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December 14, 2011

The Honorable John A. Boehner
Speaker of the House
H-232 Capitol Building
Washington, D.C. 20515

RE: Comprehensive Iran Sanctions Accountability and Divestment Act of 2010
Pub. L. No. 111-195

Dear Mr. Speaker:

I am writing to you on behalf of the United States Sentencing Commission [hereinafter the Commission] in response to the directive in Section 107 of the Comprehensive Iran Sanctions Accountability and Divestment Act of 2010, Pub. L. No. 111-195 [hereinafter the Act]. The directive required the Commission to “study and submit to Congress a report on the impact and advisability of imposing a mandatory minimum sentence for violations of” the following offenses:

- (1) Section 5(a) of the United Nations Participation Act of 1945 (22 U.S.C. § 287c(a));¹
- (2) Sections 38, 39, and 40 of the Arms Export Control Act (22 U.S.C. §§ 2778, 2779, and 2780); and
- (3) The Trading With the Enemy Act (50 U.S.C. App’x §§ 1 *et seq.*).

¹ Section (5)(a) of the United Nations Participation Act of 1945 sets forth the authority of the President to issue orders, rules, and regulations implementing United Nations Security Council resolutions, but the criminal offense for violating such orders, rules, and regulations is found in Section 5(b) of the act (22 U.S.C. § 287c(b)). Section 107 of the Act increased the statutory maximum penalty found in subsection (b) of Section 287c from ten to 20 years.

I. Description of Offenses Listed in the Act's Directive

The offenses covered by the directive all have a statutory maximum penalty of 20 years, increased from ten years by the Act, and are summarized as follows:

- 1) Section 5(b) of the United Nations Participation Act of 1945, codified at 22 U.S.C. § 287c(b), criminalizes willful violations or evasions of any order, rule, or regulation issued by the President to give effect to United Nations Security Council Resolutions.
- 2) Sections 2778, 2779, and 2780 are provisions of the Arms Export Control Act.² Section 2778 authorizes the President to control the import and export of defense articles and services, to designate those items that shall be considered defense articles and services, and to promulgate regulations therefor.³ Section 2778 also provides licensing and registration requirements for businesses engaged in manufacturing, exporting, or importing defense articles and services, or brokering those activities.⁴ Section 2778(c) criminalizes willful violations of any of the provisions of section 2778, section 2779, or any regulations promulgated under the authority of those statutes. Section 2778 also penalizes anyone who “willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading.”
- 3) Section 2779 requires adequate and timely reporting to the U.S. Secretary of State of “political contributions, gifts, commissions and fees paid, or offered or agreed to be paid, by a person in connection with” the sale of the articles and services on the USML.
- 4) Section 2780 is violated when a “United States person”⁵ willfully either 1) exports or sells, leases, loans, grants or otherwise provides any munitions item to any prohibited country, or to any other recipient if the person has reason to know the item will be made available to a prohibited country;⁶ or 2) takes any other action which “would

² See Pub. L. No. 94-329, Tit. II, 90 Stat. 729, 734 (June 30, 1976), codified at 22 U.S.C. §§ 2751 *et seq.*

³ The items so designated are added to the United States Munitions List (USML). See 22 U.S.C. § 2778(a). The USML can be found at 22 C.F.R. § 121.1. Included on the USML are such articles as military aircraft, helicopters, artillery, shells, missiles, rockets, bombs, warships, explosives, military and space electronics, and certain firearms. The USML also covers dual use items which have both military and commercial uses, such as triggered spark gaps.

⁴ The regulations, the International Traffic in Arms Regulations (ITAR), codified at 22 C.F.R. § 120-130, are administered by the United States Department of State's Directorate of Defense Trade Controls (the “DDTC”).

⁵ This term is defined in section 2780(l)(3).

⁶ See 22 U.S.C. § 2780(b)(1)(A), (b)(1)(B), (b)(1)(C).

facilitate the acquisition, directly or indirectly, of any munitions item by the government of any [prohibited] country [], or any person acting on behalf of that government, if the United States person has reason to know that that action will facilitate the acquisition of that item by such a government or person.”⁷ A United States person is also criminally liable if such actions are taken, outside the United States, by a corporation or other person controlled in fact by that United States person.⁸

- 5) Willful violations of any provisions of the Trading with the Enemy Act of 1917, or of any license, rule, or regulation issued under that act are criminalized by 50 U.S.C. App’x § 16(a).

As will be discussed in further detail in Part II below, of the offenses listed in the directive, only section 2778 has been used to prosecute an individual since fiscal year 2005.⁹ Section 2778 is used to prosecute individuals involved in a broad range of conduct. For example, the unlicensed exportation to Mexico of a single firearm, intended solely for personal use, violates the statute, as well as conduct that is “particularly damaging to national security”¹⁰ because it involves the “provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program.”¹¹

II. Commission Data for Offenses Listed in the Act’s Directive

Commission data revealed no convictions under sections 287c, 2779, 2780, or App’x section 16¹² for any of the 241,744 individual offenders sentenced in fiscal years 2008, 2009, and

⁷ See 22 U.S.C. § 2780(b)(1)(D).

⁸ See 22 U.S.C. § 2780(b)(2).

⁹ Since fiscal year 1999, Commission data revealed that the only statute listed in the directive used with any frequency is section 2778. Commission data revealed no convictions under sections 287c, 2779, or 2780 and 6 individual offenders have been convicted under the Trading with the Enemy Act, 50 U.S.C. App’x §§ 1 *et seq.* For purposes of the analyses discussed herein, the Commission used fiscal years 2008-2010 in order to provide Congress with the most current information concerning sentencing practices for the statutes listed in the directive.

¹⁰ See Letter from Lisa O. Monaco, Assistant Attorney General for National Security, U.S. Dept. of Justice, to Judge Patti B. Saris, Chair, U.S. Sentencing Commission at 5 (Sept. 9, 2011).

¹¹ *Id.* at 5-6.

¹² Commission data revealed no individual convictions under these four statutes since fiscal year 2005. Department of Justice representatives advised that offenders committing conduct violating these statutes are likely prosecuted under other statutes, such as the International Emergency Economic Powers Act, [hereinafter IEEPA] 50 U.S.C. §§ 1701, *et seq.*

2010.¹³ Therefore, for those three fiscal years, the only sentencing data available to the Commission was for section 2778 offenses.

In fiscal years 2008, 2009, and 2010,¹⁴ less than one percent of the 241,744 individual offenders (0.04%, n=108) sentenced were convicted of violating section 2778 [hereinafter Section 2778 offenders]. The overwhelming majority of all Section 2778 offenders were in Criminal History Category I (89.8%, n=97). More than half (59.3%, n=64) of these 108 Section 2778 offenses involved exportation of firearms and/or ammunition to Mexico.¹⁵ The overwhelming majority of Section 2778 offenders (93.5%, n=101) pleaded guilty.

Section 2778 offenders received a median sentence of 30 months.¹⁶ Almost two thirds of Section 2778 offenders (63.0%, n=68) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Slightly more than one third (38.0%, n=41) were sentenced within the applicable guideline range and received a median sentence of 37 months.¹⁷ One quarter (25.0%, n=27) of the Section 2778 offenders received government sponsored below range sentences,¹⁸ with a median sentence of 20 months.¹⁹ Of the 27 government sponsored below range sentences, 22 (81.5%) were for providing substantial assistance to the government pursuant to §5K1.1 (Substantial Assistance to Authorities) (Policy Statement). The average extent of the reduction for government sponsored below range sentences was 58.2 percent below the minimum of the otherwise applicable guideline range.

¹³ The Commission received statutory information on 83,946 cases in FY2010, 81,369 in FY2009, and 76,429 in FY2008, for a total of 241,744 cases for the three fiscal years.

¹⁴ Because of the relatively small number of cases involving a conviction under section 2778 reported each fiscal year, the Commission combined data for three fiscal years to have sufficient data for meaningful analyses.

¹⁵ The applicable guideline for section 2778 offenses is USSG §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). Most offenses covered by this guideline receive a base offense level of 26. Offenses involving the exportation of a limited number of firearms and/or ammunition receive a base offense level of 14. The Commission amended §2M5.2, effective November 1, 2011, to increase penalties for the unlawful exportation of firearms. Prior to the amendment, a base offense level of 14 applied to exportation of ten or fewer firearms. The Commission reduced the number of firearm triggering this base offense level from ten to two, reasoning that "export offenses involving more than two firearms are more serious and more likely to involve trafficking." See USSG, App. C, amend. 753. This base offense level now also applies to offenses involving 500 or fewer rounds of ammunition.

¹⁶ The average sentence for Section 2778 offenders was 38 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders.

¹⁷ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 45 months.

¹⁸ These are cases in which a reason for the sentence indicated that the prosecution initiated, proposed, or stipulated to a sentence outside of the guideline range.

¹⁹ The average sentence for Section 2778 offenders who received government sponsored below range sentences was 31 months.

Slightly more than one third (35.2%, n=38) of Section 2778 offenders received non-government sponsored below range sentences.²⁰ The median sentence for these offenders was 18 months,²¹ and the average extent of the reduction was 49.0 percent below the minimum of the otherwise applicable guideline range. Two Section 2778 offenders were sentenced above the applicable guideline range (1.9%).²²

The overwhelming majority (94.4%, n=102) of Section 2778 offenders were sentenced to a term of imprisonment. More than three quarters (78.7%, n=85) of Section 2778 offenders were sentenced to a term of imprisonment of one year or more. Three Section 2778 offenders (2.8%) received a sentence of probation, all of which were government sponsored below range sentences. Three additional Section 2778 offenders (2.8%) received a sentence of probation plus community or home confinement, as a result of a non-government sponsored below range sentence.

The Commission identified 24 Section 2778 cases (22.2%) involving the provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program. The median sentence for the 24 Section 2778 offenders engaging in such conduct was 36 months.²³ More than two thirds of Section 2778 offenders identified as engaging in this more serious conduct (70.4%, n=17) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Four offenders (16.7%) were sentenced within the applicable guideline range and received a median sentence of 52 months.²⁴

²⁰ Non-government below range sentences include all cases that were either 1) departures authorized in the provisions, policy statements, or commentary of the *Guidelines Manual*; 2) sentenced outside of the guideline range in which the court indicated both a departure and a reference to either *United States v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for sentencing outside of the guideline system; 3) sentenced outside of the guideline range in which no departure was indicated and in which the court cited *United States v. Booker*, 18 U.S.C. § 3553, or related factors as one of the reasons for sentencing outside of the guideline system; or 4) sentenced outside of the guideline range that could not be classified into any of the three previous outside of the range categories. The final category includes cases in which no reason was provided for a sentence outside of the guideline range.

²¹ The average sentence for Section 2778 offenders who received non-government sponsored below range sentences was 31 months.

²² The median sentence length cannot be determined with only two cases. The actual sentences imposed in the two cases were 90 months and 120 months.

²³ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security was 45 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders engaging in conduct identified as particularly damaging to national security.

²⁴ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 111 months.

More than half (54.2%, n=13) received a government sponsored below range sentence²⁵ and received a median sentence of 15 months.²⁶ Of the 13 government sponsored below range sentences, ten (76.9%) were for providing substantial assistance to the government pursuant to §5K1.1. The average extent of the reduction for government sponsored below range sentences was 65.8 percent below the minimum of the otherwise applicable guideline range. One quarter (25.0%, n=6) of Section 2778 offenders identified as engaging in this more serious conduct received non-government sponsored below range sentences.²⁷ The median sentence for these offenders was 43 months,²⁸ and the average extent of the reduction was 22.1 percent below the minimum of the otherwise applicable guideline range. One Section 2778 offender identified as engaging in this more serious conduct (4.2%) was sentenced above the applicable guideline range.

Courts sentenced the overwhelming majority (87.5%, n=21) of these Section 2778 offenders identified as engaging in this more serious conduct to a term of imprisonment of one year or more.²⁹ No Section 2778 offender identified as engaging in this more serious conduct received a sentence of imprisonment of less than one year or a term of probation as a result of a non-government sponsored below range sentence. The three Section 2778 offenders identified as engaging in this more serious conduct (12.5%) who were sentenced to a term of probation received government sponsored below range sentences.

III. Conclusion

Mandatory minimum penalties for the offenses listed in the directive, if enacted, may be too broad. For example, section 2778 covers a wide range of offense conduct that results in varying degrees of impact on national security. A mandatory minimum penalty applicable to all section 2778 offenses may be overly broad for the full range of conduct prosecutable under that statute, which could result in inconsistencies in application similar to those noted in the Commission's *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011).³⁰ There may be cases in which a mandatory minimum penalty for

²⁵ See *supra* n. 18.

²⁶ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received government sponsored below range sentences was 21 months.

²⁷ See *supra* n. 20.

²⁸ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received non-government sponsored below range sentences was 42 months.

²⁹ Section 2778 offenders engaging in conduct identified as particularly damaging to national security were sentenced to terms of imprisonment in the following lengths: 1) from one to less than three years of imprisonment (37.5%, n=9); 2) from three to less than five years (33.3%, n=8); and 3) more than five years (16.7%, n=4).

³⁰ See Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011) at 345.

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violating section 2778 is perceived as too severe because the offense had little impact on national security.

The Commission recognizes the potential threat to national security caused by certain conduct covered by the statutes listed in the directive, but there is a difference of opinion among the commissioners regarding whether Congress should enact mandatory minimum penalties for these statutes. If Congress decides to enact mandatory minimum penalties, the Commission unanimously believes that such penalties should be limited to offenses that are damaging to national security.

The Commission stands ready to work with Congress to provide appropriately tailored sentences for all of the various national security threats covered by the Act.

Sincerely,

A handwritten signature in black ink that reads "Patti B. Saris". The signature is written in a cursive style with a large, looped initial "P" and a distinct "B".

Patti B. Saris
Chair

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December 14, 2011

The Honorable Joseph Robinette "Joe" Biden Jr.
President of the Senate
276 Eisenhower Executive Office Building
1650 Pennsylvania Avenue, N.W.
Washington, D.C. 20502

RE: Comprehensive Iran Sanctions Accountability and Divestment Act of 2010
Pub. L. No. 111-195

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- (2) Sections 38, 39, and 40 of the Arms Export Control Act (22 U.S.C. §§ 2778, 2779, and 2780); and
- (3) The Trading With the Enemy Act (50 U.S.C. App’x §§ 1 *et seq.*).

¹ Section (5)(a) of the United Nations Participation Act of 1945 sets forth the authority of the President to issue orders, rules, and regulations implementing United Nations Security Council resolutions, but the criminal offense for violating such orders, rules, and regulations is found in Section 5(b) of the act (22 U.S.C. § 287c(b)). Section 107 of the Act increased the statutory maximum penalty found in subsection (b) of Section 287c from ten to 20 years.

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- 4) Section 2780 is violated when a "United States person"⁵ willfully either 1) exports or sells, leases, loans, grants or otherwise provides any munitions item to any prohibited country, or to any other recipient if the person has reason to know the item will be made available to a prohibited country;⁶ or 2) takes any other action which "would

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- 5) Willful violations of any provisions of the Trading with the Enemy Act of 1917, or of any license, rule, or regulation issued under that act are criminalized by 50 U.S.C. App’x § 16(a).

As will be discussed in further detail in Part II below, of the offenses listed in the directive, only section 2778 has been used to prosecute an individual since fiscal year 2005.⁹ Section 2778 is used to prosecute individuals involved in a broad range of conduct. For example, the unlicensed exportation to Mexico of a single firearm, intended solely for personal use, violates the statute, as well as conduct that is “particularly damaging to national security”¹⁰ because it involves the “provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program.”¹¹

II. Commission Data for Offenses Listed in the Act’s Directive

Commission data revealed no convictions under sections 287c, 2779, 2780, or App’x section 16¹² for any of the 241,744 individual offenders sentenced in fiscal years 2008, 2009, and

⁷ See 22 U.S.C. § 2780(b)(1)(D).

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⁹ Since fiscal year 1999, Commission data revealed that the only statute listed in the directive used with any frequency is section 2778. Commission data revealed no convictions under sections 287c, 2779, or 2780 and 6 individual offenders have been convicted under the Trading with the Enemy Act, 50 U.S.C. App’x §§ 1 *et seq.* For purposes of the analyses discussed herein, the Commission used fiscal years 2008-2010 in order to provide Congress with the most current information concerning sentencing practices for the statutes listed in the directive.

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2010.¹³ Therefore, for those three fiscal years, the only sentencing data available to the Commission was for section 2778 offenses.

In fiscal years 2008, 2009, and 2010,¹⁴ less than one percent of the 241,744 individual offenders (0.04%, n=108) sentenced were convicted of violating section 2778 [hereinafter Section 2778 offenders]. The overwhelming majority of all Section 2778 offenders were in Criminal History Category I (89.8%, n=97). More than half (59.3%, n=64) of these 108 Section 2778 offenses involved exportation of firearms and/or ammunition to Mexico.¹⁵ The overwhelming majority of Section 2778 offenders (93.5%, n=101) pleaded guilty.

Section 2778 offenders received a median sentence of 30 months.¹⁶ Almost two thirds of Section 2778 offenders (63.0%, n=68) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Slightly more than one third (38.0%, n=41) were sentenced within the applicable guideline range and received a median sentence of 37 months.¹⁷ One quarter (25.0%, n=27) of the Section 2778 offenders received government sponsored below range sentences,¹⁸ with a median sentence of 20 months.¹⁹ Of the 27 government sponsored below range sentences, 22 (81.5%) were for providing substantial assistance to the government pursuant to §5K1.1 (Substantial Assistance to Authorities) (Policy Statement). The average extent of the reduction for government sponsored below range sentences was 58.2 percent below the minimum of the otherwise applicable guideline range.

¹³ The Commission received statutory information on 83,946 cases in FY2010, 81,369 in FY2009, and 76,429 in FY2008, for a total of 241,744 cases for the three fiscal years.

¹⁴ Because of the relatively small number of cases involving a conviction under section 2778 reported each fiscal year, the Commission combined data for three fiscal years to have sufficient data for meaningful analyses.

¹⁵ The applicable guideline for section 2778 offenses is USSG §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). Most offenses covered by this guideline receive a base offense level of 26. Offenses involving the exportation of a limited number of firearms and/or ammunition receive a base offense level of 14. The Commission amended §2M5.2, effective November 1, 2011, to increase penalties for the unlawful exportation of firearms. Prior to the amendment, a base offense level of 14 applied to exportation of ten or fewer firearms. The Commission reduced the number of firearm triggering this base offense level from ten to two, reasoning that "export offenses involving more than two firearms are more serious and more likely to involve trafficking." See USSG, App. C, amend. 753. This base offense level now also applies to offenses involving 500 or fewer rounds of ammunition.

¹⁶ The average sentence for Section 2778 offenders was 38 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders.

¹⁷ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 45 months.

¹⁸ These are cases in which a reason for the sentence indicated that the prosecution initiated, proposed, or stipulated to a sentence outside of the guideline range.

¹⁹ The average sentence for Section 2778 offenders who received government sponsored below range sentences was 31 months.

Slightly more than one third (35.2%, n=38) of Section 2778 offenders received non-government sponsored below range sentences.²⁰ The median sentence for these offenders was 18 months,²¹ and the average extent of the reduction was 49.0 percent below the minimum of the otherwise applicable guideline range. Two Section 2778 offenders were sentenced above the applicable guideline range (1.9%).²²

The overwhelming majority (94.4%, n=102) of Section 2778 offenders were sentenced to a term of imprisonment. More than three quarters (78.7%, n=85) of Section 2778 offenders were sentenced to a term of imprisonment of one year or more. Three Section 2778 offenders (2.8%) received a sentence of probation, all of which were government sponsored below range sentences. Three additional Section 2778 offenders (2.8%) received a sentence of probation plus community or home confinement, as a result of a non-government sponsored below range sentence.

The Commission identified 24 Section 2778 cases (22.2%) involving the provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program. The median sentence for the 24 Section 2778 offenders engaging in such conduct was 36 months.²³ More than two thirds of Section 2778 offenders identified as engaging in this more serious conduct (70.4%, n=17) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Four offenders (16.7%) were sentenced within the applicable guideline range and received a median sentence of 52 months.²⁴

²⁰ Non-government below range sentences include all cases that were either 1) departures authorized in the provisions, policy statements, or commentary of the *Guidelines Manual*; 2) sentenced outside of the guideline range in which the court indicated both a departure and a reference to either *United States v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for sentencing outside of the guideline system; 3) sentenced outside of the guideline range in which no departure was indicated and in which the court cited *United States v. Booker*, 18 U.S.C. § 3553, or related factors as one of the reasons for sentencing outside of the guideline system; or 4) sentenced outside of the guideline range that could not be classified into any of the three previous outside of the range categories. The final category includes cases in which no reason was provided for a sentence outside of the guideline range.

²¹ The average sentence for Section 2778 offenders who received non-government sponsored below range sentences was 31 months.

²² The median sentence length cannot be determined with only two cases. The actual sentences imposed in the two cases were 90 months and 120 months.

²³ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security was 45 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders engaging in conduct identified as particularly damaging to national security.

²⁴ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 111 months.

More than half (54.2%, n=13) received a government sponsored below range sentence²⁵ and received a median sentence of 15 months.²⁶ Of the 13 government sponsored below range sentences, ten (76.9%) were for providing substantial assistance to the government pursuant to §5K1.1. The average extent of the reduction for government sponsored below range sentences was 65.8 percent below the minimum of the otherwise applicable guideline range. One quarter (25.0%, n=6) of Section 2778 offenders identified as engaging in this more serious conduct received non-government sponsored below range sentences.²⁷ The median sentence for these offenders was 43 months,²⁸ and the average extent of the reduction was 22.1 percent below the minimum of the otherwise applicable guideline range. One Section 2778 offender identified as engaging in this more serious conduct (4.2%) was sentenced above the applicable guideline range.

Courts sentenced the overwhelming majority (87.5%, n=21) of these Section 2778 offenders identified as engaging in this more serious conduct to a term of imprisonment of one year or more.²⁹ No Section 2778 offender identified as engaging in this more serious conduct received a sentence of imprisonment of less than one year or a term of probation as a result of a non-government sponsored below range sentence. The three Section 2778 offenders identified as engaging in this more serious conduct (12.5%) who were sentenced to a term of probation received government sponsored below range sentences.

III. Conclusion

Mandatory minimum penalties for the offenses listed in the directive, if enacted, may be too broad. For example, section 2778 covers a wide range of offense conduct that results in varying degrees of impact on national security. A mandatory minimum penalty applicable to all section 2778 offenses may be overly broad for the full range of conduct prosecutable under that statute, which could result in inconsistencies in application similar to those noted in the Commission's *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011).³⁰ There may be cases in which a mandatory minimum penalty for

²⁵ See *supra* n. 18.

²⁶ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received government sponsored below range sentences was 21 months.

²⁷ See *supra* n. 20.

²⁸ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received non-government sponsored below range sentences was 42 months.

²⁹ Section 2778 offenders engaging in conduct identified as particularly damaging to national security were sentenced to terms of imprisonment in the following lengths: 1) from one to less than three years of imprisonment (37.5%, n=9); 2) from three to less than five years (33.3%, n=8); and 3) more than five years (16.7%, n=4).

³⁰ See Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011) at 345.

The Honorable Joseph Robinette "Joe" Biden Jr.

December 14, 2011

Page (7)

violating section 2778 is perceived as too severe because the offense had little impact on national security.

The Commission recognizes the potential threat to national security caused by certain conduct covered by the statutes listed in the directive, but there is a difference of opinion among the commissioners regarding whether Congress should enact mandatory minimum penalties for these statutes. If Congress decides to enact mandatory minimum penalties, the Commission unanimously believes that such penalties should be limited to offenses that are damaging to national security.

The Commission stands ready to work with Congress to provide appropriately tailored sentences for all of the various national security threats covered by the Act.

Sincerely,

A handwritten signature in cursive script that reads "Patti B. Saris". The signature is written in black ink and is positioned above the printed name and title.

Patti B. Saris
Chair

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
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December 14, 2011

The Honorable Patrick Leahy
Chair
United States Senate Committee on the Judiciary
437 Russell Senate Office Building
Washington, D.C. 20510

RE: Comprehensive Iran Sanctions Accountability and Divestment Act of 2010
Pub. L. No. 111-195

Dear Chairman Leahy:

I am writing to you on behalf of the United States Sentencing Commission [hereinafter the Commission] in response to the directive in Section 107 of the Comprehensive Iran Sanctions Accountability and Divestment Act of 2010, Pub. L. No. 111-195 [hereinafter the Act]. The directive required the Commission to “study and submit to Congress a report on the impact and advisability of imposing a mandatory minimum sentence for violations of” the following offenses:

- (1) Section 5(a) of the United Nations Participation Act of 1945 (22 U.S.C. § 287c(a));¹
- (2) Sections 38, 39, and 40 of the Arms Export Control Act (22 U.S.C. §§ 2778, 2779, and 2780); and
- (3) The Trading With the Enemy Act (50 U.S.C. App’x §§ 1 *et seq.*).

¹ Section (5)(a) of the United Nations Participation Act of 1945 sets forth the authority of the President to issue orders, rules, and regulations implementing United Nations Security Council resolutions, but the criminal offense for violating such orders, rules, and regulations is found in Section 5(b) of the act (22 U.S.C. § 287c(b)). Section 107 of the Act increased the statutory maximum penalty found in subsection (b) of Section 287c from ten to 20 years.

I. Description of Offenses Listed in the Act's Directive

The offenses covered by the directive all have a statutory maximum penalty of 20 years, increased from ten years by the Act, and are summarized as follows:

- 1) Section 5(b) of the United Nations Participation Act of 1945, codified at 22 U.S.C. § 287c(b), criminalizes willful violations or evasions of any order, rule, or regulation issued by the President to give effect to United Nations Security Council Resolutions.
- 2) Sections 2778, 2779, and 2780 are provisions of the Arms Export Control Act.² Section 2778 authorizes the President to control the import and export of defense articles and services, to designate those items that shall be considered defense articles and services, and to promulgate regulations therefor.³ Section 2778 also provides licensing and registration requirements for businesses engaged in manufacturing, exporting, or importing defense articles and services, or brokering those activities.⁴ Section 2778(c) criminalizes willful violations of any of the provisions of section 2778, section 2779, or any regulations promulgated under the authority of those statutes. Section 2778 also penalizes anyone who "willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading."
- 3) Section 2779 requires adequate and timely reporting to the U.S. Secretary of State of "political contributions, gifts, commissions and fees paid, or offered or agreed to be paid, by a person in connection with" the sale of the articles and services on the USML.
- 4) Section 2780 is violated when a "United States person"⁵ willfully either 1) exports or sells, leases, loans, grants or otherwise provides any munitions item to any prohibited country, or to any other recipient if the person has reason to know the item will be made available to a prohibited country;⁶ or 2) takes any other action which "would

² See Pub. L. No. 94-329, Tit. II, 90 Stat. 729, 734 (June 30, 1976), codified at 22 U.S.C. §§ 2751 *et seq.*

³ The items so designated are added to the United States Munitions List (USML). See 22 U.S.C. § 2778(a). The USML can be found at 22 C.F.R. § 121.1. Included on the USML are such articles as military aircraft, helicopters, artillery, shells, missiles, rockets, bombs, warships, explosives, military and space electronics, and certain firearms. The USML also covers dual use items which have both military and commercial uses, such as triggered spark gaps.

⁴ The regulations, the International Traffic in Arms Regulations (ITAR), codified at 22 C.F.R. § 120-130, are administered by the United States Department of State's Directorate of Defense Trade Controls (the "DDTC").

⁵ This term is defined in section 2780(l)(3).

⁶ See 22 U.S.C. § 2780(b)(1)(A), (b)(1)(B), (b)(1)(C).

facilitate the acquisition, directly or indirectly, of any munitions item by the government of any [prohibited] country [], or any person acting on behalf of that government, if the United States person has reason to know that that action will facilitate the acquisition of that item by such a government or person.”⁷ A United States person is also criminally liable if such actions are taken, outside the United States, by a corporation or other person controlled in fact by that United States person.⁸

- 5) Willful violations of any provisions of the Trading with the Enemy Act of 1917, or of any license, rule, or regulation issued under that act are criminalized by 50 U.S.C. App’x § 16(a).

As will be discussed in further detail in Part II below, of the offenses listed in the directive, only section 2778 has been used to prosecute an individual since fiscal year 2005.⁹ Section 2778 is used to prosecute individuals involved in a broad range of conduct. For example, the unlicensed exportation to Mexico of a single firearm, intended solely for personal use, violates the statute, as well as conduct that is “particularly damaging to national security”¹⁰ because it involves the “provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program.”¹¹

II. Commission Data for Offenses Listed in the Act’s Directive

Commission data revealed no convictions under sections 287c, 2779, 2780, or App’x section 16¹² for any of the 241,744 individual offenders sentenced in fiscal years 2008, 2009, and

⁷ See 22 U.S.C. § 2780(b)(1)(D).

⁸ See 22 U.S.C. § 2780(b)(2).

⁹ Since fiscal year 1999, Commission data revealed that the only statute listed in the directive used with any frequency is section 2778. Commission data revealed no convictions under sections 287c, 2779, or 2780 and 6 individual offenders have been convicted under the Trading with the Enemy Act, 50 U.S.C. App’x §§ 1 *et seq.* For purposes of the analyses discussed herein, the Commission used fiscal years 2008-2010 in order to provide Congress with the most current information concerning sentencing practices for the statutes listed in the directive.

¹⁰ See Letter from Lisa O. Monaco, Assistant Attorney General for National Security, U.S. Dept. of Justice, to Judge Patti B. Saris, Chair, U.S. Sentencing Commission at 5 (Sept. 9, 2011).

¹¹ *Id.* at 5-6.

¹² Commission data revealed no individual convictions under these four statutes since fiscal year 2005. Department of Justice representatives advised that offenders committing conduct violating these statutes are likely prosecuted under other statutes, such as the International Emergency Economic Powers Act, [hereinafter IEEPA] 50 U.S.C. §§ 1701, *et seq.*

2010.¹³ Therefore, for those three fiscal years, the only sentencing data available to the Commission was for section 2778 offenses.

In fiscal years 2008, 2009, and 2010,¹⁴ less than one percent of the 241,744 individual offenders (0.04%, n=108) sentenced were convicted of violating section 2778 [hereinafter Section 2778 offenders]. The overwhelming majority of all Section 2778 offenders were in Criminal History Category I (89.8%, n=97). More than half (59.3%, n=64) of these 108 Section 2778 offenses involved exportation of firearms and/or ammunition to Mexico.¹⁵ The overwhelming majority of Section 2778 offenders (93.5%, n=101) pleaded guilty.

Section 2778 offenders received a median sentence of 30 months.¹⁶ Almost two thirds of Section 2778 offenders (63.0%, n=68) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Slightly more than one third (38.0%, n=41) were sentenced within the applicable guideline range and received a median sentence of 37 months.¹⁷ One quarter (25.0%, n=27) of the Section 2778 offenders received government sponsored below range sentences,¹⁸ with a median sentence of 20 months.¹⁹ Of the 27 government sponsored below range sentences, 22 (81.5%) were for providing substantial assistance to the government pursuant to §5K1.1 (Substantial Assistance to Authorities) (Policy Statement). The average extent of the reduction for government sponsored below range sentences was 58.2 percent below the minimum of the otherwise applicable guideline range.

¹³ The Commission received statutory information on 83,946 cases in FY2010, 81,369 in FY2009, and 76,429 in FY2008, for a total of 241,744 cases for the three fiscal years.

¹⁴ Because of the relatively small number of cases involving a conviction under section 2778 reported each fiscal year, the Commission combined data for three fiscal years to have sufficient data for meaningful analyses.

¹⁵ The applicable guideline for section 2778 offenses is USSG §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). Most offenses covered by this guideline receive a base offense level of 26. Offenses involving the exportation of a limited number of firearms and/or ammunition receive a base offense level of 14. The Commission amended §2M5.2, effective November 1, 2011, to increase penalties for the unlawful exportation of firearms. Prior to the amendment, a base offense level of 14 applied to exportation of ten or fewer firearms. The Commission reduced the number of firearm triggering this base offense level from ten to two, reasoning that “export offenses involving more than two firearms are more serious and more likely to involve trafficking.” See USSG, App. C, amend. 753. This base offense level now also applies to offenses involving 500 or fewer rounds of ammunition.

¹⁶ The average sentence for Section 2778 offenders was 38 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders.

¹⁷ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 45 months.

¹⁸ These are cases in which a reason for the sentence indicated that the prosecution initiated, proposed, or stipulated to a sentence outside of the guideline range.

¹⁹ The average sentence for Section 2778 offenders who received government sponsored below range sentences was 31 months.

Slightly more than one third (35.2%, n=38) of Section 2778 offenders received non-government sponsored below range sentences.²⁰ The median sentence for these offenders was 18 months,²¹ and the average extent of the reduction was 49.0 percent below the minimum of the otherwise applicable guideline range. Two Section 2778 offenders were sentenced above the applicable guideline range (1.9%).²²

The overwhelming majority (94.4%, n=102) of Section 2778 offenders were sentenced to a term of imprisonment. More than three quarters (78.7%, n=85) of Section 2778 offenders were sentenced to a term of imprisonment of one year or more. Three Section 2778 offenders (2.8%) received a sentence of probation, all of which were government sponsored below range sentences. Three additional Section 2778 offenders (2.8%) received a sentence of probation plus community or home confinement, as a result of a non-government sponsored below range sentence.

The Commission identified 24 Section 2778 cases (22.2%) involving the provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program. The median sentence for the 24 Section 2778 offenders engaging in such conduct was 36 months.²³ More than two thirds of Section 2778 offenders identified as engaging in this more serious conduct (70.4%, n=17) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Four offenders (16.7%) were sentenced within the applicable guideline range and received a median sentence of 52 months.²⁴

²⁰ Non-government below range sentences include all cases that were either 1) departures authorized in the provisions, policy statements, or commentary of the *Guidelines Manual*; 2) sentenced outside of the guideline range in which the court indicated both a departure and a reference to either *United States v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for sentencing outside of the guideline system; 3) sentenced outside of the guideline range in which no departure was indicated and in which the court cited *United States v. Booker*, 18 U.S.C. § 3553, or related factors as one of the reasons for sentencing outside of the guideline system; or 4) sentenced outside of the guideline range that could not be classified into any of the three previous outside of the range categories. The final category includes cases in which no reason was provided for a sentence outside of the guideline range.

²¹ The average sentence for Section 2778 offenders who received non-government sponsored below range sentences was 31 months.

²² The median sentence length cannot be determined with only two cases. The actual sentences imposed in the two cases were 90 months and 120 months.

²³ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security was 45 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders engaging in conduct identified as particularly damaging to national security.

²⁴ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 111 months.

More than half (54.2%, n=13) received a government sponsored below range sentence²⁵ and received a median sentence of 15 months.²⁶ Of the 13 government sponsored below range sentences, ten (76.9%) were for providing substantial assistance to the government pursuant to §5K1.1. The average extent of the reduction for government sponsored below range sentences was 65.8 percent below the minimum of the otherwise applicable guideline range. One quarter (25.0%, n=6) of Section 2778 offenders identified as engaging in this more serious conduct received non-government sponsored below range sentences.²⁷ The median sentence for these offenders was 43 months,²⁸ and the average extent of the reduction was 22.1 percent below the minimum of the otherwise applicable guideline range. One Section 2778 offender identified as engaging in this more serious conduct (4.2%) was sentenced above the applicable guideline range.

Courts sentenced the overwhelming majority (87.5%, n=21) of these Section 2778 offenders identified as engaging in this more serious conduct to a term of imprisonment of one year or more.²⁹ No Section 2778 offender identified as engaging in this more serious conduct received a sentence of imprisonment of less than one year or a term of probation as a result of a non-government sponsored below range sentence. The three Section 2778 offenders identified as engaging in this more serious conduct (12.5%) who were sentenced to a term of probation received government sponsored below range sentences.

III. Conclusion

Mandatory minimum penalties for the offenses listed in the directive, if enacted, may be too broad. For example, section 2778 covers a wide range of offense conduct that results in varying degrees of impact on national security. A mandatory minimum penalty applicable to all section 2778 offenses may be overly broad for the full range of conduct prosecutable under that statute, which could result in inconsistencies in application similar to those noted in the Commission's *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011).³⁰ There may be cases in which a mandatory minimum penalty for

²⁵ See *supra* n. 18.

²⁶ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received government sponsored below range sentences was 21 months.

²⁷ See *supra* n. 20.

²⁸ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received non-government sponsored below range sentences was 42 months.

²⁹ Section 2778 offenders engaging in conduct identified as particularly damaging to national security were sentenced to terms of imprisonment in the following lengths: 1) from one to less than three years of imprisonment (37.5%, n=9); 2) from three to less than five years (33.3%, n=8); and 3) more than five years (16.7%, n=4).

³⁰ See Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011) at 345.

The Honorable Patrick Leahy
December 14, 2011
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violating section 2778 is perceived as too severe because the offense had little impact on national security.

The Commission recognizes the potential threat to national security caused by certain conduct covered by the statutes listed in the directive, but there is a difference of opinion among the commissioners regarding whether Congress should enact mandatory minimum penalties for these statutes. If Congress decides to enact mandatory minimum penalties, the Commission unanimously believes that such penalties should be limited to offenses that are damaging to national security.

The Commission stands ready to work with Congress to provide appropriately tailored sentences for all of the various national security threats covered by the Act.

Sincerely,

A handwritten signature in black ink that reads "Patti B. Saris". The signature is written in a cursive, flowing style.

Patti B. Saris
Chair

UNITED STATES SENTENCING COMMISSION
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December 14, 2011

The Honorable John F. Kerry
Chair
United States Senate Committee on Foreign Relations
218 Russell Senate Office Building
Washington, D.C. 20510

RE: Comprehensive Iran Sanctions Accountability and Divestment Act of 2010
Pub. L. No. 111-195

Dear Chairman Kerry:

I am writing to you on behalf of the United States Sentencing Commission [hereinafter the Commission] in response to the directive in Section 107 of the Comprehensive Iran Sanctions Accountability and Divestment Act of 2010, Pub. L. No. 111-195 [hereinafter the Act]. The directive required the Commission to “study and submit to Congress a report on the impact and advisability of imposing a mandatory minimum sentence for violations of” the following offenses:

- (1) Section 5(a) of the United Nations Participation Act of 1945 (22 U.S.C. § 287c(a));¹
- (2) Sections 38, 39, and 40 of the Arms Export Control Act (22 U.S.C. §§ 2778, 2779, and 2780); and
- (3) The Trading With the Enemy Act (50 U.S.C. App’x §§ 1 *et seq.*).

¹ Section (5)(a) of the United Nations Participation Act of 1945 sets forth the authority of the President to issue orders, rules, and regulations implementing United Nations Security Council resolutions, but the criminal offense for violating such orders, rules, and regulations is found in Section 5(b) of the act (22 U.S.C. § 287c(b)). Section 107 of the Act increased the statutory maximum penalty found in subsection (b) of Section 287c from ten to 20 years.

I. Description of Offenses Listed in the Act's Directive

The offenses covered by the directive all have a statutory maximum penalty of 20 years, increased from ten years by the Act, and are summarized as follows:

- 1) Section 5(b) of the United Nations Participation Act of 1945, codified at 22 U.S.C. § 287c(b), criminalizes willful violations or evasions of any order, rule, or regulation issued by the President to give effect to United Nations Security Council Resolutions.
- 2) Sections 2778, 2779, and 2780 are provisions of the Arms Export Control Act.² Section 2778 authorizes the President to control the import and export of defense articles and services, to designate those items that shall be considered defense articles and services, and to promulgate regulations therefor.³ Section 2778 also provides licensing and registration requirements for businesses engaged in manufacturing, exporting, or importing defense articles and services, or brokering those activities.⁴ Section 2778(c) criminalizes willful violations of any of the provisions of section 2778, section 2779, or any regulations promulgated under the authority of those statutes. Section 2778 also penalizes anyone who “willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading.”
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- 4) Section 2780 is violated when a “United States person”⁵ willfully either 1) exports or sells, leases, loans, grants or otherwise provides any munitions item to any prohibited country, or to any other recipient if the person has reason to know the item will be made available to a prohibited country;⁶ or 2) takes any other action which “would

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facilitate the acquisition, directly or indirectly, of any munitions item by the government of any [prohibited] country [], or any person acting on behalf of that government, if the United States person has reason to know that that action will facilitate the acquisition of that item by such a government or person.”⁷ A United States person is also criminally liable if such actions are taken, outside the United States, by a corporation or other person controlled in fact by that United States person.⁸

- 5) Willful violations of any provisions of the Trading with the Enemy Act of 1917, or of any license, rule, or regulation issued under that act are criminalized by 50 U.S.C. App’x § 16(a).

As will be discussed in further detail in Part II below, of the offenses listed in the directive, only section 2778 has been used to prosecute an individual since fiscal year 2005.⁹ Section 2778 is used to prosecute individuals involved in a broad range of conduct. For example, the unlicensed exportation to Mexico of a single firearm, intended solely for personal use, violates the statute, as well as conduct that is “particularly damaging to national security”¹⁰ because it involves the “provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program.”¹¹

II. Commission Data for Offenses Listed in the Act’s Directive

Commission data revealed no convictions under sections 287c, 2779, 2780, or App’x section 16¹² for any of the 241,744 individual offenders sentenced in fiscal years 2008, 2009, and

⁷ See 22 U.S.C. § 2780(b)(1)(D).

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¹⁰ See Letter from Lisa O. Monaco, Assistant Attorney General for National Security, U.S. Dept. of Justice, to Judge Patti B. Saris, Chair, U.S. Sentencing Commission at 5 (Sept. 9, 2011).

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2010.¹³ Therefore, for those three fiscal years, the only sentencing data available to the Commission was for section 2778 offenses.

In fiscal years 2008, 2009, and 2010,¹⁴ less than one percent of the 241,744 individual offenders (0.04%, n=108) sentenced were convicted of violating section 2778 [hereinafter Section 2778 offenders]. The overwhelming majority of all Section 2778 offenders were in Criminal History Category I (89.8%, n=97). More than half (59.3%, n=64) of these 108 Section 2778 offenses involved exportation of firearms and/or ammunition to Mexico.¹⁵ The overwhelming majority of Section 2778 offenders (93.5%, n=101) pleaded guilty.

Section 2778 offenders received a median sentence of 30 months.¹⁶ Almost two thirds of Section 2778 offenders (63.0%, n=68) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Slightly more than one third (38.0%, n=41) were sentenced within the applicable guideline range and received a median sentence of 37 months.¹⁷ One quarter (25.0%, n=27) of the Section 2778 offenders received government sponsored below range sentences,¹⁸ with a median sentence of 20 months.¹⁹ Of the 27 government sponsored below range sentences, 22 (81.5%) were for providing substantial assistance to the government pursuant to §5K1.1 (Substantial Assistance to Authorities) (Policy Statement). The average extent of the reduction for government sponsored below range sentences was 58.2 percent below the minimum of the otherwise applicable guideline range.

¹³ The Commission received statutory information on 83,946 cases in FY2010, 81,369 in FY2009, and 76,429 in FY2008, for a total of 241,744 cases for the three fiscal years.

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¹⁵ The applicable guideline for section 2778 offenses is USSG §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). Most offenses covered by this guideline receive a base offense level of 26. Offenses involving the exportation of a limited number of firearms and/or ammunition receive a base offense level of 14. The Commission amended §2M5.2, effective November 1, 2011, to increase penalties for the unlawful exportation of firearms. Prior to the amendment, a base offense level of 14 applied to exportation of ten or fewer firearms. The Commission reduced the number of firearm triggering this base offense level from ten to two, reasoning that "export offenses involving more than two firearms are more serious and more likely to involve trafficking." See USSG, App. C, amend. 753. This base offense level now also applies to offenses involving 500 or fewer rounds of ammunition.

¹⁶ The average sentence for Section 2778 offenders was 38 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders.

¹⁷ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 45 months.

¹⁸ These are cases in which a reason for the sentence indicated that the prosecution initiated, proposed, or stipulated to a sentence outside of the guideline range.

¹⁹ The average sentence for Section 2778 offenders who received government sponsored below range sentences was 31 months.

Slightly more than one third (35.2%, n=38) of Section 2778 offenders received non-government sponsored below range sentences.²⁰ The median sentence for these offenders was 18 months,²¹ and the average extent of the reduction was 49.0 percent below the minimum of the otherwise applicable guideline range. Two Section 2778 offenders were sentenced above the applicable guideline range (1.9%).²²

The overwhelming majority (94.4%, n=102) of Section 2778 offenders were sentenced to a term of imprisonment. More than three quarters (78.7%, n=85) of Section 2778 offenders were sentenced to a term of imprisonment of one year or more. Three Section 2778 offenders (2.8%) received a sentence of probation, all of which were government sponsored below range sentences. Three additional Section 2778 offenders (2.8%) received a sentence of probation plus community or home confinement, as a result of a non-government sponsored below range sentence.

The Commission identified 24 Section 2778 cases (22.2%) involving the provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program. The median sentence for the 24 Section 2778 offenders engaging in such conduct was 36 months.²³ More than two thirds of Section 2778 offenders identified as engaging in this more serious conduct (70.4%, n=17) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Four offenders (16.7%) were sentenced within the applicable guideline range and received a median sentence of 52 months.²⁴

²⁰ Non-government below range sentences include all cases that were either 1) departures authorized in the provisions, policy statements, or commentary of the *Guidelines Manual*; 2) sentenced outside of the guideline range in which the court indicated both a departure and a reference to either *United States v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for sentencing outside of the guideline system; 3) sentenced outside of the guideline range in which no departure was indicated and in which the court cited *United States v. Booker*, 18 U.S.C. § 3553, or related factors as one of the reasons for sentencing outside of the guideline system; or 4) sentenced outside of the guideline range that could not be classified into any of the three previous outside of the range categories. The final category includes cases in which no reason was provided for a sentence outside of the guideline range.

²¹ The average sentence for Section 2778 offenders who received non-government sponsored below range sentences was 31 months.

²² The median sentence length cannot be determined with only two cases. The actual sentences imposed in the two cases were 90 months and 120 months.

²³ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security was 45 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders engaging in conduct identified as particularly damaging to national security.

²⁴ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 111 months.

More than half (54.2%, n=13) received a government sponsored below range sentence²⁵ and received a median sentence of 15 months.²⁶ Of the 13 government sponsored below range sentences, ten (76.9%) were for providing substantial assistance to the government pursuant to §5K1.1. The average extent of the reduction for government sponsored below range sentences was 65.8 percent below the minimum of the otherwise applicable guideline range. One quarter (25.0%, n=6) of Section 2778 offenders identified as engaging in this more serious conduct received non-government sponsored below range sentences.²⁷ The median sentence for these offenders was 43 months,²⁸ and the average extent of the reduction was 22.1 percent below the minimum of the otherwise applicable guideline range. One Section 2778 offender identified as engaging in this more serious conduct (4.2%) was sentenced above the applicable guideline range.

Courts sentenced the overwhelming majority (87.5%, n=21) of these Section 2778 offenders identified as engaging in this more serious conduct to a term of imprisonment of one year or more.²⁹ No Section 2778 offender identified as engaging in this more serious conduct received a sentence of imprisonment of less than one year or a term of probation as a result of a non-government sponsored below range sentence. The three Section 2778 offenders identified as engaging in this more serious conduct (12.5%) who were sentenced to a term of probation received government sponsored below range sentences.

III. Conclusion

Mandatory minimum penalties for the offenses listed in the directive, if enacted, may be too broad. For example, section 2778 covers a wide range of offense conduct that results in varying degrees of impact on national security. A mandatory minimum penalty applicable to all section 2778 offenses may be overly broad for the full range of conduct prosecutable under that statute, which could result in inconsistencies in application similar to those noted in the Commission's *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011).³⁰ There may be cases in which a mandatory minimum penalty for

²⁵ See *supra* n. 18.

²⁶ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received government sponsored below range sentences was 21 months.

²⁷ See *supra* n. 20.

²⁸ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received non-government sponsored below range sentences was 42 months.

²⁹ Section 2778 offenders engaging in conduct identified as particularly damaging to national security were sentenced to terms of imprisonment in the following lengths: 1) from one to less than three years of imprisonment (37.5%, n=9); 2) from three to less than five years (33.3%, n=8); and 3) more than five years (16.7%, n=4).

³⁰ See Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011) at 345.

The Honorable John F. Kerry

December 14, 2011

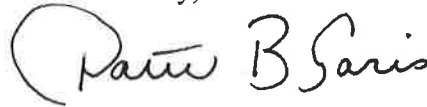
Page (7)

violating section 2778 is perceived as too severe because the offense had little impact on national security.

The Commission recognizes the potential threat to national security caused by certain conduct covered by the statutes listed in the directive, but there is a difference of opinion among the commissioners regarding whether Congress should enact mandatory minimum penalties for these statutes. If Congress decides to enact mandatory minimum penalties, the Commission unanimously believes that such penalties should be limited to offenses that are damaging to national security.

The Commission stands ready to work with Congress to provide appropriately tailored sentences for all of the various national security threats covered by the Act.

Sincerely,

A handwritten signature in cursive script that reads "Patti B Saris". The signature is written in black ink and is positioned below the word "Sincerely,".

Patti B. Saris
Chair

UNITED STATES SENTENCING COMMISSION
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December 14, 2011

The Honorable Richard C. Shelby
Ranking Member
United States Senate Committee on Banking, Housing, and Urban Affairs
304 Russell Senate Office Building
Washington, D.C. 20510

RE: Comprehensive Iran Sanctions Accountability and Divestment Act of 2010
Pub. L. No. 111-195

Dear Ranking Member Shelby:

I am writing to you on behalf of the United States Sentencing Commission [hereinafter the Commission] in response to the directive in Section 107 of the Comprehensive Iran Sanctions Accountability and Divestment Act of 2010, Pub. L. No. 111-195 [hereinafter the Act]. The directive required the Commission to “study and submit to Congress a report on the impact and advisability of imposing a mandatory minimum sentence for violations of” the following offenses:

- (1) Section 5(a) of the United Nations Participation Act of 1945 (22 U.S.C. § 287c(a));¹
- (2) Sections 38, 39, and 40 of the Arms Export Control Act (22 U.S.C. §§ 2778, 2779, and 2780); and
- (3) The Trading With the Enemy Act (50 U.S.C. App’x §§ 1 *et seq.*).

¹ Section (5)(a) of the United Nations Participation Act of 1945 sets forth the authority of the President to issue orders, rules, and regulations implementing United Nations Security Council resolutions, but the criminal offense for violating such orders, rules, and regulations is found in Section 5(b) of the act (22 U.S.C. § 287c(b)). Section 107 of the Act increased the statutory maximum penalty found in subsection (b) of Section 287c from ten to 20 years.

I. Description of Offenses Listed in the Act's Directive

The offenses covered by the directive all have a statutory maximum penalty of 20 years, increased from ten years by the Act, and are summarized as follows:

- 1) Section 5(b) of the United Nations Participation Act of 1945, codified at 22 U.S.C. § 287c(b), criminalizes willful violations or evasions of any order, rule, or regulation issued by the President to give effect to United Nations Security Council Resolutions.
- 2) Sections 2778, 2779, and 2780 are provisions of the Arms Export Control Act.² Section 2778 authorizes the President to control the import and export of defense articles and services, to designate those items that shall be considered defense articles and services, and to promulgate regulations therefor.³ Section 2778 also provides licensing and registration requirements for businesses engaged in manufacturing, exporting, or importing defense articles and services, or brokering those activities.⁴ Section 2778(c) criminalizes willful violations of any of the provisions of section 2778, section 2779, or any regulations promulgated under the authority of those statutes. Section 2778 also penalizes anyone who “willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading.”
- 3) Section 2779 requires adequate and timely reporting to the U.S. Secretary of State of “political contributions, gifts, commissions and fees paid, or offered or agreed to be paid, by a person in connection with” the sale of the articles and services on the USML.
- 4) Section 2780 is violated when a “United States person”⁵ willfully either 1) exports or sells, leases, loans, grants or otherwise provides any munitions item to any prohibited country, or to any other recipient if the person has reason to know the item will be made available to a prohibited country;⁶ or 2) takes any other action which “would

² See Pub. L. No. 94-329, Tit. II, 90 Stat. 729, 734 (June 30, 1976), codified at 22 U.S.C. §§ 2751 *et seq.*

³ The items so designated are added to the United States Munitions List (USML). See 22 U.S.C. § 2778(a). The USML can be found at 22 C.F.R. § 121.1. Included on the USML are such articles as military aircraft, helicopters, artillery, shells, missiles, rockets, bombs, warships, explosives, military and space electronics, and certain firearms. The USML also covers dual use items which have both military and commercial uses, such as triggered spark gaps.

⁴ The regulations, the International Traffic in Arms Regulations (ITAR), codified at 22 C.F.R. § 120-130, are administered by the United States Department of State's Directorate of Defense Trade Controls (the “DDTC”).

⁵ This term is defined in section 2780(1)(3).

⁶ See 22 U.S.C. § 2780(b)(1)(A), (b)(1)(B), (b)(1)(C).

facilitate the acquisition, directly or indirectly, of any munitions item by the government of any [prohibited] country [], or any person acting on behalf of that government, if the United States person has reason to know that that action will facilitate the acquisition of that item by such a government or person.”⁷ A United States person is also criminally liable if such actions are taken, outside the United States, by a corporation or other person controlled in fact by that United States person.⁸

- 5) Willful violations of any provisions of the Trading with the Enemy Act of 1917, or of any license, rule, or regulation issued under that act are criminalized by 50 U.S.C. App’x § 16(a).

As will be discussed in further detail in Part II below, of the offenses listed in the directive, only section 2778 has been used to prosecute an individual since fiscal year 2005.⁹ Section 2778 is used to prosecute individuals involved in a broad range of conduct. For example, the unlicensed exportation to Mexico of a single firearm, intended solely for personal use, violates the statute, as well as conduct that is “particularly damaging to national security”¹⁰ because it involves the “provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program.”¹¹

II. Commission Data for Offenses Listed in the Act’s Directive

Commission data revealed no convictions under sections 287c, 2779, 2780, or App’x section 16¹² for any of the 241,744 individual offenders sentenced in fiscal years 2008, 2009, and

⁷ See 22 U.S.C. § 2780(b)(1)(D).

⁸ See 22 U.S.C. § 2780(b)(2).

⁹ Since fiscal year 1999, Commission data revealed that the only statute listed in the directive used with any frequency is section 2778. Commission data revealed no convictions under sections 287c, 2779, or 2780 and 6 individual offenders have been convicted under the Trading with the Enemy Act, 50 U.S.C. App’x §§ 1 *et seq.* For purposes of the analyses discussed herein, the Commission used fiscal years 2008-2010 in order to provide Congress with the most current information concerning sentencing practices for the statutes listed in the directive.

¹⁰ See Letter from Lisa O. Monaco, Assistant Attorney General for National Security, U.S. Dept. of Justice, to Judge Patti B. Saris, Chair, U.S. Sentencing Commission at 5 (Sept. 9, 2011).

¹¹ *Id.* at 5-6.

¹² Commission data revealed no individual convictions under these four statutes since fiscal year 2005. Department of Justice representatives advised that offenders committing conduct violating these statutes are likely prosecuted under other statutes, such as the International Emergency Economic Powers Act, [hereinafter IEEPA] 50 U.S.C. §§ 1701, *et seq.*

2010.¹³ Therefore, for those three fiscal years, the only sentencing data available to the Commission was for section 2778 offenses.

In fiscal years 2008, 2009, and 2010,¹⁴ less than one percent of the 241,744 individual offenders (0.04%, n=108) sentenced were convicted of violating section 2778 [hereinafter Section 2778 offenders]. The overwhelming majority of all Section 2778 offenders were in Criminal History Category I (89.8%, n=97). More than half (59.3%, n=64) of these 108 Section 2778 offenses involved exportation of firearms and/or ammunition to Mexico.¹⁵ The overwhelming majority of Section 2778 offenders (93.5%, n=101) pleaded guilty.

Section 2778 offenders received a median sentence of 30 months.¹⁶ Almost two thirds of Section 2778 offenders (63.0%, n=68) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Slightly more than one third (38.0%, n=41) were sentenced within the applicable guideline range and received a median sentence of 37 months.¹⁷ One quarter (25.0%, n=27) of the Section 2778 offenders received government sponsored below range sentences,¹⁸ with a median sentence of 20 months.¹⁹ Of the 27 government sponsored below range sentences, 22 (81.5%) were for providing substantial assistance to the government pursuant to §5K1.1 (Substantial Assistance to Authorities) (Policy Statement). The average extent of the reduction for government sponsored below range sentences was 58.2 percent below the minimum of the otherwise applicable guideline range.

¹³ The Commission received statutory information on 83,946 cases in FY2010, 81,369 in FY2009, and 76,429 in FY2008, for a total of 241,744 cases for the three fiscal years.

¹⁴ Because of the relatively small number of cases involving a conviction under section 2778 reported each fiscal year, the Commission combined data for three fiscal years to have sufficient data for meaningful analyses.

¹⁵ The applicable guideline for section 2778 offenses is USSG §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). Most offenses covered by this guideline receive a base offense level of 26. Offenses involving the exportation of a limited number of firearms and/or ammunition receive a base offense level of 14. The Commission amended §2M5.2, effective November 1, 2011, to increase penalties for the unlawful exportation of firearms. Prior to the amendment, a base offense level of 14 applied to exportation of ten or fewer firearms. The Commission reduced the number of firearm triggering this base offense level from ten to two, reasoning that "export offenses involving more than two firearms are more serious and more likely to involve trafficking." See USSG, App. C, amend. 753. This base offense level now also applies to offenses involving 500 or fewer rounds of ammunition.

¹⁶ The average sentence for Section 2778 offenders was 38 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders.

¹⁷ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 45 months.

¹⁸ These are cases in which a reason for the sentence indicated that the prosecution initiated, proposed, or stipulated to a sentence outside of the guideline range.

¹⁹ The average sentence for Section 2778 offenders who received government sponsored below range sentences was 31 months.

Slightly more than one third (35.2%, n=38) of Section 2778 offenders received non-government sponsored below range sentences.²⁰ The median sentence for these offenders was 18 months,²¹ and the average extent of the reduction was 49.0 percent below the minimum of the otherwise applicable guideline range. Two Section 2778 offenders were sentenced above the applicable guideline range (1.9%).²²

The overwhelming majority (94.4%, n=102) of Section 2778 offenders were sentenced to a term of imprisonment. More than three quarters (78.7%, n=85) of Section 2778 offenders were sentenced to a term of imprisonment of one year or more. Three Section 2778 offenders (2.8%) received a sentence of probation, all of which were government sponsored below range sentences. Three additional Section 2778 offenders (2.8%) received a sentence of probation plus community or home confinement, as a result of a non-government sponsored below range sentence.

The Commission identified 24 Section 2778 cases (22.2%) involving the provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program. The median sentence for the 24 Section 2778 offenders engaging in such conduct was 36 months.²³ More than two thirds of Section 2778 offenders identified as engaging in this more serious conduct (70.4%, n=17) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Four offenders (16.7%) were sentenced within the applicable guideline range and received a median sentence of 52 months.²⁴

²⁰ Non-government below range sentences include all cases that were either 1) departures authorized in the provisions, policy statements, or commentary of the *Guidelines Manual*; 2) sentenced outside of the guideline range in which the court indicated both a departure and a reference to either *United States v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for sentencing outside of the guideline system; 3) sentenced outside of the guideline range in which no departure was indicated and in which the court cited *United States v. Booker*, 18 U.S.C. § 3553, or related factors as one of the reasons for sentencing outside of the guideline system; or 4) sentenced outside of the guideline range that could not be classified into any of the three previous outside of the range categories. The final category includes cases in which no reason was provided for a sentence outside of the guideline range.

²¹ The average sentence for Section 2778 offenders who received non-government sponsored below range sentences was 31 months.

²² The median sentence length cannot be determined with only two cases. The actual sentences imposed in the two cases were 90 months and 120 months.

²³ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security was 45 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders engaging in conduct identified as particularly damaging to national security.

²⁴ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 111 months.

More than half (54.2%, n=13) received a government sponsored below range sentence²⁵ and received a median sentence of 15 months.²⁶ Of the 13 government sponsored below range sentences, ten (76.9%) were for providing substantial assistance to the government pursuant to §5K1.1. The average extent of the reduction for government sponsored below range sentences was 65.8 percent below the minimum of the otherwise applicable guideline range. One quarter (25.0%, n=6) of Section 2778 offenders identified as engaging in this more serious conduct received non-government sponsored below range sentences.²⁷ The median sentence for these offenders was 43 months,²⁸ and the average extent of the reduction was 22.1 percent below the minimum of the otherwise applicable guideline range. One Section 2778 offender identified as engaging in this more serious conduct (4.2%) was sentenced above the applicable guideline range.

Courts sentenced the overwhelming majority (87.5%, n=21) of these Section 2778 offenders identified as engaging in this more serious conduct to a term of imprisonment of one year or more.²⁹ No Section 2778 offender identified as engaging in this more serious conduct received a sentence of imprisonment of less than one year or a term of probation as a result of a non-government sponsored below range sentence. The three Section 2778 offenders identified as engaging in this more serious conduct (12.5%) who were sentenced to a term of probation received government sponsored below range sentences.

III. Conclusion

Mandatory minimum penalties for the offenses listed in the directive, if enacted, may be too broad. For example, section 2778 covers a wide range of offense conduct that results in varying degrees of impact on national security. A mandatory minimum penalty applicable to all section 2778 offenses may be overly broad for the full range of conduct prosecutable under that statute, which could result in inconsistencies in application similar to those noted in the Commission's *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011).³⁰ There may be cases in which a mandatory minimum penalty for

²⁵ See *supra* n. 18.

²⁶ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received government sponsored below range sentences was 21 months.

²⁷ See *supra* n. 20.

²⁸ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received non-government sponsored below range sentences was 42 months.

²⁹ Section 2778 offenders engaging in conduct identified as particularly damaging to national security were sentenced to terms of imprisonment in the following lengths: 1) from one to less than three years of imprisonment (37.5%, n=9); 2) from three to less than five years (33.3%, n=8); and 3) more than five years (16.7%, n=4).

³⁰ See Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011) at 345.

The Honorable Richard C. Shelby
December 14, 2011
Page (7)

violating section 2778 is perceived as too severe because the offense had little impact on national security.

The Commission recognizes the potential threat to national security caused by certain conduct covered by the statutes listed in the directive, but there is a difference of opinion among the commissioners regarding whether Congress should enact mandatory minimum penalties for these statutes. If Congress decides to enact mandatory minimum penalties, the Commission unanimously believes that such penalties should be limited to offenses that are damaging to national security.

The Commission stands ready to work with Congress to provide appropriately tailored sentences for all of the various national security threats covered by the Act.

Sincerely,

A handwritten signature in black ink that reads "Patti B Saris". The signature is written in a cursive style with a large, looped "P" and "S".

Patti B. Saris
Chair

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
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December 14, 2011

The Honorable Charles Grassley
Ranking Member
United States Senate Committee on the Judiciary
135 Hart Senate Office Building
Washington, D.C. 20510

RE: Comprehensive Iran Sanctions Accountability and Divestment Act of 2010
Pub. L. No. 111-195

Dear Ranking Member Grassley:

I am writing to you on behalf of the United States Sentencing Commission [hereinafter the Commission] in response to the directive in Section 107 of the Comprehensive Iran Sanctions Accountability and Divestment Act of 2010, Pub. L. No. 111-195 [hereinafter the Act]. The directive required the Commission to “study and submit to Congress a report on the impact and advisability of imposing a mandatory minimum sentence for violations of” the following offenses:

- (1) Section 5(a) of the United Nations Participation Act of 1945 (22 U.S.C. § 287c(a));¹
- (2) Sections 38, 39, and 40 of the Arms Export Control Act (22 U.S.C. §§ 2778, 2779, and 2780); and
- (3) The Trading With the Enemy Act (50 U.S.C. App’x §§ 1 *et seq.*).

¹ Section (5)(a) of the United Nations Participation Act of 1945 sets forth the authority of the President to issue orders, rules, and regulations implementing United Nations Security Council resolutions, but the criminal offense for violating such orders, rules, and regulations is found in Section 5(b) of the act (22 U.S.C. § 287c(b)). Section 107 of the Act increased the statutory maximum penalty found in subsection (b) of Section 287c from ten to 20 years.

I. Description of Offenses Listed in the Act's Directive

The offenses covered by the directive all have a statutory maximum penalty of 20 years, increased from ten years by the Act, and are summarized as follows:

- 1) Section 5(b) of the United Nations Participation Act of 1945, codified at 22 U.S.C. § 287c(b), criminalizes willful violations or evasions of any order, rule, or regulation issued by the President to give effect to United Nations Security Council Resolutions.
- 2) Sections 2778, 2779, and 2780 are provisions of the Arms Export Control Act.² Section 2778 authorizes the President to control the import and export of defense articles and services, to designate those items that shall be considered defense articles and services, and to promulgate regulations therefor.³ Section 2778 also provides licensing and registration requirements for businesses engaged in manufacturing, exporting, or importing defense articles and services, or brokering those activities.⁴ Section 2778(c) criminalizes willful violations of any of the provisions of section 2778, section 2779, or any regulations promulgated under the authority of those statutes. Section 2778 also penalizes anyone who “willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading.”
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facilitate the acquisition, directly or indirectly, of any munitions item by the government of any [prohibited] country [], or any person acting on behalf of that government, if the United States person has reason to know that that action will facilitate the acquisition of that item by such a government or person.”⁷ A United States person is also criminally liable if such actions are taken, outside the United States, by a corporation or other person controlled in fact by that United States person.⁸

- 5) Willful violations of any provisions of the Trading with the Enemy Act of 1917, or of any license, rule, or regulation issued under that act are criminalized by 50 U.S.C. App’x § 16(a).

As will be discussed in further detail in Part II below, of the offenses listed in the directive, only section 2778 has been used to prosecute an individual since fiscal year 2005.⁹ Section 2778 is used to prosecute individuals involved in a broad range of conduct. For example, the unlicensed exportation to Mexico of a single firearm, intended solely for personal use, violates the statute, as well as conduct that is “particularly damaging to national security”¹⁰ because it involves the “provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program.”¹¹

II. Commission Data for Offenses Listed in the Act’s Directive

Commission data revealed no convictions under sections 287c, 2779, 2780, or App’x section 16¹² for any of the 241,744 individual offenders sentenced in fiscal years 2008, 2009, and

⁷ See 22 U.S.C. § 2780(b)(1)(D).

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In fiscal years 2008, 2009, and 2010,¹⁴ less than one percent of the 241,744 individual offenders (0.04%, n=108) sentenced were convicted of violating section 2778 [hereinafter Section 2778 offenders]. The overwhelming majority of all Section 2778 offenders were in Criminal History Category I (89.8%, n=97). More than half (59.3%, n=64) of these 108 Section 2778 offenses involved exportation of firearms and/or ammunition to Mexico.¹⁵ The overwhelming majority of Section 2778 offenders (93.5%, n=101) pleaded guilty.

Section 2778 offenders received a median sentence of 30 months.¹⁶ Almost two thirds of Section 2778 offenders (63.0%, n=68) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Slightly more than one third (38.0%, n=41) were sentenced within the applicable guideline range and received a median sentence of 37 months.¹⁷ One quarter (25.0%, n=27) of the Section 2778 offenders received government sponsored below range sentences,¹⁸ with a median sentence of 20 months.¹⁹ Of the 27 government sponsored below range sentences, 22 (81.5%) were for providing substantial assistance to the government pursuant to §5K1.1 (Substantial Assistance to Authorities) (Policy Statement). The average extent of the reduction for government sponsored below range sentences was 58.2 percent below the minimum of the otherwise applicable guideline range.

¹³ The Commission received statutory information on 83,946 cases in FY2010, 81,369 in FY2009, and 76,429 in FY2008, for a total of 241,744 cases for the three fiscal years.

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¹⁵ The applicable guideline for section 2778 offenses is USSG §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). Most offenses covered by this guideline receive a base offense level of 26. Offenses involving the exportation of a limited number of firearms and/or ammunition receive a base offense level of 14. The Commission amended §2M5.2, effective November 1, 2011, to increase penalties for the unlawful exportation of firearms. Prior to the amendment, a base offense level of 14 applied to exportation of ten or fewer firearms. The Commission reduced the number of firearm triggering this base offense level from ten to two, reasoning that “export offenses involving more than two firearms are more serious and more likely to involve trafficking.” See USSG, App. C, amend. 753. This base offense level now also applies to offenses involving 500 or fewer rounds of ammunition.

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¹⁹ The average sentence for Section 2778 offenders who received government sponsored below range sentences was 31 months.

Slightly more than one third (35.2%, n=38) of Section 2778 offenders received non-government sponsored below range sentences.²⁰ The median sentence for these offenders was 18 months,²¹ and the average extent of the reduction was 49.0 percent below the minimum of the otherwise applicable guideline range. Two Section 2778 offenders were sentenced above the applicable guideline range (1.9%).²²

The overwhelming majority (94.4%, n=102) of Section 2778 offenders were sentenced to a term of imprisonment. More than three quarters (78.7%, n=85) of Section 2778 offenders were sentenced to a term of imprisonment of one year or more. Three Section 2778 offenders (2.8%) received a sentence of probation, all of which were government sponsored below range sentences. Three additional Section 2778 offenders (2.8%) received a sentence of probation plus community or home confinement, as a result of a non-government sponsored below range sentence.

The Commission identified 24 Section 2778 cases (22.2%) involving the provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program. The median sentence for the 24 Section 2778 offenders engaging in such conduct was 36 months.²³ More than two thirds of Section 2778 offenders identified as engaging in this more serious conduct (70.4%, n=17) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Four offenders (16.7%) were sentenced within the applicable guideline range and received a median sentence of 52 months.²⁴

²⁰ Non-government below range sentences include all cases that were either 1) departures authorized in the provisions, policy statements, or commentary of the *Guidelines Manual*; 2) sentenced outside of the guideline range in which the court indicated both a departure and a reference to either *United States v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for sentencing outside of the guideline system; 3) sentenced outside of the guideline range in which no departure was indicated and in which the court cited *United States v. Booker*, 18 U.S.C. § 3553, or related factors as one of the reasons for sentencing outside of the guideline system; or 4) sentenced outside of the guideline range that could not be classified into any of the three previous outside of the range categories. The final category includes cases in which no reason was provided for a sentence outside of the guideline range.

²¹ The average sentence for Section 2778 offenders who received non-government sponsored below range sentences was 31 months.

²² The median sentence length cannot be determined with only two cases. The actual sentences imposed in the two cases were 90 months and 120 months.

²³ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security was 45 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders engaging in conduct identified as particularly damaging to national security.

²⁴ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 111 months.

More than half (54.2%, n=13) received a government sponsored below range sentence²⁵ and received a median sentence of 15 months.²⁶ Of the 13 government sponsored below range sentences, ten (76.9%) were for providing substantial assistance to the government pursuant to §5K1.1. The average extent of the reduction for government sponsored below range sentences was 65.8 percent below the minimum of the otherwise applicable guideline range. One quarter (25.0%, n=6) of Section 2778 offenders identified as engaging in this more serious conduct received non-government sponsored below range sentences.²⁷ The median sentence for these offenders was 43 months,²⁸ and the average extent of the reduction was 22.1 percent below the minimum of the otherwise applicable guideline range. One Section 2778 offender identified as engaging in this more serious conduct (4.2%) was sentenced above the applicable guideline range.

Courts sentenced the overwhelming majority (87.5%, n=21) of these Section 2778 offenders identified as engaging in this more serious conduct to a term of imprisonment of one year or more.²⁹ No Section 2778 offender identified as engaging in this more serious conduct received a sentence of imprisonment of less than one year or a term of probation as a result of a non-government sponsored below range sentence. The three Section 2778 offenders identified as engaging in this more serious conduct (12.5%) who were sentenced to a term of probation received government sponsored below range sentences.

III. Conclusion

Mandatory minimum penalties for the offenses listed in the directive, if enacted, may be too broad. For example, section 2778 covers a wide range of offense conduct that results in varying degrees of impact on national security. A mandatory minimum penalty applicable to all section 2778 offenses may be overly broad for the full range of conduct prosecutable under that statute, which could result in inconsistencies in application similar to those noted in the Commission's *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011).³⁰ There may be cases in which a mandatory minimum penalty for

²⁵ See *supra* n. 18.

²⁶ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received government sponsored below range sentences was 21 months.

²⁷ See *supra* n. 20.

²⁸ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received non-government sponsored below range sentences was 42 months.

²⁹ Section 2778 offenders engaging in conduct identified as particularly damaging to national security were sentenced to terms of imprisonment in the following lengths: 1) from one to less than three years of imprisonment (37.5%, n=9); 2) from three to less than five years (33.3%, n=8); and 3) more than five years (16.7%, n=4).

³⁰ See Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011) at 345.

The Honorable Charles Grassley

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violating section 2778 is perceived as too severe because the offense had little impact on national security.

The Commission recognizes the potential threat to national security caused by certain conduct covered by the statutes listed in the directive, but there is a difference of opinion among the commissioners regarding whether Congress should enact mandatory minimum penalties for these statutes. If Congress decides to enact mandatory minimum penalties, the Commission unanimously believes that such penalties should be limited to offenses that are damaging to national security.

The Commission stands ready to work with Congress to provide appropriately tailored sentences for all of the various national security threats covered by the Act.

Sincerely,

A handwritten signature in cursive script that reads "Patti B Saris". The signature is written in black ink and is positioned above the printed name and title.

Patti B. Saris
Chair

UNITED STATES SENTENCING COMMISSION
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December 14, 2011

The Honorable Tim Johnson
Chair
United States Senate Committee on Banking, Housing, and Urban Affairs
136 Hart Senate Office Building
Washington, D.C. 20510

RE: Comprehensive Iran Sanctions Accountability and Divestment Act of 2010
Pub. L. No. 111-195

Dear Chairman Johnson:

I am writing to you on behalf of the United States Sentencing Commission [hereinafter the Commission] in response to the directive in Section 107 of the Comprehensive Iran Sanctions Accountability and Divestment Act of 2010, Pub. L. No. 111-195 [hereinafter the Act]. The directive required the Commission to “study and submit to Congress a report on the impact and advisability of imposing a mandatory minimum sentence for violations of” the following offenses:

- (1) Section 5(a) of the United Nations Participation Act of 1945 (22 U.S.C. § 287c(a));¹
- (2) Sections 38, 39, and 40 of the Arms Export Control Act (22 U.S.C. §§ 2778, 2779, and 2780); and
- (3) The Trading With the Enemy Act (50 U.S.C. App’x §§ 1 *et seq.*).

¹ Section (5)(a) of the United Nations Participation Act of 1945 sets forth the authority of the President to issue orders, rules, and regulations implementing United Nations Security Council resolutions, but the criminal offense for violating such orders, rules, and regulations is found in Section 5(b) of the act (22 U.S.C. § 287c(b)). Section 107 of the Act increased the statutory maximum penalty found in subsection (b) of Section 287c from ten to 20 years.

I. Description of Offenses Listed in the Act's Directive

The offenses covered by the directive all have a statutory maximum penalty of 20 years, increased from ten years by the Act, and are summarized as follows:

- 1) Section 5(b) of the United Nations Participation Act of 1945, codified at 22 U.S.C. § 287c(b), criminalizes willful violations or evasions of any order, rule, or regulation issued by the President to give effect to United Nations Security Council Resolutions.
- 2) Sections 2778, 2779, and 2780 are provisions of the Arms Export Control Act.² Section 2778 authorizes the President to control the import and export of defense articles and services, to designate those items that shall be considered defense articles and services, and to promulgate regulations therefor.³ Section 2778 also provides licensing and registration requirements for businesses engaged in manufacturing, exporting, or importing defense articles and services, or brokering those activities.⁴ Section 2778(c) criminalizes willful violations of any of the provisions of section 2778, section 2779, or any regulations promulgated under the authority of those statutes. Section 2778 also penalizes anyone who “willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading.”
- 3) Section 2779 requires adequate and timely reporting to the U.S. Secretary of State of “political contributions, gifts, commissions and fees paid, or offered or agreed to be paid, by a person in connection with” the sale of the articles and services on the USML.
- 4) Section 2780 is violated when a “United States person”⁵ willfully either 1) exports or sells, leases, loans, grants or otherwise provides any munitions item to any prohibited country, or to any other recipient if the person has reason to know the item will be made available to a prohibited country;⁶ or 2) takes any other action which “would

² See Pub. L. No. 94-329, Tit. II, 90 Stat. 729, 734 (June 30, 1976), codified at 22 U.S.C. §§ 2751 *et seq.*

³ The items so designated are added to the United States Munitions List (USML). See 22 U.S.C. § 2778(a). The USML can be found at 22 C.F.R. § 121.1. Included on the USML are such articles as military aircraft, helicopters, artillery, shells, missiles, rockets, bombs, warships, explosives, military and space electronics, and certain firearms. The USML also covers dual use items which have both military and commercial uses, such as triggered spark gaps.

⁴ The regulations, the International Traffic in Arms Regulations (ITAR), codified at 22 C.F.R. § 120-130, are administered by the United States Department of State's Directorate of Defense Trade Controls (the “DDTC”).

⁵ This term is defined in section 2780(1)(3).

⁶ See 22 U.S.C. § 2780(b)(1)(A), (b)(1)(B), (b)(1)(C).

facilitate the acquisition, directly or indirectly, of any munitions item by the government of any [prohibited] country [], or any person acting on behalf of that government, if the United States person has reason to know that that action will facilitate the acquisition of that item by such a government or person.”⁷ A United States person is also criminally liable if such actions are taken, outside the United States, by a corporation or other person controlled in fact by that United States person.⁸

- 5) Willful violations of any provisions of the Trading with the Enemy Act of 1917, or of any license, rule, or regulation issued under that act are criminalized by 50 U.S.C. App’x § 16(a).

As will be discussed in further detail in Part II below, of the offenses listed in the directive, only section 2778 has been used to prosecute an individual since fiscal year 2005.⁹ Section 2778 is used to prosecute individuals involved in a broad range of conduct. For example, the unlicensed exportation to Mexico of a single firearm, intended solely for personal use, violates the statute, as well as conduct that is “particularly damaging to national security”¹⁰ because it involves the “provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program.”¹¹

II. Commission Data for Offenses Listed in the Act’s Directive

Commission data revealed no convictions under sections 287c, 2779, 2780, or App’x section 16¹² for any of the 241,744 individual offenders sentenced in fiscal years 2008, 2009, and

⁷ See 22 U.S.C. § 2780(b)(1)(D).

⁸ See 22 U.S.C. § 2780(b)(2).

⁹ Since fiscal year 1999, Commission data revealed that the only statute listed in the directive used with any frequency is section 2778. Commission data revealed no convictions under sections 287c, 2779, or 2780 and 6 individual offenders have been convicted under the Trading with the Enemy Act, 50 U.S.C. App’x §§ 1 *et seq.* For purposes of the analyses discussed herein, the Commission used fiscal years 2008-2010 in order to provide Congress with the most current information concerning sentencing practices for the statutes listed in the directive.

¹⁰ See Letter from Lisa O. Monaco, Assistant Attorney General for National Security, U.S. Dept. of Justice, to Judge Patti B. Saris, Chair, U.S. Sentencing Commission at 5 (Sept. 9, 2011).

¹¹ *Id.* at 5-6.

¹² Commission data revealed no individual convictions under these four statutes since fiscal year 2005. Department of Justice representatives advised that offenders committing conduct violating these statutes are likely prosecuted under other statutes, such as the International Emergency Economic Powers Act, [hereinafter IEEPA] 50 U.S.C. §§ 1701, *et seq.*

2010.¹³ Therefore, for those three fiscal years, the only sentencing data available to the Commission was for section 2778 offenses.

In fiscal years 2008, 2009, and 2010,¹⁴ less than one percent of the 241,744 individual offenders (0.04%, n=108) sentenced were convicted of violating section 2778 [hereinafter Section 2778 offenders]. The overwhelming majority of all Section 2778 offenders were in Criminal History Category I (89.8%, n=97). More than half (59.3%, n=64) of these 108 Section 2778 offenses involved exportation of firearms and/or ammunition to Mexico.¹⁵ The overwhelming majority of Section 2778 offenders (93.5%, n=101) pleaded guilty.

Section 2778 offenders received a median sentence of 30 months.¹⁶ Almost two thirds of Section 2778 offenders (63.0%, n=68) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Slightly more than one third (38.0%, n=41) were sentenced within the applicable guideline range and received a median sentence of 37 months.¹⁷ One quarter (25.0%, n=27) of the Section 2778 offenders received government sponsored below range sentences,¹⁸ with a median sentence of 20 months.¹⁹ Of the 27 government sponsored below range sentences, 22 (81.5%) were for providing substantial assistance to the government pursuant to §5K1.1 (Substantial Assistance to Authorities) (Policy Statement). The average extent of the reduction for government sponsored below range sentences was 58.2 percent below the minimum of the otherwise applicable guideline range.

¹³ The Commission received statutory information on 83,946 cases in FY2010, 81,369 in FY2009, and 76,429 in FY2008, for a total of 241,744 cases for the three fiscal years.

¹⁴ Because of the relatively small number of cases involving a conviction under section 2778 reported each fiscal year, the Commission combined data for three fiscal years to have sufficient data for meaningful analyses.

¹⁵ The applicable guideline for section 2778 offenses is USSG §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). Most offenses covered by this guideline receive a base offense level of 26. Offenses involving the exportation of a limited number of firearms and/or ammunition receive a base offense level of 14. The Commission amended §2M5.2, effective November 1, 2011, to increase penalties for the unlawful exportation of firearms. Prior to the amendment, a base offense level of 14 applied to exportation of ten or fewer firearms. The Commission reduced the number of firearm triggering this base offense level from ten to two, reasoning that "export offenses involving more than two firearms are more serious and more likely to involve trafficking." See USSG, App. C, amend. 753. This base offense level now also applies to offenses involving 500 or fewer rounds of ammunition.

¹⁶ The average sentence for Section 2778 offenders was 38 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders.

¹⁷ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 45 months.

¹⁸ These are cases in which a reason for the sentence indicated that the prosecution initiated, proposed, or stipulated to a sentence outside of the guideline range.

¹⁹ The average sentence for Section 2778 offenders who received government sponsored below range sentences was 31 months.

Slightly more than one third (35.2%, n=38) of Section 2778 offenders received non-government sponsored below range sentences.²⁰ The median sentence for these offenders was 18 months,²¹ and the average extent of the reduction was 49.0 percent below the minimum of the otherwise applicable guideline range. Two Section 2778 offenders were sentenced above the applicable guideline range (1.9%).²²

The overwhelming majority (94.4%, n=102) of Section 2778 offenders were sentenced to a term of imprisonment. More than three quarters (78.7%, n=85) of Section 2778 offenders were sentenced to a term of imprisonment of one year or more. Three Section 2778 offenders (2.8%) received a sentence of probation, all of which were government sponsored below range sentences. Three additional Section 2778 offenders (2.8%) received a sentence of probation plus community or home confinement, as a result of a non-government sponsored below range sentence.

The Commission identified 24 Section 2778 cases (22.2%) involving the provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program. The median sentence for the 24 Section 2778 offenders engaging in such conduct was 36 months.²³ More than two thirds of Section 2778 offenders identified as engaging in this more serious conduct (70.4%, n=17) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Four offenders (16.7%) were sentenced within the applicable guideline range and received a median sentence of 52 months.²⁴

²⁰ Non-government below range sentences include all cases that were either 1) departures authorized in the provisions, policy statements, or commentary of the *Guidelines Manual*; 2) sentenced outside of the guideline range in which the court indicated both a departure and a reference to either *United States v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for sentencing outside of the guideline system; 3) sentenced outside of the guideline range in which no departure was indicated and in which the court cited *United States v. Booker*, 18 U.S.C. § 3553, or related factors as one of the reasons for sentencing outside of the guideline system; or 4) sentenced outside of the guideline range that could not be classified into any of the three previous outside of the range categories. The final category includes cases in which no reason was provided for a sentence outside of the guideline range.

²¹ The average sentence for Section 2778 offenders who received non-government sponsored below range sentences was 31 months.

²² The median sentence length cannot be determined with only two cases. The actual sentences imposed in the two cases were 90 months and 120 months.

²³ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security was 45 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders engaging in conduct identified as particularly damaging to national security.

²⁴ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 111 months.

More than half (54.2%, n=13) received a government sponsored below range sentence²⁵ and received a median sentence of 15 months.²⁶ Of the 13 government sponsored below range sentences, ten (76.9%) were for providing substantial assistance to the government pursuant to §5K1.1. The average extent of the reduction for government sponsored below range sentences was 65.8 percent below the minimum of the otherwise applicable guideline range. One quarter (25.0%, n=6) of Section 2778 offenders identified as engaging in this more serious conduct received non-government sponsored below range sentences.²⁷ The median sentence for these offenders was 43 months,²⁸ and the average extent of the reduction was 22.1 percent below the minimum of the otherwise applicable guideline range. One Section 2778 offender identified as engaging in this more serious conduct (4.2%) was sentenced above the applicable guideline range.

Courts sentenced the overwhelming majority (87.5%, n=21) of these Section 2778 offenders identified as engaging in this more serious conduct to a term of imprisonment of one year or more.²⁹ No Section 2778 offender identified as engaging in this more serious conduct received a sentence of imprisonment of less than one year or a term of probation as a result of a non-government sponsored below range sentence. The three Section 2778 offenders identified as engaging in this more serious conduct (12.5%) who were sentenced to a term of probation received government sponsored below range sentences.

III. Conclusion

Mandatory minimum penalties for the offenses listed in the directive, if enacted, may be too broad. For example, section 2778 covers a wide range of offense conduct that results in varying degrees of impact on national security. A mandatory minimum penalty applicable to all section 2778 offenses may be overly broad for the full range of conduct prosecutable under that statute, which could result in inconsistencies in application similar to those noted in the Commission's *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011).³⁰ There may be cases in which a mandatory minimum penalty for

²⁵ See *supra* n. 18.

²⁶ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received government sponsored below range sentences was 21 months.

²⁷ See *supra* n. 20.

²⁸ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received non-government sponsored below range sentences was 42 months.

²⁹ Section 2778 offenders engaging in conduct identified as particularly damaging to national security were sentenced to terms of imprisonment in the following lengths: 1) from one to less than three years of imprisonment (37.5%, n=9); 2) from three to less than five years (33.3%, n=8); and 3) more than five years (16.7%, n=4).

³⁰ See Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011) at 345.

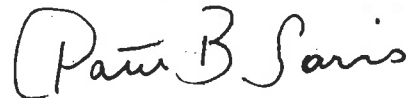
The Honorable Tim Johnson
December 14, 2011
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violating section 2778 is perceived as too severe because the offense had little impact on national security.

The Commission recognizes the potential threat to national security caused by certain conduct covered by the statutes listed in the directive, but there is a difference of opinion among the commissioners regarding whether Congress should enact mandatory minimum penalties for these statutes. If Congress decides to enact mandatory minimum penalties, the Commission unanimously believes that such penalties should be limited to offenses that are damaging to national security.

The Commission stands ready to work with Congress to provide appropriately tailored sentences for all of the various national security threats covered by the Act.

Sincerely,

A handwritten signature in black ink that reads "Patti B. Saris". The signature is written in a cursive style with a large, looped initial "P".

Patti B. Saris
Chair

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December 14, 2011

The Honorable Richard G. Lugar
Ranking Member
United States Senate Committee on Foreign Relations
306 Hart Senate Office Building
Washington, D.C. 20510

RE: Comprehensive Iran Sanctions Accountability and Divestment Act of 2010
Pub. L. No. 111-195

Dear Ranking Member Lugar:

I am writing to you on behalf of the United States Sentencing Commission [hereinafter the Commission] in response to the directive in Section 107 of the Comprehensive Iran Sanctions Accountability and Divestment Act of 2010, Pub. L. No. 111-195 [hereinafter the Act]. The directive required the Commission to “study and submit to Congress a report on the impact and advisability of imposing a mandatory minimum sentence for violations of” the following offenses:

- (1) Section 5(a) of the United Nations Participation Act of 1945 (22 U.S.C. § 287c(a));¹
- (2) Sections 38, 39, and 40 of the Arms Export Control Act (22 U.S.C. §§ 2778, 2779, and 2780); and
- (3) The Trading With the Enemy Act (50 U.S.C. App’x §§ 1 *et seq.*).

¹ Section (5)(a) of the United Nations Participation Act of 1945 sets forth the authority of the President to issue orders, rules, and regulations implementing United Nations Security Council resolutions, but the criminal offense for violating such orders, rules, and regulations is found in Section 5(b) of the act (22 U.S.C. § 287c(b)). Section 107 of the Act increased the statutory maximum penalty found in subsection (b) of Section 287c from ten to 20 years.

I. Description of Offenses Listed in the Act's Directive

The offenses covered by the directive all have a statutory maximum penalty of 20 years, increased from ten years by the Act, and are summarized as follows:

- 1) Section 5(b) of the United Nations Participation Act of 1945, codified at 22 U.S.C. § 287c(b), criminalizes willful violations or evasions of any order, rule, or regulation issued by the President to give effect to United Nations Security Council Resolutions.
- 2) Sections 2778, 2779, and 2780 are provisions of the Arms Export Control Act.² Section 2778 authorizes the President to control the import and export of defense articles and services, to designate those items that shall be considered defense articles and services, and to promulgate regulations therefor.³ Section 2778 also provides licensing and registration requirements for businesses engaged in manufacturing, exporting, or importing defense articles and services, or brokering those activities.⁴ Section 2778(c) criminalizes willful violations of any of the provisions of section 2778, section 2779, or any regulations promulgated under the authority of those statutes. Section 2778 also penalizes anyone who “willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading.”
- 3) Section 2779 requires adequate and timely reporting to the U.S. Secretary of State of “political contributions, gifts, commissions and fees paid, or offered or agreed to be paid, by a person in connection with” the sale of the articles and services on the USML.
- 4) Section 2780 is violated when a “United States person”⁵ willfully either 1) exports or sells, leases, loans, grants or otherwise provides any munitions item to any prohibited country, or to any other recipient if the person has reason to know the item will be made available to a prohibited country;⁶ or 2) takes any other action which “would

² See Pub. L. No. 94-329, Tit. II, 90 Stat. 729, 734 (June 30, 1976), codified at 22 U.S.C. §§ 2751 *et seq.*

³ The items so designated are added to the United States Munitions List (USML). See 22 U.S.C. § 2778(a). The USML can be found at 22 C.F.R. § 121.1. Included on the USML are such articles as military aircraft, helicopters, artillery, shells, missiles, rockets, bombs, warships, explosives, military and space electronics, and certain firearms. The USML also covers dual use items which have both military and commercial uses, such as triggered spark gaps.

⁴ The regulations, the International Traffic in Arms Regulations (ITAR), codified at 22 C.F.R. § 120-130, are administered by the United States Department of State's Directorate of Defense Trade Controls (the “DDTC”).

⁵ This term is defined in section 2780(l)(3).

⁶ See 22 U.S.C. § 2780(b)(1)(A), (b)(1)(B), (b)(1)(C).

facilitate the acquisition, directly or indirectly, of any munitions item by the government of any [prohibited] country [], or any person acting on behalf of that government, if the United States person has reason to know that that action will facilitate the acquisition of that item by such a government or person.”⁷ A United States person is also criminally liable if such actions are taken, outside the United States, by a corporation or other person controlled in fact by that United States person.⁸

- 5) Willful violations of any provisions of the Trading with the Enemy Act of 1917, or of any license, rule, or regulation issued under that act are criminalized by 50 U.S.C. App’x § 16(a).

As will be discussed in further detail in Part II below, of the offenses listed in the directive, only section 2778 has been used to prosecute an individual since fiscal year 2005.⁹ Section 2778 is used to prosecute individuals involved in a broad range of conduct. For example, the unlicensed exportation to Mexico of a single firearm, intended solely for personal use, violates the statute, as well as conduct that is “particularly damaging to national security”¹⁰ because it involves the “provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program.”¹¹

II. Commission Data for Offenses Listed in the Act’s Directive

Commission data revealed no convictions under sections 287c, 2779, 2780, or App’x section 16¹² for any of the 241,744 individual offenders sentenced in fiscal years 2008, 2009, and

⁷ See 22 U.S.C. § 2780(b)(1)(D).

⁸ See 22 U.S.C. § 2780(b)(2).

⁹ Since fiscal year 1999, Commission data revealed that the only statute listed in the directive used with any frequency is section 2778. Commission data revealed no convictions under sections 287c, 2779, or 2780 and 6 individual offenders have been convicted under the Trading with the Enemy Act, 50 U.S.C. App’x §§ 1 *et seq.* For purposes of the analyses discussed herein, the Commission used fiscal years 2008-2010 in order to provide Congress with the most current information concerning sentencing practices for the statutes listed in the directive.

¹⁰ See Letter from Lisa O. Monaco, Assistant Attorney General for National Security, U.S. Dept. of Justice, to Judge Patti B. Saris, Chair, U.S. Sentencing Commission at 5 (Sept. 9, 2011).

¹¹ *Id.* at 5-6.

¹² Commission data revealed no individual convictions under these four statutes since fiscal year 2005. Department of Justice representatives advised that offenders committing conduct violating these statutes are likely prosecuted under other statutes, such as the International Emergency Economic Powers Act, [hereinafter IEEPA] 50 U.S.C. §§ 1701, *et seq.*

2010.¹³ Therefore, for those three fiscal years, the only sentencing data available to the Commission was for section 2778 offenses.

In fiscal years 2008, 2009, and 2010,¹⁴ less than one percent of the 241,744 individual offenders (0.04%, n=108) sentenced were convicted of violating section 2778 [hereinafter Section 2778 offenders]. The overwhelming majority of all Section 2778 offenders were in Criminal History Category I (89.8%, n=97). More than half (59.3%, n=64) of these 108 Section 2778 offenses involved exportation of firearms and/or ammunition to Mexico.¹⁵ The overwhelming majority of Section 2778 offenders (93.5%, n=101) pleaded guilty.

Section 2778 offenders received a median sentence of 30 months.¹⁶ Almost two thirds of Section 2778 offenders (63.0%, n=68) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Slightly more than one third (38.0%, n=41) were sentenced within the applicable guideline range and received a median sentence of 37 months.¹⁷ One quarter (25.0%, n=27) of the Section 2778 offenders received government sponsored below range sentences,¹⁸ with a median sentence of 20 months.¹⁹ Of the 27 government sponsored below range sentences, 22 (81.5%) were for providing substantial assistance to the government pursuant to §5K1.1 (Substantial Assistance to Authorities) (Policy Statement). The average extent of the reduction for government sponsored below range sentences was 58.2 percent below the minimum of the otherwise applicable guideline range.

¹³ The Commission received statutory information on 83,946 cases in FY2010, 81,369 in FY2009, and 76,429 in FY2008, for a total of 241,744 cases for the three fiscal years.

¹⁴ Because of the relatively small number of cases involving a conviction under section 2778 reported each fiscal year, the Commission combined data for three fiscal years to have sufficient data for meaningful analyses.

¹⁵ The applicable guideline for section 2778 offenses is USSG §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). Most offenses covered by this guideline receive a base offense level of 26. Offenses involving the exportation of a limited number of firearms and/or ammunition receive a base offense level of 14. The Commission amended §2M5.2, effective November 1, 2011, to increase penalties for the unlawful exportation of firearms. Prior to the amendment, a base offense level of 14 applied to exportation of ten or fewer firearms. The Commission reduced the number of firearm triggering this base offense level from ten to two, reasoning that “export offenses involving more than two firearms are more serious and more likely to involve trafficking.” See USSG, App. C, amend. 753. This base offense level now also applies to offenses involving 500 or fewer rounds of ammunition.

¹⁶ The average sentence for Section 2778 offenders was 38 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders.

¹⁷ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 45 months.

¹⁸ These are cases in which a reason for the sentence indicated that the prosecution initiated, proposed, or stipulated to a sentence outside of the guideline range.

¹⁹ The average sentence for Section 2778 offenders who received government sponsored below range sentences was 31 months.

Slightly more than one third (35.2%, n=38) of Section 2778 offenders received non-government sponsored below range sentences.²⁰ The median sentence for these offenders was 18 months,²¹ and the average extent of the reduction was 49.0 percent below the minimum of the otherwise applicable guideline range. Two Section 2778 offenders were sentenced above the applicable guideline range (1.9%).²²

The overwhelming majority (94.4%, n=102) of Section 2778 offenders were sentenced to a term of imprisonment. More than three quarters (78.7%, n=85) of Section 2778 offenders were sentenced to a term of imprisonment of one year or more. Three Section 2778 offenders (2.8%) received a sentence of probation, all of which were government sponsored below range sentences. Three additional Section 2778 offenders (2.8%) received a sentence of probation plus community or home confinement, as a result of a non-government sponsored below range sentence.

The Commission identified 24 Section 2778 cases (22.2%) involving the provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program. The median sentence for the 24 Section 2778 offenders engaging in such conduct was 36 months.²³ More than two thirds of Section 2778 offenders identified as engaging in this more serious conduct (70.4%, n=17) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Four offenders (16.7%) were sentenced within the applicable guideline range and received a median sentence of 52 months.²⁴

²⁰ Non-government below range sentences include all cases that were either 1) departures authorized in the provisions, policy statements, or commentary of the *Guidelines Manual*; 2) sentenced outside of the guideline range in which the court indicated both a departure and a reference to either *United States v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for sentencing outside of the guideline system; 3) sentenced outside of the guideline range in which no departure was indicated and in which the court cited *United States v. Booker*, 18 U.S.C. § 3553, or related factors as one of the reasons for sentencing outside of the guideline system; or 4) sentenced outside of the guideline range that could not be classified into any of the three previous outside of the range categories. The final category includes cases in which no reason was provided for a sentence outside of the guideline range.

²¹ The average sentence for Section 2778 offenders who received non-government sponsored below range sentences was 31 months.

²² The median sentence length cannot be determined with only two cases. The actual sentences imposed in the two cases were 90 months and 120 months.

²³ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security was 45 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders engaging in conduct identified as particularly damaging to national security.

²⁴ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 111 months.

More than half (54.2%, n=13) received a government sponsored below range sentence²⁵ and received a median sentence of 15 months.²⁶ Of the 13 government sponsored below range sentences, ten (76.9%) were for providing substantial assistance to the government pursuant to §5K1.1. The average extent of the reduction for government sponsored below range sentences was 65.8 percent below the minimum of the otherwise applicable guideline range. One quarter (25.0%, n=6) of Section 2778 offenders identified as engaging in this more serious conduct received non-government sponsored below range sentences.²⁷ The median sentence for these offenders was 43 months,²⁸ and the average extent of the reduction was 22.1 percent below the minimum of the otherwise applicable guideline range. One Section 2778 offender identified as engaging in this more serious conduct (4.2%) was sentenced above the applicable guideline range.

Courts sentenced the overwhelming majority (87.5%, n=21) of these Section 2778 offenders identified as engaging in this more serious conduct to a term of imprisonment of one year or more.²⁹ No Section 2778 offender identified as engaging in this more serious conduct received a sentence of imprisonment of less than one year or a term of probation as a result of a non-government sponsored below range sentence. The three Section 2778 offenders identified as engaging in this more serious conduct (12.5%) who were sentenced to a term of probation received government sponsored below range sentences.

III. Conclusion

Mandatory minimum penalties for the offenses listed in the directive, if enacted, may be too broad. For example, section 2778 covers a wide range of offense conduct that results in varying degrees of impact on national security. A mandatory minimum penalty applicable to all section 2778 offenses may be overly broad for the full range of conduct prosecutable under that statute, which could result in inconsistencies in application similar to those noted in the Commission's *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011).³⁰ There may be cases in which a mandatory minimum penalty for

²⁵ See *supra* n. 18.

²⁶ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received government sponsored below range sentences was 21 months.

²⁷ See *supra* n. 20.

²⁸ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received non-government sponsored below range sentences was 42 months.

²⁹ Section 2778 offenders engaging in conduct identified as particularly damaging to national security were sentenced to terms of imprisonment in the following lengths: 1) from one to less than three years of imprisonment (37.5%, n=9); 2) from three to less than five years (33.3%, n=8); and 3) more than five years (16.7%, n=4).

³⁰ See Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011) at 345.

The Honorable Richard G. Lugar
December 14, 2011
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violating section 2778 is perceived as too severe because the offense had little impact on national security.

The Commission recognizes the potential threat to national security caused by certain conduct covered by the statutes listed in the directive, but there is a difference of opinion among the commissioners regarding whether Congress should enact mandatory minimum penalties for these statutes. If Congress decides to enact mandatory minimum penalties, the Commission unanimously believes that such penalties should be limited to offenses that are damaging to national security.

The Commission stands ready to work with Congress to provide appropriately tailored sentences for all of the various national security threats covered by the Act.

Sincerely,

A handwritten signature in black ink that reads "Patti B Saris". The signature is written in a cursive style with a large, looped "P" and "S".

Patti B. Saris
Chair

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December 14, 2011

The Honorable John Conyers, Jr.
Ranking Member
United States House of Representatives Committee on the Judiciary
2426 Rayburn House Office Building
Washington, D.C. 20515

RE: Comprehensive Iran Sanctions Accountability and Divestment Act of 2010
Pub. L. No. 111-195

Dear Ranking Member Conyers:

I am writing to you on behalf of the United States Sentencing Commission [hereinafter the Commission] in response to the directive in Section 107 of the Comprehensive Iran Sanctions Accountability and Divestment Act of 2010, Pub. L. No. 111-195 [hereinafter the Act]. The directive required the Commission to “study and submit to Congress a report on the impact and advisability of imposing a mandatory minimum sentence for violations of” the following offenses:

- (1) Section 5(a) of the United Nations Participation Act of 1945 (22 U.S.C. § 287c(a));¹
- (2) Sections 38, 39, and 40 of the Arms Export Control Act (22 U.S.C. §§ 2778, 2779, and 2780); and
- (3) The Trading With the Enemy Act (50 U.S.C. App’x §§ 1 *et seq.*).

¹ Section (5)(a) of the United Nations Participation Act of 1945 sets forth the authority of the President to issue orders, rules, and regulations implementing United Nations Security Council resolutions, but the criminal offense for violating such orders, rules, and regulations is found in Section 5(b) of the act (22 U.S.C. § 287c(b)). Section 107 of the Act increased the statutory maximum penalty found in subsection (b) of Section 287c from ten to 20 years.

I. Description of Offenses Listed in the Act's Directive

The offenses covered by the directive all have a statutory maximum penalty of 20 years, increased from ten years by the Act, and are summarized as follows:

- 1) Section 5(b) of the United Nations Participation Act of 1945, codified at 22 U.S.C. § 287c(b), criminalizes willful violations or evasions of any order, rule, or regulation issued by the President to give effect to United Nations Security Council Resolutions.
- 2) Sections 2778, 2779, and 2780 are provisions of the Arms Export Control Act.² Section 2778 authorizes the President to control the import and export of defense articles and services, to designate those items that shall be considered defense articles and services, and to promulgate regulations therefor.³ Section 2778 also provides licensing and registration requirements for businesses engaged in manufacturing, exporting, or importing defense articles and services, or brokering those activities.⁴ Section 2778(c) criminalizes willful violations of any of the provisions of section 2778, section 2779, or any regulations promulgated under the authority of those statutes. Section 2778 also penalizes anyone who "willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading."
- 3) Section 2779 requires adequate and timely reporting to the U.S. Secretary of State of "political contributions, gifts, commissions and fees paid, or offered or agreed to be paid, by a person in connection with" the sale of the articles and services on the USML.
- 4) Section 2780 is violated when a "United States person"⁵ willfully either 1) exports or sells, leases, loans, grants or otherwise provides any munitions item to any prohibited country, or to any other recipient if the person has reason to know the item will be made available to a prohibited country;⁶ or 2) takes any other action which "would

² See Pub. L. No. 94-329, Tit. II, 90 Stat. 729, 734 (June 30, 1976), codified at 22 U.S.C. §§ 2751 *et seq.*

³ The items so designated are added to the United States Munitions List (USML). See 22 U.S.C. § 2778(a). The USML can be found at 22 C.F.R. § 121.1. Included on the USML are such articles as military aircraft, helicopters, artillery, shells, missiles, rockets, bombs, warships, explosives, military and space electronics, and certain firearms. The USML also covers dual use items which have both military and commercial uses, such as triggered spark gaps.

⁴ The regulations, the International Traffic in Arms Regulations (ITAR), codified at 22 C.F.R. § 120-130, are administered by the United States Department of State's Directorate of Defense Trade Controls (the "DDTC").

⁵ This term is defined in section 2780(1)(3).

⁶ See 22 U.S.C. § 2780(b)(1)(A), (b)(1)(B), (b)(1)(C).

facilitate the acquisition, directly or indirectly, of any munitions item by the government of any [prohibited] country [], or any person acting on behalf of that government, if the United States person has reason to know that that action will facilitate the acquisition of that item by such a government or person.”⁷ A United States person is also criminally liable if such actions are taken, outside the United States, by a corporation or other person controlled in fact by that United States person.⁸

- 5) Willful violations of any provisions of the Trading with the Enemy Act of 1917, or of any license, rule, or regulation issued under that act are criminalized by 50 U.S.C. App’x § 16(a).

As will be discussed in further detail in Part II below, of the offenses listed in the directive, only section 2778 has been used to prosecute an individual since fiscal year 2005.⁹ Section 2778 is used to prosecute individuals involved in a broad range of conduct. For example, the unlicensed exportation to Mexico of a single firearm, intended solely for personal use, violates the statute, as well as conduct that is “particularly damaging to national security,”¹⁰ because it involves the “provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program.”¹¹

II. Commission Data for Offenses Listed in the Act’s Directive

Commission data revealed no convictions under sections 287c, 2779, 2780, or App’x section 16¹² for any of the 241,744 individual offenders sentenced in fiscal years 2008, 2009, and

⁷ See 22 U.S.C. § 2780(b)(1)(D).

⁸ See 22 U.S.C. § 2780(b)(2).

⁹ Since fiscal year 1999, Commission data revealed that the only statute listed in the directive used with any frequency is section 2778. Commission data revealed no convictions under sections 287c, 2779, or 2780 and 6 individual offenders have been convicted under the Trading with the Enemy Act, 50 U.S.C. App’x §§ 1 *et seq.* For purposes of the analyses discussed herein, the Commission used fiscal years 2008-2010 in order to provide Congress with the most current information concerning sentencing practices for the statutes listed in the directive.

¹⁰ See Letter from Lisa O. Monaco, Assistant Attorney General for National Security, U.S. Dept. of Justice, to Judge Patti B. Saris, Chair, U.S. Sentencing Commission at 5 (Sept. 9, 2011).

¹¹ *Id.* at 5-6.

¹² Commission data revealed no individual convictions under these four statutes since fiscal year 2005. Department of Justice representatives advised that offenders committing conduct violating these statutes are likely prosecuted under other statutes, such as the International Emergency Economic Powers Act, [hereinafter IEEPA] 50 U.S.C. §§ 1701, *et seq.*

2010.¹³ Therefore, for those three fiscal years, the only sentencing data available to the Commission was for section 2778 offenses.

In fiscal years 2008, 2009, and 2010,¹⁴ less than one percent of the 241,744 individual offenders (0.04%, n=108) sentenced were convicted of violating section 2778 [hereinafter Section 2778 offenders]. The overwhelming majority of all Section 2778 offenders were in Criminal History Category I (89.8%, n=97). More than half (59.3%, n=64) of these 108 Section 2778 offenses involved exportation of firearms and/or ammunition to Mexico.¹⁵ The overwhelming majority of Section 2778 offenders (93.5%, n=101) pleaded guilty.

Section 2778 offenders received a median sentence of 30 months.¹⁶ Almost two thirds of Section 2778 offenders (63.0%, n=68) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Slightly more than one third (38.0%, n=41) were sentenced within the applicable guideline range and received a median sentence of 37 months.¹⁷ One quarter (25.0%, n=27) of the Section 2778 offenders received government sponsored below range sentences,¹⁸ with a median sentence of 20 months.¹⁹ Of the 27 government sponsored below range sentences, 22 (81.5%) were for providing substantial assistance to the government pursuant to §5K1.1 (Substantial Assistance to Authorities) (Policy Statement). The average extent of the reduction for government sponsored below range sentences was 58.2 percent below the minimum of the otherwise applicable guideline range.

¹³ The Commission received statutory information on 83,946 cases in FY2010, 81,369 in FY2009, and 76,429 in FY2008, for a total of 241,744 cases for the three fiscal years.

¹⁴ Because of the relatively small number of cases involving a conviction under section 2778 reported each fiscal year, the Commission combined data for three fiscal years to have sufficient data for meaningful analyses.

¹⁵ The applicable guideline for section 2778 offenses is USSG §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). Most offenses covered by this guideline receive a base offense level of 26. Offenses involving the exportation of a limited number of firearms and/or ammunition receive a base offense level of 14. The Commission amended §2M5.2, effective November 1, 2011, to increase penalties for the unlawful exportation of firearms. Prior to the amendment, a base offense level of 14 applied to exportation of ten or fewer firearms. The Commission reduced the number of firearm triggering this base offense level from ten to two, reasoning that “export offenses involving more than two firearms are more serious and more likely to involve trafficking.” See USSG, App. C, amend. 753. This base offense level now also applies to offenses involving 500 or fewer rounds of ammunition.

¹⁶ The average sentence for Section 2778 offenders was 38 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders.

¹⁷ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 45 months.

¹⁸ These are cases in which a reason for the sentence indicated that the prosecution initiated, proposed, or stipulated to a sentence outside of the guideline range.

¹⁹ The average sentence for Section 2778 offenders who received government sponsored below range sentences was 31 months.

Slightly more than one third (35.2%, n=38) of Section 2778 offenders received non-government sponsored below range sentences.²⁰ The median sentence for these offenders was 18 months,²¹ and the average extent of the reduction was 49.0 percent below the minimum of the otherwise applicable guideline range. Two Section 2778 offenders were sentenced above the applicable guideline range (1.9%).²²

The overwhelming majority (94.4%, n=102) of Section 2778 offenders were sentenced to a term of imprisonment. More than three quarters (78.7%, n=85) of Section 2778 offenders were sentenced to a term of imprisonment of one year or more. Three Section 2778 offenders (2.8%) received a sentence of probation, all of which were government sponsored below range sentences. Three additional Section 2778 offenders (2.8%) received a sentence of probation plus community or home confinement, as a result of a non-government sponsored below range sentence.

The Commission identified 24 Section 2778 cases (22.2%) involving the provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program. The median sentence for the 24 Section 2778 offenders engaging in such conduct was 36 months.²³ More than two thirds of Section 2778 offenders identified as engaging in this more serious conduct (70.4%, n=17) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Four offenders (16.7%) were sentenced within the applicable guideline range and received a median sentence of 52 months.²⁴

²⁰ Non-government below range sentences include all cases that were either 1) departures authorized in the provisions, policy statements, or commentary of the *Guidelines Manual*; 2) sentenced outside of the guideline range in which the court indicated both a departure and a reference to either *United States v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for sentencing outside of the guideline system; 3) sentenced outside of the guideline range in which no departure was indicated and in which the court cited *United States v. Booker*, 18 U.S.C. § 3553, or related factors as one of the reasons for sentencing outside of the guideline system; or 4) sentenced outside of the guideline range that could not be classified into any of the three previous outside of the range categories. The final category includes cases in which no reason was provided for a sentence outside of the guideline range.

²¹ The average sentence for Section 2778 offenders who received non-government sponsored below range sentences was 31 months.

²² The median sentence length cannot be determined with only two cases. The actual sentences imposed in the two cases were 90 months and 120 months.

²³ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security was 45 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders engaging in conduct identified as particularly damaging to national security.

²⁴ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 111 months.

More than half (54.2%, n=13) received a government sponsored below range sentence²⁵ and received a median sentence of 15 months.²⁶ Of the 13 government sponsored below range sentences, ten (76.9%) were for providing substantial assistance to the government pursuant to §5K1.1. The average extent of the reduction for government sponsored below range sentences was 65.8 percent below the minimum of the otherwise applicable guideline range. One quarter (25.0%, n=6) of Section 2778 offenders identified as engaging in this more serious conduct received non-government sponsored below range sentences.²⁷ The median sentence for these offenders was 43 months,²⁸ and the average extent of the reduction was 22.1 percent below the minimum of the otherwise applicable guideline range. One Section 2778 offender identified as engaging in this more serious conduct (4.2%) was sentenced above the applicable guideline range.

Courts sentenced the overwhelming majority (87.5%, n=21) of these Section 2778 offenders identified as engaging in this more serious conduct to a term of imprisonment of one year or more.²⁹ No Section 2778 offender identified as engaging in this more serious conduct received a sentence of imprisonment of less than one year or a term of probation as a result of a non-government sponsored below range sentence. The three Section 2778 offenders identified as engaging in this more serious conduct (12.5%) who were sentenced to a term of probation received government sponsored below range sentences.

III. Conclusion

Mandatory minimum penalties for the offenses listed in the directive, if enacted, may be too broad. For example, section 2778 covers a wide range of offense conduct that results in varying degrees of impact on national security. A mandatory minimum penalty applicable to all section 2778 offenses may be overly broad for the full range of conduct prosecutable under that statute, which could result in inconsistencies in application similar to those noted in the Commission's *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011).³⁰ There may be cases in which a mandatory minimum penalty for

²⁵ See *supra* n. 18.

²⁶ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received government sponsored below range sentences was 21 months.

²⁷ See *supra* n. 20.

²⁸ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received non-government sponsored below range sentences was 42 months.

²⁹ Section 2778 offenders engaging in conduct identified as particularly damaging to national security were sentenced to terms of imprisonment in the following lengths: 1) from one to less than three years of imprisonment (37.5%, n=9); 2) from three to less than five years (33.3%, n=8); and 3) more than five years (16.7%, n=4).

³⁰ See Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011) at 345.

The Honorable John Conyers, Jr.

December 14, 2011

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violating section 2778 is perceived as too severe because the offense had little impact on national security.

The Commission recognizes the potential threat to national security caused by certain conduct covered by the statutes listed in the directive, but there is a difference of opinion among the commissioners regarding whether Congress should enact mandatory minimum penalties for these statutes. If Congress decides to enact mandatory minimum penalties, the Commission unanimously believes that such penalties should be limited to offenses that are damaging to national security.

The Commission stands ready to work with Congress to provide appropriately tailored sentences for all of the various national security threats covered by the Act.

Sincerely,

A handwritten signature in black ink that reads "Patti B Saris". The signature is written in a cursive style with a large, looped "P" and "S".

Patti B. Saris
Chair

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December 14, 2011

The Honorable Howard Berman
Ranking Member
United States House of Representatives Committee on Foreign Affairs
2221 Rayburn House Office Building
Washington, D.C. 20515

RE: Comprehensive Iran Sanctions Accountability and Divestment Act of 2010
Pub. L. No. 111-195

Dear Ranking Member Berman:

I am writing to you on behalf of the United States Sentencing Commission [hereinafter the Commission] in response to the directive in Section 107 of the Comprehensive Iran Sanctions Accountability and Divestment Act of 2010, Pub. L. No. 111-195 [hereinafter the Act]. The directive required the Commission to “study and submit to Congress a report on the impact and advisability of imposing a mandatory minimum sentence for violations of” the following offenses:

- (1) Section 5(a) of the United Nations Participation Act of 1945 (22 U.S.C. § 287c(a));¹
- (2) Sections 38, 39, and 40 of the Arms Export Control Act (22 U.S.C. §§ 2778, 2779, and 2780); and
- (3) The Trading With the Enemy Act (50 U.S.C. App’x §§ 1 *et seq.*).

¹ Section (5)(a) of the United Nations Participation Act of 1945 sets forth the authority of the President to issue orders, rules, and regulations implementing United Nations Security Council resolutions, but the criminal offense for violating such orders, rules, and regulations is found in Section 5(b) of the act (22 U.S.C. § 287c(b)). Section 107 of the Act increased the statutory maximum penalty found in subsection (b) of Section 287c from ten to 20 years.

I. Description of Offenses Listed in the Act's Directive

The offenses covered by the directive all have a statutory maximum penalty of 20 years, increased from ten years by the Act, and are summarized as follows:

- 1) Section 5(b) of the United Nations Participation Act of 1945, codified at 22 U.S.C. § 287c(b), criminalizes willful violations or evasions of any order, rule, or regulation issued by the President to give effect to United Nations Security Council Resolutions.
- 2) Sections 2778, 2779, and 2780 are provisions of the Arms Export Control Act.² Section 2778 authorizes the President to control the import and export of defense articles and services, to designate those items that shall be considered defense articles and services, and to promulgate regulations therefor.³ Section 2778 also provides licensing and registration requirements for businesses engaged in manufacturing, exporting, or importing defense articles and services, or brokering those activities.⁴ Section 2778(c) criminalizes willful violations of any of the provisions of section 2778, section 2779, or any regulations promulgated under the authority of those statutes. Section 2778 also penalizes anyone who “willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading.”
- 3) Section 2779 requires adequate and timely reporting to the U.S. Secretary of State of “political contributions, gifts, commissions and fees paid, or offered or agreed to be paid, by a person in connection with” the sale of the articles and services on the USML.
- 4) Section 2780 is violated when a “United States person”⁵ willfully either 1) exports or sells, leases, loans, grants or otherwise provides any munitions item to any prohibited country, or to any other recipient if the person has reason to know the item will be made available to a prohibited country;⁶ or 2) takes any other action which “would

² See Pub. L. No. 94-329, Tit. II, 90 Stat. 729, 734 (June 30, 1976), codified at 22 U.S.C. §§ 2751 *et seq.*

³ The items so designated are added to the United States Munitions List (USML). See 22 U.S.C. § 2778(a). The USML can be found at 22 C.F.R. § 121.1. Included on the USML are such articles as military aircraft, helicopters, artillery, shells, missiles, rockets, bombs, warships, explosives, military and space electronics, and certain firearms. The USML also covers dual use items which have both military and commercial uses, such as triggered spark gaps.

⁴ The regulations, the International Traffic in Arms Regulations (ITAR), codified at 22 C.F.R. § 120-130, are administered by the United States Department of State's Directorate of Defense Trade Controls (the “DDTC”).

⁵ This term is defined in section 2780(l)(3).

⁶ See 22 U.S.C. § 2780(b)(1)(A), (b)(1)(B), (b)(1)(C).

facilitate the acquisition, directly or indirectly, of any munitions item by the government of any [prohibited] country [], or any person acting on behalf of that government, if the United States person has reason to know that that action will facilitate the acquisition of that item by such a government or person.”⁷ A United States person is also criminally liable if such actions are taken, outside the United States, by a corporation or other person controlled in fact by that United States person.⁸

- 5) Willful violations of any provisions of the Trading with the Enemy Act of 1917, or of any license, rule, or regulation issued under that act are criminalized by 50 U.S.C. App’x § 16(a).

As will be discussed in further detail in Part II below, of the offenses listed in the directive, only section 2778 has been used to prosecute an individual since fiscal year 2005.⁹ Section 2778 is used to prosecute individuals involved in a broad range of conduct. For example, the unlicensed exportation to Mexico of a single firearm, intended solely for personal use, violates the statute, as well as conduct that is “particularly damaging to national security”¹⁰ because it involves the “provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program.”¹¹

II. Commission Data for Offenses Listed in the Act’s Directive

Commission data revealed no convictions under sections 287c, 2779, 2780, or App’x section 16¹² for any of the 241,744 individual offenders sentenced in fiscal years 2008, 2009, and

⁷ See 22 U.S.C. § 2780(b)(1)(D).

⁸ See 22 U.S.C. § 2780(b)(2).

⁹ Since fiscal year 1999, Commission data revealed that the only statute listed in the directive used with any frequency is section 2778. Commission data revealed no convictions under sections 287c, 2779, or 2780 and 6 individual offenders have been convicted under the Trading with the Enemy Act, 50 U.S.C. App’x §§ 1 *et seq.* For purposes of the analyses discussed herein, the Commission used fiscal years 2008-2010 in order to provide Congress with the most current information concerning sentencing practices for the statutes listed in the directive.

¹⁰ See Letter from Lisa O. Monaco, Assistant Attorney General for National Security, U.S. Dept. of Justice, to Judge Patti B. Saris, Chair, U.S. Sentencing Commission at 5 (Sept. 9, 2011).

¹¹ *Id.* at 5-6.

¹² Commission data revealed no individual convictions under these four statutes since fiscal year 2005. Department of Justice representatives advised that offenders committing conduct violating these statutes are likely prosecuted under other statutes, such as the International Emergency Economic Powers Act, [hereinafter IEEPA] 50 U.S.C. §§ 1701, *et seq.*

2010.¹³ Therefore, for those three fiscal years, the only sentencing data available to the Commission was for section 2778 offenses.

In fiscal years 2008, 2009, and 2010,¹⁴ less than one percent of the 241,744 individual offenders (0.04%, n=108) sentenced were convicted of violating section 2778 [hereinafter Section 2778 offenders]. The overwhelming majority of all Section 2778 offenders were in Criminal History Category I (89.8%, n=97). More than half (59.3%, n=64) of these 108 Section 2778 offenses involved exportation of firearms and/or ammunition to Mexico.¹⁵ The overwhelming majority of Section 2778 offenders (93.5%, n=101) pleaded guilty.

Section 2778 offenders received a median sentence of 30 months.¹⁶ Almost two thirds of Section 2778 offenders (63.0%, n=68) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Slightly more than one third (38.0%, n=41) were sentenced within the applicable guideline range and received a median sentence of 37 months.¹⁷ One quarter (25.0%, n=27) of the Section 2778 offenders received government sponsored below range sentences,¹⁸ with a median sentence of 20 months.¹⁹ Of the 27 government sponsored below range sentences, 22 (81.5%) were for providing substantial assistance to the government pursuant to §5K1.1 (Substantial Assistance to Authorities) (Policy Statement). The average extent of the reduction for government sponsored below range sentences was 58.2 percent below the minimum of the otherwise applicable guideline range.

¹³ The Commission received statutory information on 83,946 cases in FY2010, 81,369 in FY2009, and 76,429 in FY2008, for a total of 241,744 cases for the three fiscal years.

¹⁴ Because of the relatively small number of cases involving a conviction under section 2778 reported each fiscal year, the Commission combined data for three fiscal years to have sufficient data for meaningful analyses.

¹⁵ The applicable guideline for section 2778 offenses is USSG §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). Most offenses covered by this guideline receive a base offense level of 26. Offenses involving the exportation of a limited number of firearms and/or ammunition receive a base offense level of 14. The Commission amended §2M5.2, effective November 1, 2011, to increase penalties for the unlawful exportation of firearms. Prior to the amendment, a base offense level of 14 applied to exportation of ten or fewer firearms. The Commission reduced the number of firearm triggering this base offense level from ten to two, reasoning that "export offenses involving more than two firearms are more serious and more likely to involve trafficking." See USSG, App. C, amend. 753. This base offense level now also applies to offenses involving 500 or fewer rounds of ammunition.

¹⁶ The average sentence for Section 2778 offenders was 38 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders.

¹⁷ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 45 months.

¹⁸ These are cases in which a reason for the sentence indicated that the prosecution initiated, proposed, or stipulated to a sentence outside of the guideline range.

¹⁹ The average sentence for Section 2778 offenders who received government sponsored below range sentences was 31 months.

Slightly more than one third (35.2%, n=38) of Section 2778 offenders received non-government sponsored below range sentences.²⁰ The median sentence for these offenders was 18 months,²¹ and the average extent of the reduction was 49.0 percent below the minimum of the otherwise applicable guideline range. Two Section 2778 offenders were sentenced above the applicable guideline range (1.9%).²²

The overwhelming majority (94.4%, n=102) of Section 2778 offenders were sentenced to a term of imprisonment. More than three quarters (78.7%, n=85) of Section 2778 offenders were sentenced to a term of imprisonment of one year or more. Three Section 2778 offenders (2.8%) received a sentence of probation, all of which were government sponsored below range sentences. Three additional Section 2778 offenders (2.8%) received a sentence of probation plus community or home confinement, as a result of a non-government sponsored below range sentence.

The Commission identified 24 Section 2778 cases (22.2%) involving the provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program. The median sentence for the 24 Section 2778 offenders engaging in such conduct was 36 months.²³ More than two thirds of Section 2778 offenders identified as engaging in this more serious conduct (70.4%, n=17) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Four offenders (16.7%) were sentenced within the applicable guideline range and received a median sentence of 52 months.²⁴

²⁰ Non-government below range sentences include all cases that were either 1) departures authorized in the provisions, policy statements, or commentary of the *Guidelines Manual*; 2) sentenced outside of the guideline range in which the court indicated both a departure and a reference to either *United States v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for sentencing outside of the guideline system; 3) sentenced outside of the guideline range in which no departure was indicated and in which the court cited *United States v. Booker*, 18 U.S.C. § 3553, or related factors as one of the reasons for sentencing outside of the guideline system; or 4) sentenced outside of the guideline range that could not be classified into any of the three previous outside of the range categories. The final category includes cases in which no reason was provided for a sentence outside of the guideline range.

²¹ The average sentence for Section 2778 offenders who received non-government sponsored below range sentences was 31 months.

²² The median sentence length cannot be determined with only two cases. The actual sentences imposed in the two cases were 90 months and 120 months.

²³ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security was 45 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders engaging in conduct identified as particularly damaging to national security.

²⁴ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 111 months.

More than half (54.2%, n=13) received a government sponsored below range sentence²⁵ and received a median sentence of 15 months.²⁶ Of the 13 government sponsored below range sentences, ten (76.9%) were for providing substantial assistance to the government pursuant to §5K1.1. The average extent of the reduction for government sponsored below range sentences was 65.8 percent below the minimum of the otherwise applicable guideline range. One quarter (25.0%, n=6) of Section 2778 offenders identified as engaging in this more serious conduct received non-government sponsored below range sentences.²⁷ The median sentence for these offenders was 43 months,²⁸ and the average extent of the reduction was 22.1 percent below the minimum of the otherwise applicable guideline range. One Section 2778 offender identified as engaging in this more serious conduct (4.2%) was sentenced above the applicable guideline range.

Courts sentenced the overwhelming majority (87.5%, n=21) of these Section 2778 offenders identified as engaging in this more serious conduct to a term of imprisonment of one year or more.²⁹ No Section 2778 offender identified as engaging in this more serious conduct received a sentence of imprisonment of less than one year or a term of probation as a result of a non-government sponsored below range sentence. The three Section 2778 offenders identified as engaging in this more serious conduct (12.5%) who were sentenced to a term of probation received government sponsored below range sentences.

III. Conclusion

Mandatory minimum penalties for the offenses listed in the directive, if enacted, may be too broad. For example, section 2778 covers a wide range of offense conduct that results in varying degrees of impact on national security. A mandatory minimum penalty applicable to all section 2778 offenses may be overly broad for the full range of conduct prosecutable under that statute, which could result in inconsistencies in application similar to those noted in the Commission's *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011).³⁰ There may be cases in which a mandatory minimum penalty for

²⁵ See *supra* n. 18.

²⁶ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received government sponsored below range sentences was 21 months.

²⁷ See *supra* n. 20.

²⁸ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received non-government sponsored below range sentences was 42 months.

²⁹ Section 2778 offenders engaging in conduct identified as particularly damaging to national security were sentenced to terms of imprisonment in the following lengths: 1) from one to less than three years of imprisonment (37.5%, n=9); 2) from three to less than five years (33.3%, n=8); and 3) more than five years (16.7%, n=4).

³⁰ See Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011) at 345.

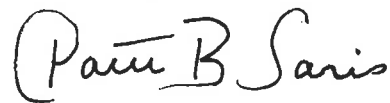
The Honorable Howard Berman
December 14, 2011
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violating section 2778 is perceived as too severe because the offense had little impact on national security.

The Commission recognizes the potential threat to national security caused by certain conduct covered by the statutes listed in the directive, but there is a difference of opinion among the commissioners regarding whether Congress should enact mandatory minimum penalties for these statutes. If Congress decides to enact mandatory minimum penalties, the Commission unanimously believes that such penalties should be limited to offenses that are damaging to national security.

The Commission stands ready to work with Congress to provide appropriately tailored sentences for all of the various national security threats covered by the Act.

Sincerely,

A handwritten signature in black ink that reads "Patti B Saris". The signature is written in a cursive style with a large, looped initial "P".

Patti B. Saris
Chair

UNITED STATES SENTENCING COMMISSION
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December 14, 2011

The Honorable Ileana Ros-Lehtinen
Chair
United States House of Representatives Committee on Foreign Affairs
2206 Rayburn House Office Building
Washington, D.C. 20515

RE: Comprehensive Iran Sanctions Accountability and Divestment Act of 2010
Pub. L. No. 111-195

Dear Chairman Ros-Lehtinen:

I am writing to you on behalf of the United States Sentencing Commission [hereinafter the Commission] in response to the directive in Section 107 of the Comprehensive Iran Sanctions Accountability and Divestment Act of 2010, Pub. L. No. 111-195 [hereinafter the Act]. The directive required the Commission to “study and submit to Congress a report on the impact and advisability of imposing a mandatory minimum sentence for violations of” the following offenses:

- (1) Section 5(a) of the United Nations Participation Act of 1945 (22 U.S.C. § 287c(a));¹
- (2) Sections 38, 39, and 40 of the Arms Export Control Act (22 U.S.C. §§ 2778, 2779, and 2780); and
- (3) The Trading With the Enemy Act (50 U.S.C. App’x §§ 1 *et seq.*).

¹ Section (5)(a) of the United Nations Participation Act of 1945 sets forth the authority of the President to issue orders, rules, and regulations implementing United Nations Security Council resolutions, but the criminal offense for violating such orders, rules, and regulations is found in Section 5(b) of the act (22 U.S.C. § 287c(b)). Section 107 of the Act increased the statutory maximum penalty found in subsection (b) of Section 287c from ten to 20 years.

I. Description of Offenses Listed in the Act's Directive

The offenses covered by the directive all have a statutory maximum penalty of 20 years, increased from ten years by the Act, and are summarized as follows:

- 1) Section 5(b) of the United Nations Participation Act of 1945, codified at 22 U.S.C. § 287c(b), criminalizes willful violations or evasions of any order, rule, or regulation issued by the President to give effect to United Nations Security Council Resolutions.
- 2) Sections 2778, 2779, and 2780 are provisions of the Arms Export Control Act.² Section 2778 authorizes the President to control the import and export of defense articles and services, to designate those items that shall be considered defense articles and services, and to promulgate regulations therefor.³ Section 2778 also provides licensing and registration requirements for businesses engaged in manufacturing, exporting, or importing defense articles and services, or brokering those activities.⁴ Section 2778(c) criminalizes willful violations of any of the provisions of section 2778, section 2779, or any regulations promulgated under the authority of those statutes. Section 2778 also penalizes anyone who “willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading.”
- 3) Section 2779 requires adequate and timely reporting to the U.S. Secretary of State of “political contributions, gifts, commissions and fees paid, or offered or agreed to be paid, by a person in connection with” the sale of the articles and services on the USML.
- 4) Section 2780 is violated when a “United States person”⁵ willfully either 1) exports or sells, leases, loans, grants or otherwise provides any munitions item to any prohibited country, or to any other recipient if the person has reason to know the item will be made available to a prohibited country;⁶ or 2) takes any other action which “would

² See Pub. L. No. 94-329, Tit. II, 90 Stat. 729, 734 (June 30, 1976), codified at 22 U.S.C. §§ 2751 *et seq.*

³ The items so designated are added to the United States Munitions List (USML). See 22 U.S.C. § 2778(a). The USML can be found at 22 C.F.R. § 121.1. Included on the USML are such articles as military aircraft, helicopters, artillery, shells, missiles, rockets, bombs, warships, explosives, military and space electronics, and certain firearms. The USML also covers dual use items which have both military and commercial uses, such as triggered spark gaps.

⁴ The regulations, the International Traffic in Arms Regulations (ITAR), codified at 22 C.F.R. § 120-130, are administered by the United States Department of State's Directorate of Defense Trade Controls (the “DDTC”).

⁵ This term is defined in section 2780(l)(3).

⁶ See 22 U.S.C. § 2780(b)(1)(A), (b)(1)(B), (b)(1)(C).

facilitate the acquisition, directly or indirectly, of any munitions item by the government of any [prohibited] country [], or any person acting on behalf of that government, if the United States person has reason to know that that action will facilitate the acquisition of that item by such a government or person.”⁷ A United States person is also criminally liable if such actions are taken, outside the United States, by a corporation or other person controlled in fact by that United States person.⁸

- 5) Willful violations of any provisions of the Trading with the Enemy Act of 1917, or of any license, rule, or regulation issued under that act are criminalized by 50 U.S.C. App’x § 16(a).

As will be discussed in further detail in Part II below, of the offenses listed in the directive, only section 2778 has been used to prosecute an individual since fiscal year 2005.⁹ Section 2778 is used to prosecute individuals involved in a broad range of conduct. For example, the unlicensed exportation to Mexico of a single firearm, intended solely for personal use, violates the statute, as well as conduct that is “particularly damaging to national security”¹⁰ because it involves the “provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program.”¹¹

II. Commission Data for Offenses Listed in the Act’s Directive

Commission data revealed no convictions under sections 287c, 2779, 2780, or App’x section 16¹² for any of the 241,744 individual offenders sentenced in fiscal years 2008, 2009, and

⁷ See 22 U.S.C. § 2780(b)(1)(D).

⁸ See 22 U.S.C. § 2780(b)(2).

⁹ Since fiscal year 1999, Commission data revealed that the only statute listed in the directive used with any frequency is section 2778. Commission data revealed no convictions under sections 287c, 2779, or 2780 and 6 individual offenders have been convicted under the Trading with the Enemy Act, 50 U.S.C. App’x §§ 1 *et seq.* For purposes of the analyses discussed herein, the Commission used fiscal years 2008-2010 in order to provide Congress with the most current information concerning sentencing practices for the statutes listed in the directive.

¹⁰ See Letter from Lisa O. Monaco, Assistant Attorney General for National Security, U.S. Dept. of Justice, to Judge Patti B. Saris, Chair, U.S. Sentencing Commission at 5 (Sept. 9, 2011).

¹¹ *Id.* at 5-6.

¹² Commission data revealed no individual convictions under these four statutes since fiscal year 2005. Department of Justice representatives advised that offenders committing conduct violating these statutes are likely prosecuted under other statutes, such as the International Emergency Economic Powers Act, [hereinafter IEEPA] 50 U.S.C. §§ 1701, *et seq.*

2010.¹³ Therefore, for those three fiscal years, the only sentencing data available to the Commission was for section 2778 offenses.

In fiscal years 2008, 2009, and 2010,¹⁴ less than one percent of the 241,744 individual offenders (0.04%, n=108) sentenced were convicted of violating section 2778 [hereinafter Section 2778 offenders]. The overwhelming majority of all Section 2778 offenders were in Criminal History Category I (89.8%, n=97). More than half (59.3%, n=64) of these 108 Section 2778 offenses involved exportation of firearms and/or ammunition to Mexico.¹⁵ The overwhelming majority of Section 2778 offenders (93.5%, n=101) pleaded guilty.

Section 2778 offenders received a median sentence of 30 months.¹⁶ Almost two thirds of Section 2778 offenders (63.0%, n=68) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Slightly more than one third (38.0%, n=41) were sentenced within the applicable guideline range and received a median sentence of 37 months.¹⁷ One quarter (25.0%, n=27) of the Section 2778 offenders received government sponsored below range sentences,¹⁸ with a median sentence of 20 months.¹⁹ Of the 27 government sponsored below range sentences, 22 (81.5%) were for providing substantial assistance to the government pursuant to §5K1.1 (Substantial Assistance to Authorities) (Policy Statement). The average extent of the reduction for government sponsored below range sentences was 58.2 percent below the minimum of the otherwise applicable guideline range.

¹³ The Commission received statutory information on 83,946 cases in FY2010, 81,369 in FY2009, and 76,429 in FY2008, for a total of 241,744 cases for the three fiscal years.

¹⁴ Because of the relatively small number of cases involving a conviction under section 2778 reported each fiscal year, the Commission combined data for three fiscal years to have sufficient data for meaningful analyses.

¹⁵ The applicable guideline for section 2778 offenses is USSG §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). Most offenses covered by this guideline receive a base offense level of 26. Offenses involving the exportation of a limited number of firearms and/or ammunition receive a base offense level of 14. The Commission amended §2M5.2, effective November 1, 2011, to increase penalties for the unlawful exportation of firearms. Prior to the amendment, a base offense level of 14 applied to exportation of ten or fewer firearms. The Commission reduced the number of firearm triggering this base offense level from ten to two, reasoning that "export offenses involving more than two firearms are more serious and more likely to involve trafficking." See USSG, App. C, amend. 753. This base offense level now also applies to offenses involving 500 or fewer rounds of ammunition.

¹⁶ The average sentence for Section 2778 offenders was 38 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders.

¹⁷ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 45 months.

¹⁸ These are cases in which a reason for the sentence indicated that the prosecution initiated, proposed, or stipulated to a sentence outside of the guideline range.

¹⁹ The average sentence for Section 2778 offenders who received government sponsored below range sentences was 31 months.

Slightly more than one third (35.2%, n=38) of Section 2778 offenders received non-government sponsored below range sentences.²⁰ The median sentence for these offenders was 18 months,²¹ and the average extent of the reduction was 49.0 percent below the minimum of the otherwise applicable guideline range. Two Section 2778 offenders were sentenced above the applicable guideline range (1.9%).²²

The overwhelming majority (94.4%, n=102) of Section 2778 offenders were sentenced to a term of imprisonment. More than three quarters (78.7%, n=85) of Section 2778 offenders were sentenced to a term of imprisonment of one year or more. Three Section 2778 offenders (2.8%) received a sentence of probation, all of which were government sponsored below range sentences. Three additional Section 2778 offenders (2.8%) received a sentence of probation plus community or home confinement, as a result of a non-government sponsored below range sentence.

The Commission identified 24 Section 2778 cases (22.2%) involving the provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program. The median sentence for the 24 Section 2778 offenders engaging in such conduct was 36 months.²³ More than two thirds of Section 2778 offenders identified as engaging in this more serious conduct (70.4%, n=17) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Four offenders (16.7%) were sentenced within the applicable guideline range and received a median sentence of 52 months.²⁴

²⁰ Non-government below range sentences include all cases that were either 1) departures authorized in the provisions, policy statements, or commentary of the *Guidelines Manual*; 2) sentenced outside of the guideline range in which the court indicated both a departure and a reference to either *United States v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for sentencing outside of the guideline system; 3) sentenced outside of the guideline range in which no departure was indicated and in which the court cited *United States v. Booker*, 18 U.S.C. § 3553, or related factors as one of the reasons for sentencing outside of the guideline system; or 4) sentenced outside of the guideline range that could not be classified into any of the three previous outside of the range categories. The final category includes cases in which no reason was provided for a sentence outside of the guideline range.

²¹ The average sentence for Section 2778 offenders who received non-government sponsored below range sentences was 31 months.

²² The median sentence length cannot be determined with only two cases. The actual sentences imposed in the two cases were 90 months and 120 months.

²³ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security was 45 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders engaging in conduct identified as particularly damaging to national security.

²⁴ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 111 months.

More than half (54.2%, n=13) received a government sponsored below range sentence²⁵ and received a median sentence of 15 months.²⁶ Of the 13 government sponsored below range sentences, ten (76.9%) were for providing substantial assistance to the government pursuant to §5K1.1. The average extent of the reduction for government sponsored below range sentences was 65.8 percent below the minimum of the otherwise applicable guideline range. One quarter (25.0%, n=6) of Section 2778 offenders identified as engaging in this more serious conduct received non-government sponsored below range sentences.²⁷ The median sentence for these offenders was 43 months,²⁸ and the average extent of the reduction was 22.1 percent below the minimum of the otherwise applicable guideline range. One Section 2778 offender identified as engaging in this more serious conduct (4.2%) was sentenced above the applicable guideline range.

Courts sentenced the overwhelming majority (87.5%, n=21) of these Section 2778 offenders identified as engaging in this more serious conduct to a term of imprisonment of one year or more.²⁹ No Section 2778 offender identified as engaging in this more serious conduct received a sentence of imprisonment of less than one year or a term of probation as a result of a non-government sponsored below range sentence. The three Section 2778 offenders identified as engaging in this more serious conduct (12.5%) who were sentenced to a term of probation received government sponsored below range sentences.

III. Conclusion

Mandatory minimum penalties for the offenses listed in the directive, if enacted, may be too broad. For example, section 2778 covers a wide range of offense conduct that results in varying degrees of impact on national security. A mandatory minimum penalty applicable to all section 2778 offenses may be overly broad for the full range of conduct prosecutable under that statute, which could result in inconsistencies in application similar to those noted in the Commission's *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011).³⁰ There may be cases in which a mandatory minimum penalty for

²⁵ See *supra* n. 18.

²⁶ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received government sponsored below range sentences was 21 months.

²⁷ See *supra* n. 20.

²⁸ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received non-government sponsored below range sentences was 42 months.

²⁹ Section 2778 offenders engaging in conduct identified as particularly damaging to national security were sentenced to terms of imprisonment in the following lengths: 1) from one to less than three years of imprisonment (37.5%, n=9); 2) from three to less than five years (33.3%, n=8); and 3) more than five years (16.7%, n=4).

³⁰ See Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011) at 345.

The Honorable Ileana Ros-Lehtinen

December 14, 2011

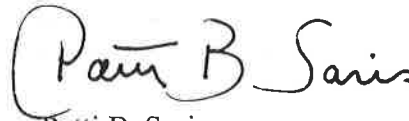
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violating section 2778 is perceived as too severe because the offense had little impact on national security.

The Commission recognizes the potential threat to national security caused by certain conduct covered by the statutes listed in the directive, but there is a difference of opinion among the commissioners regarding whether Congress should enact mandatory minimum penalties for these statutes. If Congress decides to enact mandatory minimum penalties, the Commission unanimously believes that such penalties should be limited to offenses that are damaging to national security.

The Commission stands ready to work with Congress to provide appropriately tailored sentences for all of the various national security threats covered by the Act.

Sincerely,

A handwritten signature in cursive script that reads "Patti B. Saris". The signature is written in black ink and is positioned above the printed name and title.

Patti B. Saris
Chair

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December 14, 2011

The Honorable Lamar Smith
Chair
United States House of Representatives Committee on the Judiciary
2409 Rayburn House Office Building
Washington, D.C. 20515

RE: Comprehensive Iran Sanctions Accountability and Divestment Act of 2010
Pub. L. No. 111-195

Dear Chairman Smith:

I am writing to you on behalf of the United States Sentencing Commission [hereinafter the Commission] in response to the directive in Section 107 of the Comprehensive Iran Sanctions Accountability and Divestment Act of 2010, Pub. L. No. 111-195 [hereinafter the Act]. The directive required the Commission to “study and submit to Congress a report on the impact and advisability of imposing a mandatory minimum sentence for violations of” the following offenses:

- (1) Section 5(a) of the United Nations Participation Act of 1945 (22 U.S.C. § 287c(a));¹
- (2) Sections 38, 39, and 40 of the Arms Export Control Act (22 U.S.C. §§ 2778, 2779, and 2780); and
- (3) The Trading With the Enemy Act (50 U.S.C. App’x §§ 1 *et seq.*).

¹ Section (5)(a) of the United Nations Participation Act of 1945 sets forth the authority of the President to issue orders, rules, and regulations implementing United Nations Security Council resolutions, but the criminal offense for violating such orders, rules, and regulations is found in Section 5(b) of the act (22 U.S.C. § 287c(b)). Section 107 of the Act increased the statutory maximum penalty found in subsection (b) of Section 287c from ten to 20 years.

I. Description of Offenses Listed in the Act's Directive

The offenses covered by the directive all have a statutory maximum penalty of 20 years, increased from ten years by the Act, and are summarized as follows:

- 1) Section 5(b) of the United Nations Participation Act of 1945, codified at 22 U.S.C. § 287c(b), criminalizes willful violations or evasions of any order, rule, or regulation issued by the President to give effect to United Nations Security Council Resolutions.
- 2) Sections 2778, 2779, and 2780 are provisions of the Arms Export Control Act.² Section 2778 authorizes the President to control the import and export of defense articles and services, to designate those items that shall be considered defense articles and services, and to promulgate regulations therefor.³ Section 2778 also provides licensing and registration requirements for businesses engaged in manufacturing, exporting, or importing defense articles and services, or brokering those activities.⁴ Section 2778(c) criminalizes willful violations of any of the provisions of section 2778, section 2779, or any regulations promulgated under the authority of those statutes. Section 2778 also penalizes anyone who “willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading.”
- 3) Section 2779 requires adequate and timely reporting to the U.S. Secretary of State of “political contributions, gifts, commissions and fees paid, or offered or agreed to be paid, by a person in connection with” the sale of the articles and services on the USML.
- 4) Section 2780 is violated when a “United States person”⁵ willfully either 1) exports or sells, leases, loans, grants or otherwise provides any munitions item to any prohibited country, or to any other recipient if the person has reason to know the item will be made available to a prohibited country;⁶ or 2) takes any other action which “would

² See Pub. L. No. 94-329, Tit. II, 90 Stat. 729, 734 (June 30, 1976), codified at 22 U.S.C. §§ 2751 *et seq.*

³ The items so designated are added to the United States Munitions List (USML). See 22 U.S.C. § 2778(a). The USML can be found at 22 C.F.R. § 121.1. Included on the USML are such articles as military aircraft, helicopters, artillery, shells, missiles, rockets, bombs, warships, explosives, military and space electronics, and certain firearms. The USML also covers dual use items which have both military and commercial uses, such as triggered spark gaps.

⁴ The regulations, the International Traffic in Arms Regulations (ITAR), codified at 22 C.F.R. § 120-130, are administered by the United States Department of State's Directorate of Defense Trade Controls (the “DDTC”).

⁵ This term is defined in section 2780(l)(3).

⁶ See 22 U.S.C. § 2780(b)(1)(A), (b)(1)(B), (b)(1)(C).

facilitate the acquisition, directly or indirectly, of any munitions item by the government of any [prohibited] country [], or any person acting on behalf of that government, if the United States person has reason to know that that action will facilitate the acquisition of that item by such a government or person.”⁷ A United States person is also criminally liable if such actions are taken, outside the United States, by a corporation or other person controlled in fact by that United States person.⁸

- 5) Willful violations of any provisions of the Trading with the Enemy Act of 1917, or of any license, rule, or regulation issued under that act are criminalized by 50 U.S.C. App’x § 16(a).

As will be discussed in further detail in Part II below, of the offenses listed in the directive, only section 2778 has been used to prosecute an individual since fiscal year 2005.⁹ Section 2778 is used to prosecute individuals involved in a broad range of conduct. For example, the unlicensed exportation to Mexico of a single firearm, intended solely for personal use, violates the statute, as well as conduct that is “particularly damaging to national security”¹⁰ because it involves the “provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program.”¹¹

II. Commission Data for Offenses Listed in the Act’s Directive

Commission data revealed no convictions under sections 287c, 2779, 2780, or App’x section 16¹² for any of the 241,744 individual offenders sentenced in fiscal years 2008, 2009, and

⁷ See 22 U.S.C. § 2780(b)(1)(D).

⁸ See 22 U.S.C. § 2780(b)(2).

⁹ Since fiscal year 1999, Commission data revealed that the only statute listed in the directive used with any frequency is section 2778. Commission data revealed no convictions under sections 287c, 2779, or 2780 and 6 individual offenders have been convicted under the Trading with the Enemy Act, 50 U.S.C. App’x §§ 1 *et seq.* For purposes of the analyses discussed herein, the Commission used fiscal years 2008-2010 in order to provide Congress with the most current information concerning sentencing practices for the statutes listed in the directive.

¹⁰ See Letter from Lisa O. Monaco, Assistant Attorney General for National Security, U.S. Dept. of Justice, to Judge Patti B. Saris, Chair, U.S. Sentencing Commission at 5 (Sept. 9, 2011).

¹¹ *Id.* at 5-6.

¹² Commission data revealed no individual convictions under these four statutes since fiscal year 2005. Department of Justice representatives advised that offenders committing conduct violating these statutes are likely prosecuted under other statutes, such as the International Emergency Economic Powers Act, [hereinafter IEEPA] 50 U.S.C. §§ 1701, *et seq.*

2010.¹³ Therefore, for those three fiscal years, the only sentencing data available to the Commission was for section 2778 offenses.

In fiscal years 2008, 2009, and 2010,¹⁴ less than one percent of the 241,744 individual offenders (0.04%, n=108) sentenced were convicted of violating section 2778 [hereinafter Section 2778 offenders]. The overwhelming majority of all Section 2778 offenders were in Criminal History Category I (89.8%, n=97). More than half (59.3%, n=64) of these 108 Section 2778 offenses involved exportation of firearms and/or ammunition to Mexico.¹⁵ The overwhelming majority of Section 2778 offenders (93.5%, n=101) pleaded guilty.

Section 2778 offenders received a median sentence of 30 months.¹⁶ Almost two thirds of Section 2778 offenders (63.0%, n=68) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Slightly more than one third (38.0%, n=41) were sentenced within the applicable guideline range and received a median sentence of 37 months.¹⁷ One quarter (25.0%, n=27) of the Section 2778 offenders received government sponsored below range sentences,¹⁸ with a median sentence of 20 months.¹⁹ Of the 27 government sponsored below range sentences, 22 (81.5%) were for providing substantial assistance to the government pursuant to §5K1.1 (Substantial Assistance to Authorities) (Policy Statement). The average extent of the reduction for government sponsored below range sentences was 58.2 percent below the minimum of the otherwise applicable guideline range.

¹³ The Commission received statutory information on 83,946 cases in FY2010, 81,369 in FY2009, and 76,429 in FY2008, for a total of 241,744 cases for the three fiscal years.

¹⁴ Because of the relatively small number of cases involving a conviction under section 2778 reported each fiscal year, the Commission combined data for three fiscal years to have sufficient data for meaningful analyses.

¹⁵ The applicable guideline for section 2778 offenses is USSG §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). Most offenses covered by this guideline receive a base offense level of 26. Offenses involving the exportation of a limited number of firearms and/or ammunition receive a base offense level of 14. The Commission amended §2M5.2, effective November 1, 2011, to increase penalties for the unlawful exportation of firearms. Prior to the amendment, a base offense level of 14 applied to exportation of ten or fewer firearms. The Commission reduced the number of firearm triggering this base offense level from ten to two, reasoning that "export offenses involving more than two firearms are more serious and more likely to involve trafficking." See USSG, App. C, amend. 753. This base offense level now also applies to offenses involving 500 or fewer rounds of ammunition.

¹⁶ The average sentence for Section 2778 offenders was 38 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders.

¹⁷ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 45 months.

¹⁸ These are cases in which a reason for the sentence indicated that the prosecution initiated, proposed, or stipulated to a sentence outside of the guideline range.

¹⁹ The average sentence for Section 2778 offenders who received government sponsored below range sentences was 31 months.

Slightly more than one third (35.2%, n=38) of Section 2778 offenders received non-government sponsored below range sentences.²⁰ The median sentence for these offenders was 18 months,²¹ and the average extent of the reduction was 49.0 percent below the minimum of the otherwise applicable guideline range. Two Section 2778 offenders were sentenced above the applicable guideline range (1.9%).²²

The overwhelming majority (94.4%, n=102) of Section 2778 offenders were sentenced to a term of imprisonment. More than three quarters (78.7%, n=85) of Section 2778 offenders were sentenced to a term of imprisonment of one year or more. Three Section 2778 offenders (2.8%) received a sentence of probation, all of which were government sponsored below range sentences. Three additional Section 2778 offenders (2.8%) received a sentence of probation plus community or home confinement, as a result of a non-government sponsored below range sentence.

The Commission identified 24 Section 2778 cases (22.2%) involving the provision of war armaments or other goods and services to: 1) State sponsors of international terrorism; 2) foreign nations subject to an arms embargo; 3) designated foreign terrorists or proliferators of Weapons of Mass Destruction; 4) a chemical, biological, or nuclear weapons program; or 5) a missile program. The median sentence for the 24 Section 2778 offenders engaging in such conduct was 36 months.²³ More than two thirds of Section 2778 offenders identified as engaging in this more serious conduct (70.4%, n=17) were sentenced either within the applicable guideline range or below the range pursuant to a government motion. Four offenders (16.7%) were sentenced within the applicable guideline range and received a median sentence of 52 months.²⁴

²⁰ Non-government below range sentences include all cases that were either 1) departures authorized in the provisions, policy statements, or commentary of the *Guidelines Manual*; 2) sentenced outside of the guideline range in which the court indicated both a departure and a reference to either *United States v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for sentencing outside of the guideline system; 3) sentenced outside of the guideline range in which no departure was indicated and in which the court cited *United States v. Booker*, 18 U.S.C. § 3553, or related factors as one of the reasons for sentencing outside of the guideline system; or 4) sentenced outside of the guideline range that could not be classified into any of the three previous outside of the range categories. The final category includes cases in which no reason was provided for a sentence outside of the guideline range.

²¹ The average sentence for Section 2778 offenders who received non-government sponsored below range sentences was 31 months.

²² The median sentence length cannot be determined with only two cases. The actual sentences imposed in the two cases were 90 months and 120 months.

²³ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security was 45 months. Some offenders received relatively long sentences, which skewed the average sentence for all offenders. Consequently, the median sentence is used to provide a more accurate indication of the typical sentence imposed on Section 2778 offenders engaging in conduct identified as particularly damaging to national security.

²⁴ The average sentence for Section 2778 offenders sentenced within the applicable guideline range was 111 months.

More than half (54.2%, n=13) received a government sponsored below range sentence²⁵ and received a median sentence of 15 months.²⁶ Of the 13 government sponsored below range sentences, ten (76.9%) were for providing substantial assistance to the government pursuant to §5K1.1. The average extent of the reduction for government sponsored below range sentences was 65.8 percent below the minimum of the otherwise applicable guideline range. One quarter (25.0%, n=6) of Section 2778 offenders identified as engaging in this more serious conduct received non-government sponsored below range sentences.²⁷ The median sentence for these offenders was 43 months,²⁸ and the average extent of the reduction was 22.1 percent below the minimum of the otherwise applicable guideline range. One Section 2778 offender identified as engaging in this more serious conduct (4.2%) was sentenced above the applicable guideline range.

Courts sentenced the overwhelming majority (87.5%, n=21) of these Section 2778 offenders identified as engaging in this more serious conduct to a term of imprisonment of one year or more.²⁹ No Section 2778 offender identified as engaging in this more serious conduct received a sentence of imprisonment of less than one year or a term of probation as a result of a non-government sponsored below range sentence. The three Section 2778 offenders identified as engaging in this more serious conduct (12.5%) who were sentenced to a term of probation received government sponsored below range sentences.

III. Conclusion

Mandatory minimum penalties for the offenses listed in the directive, if enacted, may be too broad. For example, section 2778 covers a wide range of offense conduct that results in varying degrees of impact on national security. A mandatory minimum penalty applicable to all section 2778 offenses may be overly broad for the full range of conduct prosecutable under that statute, which could result in inconsistencies in application similar to those noted in the Commission's *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011).³⁰ There may be cases in which a mandatory minimum penalty for

²⁵ See *supra* n. 18.

²⁶ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received government sponsored below range sentences was 21 months.

²⁷ See *supra* n. 20.

²⁸ The average sentence for Section 2778 offenders engaging in conduct identified as particularly damaging to national security who received non-government sponsored below range sentences was 42 months.

²⁹ Section 2778 offenders engaging in conduct identified as particularly damaging to national security were sentenced to terms of imprisonment in the following lengths: 1) from one to less than three years of imprisonment (37.5%, n=9); 2) from three to less than five years (33.3%, n=8); and 3) more than five years (16.7%, n=4).

³⁰ See Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011) at 345.

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violating section 2778 is perceived as too severe because the offense had little impact on national security.

The Commission recognizes the potential threat to national security caused by certain conduct covered by the statutes listed in the directive, but there is a difference of opinion among the commissioners regarding whether Congress should enact mandatory minimum penalties for these statutes. If Congress decides to enact mandatory minimum penalties, the Commission unanimously believes that such penalties should be limited to offenses that are damaging to national security.

The Commission stands ready to work with Congress to provide appropriately tailored sentences for all of the various national security threats covered by the Act.

Sincerely,

A handwritten signature in cursive script that reads "Patti B Saris". The signature is written in black ink and is positioned above the printed name and title.

Patti B. Saris
Chair