Code. Where the administrators and managers of retirement arrangements are subject to duties of honest service created by statute, contract, or the terms of governing plan documents, schemes to defraud which involve deceitful breaches of fiduciary duty in relation to any retirement arrangement could be prosecuted under the retirement fraud statute in the same manner as they are currently subject to prosecution under 18 U.S.C. § 1346, but without proof of a foreseeable use of the mails, commercial communications, or interstate wire transmissions in furtherance of the fraudulent scheme. For example, persons with discretionary authority over the disposition of the property of an employee pension benefit plan subject to title I of ERISA have fiduciary responsibilities to safeguard plan assets and refrain from certain prohibited financial conflicts of interest by statute. See 29 U.S.C. §§ 1104 and 1106.

Moreover, inclusion of the offense in Chapter 63 of Title 18 will also mean that the Department of Justice may pursue a civil action under 18 U.S.C. § 1345 to enjoin fraudulent activity which is ongoing or about to be committed in violation of the retirement fraud statute.
Although the Department of Labor has similar remedies to enjoin violations of title I of ERISA, the injunctive remedies in 18 U.S.C. § 1345 are not limited to frauds against retirement arrangements which are also employee benefit plans covered by title I of ERISA.

Section 1348(b). Definition of Retirement Arrangement

Proposed Section 1348(b) defines the term "retirement arrangement" which is the class of entities protected by the new statute against fraudulent abuse. Section 1348(b)(1) includes within the term employee pension benefit plans regulated by title I of ERISA, 29 U.S.C. § 1001, et seq. Currently, more than 700,000 such employee pension plans which promise or provide retirement benefits to more than 85 million workers hold assets of approximately $3.5 trillion.

New section 1348(b)(2) includes within "retirement arrangement" retirement plans which are tax qualified under the Internal Revenue Code (IRC). Such tax qualified plans include employee pension plans subject to ERISA as well as individual retirement accounts (IRAs) and other arrangements which are tax qualified. These include IRAs described in 26 U.S.C. §§ 408 and 408A;

tax-sheltered annuity contracts, custodial accounts, and retirement income accounts described in 26 U.S.C. § 403(b); qualified plans described in 26 U.S.C. § 401(a); and qualified annuity plans described in 26 U.S.C § 403(a). For purposes of the Internal Revenue Code, the term "qualified retirement plan" also includes any plan, contract, account, or annuity that, at any time, has been determined by the Secretary of the Treasury to be such a plan, contract, account or annuity. See 26 U.S.C. §4974(c). For example, because retirement arrangements maintained by church organizations for church employees can be tax qualified pursuant to the Internal Revenue Code, church plans which are otherwise excluded from regulation under title I of ERISA are included within the protection of the new retirement fraud statute. See 29 U.S.C. §§ 1002(33) and 1003(b)(2) (excluding church plans from coverage by title I of ERISA).

Proposed section 1348(b)(2) also includes within the definition of protected retirement arrangements "any arrangement which has been represented to be a qualified retirement plan." By means of this language, the statute is intended to reach fraudulent schemes perpetrated by persons operating an arrangement which is deliberately misrepresented to be a tax qualified retirement plan with knowledge that the arrangement is not so qualified and would not likely become so qualified by Internal Revenue Service in order to promote a scheme to defraud victims of their property or rights of honest service. As in the case of frauds under existing law, a good faith assertion that the arrangement was tax qualified or would likely become so qualified by the Internal Revenue Service would be a defense to a finding of intent to defraud based on the tax status of the arrangement, but would not be a defense to investigative and prosecutorial jurisdiction.

Proposed section 1348(b)(3) includes a medical savings account described in section 220 of the Internal Revenue Code because amounts in such accounts may be used for retirement purposes if the assets in such accounts are not exhausted for medical expenditures. The separate designation of such accounts is necessary because a medical savings account is not otherwise included within the definition of a qualified retirement plan under section 4974(c) of the Internal Revenue Code.

Proposed section 1348(b)(4) includes within the class of protected retirement arrangements funds established within the Thrift Savings Fund by the Federal Retirement Thrift Investment Board for employees of the Federal Government. In order to reach potential abuses of the large amount of Thrift Savings Fund assets which are invested in private securities and other investments managed by the private sector, the term "retirement arrangement" includes those funds currently within the Common Stock Index Investment Fund, the Fixed Income Investment Fund, the Small Capitalization Stock Index Investment Fund and the International Stock Index Investment Fund. Although assets within the Government Securities Investment Fund consist of public securities issued by the Federal Government, fraud might also occur in connection with record keeping or within an employing agency.

Section 1348(c). Exclusion of Governmental Plans

With the exception of the Federal Thrift Savings Funds described above, proposed section 1348(c) also would exclude from the class of protected retirement arrangements employee "governmental plans" as defined in ERISA section 3(32), 29 U.S.C. § 1002(32). Under existing law, employee pension benefit plans which are either administered or funded by Federal or state governmental agencies on behalf of their employees are not regulated pursuant to title I of ERISA. See 29 U.S.C. § 1003(b)(1). The financial integrity of such state governmental plans historically has been overseen by the state governments which sponsor them rather than the Federal Government. In the case of governmental plans such as the Civil Service Retirement Fund for employees of the Federal Government, benefits are funded primarily by public funds of the Federal Government and are otherwise protected by existing law.

Section 1348(d). Investigative Authority

Proposed section 1348(d) would confer on the Attorney General the authority to investigate violations of the new retirement fraud offense. However, the regulation and investigation of the financial and fiduciary integrity of employee pension benefit plans subject to title I of ERISA is the primary responsibility of the Pension and Welfare Benefits Administration of the United States Department of Labor. The Department of Labor is authorized by ERISA to enter into arrangements with other federal agencies for cooperation and assistance in the performance of its enforcement responsibilities under ERISA, and in fact, has delegated parts of its criminal investigative powers under ERISA to the Federal Bureau of Investigation pursuant to such statutory authority. See 29 U.S.C. § 1136(a). The Labor Department's Inspector General has also been authorized to conduct criminal investigations of employee benefit plans subject to title I of ERISA in racketeering cases. Both the FBI and components within the Department of Labor are authorized to investigate violations of Title 18 and other federal laws related to employee benefit plans subject to title I of ERISA. See 29 U.S.C. § 1136(b). Section 1348(d) is intended to preserve that allocation of investigative responsibility in relation to employee benefit plans.

Nevertheless, it is anticipated that other federal agencies will detect and refer potential criminal violations of the new retirement fraud offense to the Department of Justice for further investigation and prosecution. Under existing law, the Federal Deposit Insurance Corporation as well as the Comptroller of the Currency and the Office of Thrift Supervision within the Department of the Treasury are responsible for oversight of federally insured banks and savings and loan institutions which act as trustees of individual retirement accounts and sponsor other retirement arrangements covered by the new retirement fraud crime. The tax qualification of such accounts and other retirement arrangements under the Internal Revenue Code is the responsibility of the Internal Revenue Service within the Department of the Treasury. In the course of its responsibilities, the Securities and Exchange Commission also regulates the activities of organizations such as mutual funds and registered investment companies which act as IRA trustees and sponsor other forms of retirement arrangements that involve securities regulated by the federal securities laws. State regulatory agencies oversee insurance carriers which may offer annuities and other retirement arrangements protected by the new offense. It is expected that such federal and state agencies would use their regulatory and investigative powers under existing law to detect and refer evidence of retirement fraud proscribed by the new offense in 18 U.S.C. 1348.

SEC. 5052. CIVIL PENALTY FOR VIOLATION OF SECTION 1348.

Section 5052 creates a new cause of action whereby the Attorney General may bring civil suit to impose a civil penalty on conduct which constitutes a violation of section 1348, or conspiracy to violate section 1348, in those cases where a civil penalty could not be imposed under existing law in regard to employee pension benefit plans subject to title I of ERISA.
Subsection 1349(a) would authorize an action in the federal district courts under which proof of the civil defendant's unlawful conduct by a preponderance of the evidence would suffice as contrasted with the burden of proof in a criminal prosecution, namely, beyond a reasonable doubt.

The amount of the civil penalty imposed would be the amount specified in the statute, the amount of pecuniary gain to the violator, or the amount of pecuniary loss sustained by the victim, whichever is the greatest amount. The civil penalty could be imposed under section 1349(a) in addition to any other criminal, civil, or administrative remedy which is available to the United States or any other person except as provided in section 1349(b).

Subsection 1349(b) would provide that in regard to frauds, or conspiracies to defraud, involving employee pension benefit plans, as contrasted with other types of retirement arrangements, the Department of Labor would continue to exercise its authority under existing law to impose civil penalties on fiduciaries and other persons if the violation, or conspiracy to violate section 1348, would permit a civil penalty to be imposed under title I of ERISA. In the event that no civil penalty could be imposed in regard to the particular fraudulent abuse of an employee pension benefit plan, or other person in connection with the establishment or maintenance of such a plan, the Attorney General would be free to seek a civil penalty under section 1349.

Where civil penalties can not be imposed under ERISA, subsection 1349(b) would also permit the district court to waive or reduce a civil penalty which could be otherwise imposed under subsection 1349(a) where the court finds that the violator or other person acting in privity would suffer severe financial hardship under certain conditions. Those conditions include circumstances in which the violator or such other person may not be able to restore all losses to the victims of the retirement fraud offense or to otherwise comply with judgments in other civil or criminal actions related to the fraudulent conduct. Such a waiver or reduction of the civil penalty could also occur where the court found that the violator or other person acting in privity with the violator could not pay a penalty or tax imposed under the Internal Revenue Code, such as excise taxes imposed on prohibited transactions involving tax qualified plans. In regard to such waivers and reductions, subsection 1349(b) affords relief from civil penalties similar to that available to fiduciaries and other persons subject to civil penalties imposed by the Department of Labor pursuant to section 502(l) of ERISA, 29 U.S.C. § 1132(l).

Amendments Pertaining to Employee Benefit Plans

Sections 5053-4 contain amendments designed to strengthen the law which prohibits the giving or acceptance of bribes or graft payments in connection with the operation of employee pension or welfare benefit plans (18 U.S.C. § 1954) and embezzlement or theft from such plans (18 U.S.C. § 664). Sections 664 and 1954 are the primary criminal enforcement tools for protecting approximately 6 million employee pension and welfare benefit plans in the private sector which are regulated by ERISA and provide benefits to more than 150 million workers and their families.

SEC. 5053. BRIBERY AND GRAFT IN CONNECTION WITH EMPLOYEE BENEFIT PLANS BACKGROUND.

Section 5053 is designed to overcome impediments to the enforcement of section 1954 and to enhance the maximum penalty of imprisonment for bribery and graft involving employee benefit plans which is limited to a maximum sentence of imprisonment of 3 years under existing law. Approximately 700,000 employee pension plans regulated under ERISA provide retirement coverage and benefits to more than 87 million participants. During the period of high interest rates and yields formerly available from certain financial institutions, some pension plans were victimized as the result of criminal activity which took advantage of plan managers' desires to maximize the return on plan investments. In the largest employee pension kickback case prosecuted by the Federal Government to date, for example, a pension plan investment advisor and a financial broker were convicted of RICO based on violations of section 1954. The defendants had received $14 million of undisclosed fees from banking institutions in which they had invested $100 million of union-sponsored pension plan monies in certificates of deposit. United States v. Schwimmer, 924 F.2d 443 (2d Cir. 1991). The investment advisor was sentenced to 10 years' imprisonment because the transactions were successfully prosecuted under RICO. However, if the defendant had completed a criminal transaction of similar size and economic impact, but without engaging in the pattern of racketeering acts required for RICO, he would not have received an equivalent sentence under the existing penalty for bribery and graft because the maximum penalty for a violation of section 1954 is limited to 3 years' imprisonment.

More than 5.3 million employee welfare benefit plans provide employees and their families with assistance for accident, disability, unemployment, scholarships, children's day care centers, housing assistance, prepaid legal service, and health care, among other benefits. Of special concern are the activities of corrupt operators of so-called multiple employer welfare arrangements (MEWAs) which purport to provide insurance-type benefits to small employers seeking to lower the high cost of maintaining health care for their employees. See 29 U.S.C. § 1002(40) (definition within ERISA of entity subject to state insurance regulation). In September 1991 the General Accounting Office reported that since 1988 MEWA operators had failed to pay $132 million in claims for approximately

400,000 workers and their beneficiaries and that state insurance regulators had been able to obtain payment of only $10 million of those claims. Corrupt MEWA operators who were prosecuted for federal crimes between 1990 and 1995 were responsible for approximately $150 million in unpaid medical claims by employees and their families. Although the HIPAA added new crimes which reach health care fraud and other crimes directed at health care benefit programs, including privately funded plans and MEWAs regulated by ERISA, no bribery or graft offense was included in the HIPAA. Therefore, Section 1954 remains the only federal offense proscribing such criminal activity for employee health and welfare benefit plans subject to ERISA.

Moreover, as the President's Commission on Organized Crime explained in its 1986 report on labor and management racketeering entitled The Edge: Organized Crime, Business, and Labor Unions 12-15, 99-102 (1986), the corruption of labor unions and employee benefit plans by organized crime has involved the criminal participation of persons other than those occupying official positions inside an employee benefit plan or within the organizations which sponsor or serve such plans. Organized criminal groups can control employee benefit plans by their domination of particular affiliated labor unions and businesses and derive unlawful profits in specific transactions. Additional means are needed to punish the organized crime member or other person who exercises de facto control over plan affairs without proof that benefit plan insiders and other persons described in the four classes of prohibited receivers in section 1954(1) through (4) shared in the prohibited receipt of the bribe or graft payment. Furthermore, amendments of section 1954 are needed to facilitate the prosecution of attempted violations of the statute detected in undercover investigations in which federal investigators pretend to occupy benefit plan-related positions in anticipation that corrupt individuals will offer or solicit bribes and other prohibited payments to influence benefit plan operations.

New 18 U.S.C. § 1954(a) and (b): Penalties for Bribery and Graft

Section 5053 adds new subsections (a) and (b) of section 1954 and makes a distinction between the penalties for bribery ("with the intent to be influenced") and graft ("because of") similar to the grading under 18 U.S.C. § 201. The legislation provides that a more severe penalty could be imposed if the government proves that the thing of value given or received is intended as a bribery "quid pro quo" for the action taken in relation to a plan matter. A more severe penalty of imprisonment is justified where the corrupt payment in violation of section 1954(a) is the primary motivation for the conduct affecting the operation of the plan as contrasted with gratuities outlawed by section 1954(b) which do not require that the payment be made in contemplation of any specific favor affecting the plan.

Under the federal sentencing guidelines in effect since November 1987, the sentence for conviction of a section 1954 offense is increased on the basis of the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater. U.S.S.G. § 2E5.1(b)(2) (1997). For example, in the case of a bribery violation of section 1954 in which a fiduciary, such as a trustee of an employee benefit plan, is paid or derives a gross benefit from his crime valued at more than $120,000, the sentencing guidelines call for a sentence range of 30 to 37 months' imprisonment for a first offender. Consequently, the enhancement becomes meaningless when the value or resulting benefit a defendant receives from the bribery or kickback exceeds $120,000 because the maximum sentence of 36 months' imprisonment may not be further increased. Under existing law, a second offender would only have to receive or benefit by $70,000 in order to reach the same range. U.S.S.G. § 2F1.1(b)(1)(G) and (H) (1997). In contrast, under the new penalty structure proposed by the amended section 1954, a first offender who is a plan fiduciary could be paid or receive value worth $80 million as a bribe before his potential sentence would reach the new statutory maximum of 10 years' imprisonment. In the case of graft, or what the sentencing guidelines describe as the "receipt of a gratuity not requiring a specific understanding that the payment will corruptly affect an action of the recipient," the existing statutory maximum of 36 months' imprisonment is not reached until a first offender who is a plan fiduciary has received or agreed to accept between $800,000 and $1.5 million. U.S.S.G. § 5E5.1(a)(2) and 2F1.1(b)(1)(L) (1997). Under the amended section 1954, a gratuity to the same individual would have to reach a value of $20 million before a sentence to the statutory maximum of 60 months could be imposed.

New Section 1954(a)(1)(E): Prohibited Receivers Who Exercise De Facto Authority

Proposed section 1954(a)(1)(E) would add a new class of prohibited receivers as statutory principals in order to expressly proscribe corrupt payments to persons "with actual or apparent influence or decision-making authority in regard to such [employee benefit] plan." Corrupt payments which adversely affect the operation of employee pension and welfare benefit plans are sometimes received by persons who have actual or apparent influence or decision-making authority with respect to plan matters, but who do not occupy the positions described by current law for prohibited receivers. For example, organized crime members or associates who effectively dominate or control the operation of an employee benefit plan and can influence or control plan investments and other expenditures are not subject to prosecution under the existing section 1954 for receipt of corrupt payments unless they occupy a position described in parts (1)-(4) of the statute or share in the receipt of the corrupt payment with some other person who does occupy the statutory position in relation to the plan such as trustee, administrator, employer with covered employees, union official with covered members, or service provider to the plan.

New Section 1954(a)(3) and (b)(3): Attempted Violations

Proposed subsections (a)(3) and (b)(3) of new section 1954 would punish an attempt to violate section 1954 to the same degree as the completed operative crime. Under existing law, an offer to pay, or an agreement to accept, a bribe or prohibited gratuity is punished to the same degree as the actual payment or acceptance of the prohibited thing of value. However, section 1954 currently contains no proscription of an attempted violation in which the bribery or graft offense is not completed because the intended recipient does not in fact occupy a prohibited position or status in relation to the plan. Under existing law, the completed payment of a bribe to a federal law enforcement officer, who as part of an undercover investigation or "sting operation" only pretends to be a prohibited recipient subject to section 1954, does not violate section 1954 because the undercover officer does not hold a status required of prohibited recipients.

The amendment would prohibit a defendant's attempt to pay or receive a prohibited thing of value, provided he had the mental state required for the completed crime, in situations where another participant in the transaction only appears to hold the required status or to exercise influence or decision-making authority over the plan because that person was, or was cooperating with, a federal law enforcement officer. That is, when a defendant offers or pays value to a person whom he believes to be in a position to corruptly influence the operation of a pension or welfare benefit plan, or the operation of an entity which the defendant believes to be an employee benefit plan in fact, such conduct exemplifies the same degree of culpability in the defendant and potentially poses the same danger to the integrity of the benefit plan industry as if a scheme to compromise the loyalty of a real official of an actual employee benefit plan had been attempted.

New Section 1954(a) and (b): Third Party Payments

Proposed subsections (a) and (b) of the amended section 1954 would proscribe receipt of value "personally or by any other person" in the manner of the federal bribery and graft statute governing public officials and witnesses, 18 U.S.C. § 201. This language would also codify those judicial decisions interpreting section 1954 which hold that payments to third parties outside the class of recipients described in section 1954 are prohibited if connected to a statutory receiver's actions, decisions, or duties pertaining to plan operations. United States v. Robilotto, 828 F.2d 940 (2d Cir. 1987), holding that a bank's delivery of loans to a third party at the request of a plan official was a prohibited thing of value to the official when connected to the official's decision to deposit plan funds at the bank.

New Section 1954(a)(1) and (2): Intent of Bribe Maker and Bribe Taker

The structure of new subsections (a)(1) and (a)(2) also makes clear that mutuality of intent between the maker and the taker of the payment is not required. The revised section 1954 would eliminate any ambiguity in this area by expressly requiring that the mental state of the maker of a bribe payment is an "intent to influence" the recipient. Section 1954 currently prohibits a payer's giving of things of value "prohibited by this section" which literally refers only to a recipient's "intent to be influenced." In one case, an indictment charging an employer-payer "with intent to influence" the recipient was dismissed for failure to state a crime under section 1954. The "recipient" was a union official cooperating with the Federal Bureau of Investigation when the offense occurred; therefore the indictment had not charged the recipient's "intent to be influenced." The court explained that the phrase "prohibited by this section" referred back to the operative elements imposed on the recipient, and therefore the Government must charge and prove the recipient's corresponding "intent to be influenced." Although published cases refer to prosecutions based on an "intent to influence" the recipient, they do so without discussion of the statutory structure. See, e.g., United States v. Provenzano, 615 F.2d 37, 43-44 (2d Cir. 1980) (affirming conviction for conspiracy to pay plan trustee); United States v. Berger, 433 F.2d 680 (2d Cir. 1970) (affirming conviction for conspiracy to pay a union official and plan trustee); United States v. Corrado, 307 F. Supp 513, 514 (S.D. N.Y. 1969) (conspiracy to influence pension plan agent).

New Section 1954(c)(1): Exception for Good Faith Compensation Involving Plan Administration

Proposed subsection (c)(1) would continue the exception and defense under existing law for "the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties" as a person described in the class of receivers. See United States v. Schwimmer, at 924 F.2d 448 (upholding the section 1954 conviction of an advisor to a benefit plan who concealed from the plan his outside compensation in connection with plan investments despite his assertion of the good faith compensation defense). However, in order to conform the defense to the amendment in section 1954(a)(E), prohibiting the payment of bribery or graft to persons having actual or apparent influence or decision-making authority in regard to a benefit plan, section 1954(c)(1) expressly includes such persons within the list of prohibited recipients who may assert the defense of good faith compensation.

New Section 1954(c)(2): Good Faith Defense Involving Settlor Activity

Proposed subsection (c)(2) is new and adds an exception for the payment to or acceptance by an employee benefit plan sponsor of any thing of value in good faith relating to his decision or action to establish, terminate, or modify the governing instruments of an employee benefit plan under circumstances which do not violate title I of ERISA, or any regulation or order promulgated under title I of ERISA, or any other law governing the plan. The purpose of the exception is to make clear that expansion of the class of prohibited recipients under the amended section 1954 would not result in the punishment of certain payments made to or received by plan sponsors acting as "settlors" who establish, terminate, or modify an employee benefit plan in good faith without violating their responsibilities under law. The statute will also except from its coverage payments to or acceptance by persons acting on behalf of the employee benefit plan sponsor of things of value relating to the sponsor's settlor decisions. A plan sponsor is defined by ERISA as the employer or employee organization which establishes or maintains the plan, or the entity created by two or more employers or by employers and employee organizations acting jointly to establish or maintain the plan. 29 U.S.C. § 1002(16)(B). So-called settlor functions include decisions to establish or terminate employee benefit plans as well as decisions concerning plan design as contrasted with the management and administrative operation of an employee benefit plan which are subject to the fiduciary rules in ERISA. Generally, for purposes of ERISA a fiduciary is anyone who exercises any discretionary authority or control over plan assets or who renders investment advice for a fee. Therefore, an employer or other person acting as a settlor would not owe a fiduciary duty to the plan participants. For example, an employer's acceptance of a reversion of pension plan assets, beyond those needed to guarantee the payment of vested benefits to plan participants, following the employer's termination of his employees' pension plan would not violate section 1954 if the termination were otherwise accomplished in good faith and without violating the requirements of ERISA and other law governing the plan.

On the other hand, the exception would not apply, and prosecution under section 1954 would be possible, with respect to the prohibited payment of things of value to, or receipt by, a plan sponsor because of the sponsor's decision to establish, terminate, or modify the plan in a manner which demonstrated a knowing or reckless violation of a fiduciary duty or other responsibility under title I of ERISA in bad faith. For example, the receipt of a thing of value by an employer in return for terminating an ERISA pension plan without safeguarding the benefits of vested beneficiaries of the plan, under circumstances which demonstrated that the employer knowingly or recklessly disregarded the illegality of such conduct in bad faith, would violate section 1954. Similarly, an employer's termination of his employees' pension plan and substitution of an insurance contract for the payment of future benefits would violate section 1954 if it were done in return for the employer's bad faith receipt of commissions or other compensation which the employer knew were paid or received in violation of state insurance or trust law--even if the plan termination was lawfully executed under ERISA. Compensation for goods delivered or services performed in connection with transactions which involve plan operations, but which do not involve the establishment, termination, or modification of the plan, would continue to be governed by the exception in new subsection (c)(1).

SEC. 5054. INCREASED PENALTY FOR EMBEZZLEMENT AND THEFT FROM EMPLOYEE BENEFIT PLANS AND CONNECTED FUNDS.

Section 5054 increases the maximum imprisonment for embezzlement and other forms of theft from employee pension and welfare benefit plans subject to title I of ERISA, and their connected funds, in violation of 18 U.S.C. § 664, from 5 to 10 years' imprisonment. The Health Insurance Portability and Accountability Act of 1996 effectively increased the maximum penalty to 10 years' imprisonment for embezzlement and theft from privately funded health plans subject to ERISA and 18 U.S.C. § 664 by enacting a new crime at 18 U.S.C. § 669 which punishes embezzlement and theft from health care benefit programs. The enhanced penalty for embezzlement or theft in violation of 18 U.S.C. § 664 will extend similar deterrence and protection to employee pension benefit plans on which working and retired Americans rely for retirement income. Moreover, to the extent that the new offense at 18 U.S.C. § 669 does not afford the participants of employee health care plans the same protection they enjoy under the well-established case law governing 18 U.S.C. § 664, prosecutors will have the option of proceeding under the more established offense with no loss of penalty exposure for the defendant.

The Federal sentencing guidelines currently treat a "union or employee pension fund" or "any health, medical, or hospital association" providing medical benefits for "large numbers of persons" as a "financial institution" from which the theft of more than $1 million warrants an enhanced sentence. See U.S.S.G. § 2B1.1(b)(6)(B) (1997) and Application Note 9. Consequently any theft by a first offender, even by a non-fiduciary, of more than $1 million from an employee pension or welfare (health) benefit plan serving a "large number of persons" results in a sentencing range of 51 to 63 months' imprisonment. Under existing law that range meets and exceeds the maximum statutory sentence of imprisonment (60 months) permitted by section 664. In view of the large amounts of monies to be protected in employee benefit plans and the opportunities for larceny of such funds, the maximum penalty of imprisonment should be greater. Under the amended penalty and existing sentencing guidelines, a non-fiduciary first offender would not reach the maximum penalty of 120 months' imprisonment until he or she had stolen more than $80 million from a pension or health plan serving a "large number of persons" -- assuming that more than minimal planning was required to accomplish the crime. See U.S.S.G. § 2B1.1(b)(1) (1997).

SEC. 5055. PAYMENTS OF THINGS OF VALUE TO PERSONS WITH ACTUAL OR APPARENT INFLUENCE OR DECISION-MAKING AUTHORITY.

Criminal prosecutions in the labor-management field during the past thirty years have demonstrated that certain labor unions and their affiliated employee benefit plans in particular industries have been dominated and controlled by organized criminal groups. In its report on labor-management racketeering and its effects on the economy, the President's Commission on Organized Crime concluded that, in addition to the traditional practice of using dominated labor unions to exact payoffs from employers for labor peace, organized crime has used labor unions as a tool to obtain monopoly power in certain markets and to give mob-run businesses an "edge." By manipulating the supply and the cost of labor, organized crime can raise its competitor's cost, force legitimate businesses to deal with mob-run companies, and enforce price fixing, bid-rigging, and other anti-competitive practices throughout an industry.

> In many labor racketeering schemes legitimate businesses have willingly cooperated with organized crime and have derived benefits such as decreased labor costs, inflated prices, or increased business in a market. . . . Through its domination of select labor unions in major metropolitan areas, organized crime at various times has influenced a number of markets in construction, wholesale and retail meat processing, trucking, garbage carting, and waterfront trade. This type of control has enabled the mob to determine who will do business, to allocate territories and set prices, to decide when and where people will work, and even to dictate wages and benefits. This situation makes a mockery of free competition and collective bargaining.

Report of the President's Commission on Organized Crime, The Edge: Organized Crime, Business, and Labor Unions 1-3 (1986).

Consequently, when mob-favored businesses benefit from organized crime groups' extortion and use of other anti-competitive practices against their economic competitors in the marketplace, mob-favored companies may willingly distribute a share of the resulting benefits to their organized crime accomplices without being subjected to fear and coercion required for the prosecution of extortion. When such mob-favored companies obtain labor peace from mob-dominated unions, there is also likely to be no need for corrupt payments to officials of labor unions which might otherwise organize and fairly represent employees. Labor peace can be achieved for such businesses simply by direction of the organized crime member or associate who controls the particular labor organization and receives financial payment and support from the mob-favored employer. But, without the transfer of things of value to an officer or employee of a labor organization or other representative of employees, no violation of the federal labor-management bribery statute can be proven even though labor-management relations are corrupted to the same degree as if a labor union official had been corruptly paid.

Section 5055 would amend Section 302 of the Labor-Management Relations Act of 1947 (Taft-Hartley Act), 29 U.S.C. § 186, and add a new subsection (a)(5) to the existing statute . The amendment would punish bribery payments, by employers and other persons acting in the interest of employers, to persons with actual or apparent influence or decision-making authority in regard to a labor organization whether or not the recipient of the corrupt payment was a labor union official or representative of employees who shares in the payment as is required under existing law.

SEC. 5056. RECEIPT OF PAYMENT BY PERSON WITH ACTUAL OR APPARENT INFLUENCE OR DECISION-MAKING AUTHORITY.

Section 5056 would add new subsection (b)(2) to Section 302 of the Taft-Hartley Act, 29 U.S.C. § 186, in order to make it unlawful "for any person with actual or apparent influence or decision-making authority in regard to a labor organization" to receive or accept such bribery payments "with intent to be influenced with respect to such person's duties, actions, or decisions relating to any question or matter concerning the labor organization." Existing subsection (b)(2) would be renumbered as subsection (b)(3).

The amended subsection (b)(2) would prohibit transactions which financially benefit non-union officials because of their apparent or de facto influence or control over labor-management relations in situations where persons occupying official positions within a labor union have not participated, shared in or benefitted from the financial transaction, but merely follow the dictates of the third-party exercising de facto influence or control over the labor organization. Report of the President's Commission on Organized Crime, supra. It should be noted that Congress has already indicated that persons who have been convicted of bribery and other crimes are barred from serving "in any capacity, other than in [a] capacity as a member . . . that involves decision making authority" with respect to a labor organization (29 U.S.C. § 504(a)(5)). See Sec. 803 of Pub.L. 98-473, 98 Stat. 2133 (1984). Thus, this amendment would only outlaw corrupt payments to and receipts by persons whose criminal conduct Congress has already mandated shall disqualify them from running labor unions, such as organized crime figures who dominate or corruptly influence the organizations whom these statutes are designed to protect

Moreover, this amendment would also codify existing law with respect to circumstances where a third person, at the direction of the union official and statutory receiver whose favor is sought, receives a financial thing of value, but without any receipt of financial value by the union official. Holding that the Taft-Hartley Act is designed to protect employees and employers from the misuse of power by corrupt union officials or employee representatives, some judicial decisions interpreting 29 U.S.C. § 186 apply a "third party beneficiary" theory to prohibit such transactions. See United States v. DeBrouse, 652 F.2d 383, 387 (4th Cir. 1981) (affirming conviction of union official who requested that an employer pay wages to a third party as a "no-show" employee); United States v. Carlock, 806 F.2d 535 (5th Cir. 1986)(union official's power to direct employer payments for bogus services to third parties upheld as a prohibited thing of value received by the union official) . However, the amendment would also eliminate confusion about when the statute penalizes such third-party benefits. In United States v. Cervone, 907 F.2d 332, 339, 346-47 (2d Cir. 1990), the court of appeals reversed the conviction of a union official who had requested that an employer pay off a rival labor representative in order to ensure the official's corrupt control of labor relations at a particular job site. Although the court acknowledged that DeBrouse and Carlock, supra, had upheld Taft-Hartley convictions in relation to third-party payments to friends and relatives of the labor official, it declined to adopt a theory of intangible benefits to the union official noting that the statute contemplated only the transfer of "tangible items or at least valuable services" to the statutory receiver.

SEC. 5057. ATTEMPT TO VIOLATE TAFT-HARTLEY SECTION 302.

Section 5057 would amend Section 302(d)(2) of the Taft-Hartley Act, 29 U.S.C. § 186(d)(2), to punish any person who "willfully attempts to pay, lend, deliver, receive, or accept a thing of value in violation of [section (d)(2)]." This provision is intended to cover attempts to do the operative conduct prohibited by subsection (d)(2) and is punishable to the same degree as the completed conduct itself. The amendment does not affect any part of subsection (d)(l) which governs prohibited things of value "received and used" by labor organizations, employee benefit trust funds, and labor-management committees as contrasted with individuals or other persons.

The new provision, however, will prohibit attempts to pay or receive a prohibited thing of value, done with the requisite state of mind for completion of the crime, in situations where another participant in the transaction only appears to hold the required status or exercise influence or decision-making authority over the union because that person was, or was cooperating with, a federal law enforcement officer. Under existing law, for example, the completed payment of a corrupt employer's bribe to a Federal law enforcement officer who, during an undercover investigation or "sting operation" only pretends to be a union official, does not violate section 29 U.S.C. § 186 because the undercover investigator is not operating as "representative of employees" and does not occupy the status of "officer or employee of a labor organization" required for completion of the crime. Moreover, a corrupt union official's bribe solicitation of a federal law enforcement officer who merely pretends to be an employer or person acting in the interest of an employer is not a completed "request" for payment in violation of the statute because the undercover officer is not in fact an employer or person acting in the interest of an employer covered by the statute. This amendment will permit the prosecution of the corrupt participants in such "sting" transactions as attempts to violate the statute.

SEC. 5058. FORFEITURE FOR RETIREMENT OFFENSES.

Section 5058 adds to employee pension plans regulated by ERISA and other retirement arrangements protection which is similar to that given to privately funded employee health care plans by the HIPAA. The HIPAA amended 18 U.S.C. § 982 and made property that constitutes, or is derived, directly or indirectly, from proceeds traceable to the commission of a federal health care offense subject to forfeiture following conviction of the offense. For example, the HIPAA made the proceeds of embezzlement or theft from an employee health plan regulated by ERISA, or of bribery or graft affecting such a health plan, subject to criminal forfeiture without proof that the proceeds were also used in violation of the money laundering statute (18 U.S.C. §§ 1956 and 1957) or were part of a pattern of racketeering activity in violation of the RICO statute (18 U.S.C. § 1961, et seq.).

This section similarly would make the proceeds of any embezzlement or theft from an employee pension benefit plan regulated by ERISA, or bribery or graft effecting such a pension plan, directly subject to forfeiture without proof of money laundering or RICO crimes. It would also make the proceeds of the new retirement fraud crime and other crimes involving retirement arrangements subject to forfeiture. A "retirement offense" whose proceeds are subject to forfeiture is defined in terms of offenses relating to a retirement arrangement described in the proposed retirement fraud crime (18 U.S.C. § 1348) which would protect both employee benefit plans subject to ERISA and other forms of tax-advantaged retirement arrangements. The class of retirement offenses would include a violation of, a criminal conspiracy to violate, or solicitation to commit a crime of violence relating to a retirement arrangement involving a violation of section 664, 1001, 1027, 1341, 1343, 1348, 1951, 1952 or 1954 of Title 18, United States Code; or sections 411, 501, and 511 of ERISA (29 U.S.C. §§ 1111, 1131 and 1141).

Section 5058 also provides for civil forfeiture of the proceeds of these same crimes by amending 18 U.S.C. § 981 to include "retirement offenses." This amendment permits the proceeds of a retirement offense to be forfeited in the event that criminal prosecution is not warranted, or if a criminal defendant is a fugitive, or dies, and no prosecution is possible. In such cases, civil forfeiture will be available to recover the proceeds of the offense.

SEC. 5059. USE OF FORFEITED FUNDS TO PAY RESTITUTION TO CRIME VICTIMS AND REGULATORY AGENCIES.

Section 5059 amends the civil forfeiture statute, 18 U.S.C. § 981, to make it clear that the forfeited property may be used to restore property to victims of the offense giving rise to the forfeiture. The civil statute, 18 U.S.C. § 981, explicitly authorizes the use of forfeited funds to restore property only in cases based on the offenses set forth in § 981(a)(1)(C) and (D), most of which involve financial institution fraud. The restitution provisions were enacted as part of the Financial Institutions Reform and Recovery Act (FIRREA) of 1989. At the same time, the criminal statute, § 982, permits forfeited funds to be restored to victims in virtually all instances. See 21 U.S.C. § 853(i) incorporated by reference in § 982(b). Taken together, these statutes imply that the Attorney General may not use forfeited funds to restore property to victims in other civil cases -- such as consumer fraud and money laundering. These amendments negate that implication by making it clear that the Attorney General may use the forfeiture laws to restore property to victims in all cases.

First, subsection (e)(6), which presently authorizes the payment of restitution to victims of any crime listed in § 981(a)(1)(C), is expanded to cover all offenses for which forfeiture is authorized under § 981. In the case of money laundering offenses, this includes the offense that constituted the underlying "specified unlawful activity."

Second, subsections (e)(3), (4) and (5), which authorize restitution to financial institutions in cases governed by § 981(a)(1)(C), is revised to take into account the fact that not all financial institution offenses are covered by subsection (a)(1)(C). See subsection (a)(1)(A) relating to money laundering offenses in which the underlying unlawful activity may be a financial institution offense. Thus, the introduction to each subsection, respectively, is amended to refer to "property forfeited in connection with an offense resulting in pecuniary loss to a financial institution or regulatory agency" regardless of what statutory provision is employed to accomplish the forfeiture.

Third, a similar amendment is made to subsection (e)(7) to reflect that not all crimes relating to the sale of assets by receivers of failed financial institutions are covered by subsection (a)(1)(D), see subsections (a)(1)(A) and (E), and to eliminate the need to revise the cross references in this section in the future each time the various subparagraphs of subsection (a)(1) are amended or redesignated.

SEC. 5060. VICTIM RESTITUTION IN CRIMINAL FORFEITURES.

Section 3060 establishes procedures in 21 U.S.C. § 853 for criminal forfeiture cases in which there is also the potential for court-ordered restitution pursuant to the Victim Witness Protection Act (18 U.S.C. §§ 3663-64). The criminal forfeiture procedures of section 853 are incorporated by reference in 18 U.S.C. § 982. These procedures already provide for the judicial resolution of third-party legal interests in forfeited property (21 U.S.C. § 853(n)(1)) and for "remission" or "restoration" of forfeited property to victims by the Attorney General (21 U.S.C. § 853(i)(1)). The amendment adds a new subsection in section 853.

New paragraph (1) adds a provision for the government's voluntary dismissal of the criminal forfeiture proceeding in favor of court-ordered restitution where the defendant has no other assets with which to satisfy such restitution. However, it is not intended to allow for dismissal of forfeiture proceedings in favor of restituition to a Federal agency victim where Congress has indicated its intent that forfeiture be pursued in order to channel proceeds back into law enforcement efforts to combat fraud against Federal agencies. It will also prohibit defendants from using forfeitable property to satisfy restitution orders obtained in criminal prosecutions where the defendant has additional assets that are not forfeitable and effectively requires a defendant with non-forfeitable assets to use those assets to satisfy the restitution order, not the property that is he subject of the criminal forfeiture.[8] However, also makes clear that the government can use criminal forfeiture procedures -- including seizure warrants and restraining orders not available under the restitution statutes -- to recover and preserve forfeitable property, and then can move to dismiss the criminal forfeiture proceeding when necessary to make court-ordered restitution possible.

Because this section applies only to court-ordered restitution pursuant to the Victim Witness Protection Act in criminal proceedings, a defendant may use his property which is subject to forfeiture in order to make restitution to the victim(s) of his crime pursuant to an administrative order or civil judgment in favor of such victim(s) obtained in a parallel proceeding. For example, an employee benefit plan, a participant or fiduciary of such plan, and the United States Department of Labor, have standing to seek restoration of losses incurred by an employee benefit plan or its participants as part of civil remedies in section 502 of ERISA, 29 U.S.C. § 1132. Therefore, this section would permit such plaintiffs to pursue their remedies under ERISA with respect to a defendant's conduct, which had also

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[8] This preserves the rule in existence before the enactment of the mandatory restitution statute in 1996, see United States v. Various Computers, 82 F.3d 582 (3rd Cir. 1996) (no double jeopardy violation to require defendant effectively to pay twice by forfeiting proceeds of crime and paying restitution to the victims), and negates any suggestion that the enactment of § 3663A provides a windfall to defendants by allowing defendants to pay restitution using assets that have been seized or restrained for forfeiture.

resulted in criminal prosecution and forfeiture proceedings against criminal proceeds, and thereafter satisfy a civil judgment of restitution from the defendant's property which would otherwise be subject to forfeiture. Of course, in the case of civil restoration of losses to victims by the Department of Labor and/or other federal agencies, it is anticipated that the forfeiture of criminal proceeds and the conduct of civil restoration actions would be coordinated in a manner which does not diminish either restoration of victims' losses or forfeiture of criminal proceeds from available assets of the criminal defendant.

New paragraph (2) provides that if the government does forfeit the property and the defendant is unable otherwise to satisfy a criminal restitution order, the government must remit or restore the forfeited property to the victims pursuant to section 853(i)(1) as a first priority after deduction of the costs of the forfeiture. However, the property may not be remitted or restored to victims pursuant to section 853(i)(1) until the ancillary proceeding has been completed pursuant to section 853(n) to resolve the legal interests of third parties in the property and establish clear title for disposition. At that point, the government may also ask the court to appoint a special master to assist in identifying and distributing the property to victims, or take any other action that facilitates the process of providing restitution to the victims.[9]

New paragraph (3) defines the term "victim" for purposes of the section as a person not having the requisite legal interest in the forfeited property for third party standing and recovery under section 853(n) who may nevertheless be entitled to recovery from the forfeited funds pursuant to the Department of Justice regulations at 28 C.F.R. Part 9.8 governing the remission and restoration of forfeited property to victims of the offense underlying the forfeiture or related offenses. Therefore, an employee benefit plan, its fiduciaries or participants, and other victims of crimes whose proceeds were

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[9] Generally, victims of fraud and other financial crimes do not have standing to file a claim in the ancillary proceeding even if they can trace their interests to the property subject to forfeiture. That is because a person who voluntarily transfers his interest in property to another is no longer the owner of that property and thus does not have the requisite "legal right, title or interest." See United States v. BCCI Holdings (Luxembourg) S.A., 46 F.3d 1185 (D.C. Cir. 1995), cert. denied, 115 S. Ct. 2613 (1995) (crime victims are general creditors who lack standing to file claims in the ancillary proceeding); United States v. $3,000 in Cash, 906 F. Supp. 1061 (E.D. Va. 1995) (same for civil forfeiture); United States v. $79,000 in Account Number 2168050/6749900, 1996 WL 648934 (S.D.N.Y. 1996). The exception would be a person who is the victim of a theft or embezzlement whose property was taken from him without his consent. See United States v. Lavin, 942 F.2d 177 (3rd Cir. 1991). Thus, this section provides a source of relief for victims whose claims are not cognizable under § 853(n) but who nevertheless are entitled to restitution.

forfeited, for example, would be entitled to seek recovery of their losses from forfeited funds under this section by filing a petition with the Department of Justice in accordance with governing regulations. Moreover, forfeited funds would also be available using this procedure in order to satisfy a civil order of restitution in favor of such victims which had been obtained by the United States Department of Labor as part of its parallel remedies in favor of such victims under title I of ERISA.

SUBTITLE G – ENVIRONMENTAL CRIMES AND ENFORCEMENT ACT.

SEC. 5071. JOINT FEDERAL, STATE, AND TRIBAL ENVIRONMENTAL ENFORCEMENT.

This section authorizes Federal district courts to order convicted criminals to reimburse States, localities, and tribes for costs they incur during Federal environmental prosecutions. Moneys paid to State, local, and tribal governments under this provision may be used solely for environmental law enforcement. This reimbursement provision applies to prosecutions under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); the Toxic Substances Control Act (TSCA); the Rivers and Harbors Appropriations Act of 1899; the Federal Water Pollution Control Act; the Marine Protection, Research, and Sanctuaries Act; the Act to Prevent Pollution from Ships; the Shore Protection Act; the Safe Drinking Water Act; the Resource Conservation and Recovery Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Emergency Planning and Community Right-to-Know Act; the Federal Land Policy and Management Act; 49 U.S.C. § 5124, relating to transportation of hazardous materials; and 49 U.S.C. §§60123(a) and (b), relating to interstate pipelines.

This provision will strengthen criminal environmental enforcement by fostering cooperative efforts among Federal, State, local, and tribal officials. State and local inspectors and investigators often initiate what become Federal enforcement actions, and they continue to work with Federal officials through the trial stage. For example, State laboratories provide analytical support. Many State and local prosecutors participate in joint task forces and they sometimes are cross-designated as Special Assistant United States Attorneys. Although certain State courts may award costs to State and local governments in State criminal proceedings, Federal courts are not now expressly authorized to order such reimbursement. Providing for reimbursement will greatly increase the ability of State, local, and tribal officials to cooperate in Federal criminal proceedings to address violations of environmental law. Joint enforcement efforts also make the Federal program more responsive to local communities.

Because the court may order reimbursement only upon motion of the United States, the discretion of both the Federal prosecutor and the court will serve as a check against unwarranted cost awards. Allowable costs are limited to those incurred by a State, local, or tribal government or agency for assistance to the Federal government's investigation and prosecution of a case. Costs imposed on a defendant are payable directly to the State or local government in a manner analogous to the payment of restitution directly to the victims of a crime, thus obviating the need for a separate Federal fund or Federal administrator to collect and transfer the monies.

SEC. 5072. PROTECTION OF GOVERNMENT EMPLOYEES AND THE PUBLIC.

This section provides for enhanced punishment where a criminal violation of specified environmental laws directly or proximately causes serious bodily injury or death to any person, including any Federal, State, local, or tribal government official.

Police officers, firefighters, paramedics, and other public safety and public health personnel often are the first on the scene of an environmental crime. In their efforts to protect others from harm, they themselves may suffer serious injury or death resulting from other people's criminal mishandling of dangerous materials or failure to comply with their legal duty to notify the government of releases of dangerous substances. Members of the public can also be injured or killed as a result of environmental crimes.

This section will ensure that the criminals who cause this suffering will face an appropriately severe, enhanced punishment upon conviction. It does not establish a new or different crime, but instead provides for enhanced terms of imprisonment and enhanced fines for persons convicted of felony violations under specified Federal environmental laws where death or serious injury results. The laws covered by this provision are: the Federal Water Pollution Control Act; the Marine Protection, Research, and Sanctuaries Act; the Resource Conservation and Recovery Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Emergency Planning and Community Right-to-Know Act; and 49 U.S.C. § 5124. The section also provides for enhanced penalties for environmental misdemeanors under the Federal Insecticide Fungicide and Rodenticide Act and the Toxic Substances Control Act where death or serious injury results, thereby transforming those violations into felonies.

For enhanced punishment to be imposed, the underlying environmental crime must be the direct or proximate cause of serious bodily injury or death. The requirement of "direct or proximate" causation is in line with language used in other criminal provisions, see, e.g., 18 U.S.C. § 844 (personal injury resulting from arson), and limits the sentence enhancement to appropriate cases. Those who commit environmental crimes, for example, by illegally storing hazardous waste, are on notice that their actions may cause serious injury or death to other persons. Unlike existing endangerment provisions in certain environmental statutes that apply to threatened injuries, the new provisions require actual injury or death, but do not require that the defendant intend or know of the injury or death that the defendant's crime causes.

For the most part, the definition of "serious bodily injury" in subsection (c) follows similar definitions in 18 U.S.C. § 113 (assaults within maritime and territorial jurisdiction) and 18 U.S.C. § 1365(g)(3) (tampering with consumer products). The definition in subsection (c), however, does not include "substantial risk of death." In other words, actual serious bodily injury or death (not just the risk of injury or death) must occur for enhanced punishment to be imposed under this definition. It also includes "unconsciousness" within the definition of "serious bodily injury," thereby conforming to the definition of that term in the Federal hazardous waste laws at 42 U.S.C. § 6928(f)(6).

SEC. 5073. ESTABLISHMENT OF THE STATE, LOCAL AND TRIBAL ENVIRONMENTAL ENFORCEMENT TRAINING PROGRAM.

This section responds to the urgent need expressed by State, local, and tribal officials for additional Federal training on environmental criminal enforcement. It establishes within the Environmental Protection Agency a separate program dedicated to the training of State, local, and tribal law enforcement personnel in the investigation of environmental crimes.

States and local governments are undertaking an expanded role in environmental enforcement, not only of their own laws but also of Federal statutes pursuant to delegated authority. The Pollution Prosecution Act of 1990 mandated that EPA deploy 200 criminal investigators across the country and establish the National Enforcement Training Institute (NETI) to train State, local, and tribal law enforcement in safe and effective investigation of environmental crimes. This section will increase training for State, local, and tribal law enforcement officials and strengthen cooperative enforcement of the Nation's environmental laws. Under the mandate of the Pollution Prosecution Act of 1990, the Environmental Protection Agency has regularly trained State, local, and tribal investigators and regulatory personnel in courses conducted at the Federal Law Enforcement Training Center (FLETC) in Glynco, GA. The need and demand for such training, however, has been greatly increasing.

SEC. 5074. STATUTE OF LIMITATIONS.

Section 5074 provides for an extension of the statute of limitations where a violator has engaged in affirmative acts of concealment of specified environmental crimes.

As is the case for most Federal crimes, Federal environmental crimes are currently subject to a five-year statute of limitations, which runs from the time the offense is committed. 18 U.S.C. § 3282. Some environmental crimes, including some of the most egregious ones, involve affirmative acts of concealment by the wrongdoers. Criminals who are the most deceptive, and thus able to hide their wrongdoing the longest, are most likely to escape the legal consequences of their acts through expiration of the statute of limitations.

This section addresses this problem for a specified list of felony violations of environmental statutes by extending the limitations period for up to three years beyond the traditional five-year period when the defendant commits an affirmative act of concealment. In these circumstances, the limitation period extends to three years after discovery of the crime by the government. In no event does the limitations period extend beyond eight years after the offense was committed. This extended limitations period covers violations of various provisions under the Federal Water Pollution Control Act; the Marine Protection, Research, and Sanctuaries Act; the Act to Prevent Pollution from Ships; the Shore Protection Act; the Safe Drinking Water Act; the Resource Conservation and Recovery Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Emergency Planning and Community Right-to-Know Act; 49 U.S.C. § 5124; and 49 U.S.C. §§60123(a) and (b).

For example, if a violator committed an affirmative act of concealment and the environmental crime were not discovered until three, four, or five years after it was committed, this section would extend the statute of limitations to six, seven, or eight years after the crime was committed, respectively -- that is, up to three years after the time of discovery with an eight year cap. If a violator committed an affirmative act of concealment, but the crime were nevertheless discovered by any Federal, State, local, or tribal government agency immediately after it was committed, there would be no extension under this section, and the limitations period would be the five-year period running from the time the crime was committed. Similarly, where there was no affirmative act of concealment, the five-year period would apply and would run from commission of the crime. The burden rests on the government to prove an affirmative act of concealment under this section.

SEC. 5075. ATTEMPTS.

Section 5075 amends specified environmental statutes to add attempt provisions. Under these new provisions, any person who attempts to commit an offense shall be subject to the same penalties as those prescribed for the offense itself.

The rationale for these new attempt provisions is similar to that for comparable provisions in other Federal criminal statutes. Under these existing attempt laws, when law enforcement authorities uncover planned criminal activity and a substantial step is taken towards the commission of the crime, the crime can be stopped before it is completed and the perpetrator may still be prosecuted. For example, Federal law makes attempted bank robbery a crime, punishable the same as bank robbery. 18 U.S.C. § 2113(a). Similar attempt provisions exist for numerous other crimes, such as uttering a Treasury check with forged endorsement (18 U.S.C. §§ 510); bank fraud (18 U.S.C. § 1344); damage to government property (18 U.S.C. § 1361); obstruction of court orders (18 U.S.C. § 1509); and obtaining mail by fraud or deception (18 U.S.C. § 1708).

There has been only one attempt provision in Federal environmental criminal enforcement statutes. As a result, Federal agents can be placed in the untenable situation of choosing between obtaining evidence necessary for a criminal prosecution and preventing pollution from occurring. For example, without an attempt statute, if agents stop a would-be environmental criminal from dumping hazardous waste, the perpetrator cannot be prosecuted for illegal dumping because no environmental crime has occurred. Only if the agents allow the dumping to occur, with the possibility of damage to the environment and risk to the public health, could the perpetrator be prosecuted for illegal dumping. These attempt provisions allow law enforcement personnel to stop environmental crimes before they are completed and still bring the wrongdoer to justice.

Attempt statutes serve another very important purpose in law enforcement. Undercover operations are widely recognized as a valuable tool to ferret out serious crimes. Where dangerous substances are involved, however, undercover operations carry the risk that the government will lose control of the substances and the public subsequently will be exposed to them. Attempt provisions facilitate undercover investigations by allowing prosecution where a defendant purposely engages in conduct that would constitute the crime if the circumstances were as the defendant believes them to be. Where feasible, attempt provisions allow the government to substitute benign substances for the substances that make the conduct illegal but still prosecute for attempt the person who believes he is engaging in illegal conduct.

The new language added by Section 5075 is analogous to the attempt provision contained in the Federal drug laws. 21 U.S.C. § 846. An attempt to commit the conduct constituting one of specified environmental criminal offenses is punished in the same manner as the offense itself.

SEC. 5076. ENVIRONMENTAL CRIMES RESTITUTION.

Section 5076 amends the Federal restitution statutes to clarify the authority of the courts to provide for restitution to victims in environmental crimes cases.

Existing restitution statutes provide for restitution for bodily injury and property loss. Those categories of restitution address the harm suffered by victims of violent and economic crimes and are intended to make them whole for their physical injuries and pecuniary damages. The victims of environmental crimes also may suffer physical injuries and pecuniary losses. Indeed, environmental crimes often are economic crimes. At the same time, however, an environmental crime also may cause more widespread and longstanding damage, with the harm inflicted on all members of a community or communities affected by the environmental pollution or damage.

Section 5076 clarifies the existing authority of the courts by including environmental offenses among the crimes explicitly enumerated in the restitution statutes. It makes plain that the costs of removal and remediation of environmental pollution or damage, and required restoration of the environment, are included within the coverage of that statute, to the extent of the pollution or damage resulting from the offense. This section recognizes that environmental crimes can harm entire communities and clarifies that the definition of "victim" in the restitution statutes may include all members of a community or communities, whether or not they are individually identified.

SEC. 5077. PREVENTION OF ALIENATION OR DISPOSAL OF ASSETS NEEDED TO REMEDY ENVIRONMENTAL HARMS CAUSE BY ENVIRONMENTAL CRIMES.

Section 5077 authorizes the government, after notice to the defendant, to seek an order from the court to prevent a defendant charged with an environmental crime from dealing with its assets in a manner that would impair its ability to pay for the harm caused by its environmental violations. The government bears the burden of establishing the costs involved, and the defendant may avert such an order by showing that it retains sufficient assets to cover those costs or that it already has paid such costs. The Federal Rules of Criminal Procedure govern any proceedings under this section for an order to prevent the disposal or alienation of assets. Such an order expires at the point of sentencing, or of dismissal or acquittal of the prosecution.

This section expressly codifies the authority already available to a court under the All Writs Act, 28 U.S.C. § 1651. It will prevent a defendant, during the pendency of criminal environmental charges, from concealing, disposing of, or otherwise dealing with its assets in such a manner that, if it is convicted and is ordered to pay the costs of the harm caused by its actions, sufficient assets no longer will be available for that purpose. If such authority were not available, defendants could easily thwart the purposes of the restitution provisions of this act and those found elsewhere in the law. Similar authority, to prevent the disposal of assets to pay for violations of law, can be found at 18 U.S.C. § 1345

(Injunctions against Fraud). At the same time, the section allows a defendant that can show that defendant's other assets will be sufficient to pay for such harm, or that such costs already have been paid, to avoid being burdened by such an order.

SUBTITLE G – HATE CRIMES PREVENTION ACT.

SEC. 5081. SHORT TITLE.

The Act may be cited as the "Hate Crimes Prevention Act of 1999."

SEC. 5082. FINDINGS.

Congress finds that violence motivated by actual or perceived race, color, national origin, ethnicity, religion, sexual orientation, gender or disability of the victim poses a serious national problem; that existing Federal law is inadequate; and that such violence affects interstate commerce. Congress also finds that while state and local prosecutors are now and will continue to be responsible for prosecuting the vast majority of violent crimes, Federal jurisdiction over certain bias-motivated crimes is necessary to supplement state and local jurisdiction and assure justice in every case.

SEC. 5083. DEFINITION OF HATE CRIME.

This section defines "hate crime" for purposes of the Act as that used in section 280003(a) of the Violent Crime Control and Law Enforcement Act of 1994 (28 U.S.C. 994 note)

SEC. 5084. PROHIBITION OF CERTAIN ACTS OF VIOLENCE.

Section 5084 leaves 18 U.S.C. 245(b)(2) unchanged. That provision prohibits the intentional interference, or attempted interference, with a person's participation in one of six specifically enumerated 'federally protected activities' on the basis of the person's race, color, religion, or national origin. These activities are: (A) enrolling in or attending a public school or public college; (B) participating in or enjoying a service, program, facility or activity provided or administered by any state or local government; (C) applying for or enjoying employment; (D) serving in a state court as a grand or petit juror; (E) traveling in or using a facility of interstate commerce; and (F) enjoying the goods or services of certain places of public accommodation.

Section 5084 adds a new provision, 18 U.S.C. 245(c)(1), which prohibits the intentional infliction of bodily injury on the basis of race, color, religion, or national origin. This new provision does not require a showing that the defendant committed the offense because of the victim's participation in a federally protected activity. However, an offense under the new 18 U.S.C. 245(c)(1) will be prosecuted as a felony only, and a showing of bodily injury or death or of an attempt to cause bodily injury or death through the use of fire, a firearm, or an explosive device is required. Other attempts will not constitute offenses under this section.

Section 5084 adds another new provision, 18 U.S.C. 245(c)(2), which prohibits the intentional infliction of bodily injury or death (or an attempt to inflict bodily injury or death) through the use of fire, a firearm, or an explosive device on the basis of religion, gender, sexual orientation, or disability. Like 18 U.S.C. Sec. 245(c)(1), this provision authorizes the prosecution of felonies only, and excludes most attempts, while omitting the `federally protected activity' requirement. Unlike 18 U.S.C. 245(c)(1), this provision requires proof of a Commerce Clause nexus as an element of the offense. The bill excludes misdemeanors and limits federal hate crimes based on sexual orientation, gender, or disability to those involving bodily injury or death (and a limited set of attempts to cause bodily injury or death). These limitations will limit federal cases to truly serious offenses.

Prosecutions under both of the new provisions require a certification by the Attorney General or other senior Justice Department official that `a prosecution by the United States is in the public interest and necessary to secure substantial justice.'

It is expected that the Hate Crimes Prevention Act of 1999 will result in only a modest increase in the number of hate crimes prosecutions brought by the federal government. The intent is to ensure that the federal government will limit its prosecutions of hate crimes to cases that implicate the greatest federal interest and present a clear need for federal intervention. The Act is not intended, for example, to federalize all rapes or all acts of domestic violence.

SEC. 5085. DUTIES OF THE UNITED STATES SENTENCING COMMISSION.

Section 5085 directs the United States Sentencing Commission to study the issue of adult recruitment of juveniles to commit hate crimes, and, if appropriate, amend the sentencing guidelines to provide sentencing enhancement for such adults.

SEC. 5086. GRANT PROGRAM.

Section 5086 authorizes the Office of Justice Programs to make grants to state and local programs directed at combating hate crimes committed by juveniles.

SEC. 5087. AUTHORIZATION FOR ADDITIONAL PERSONNEL.

Section 5087 authorizes appropriations to the Department of Treasury and the Department of Justice, including the Community Relations Service, for fiscal years 2001 and 2002 to increase personnel to prevent and respond to hate crimes.

SEC. 5088. SEVERABILITY.

Section 5088 states that the provisions of the act are to be presumed severable if any provision is found unconstitutional.

SECTION-BY-SECTION ANALYSIS OF TITLE VI

SUBTITLE A - BOLSTERING FEDERAL LAW TO FIGHT VIOLENT CRIME AND APPREHEND DANGEROUS FUGITIVES

SEC. 6001. FUGITIVE APPREHENSION ACT OF 1999.

According to some estimates, there are at present approximately 45,000 fugitives from justice in federal felony criminal cases, and in excess of 500,000 fugitives from justice in state and local felony criminal cases nationwide. A significant percentage of these fugitives are convicted felons who are wanted on court bench warrants for a failure to appear in court and answer charges that they are in violation of their probation or parole status. This situation represents not only an affront to the rule of law, but also a threat to the safety and security of Americans. Fugitives in violation of probation or parole commit a significant percentage of criminal offenses, crimes that would not occur if they were apprehended first.

As a general matter, under federal law, if there is no intent to seek federal indictment -- as is true in the great majority of fugitive apprehension investigations -- law enforcement officers may not use a grand jury subpoena to obtain information relevant to a fugitive investigation. Indeed, to do so would constitute abuse of the grand jury process.

Although there are some mechanisms to obtain this information through application to the court, time spent by law enforcement seeking state or federal court orders to obtain release of the information can make the difference between the apprehension or further flight of the fugitive.

This provision would remedy the current deficiency in the law by providing for administrative subpoena authority in fugitive investigations. The provision is based on the administrative subpoena authority provided in Title 21, United States Code, Section 876, which authorizes the Attorney General to issue administrative subpoenas in controlled substance-related criminal investigations and administrative proceedings. However, this provision incorporates significant restrictions on its use in order to satisfy concerns over an expansion in the use of administrative subpoenas.

First, this is more narrowly tailored than Title 21, United States Code, Section 876, in that proposed section 6001 does not authorize the Attorney General to obtain testimony in response to the subpoena, only documents.

Second, the statute is limited in its application to fugitives in federal and state felony cases.

Third, the statute strictly controls any delegation of the Attorney General's authority to issue such subpoenas, by requiring that any such delegation be accomplished only through formal Attorney General guidelines that would be subject to scrutiny.

Fourth, the statute requires that, before a subpoena can be issued, the Attorney General must find that the records sought are "relevant or material," i.e., there are "articulable facts" that show the fugitive's whereabouts may be discerned from the records sought.

Fifth, the statute makes clear than an administrative subpoena issued under this section does not "trump" protections accorded records under existing statutes, such as electronic records whose production is covered by section 2703 of Title 18 and financial records whose production is covered by section 3402 of Title 12. Rather, this statute is to be construed and applied consistent with such existing statutes.

The provision would help bring to justice the large number of federal fugitives who the government has already decided merit prosecution insofar as they have been charged with and/or convicted of a federal felony offense or have escaped after having been convicted of such an offense. These are individuals who, by their conduct, have indicated a complete lack of respect for our nation's criminal justice system and an unwillingness to play by its rules. As to these fugitives, the government does not need proof that they have moved in interstate commerce prior to issuing a subpoena.

The provision also would allow federal law enforcement officials to issue an administrative subpoena to assist state law enforcement officials in apprehending state fugitives when the fugitivity affects interstate commerce or when there is a request for assistance from the appropriate state official, and the Attorney General finds that the request gives rise to a federal interest sufficient to warrant exercise of federal jurisdiction under section 1075. This portion of the statute is modeled on similar provisions in title 28 U.S.C. §§ 540 and 540A. It responds to the need of state officials to use the unique, nationwide detection and enforcement capabilities of federal law enforcement agencies in apprehending fugitives, many of whom cross state lines to avoid capture. It also recognizes the importance of, and provides additional support for, ongoing cooperation between state and federal officials in capturing fugitives, particularly in joint federal/state task forces.

Under 28 U.S.C. §566(e)(1)(B), the U.S. Marshals Service has authority to investigate fugitive matters "as directed by the Attorney General." The FBI has the authority to investigate fugitive matters (in violation of 18 U.S.C. §1073) under 28 U.S.C. §533(1). This statute would neither increase nor decrease the Attorney General's authority under those statutory provisions to direct the activities of the Marshals Service and the FBI.

Finally, the provision would provide investigators a mechanism to obtain documentary information in cases alleging a violation of the federal Unlawful Flight to Avoid Prosecution (UFAP) statute for fugitives unlawfully fleeing from testimonial responsibilities or to avoid lawful process (18 U.S.C. §§1073(2) and (3)). As to this lower priority category of fugitives, the proposal incorporates by reference the UFAP interstate movement requirement.

SEC. 6002. AMENDMENTS RELATING TO VIOLENT CRIME IN INDIAN COUNTRY AND AREAS OF EXCLUSIVE FEDERAL JURISDICTION.

This section makes several interconnected amendments designed to strengthen the laws punishing violent crime in Indian country and other areas of exclusive federal jurisdiction. The amendments are set forth in subsections, which are discussed below.

(a) Recently, prosecutors of serious assaults in Indian country have experienced considerable difficulty in obtaining convictions for assaults resulting in "serious bodily injury." The difficulty is traceable to the definition of that term in 18 U.S.C. 1365 (which is cross-referenced in the assault statute, 18 U.S.C. 115), which omits explicit coverage of injuries requiring medical intervention such as hospitalization or surgery. The branch of the current definition most commonly relied on, e.g., when an assault requires hospitalization, covers injuries that cause "extreme physical pain." But juries have, through questions to judges during deliberations, expressed confusion as to whether the pain must continue after the crime or whether it is enough that it happened while the assault was taking place; and many victims have also been reluctant, on the witness stand, to admit that they experienced great pain. In addition, some serious assaults have eluded prosecution because the victim, while suffering a severe beating, was unconscious or so drunk as not to experience "extreme physical pain."

The Sentencing Commission, in the Guidelines, has augmented the statutory definition in section 1365 with another branch encompassing situations in which the injury "requires medical intervention." Guidelines, §1B1.1. This appears to be a superior formulation in that it provides an objective test, for example whether hospitalization ensued from, or emergency medical services were used to treat, the injury, or whether such treatment was medically "required" even if the victim did not seek or receive it. The proposed amendment would therefore adopt the Sentencing Commission's clarification to the statutory definition, by adding it to the existing definition of "serious bodily injury" in section 1365. It is intended that the same interpretation be given to the statutory term "medical intervention" as has been given to that term under the guidelines in order to distinguish among less serious assaults.

(b) This subsection eliminates a superfluous intent element in 18 U.S.C. 113(a)(3), an assault with a dangerous weapon statute applicable in the special maritime and territorial jurisdiction and, through being referenced in 18 U.S.C. 1153, in Indian country. No other assault with a dangerous weapon statute includes an extra element that the actor must have intended to "do bodily harm" as does section 113(a)(3). See, e.g., 18 U.S.C. 351 (assault on Members of Congress and Cabinet officials); 18 U.S.C. 2113(d)(assault during bank robbery); 18 U.S.C. 2231(b)(assault upon persons executing search warrant). The problem with this extra element is that it may give rise to a defense based on intoxication that the actor lacked the specific intent to do bodily harm even though he or she was using a dangerous weapon. The prospect of such a defense being asserted has indeed led in recent years to the inability of federal prosecutors to bring felony charges against defendants in Indian country who used knives or other dangerous weapons in the course of an assault. Elimination of this superfluous and unjustified intent element in section 113(a)(3) will bring that statute into conformity with other federal assault with a dangerous weapon offenses and facilitate the ability to bring appropriate charges and secure convictions in serious assaultive cases, especially in Indian country.

(c) This subsection would eliminate an unjustified restriction in the assault resulting in substantial injury statute, 18 U.S.C. 113(a)(7). Currently, that statute, which is a lesser felony to the assault resulting in serious bodily injury statute, 18 U.S.C. 113(a)(6), applies only when the victim is less than sixteen years of age. This is unjustified. Adult victims should also be protected against assaults that cause significant physical injury, although not rising to the level of "serious bodily injury" as defined in the law. Section 113 defines "substantial bodily injury" to include injuries that involve a "temporary but substantial disfigurement" or a "temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty." Thus, if a victim were so severely beaten as to be temporarily knocked out and/or so as to produce major facial bruises, the assault would fall under the "substantial bodily injury" category. Such situations do unfortunately arise with some frequency in Indian country, where often the adult victim may not experience (or be willing to admit to having experienced) "extreme physical pain" which would bring the assault within the present statute punishing assaults that result in "serious bodily injury." Accordingly, in addition to eliminating the restriction to minor victims in section 113(a)(7), the instant proposal makes that offense a predicate under the Major Crimes Act, 18 U.S.C. 1153, which now covers only assaults against victims under the age of sixteen.

This part of the proposal also would clarify that the Major Crimes Act does not divest Indian tribes of their inherent power to prosecute all Indian offenders for crimes committed in Indian country, even if those crimes are punishable under that Act, subject to the limitations on the maximum penalty that may be imposed by tribal courts (currently one-year's imprisonment or a fine, or both). This clarification, which is consistent with present appellate court caselaw, Wetsit v. Stafne, 44 F.3d 823 (9th Cir. 1995) is significant because tribal courts exercise concurrent jurisdiction over these offenses and act as an important supplement to federal courts in enforcing Major Crimes Act violations. Notably, Congress has previously acted to clarify tribes' inherent jurisdiction by statute in 25 U.S.C. §1301, which removed any common law impediment that might otherwise have existed to the exercise of inherent tribal criminal jurisdiction over all Indian offenders.

This amendment, in conjunction with the amendments made by the two previous subsections, would remedy a gap in the coverage of the federal assault laws that unjustifiably allows some serious violent offenders to escape justice and that fails adequately to protect victims of assaults in areas of exclusive federal jurisdiction.

(d) The definition of "racketeering activity" in the RICO statute includes the commission of any act or threat involving a series of enumerated felonies, including murder, kidnapping, arson, robbery, and extortion which are "chargeable under State law." Because State law is inapplicable in Indian country, see 18 U.S.C. 1151, a consequence of this definition is that certain violent felonies, such as murder, robbery, and kidnapping, if committed by a gang in Indian country or elsewhere in an area of exclusive federal jurisdiction, cannot be prosecuted under RICO. The RICO statute has proven to be the most effective federal tool for prosecuting violent gangs throughout the United States and there seems no justification for denying the citizens and residents of Indian country and other areas of exclusive federal jurisdiction its protection and benefits to the same extent as those living elsewhere in the United States.

Recently, according to the FBI, violent gang activity in Indian country has increased and is now a significant problem. For example, the F.B.I. reports that on the Navajo Reservation in Arizona alone, there are more than fifty violent gangs, many of which have ties to other gangs throughout the nation. Thus, this gap in the RICO law, which previously was of little or no importance, should now be remedied.

(e) This subsection would increase the maximum penalty for voluntary manslaughter within the special maritime and territorial jurisdiction of the United States from ten to twenty years. Voluntary manslaughter is an unjustified killing that occurs in the heat of passion or upon a sudden quarrel. It is only slightly less serious in terms of culpability than second degree murder under 18 U.S.C. 1111, which also requires no premeditation, yet second degree murder carries a sentence of up to life imprisonment whereas voluntary manslaughter is punishable by a maximum of only ten years' incarceration.

In 1998 the United States Sentencing Commission, in a letter to the Chairmen and ranking minority members of the House and Sesnate Judiciary Committees, endorsed an increase in the maximum penalty for voluntary manslaughter from ten to twenty years. Likewise a federal judge wrote the Attorney General to urge that the penalty for voluntary manslaughter be raised, as the judge had experienced several voluntary manslaughter cases in which female victims had been brutally slain as the result of domestic violence. Most States also treat voluntary manslaughter more severely than does current federal law. Accordingly, this section would increase the maximum penalty available for voluntary manslaughter to twenty years.

(f) Recently, several incidents have occurred in Indian country involving feuding residents firing shots at occupied buildings, houses, and trailers. Such conduct, if committed by a non-Indian against an Indian in Indian country, by an Indian against a non-Indian, or on a federal reservation would be punishable under 18 U.S.C. 1363 by up to twenty years' imprisonment since the offense not only damaged or destroyed property but was either directed at a dwelling or endangered human life. But because section 1363 is not listed in the Major Crimes Act, 18 U.S.C. 1153, the conduct cannot presently be prosecuted if committed by an Indian against an Indian in Indian country, absent proof of an intent to kill or injure (as opposed to frighten or intimidate). This proposal would add aggravated violations of section 1363 (acts that are directed at dwellings or that place a human life in jeopardy) that carry a maximum twenty-year prison term to the Major Crimes Act, thereby plugging this loophole in existing law.

(g) This proposal is a response to the decision of the Second Circuit in United States v. Markiewicz, 978 F.2d 786, 804-5 (1992), cert. denied, 506 U.S. 1086 (1993), which held that the statute punishing receipt of property stolen from an Indian tribal organization, 18 U.S.C. 1163, required proof not only that the defendant knew the property was stolen but knew that it was stolen from an Indian tribal organization. The court reached this conclusion because of the presence of the word "so" before "embezzled" and "stolen" which, the court said, referred to the first paragraph of the statute proscribing theft from the organization. The legislative history indicates that Congress intended to model section 1163 on other federal stolen property statutes such as 18 U.S.C. 641, which require no proof of knowledge of the particular source of the stolen goods. The Second Circuit's interpretation of section 1163 produces a result that is contrary to sound policy. It makes no difference in culpability whether or not the defendant knew the particular source of the stolen property as opposed to the fact that it had been stolen generally, and no other federal receipt of stolen property law requires this extra element, see, e.g., 18 U.S.C. 2113(c) (stolen bank proceeds). The proposal would amend section 1163 to bring it into harmony with similar title 18 statutes by eliminating the troublesome word "so", thus clarifying that the defendant need only know that the property was stolen.

SEC. 6003. KIDNAPPING.

This section would add new but traditional jurisdictional bases to the kidnapping statute which, because of its genesis and relative age, remains quite limited. 18 U.S.C. 1201 was originally fashioned in reaction to the interstate kidnapping of the Lindbergh baby. Because of this, its Commerce Clause scope applies only to instances in which the victim is transported interstate and does not include other, traditional bases for federal jurisdiction such as travel by the offender in interstate commerce, or the use of a facility in interstate commerce or the mails in the commission of the crime. Compare, e.g. 18 U.S.C. 1952, 1958. The proposed amendment would add these bases to the kidnapping statute. This would enable federal prosecution in such cases as the kidnapping some years ago of an Exxon executive in New Jersey, where the FBI, after a painstaking investigation, apprehended the perpetrators but lacked federal jurisdiction to prosecute because the victim had never been transported out of New Jersey, although the defendants had used interstate facilities during the commission of the crime.

SEC. 6004. OFFENSES COMMITTED OUTSIDE THE UNITED STATES BY PERSONS ACCOMPANYING THE ARMED FORCES.

This section would address gaps in federal law that have existed for forty years and that literally have permitted individuals to "get away with murder." The gaps result from the fact that the Supreme Court held in Reid v. Covert, 354 U.S. 1 (1957), Kinsella v. Singleton, 361 U.S. 234 (1960), and Toth v. Quarles, 350 U.S. 11 (1955), that court-martial jurisdiction could not constitutionally be applied (1) to crimes committed in peacetime by persons accompanying the armed forces of the United States abroad,[10] or (2) to crimes committed by a member of the armed forces after the member's service with the armed forces has expired. Because foreign nations often have no interest in vindicating crimes committed by American servicemen or their dependents or employees against other Americans or against victims who are not citizens of the host country, the present lack of civilian court jurisdiction over such crimes, coupled with the Supreme Court's invalidation of the previously existing court-martial jurisdiction over them, means that many such offenses, although extremely serious in nature, have gone and are likely to continue to go unpunished. On the other hand, there have been cases in which the United States had to turn United States civilians over to host country authorities for potentially harsh punishment because the United States was unable to take appropriate enforcement action.

The instant proposal, although having a lengthy history, was developed most recently in response to the request of the House Armed Services Committee to the Department of Defense for the views of that Department on then pending legislation (H.R. 4531) near the end of the 103rd Congress.[11] The proposed legislation, which was introduced in the l04th Congress as part of S. 2083, would create a new chapter 212 in title 18, United States Code, consisting of four sections, 18 U.S.C. 3261-4. Section 3261 would provide for appropriate penalties for any person who, while serving with,

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[10]Reid so held with respect to capital offenses; Kinsella extended Reid to non-capital crimes.

[11]It is also similar to the 1971 recommendation of the National Commission on Reform of Federal Criminal Laws (see Final Report, §208(f), (h)), and to provisions in the ensuing federal criminal code reform bills of the 1970s and 1980s (e.g., S. 1630, 97th Cong., lst Sess., §204; S. Rep. No. 97-307, 97th Cong., lst Sess., pp. 53-4 (1981)).

employed by, or accompanying the armed forces outside the United States, engages in any conduct that would constitute a felony if committed within the special maritime and territorial jurisdiction of the United States. The crimes covered are primarily violent in nature such as murder (18 U.S.C. 1111), manslaughter (18 U.S.C. 1112), assault (18 U.S.C. 113), arson (18 U.S.C. 81), destruction of buildings (18 U.S.C. 1363), sexual abuse (18 U.S.C. 2241-3), and robbery (18 U.S.C. 2111).[12]

Although this would give rise to civilian court concurrent jurisdiction over overseas crimes committed by active servicemen, it is anticipated that a memorandum of understanding between the Departments of Defense and Justice would provide for primary military jurisdiction in all but exceptional cases. Civilian court jurisdiction over an active serviceman might occasionally be appropriate, for example in a situation in which a murder or robbery was committed jointly by the serviceman and a civilian dependent. In such a case, civilian court jurisdiction over both perpetrators would avoid the need for separate military and civilian trials.

So as to avoid unjustified double punishment, cases in which the offender was prosecuted (or is being prosecuted) by the foreign nation in which the crime occurred could not be federally prosecuted, unless such a prosecution was personally approved by the Attorney General or the Deputy Attorney General (or a person acting in either such capacity). See, for similar requirements, 18 U.S.C. 245(a), 1119(c) and 2332(d).

Under section 3261(d), law enforcement officers in the Department of Defense (and of Transportation when the Coast Guard is not operating as part of the navy) designated by the Secretary would be authorized to arrest persons who they have probable cause to believe engaged in the conduct prohibited by the section, and to deliver such persons to the custody of civilian law enforcement authorities for removal to the United States to face trial.[13] Such officers would also be empowered, under section 3262, to deliver arrested persons to the custody of a foreign nation which so requested them for purposes of trial, if the delivery is authorized by a treaty or international agreement between the country and the United States. Section 3263 provides for regulations to be promulgated by the Secretary of Defense, in consultation with the Secretary of State, relating to the apprehension, detention, and delivery of persons under this chapter, while section 3264 contains definitions of some key terms.

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[12]Also covered are theft (18 U.S.C. 661-2), false pretenses (18 U.S.C. 1025), and possession of child pornography (18 U.S.C. 2252).

[13]It is contemplated that arrests would be made consistent with the requirements of any applicable treaty and in accordance with principles of international law. Compare United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

SEC. 6005. STATUS KILLING OF FEDERAL EMPLOYEES AND CONSOLIDATION OF 18 U.S.C. 1114 AND 1121.

With one relatively minor exception, subsection (a) of 18 U.S.C. 1121 is wholly encompassed within 18 U.S.C. 1114 as that latter statute was enacted in the Effective Death Penalty and Anti-terrorism Act of 1996. Section 1121(a) punishes killings of State or local officials while working with federal officials in a federal criminal investigation, either (1) while the victim is engaged in the performance of duties, (2) on account of the performance of such duties, or (3) because of the status of the victim as a public servant. It also punishes killings of any person assisting a federal criminal investigation while that assistance is being rendered and because of it. Section 1114 punishes killing (or attempting to kill) any officer or employee of the United States and <u>any</u> person assisting such an officer or employee either while engaged in or on account of the performance of official duties.

Section 1114 is obviously considerably broader overall than section 1121(a) and completely covers all the conduct made criminal by that section, except for killings of State or local officials assisting in a federal criminal investigation that are motivated by the status of such officials. Since it is anomalous that "status" killings of State and local officials assisting federal officials in an investigation are proscribed while such killings of <u>federal</u> officials themselves are not, the proposed amendment would add this concept to section 1114 (along with section 1121(a)'s "status" coverage of State officers and employees assisting federal officials). Tribal officers assisting federal law enforcement personnel would also be protected. With that accomplished, subsection (a) of 18 U.S.C. 1121 would become totally redundant, and the proposed amendment therefore deletes it and redesignates the remaining subsections accordingly.

SEC. 6006. THREATS AGAINST FORMER PRESIDENTS AND OTHERS ELIGIBLE FOR SECRET SERVICE PROTECTION.

This section would expand the coverage of 18 U.S.C. 879, which deals with threats against former Presidents, the immediate families of the President and Vice President, major Presidential and Vice Presidential candidates, and certain other persons protected by the Secret Service. Currently, the statute limits coverage to the enumerated persons "who are protected by the Secret Service." While 18 U.S.C. 115 covers some more serious threats against some of the individuals covered in section 879, there are important gaps that need to be addressed. For example, section 3056(a)(3) limits future protection of former Presidents and their spouses. Likewise, there is no protection for the immediate family of a major candidate for the Presidency.

The Secret Service has a legitimate interest in investigating threats against a former President or a current major Presidential candidate regardless of whether the individual is receiving Secret Service protection. The status of the person as "former President" or "major candidate" is generally the reason why those persons are the subjects of a threat and not whether they have Secret Service protection. An individual who threatens a former President or a major candidate is also the type of person who may threaten or attempt to harm other Secret Service protectees. It is thus important for the Secret Service to be able to investigate these threats.

SEC. 6007. CLARIFICATION OF INAPPLICABILITY OF 18 U.S.C. 2515 TO CERTAIN DISCLOSURES.

This section would make a carefully limited and clarifying amendment to 18 U.S.C. 2515, the statutory exclusionary rule for violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, so as clearly to exempt two situations: (1) those in which private persons, not acting for any government authority, illegally intercept or record a communication, but the recording later lawfully comes into the possession of the government, which then wishes to use it in a criminal investigation or trial; and (2) those in which a private or government actor violates chapter 119 (e.g., by engaging in an illegal wiretap) and the government thereafter seeks to use the communication to prosecute that violator.

At present, appellate decisions are in apparent conflict over whether section 2515 precludes the use of communications in the first category described above. Under one possible interpretation of section 2515, if a private individual consensually records a conversation in aid of an illegal activity, or illegally records a conversation between other parties without their consent, the contents of such recordings are not admissible in a criminal trial or hearing even if the government had no role in having the evidence recorded and only acquired it, through lawful means, at a later date. This is because, under 18 U.S.C. 2511(2)(d), a recording by a consenting party, not acting under color of law, is permissible only if the recording is for a non-criminal or non-tortious purpose. Thus, if a briber secretly records a transaction in which a bribe is paid to an official, and the government later obtains the recording and seeks to use it against the official to prove the bribe, section 2515 arguably precludes such use. One appellate court has so held. United States v. Vest, 813 F.2d 477 (1st Cir. 1987).

By contrast, another appellate court has held that section 2515 does not bar the government from using evidence where individuals operating an illegal gambling business record bets placed by telephone so as to facilitate their business by avoiding disagreements with bettors over the amount of their bets. United States v. Underhill, 813 F.2d 105 (6th Cir.), cert. denied, 484 U.S. 821, 846 (1987). While the court in Vest acknowledged that no deterrent purpose would be served by suppression, since the government played no role in the illegal recording, it relied on the fact that further disclosure in court of the contents would magnify the original privacy violation. The court in Underhill, on the other hand, relied on clear legislative history indicating that Congress, despite the facial breadth of section 2515, did not intend to permit lawbreakers to immunize themselves from prosecution by their own acts, the criminal purposes of which made the recordings illegal.

The same disagreement among circuit courts exists as to the admissibility of recordings made by private actors intercepting communications without the consent of any of the parties. In one case, a court barred the use before a grand jury of such illegally intercepted communications. See In re Grand

Jury, 111 F.3d 1066 (3d Cir. 1997). By contrast, where a wife secretly installed a recording device to intercept her husband's conversations with other persons, the Sixth Circuit concluded that section 2515 did not bar the use of the contents of those communications in a prosecution of the husband, given the government's lack of involvement in the original interception. See United States v. Murdock, 63 F.3d 1391 (6^{th} Cir. 1995).

Whether or not Vest and In re Grand Jury were correctly decided under the existing statutory provision, an exemption should be created under section 2515 for that narrow class of cases in which private illegal recordings are later lawfully acquired by the government and sought to be used as evidence in a criminal trial or hearing. The truth-seeking function of a criminal proceeding is of paramount importance and, in the absence of any deterrent purpose to be served by exclusion, should prevail over the remaining concern that disclosure in the criminal proceeding would somehow exacerbate the original illegal recording. The instant amendment reflects the view that the severe remedy of exclusion of otherwise probative evidence should not be applied against the government in a criminal case with respect to a private violation of the statute (just as the Fourth Amendment, of course, does not apply to non-governmental searches and seizures). Accordingly, this section would amend section 2515 to expressly exempt such cases from its purview.

In addition, the amendment would also permit the use of illegal intercepts made by governmental actors for the limited purpose of prosecuting those actors. In one recent case, a State officer illegally intercepted conversations between a prisoner and his attorney. When the United States sought to use the recording to prosecute that violation, the district court ruled the evidence inadmissible. The amendment would permit such use, but only for the limited purpose of prosecuting the violator of chapter 119; the recordings could not be used against the victims of the violation even if those recordings contained evidence of separate criminal activity by the parties to the communication.

A conforming amendment is also made to section 2518(10)(a).

SEC. 6008. PARTICIPATION OF FOREIGN AND STATE GOVERNMENT PERSONNEL UNDER FEDERAL SUPERVISION IN CERTAIN INTERCEPTIONS.

This section would amend 18 U.S.C. 2815(5) to make clear that foreign, State, and tribal government personnel, if acting under federal supervision, may help in conducting court-authorized interception. The current language in the statute permits such assistance by "Government personnel," but it is uncertain whether this covers foreign, State, and tribal government personnel as opposed to federal employees.

There is often great utility in permitting foreign, State, tribal government personnel to assist in monitoring a wiretap, such as in joint investigations involving terrorist or other offenses in which the particular language skills of such personnel are necessary. Currently, federal agencies such as the FBI may employ such personnel through the cumbersome device of crossdesignating them as federal agents. See United States v. Bynum, 763 F.2d 477 (lst Cir. 1985). The paperwork involved in such methods is burdensome and costly, with no corresponding benefit to privacy or other interests served by the statutes. It would be far more efficient, and consistent with the purpose of the 1986 amendment adding "Government personnel" to 18 U.S.C. 2815(5), if that provision expressly authorized foreign or State government personnel, acting under the supervision of a federal officer, to participate in the conduct of a Title III interception. The proposed amendment would effect this result.

SEC. 6009. IMPROVED LAW ENFORCEMENT ACCESS TO CERTAIN RECORDS.

This proposal would correct anomalous situations that arise under the Cable Communications Policy Act of 1984. In the interest of protecting the privacy of cable subscribers, that legislation included, at 47 U.S.C. 55l(c) and (h), provisions prohibiting the disclosure of individual subscribers' records to governmental entities, including law enforcement agencies, except by court order based on a showing of the relevance of the information sought to a criminal investigation, with an additional requirement that the subscriber be given an opportunity to contest the disclosure. This extremely restrictive provision gives greater protection to cable subscriber records than the law provides with respect to any other type of commercial information about a person, including bank records (12 U.S.C. 3401 et seq.), credit records (l5 U.S.C. 1681 et seq.), motor vehicle records (18 U.S.C. 2721), video tape rental records (18 U.S.C. 2710), and billing records of customers of electronic communication service providers (18 U.S.C. 2703(c)). The provisions are so restrictive that it is not even certain that a cable company could comply with a court order authorizing the use of a wiretap or pen register/trap and trace device to collect information about a subscriber.

Although there is considerable justification for prohibiting indiscriminate disclosures of records about a person's cable television viewing habits, there is no justification for making it more difficult for law enforcement agencies to obtain such records for legitimate law enforcement purposes than to obtain bank, credit, motor vehicle, video tape rental, or electronic mail records. Although prosecutors do not often need access to cable television records, information about a person's cable service may be relevant to various types of criminal investigations. For example, such records have been sought in order to establish a pattern of expenditures in tax evasion prosecutions, and they can be of use in locating fugitives or others whose location can be traced through their subscriber records. Of course, providing notice to the subscriber of such a request for records in many cases would jeopardize the criminal investigation. Hence, in some instances, prosecutors have abandoned attempts to get access to cable records once they have learned of the uniquely restrictive provisions of section 55l.

The proposed amendment would enable governmental entities, both State and federal, to get access to cable subscriber records by means similar to those provided for access to records concerning electronic mail subscribers under l8 U.S.C. 2703. For billing records that show only the subscriber's name, length of service, and similar basic account information (but not records of particular program viewing habits), the government could use a subpoena without providing notice to the subscriber.

Moreover, the court could order that no notice of the request or information furnished by the provider be divulged to the subscriber. For access to other information about specific transactions, such as the names of pay-per-view programs selected or lists of choices made on interactive services, the governmental entity may use a court order based upon a showing of relevance, as under present law, although the proceeding could be ex parte. As under section 2703, a court would be given authority to quash or modify a court order or subpoena upon a showing by the service provider that compliance would be unduly burdensome.

In addition, the amendment takes account of the fact that today--unlike in 1984--many cable companies offer not only traditional cable programming services, but also Internet access and telephone service. Like traditional telephone carriers and Internet service providers, cable companies offering such services must comply with court orders and other legal process permitted under Title III (the wiretap statute), the Electronic Communications Privacy Act (ECPA), and the pen register/trap-and-trace statute. In recent years, however, cable companies have increasingly balked at complying with such process, noting the seeming inconsistency with their duty of nondisclosure (except under stringent limits) under 47 U.S.C. 551. See In re Application of United States, 36 F. Supp. 2d __ (D. Mass. Feb. 9, 1999) (noting apparent statutory conflict and ultimately granting application for order under 18 U.S.C. 2703(d) against cable company providing Internet service). These complications have at times delayed or frustrated investigations.

Applying the restrictions of section 551, even as modified above, makes little sense in the context of investigations based on these other statutes. For example, computer crime investigators should not be hampered by the requirement under section 551 that the subscriber be a suspect in a criminal investigation. In many cases involving online evidence, this requirement may be impossible to meet. Consider, for example, a case in which a fugitive is believed to be corresponding with his or her spouse via electronic mail. Under 18 U.S.C. 2703, government investigators could obtain a court order to compel the spouse's Internet service provider to turn over records reflecting the addresses of the innocent spouse's online correspondents, thus facilitating apprehension of the fugitive. If a cable company is providing that Internet service, 47 U.S.C. 551 could be read as barring such disclosure.

The Department believes that rules governing law enforcement access to the records of communication service providers' customers should not depend on whether the provider of telephone or Internet service is a cable company . Accordingly, the amendment inserts a new subsection 551(c)(2)(E) to confirm that cable companies, like other providers, remain subject to ECPA, the wiretap statute, and the pen register statute notwithstanding section 551.

However, new subsection 551(c)(2)(E) preserves the Cable Act's primacy with respect to records revealing a customer's cable TV viewing habits. Thus, in a case where a customer receives both Internet access and conventional cable TV service from a single cable provider, only those customer records relating to Internet service could be compelled under ECPA.

SEC. 6010. REMOVAL OF THE SUNSET PROVISION FOR THE S VISA CLASSIFICATION PROGRAM.

Section 6010 repeals the restriction, found in 8 U.S.C. § 1184(k)(2), which limits the duration of the S visa classification program to a five year period commencing on September 13, 1994. The S visa classification program expired on September 12, 1999.

Section 13003 of the Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322) amended the Immigration and Nationality Act (INA) to establish a new "S" nonimmigrant visa classification for two categories of alien witnesses and informants. The first category of nonimmigrant classification, (S)(i), may be granted to an alien who the Attorney General has determined is in possession of critical reliable information concerning a criminal organization or enterprise, which the alien is willing to supply or has supplied to Federal or State law enforcement authorities or to a Federal or State court. 8 U.S.C. § 1101(a)(15)(S)(i). The Attorney General must also determine that the alien's presence in the United States is essential to the success of an authorized investigation or the successful prosecution of an individual involved in a criminal organization or enterprise. The number of witnesses or informants who may be granted (S)(i) nonimmigrant classification in any fiscal year may not exceed 200. 8 U.S.C. § 1184(k)(1).

The second category of nonimmigrant classification, (S)(ii), may be granted to an alien who the Secretary of State and the Attorney General jointly determine is in possession of critical reliable information concerning a terrorist organization, enterprise, or operation, which the alien is willing to supply or has supplied to Federal law enforcement authorities or to a Federal court. 8 U.S.C. § 1101(a)(15)(S)(ii). The Secretary of State and the Attorney General must also determine that the alien will be or has been placed in danger as a result of providing such information, and is eligible to receive a reward under Section 36(a) of the State Department Basic Authorities Act of 1956 (22 U.S.C. § 2708(a)). The number of witnesses or informants who may be granted (S)(ii) visas in any fiscal year may not exceed 50. 8 U.S.C. § 1184(k)(1).

The INA also provides for nonimmigrant visas for immediate family members of (S)(i) and (S)(ii) category alien witnesses or informants, including spouses, married and unmarried children and parents. The Act requires that the Attorney General determine whether a ground for inadmissibility exists with respect to any S category visa applicant. The Attorney General has discretion to waive most grounds for inadmissibility if the Attorney General considers that is in the national interest to do so. 8 U.S.C. § 1182(d)(1).

The Attorney General may adjust the status of an (S)(i) nonimmigrant to that of an alien lawfully admitted for permanent residence, if, in the opinion of the Attorney General, the alien has supplied information as agreed, and the information has substantially contributed to a successful criminal investigation or prosecution. 8 U.S.C. § 1255(i)(1). Similarly, the Attorney General may adjust the status of an (S)(ii) nonimmigrant to that of an alien lawfully admitted for permanent residence, if the alien has, in the sole discretion of the Attorney General, supplied information as agreed, the information has substantially contributed to the prevention or frustration of an act of terrorism, or to a successful investigation or prosecution of an individual involved in such an act of terrorism, and the nonimmigrant has received a reward under Section 36(a) of the State Department Basic Authorities Act of 1956.

An alien witness or informant admitted as either an (S)(i) or (S)(ii) category nonimmigrant must report quarterly to the Attorney General, may not be convicted of any crime punishable by one year or more of imprisonment after the date of admission, must waive the right to contest, other than on a basis of an application for withholding of deportation, any action of deportation instituted before the alien obtains lawful permanent resident status, and must abide by any other condition, limitation or restriction imposed by the Attorney General. 8 U.S.C. § 1184(k)(4). The Attorney General is required by 8 U.S.C. § 1184(k)(5) to make an annual report to Congress regarding the granting of S visa classifications.

From the beginning of the S visa classification program until the end of Fiscal Year 1998, a total of 246 S visas had been issued for witnesses and informants and a total of 158 family members had been granted derivative S visa status. In addition, as of the end of Fiscal Year 1998, applications for an additional 40 witnesses and informants and their family members had been approved by the Criminal Division and were pending final approval by the Immigration and Naturalization Service. By the end of Fiscal Year 1998, when their nonimmigrant status was due to expire, all of the individuals granted S visas in Fiscal Year 1995 who were eligible to do so had applied for adjustment of status to lawful permanent resident.

The S visa classification program has proved to be very beneficial in prosecuting various international criminal organizations, and helping law enforcement efforts against terrorism, narcotics, fraud, immigration violations, and numerous other criminal activities. As required by 8 U.S.C. § 1184(k)(5), the Attorney General will continue to report annually to the Congress on the use of this valuable law enforcement tool.

SEC. 6011. FEDERAL JUDICIARY SECURITY ACT.

This section strikes existing §566(e)(1)(A) and inserts a new section remedying a deficiency in authority. The amended language makes permanent the authority of the U.S. Marshals Service (USMS) to provide for security at the residences of federal jurists. This proposal addresses a upward trend in threats to the judiciary and an environment of increasing violence and hostility towards the criminal justice system. The authority is necessary to fulfill the USMS's statutory mandate, ensure the efficiency of the criminal justice system and prevent loss of life.

SEC. 6012. AUTOPSY AUTHORITY.

This proposal would create federal authority, in the Attorney General or the head of another federal agency, as the case may be, to conduct autopsies when necessary or appropriate in the conduct of federal criminal investigations. It is not intended that enactment of the proposal would result in the hiring, by federal law enforcement agencies, of medical examiners. Rather, as in the past, the agencies will rely on local coroners, or as appropriate the Armed Forces Medical Examiner and his staff, to perform autopsies.

The primary need for federal autopsy authority arises in the case of offenses, such as acts of terrorism, outside the United States. At present, except in cases involving military personnel, there is no federal authority to perform autopsies outside the United States. When a non-military United States national dies outside the United States as a result of a possible offense against the United States, the federal investigative agency must have the authority to perform an autopsy. Typically the victim's body must be transported back to the United States before an autopsy can be performed, which may significantly delay both the return of the loved one's remains to his or her family, as well as cause potentially vital delays in the criminal investigation. Enactment of this proposal would enable the Federal Government to respond more effectively to terrorist incidents against United States nationals abroad, by permitting (consistent with the laws of the foreign country in which the act occurred) autopsies to be performed without the need to transport the victims' bodies back to the United States.

Although thus far the lack of federal autopsy authority pursuant to a criminal investigation has not proved to be a major problem in cases involving murders within the United States, such as in Indian country or other places of exclusive federal jurisdiction, there may also be a crucial need for federal autopsy authority in some domestic situations. Ordinarily, as noted above, when a federal investigative agency such as the F.B.I. is investigating a possible homicide within the United States, the agency relies on local authorities such as coroners' offices to perform an autopsy. This has proved to be a generally satisfactory arrangement, although State and local laws with respect to the conduct of autopsies vary widely. Nothing in the present proposal is intended to change this practice of reliance upon local authorities. There may, however, be a need for independent federal autopsy authority in certain cases involving mass victims of possible domestic terrorism (or cult activity involving a federal victim such as Jonestown had it occurred within the United States) that occur in remote locations where the local coroner's resources to perform an autopsy or related forensic procedures are inadequate to the needs of the investigation. Enactment of this proposal would enable the F.B.I., or possibly the Bureau of Alcohol, Tobacco, and Firearms in certain bombing incidents, to enlist the assistance of the Armed Forces Medical Examiner or other private forensic practitioners by contract to perform the necessary autopsies in a timely manner.

The proposal includes requirements that are sensitive to the needs of the affected victims' families as well. Before conducting an autopsy, the Attorney General or other agency head would have to make an effort to notify the victim's family, if known; and once the autopsy is completed, the victim's remains must be returned to his or her family (assuming identification of the victim) as soon as practicable.

SEC. 6013. ADMINISTRATIVE SUMMONS AUTHORITY FOR THE UNITED STATES SECRET SERVICE'S PROTECTIVE FUNCTION RESPONSIBILITIES.

This section authorizes the Director of the United States Secret Service ("Secret Service"), and supervisory level special agents of the Secret Service designated by the Director, pursuant to regulations, to issue and serve summons requiring the production of documents, recordings, including recordings of information in electronic form, and other tangible things. The material requested under such a summons must be relevant to the investigation of an imminent threat to the life or safety of the President of the United States or other person protected by the Secret Service under the provisions of 18 U.S.C. 3056. This section requires the Secret Service to notify that Attorney General as soon as practicable when it issues a summons pursuant to this authority.

This will permit the Secret Service more effectively to fulfill its protective responsibility. Pursuant to 18 U.S.C. 3056, the Secret Service is charged with the responsibility for the protection of the President and Vice President of the United States, their immediate families, visiting heads of state, and other individuals as designated by the President. Under 18 U.S.C. 871 and 879, the Secret Service is also responsible for conducting investigations into threats made against Secret Service protectees. In order to protect the President and the other persons for whom it is responsible, the Secret Service must be reasonably empowered to retrieve, assemble, evaluate, and utilize data in an expeditious manner. Given the nature of the Secret Service mission, time is often of the essence. The administrative summons could pay life saving dividends in speeding the ability of the Secret Service to retrieve information essential to its protective function.

A conventional subpoena for requested information or records may be obtained through the courts. However, that process takes additional time that may not be available in some circumstances. The authority granted by this section is intended for those circumstances where immediate access to information is necessary to protect the life of the President or another protectee. Summons issued pursuant to this section are not intended to be used to investigate cases within the jurisdiction of the Secret Service when there is no imminent threat to a protectee.

SEC. 6014. ESTABLISHING PERMANENT ONE PERCENT RESEARCH AND EVALUATION SET-ASIDES FOR CERTAIN PROGRAMS.

This legislation would establish permanent research and evaluation set-asides for certain grant programs administered by the Office of Justice Programs that were created by the Violent Crime Control and Law Enforcement Act of 1994, in order to more effectively gauge their effectiveness and implement program changes, where necessary. In each instance, the Attorney General is directed to reserve not less than one percent and no more than three percent of the sums which are actually appropriated in a particular fiscal year for research and evaluation of the grant program. All of the grant programs affected, except for the VOI/TIS grant program, are treated identically in the ten amendments that make up this proposal. The balance of this analysis simply identifies the programs so amended in each of the sections and, in the case of VOI/TIS, explains the additional change.

Subsection (a) applies to the VOI/TIS grant programs. And, because the existing VOI/TIS statute, at subsection 20108(b)(3), already contains language providing for the possible use of certain funds not only for research and evaluation but also for technical assistance, development and implementation of sentencing reforms as well, an additional subparagraph (4) is added to subsection 20108(a) to ensure that the Attorney General shall have a similar direction to reserve funds for the latter purposes.

Subsection (b) applies to the Certain Punishment for Young Offenders grant program.

Subsection (c) applies to the Residential Substance Abuse Treatment (RSAT) program.

Subsection (d) applies to the program of Grants to Combat Violent Crimes Against Women.

Subsection (e) applies to the program of Grants to Encourage Arrest Policies in domestic violence cases.

Subsection (f) applies to the Law Enforcement Family Support program.

Subsection (g) applies to the DNA Identification Grant program.

Subsection (h) applies to the Police Corps grant program.

Subsection (i) applies to the Motor Vehicle Theft Prevention program.

Subsection (j) applies to the Missing Alzheimer's Disease Patient Alert grant program.

SUBTITLE B – COMBATING CRIME AND IMPROVING OPERATIONS IN CORRECTION FACILITIES

SEC. 6021. INCREASED PENALTIES AND EXPANDED JURISDICTION FOR SEXUAL ABUSE OFFENSES IN CORRECTIONAL FACILITIES.

SEC. 6022. INCREASED PENALTIES AND EXPANDED JURISDICTION FOR CONTRABAND OFFENSES IN CORRECTIONAL FACILITIES.

Crimes of sexual abuse punishable under chapter 109A of title 18 are, in some circumstances, misdemeanor offenses punishable by a maximum sentence of one year. They also require that the offense occur in the "special maritime and territorial jurisdiction of the United States or in a Federal prison." the same jurisdictional limitation as to federal prisons applies under the prison contraband statute, 18 U.S.C. 1791.

With strong encouragement from Congress, the Department of Justice is entering into contracts with State and local governments and private commercial entities to house federal offenders. Courts have held that penal facilities that are not owned or operated by the Federal Government are not federal correctional, detention, or penal facilities as defined in the statutes. See United States v. Gibson, 880 F.2d 795, 796 (4th Cir. 1989); United States v. Jimenez, 454 F.Supp. 610, 611 (M.D. Tenn. 1978). The proposed legislation would afford protection to victims of sex crimes involving federal prisoners in contract facilities. In addition, the proposals would elevate the misdemeanor offenses to felony status through increasing the maximum period of incarceration to three years and two years, respectively. Finally, by extending jurisdiction over contraband offenses by federally convicted prisoners in contract facilities, the proposals would greatly benefit the administration of such facilities inasmuch as State and local law enforcement officials have little interest in pursuing such crimes.

SEC. 6023. REMOVAL OF WIRETAP RESTRICTIONS FROM PRISON COMMUNICATIONS.

This section would clarify that federal laws relating to the interception of communications and the use of pen registers and trap and trace devices do not apply to persons in federal or state custody. It is well settled that, in view of the overriding interest in maintaining security in penal institutions, prisoners have no constitutionally protected reasonable expectation of privacy. See Hudson v. Palmer, 468 U.S. 517, 527 (1984); Lanza v. New York, 370 U.S. 139, 143-4 (1962); United States v. Amen, 831 F.2d 373, 379 (2d Cir. 1987). It is less clear, however, whether current federal statutes allow law enforcement authorities to intercept communications or to use pen registers and trap and trace devices with respect to prisoners. Most prisons contain prominent signs warning inmates and others that their communications may be monitored. Prisoners' use of the facilities has been held to constitute implied consent to such routine monitoring. (See, United States v. Amen, supra. But where the monitoring is not random but occurs because of suspicion that the particular inmate is engaged in illegal activity, it is uncertain that the posting of the standard "Notice" signs would suffice to constitute implied consent. Accordingly, there is a need for a statutory clarification that, with respect to persons in the custody of the Attorney General or of a state or political subdivision, the current federal statutes that proscribe the interception of communications are inapplicable. This section so provides.

SEC. 6024. IMPROVING EFFICIENCY THROUGH IMPROVED MEDICAL PAYMENT RULES IN PRISONS AND RELATED FACILITIES.

This section would assist the Department of Justice in ensuring that appropriate medical care for detainees and prisoners is provided in a cost efficient manner. Passage of this legislation would allow for significant cost savings in connection with providing health care services for individuals in the custody of the Attorney General and save taxpayer dollars.

Specifically subsection (a) of this section will disallow certain providers of medical care to charge more than the medicare rate for treatment of prisoners in the custody of the Attorney General. Regulations would establish the applicable medicare rate as the maximum rate for medical care in these cases, although medical care could still be contracted for at a lower rate.

Subsection (b) of this section strikes existing §4006 of Title 18 and inserts new language. The new language more appropriately defines cost of subsistence and medical care as "fair and reasonable". This proposal permits the USMS to evaluate the cost to the agency for subsistence and medical care based on adequate price competition, market prices~ past prices, cost and pricing data or value analysis, with an emphasis on the relative cost to the USMS of providing services given the nature and location of the place of confinement. It would allow the U.S. Marshals Service (USMS) to pay no more than the medicare or medicaid rate for medical treatment of detainees in the custody of the Attorney General. This proposal does not authorize the Department of Justice to participate in the Medicare or Medicaid program, but rather permits the Department of Justice to follow medicare and medicaid rate schedules.

SEC. 6025. JUDICIAL DISTRICT DESIGNATION.

This proposal would make a technical amendment to title 28 concerning the location of a Bureau of Prisons correctional complex in a particular federal judicial district. Currently, 28 U.S.C. 113 references the Federal Correctional Institution, Butner as being within the Eastern District of North Carolina. Given the expansion of correctional facilities at Butner, this reference should be modified to reflect that the entire correctional complex at Butner will be within the Eastern District. Passage of this proposal would avoid confusion and ensure that all legal matters involving Butner will be carried out in the same judicial district.

SUBTITLE C – IMPROVEMENTS IN FEDERAL LAW RELATING TO WHITE COLLAR CRIME

SEC. 6031. ELIMINATION OF PROOF OF VALUE REQUIREMENT FOR FELONY THEFT OR CONVERSION OF GRAND JURY MATERIAL.

18 U.S.C. 641 is a general theft of government property statute that carries up to ten years' imprisonment unless the value of the property stolen is $1000 or less in which event it is a misdemeanor. It is well settled that the statute covers theft of intangibles as well as tangible property, such as the information in confidential law enforcement files or in documents containing secret grand jury information. E.g., United States v. Jeter, 775 F.2d 670 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986); United States v. Friedman, 445 F.2d 1076 (9th Cir.), cert. denied, 404 U.S. 958 (1971); United States v. Girard, 601 F.2d 69 (2d Cir.), cert. denied, 444 U.S. 871 (1979); United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). However, in such cases proof of the value of the property taken is often difficult, because the information may have no general or fair market value; rather it may have worth only to a particular individual or small group of individuals. See DiGilio, supra, in which the court held that the government had failed to prove the requisite value of the information in FBI files that was improperly disclosed. Whatever the situation as regards other kinds of intangible government property, the strong societal interest inherent in protecting the secrecy of grand jury material warrants the availability of felony penalties in instances of its theft or improper conversion and disclosure. Accordingly, this section would amend 18 U.S.C. 641 so that the misdemeanor penalty for thefts of government property worth less than $1000 will not apply when the property consists of matters occurring before the grand jury within the meaning of Rule 6(e) of the Federal Rules of Criminal Procedure.

SEC. 6032. AMENDMENT OF INTERSTATE TRAVEL FRAUD STATUTE TO COVER TRAVEL BY PERPETRATOR.

This amendment would remedy an unjustified gap in 18 U.S.C. 2314, which proscribes interstate travel or transportation in the execution of a scheme to defraud. For reasons that are unknown, the statute covers those who transport or cause others to travel in interstate commerce but not interstate travel by the fraud perpetrator. The proposal would add such perpetrator travel to section 2314, since States can have as much difficulty in prosecuting such cases as those involving interstate movement by others (e.g. victims).

SEC. 6033. CONFORMING PENALTY AMENDMENT FOR FRAUDS RESULTING IN SERIOUS INJURY OR DEATH.

This amendment would add penalty enhancements for mail and wire fraud schemes under 18 U.S.C. 1341 and 1343 that result in serious bodily injury or death. An identical enhancement was included in the health care fraud statute (18 U.S.C. 1347) enacted by Congress as part of the Health Insurance Portability and Accountability Act of 1996, P.L. 104-191. Mail and wire fraud schemes may often cause serious injury or even death, for example when they involve supplying defective equipment or parts. Presently, these rather old statutes contain no enhancements for such consequences, although many more recent statutes include them. A five-year maximum sentence such as is provided in sections 1341 and 1343 today is insufficient to vindicate some fraudulent activities that produce serious bodily injury or death. Accordingly, this amendment would add penalty enhancements, of the same degree as Congress provided in the health care fraud statute, to the mail and wire fraud laws.

SEC. 6034. FORFEITURE OF COMPUTERS AND OTHER DEVICES USED FOR COUNTERFEITING.

18 U.S.C. § 492 has provided for the civil forfeiture of counterfeiting paraphernalia since 1909. It was last amended in 1938. The amendments are intended to bring the statute up to date and in conformance with modern civil forfeiture statutes by cross-referencing procedures pertaining to administrative forfeitures in the customs laws, 19 U.S.C. § 1602 et seq., and the civil forfeiture procedures in 18 U.S.C. § 981-87. The amendment also adds a criminal forfeiture provision that cross-references the procedures in § 982.

SEC. 6035. PREVENTION OF FRAUDS INVOLVING AIRCRAFT OR SPACEVEHICLE PARTS IN INTERSTATE OR FOREIGN COMMERCE.

This section, whose primary purpose is to safeguard U.S. aircraft and spacecraft, and passengers and crewmembers from the dangers posed by installation of nonconforming, defective, or counterfeit frames, assemblies, components, appliances, engines, propellers, materials, parts or spare parts into or onto civil, public, and military aircraft. Thus, even though the section is cast as an amendment to the criminal law, it is a public safety measure.

The problems associated with nonconforming, defective, and counterfeit aircraft parts have been explored and discussed in a number of fora for several years. For example, in 1995, the Honorable Bill Cohen, then Chairman of the Senate Subcommittee on Oversight of Government Management and the District of Columbia, (now Secretary of Defense) said: "Airplane parts that are counterfeit, falsely documented or manufactured without quality controls are posing an increased risk to the flying public, and the federal government is not doing enough to ensure safety." Similarly, Senator Carl Levin, in a 1995 statement before the same Subcommittee, said: "A domestic passenger airplane can contain as many as 6 million parts. Each year, about 26 million parts are used to maintain domestic aircraft.

Industry has estimated that as much as $2 billion in unapproved parts are now sitting on the shelves of parts distributors, airlines, and repair stations."

Notwithstanding increased enforcement efforts, the magnitude of the problem is increasing: according to the June 10, 1996, edition of Business Week magazine, "Numerous FAA inspectors . . . say the problem of substandard parts has grown dramatically in the past five years. That's partly because the nation's aging airline fleet needs more repairs and more parts to keep flying--increasing the opportunities for bad parts to sneak in. And cash-strapped startups outsource much of their maintenance, making it harder for them to keep tabs on the work." According to Senator Levin's 1995 statement, "over the past five years, the Department of Transportation Inspector General and the Federal Bureau of Investigation have obtained 136 indictments, 98 convictions, about $50 million in criminal fines, restitutions and recoveries in cases involving unapproved aircraft parts. . . . The bad news is that additional investigations are underway with no sign of a flagging market in unapproved parts."

Yet, no single Federal law targets the problem in a systemic, organized manner. Prosecutors currently use a variety of statutes to bring offenders to justice. These statutes include mail fraud, wire fraud, false statements and conspiracy, among others. While these prosecutorial tools work well enough in many situations, none of them focus directly on the dangers posed by nonconforming, defective, and counterfeit aircraft parts. Offenders benefit from this lack of focus, often in the form of light sentences. One incident reveals the inherent shortcomings of such an approach:

> in 1991, a mechanic at United [Airlines] noticed something odd about what were supposed to be six Pratt & Whitney bearing-seal spacers used in P&W's jet engines--engines installed on Boeing 727s and 737s and McDonnell-Douglas DC-9s world-wide. The spacers proved to be counterfeit, and P&W determined that they would have disintegrated within 600 hours of use, compared with a 20,000-hour service life of the real part. A spacer failure in flight could cause the total failure of an engine. Investigators traced the counterfeits to a broker who allegedly used unsuspecting small toolmakers and printers to fake the parts, as well as phony Pratt & Whitney boxes and labels. The broker . . . pled guilty to trafficking in counterfeit goods and received a seven-month sentence in 1994. (June 10, 1996, Edition of Business Week Magazine.)

Given the potential threat to public safety, a focused, comprehensive law is needed to attack this problem.

Prevention of Frauds Involving Aircraft or Spacecraft Parts in Interstate or Foreign Commerce remedies the problems noted above by amending Chapter Two of Title 18, United States Code. Chapter Two deals with "Aircraft and Motor Vehicles," and currently contains provisions dealing with the destruction of aircraft or aircraft facilities, and violence at international airports but says nothing about fraudulent trafficking in nonconforming, defective, or counterfeit aircraft parts.

Subsection (a) builds on the existing framework of Chapter Two by adding some relevant definitions to Section 31. The subsection defines "aviation quality," when used with respect to aircraft or aircraft parts, to mean aircraft or parts that have been manufactured, constructed, produced, repaired, overhauled, rebuilt, reconditioned, or restored in conformity with applicable standards, specified by law, regulation, or contract. The term is used in Section 38(b) of the Act, which sets forth the maximum penalties for violation of the offenses prescribed by Section 38(a). If the misrepresentation or fraud that leads to a conviction under Section 38(a) concerns the "aviation quality" of an aircraft part, then Section 38(b)(2) enhances the maximum punishment by 10 years imprisonment and doubles the potential fine.

This subsection also defines "aircraft." This definition essentially repeats the definition of aircraft already provided in Section 40102 of Title 49.

"Part" is defined to mean virtually all aircraft components and equipment.

"Spacevehicle" is defined to mean any man-made device, manned or unmanned, designed for operation beyond the earth's atmosphere and would include rockets, missiles, satellites, and the like.

Subsection (b) of section 6035 adds a totally new Section 38 to Chapter Two. Proposed subsection (a)(1)-(3) sets out three new offenses designed to outlaw the fraudulent exportation, importation, sale, trade, installation, or introduction of nonconforming, defective, or counterfeit aircraft or aircraft parts into interstate or foreign commerce. This is accomplished by making it a crime to falsify or conceal any material fact, to make any materially fraudulent representation, or to use any materially false documentation or electronic communication concerning any aircraft or spacecraft part, or to attempt to do so.

The three provisions overlap to some extent but each focuses upon a different aspect of the problem to provide investigators and prosecutors with necessary flexibility. All are specific intent crimes; that is, all require the accused to act with knowledge, or reason to know, of his fraudulent activity.

Proposed subsection (b) prescribes the maximum penalties that attach to the offenses created in new subsection (a). A three-pronged approach is taken in order to both demonstrate the gravity of the offenses and provide prosecutors and judges alike with flexibility in punishing the conduct at issue. A basic 15-year imprisonment and $250,000 fine maximum punishment is set for all offenses created by the new section; however, the maximum punishment may be escalated if the prosecution can prove additional aggravating circumstances. If the fraud that is the subject of a conviction concerns the aviation quality of the part at issue and the part is actually installed in an aircraft or spacevehicle, then the maximum punishment increases to 25 years imprisonment and a $500,000 fine. If, however, the prosecution is able to show that the part at issue was the probable cause of a malfunction or failure leading to an emergency landing or mishap that results in the death or injury of any person, then the maximum punishment is increased to life imprisonment and a $1 million fine. Finally, if a person other than an individual is convicted, the maximum fine is increased to $25 million.

New subsection (c) authorizes the Attorney General to seek appropriate civil remedies, such as injunctions, to prevent and restrain violations of the Act. Part of the difficulty in stopping the flow of nonconforming, defective, and counterfeit parts into interstate or foreign commerce is the ease with which unscrupulous individuals and firms enter and re-enter the business: "Moreover, even when they are caught and punished, these criminals can conceivably go back to selling aircraft parts when their sentences are up." (1995 Statement of Senator Joe Liebermann before the Senate Subcommittee on Oversight of Government Management and the District of Columbia.) In addition to providing a way to maintain the status quo and to keep suspected defective or counterfeit parts out of the mainstream of commerce during an investigation, this provision adds important post-conviction enforcement tools to prosecutors. The ability to bring such actions may be especially telling in dealing with repeat offenders since a court may, in addition to imposing traditional criminal penalties, order individuals to divest themselves of interests in businesses used to perpetuate related offenses or to refrain from entering the same type of business endeavor in the future. Courts may also direct the disposal of stockpiles and inventories of parts not shown to be genuine or conforming to specifications to prevent their subsequent resale or entry into commerce. It is envisioned that the prosecution would seek such relief only when necessary to ensure aviation safety.

Proposed subsection (d) provides for criminal forfeiture proceedings in cases arising under new section 38 of Title 18.

Proposed subsection (e) discusses how the Act is to be construed with other laws relating to the subject of fraudulent importation, sale, trade, installation, or introduction of aircraft or aircraft parts. The section makes clear that other remedies, whether civil or criminal, are not preempted by the Act and may continue to be enforced. In particular, the Act is not intended to alter the jurisdiction of the U.S. Customs Service, which is generally responsible for enforcing the laws governing importation of goods into the United States.

Proposed subsection (f) deals with the territorial scope of the Act. To rebut the general presumption against the extraterritorial effect of U.S. criminal laws, this section provides that the Act will apply to conduct occurring both in the United States and beyond U.S. borders. Thus, if an offender affects the safety of U.S. aircraft, spacevehicles, or is a U.S. person, this section would provide for subject matter jurisdiction even if the offense is committed overseas.

Subsection (g) of new section 38 authorizes administrative subpoenas to be issued in furtherance of the investigation of offenses under this section. Under this provision, the Attorney General or designee may issue written subpoenas requiring the production of records relevant to an authorized law enforcement inquiry pertaining to offenses under the new section. Testimony concerning the production and authentication of such records may also be compelled. The subsection also sets forth guidance concerning the service and enforcement of such subpoenas and provides civil immunity to any person who, in good faith, complies with a subpoena issued pursuant to the Section.

The subsection is modeled closely on an analogous provision found in Section 3486(a)(1) of Title 18, pertaining to health care fraud investigations. Like the health care industry, the aviation industry--including the aviation-parts component of the industry--is highly regulated since the public has an abiding interest in the safe and efficient operation of all components of the industry. The public also has a concomitant interest in access to the records and related information pertaining to the industry since, often, the only evidence of possible violations of law may be the records of this regulated industry. Thus, companies and individuals doing business in this industry are in the public limelight by choice and have reduced or diminished expectations of privacy in their affairs relating to how that business is conducted. In such situations, strict probable cause requirements regarding the production of records, documents, testimony, and related materials make enforcement impossible. This provision recognizes this but also imposes some procedural rigor and related safeguards so that the administrative subpoena power is not abused in this context. The provision requires the information sought to be relevant to the investigation, reasonably specific, and not unreasonably burdensome to meet.

SEC. 6036. CONFORMING AMENDMENT.

This section would add the new offenses created by the Act to the list of predicate offenses for which oral, wire, and electronic communications may be authorized.

SEC. 6037. INCREASED MAXIMUM CORPORATE PENALTY FOR ANTITRUST VIOLATIONS.

Section 6037 would increase the maximum statutory fine for corporations convicted of criminal antitrust violations from the current Sherman Act maximum of $10,000,000 to a new maximum of $100,000,000. Subsection (a) would apply this increase to antitrust violations that consist of agreements in restraint of trade or commerce among the States, primarily price-fixing and bid-rigging violations. Subsection (b) would apply this increase to antitrust violations that consist of monopolizing, attempting to monopolize, or conspiring to monopolize trade or commerce among the States. Subsection (c) would apply this increase to antitrust violations that consist of agreements in restraint of trade in or among Territories of the United States or the District of Columbia and any State.

Analysis

I. Introduction

The Department of Justice supports amending the Sherman Act to raise the maximum corporate fine from $10 million to $100 million. Currently, the methodology adopted by the United States Sentencing Commission for imposing fines for criminal antitrust offenses bases those fines on a percentage of the volume of commerce affected by the violation. However, for an increasing number of corporate antitrust crimes that involve a very large volume of commerce, the Sentencing Commission methodology results in a fine greater than the current statutory maximum of $10 million. In such cases, the only alternative to a fine capped at $10 million is for the offending corporation to be sentenced under the "twice the gain/twice the loss" alternative sentencing provision found in 18 U.S.C. 3571(d). Unfortunately, proving gain or loss for antitrust offenses is much more difficult than is the case for most other economic crimes.

The end result is that for the largest, most harmful antitrust conspiracies--typically conspiracies involving international cartels and foreign corporations--the standard methodology adopted by the Sentencing Commission for calculating antitrust fines is mooted in favor of a fine calculation that tends to be considerably more lenient towards the offender. The current statutory scheme thereby provides less deterrent effect for firms whose illegal conduct affects the largest volume of commerce--an inherently incongruous result. Raising the maximum corporate antitrust fine in the Sherman Act to $100 million would rectify this problem and ensure that multinational corporations that commit antitrust offenses involving hundreds of millions of dollars in U.S. commerce are punished just as severely as local firms that commit antitrust offenses involving hundreds of thousands of dollars.

II. The Proposed Change in the Context of the Existing Statutory Structure

The central statutory provisions governing sentencing of corporations convicted of antitrust offenses are the general fine sentencing statute, 18 U.S.C. 3571 and the Sherman Act, 15 U.S.C. 1-3. The fine sentencing statute provides that corporations "may not be fined more than the greatest of -- (1) the amount specified in the law setting forth the offense; (2) the applicable amount under subsection (d) of this section; . . ." 18 U.S.C. 3571(c). Subsection (d) is the alternative "twice the gain, twice the loss" fine provision: it states that for offenses resulting in pecuniary gain or loss to any person, the defendant may be fined "not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process." 18 U.S.C. 3571(d). In the case of antitrust crimes, the "law setting forth the offense" is the Sherman Act: it provides for corporate fines of up to $10 million. 15 U.S.C. 1-3. Thus, for antitrust offenses the maximum fine is $10 million or twice the gross pecuniary gain or loss, whichever is greater.

Actual fines in antitrust cases are calculated pursuant to the United States Sentencing Guidelines. USSG §2R1.1 (in conjunction with §8C2.4) provides that the base fine for organizations in antitrust offenses is 20 percent of the affected volume of commerce. The base fine is modified by the culpability score (calculated pursuant to §8C2.5[14]) to produce a fine range. The range can include a minimum fine as low as 15 percent of the affected volume of commerce and a maximum of as much as 80 percent of the volume of commerce affected by the violation depending on the culpability score.

For antitrust offenses with a volume of commerce of $12.5 million or less,[15] the $10 million statutory maximum does not constrain the actual fine, and the fine calculation methodology adopted by the Sentencing Commission can be applied without difficulty. However, for larger antitrust conspiracies, the $10 million statutory maximum prevents a court from imposing any sentence over $10 million that might otherwise be required under the Sentencing Commission's methodology. Indeed, for any offense that involves a volume of commerce of greater than $66.66 million, the $10 million statutory maximum prevents a court from applying even the minimum possible Guidelines fine.[16]

When the Sherman Act corporate maximum fine was set at $10 million in 1990, the vast majority of antitrust offenses prosecuted by the Department involved a volume of commerce small enough to permit a full implementation of the fines provided by the Sentencing Guidelines without resort to the alternative fine statute. Just the opposite is true today. The vast majority of current investigations of national conspiracies and nearly all of the grand juries looking at suspected international cartel activity involve commerce which would result in fines above the current $10 million statutory maximum. Perhaps the most telling indicator that the statutory maximum has not kept pace with the scope of Department enforcement is that the average fine obtained against corporations in criminal antitrust cases last year was higher than the statutory maximum. The average fine for all corporations was approximately $12 million; the average fine for corporations involved in national or international conspiracies (the majority of the Department's prosecutions) was over $16 million.

At present, the only way to obtain a fine in excess of $10 million is to utilize the "twice the gain, twice the loss" provision of the alternative fine statute. Unfortunately, proving the gain or loss in an antitrust conspiracy is inherently very difficult[17]--a fact the Sentencing Commission recognized when it

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[14] The culpability score takes into account factors such as the size of the organization, the level of participation in the offense of high-level personnel, any prior history of misconduct, the degree of cooperation and acceptance of responsibility, etc.

[15]$12.5 million multiplied by 80 percent yields the $10 million statutory maximum.

[16]15 percent of $66.66 million equals $10 million.

[17]Given the *per se* nature of criminal antitrust offenses, proving gain or loss is unnecessary to establish liability and therefore, information supporting a calculation of gain or loss may not be

opted for a fine calculation for antitrust offenses based on the volume of commerce affected by the violation rather than on gain or loss from the offense as is used for other economic crimes.[18] Although the Department has been able to obtain fines greater than the statutory maximum of $10 million on 14 occasions,[19] all 14 involved negotiated settlements. To date, in large part due to the inherent difficulty of proving gain or loss, the Department has never sought to prove gain or loss to obtain a corporate antitrust fine above $10 million.

Thus, under the existing statutory scheme, most antitrust fines are calculated using the methodology adopted by the Sentencing Guidelines which relies principally on a percentage of the volume of affected commerce. For the largest antitrust conspiracies, however, the fine is either capped at $10 million (which may be substantially less than the fine that would otherwise be appropriate under the Guidelines methodology) or the Department must prove gain or loss--something which is inherently very complex and difficult.

III. Rationale for the Proposed Change

In the past few years the Department has devoted an ever-increasing amount of resources to cracking large international antitrust conspiracies. Criminal enforcement of the antitrust laws is the Department's top antitrust priority, and cracking large international cartels is perhaps the single most important focus of current criminal antitrust enforcement. Increasing international cooperation has enhanced the Department's ability to pursue international cartels even when they principally involve foreign firms and conduct on foreign soil that impacts American consumers.[20] International conspiracies

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extensively sought in an investigation. In many cases, data needed to calculate gain or loss may be unavailable. Calculating gain or loss may require a comparison of the prices actually charged by the conspirators with prices that would have been charged in the absence of a conspiracy--an inherently speculative calculation. Finally, even where data is available, it will often be difficult to analyze, and different analyses will produce different estimations of gain or loss.

[18]See USSG §2R1.1, comment. (background). The Sentencing Commission adopted the volume of commerce approach and the 20 percent proviso expressly to relieve the Department of the need to prove the amount of loss in calculating Guidelines fines for antitrust offenses. The Commission's rationale was that calculating the amount of loss at sentencing in *per se* antitrust cases would be highly complicated and unduly burdensome, and that the much easier to determine volume of commerce affected by the violation could serve as a suitable proxy for the harm caused by the offense.

[19]Appendix A contains a listing of all of the antitrust defendants against which a fine of $10 million or greater has been imposed.

[20]In late 1995, the Department indicted Nippon Paper Industries Co., Ltd. for participating in a conspiracy to raise the price of fax paper to American consumers. Even though the conspiratorial acts

tend to be complex and extremely broad in their impact--both in terms of geographic scope and in the amount of commerce affected. As a result, it is no longer uncommon for the Department to be pursuing conspiracies where the affected volume of commerce is in the hundreds of millions, or even billions, of dollars. Currently over 30 U.S. antitrust grand juries are looking at international cartel activity[21]: in more than half of these investigations the affected volume of commerce is well over $100 million, and in some the affected volume of commerce is well over $1 billion. Unfortunately, the Sherman Act maximum fine has not kept pace with this increased activity.

As discussed above, if the affected volume of commerce involving a defendant is over $66.66 million, the $10 million statutory maximum will prevent a court from imposing even the minimum fine called for under the methodology adopted by the Sentencing Commission. If the affected volume of commerce is as little as $12.51 million, the $10 million statutory maximum may constrain a court's ability to impose the fine called for under the Sentencing Guidelines. Given that over a dozen corporate defendants successfully prosecuted by the Department have participated in conspiracies where the affected volume commerce resulted in a Guidelines fine greater than $10 million, the $10 million statutory maximum has already begun to affect fines imposed on the largest antitrust felons; needless to say, it may become an increasing obstacle to the use of the Sentencing Commission's methodology for calculating antitrust fines as the Department cracks more international conspiracies.

The ultimate effect of the $10 million cap is that participants in the largest antitrust conspiracies--typically large international firms--tend to get, in relative terms, a more lenient sentence than participants in smaller antitrust conspiracies[22]--which are typically smaller domestic firms. Not only is this result inherently unfair, it creates a climate where deterrence is weakest where it actually should be strongest. Conspiracies affecting hundreds of millions or even billions of dollars are the most damaging to

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alleged took place in Japan, the U.S. Court of Appeals for the First Circuit held that the defendant could still be prosecuted because the conspiracy had an effect on U.S. customers. See United States v. Nippon Paper Industries Co., 109 F.3d 1 (1st Cir. 1997). The Department has also prosecuted numerous companies for involvement in conspiracies where several of the conspiratorial meetings took place overseas.

[21]The subjects and targets of these investigations are located in over 20 different countries and on 5 continents.

[22]Although it is possible to secure a fine larger than $10 million, such a fine can only be obtained via the "twice the gain, twice the loss" alternative sentencing statute. As discussed above, such a sentence requires the use of a methodology different than that usually employed for antitrust crimes under the Sentencing Guidelines--a methodology that requires proof of gain or loss. Given the extreme difficulty of accurately proving gain or loss for an antitrust offense, an antitrust defendant is significantly more likely to get a lesser sentence if the Sentencing Commission's volume of commerce-based methodology cannot be employed.

competition and consumers; it is therefore potential participants in these conspiracies where deterrence is most necessary. The fact that the Department has discovered conspiracies involving hundreds of millions of dollars in the past few years suggests that large corporations are not adequately deterred by the current fine structure and that more deterrence, in the form of potentially greater fines, is necessary to protect American consumers.[23]

IV. Conclusion

The current Sherman Act $10 million statutory maximum fine combined with the Department's increasing focus on large international conspiracies has created, in effect, a two-tiered sentencing system. Antitrust conspirators that engage in a small to moderate volume of commerce are sentenced under the volume of commerce-based methodology adopted by the Sentencing Commission; however, large international firms that engage in conspiracies affecting a huge volume of commerce obtain more lenient treatment: either they receive the $10 million statutory maximum (which will often be considerably less than the fine that would be appropriate under the Sentencing Commission's volume of commerce-based methodology) or the Department must prove "gain" or "loss"--something which is so difficult in an antitrust case that the Department has never litigated a corporate antitrust fine in excess of $10 million. The potential constraint on fines is such that the largest potential conspirators--those doing hundreds of millions or even billions of dollars in commerce--may regard the potential fine as merely a cost of doing business.[24] In order to rectify this problem, provide adequate deterrence to the largest potential antitrust conspirators, and thereby protect American consumers, the Department of Justice supports amending the Sherman Act to raise the maximum permissible corporate fine from $10 million to $100 million.

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[23]Increasing the maximum statutory fine would not adversely affect the ability of private parties to secure restitution nor would it jeopardize the continued viability of convicted corporate defendants. Under the Sentencing Guidelines and Department of Justice policy, restitution to injured parties takes precedence over criminal fines. Moreover, the Sentencing Guidelines provide that a court may depart downward from the specified Guidelines fine if the defendant is unable to pay that fine. Finally, it is important to note that all criminal fines in antitrust cases ultimately are deposited in the Crime Victims Fund, see 42 U.S.C. § 10601, which in turn supports two major formula grant programs: Victim Compensation and Victim Assistance. Over 90 percent of Fund deposits are used to support state victim compensation and assistance services for victims of domestic violence, sexual assault, child abuse, drunk driving, homicide, and other crimes.

[24]This problem is particularly acute for foreign-based firms: for domestic firms, the prospect of jail time for individuals provides a substantial added deterrent to engaging in antitrust offenses on behalf of their respective companies; for foreign-based firms, jurisdictional realities are such that foreign executives face much less risk of seeing the inside of a U.S. courtroom and therefore are less likely to be deterred from participating in antitrust conspiracies.

APPENDIX A

Sherman Act Violations Yielding a Fine of $10 Million or More (thru 5/12/99)

Defendant (FY)	Product	Fine ($ Millions)	Geographic Scope	Country
SGL Carbon AG (1999)	Graphite Electrodes	$135	International	Germany
UCAR International, Inc. (1998)	Graphite Electrodes	$110	International	U.S.
Archer Daniels Midland Co. (1997)	Lysine & Citric Acid	$100	International	U.S.
Haarmann & Reimer Corp. (1997)	Citric Acid	$50	International	German Parent
HeereMac v.o.f. (1998)	Marine Construction	$49	International	Netherlands
Hoechst AG (1999)	Sorbates	$36	International	Germany
Showa Denko Carbon, Inc. (1998)	Graphite Electrodes	$32.5	International	Japan
Fujisawa Pharmaceuticals Co. (1998)	Sodium Gluconate	$20	International	Japan
Dockwise N.V. (1998)	Marine Transportation	$15	International	Belgium
Dyno Nobel (1996)	Explosives	$15	Domestic	Norwegian Parent
F. Hoffmann-LaRoche, Ltd. (1997)	Citric Acid	$14	International	Switzerland
Eastman Chemical Co. (1998)	Sorbates	$11	International	U.S.
Jungbunzlauer International (1997)	Citric Acid	$11	International	Switzerland
Lonza AG (1998)	Vitamins	$10.5	International	Switzerland
Akzo Nobel Chemicals, BV & Glucona, BV (1997)	Sodium Gluconate	$10	International	Netherlands
ICI Explosives (1996)	Explosives	$10	Domestic	British Parent
Mrs. Baird's Bakeries (1996)	Bread	$10	Domestic	U.S.
Ajinomoto (1996)	Lysine	$10	International	Japan
Kyowa Hakko Kogyo, Co., Ltd. (1996)	Lysine	$10	International	Japan

SUBTITLE D – FEDERAL LAW ENFORCEMENT PROGRAMS

SEC. 6041. FEDERAL PROSECUTOR ETHICS ACT.

This section repeals a provision that was included in the Omnibus Appropriations Act for FY '99 that would require that Department of Justice attorneys, and federal law enforcement agents supervised by them, comply with "state laws and rules and local federal court rules" in each state where the Department attorney "engages in that attorney's duties." This will have a significant, detrimental impact on federal law enforcement because some state rules were not drafted with federal prosecutors in mind and would interfere with completely lawful and legitimate law enforcement techniques.

SEC. 6042. STRENGTHENING LAW ENFORCEMENT IN US. TERRITORIES, COMMONWEALTHS AND POSSESSIONS.

Subsection (a) of this proposal would amend title 5, United States Code, to create a new section 5757, which would authorize extended assignment incentives.

Subsection (a) of the new section would provide the head of an Executive agency the authority to pay an extended assignment incentive to an employee if (1) the employee had completed at least 2 years of continuous service in one or more civil service positions in a single United States territory or possession or the Commonwealth of Puerto Rico or Commonwealth of the Northern Mariana Islands; (2) the agency determines that replacing the employee would be difficult; and (3) the agency determines it is in the best interest of the Government to encourage the employee to complete an additional period of employment with the agency in the territory, commonwealth or possession, not to exceed 5 years. This authority would cover an "employee" as defined by 5 U.S.C. 2105.

Subsection (b) of the new section would provide that the sum of extended assignment incentive payments for a service period may not exceed the greater of 25 percent of the annual rate of basic pay of the employee at the beginning of the service period, times the number of years in the service period, or $15,000 per year in the service period.

Subsection (c) of the new section would provide that payment of an extended assignment incentive is contingent upon the employee entering into an agreement with the agency. The agreement would specify the terms and conditions under which the extended assignment incentive is payable including the period of service and any use of an initial lump-sum payment, installment payments, or a final lump-sum payment upon completion of the entire period of service. The agreement must describe the conditions for canceling the incentive (e.g., upon separation, relocation, poor performance). The agreement must require that if, at the time the incentive is canceled, the employee has received incentive payments which exceed the amount which bears the same relationship to the total amount to be paid under the agreement as the completed service period bears to the agreed-upon service period, the employee must repay that excess amount, at a minimum. The agreement must not require an employee who is involuntarily reassigned to a position stationed outside the territory, commonwealth or possession or involuntarily separated (not for cause on charges of misconduct, delinquency, or inefficiency) to repay any excess payments.

Subsection (d) of the new section would prohibit the payment of an extended assignment incentive while an employee is fulfilling a recruitment or relocation bonus service agreement or during a period for which an employee is receiving a retention allowance. Subsection (e) of the new section would provide that extended assignment incentive payments are not part of the basic pay of an employee for any purpose.

Subsection (f) of the new section would provide the Office of Personnel Management with authority to regulate the extended assignment incentive authority. This subsection would also provide that neither this new section nor implementing regulations would impair an agency's independent authority to administratively determine compensation for a class of its employees. Paragraph (2) of subsection (a) of the proposal would add the appropriate new reference to new section 5757 to the analysis for chapter 57 of title 5, United States Code.

Subsection (b) of section 6042 would amend section 5307(a)(2)(B) of title 5, United States Code, to provide that extended assignment incentives would apply toward the aggregate limitation on pay of level I of the Executive Schedule.

Subsection (c) of the proposal would provide that the amendments made by this Act would take effect on the first day of the first applicable pay period beginning on or after 6 months after the date of enactment of the Act.

Subsection (d) of the proposal requires the Office of Personnel Management to report to the Congress on the effectiveness of the extended assignment incentive authority (including the effectiveness of the $15,000 base level) as a human resources management tool. Agencies are required to report to the Office of Personnel Management such information on their use of the authority as the Office may prescribe for purposes of preparing the report.

SEC. 6043. AGENCIES AUTHORIZED TO INVESTIGATE VIOLATIONS.

Currently, section 1956 of title 18, United States Code, authorizes the National Enforcement Investigation Center (NEIC) of the Environmental Protection Agency (EPA) to investigate violations of the section that involve environmental crimes. The NEIC does not, however, have criminal investigators under its auspices. This proposed change simply places the investigatory authority into the appropriate Division of the EPA – the Criminal Investigation Division.

Section 1957 is currently silent as to the authority of the EPA to investigate violations of the section that involve environmental offenses. The draft bill proposes an amendment to conform this section with section 1956.

SUBTITLE E – IMPROVEMENTS TO FEDERAL SENTENCING LAWS

SEC. 6051. PRISON CREDIT AND AGING PRISONER REFORM.

Congress has long been concerned with unwarranted disparity in sentencing and time served among federally convicted offenders. In 1984, in furtherance of the goal of avoiding unwarranted disparities in time served, Congress passed the Sentencing Reform Act, which dramatically changed federal sentencing practices in order to ensure that offenders who committed similar crimes would serve similar sentences. This section is intended to remedy certain remaining anomalies in federal law that work against the goal of avoiding unwarranted disparities in time served.

The section has three components. The first, contained in subsection (a), would amend section 3585 of title 18 to eliminate inappropriate accrual of custody credit and avoid the resulting unwarranted disparities in time served by federal offenders. This would be accomplished by repealing section 3585(b)(2) which among other problems, as explained herein, confers credit excessively and unfairly and actually rewards defendants who commit further state offenses while on release from federal charges.

Under section 3585 of title 18, an offender is credited both for the actual time served in the custody of the BOP pursuant to the sentence (§ 3585(a)) as well as for certain specified time spent in official detention prior to the date the sentence commences (§ 3585(b)(1) and (2)). The original purpose for crediting periods of custody prior to sentencing was to ensure uniformity in the amount of time served by sentenced federal offenders as a result of their federal offenses, regardless of their pre-sentence release status or imprisonment location. Section 3585(b)(2), however, goes far beyond the original and legitimate purpose of the crediting statute, detailed below, by providing credit for time served as a result of certain <u>unrelated</u> offenses for which the awardee defendant is arrested after the commission of the federal crime for which he is later sentenced. This provision actually operates to reward defendants for committing additional acts for which they are arrested and confined and results both in unwarranted disparities in time served and the inappropriate accrual of custody credit. This section of the bill would repeal this anomalous provision of current law.

The history of the credit provisions in federal law reveals their primary purpose to be to eliminate unwarranted disparities in time served among similarly sentenced offenders. The first statutory credit provision was enacted in 1932 to clarify when a federal sentence began to run. <u>See</u> 18 U.S.C. § 709(a) (1934). The 1932 statute gave offenders credit for time spent in custody awaiting transfer to the facility at which the sentence would be served. The purpose of the statute was to ensure that post-sentence time spent in custody for the sentenced offense — whether that custody be awaiting transfer or at the facility at which the sentence would be served — would count towards an offender's sentence. The credit statute thus eliminated disparities based on custodial transfers within the federal prison system.

The credit statute retained that limited thrust until 1960, when Congress broadened it to eliminate disparities in time served under mandatory minimum sentencing statutes based on an offender's bail status for the offense under which the sentence was imposed. See 18 U.S.C. § 3568 (1961). Before the 1960 amendment, offenders who were detained pre-trial because they could not post bail and who were later found guilty of an offense carrying a mandatory minimum sentence would serve more time in custody than a similarly situated offender who was released pre-conviction. This occurred because there was no provision to credit the pre-trial detention period toward the mandatory minimum sentence or reduce the mandatory sentence itself. As stated in the House Report accompanying the bill, its purpose was "to eliminate the disparity in sentences under statutes requiring mandatory terms of imprisonment" by allowing the pre-trial detention period resulting from the failure to post bail to be credited towards service of the sentence. H. Rep. No. 86-2058 (1960) reprinted in 1960 U.S.C.C.A.N. 3288, 3289. Under the 1960 statute, all offenders sentenced to the mandatory minimum term would serve that term as a result of the offense, no more and no less. In 1966, Congress further broadened the credit statute — in the Bail Reform Act of that year — by providing credit for all pre-sentence detention resulting from the sentenced offense and by making such credit available for all offenses including those that did not carry a mandatory minimum sentence. Pub. L. No. 89-465, § 4, 80 Stat. 217.

While the breadth of the cases eligible for credit under the statute increased from 1932 to 1966, the policy goal underlying all of the statutes remained the same: to ensure credit towards a sentence for detention resulting from the sentenced offense and thus avoid disparities in the time served as a result of the offense for similarly sentenced offenders.

In the 1970s federal policy changed in favor of conferring credit not only for custodial periods connected with the act or offense on which the defendant was ultimately sentenced but also for certain unrelated pre-sentence custodial periods. In companion cases before the Supreme Court, see Nelson v. United States, 402 U.S. 1006 (1971), the Department of Justice took the position that certain pre-sentence custodial periods unrelated to the sentenced offense should also be credited towards an offender's sentence. The objective of this policy was apparently to provide relief for offenders who served so-called "dead time" prior to their federal sentence — periods of custody that would not otherwise be credited to any other sentence.

In Nelson, the defendant was convicted in federal court of transporting stolen cattle and sentenced to a three-year prison term. Nelson was released pending appeal. When the appeal was ultimately dismissed, Nelson was ordered to surrender within 30 days. During the 30-day period, state authorities arrested Nelson for a new and unrelated burglary charge, and he was detained pending trial. Nelson remained in state custody for over two years — unable to post bond — during which time he was convicted for the burglary charge, received a sentence of ten years, appealed his conviction, and then finally won reversal of that conviction because of a defective search warrant.

Subsequently, in federal court, Nelson sought credit for the two years he was in state custody on the burglary charges, during which time, he argued, he would otherwise have been serving his federal sentence. Nelson's claims were denied in the lower courts, but in the Supreme Court, the Solicitor General conceded that Nelson should get credit for the state custody, notwithstanding the fact that it was as a result of conduct unrelated to the federal offense for which Nelson had been sentenced. The Solicitor General reasoned that had Nelson been able to post bond on the state charges, he would have been surrendered to federal authorities and would have served his term of imprisonment.[25] "To construe Section 3568 to deny Nelson relief under these circumstances would be inconsistent with the spirit of numerous decisions of this Court requiring that justice be applied equally and not on the basis of ability to pay. [Citations omitted.] Section 3568 is in our view not so inflexible in its provisions as to be incompatible with an interpretation that would give Nelson the relief he seeks." Memorandum of the United States in Response to Defendant's Petition for Certiorari, Nelson v. United States, 402 U.S. 1006 (1971). The Court remanded the cases back to the appellate courts for reconsideration "in light of the position asserted by the Solicitor General." Nelson v. United States, 402 U.S. at 1006. The lower courts subsequently released the defendants and ordered that credit be given. United States v. Gaines, 449 F.2d 143, 144 (2nd Cir. 1971); Nelson v. United States, 445 F.2d 631 (8th Cir. 1971);

In response to Nelson and similar cases, the BOP in 1973 issued Program Statement 7600.55 that provided credit for unrelated periods of custody that occurred while a federal detainer was pending, if the custody was not ultimately credited against some state charge. But credit was limited, under the Nelson rationale and the Program Statement, to circumstances when federal imprisonment would have

[25]The Department of Justice's position in the Supreme Court followed several lower court cases that held, as a matter of statutory interpretation, that credit should be given for unrelated pre-sentence custody in certain limited circumstances. See e.g., Davis v. Attorney General, 425 F.2d 238 (5th Cir. 1970) (credit should be given toward a federal sentence if a federal detainer lodged against a prisoner prevented bail from being set on a state offense); Willis v. United States, 438 F.2d 923 (5th Cir. 1971) (credit should be given against a federal sentence for unrelated pre-sentence time spent in state custody that is not credited to any the state sentence).

occurred except for the unrelated custody. That policy remained in place until November, 1987, when the Sentencing Reform Act of 1984 which included section 3585(b)(2) went into effect and which dramatically expanded the periods of unrelated pre-sentence custody that qualify for credit.[26]

As previously indicated, section 3585(b)(2) provides credit for unrelated pre-sentence custody that is not credited towards another offense, whether or not bail was an available option and whether or not a federal detainer was issued. Thus while under the Nelson rationale an offender receives credit only when he would have been serving his federal sentence had bail been made on the other charges, under section 3585(b)(2) an offender who is arrested and confined on an unrelated charge receives credit for all pre-sentence incarceration not otherwise credited to a sentence regardless of whether he would have been serving a federal sentence and regardless of whether bail was available for the unrelated custody period. Current law thus provides offenders credit broadly for periods of "dead time" that occur following the commission of the federal crime.

Section 3585(b)(2) creates unwarranted disparities between federal offenders who accrue so-called "dead time," by providing relief only to those who have been separately arrested after the commission of the federal offense for which they are ultimately sentenced. Furthermore, the current law is clearly insupportable for the class of federal offenders who, before sentencing on the federal charge, commit a new crime only to have charges for that crime dropped solely because of the impending federal sentence. Take the example of two persons convicted of federal bank robbery, both of whom are released on bail after conviction. One is arrested and incarcerated pretrial on state armed robbery charges, for conduct occurring while the defendant was on release status, which are later dismissed when the state prosecutor learns of the pending federal charge; the other defendant engages in only law abiding conduct while on federal release and suffers no state arrest or detention. Under section 3585(b)(2), only the first, clearly least deserving defendant, receives credit toward his federal sentence. This is without any legitimate rationale. In applications such as this, section 3585(b)(2) actually gives more favorable treatment to the defendant who is subject, by his own culpable actions, to multiple, unrelated charges.

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[26]The legislative history of section 3585 is unhelpful in explaining the genesis of subsection (b)(2). See S. Rep. No. 98-225, p. 129 (98^{th} Cong., 1^{st} Sess.) (1983). Cf. Final Report of the National Commission on Reform of Federal Criminal Laws, § 3205 (1971), which was a precursor to many bills in the 1970s and early 1980s that led to the enactment of the Sentencing Reform Act of 1984.

Ordinarily, a defendant will be held in custody prior to trial (the most typical situation in which section 3585(b)(2) operates) only if a judicial officer has determined that there is probable cause to believe he has committed a crime. There are many reasons, most unrelated to factual innocence, why such a defendant may ultimately be released without sustaining a conviction and sentence on the charge for which he is held — thus accruing "dead time." These include (inter alia):

(1) a prosecutorial decision not to file formal charges;

(2) having pending charges dismissed as part of a plea agreement whereby the defendant pleads guilty to an unrelated charge;

(3) the suppression of inculpatory evidence on the grounds that some constitutional or statutory process was not followed; and

(4) the destruction or loss of physical evidence or the death of a critical witness or other event that necessitates the dismissal of charges.

It has long been national policy that a defendant held in custody pre-trial who was later released without being convicted, or even after acquittal, is not entitled to compensation for that period of custody absent extraordinary willful or malicious conduct. Courts have long held that prisoners have no right to credit for such dead time, including even when the confinement was unlawful. <u>See, e.g.</u>, <u>United States v. Tagbering</u>, 116 F.3d 1484 (8th Cir. 1997) ("a prisoner has no constitutional right to credit for prison time served on a prior illegal conviction); <u>Holscher v. Young</u>, 440 F.2d 1283, 1290 (8th Cir. 1971); <u>United States v. Rundle</u>, 279 F.Supp. 453, 454 (E.D. Pa. 1968). In addition, because public officials and entities enjoy qualified or absolute immunity for their actions, only in the most egregious circumstances might such pre-trial custody result in financial compensation following an action for malicious conduct. Finally, there has never been any congressional action to provide redress for the typical accrual of dead time.[27] Thus, defendants who accrue "dead time" normally receive no compensation for such time. Section 3585(b)(2) flies in the face of this longstanding policy and, in doing so, even as to its most sympathetic applications such as the <u>Nelson</u> case, <u>supra</u>, creates unwarranted disparities and bestows a windfall benefit on some defendants.

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[27]The 1998 Department of Justice Appropriations Bill did include a provision, commonly known as the "Hyde Amendment," that authorizes the court in a criminal case to pay a prevailing defendant his or her attorney's fees and other litigation expenses when the government's position was "vexatious, frivolous, or in bad faith." This provision, by its very terms, would apply only to the most extraordinary circumstances and thus would not cover the typical defendant who accrued dead time.

Moreover, the rationale in Nelson — that Nelson was being penalized because of his inability to post bail in his state criminal case — was misguided. Nelson was not being penalized while being detained in state custody; rather he was being detained because there existed probable cause to believe that he had committed a burglary — a culpable act on his part, voluntarily engaged in while on release. Second, to credit Nelson while not compensating other similar defendants is unjust. For example, if Nelson had had a state co-defendant who was similarly incarcerated until the state appeal was won, only Nelson would have received a benefit: a two-year reduction on his federal offense.

Hence, the more appropriate policy is to provide credit for pre-sentence time served only for custody resulting from the federal offense. Such a policy will reasonably ensure that all offenders serve no more and no less time than their sentences prescribe by eliminating relief for "dead time." Relief of any kind is not now provided for most offenders who accrue "dead time," and it is inappropriate to use prison credits to provide such relief for a limited group of such offenders, primarily those who accrue "dead time" only because they choose to commit new offenses for which they are properly charged and confined but which do not result in a conviction and prison sentence.

The proposed amendment to section 3585 also addresses another credit inequity. The amendment further adds language to section 3585 to preclude credit for time spent in official detention that has been applied to an undischarged concurrent term of imprisonment. This would overturn an inappropriate exception to current policy that was created by two appellate court cases. Kayfez v. Gasele, 993 F.2d 1288 (7th Cir. 1993); Willis v. United States, 438 F.2d 923 (5th Cir. 1971). Although current BOP policy is to preclude crediting time that has been served and already credited to a state offense, Kayfez and Willis held that all time credited to a state sentence that was ordered to run concurrently with a federal sentence must, under section 3585(b), be also credited to the federal sentence, even if the time was spent in custody before the federal sentence commenced. These holdings have the unwarranted effect of reducing the time served for the federal offense and inappropriately benefitting federal offenders who have committed other state offenses. Although disagreeing with the two cases, because of the resulting disparities and administrative confusion if the BOP chose to follow them only within their respective circuits, the BOP has felt obligated to apply this exception nationwide. The proposed amendment to section 3585(b) would harmonize credit policy by alleviating the double-crediting mandated by these two cases and ensuring that all offenders serve no more and no less time for their federal offenses than other similarly situated offenders.

The recommended changes to section 3585, if enacted, will greatly enhance fairness but some effect on the size of future federal prison populations is also inevitable. To estimate the impact, the BOP reviewed its credit records for a random sample of current inmates. Based on this review, the BOP estimated that about 20 percent of all federal inmates currently receive an average of 62 days of credit under section 3585(b)(2). Therefore, eliminating section 3585(b)(2) credit will, over time, lead to a very small increase in the average time served of the federal prison population.

The second component, contained in subsections (b) and (c), would amend section 4105(c)(1) to ensure that so-called "good time credits" are provided to foreign prisoners transferred to the United States in such a way as to ensure that foreign and domestic prisoners who have committed similar crimes are treated in a similar way.

This provision addresses and resolves a conflict in circuits regarding the calculation of "good time" for offenders sentenced to imprisonment in a foreign country who are transferred pursuant to treaty to serve their sentences in the United States. As a result of appellate court decisions interpreting provisions of law relating to good time credits for treaty prisoners, some prisoners have been able to serve substantially less time in prison than domestic offenders who are guilty of similar crimes. Subparagraphs (b) and (c) would eliminate this unwarranted disparity in time served.

The question addressed by the courts is whether foreign and domestic good time credits under section 4105(c) of title 18, United States Code, were intended to be applied to the foreign sentence or, instead, to the "release date" set by the United States Parole Commission by reference to the sentencing guidelines. Until a few years ago, the BOP had applied all credits stemming from time served in confinement to the foreign sentence, not the release date under section 4106A. However, in Trevino-Casares v. United States Parole Commission, 992 F.2d 1068 (10th Cir. 1993), the court held that the credits are to be applied to the "release date" established by the Parole Commission under section 4106A of title 18, United States Code. The Tenth Circuit's interpretation conflicts with that of the Fifth Circuit, which takes the approach that the credits are to be applied to the full term of the foreign sentence, Cannon v. United States Department of Justice, 961 F.2d 82 (5th Cir. 1992), cert. denied, 113 S. Ct. 2354 (1993). The BOP has changed its earlier approach and now follows the rule established by the Tenth Circuit, with which the Fourth and Ninth Circuits agree. Asare v. United States Parole Commission, 2 F.3d 540 (4th Cir. 1993); Ajala v. United States Parole Commission, 997 F.2d 651 (9th Cir. 1993).

However, the current majority approach is particularly troubling as a policy matter with respect to sentences imposed by such countries as Mexico and England, which give more generous service credits than the United States. Under the majority courts' interpretation, transferred offenders from such countries receive a windfall as compared with similarly situated United States offenders because (1) transferees receive a combination of both foreign credits and domestic ones, and (2) the combined credits apply to advance a release date established under the sentencing guidelines, even when that release date is earlier than the full term of the foreign sentence. For example, the transferee in Trevino received twice the credits a domestic offender would have received with the same term of imprisonment.

The proposed amendment of section 4105(c)(1) would establish that the domestic and foreign service credits are to applied to the entire foreign sentence. However, the proposal recognizes that in some cases this approach will produce a sentence substantially longer than that faced by a United States offender. This would be true, for example, where the foreign sentence is longer than what the sentencing guidelines provide and the foreign good time credits are less than ours. Thus, an alternative calculation that would benefit such an offender is available under proposed section 4105(c)(3). This alternative calculation would apply where the term of imprisonment determined by the Parole Commission under 18 U.S.C. § 4106A is less than or equal to the foreign sentence on the basis of considerations other than the limitation arising from the length of the sentence imposed by the foreign country under section 4106A(b)(1)(C) (which provides that the term of imprisonment, when combined with supervised release, may not exceed the foreign sentence). In such a case the amendment directs the BOP to calculate credits for satisfactory behavior under domestic law, 18 U.S.C. §3624(b), and to compute such credits on the basis of the term of imprisonment established by the Parole Commission, rather than the foreign sentence. If the release date so calculated is earlier than the release date determined on the basis of the combined domestic and foreign credits applied to the foreign sentence, the earlier release date prevails. This alternative is available only where the term of imprisonment determined by the Parole Commission is less than or equal to the foreign sentence on the basis of sentencing factors, and not the limitation of the foreign sentence, so that an offender who would have faced a longer United States sentence but for the foreign limitation does not receive a windfall by virtue of deduction of the good time credits from the reduced term of imprisonment.

As with the proposal in subsection (a), enactment of the proposed amendments in subsection (b) and (c) will greatly increase fairness but will likely have some impact on the length of prison sentences. Although, due to the varied sentencing and credit laws of the foreign countries from which transferred offenders come, no precise determination of the effect is readily calculable, it is believed that the overall impact of the proposal is slight, considering the small number of incoming American foreign transferee prisoners -- approximately 100 per year over the last three fiscal years -- compared with the total federal prison population of approximately 124,000.

Finally, subsection (d) would amend section 3582 of title 18 which permits, upon the approval of the Director of the Bureau of Prisons (BOP) and a federal court, non-dangerous federal prisoners over the age of 70, except those who have been convicted of a sexual abuse offense, to be released after they have served at least 30 years in custody. Currently, only elderly prisoners who have been sentenced under the so-called "three-strikes" law may be released pursuant to section 3582. This bill would eliminate disparities by making all prisoners over 70 -- except sexual abuse offenders -- who have served 30 or more years eligible to be considered for release regardless of the statute under which they were convicted.

Title VII of the Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322) enacted the so-called "three strikes" statute, 18 U.S.C. 3559(c). That statute mandates a life sentence for a person convicted of a serious violent felony (as defined) and who has at least two previous convictions for a serious violent or drug offense. Congress, however, as part of the "three strikes" provision, also enacted a unique ameliorating feature, codified at 18 U.S.C. 3582(c)(1)(A)(ii), that allows a person convicted under the "three strikes" law and who has served at least thirty years of his life sentence and has attained the age of 70 to be released by the court, if the Director of the Bureau of

Prisons finds "that the defendant is not a danger to the safety of any other person or the community." Of course, this provision has not yet been utilized since far less than thirty years has elapsed since the enactment of the "three strikes" statute.

But the provision is significant because it reflects the latest expression of Congressional policy with respect to aging prisoners. The federal elderly prisoner population remains relatively small. However, it is growing rapidly and is likely to continue to grow for the foreseeable future. In 1992, there were 639 federal prisoners over the age of 65, but by 1997 the number of elderly prisoners had grown to 1,655, a 159 percent increase. Kathleen Maguire and Ann L. Pastore, eds., Sourcebook of Criminal Justice Statistics 1997, U.S. Department of Justice, Bureau of Justice Statistics, Washington, DC: USGPO 1998. Statistics provided by the Sentencing Commission and the BOP suggest that the number of elderly prisoners will continue to increase in coming years.

There are numerous issues relating to elderly prisoners, including providing special facilities to address certain unique needs and exceedingly expensive health care costs. And while the problem of how to deal with an aging federal prison inmate population is larger than merely providing for the discretionary release of some non-dangerous prisoners who have served a lengthy portion of their sentences, nevertheless this policy represents part of the solution. There seems no sound reason why the provision enacted by Congress for application solely to the "three strikes" statute, which requires at least three convictions for serious violent and drug offenses, and thus is available to the "worst of the worst" offenders, should not also apply to other federal prisoners serving a sentence in excess of thirty years who has attained the age of 70. This proposal would accordingly effect such an expansion, by deleting the language in section 3582(c)(1)(ii) that limits the operation of the provision to persons convicted under section 3559(c), except for those offenders convicted of sexual abuse offenses under chapter 109A of title 18. The BOP advises that there are currently approximately 538 prisoners over 70 years of age in federal custody of whom 10 could be eligible for relief under this proposal over the next ten years.

The other part of the proposed amendment to section 3582(c)(1)(A) is complementary. A court exercising its discretion whether or not to release a person convicted of a serious crime, even if the person is over 70 years old, may properly be reluctant simply to release the prisoner back into society unless another sentencing option such as home confinement or reporting restrictions as a condition of probation or supervised release can be imposed. Presently, however, it is doubtful whether a court can order such a sentence since section 3582(c)(1)(A) speaks only in terms of reducing "the term of imprisonment," not imposing in its stead a lesser type of sentence. Compare Rule 35(b), F.R.Crim.P., which gives a court the power to "reduce a sentence" to reflect substantial assistance. Hence the proposed amendment would confer express authority on courts who opt to release an individual under section 3582(c)(1)(A) to impose a sentence of probation or supervised release with or without conditions. This added flexibility is consistent with the purposes for which this statute was designed and will likely facilitate its use in appropriate cases.

SEC. 6052. CORRECTION OF ABERRANT STATUTES TO PERMIT IMPOSITION OF BOTH A FINE AND IMPRISONMENT RATHER THAN ONLY EITHER PENALTY.

Of the thousands of federal criminal offenses that carry imprisonment as a sanction, virtually all also permit a court to impose a fine in addition to imprisonment. Indeed, in 1984 Congress enacted 18 U.S.C. 3571, which made uniform the amounts of allowable fines for offenses throughout all titles of the United States Code, and authorized the imposition of such fines even if the statute defining an offense was silent as to the availability of a fine.

Five statutes in title 18, however, because of a quirk in draftsmanship, expressly provide for the imposition of imprisonment or a fine but not both. This proposal would remedy this anomalous and occasionally troublesome feature of these statutes, by adding the words "or both" at the appropriate place in each provision, so as to permit a court the customary sentencing flexibility to impose both a fine and a prison term if so desired. The Administrative Office of the United States Courts has written in support of this amendment.

The statutes affected are 18 U.S.C. 401 (criminal contempt), 18 U.S.C. 1705 (destruction of letter boxes), 18 U.S.C. 1916 (unauthorized employment or disposition of lapsed appropriations), 18 U.S.C. 2234 (willfully exceeding authority in executing a search warrant), and 18 U.S.C. 2235 (maliciously procuring and executing a search warrant). Of these, section 401 is the only one which has generated caselaw with respect to the punishment issue. Although criminal contempt is an offense of hoary lineage, dating from the Judiciary Act of 1789, see Green v. United States, 356 U.S. 165 (1958), no legislative history or other explanation apparently exists for why the statute is drafted in the disjunctive to permit only a fine or imprisonment but not both, and the Senate Judiciary Committee has stated that this feature was probably unintended and in past years had proposed to correct it in a comprehensive criminal code reform bill. See S. Rep. No. 96-553 (96th Cong., 2d Sess., p. 375). This statutory quirk has produced occasional windfalls to undeserving defendants, and has proved a trap for unwary judges who, being unaware of the statute's unusual restriction on their sentencing authority, impose an illegal sentence of both a fine and imprisonment. See, e.g., United States v. Versaglio, 85 F.3d 943, 945-7 (2d Cir. 1996)(and cases cited). The Supreme Court has held that, in such a case, if the defendant tenders payment of the fine to the clerk before the error is corrected, the sentence is fully satisfied and the imprisonment portion of it must be vacated. In re Bradley, 318 U.S. 50 (1943); see also United States v. Versaglio, supra; United States v. Holmes, 822 F.2d 481, 486 (5th Cir. 1987)(and cases cited); United States v. Sampogne, 533 F.2d 766 (2d Cir. 1976). Presumably, the same result would obtain under the other statutes similarly worded, although no case law exists as to these seldom prosecuted offenses. Since there is no sound reason for limiting a court's customary sentencing discretion to impose both a fine and imprisonment when the offense so warrants, this amendment would so provide as to the aberrant statutes described above.

SEC. 6053. AMENDMENT OF FEDERAL SENTENCING GUIDELINES FOR COUNTERFEIT BEARER OBLIGATIONS OF THE UNITED STATES.

This proposed legislative directive to the Sentencing Commission would require that the Commission enhance penalties for counterfeiting offenses generally, but it does not specify the exact type or level of such enhancement. Its purpose is to address the dramatic increase in recent years of computer-generated counterfeit U.S. currency produced by inkjet printers and color copiers. Advances in computer technology have dramatically changed the nature of production used in counterfeiting. Operations have evolved from using the traditional method of offset printing to suing personal printers and full color copiers. Inkjet printers and copiers are relatively inexpensive, readily available, easily transportable and user-friendly. When using the technology currently available, these devices are capable of producing high-quality counterfeit currency. Paramount to the process, once the image of a currency note is scanned or digitally captured, a personal computer may be used to enhance its quality. The image can then be transmitted electronically – computer-to-computer over the Internet – and printed by individuals who lack any specialized computer or graphics knowledge. As a result, today's counterfeiter is able to produce counterfeit currency using a high-quality inkjet printer that can cost as little as $300.

The ready availability and low cost of this new counterfeiting technology has resulted in it being used to produce a greater and greater proportion of all counterfeit currency produced domestically. For instance, from 1996 to 1997, computer-generated notes produced on inkjet printers (so-called "P-Notes") increased from 2.5% to 19% of all counterfeit currency passed domestically; in 1998, it increased to 44%. This dramatic percentage increase in P-Notes is matched by a similar increase in the total amount of counterfeit currency; from 1997 to 1998, counterfeit currency passed domestically increased from $31.7 million to $40 million.

The increase in computer-generated counterfeiting cases represents not only a threat to law enforcement, but also to the integrity of U.S. currency worldwide. Maintaining the stability and integrity of U.S. currency is essential to preserving the benefits derived from the dollar's status as a world currency. U.S. bearer obligations serve as a stable and accepted medium of exchange and store of value that is often preferred to local foreign currencies, particularly in the former Soviet Union, Eastern Europe and Latin America. In addition to the investment and trade benefits associated with the dollar's position as a reserve currency, the demand for U.S. paper currency provides direct economic benefits for the U.S. government – overseas currency holdings provide the U.S. with approximately $16 billion in interest earnings per year.

As currently written and applied, the Sentencing Guidelines do not adequately address the seriousness of counterfeiting cases, especially those involving computer-generated counterfeit notes. Under U.S.S.G § 2B.51, which incorporates the fraud monetary loss table in § 2F1.1, a defendant's guideline range in counterfeiting cases depends largely on the amount of counterfeit inventory seized when a counterfeiting operation is shut down. A low seizure amount results in little is any increase to the base offense level, which in turn usually yields a sentence of probation. This is precisely the scenario most often encountered in counterfeiting cases involving computer-generated notes and inkjet printers. Because counterfeiters using this technology can run off currency on an as-needed basis, they have not generated the type of large cash inventories associated with the traditional offset printing method – where the cost of a single production "run" was so high that defendants were forced to create large cash inventories at one time.

Consequently, counterfeiters using this new technology enjoy a sentencing windfall as compared to counterfeiters using the offset printing method. The directive to the Commission specifically requires them to consider whether the current base offense level of nine is adequate to address the serious nature of these offenses and the public interest in protecting the integrity of U.S. currency. It also directs the Commission to consider whether the specific offense characteristic applicable to manufacturing cases adequately accounts for the range of offenses in this category. Currently, § 2BS.1(b)(2) provides a minimum offense level of 15 in manufacturing cases, which has the practical effect of not providing no increase for manufacturing conduct in any offense involving more than $70,000 in counterfeit currency. The legislative directive invites the Commission to address this disparity, which could be remedied by providing for a two-level increase for all manufacturing offenses, while retaining the offense level of 15 as a "floor."

Finally, the legislative directive provides emergency amendment authority for any amendments adopted by the Commission. This addresses the practical reality that the Sentencing Commission currently has no appointed Commissioners and is therefore incapable of following its usual notice-and-comment procedures in the current amendment cycle.