UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

CHAMBERS OF
HAROLD D. VIETOR
U. S. DISTRICT JUDGE
U. S. COURT HOUSE
DES MOINES, IOWA 50309

February 9, 1993

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Attention: Public Information

This letter sets forth some comments I have concerning proposed guideline amendments. I may supplement these comments with a later letter after I have had an opportunity to examine the proposed guidelines amendments in greater detail.

By and large, the proposed amendments look good to me. I strongly favor proposed amendments 1, 9, 10, 11, 12, 23 and 25.

* In respect to 13, issue for comment, I believe that section 2D1.1 should be amended to reduce the amount of drugs for which the defendant should be held responsible to the amount that the negotiated payment would fetch on the actual market.

In respect to 24, issue for comment, I believe that the court should have downward departure power for substantial assistance, without a government motion, when the defendant is a first offender and the offense involves no violence. Indeed, I would prefer an even broader power.

In respect to 40, issue for comment, I believe the Commission should ask Congress to eliminate the 100 to 1 ratio for powder and crack cocaine. The Draconian sentences required for crack offenders are unconscionable.

In respect to 66, issue for comment, I strongly oppose a 4 level enhancement for felonies committed by a member of, on behalf of, or in association with a criminal gang because I believe that such a guideline would be difficult to apply, would border on guilt by association, and would tend to infringe on constitutional rights of free expression and association. It would work far more mischief than good, I fear.

Sincerely,

Harold D. Vietor

Harold D. Vietor

Laurienne Moss
3921 Pemberly Ct.
Ann Arbor Mi. 48103
Phone & Fax #
(313) 668-0716
(call first for fax)

U.S. Sentencing Commission
One Columbus Circle, NE.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Commissioners,

I am writing to urge you to please consider the proposed amendments to the sentencing guidelines that would reduce sentences for first-time, non-violent offenders in drug cases. My husband, Robert Moss, is serving a 25-year sentence for conspiracy to import & distribute marijuana. As a first time, non-violent offender, he does not deserve to receive this harsh treatment by our courts. My family, which consists of two girls, ages 1 & 2 and a twelve year old, and myself, desperately need Robert to keep us going - as we have been emotionally and financially devastated by the federal courts decisions. Please give those like my husband

and their families a second chance at becoming productive members of this society which prides itself in giving fair & just treatment to its citizens who break the law.

In addition, I would like to remind you, as distinguished members of the sentencing commission, that the guidelines, which were intended to be used as a tool against drug use and abuse, has had no effect in this area. Abuse of drugs has remained the same or even risen in some cases, in spite of these stiff sentences. This leads me to believe that we should not use our courtrooms to rectify a social problem - rather it is a health problem. The money spent on prisons would be put to more effective use in education and prevention. This opinion is shared by many judges, and others

throughout this country. Government officials such as yourselves, need to get <u>out</u> of the business of destroying lives like ours by the thousands, and instead restore fair treatment to these offenders, which gives them a second chance in life.

Respectfully Yours,
Laurienne M. Moss

Dear Commissioner Wilkens,

Enclosed for the commissions' review is a petition signed by nearly 1,000 concerned citizens. As taxpayers we highly commend your wisdom. We recommend our support for all amendments that create shorter more equitable sentences, especially for non-violent first time offenders like Christian Martensen. (article with update on the book also enclosed)

We especially endorse Amendments 48, 49, 50 and 56. Thank you and the other commissioners for your time and support. We appreciate your work and know the passage of these vital amendments will be a gateway to Congress in restoring justice. I hope you and the rest of the commission finds this information helpful. Thank you

Respectfully,

Dkari Himel

WE, the undersigned concerned citizens and registered voters of the United States of America demand a fair solution to the LSD carrier weight issue. We want Congress and the United States Sentencing Commission to develop a coherent and realistic calculation in the drug quality table of the Federal sentencing guidelines concerning the carrier weight issue. Let the punishment fit the crime, don't destroy the futures of these unfortunate young people who are receiving these cruel and excessive sentences. Please enact legislation to reform this serious error in the Federal sentencing guidelines.

	NAME	ADDRESS	CITY	STATE	ZIP	SIGNATURE
1.	Mark Leyse	17 Harwood St.	San Fran.	CA.	94133	Mark Leyse
2.	Mike Bergstrom	200 Ascot pkwy	Vallejo	Ca.	94591	Mike Bergstrom
3.	KARL GABRIELSON	1436 OHARE DR	BENICIA	CA	94510	
4.	Claudia Delman	50 Baker St	CA	94117		
5.	Erik Mathews	179 Hillcrest	G.P.F.	MI	48236	Erik Mathews
6.	Elizabeth G. O'Brien	10282 Aqueduct Dr	Cypress	CA	90630	
7.	Michael Sutherland	490 Arbol Verde St	Carpinteria	CA	93013	
8.	Brandon Tarbox	8843 Shady Meadows dr	Sandy	UT	84093	
9.	Glenn Bouchard	911 Vista Del Mar,	Aptos	CA	95003	Glenn Bouchard
10.	Eric Alsop	1271 Excelsior,	Oakland			
11.	Chris McLaughlin	441 High St,	Santa Cruz,	CA	95060	
12.	Quinn McLaughlin	4454 Bloods Ave.	Santa Cruz,	CA	93111	
13.	Melissa Meyers	1020 Agate St	San Diego	CA	92109	
14.	Brad Sargent	1204 California	Huntington Beach		92672	
15.	ESSE GERSHFIELD	14 WESTMINSTER #B	VENICE	CA	90291	
16.	Joe Bishop	26446 oliver rd.	Carmel	CA	93923	Joe Bishop

Mandatory Sentencing Dispute

Man with clean record gets long prison term for drug trafficking

By Ken Hoover
Chronicle Staff Writer

Christian Martensen, a 22-year-old San Francisco man with no previous convictions, has surrendered to begin serving a prison term that may end up lasting 17 years.

The case of Martensen, who was convicted of being part of a drug-trafficking conspiracy, is being spotlighted by critics of mandatory minimum sentences, who argue that it arbitrarily subjects marginal participants in a crime to time behind bars that should be reserved for hardened career criminals.

Martensen's story began in 1989 when he met a man at a Grateful Dead concert who said he wanted to buy some LSD. He did not supply it to him, Martensen says, because he did not deal in drugs.

He may serve 17 years for a drug deal in which he was to make $400

Over the next two years, Martensen says, he saw the man at various Grateful Dead concerts around the country, and he repeatedly asked Martensen for LSD. Martensen says that in 1991, because he was short of cash, he introduced the man, whom he thought to be a fellow "Deadhead," to two men who supplied the drug. Martensen was paid $400 for the introduction, but the man turned out to be an informant for federal drug agents. The meeting was secretly videotaped by agents, and Martensen was arrested.

Federal sentencing guidelines that went into effect in 1987 impose minimum sentences on drug dealers depending on the quantity of drugs involved.

The LSD in the case had been dropped onto blotter paper. The issue in the appeal was whether the hallucinogenic drug should be weighed with or without the blotter paper. Prosecutors contended it constituted a "mixture" of blotter paper and drug, which weighs enough to constitute a sizable amount of drugs justifying a harsher sentence.

The defense said that just the minute amount of drug should be weighed, which would have made Martensen eligible for a lighter sentence.

U.S. District Judge Vaughn Walker had accepted the defense argument that Martensen should receive the lighter sentence, and prosecutors appealed.

Just before he turned himself in last Saturday at the federal prison at Boron, the U.S. Court of Appeals in San Francisco ruled he would have to be sentenced as if he had dealt in a large quantity of drugs. Had the court ruled his case involved a small quantity, the sentence of five years imposed by Judge Walker would have stood.

"I'm upset by this one," said Martensen's attorney, John Runfola, noting his client's youth and lack of a criminal record.

Runfola said he would ask the full U.S. Court of Appeals, rather than the three-judge panel that decided the case, to reconsider the decision.

Martensen's story first came to light in an article in The Chronicle written by Dannie Martin, the paroled bank robber and award-winning author of more than 50 newspaper articles about prison life.

BY FREDERIC LARSON/THE CHRONICLE

Christian Martensen awaiting sentencing for selling LSD

Hard Time for Heavy Paper

Executive Director and Administrator
Charles and Pauline Sullivan

NATIONAL OFFICE:
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National Capital Station
Washington, DC 20013-2310
202-842-1650, ex. 320

CITIZENS UNITED FOR REHABILITATION OF ERRANTS

"A National Effort to Reduce Crime Through Criminal Justice Reform"

PUBLIC COMMENT OF CHARLES SULLIVAN TO THE UNITED STATES SENTENCING COMMISSION

CURE very strongly opposes "in an exceptional case, however, such conduct may provide a basis for an upward departure" (amendment to Commentary to 1B1.3).

CURE is dedicated to reducing crime through rehabilitation. One of the first steps in this process is the perception by the person convicted that "the system" is fair.

When the potential is there in the Guidelines to use acquitted conduct to enhance a sentence, then I believe the system will be perceived as "rigged".

In fact, in my opinion, this proposed amendment goes against the very spirit of the confirmation hearings of the first commissioners that were conducted in 1985 by Sen. Charles Mathias, the Republican from Maryland.

I shall never forget Sen. Mathias asking the commission-appointees "to raise their hands" if they had ever spent time in jail. For those who had not, he encouraged them to visit the jails and prisons.

By this exercise, Sen. Mathias was encouraging a word that is almost non-existent today, "mercy". Sen. Mathias was indirectly telling the Commission that their attitude should be one of coming down of the side of reducing (not enhancing) the sentence whenever appropriate!

In the same way, I encourage you to support the 33 proposed amendments that would reduce drug sentences especially the one that would eliminate the weight of the carrier in LSD cases.

In this regard, I have attached a copy of a recent letter that we have received. I have removed the name since we are not certain if he wants his name to be known.

Dear CHARLES + PAULINE ....Monday March 1st 1993

Greetings from F.C.I. Danbury. I am currently serving a 128 month sentence without parole, for conspiracy to distribute LSD. I have no history of violence what so ever, nor any prior felony convictions. I have taken responsibility for my crime. I continue to demonstrate, diligently, my whole-hearted conviction to reform my life. I am biding my time wisely, attending Marist College (I made high honors last semester,..intend to do so again), and the Comprehensive Chemical Abuse Program, among other programs. In 21 months, I've done *all* this--128 months are entirely unnecessary and unfathomable. I *am* an asset to our society, and to the world.

An interesting turn of events has unfolded, and it warrants your *immediate attention!* I have enclosed information that documents and explains the "quirk in the law" that justifies these absurd sentences for LSD offenses, by including the irrelevant weight of carrier mediums. You will also find an excerpt, from the Federal Register, containing 1993 amendments to the Federal Sentencing Guidelines, as proposed by the U.S. Sentencing Commission. See **amendment #50--*synopsis of proposed amendment and proposed amendment*--which reads: "In determining the weight of LSD, use the actual weight of the LSD itself. The weight of any carrier medium (blotter paper, for example) is not to be counted."** This amendment seeks to rectify a truly gross misappropriation of justice.

This means that prison stays (which are costly to the American taxpayers and public at large, as well as the individuals and their families, in both tangible and intangible ways) could be dutifully shortened, for myself and 2000 other human beings serving 10, 15, and 20 year sentences (with out parole), for the sheer weight of *irrelevant* carrier mediums....This would not be mocking the fact that LSD is illegal, it would simply serve to produce *just sentences*, in which the "time would fit the crime".

I earnestly request that you write the U.S. Sentencing Commission, and voice your support for crucial amendment #50! IT IS ESPECIALLY IMPORTANT FOR YOU TO URGE THAT IT BE RETROACTIVE!! This needs to be done by March 15th, since public hearings are scheduled in Washington D.C., on March 22nd. (See Federal Registar excerpt).

I hope and pray that you will find the time and understanding to act on this issue,..it's not only for my benefit, but thousands just like me, encompassing all our families and loved ones, as well as all those that will continue to be federally prosecuted for LSD offenses. Please, justice and equity ***must*** transcend rhetoric!

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-3205NI

United States of America,

Appellee,

v.

Nancy Irene Martz,
a/k/a Nancy Lebo,

Appellant.

* Appeal from the United States District Court for the Northern District of Iowa.

Submitted: February 12, 1992

Filed: May 18, 1992

Before MAGILL, Circuit Judge, HEANEY, Senior Circuit Judge, and LARSON,* Senior District Judge.

MAGILL, Circuit Judge.

Nancy Irene Martz appeals her conviction and sentence for distributing LSD. Martz alleges the district court[1] erred in refusing to allow her to admit a California court document into evidence to impeach a key government witness. Martz also contests the district court's sentence, claiming the computation of the amount of LSD involved was erroneous. We affirm.

*THE HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

[1]The Honorable David R. Hansen was a United States District Judge for the Northern District of Iowa at the time judgment was entered. He was appointed to the United States Court of Appeals for the Eighth Circuit on November 18, 1991.

EXHIBIT A

I.

Postal inspectors executed a search warrant on June 26, 1990, and opened a first-class letter addressed to Paul Richard Smith in Charles City, Iowa. The letter, mailed from Oakland, California, contained 500 dosage units of LSD on blotter paper. Smith was arrested and agreed to cooperate in the ongoing investigation. Smith, acting with federal authorities in Iowa, twice wrote to Martz in Oakland requesting to purchase LSD. On both occasions, Smith received the requested LSD blotter sheets in return.

Martz was arrested and charged with three counts of distributing LSD, three counts of using the United States mails to distribute LSD, and one count of conspiracy to distribute LSD. A jury convicted Martz on all counts. The district court attributed 187.9 grams of LSD to Martz for an offense level of 36. The court found that Martz was the manager of a criminal enterprise involving more than five persons and increased Martz' offense level by three to 39. The judge also denied a two-level reduction for acceptance of responsibility. This put the total offense level at 39. With a criminal history in category I, Martz had a sentencing range of 262 to 327 months. The district court sentenced her to 288 months in prison and five years of supervised release.

A. Impeachment of Smith

During Smith's testimony, Martz' attorney cross-examined Smith about the plea agreement Smith had reached with federal prosecutors. Martz also sought to introduce evidence of two prior guilty pleas Smith had entered in California and Utah.[2] Martz

[2]The two documents included the certified record of an unrelated 1987 criminal case from California. In that case, Smith pleaded guilty to two drug possession misdemeanors while two felony drug charges were dismissed. The other document laid out Smith's guilty plea to a Utah felony which resulted in other related charges being dropped.

contended the documents would show Smith's knowledge of how cooperating with authorities could aid Smith in his own criminal case.

The district court allowed questioning about the prior pleas to the extent they demonstrated Smith's knowledge of the benefits of plea agreements and his concomitant incentive to aid prosecutors. Smith admitted in testimony that he had been charged with drug crimes in California, but he denied that he received a reduction in charges. Smith testified outside the jury's presence that he never entered a plea agreement in California, but merely pleaded guilty to two misdemeanors. The district court sustained the government's objection to the introduction of the California plea document. The court found that since the California plea required no cooperation or testimony from Smith, it gave Smith no incentive to cooperate with prosecutors and had no bearing on Smith's potential bias or prejudice. Therefore, the California document was excluded under Rule 608(b) of the Federal Rules of Evidence, which precludes the use of extrinsic evidence to prove specific instances of conduct to attack the witness' credibility. On appeal, Martz asserts the district court erred in refusing to allow introduction of the California document to impeach Smith.

Rule 608(b) gives the court discretion to allow questioning during cross-examination on specific bad acts not resulting in the conviction for a felony if those acts concern the witness' credibility. United States v. Hastings, 577 F.2d 38, 40-41 (8th Cir. 1978). The rule, however, forbids the use of extrinsic evidence to prove that the specific bad acts occurred. Fed. R. Evid. 608(b). The purpose of barring extrinsic evidence is to avoid holding mini-trials on peripherally related or irrelevant matters. Carter v. Hewitt, 617 F.2d 961, 971 (3d Cir. 1980) (citing 3A Wigmore on Evidence, § 979 at 826-27 (Chadbourn rev. ed. 1970)). The introduction of extrinsic evidence to attack credibility, to the extent it is ever admissible, is subject to the

discretion of the trial judge. United States v. Capozzi, 883 F.2d 608, 615 (8th Cir. 1989), cert. denied, 495 U.S. 918 (1990).

The district court allowed Martz to cross-examine Smith about prior guilty pleas he had made and whether he had come to realize the benefits of cutting deals with prosecutors in the past. But in conducting this questioning, Martz was required to "take his answer." Capozzi, 883 F.2d at 615; McCormick on Evidence § 42 at 92 (3d ed. 1984). While documents may be admissible on cross-examination to prove a material fact, United States v. Opager, 589 F.2d 799, 801-02 (5th Cir. 1979), or bias, United States v. James, 609 F.2d 36, 46 (2d Cir. 1979), cert. denied, 445 U.S. 905 (1980), they are not admissible under Rule 608(b) merely to show a witness' general character for truthfulness or untruthfulness. United States v. Whitehead, 618 F.2d 523, 529 (4th Cir. 1980); James, 609 F.2d at 46. The credibility determination pertinent to the Martz trial concerned whether Smith would lie in his testimony against Martz to receive favorable treatment from prosecutors. The issue was not whether Smith, in fact, received a reduced sentence in California for pleading guilty to two misdemeanors, or whether the charges were merely dropped by prosecutors on account of lack of evidence, crowded court dockets, or other unrelated reasons. Martz' attorney argued to the district court that "a sufficient record has been made at least to establish a question for the jury at least as to whether or not a plea bargain was entered into and whether or not the defendant received the benefit of the bargain." Tr. at 192. This argument represents exactly the type of mini-trial over a collateral matter that Rule 608(b) forbids.

Martz relies on Carter, 617 F.2d 961, for the proposition that documents admitted as evidence during cross-examination of the witness do not violate Rule 608(b). Carter's holding was much

narrower. In Carter,[3] the Third Circuit admitted the letter in question only after the witness admitted its authenticity. The court specifically held that extrinsic evidence could not be admitted after a witness denied a charge.

> [I]f refutation of the witness's denial were permitted through extrinsic evidence, these collateral matters would assume a prominence at trial out of proportion to their significance. In such cases, then, extrinsic evidence may not be used to refute the denial, even if this evidence might be obtained from the very witness sought to be impeached.

Carter, 617 F.2d at 970. Therefore, the district court did not abuse its discretion in refusing to admit the California plea document into evidence.

B. Sentence

Martz contests her sentence based on the district court's computation of the total weight of the LSD involved. Martz contends the district court should have compiled the total weight by using the Typical Weight Per Unit Table contained in application note 11 of U.S.S.G. § 2D1.1. Utilizing this table, Martz argues, would have resulted in an offense level of 28 rather than 36.

The district court attributed 33,800 dosage units of LSD to Martz and that figure is not contested on this appeal. In computing the total weight, the district court correctly included the weight of the drug-laced blotter paper. Chapman v. United States, 111 S. Ct. 1919, 1922 (1991); United States v. Bishop, 894

[3]In Carter, a prison inmate sued prison officials in a § 1983 action stemming from an alleged beating. On cross-examination of the plaintiff, defense attorneys introduced a letter written by the plaintiff they allege outlined a scheme to encourage inmates to file false brutality charges against prison officials. Carter, 617 F.2d at 964-65.

F.2d 981, 985 (8th Cir.), cert. denied, 111 S. Ct. 106 (1990). The court, however, noted that blotters that were tested contained varying weights, ranging from .00692 grams per dose to .0055 grams per dose. The actual weight of only 1800 of the dosage units was known. Applying the rule of lenity, the district court attributed the lightest known weight to all dosage units and arrived at a total of 185.9 grams (33,800 doses times .0055 grams). The court added to that figure two liquid grams of LSD that were not applied to blotter paper but were attributed to Martz.[4] The resulting total was 187.9 grams.

Martz argues that the district court should have applied the weight listed in the Typical Weight Per Unit Table contained in application note 11 of U.S.S.G. § 2D1.1. This table reveals a per-unit weight for LSD of .05 milligrams and would result in a total weight of 1.69 grams for the 33,800 doses. Adding in the two grams of liquid LSD and the 11 grams of LSD listed in the indictment would total 14.69 grams of LSD. This computation would have given Martz a base offense level of 28.

The district court's determination that extrapolating the lightest-known unit across the dosage units is a more reliable estimate than using the Typical Weight Per Unit Table was not erroneous. Application note 11 to U.S.S.G. § 2D1.1, itself, notes its inaccuracy and cautions that it should only be used when a more reliable estimate of weight is unavailable.

> If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance. . . . Do not use this table

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[4]The district court rejected the government's argument that blotter paper weight should be added to the two grams of liquid LSD merely because Martz' pattern was always to sell LSD on blotter paper.

if any more reliable estimate of the total weight is available from case-specific information.

The note provides further that the table does not include the weight of the carrying mechanism.

> For controlled substances marked with an asterisk [including LSD], the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.

U.S.S.G. § 2D1.1 & comment. (n.11). Since all of these doses were on blotter paper, the weight of the blotter paper and the LSD obviously provides a more reliable estimate than the naked drug itself.

In Bishop, 894 F.2d at 987, we upheld the estimate of a total amount of LSD based on the district court's extrapolating the lightest known weight over the total number of dosage units, including those that were unrecovered. Martz attempts to distinguish Bishop by arguing that the sample of blotter paper tested in her case did not constitute a representative sample. Unlike Bishop, the blotter paper in this case did not come from the same source at the same time. Nevertheless, the district court found that there was adequate case-specific information to estimate the total weight by extrapolating the lightest known weight over all the doses.

Random testing of drugs may be sufficient for sentencing purposes. United States v. Johnson, 944 F.2d 396, 404-05 (8th Cir.), cert. denied, 112 S. Ct. 646 (1991). In Johnson, this court refused to adopt the requirement that a representative sample of drugs from each independent source be tested. See also United States v. Follett, 905 F.2d 195, 196-97 (8th Cir. 1990) (estimate

of drug weight permissible in plea agreement although no LSD blotters were recovered and weighed), cert. denied, 111 S. Ct. 2796 (1991).

While there may arise situations where a sample is too small or too arbitrary to extrapolate fairly over a large number of dosage units that come from disparate sources, this is not such a case. First, all of the dosage units came from Martz. Martz' bare assertion that some of the blotter sheets may have been prepared by someone else is not enough to discredit the finding that the dosage units all were distributed by Martz, consisted of LSD-laced blotter paper, and were similar in appearance. Second, in order to reduce her offense level even one step to 34, Martz would have to show that the average weight of the dosage units weighed about half of the lightest known dosage unit (.0029 compared to .0055). See U.S.S.G. § 2D1.1(c). The evidence does not show that such a wide variance is possible since the known weights were clustered at .0055 to .00692. Moreover, a cursory review of LSD blotter weights from other cases reveals that .0055 rests at the bottom of the logical range. Compare United States v. Marshall, 908 F.2d 1312, 1316 (7th Cir. 1990) (en banc) (per-dose weights of .0057 grams and .00964 grams), aff'd sub nom. Chapman v. United States, 111 S. Ct. 1919 (1991); United States v. Bishop, 704 F. Supp. 910 (N.D. Iowa 1989) (per-dose weight of .0075 grams), aff'd, 894 F.2d 981 (8th Cir.), cert. denied, 111 S. Ct. 106 (1990); United States v. Andress, 943 F.2d 622 (6th Cir. 1991) (per-dose weight of .0065 grams), cert. denied, 112 S. Ct. 1192 (1992); United States v. Leazenby, 937 F.2d 496 (10th Cir. 1991) (per-dose weight of .0060 grams); United States v. Larsen, 904 F.2d 562 (10th Cir. 1990) (per-dose weight of .0061 grams), cert. denied, 111 S. Ct. 2800 (1991); United States v. Elrod, 898 F.2d 60 (6th Cir.) (per-dose weight of .0055 grams), cert. denied, 111 S. Ct. 104 (1990); United States v. Rose, 881 F.2d 386 (7th Cir. 1989) (per-dose weight of .0154 grams); United States v. DiMeo, 753 F. Supp. 23 (D. Me. 1990) (per-dose weight of .0069 grams), aff'd without opinion, 946 F.2d

880 (1st Cir. 1991). Therefore, we find that the district court did not err in determining that extrapolating the lightest known weight over all the dosage units was a more reliable estimate than using the bare drug weight found in the table.

II.

We find that the district court did not abuse its discretion in refusing to admit extrinsic evidence to impugn a witness' credibility. Further, we find that the district court properly calculated Martz' sentence. The decision below, therefore, is affirmed.

HEANEY, Senior Circuit Judge, dissenting.

In my view, Nancy Martz should have been permitted to introduce into evidence two documents which established that the government informant was lying when he testified that he had not entered into plea agreements in state courts in California and Utah. With respect to drug related offenses in those states, the exhibits were not offered to prove that Smith had prior drug convictions, but rather to attack his credibility. Smith's credibility was crucial -- his testimony was essential to Martz's conviction. The admission of these documents could have been accomplished quickly, and it would not have given rise to a mini-trial.

Although the Carter case well supports Martz's position, the majority distinguishes Carter on the grounds that the document in that case was admitted only after the witness admitted its authenticity. Here, however, the trial court did not ever question Smith as to the authenticity of the plea agreement. If faced with questioning about the previous plea agreements, Smith may well have backed off his previous statements, and his credibility would have been damaged.

I also believe that the majority errs in affirming the sentence. This court, over my dissent, recently held en banc that we must follow policy statements and commentary to bring about consistency in sentencing. United States v. Kelley, 956 F.2d 748, 756 (8th Cir. 1992) (en banc). One would think that we would be bound by that decision where the policy statement or commentary requires a shorter sentence as well as where it requires a longer sentence.

But, apparently this is not to be the case even though the application note here is clear and precise: "If the number of doses . . . but not the weight of the controlled substance is known, multiply the number of doses . . . by the typical weight per dose in the table below to estimate the total weight of the controlled substance." U.S.S.G. § 2D1.1 (Application Note 11). The weight of each dose was not known; thus, the table had to be used.

Unlike the majority, I do not believe extrapolation would be proper in this case. Unlike the situation in Bishop, the blotter paper here did not come from the same source at the same time. United States v. Bishop, 894 F.2d 981, 987 (8th Cir. 1990). Moreover, the amount of blotter paper weighed was a small fraction (approximately five percent) of the total amount attributed to Martz. Under these circumstances, the district court did not have enough "case-specific information" from which to make a "more reliable estimate of the total weight." U.S.S.G. § 2D1.1 (Application Note 11). Compare United States v. Shabazz, 933 F.2d 1029, 1034 (D.C. Cir. 1991) (use of table in Note 11 not required where defendant conceded estimated weight of dilaudid pills was accurate, and where estimated weight was supported by data from Physicians Desk Reference, the manufacturer, and the DEA).

The majority opinion buttresses the district court's findings by favorably comparing the district court's calculation of the

average weight per dose of the dosage unit (.0055 grams) to LSD blotter weights set forth in reported cases from other circuits. See ante at 8-9. Although the majority's review is interesting, I do not see how findings of fact from other cases can constitute "case-specific" evidence to support the district court's findings of fact in this case.

The majority also reports that a wide variance in blotter paper weights would not be possible in this case "because the known weights were clustered at .0055 to .00692." See ante at 8. With all due respect, I think this reasoning is circular: because only three samples were taken, there is no way to know whether there was a wide variance between blotter paper weights, yet the limited sample is used as proof that there was not a wide variance in weights. Moreover, there was a wide variance between even the three samples -- the heaviest sample was almost twenty-five percent heavier than the lightest sample.

While it would have taken a short time to accurately determine the weight per dose, the government did not make this effort. Thus, the court was obligated to follow the table.

A true copy-

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

Practitioner s Advisory
Group ; Probation Officers
Advisory Group

PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

Thomas N. Whiteside
Chairman, 4th Circuit

U.S. Probation Office
P.O. Box 809
Columbia, SC 29202-0809

Phone # 803-253-3330
Fax # 803-765-5110

March 11, 1993

The Honorable William W. Wilkins, Jr., Chairman
United States Sentencing Commission
Federal Judiciary Building
Washington, DC 20002-8002

Dear Chairman Wilkins:

The United States Probation Officers Advisory Group submits the attached recommendations pertaining to the 1993 amendments to the sentencing guidelines. These recommendations are based upon a field survey of the federal probation system. Enclosed is a copy of the survey materials. You will note that we have organized this year's proposed amendments into four (4) categories: Drugs, White-Collar/Fraud, Violence/Firearms, and Miscellaneous. Four subcommittees paralleling these categories were created to elicit a national response and assess the impact of the changes. The recommendations are being provided directly from those committee chairpersons.

The United States Probation Officers Advisory Group was organized in September of 1992, and designated at least one (1) representative from each circuit. Within each circuit, there are district representatives to coordinate the flow of information. The Probation Division of the Administrative Office and the Federal Probation Officers Association are also represented in the group.

Last Fall, an initial assessment of the amendment process directed specifically at amendment quantity was completed by our group. It was found that the probation system favored the continued improvement of the guideline process, albeit, slowly and deliberately, with emphasis upon change enhancing consistency in guideline application. Our enclosed recommendations will also reflect that theme.

On behalf of the probation officers, the Advisory Group extends sincere gratitude to the members of the United States Sentencing Commission and staff for the opportunity to participate in the amendment cycle, a process which will ultimately affect the manner by which we fulfill our statutory responsibilities and service to the Court.

Sincerely,

Thomas N. Whiteside

Thomas N. Whiteside
Chairman

TNW/jsd

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
PROBATION OFFICE

LOUIS G. BREWSTER
CHIEF PROBATION OFFICER
POST OFFICE BOX 61207
HOUSTON, TX 77208-1207

The Honorable William W. Wilkins, Jr., Chairman
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Proposed Drug Amendments

Dear Chairman Wilkins:

The "Drug Amendment" committee of the Probation Officer Advisory Group reviewed survey results from probation officers, soliciting the field's opinion about the various proposed amendments to the drug guidelines. The committee determined that portions of two of the proposed amendments (8 and 9) and amendments 10 and 49, generated sufficient support from the field to report out to the full Advisory Group for comment to the Commissioners. The following represents our committee's recommendations which were endorsed by the Probation Officer Advisory Group:

Amendments 10 and 49: Amendments 10 and 49 each offer a new definition to clarify the term "mixture or substance" as used in 2D1.1.

Comments

Survey results reflect a significant majority of probation officers agree that uningestible, unmarketable portions of a mixture containing a controlled substance should not be used in determining the offense level. A slight preference for the wording proposed in Amendment 49 was noted. It was suggested Amendment 49 be modified to include the creme liqueur example presented in Amendment 10. Comments were received indicating some concern as to whether or not the proposed definition of mixture or substance would apply to marijuana plants as they are marketable but largely uningestible. Our committee felt it appropriate to recommend the definition contain additional language clarifying that marijuana plants, although uningestible, are marketable and should not be exempted from weight determination described elsewhere in 2D1.1.

Recommendation

Our committee recommends the adoption of Amendment 49 with the noted modifications.

Amendment 8: (Part 1)-Provides offense level ceiling in drug trafficking guideline for defendants who receive a mitigating role adjustment. (Part 2)-Revises commentary to 3B1.2 to more clearly describe cases in which a mitigating role adjustment is warranted, as well as to differentiate better between different degrees of mitigating role.

Comments

The committee reviewed survey results related to Part 1 of proposed Amendment 8 in conjunction with survey results pertaining to Amendments 9, 39, 48,and 60. It appears that probation officers generally perceive drug offense levels are too harsh on some defendants, particularly offenders of lower culpability with limited involvement in the offense. However, officers did not support the "cap" approach as proposed in Amendment 8, 39, and 48 to the degree we believe warrants our endorsement at this time. It was felt by the committee that further study and testing should be undertaken by the Commission prior to implementing this approach to ensure it targets the intended offender and reaches the desired outcome in a consistent manner.

Part 2 of Amendment 8 received strong support from officers. Comments consistently noted greater clarification has long been needed to better describe when a mitigating role adjustment is warranted and to better distinguish between minor and minimal roles. Some comments did suggest some confusion with proposed application note 7. Specifically, several questioned the advisability of the distinction made between "courier and mule" and offloader and deckhand." That is a courier or mule may be no less culpable than an offloader or deckhand in some instances. In addition the inclusion of these terms may focus application decisions based on titles rather than on the defendant's conduct, responsibility, etc. as noted in proposed application note 5 and 6 of this amendment. It was the committee's opinion that application note 7 be redrafted or even eliminated considering these concerns.

Recommendation

Our committee recommends adoption of Part 2 of proposed Amendment 8 while urging the Commission to consider modifications to application note 7 consistent with the above noted concerns.

Amendment 9: Proposes to reduce upper limit of Drug Quantity Table from 42 to 36 and adds adjustments (specific offense characteristics) to further reflect defendant culpability and risk of harm.

Comments

Survey results reveal significant support for reducing the Drug Quantity Table from 42 to 36 while only supporting the inclusion of two of the proposed specific offense characteristic at 2D1.1:

> Officers supported including specific offense characteristics sanctioning for the use of a firearm/dangerous weapon, including sanctioning for substantial risk of death or serious bodily injury created by the firearm. [proposed 2D1.1 (b)(1)]
>
> Officers also supported the inclusion of a cross reference to Chapter Two Part A (Offenses Against the Person) if death or bodily injury resulted from the offense. [proposed 2D1.1(d)]

Officers did not support including specific offense characteristics increasing the offense level based on the number of participants [proposed 2D1.1(b)(2)] or reducing the offense level based on a mitigating role [proposed 2D1.1(b)(3)].

Recommendation

Our committee recommends adoption of the following provisions of Amendment 9:

Reduce the Drug Quantity Table from 42 to 36. Include as specific offense characteristics sanctions for the use of a firearm or dangerous weapon, including sanctioning for substantial risk of death or serious bodily injury created by the firearm. Include a cross reference to Chapter Two Part A (Offenses Against the Person) if death or bodily injury resulted from the offense.

Respectfully submitted,

Jerry Denzlinger

Jerry Denzlinger, Deputy Chief
United States Probation Officer

Drug Amendment Committee Chairman

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
PROBATION OFFICE

March 9, 1993

ROBERT M. LATTA
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LOS ANGELES 90012-4708

William W. Wilkins, Jr. Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Chairman Wilkins:

This letter will address the recommendations of the Probation Officers' Advisory Board sub-committee reviewing the proposed amendments relating to crimes of violence or firearms violations. Of the 17 amendments in this category, numbers 14, 15, 16 and 28(B) received the most favorable responses from probation officers.

Amendment #14:	Conforms definition of "prior felony convictions" at sections 2K1.3 and 2K2.1 with definition at section 4B1.2.
Amendment #15:	Conforms guideline definitions of certain firearms at sections 2K2.1 and 7B1.1 to statutory definitions at 26 USC 5845(a).
Amendment #16:	Clarifies that enhancement at 2K2.1 (b)(4) applies whether or not the defendant knew or had reason to believe the firearm was stolen or had an obliterated or altered serial number.
Amendment #28(B):	Revises the bodily injury enhancements at sections 2A2.1 and 2A2.2 to include consideration of any victim who is part of relevant conduct by deleting the words "the victim" and inserting the words "a victim."

The probation officers who supported and provided feedback on these proposed clarifying amendments, strongly advocate these changes as a means of increasing the uniformity and consistency of guideline application. Conforming definitions of guideline and statutory language (amendments #14 and #15) and including concise explanations to assist with guideline interpretation and application (amendments #16 and #28 (B)), inevitably reduces the number of objections, thus contributing to the efficiency of the court in the sentencing process. Clarifying language in the guidelines manual can literally save hours of debate (preparation

of objections, addenda, plus oral discussion in court) over differences in guideline interpretation.

With respect to amendment #28(B), the suggestion was made to insert the words "any victim" rather than "a victim", but most of the responses to this amendment believed the proposed revision would be sufficient to clarify that the bodily injury enhancement applies to any victim who sustains injury from the assault within the parameters of 1B1.3: Relevant Conduct, and not only the victim established by the offense of conviction.

Among the issues for comment, amendment #26 engendered the most consistent and specific responses to the following query:

Amendment #26: Comment on the most appropriate guideline for the recently enacted armed carjacking statute.

The most frequently cited guideline as most appropriate for the new armed carjacking statute was 2B3.1: Robbery. The given reason for this guideline choice, common among many of the responses, was the inclusion of several specific offense characteristics addressing offense conduct frequently found in the crime of armed carjacking, namely: presence or threat of dangerous weapon or firearm; physical injury to victim; abduction or restraint of victim; and monetary loss. Additionally, it was noted that the higher base offense level assigned to the robbery guideline, as opposed to the theft guideline, 2B1.1, reflects the presence of force, violence or intimidation, which are elements of armed carjacking.

Most respondents (slightly less than three to one) believed the offense levels at sections 2B1.1, 2B1.2 and 2B6.1 should be raised for offenses involving stolen vehicles to reflect the increase in penalty under the Anti-Car Theft Act of 1992. There was no consensus as to the amount of increase; however, almost one half of those responding to this question chose either the 4 or 6 level enhancement.

Very truly yours,

Nancy Reims

Nancy Reims, Asst. Deputy Chief
United States Probation Officer

NR
3-9-92

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
PROBATION OFFICE

THOMAS J. WEADOCK, JR.
CHIEF PROBATION OFFICER

945 POST OFFICE & COURTHOUSE
BOSTON 02109-4561

March 10, 1993

Honorable William W. Wilkins, Jr.
Chairman U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Wilkins,

As you are aware, the Probation Officers Advisory Group to the Sentencing Commission sent questionnaires to presentence writers in the field to solicit input regarding the 1993 proposed amendments. The questionnaires were divided into four groups of specific issues. The results of surveys that focused on the White Collar/Fraud proposals were studied by Circuit Representatives, Mary O'Neal, 3rd circuit, Jack Koonce, 4th circuit and myself 1st circuit. After we reviewed the results and reported them to the full body of the Advisory Group, it was unanimously agreed that the following represents a fair assessment and recommendations from a wide margin of probation officers in the field.

RECOMMEND: Approve Consolidation of Tax Guidelines and Uniform Definition Tax Loss/ Amendment # 21

On the other hand, the second part of Amendment # 21 which proposes to raise the level of the Tax table at § 2T4.1 **does not** gain approval of the probation officers.

RECOMMEND: Revision and Consolidation of Money Laundering §§ 2S1.1 and 2S1.2/ Amendment # 20

Officers generally thought it a good idea to redo the Money Laundering guideline to reflect the underlying behavior. The change prevents the present anomalous result when the criminal behavior from which proceeds are being laundered is less onerous than the guidelines at §§ 2S1.1 and 2S1.2 provide. Too, there is at the moment some confusion about whether to group the money laundering counts with the underlying activity. The change would rectify a real problem that currently results in disparity and unjust sentences. The proposed guideline at § 2S1.1 appears to adequately account for the gradations of seriousness for offenses at 18 U.S.C. §§ 1956, 1957.

Consolidation and Change to §§ 2S1.3 and 2S1.4

While the officers agreed to the changes and consolidation at Amendment # 20, they were often disturbed about the reference in proposed guideline § 2S1.2 that ties the base offense level to the defendant's reckless disregard as to whether the funds were the proceeds of unlawful activity. With the exception of the above caveat relevant to § 2S1.2, the proposed change would rectify the present problem of confusion.

RECOMMEND: Reformulation of ABUSE OF TRUST/ Amendment #23

This proposed change yielded a positive response inasmuch as it provides greater clarification by being more specific. But the field did not care for the alternative idea of making a specific offense characteristic for abuse of trust to §§ 2B1.1 and 2B1.2.

The questionnaire neglected to solicit responses for the related amendment # 46.

RECOMMEND: Clarification of Loss Definition/ Amendment #28g

Officers in the field agreed that the proposed changes provide a more uniform, simpler determination of loss. The new definition more adequately describes the crime and raises the standard by clarifying the meaning the loss.

We are looking forward to meeting with the Commissioners later this month and are prepared to answer more specific questions regarding our findings.

Very Truly Yours,

Francesca D. Bowman

Francesca D. Bowman
Deputy Chief USPO

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
PROBATION OFFICE

MAR 1 0 1993

U. S. PROBATION OFFICE

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Reply to: Minneapolis

March 9, 1993

The Honorable William W. Wilkins
United States Sentencing Commission
Federal Judiciary Building
One Columbus Circle, NE
Washington, D.C. 20002-8002

Dear Chairman Wilkins:

Listed below are those "miscellaneous" amendments that the Probation Officer Advisory Group supports.

Amendment #1: **Excludes acquitted behavior from relevant conduct consideration. In exceptional cases, such conduct would be basis for upward departure.**

Of those USPOs surveyed, the vast majority are in favor of this amendment. The concept of fairness was cited as the primary justification for enactment.

Although the Probation Advisory Group supports this amendment, it does have some concerns. First, the amendment's ramifications would seem to conflict with case law in particular circuits where acquitted conduct is used for sentencing purposes. There is also a concern that this amendment would introduce a different standard of evidence that could eventually weaken the philosophy and application of §1B1.3, Relevant Conduct. An example might be a cases where, through plea negotiations, the relevant conduct of dismissed counts would not be used because it would be considered analogous to acquitted conduct.

Some group members wonder if this amendment to Relevant Conduct would serve to penalize the defendant who pleads guilty and whose entire conduct is used to calculate the guidelines. There is also a question whether this amendment would encourage more trials.

In general, the Probation Advisory Group supports this amendment because it seems fair and it would affect a relatively small number of cases. However, this support is accompanied be several concerns because of the magnitude of their potential impact on a large number of cases.

Amendment #27: **Deletes 27 offense guidelines and consolidates them with guidelines that contain similar conduct.**

Of those USPOs surveyed, the vast majority do not consider the deletion of the 21 offense guidelines as problematic. The comments provided listed simplification and clarification as the majors reasons for support of the consolidation.

Although this amendment that further streamlines Chapter 2 does not produce a large number of substantive changes, some defendants will face higher offense levels because of the merger of these 27 guidelines. Consequently, some ex post facto issues will occur.

Amendment #54: **Clarifies the term "instant offense" under §4A1.2(a)(1) to include relevant conduct.**

Of those USPOs surveyed, the vast majority favor this amendment. There were not many comments because this appears to be a clarifying amendment that is non-controversial.

The subcommittee on "miscellaneous" amendments also reviewed the survey results on 19 other proposed amendments: (Numbers 24, 25, 29, 30, 32, 33, 34, 35, 42, 43, 44, 45, 46, 52, 53, 56, 55, 57, and 61). I am prepared to provide information on these other amendments if there are questions about the field's response to them.

Sincerely,

Jay F. Meyer

Jay F. Meyer
Senior U.S. Probation Officer

PROPOSED AMENDMENTS QUESTIONNAIRE

DRUGS

AMENDMENT #8

SYNOPSIS:

This amendment has two (2) parts. First, it provides a ceiling in the drug trafficking guideline, 2D1.1 for defendants who receive a mitigating role adjustment under 3B1.2, Mitigating Role. Second, the commentary to 3B1.2 is revised to more clearly describe cases in which a mitigating role adjustment is warranted, as well as to differentiate better between different degrees of mitigating role.

Commentators have argued that the guidelines over punish certain lower level defendants when the sentence is driven in large part by the quantity of drugs involved in the offense. For such lower level defendants, the quantity of drugs involved is often opportunistic and may be a less appropriate measure of the seriousness of the offense than when the defendant has assumed a mid-level or higher role.

The proposed ceiling on drug quantity would limit the impact quantity would play at very high offense levels in determining the sentence of a low-level defendant who receives a mitigating role adjustment. Revisions to the commentary of 3B1.2 seek to ensure a more clearer, concise definition of the defendant who merits mitigating role reduction and provides greater consistency in application. (Related amendment proposals: 9, 39, 48, 60)

A. Do you think that a defendant whose offense comes under 2D1.1, Drug Trafficking, etc. should not have a base offense level of greater than level 32 if he/she qualifies for a mitigating role adjustment under 3B1.2 (Mitigating Role)?

_____ Yes
_____ No

Comments:

B. Do you think that the commentary to 3B1.2 should be amended to clarify the application of the guideline?

_____ Yes
_____ No

Comments:

AMENDMENT #9

SYNOPSIS:

This amendment reduces the upper limit of the drug quantity table from level 42 to level 36 (The upper limit in the original addition of the guidelines manual). In addition, this amendment adds specific offense characteristics that further reflect defendant culpability and risk of harm associated with certain offense behavior. As a further measure of distinguishing the seriousness of the offense, a cross-reference to Chapter II, Part A is added where death or bodily injury resulted from the offense conduct. (Related amendment proposals: 8, 39, 48)

A. Do you think that 2D1.1 should be amended to increase the offense level for the use of a dangerous weapon to include the substantial risk of death or serious bodily injury?

_____ Yes
_____ No

Comments:

B. Do you think that 2D1.1 should be amended to increase offense level up to eight (8) levels based upon the number participants where the defendant was the principal organizer or leader or was one of such several organizers or leaders?

_____ Yes
_____ No

Comments:

C. Do you think that 2D1.1 should be amended to allow a decrease of four (4) levels in offense level, if the defendant did not own or sell the drugs, did not exercise decision-making authority, did not finance the operation, and did not use relevant special skills?

_____ Yes
_____ No

Comments:

D. Do you think that 2D1.1 should be amended to delete subdivisions 1-4 (levels 36-42) and inserting subdivision (1) the drug quantities noted in the amendment?

_____ Yes
_____ No

Comments:

E. Do you think that 2D1.1 should be amended to add a cross-reference to Chapter II, Part A, Offense Against the Person, if the offense resulted in death or bodily injury?

_____ Yes
_____ No

Comments:

AMENDMENT #10 AND #49:

SYNOPSIS:

Clarifies term "mixture or substance" as used in 2D1.1 by expressly providing the term does not include uningestible, unmarketable portions of a drug mixture. Examples of such mixtures are provided.

(A) Do you agree uningestible, unmarketable portions of a mixture containing a controlled substance should <u>not</u> be used in establishing the offense level?

___ yes
___ no

(B) If yes to (A), which amendment is preferable?

___ # 10
___ # 49
___ neither

(C) Are the proposed amendments necessary?

___ yes
___ no

(D) Comments:

AMENDMENT #11:

SYNOPSIS:

Restructures 2D1.1 so that the scale of the offense is based on the largest amount of controlled substances with which the defendant was associated at any one time (Option 1), or in any 30 day period (Option 2), except in extremely large scale offenses.

(A) Will this "snapshot" approach more reliably distinguish between the larger and smaller drug trafficker?

___ yes
___ no

(B) If you answered yes to (A), which option is the preferred?

___ Option 1
___ Option 2
___ neither

(C) Is this amendment necessary?

___ yes
___ no

(D) Comments:

AMENDMENT #12:

SYNOPSIS:

Revises phrase "did not intend to produce and was not reasonably capable of producing" (App. Note 12, 2D1.1) to: "was not reasonably capable of producing, or otherwise did not intend to produce."

(A) Are you in favor of the proposed change?

___ yes
___ no

(B) Is this amendment necessary?

___ yes
___ no

(C) Comments:

AMENDMENT #13:

SYNOPSIS:

Issue for comment regarding 2D1.1 and "reverse sting" operations (an operation in which government agents sell or negotiate to sell controlled substances to a defendant).

(A) Should 2D1.1 be amended to address the calculation of weight of drugs in reverse sting operations where the government has set a price for the controlled substance that is substantially below the market value, thereby leading the defendant to purchase a larger quantity than his available resources would otherwise have allowed?

___ yes
___ no

(B) Comments:

AMENDMENT #39

SYNOPSIS:

This amendment reduces the maximum offense level for drug quantity from 42 to 36 (36 was the maximum offense level in the original sentencing guideline); provides additional enhancements for weapon usage, principal organizers of large scale organizations, and obtaining substantial resources from engaging in criminal activity by a defendant with an aggravating role; places a cap on the offense level for defendants with mitigating roles; reduces the offense levels associated with higher drug quantities by two (2) levels; provides a greater reduction for a significantly minimal participant; and provides additional guidance for the determination of mitigating role. (Related amendment proposals: 8, 9, 48, 60).

A. Do you think that 3B1.2, Mitigating Role should be amended to place a cap of level 32 on those defendants who qualify for mitigating role and the offense involves certain controlled substances such as heroin, cocaine, crack, marijuana, etc., and a level of 24 for other drugs, provided that if the offense involves both types of drugs, the base offense level should not exceed 32?

_____ Yes
_____ No

Comments:

The amendment also modifies 2D1.1, to consider other factors such as use of weapon, pilot/navigational skills where craft or vessel was used to carry controlled substances, organizer or leader where 15 or more participants involved, and substantial gain of income or resources by defendant. The amendment also changes Section 3B1.2, Mitigating Role to allow for downward adjustment of up to six (6) levels and a greater clarification as to who should qualify.

A. Do you think that 2D1.1 should be amended to consider these factors?

_____ Yes
_____ No

Comments:

B. Do you think 2D1.1 should be amended to delete subdivisions 1-11; by renumbering subdivisions 12-19 as 9-16; and by inserting the drug quantities noted in the amendment as subdivisions 1-8?

_____ Yes
_____ No

Comments:

AMENDMENT #40: Issues for comment regarding "crack" cocaine.

(A) Should the Commission ask Congress to modify or eliminate the provisions that distinguish between the punishment for powdered cocaine and cocaine base (crack) at the quantity ratio of 100 to 1?

___ yes
___ no

Comments:

(B) Do you believe the quantity-based sentencing system for all defendants who possess or distribute cocaine base (crack) increases the sentencing range of defendants in a particularly harsh manner beyond those targeted by Congress (i.e. street dealers)?

___ yes
___ no

Comments:

(C) Is it appropriate to change the quantity-based guideline system for cocaine base (crack) for offenses involving the distribution or possession of amounts above the 10 yr. mandatory minimum level (50 grams) and below the 5 yr. mandatory minimum level (5 grams)?

___ yes
___ no

Comments:

(D) As opposed to the mandatory minimum distinction between cocaine and cocaine base (crack), should other guideline distinctions be drawn?

___ yes
___ no

Comments:

AMENDMENT #48

SYNOPSIS:

This amendment revises 2D1.1, Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy to establish ceilings on the offense level for minor and minimal participants in jointly undertaken activity. The amendment carries forward the policy of 3B1.2 to provide a greater reduction for minimal participants than for minor participants and the policy of this guideline to treat certain controlled substances more harshly than others. Thus, the amendment sets a ceiling for minor participants that is higher than the ceiling for minimal participants, and a ceiling for certain controlled substances (e.g., heroin) that is higher than the ceiling for other controlled substances (e.g., marijuana). (Related amendment proposals: 8, 9, 39, 60)

A. Do you think that 2D1.1 should be amended by allowing for a reduction of four (4) levels with a cap of sixteen (16) on minimal participants where their offense involved marijuana, hashish oil, a Schedule I or II depressant or a Schedule II, IV or V substance? Minimal participants involved with any other controlled substance would receive a reduction of four (4) levels with a cap of twenty (20). Minor participants would receive a two (2) level reduction with a cap of twenty-two (22) for marijuana, hashish, etc. with a two-level reduction and a cap of twenty-six (26) for all other controlled substances. Do you think that this amendment should pass?

_____ Yes
_____ No

Comments:

AMENDMENT #50:

SYNOPSIS:

Proposes the base offense level for LSD be based on the actual amount of LSD involved, excluding the weight of any carrier medium (e.g., blotter paper).

(A) Do you agree with the proposed amendment?

___ yes
___ no

(B) Is this amendment necessary?

___ yes
___ no

(C) Comments:

AMENDMENT #51: Proposes definition for "cocaine base" as the "lumpy, rock-like form of cocaine base usually prepared by processing cocaine Hcl and sodium bicarbonate. Crack is the street name for this form of cocaine base."

(A) Do you agreement with the proposed amendment?

___ yes
___ no

(B) Is this amendment necessary?

___ yes
___ no

(C) Comments:

AMENDMENT #60

SYNOPSIS:

This amendment to 3B1.2 is intended to adopt a rule in light of the current scope of "relevant conduct" under 1B1.3 against mitigating role adjustments for a defendant who has been held responsible under the definition of relevant conduct only for the quantity of controlled substances in which he/she actually trafficked. Such a rule recognizes that a role reduction is not appropriate when the measure of the defendant's involvement in the offense is not increased by the conduct of others. That is he/she cannot be considered a minor or minimal participant as to his or her own conduct. (Related amendment proposals: 8, 39, 48)

A. Do you think that this amendment should pass?

_____ Yes
_____ No

Comments:

AMENDMENT #63:

SYNOPSIS:

Issues for comment regarding (1) "caps" on base offense levels for distribution of schedule III, IV, and V controlled substances and schedule I and II depressants; (2) changing definition of a "unit" of anabolic steroid from "a 10 cc vial of injectable steroid or fifty tablets" to "a one cc vial of injectable steroid or five tablets."; (3) whether fewer than five tablets should be equivalent to a one cc vial of injectable steroid.

(A) Should the "caps" on base offense levels for distribution of schedule III, IV, and V controlled substances and schedule I and II depressants be removed or raised to adequately sanction very large quantities of these drugs?

__ yes
__ no

Comments:

(B) Should the guideline ranges for trafficking in anabolic steroids be increased to make them more comparable to those for other schedule III substances?

__ yes
__ no

Comments:

(C) If yes to (B), do you agree the definition of a "unit" of anabolic steroid should be changed as noted?

__ yes
__ no

Comments:

(D) Should fewer than five tablets be equivalent to a one cc vial of injectable steroid?

__ yes
__ no

Comments:

PROPOSED AMENDMENTS QUESTIONNAIRE

VIOLENCE/FIREARMS

AMENDMENT #4: Section 2A4.2 (Demanding or Receiving Ransom Money) This amendment revises 2A4.2 to better differentiate the types of conduct covered.

A. Should this specific offense characteristic be added?
(1) If the amount of ransom demanded exceeded $10,000,increase by the corresponding number of levels from the table in 2B3.1(b)(6).

____Yes ____No
Comments:

B. Should this cross reference be added?
(1) If the defendant was a participant in the kidnapping offense, apply 2A4.1 (Kidnapping; Abduction; Unlawful Restraint).

____Yes ____No
Comments:

C. Should this special instruction be added?
If the offense involved receiving or possessing ransom money, but the defendant was not a participant in the kidnapping or demand for ransom offense (i.e., the defendant's conduct was tantamount to that of an accessory after the fact to the kidnapping or ransom, demand offense)., do not apply this guideline. Instead, apply 2X3.1 (Accessory After the Fact) in respect to the underlying offense.

____Yes ____No
Comments:

D. Should an Application Note be added to include the definition for "participant"?

____Yes ____No
Comments:

E. Should the commentary captioned "Background" be amended as proposed, which explains how the guideline is applied to a variety of criminal behavior covered by this guideline?

____Yes ____No
Comments:

AMENDMENT #14: Sections 2K1.3 and 2K2.1. Conforms definition of "prior felony convictions" with Chapter Four definitions.

A. Should Application Note #2 to 2K1.3 be amended to provide that the determination of prior conviction(s) of felony crimes of violence or controlled substance offenses under subsections (a)(1) and (2) of 2K1.3 is to be made under the same terms and conditions as such determinations under 4B1.2?

____Yes ____No
Comments:

B. Should Application Note #5 to 2K2.1 be amended to provide that the determination of prior conviction(s) under subsections (a)(1), (2), (3), and (4)(A) of 2K2.1 is to be made under the same terms and conditions as such determinations under 4B1.2?

____Yes ____No
Comments:

AMENDMENT #15: Sections 2K2.1 and 7B1.1. Conforms guideline definitions of certain firearms to statutory definitions.

A. Should the commentary to guideline 2K2.1 and policy statement 7B1.1 be amended to conform the definitions of firearms with the firearms listed under 26 USC 5845 (a)?

____Yes ____No
Comments:

AMENDMENT #16: Section 2K2.1. Clarifies enhancement for stolen firearms.

A. Should subsection (b)(4) of 2K2.1 be clarified by amending the commentary to expressly state that the enhancement for a stolen firearm or a firearm with an altered or obliterated serial number applies whether or not the defendant knew or had reason to believe the firearm was stolen or had an altered or obliterated serial number?

____Yes ____No
Comments:

AMENDMENT #17: Section 2K2.4. Issue for comment.

A. Should there be a clarification of the split among the circuits regarding whether the commentary to 2K2.1 permits or precludes departure on the basis of the type or nature of the firearm (e.g., semiautomatic, military-style assault weapon)?

____Yes ____No

If yes, what are your suggestions regarding the clarification?

AMENDMENT #18: Section 2K2.4. Issue for comment addressing revision of commentary to handle convictions under 18 USC 924(c) and underlying offense.

A. Can paragraphs 2 and 3 of Application Note 2 be clarified or simplified?

____Yes ____No

If yes, how?

B. Should the proviso in paragraphs 2 and 3 of Application Note 2 be deleted and the issue addressed in the unusual case by departure?

____Yes ____No

Comments:

C. Should an approach be used that requires the application of the relevant guideline firearm enhancement and apportions the resulting combined sentence between the statutorily mandated sentence and the sentence for the underlying offense?

____Yes ____No

Comments:

AMENDMENT #19: Section 2K2.5. Issue for comment regarding appropriateness of current offense levels for possession of firearms in a school zone and federal facility.

A. Are the offense levels of 6 and 8 for violations of 18 USC 922(q): Possession of firearm in school zone, and 18 USC 930: Possession of dangerous weapon in federal facility in 2K2.5 adequate relative to the offense level 12 under 2K2.1(a)(7) for certain nonregulatory firearms offenses, or the offense level 6 provided under 2K2.1(a)(8) for most regulatory firearms offenses?

____Yes ____No

Comments:

B. Does the offense level provided under 2K2.5 adequately reflect the mandate that any term of imprisonment imposed under 18 USC 922(q) run consecutively to any other term of imprisonment?

____Yes ____No

Comments:

AMENDMENT #26: Sections 2B1.1, 2B1.2 and 2B1.6. Issues for comment regarding carjacking and stolen vehicles.

A. What is the most appropriate guideline for the recently enacted armed carjacking statute (Section 101 of Public Law 102-519:), and why?

B. Should the offense levels in 2B1.1, 2B1.2 and 2B1.6 be raised for offenses involving stolen vehicles to reflect the increase in the maximum imposable sentence from five to ten years imprisonment under sections 102 and 103 of Public Law 202-519 (Anti-Car Theft Act of 1992)?

____Yes ____No

Comments:

C. If the answer to question B is "yes", should the offense levels be increased by ____2, ____4, or ____6 levels?

AMENDMENT #28(A): **Section 2A1.1.** Clarifies the statutory penalty for 18 USC 111(b): First degree murder.

A. Should the commentary captioned "Background" to 2A1.1 be deleted now that the appellate courts have uniformly held that a conviction under 18 USC 111(b) requires a mandatory term of life imprisonment.

____Yes ____No
Comments:

AMENDMENT # 28(B): **Sections 2A2.1 and 2A2.2.** Revises these guidelines to include consideration of any victim part of relevant conduct as to bodily injury enhancement.

A. Should the bodily injury enhancement at these guidelines be amended by deleting the words "the victim" and inserting the words "a victim"?

____Yes ____No
Comments:

B. Will this proposed revision be sufficient to clarify that the bodily injury enhancement applies to any victim who sustains injury from the assault within the parameters of 1B1.3 (Relevant Conduct), and not only the victim established by the offense of conviction?

____Yes ____No
Comments:

AMENDMENT #28(C): **Sections 2A3.1, 2B3.1, 2B3.2 and 2E2.1.** This amendment conforms these guidelines, each of which contains enhancements for physical injury but not death, to the structure of the kidnapping guideline, which provides a cross reference to 2A1.1 where the victim is murdered in the course of the offense.

A. Should a cross reference which states, "If a victim was killed under circumstances that would constitute murder under 18 USC 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply 2A1.1 (First Degree Murder)" be added to: 2A3.1 ___Yes___No; 2B3.1 ___Yes___No; 2B3.2___Yes___No; 2E2.1 ___Yes___No?

Comments:

AMENDMENT #28(D): **Sections 2A4.2, 2K1.3 and 2K2.1.** Clarifies that 2A4 .2(b)(7) and (c)(1) and 2K1.3(b)(3) and (c)(1) and 2K2,1(b)(5) and (c)(1) apply to federal, state and local offenses.

A. Should the commentary to these guidelines be amended to clarify that these subsections apply to federal,state and local offenses: 2A4.2 ___Yes___No; 2K1.3 ___Yes___No; 2K2.1 ___Yes___No?

Comments:

AMENDMENT #28(E): **Sections 2A5.2 and 2A6.1.** Broadens scope of these guidelines.

A. Should the term "offense involved" (standard guideline terminology that includes all relevant conduct) be substituted for the term "defendant" (a term with a narrower scope): in subsection (a)(1) of 2A5.2 ___Yes___No; in subsection (b)(1) and (2) of 2A6.1 ___Yes___No?

Comments:

AMENDMENT #28(F): **Section 2A6.1.** Issue for comment.

A. Should 2A6.1 be amended to provide that multiple instances of threatening communications to the same victim on different occasions are separate harms and, therefore, not grouped together under 3D1.2?

____Yes ____No

Comments:

B. If the answer to question A is yes, are any additional revisions to this guideline required?

____Yes ____No

Explain:

AMENDMENT #28(H): **Section 2B3.3.** This amendment revises this guideline so that under certain statutes the appropriate guideline will be selected on the basis of the underlying offense.

A. Should 2B3.3 be amended to include the following cross reference:

(1) If the offense involved extortion under color of official right, apply 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right).
(2) If the offense involved extortion by force or threat of injury or serious damage, apply 2B3.3 (Extortion by Force or Threat of Injury or Serious Damage).

____Yes ____No
Comments:

AMENDMENT #64: Section 2K2.1. Issues for comment.

A. Should the base offense level for offenses involving National Firearms Act firearms (e.g., machineguns, short-barreled firearms, silencers) be increased from the current level 18 to level 22 (level 24 for destructive devices)?

____Yes ____No
Comments:

B. Should the offense levels for offenses involving semiautomatic firearms be increased from the current level 12 to level 22 (the level proposed for machineguns and most other National Firearms Act firearms)?

____Yes ____No
Comments:

C. Should the base offense level for firearms violations by prohibited persons (e.g., felons or fugitives) be increased by 4 levels?

____Yes ____No
Comments:

AMENDMENT #64 continued

D. Should the minimum offense level for possession or use of a firearm in connection with another felony offense be increased from level 18 to level 22?

____Yes ____No

Comments:

E. Should the cumulative offense level restriction (cap) of level 29 be eliminated?

____Yes ____No

Comments:

F. Should the base offense level for distribution of a firearm to a prohibited person (e.g. a felon or fugitive) be increased from the current level 12 to level 16?

____Yes ____No

Comments:

G. Should the adjustment for offenses involving multiple firearms increase more rapidly?

____Yes ____No

Comments:

AMENDMENT #66: Issue for comment.

A. Should the guidelines provide for a 4-level enhancement for felonies committed by a member of, on behalf of, or in association with a criminal gang?

____Yes ____No

Comments:

B. Should a "criminal gang" be defined as "a group, club, organization, or association of five or more persons whose member engage, or have engaged within the past five years, in a continuing series of crimes of violence and/or serious drug offenses?

____Yes ____No

Comments:

PROPOSED AMENDMENTS QUESTIONNAIRE

WHITE COLLAR/FRAUD

The following questionnaire provides a synopsis of the amendments as a guide to help answer the questions. The questions cannot be answered unless the guideline amendment itself is read and understood. Therefore, it is necessary to read the actual amendments before answering the questions.

WHITE COLLAR/FRAUD

AMENDMENT # 5 Synopsis: The Commission is considering amendments to certain fraud, theft, and tax guidelines as they relate to loss and the treatment of the specific offense characteristic for more than minimal planning.

This amendment eliminates "more than minimal planning" as a specific offense characteristic from §§ 2B1.1, 2B1.2, and 2F1.1 in order to increase uniformity of application in respect to offenses involving this characteristic.

The amendment also modifies the loss tables in §§ 2B1.1 and 2F1.1 to incorporate gradually an increase for "more than minimal planning" with a two-level increase reached for loss amounts greater than $40,000. In addition to the phasing-in of the increase for "more than minimal planning," this amendment also modifies the loss tables in §§ 2B1.1 and 2F1.1 by providing a more uniform rate of increase in the loss increments and by increasing the offense levels for cases that involve extremely high loss amounts, consistent with recent statutory increases in the maximum imprisonment sentences for certain cases sentenced under §§ 2B1.1 and 2F1.1.

This amendment also creates a table in § 2F1.2 that starts at a higher amount in order to maintain approximately the same Chapter Two offense levels for guidelines that apply at the loss table in § 2F1.1 but start with a higher base offense level.

Finally, the amendment modifies the tax loss table in § 2T4.1 to conform with the changes in the loss tables in §§ 2B1.1 and 2F1.1 and eliminates the specific offense characteristic in Part T relating to the use of sophisticated means to impede discovery of the nature or extent of the offense, consistent with the elimination of "more than minimal planning" as a specific offense characteristic.

QUESTIONS: Group I

After reviewing the proposed amendments to the loss tables at §§ 2F1.1 and §§ 2B1.1, 2F1.1, 2F1.2, and 2T4.1 that incorporate a two-level increase for "more than minimal planning," please answer the following questions.

1) Do the loss tables in §§ 2B1.1, 2F1.1, and 2T4.1 provide appropriate and adequate punishment for the loss categories included?

___Yes, because

___No, because

___Other, because

2) Should the offense levels in the loss table increase at a different rate (e.g., increasing the loss amounts by multiples of 1.5, 1.6, or 1.7, or some other pattern of mathematical increases)?

___Yes, because

___No, because

___Other, because

3) Should there be fewer offense level gradations at the lower end of the loss table?

___Yes, because

___NO, because

___Other, because

4) Should there be additional offense level increases at higher loss amounts to provide further distinctions among, and increased punishment for, such offenses?

___Yes, because

___NO, because

___Other, because

Group II

In the alternative to amending the loss tables to achieve a gradual increase for the two-level increment for "more than minimal planning," should the following changes be made to achieve the goal of incorporating the two-level increase to §§ 2B1.1, 2B1.2, 2F1.1 (and other guidelines containing an enhancement for more than minimal planning)?

1) Increase the base offense level of each by two levels. Delete the specific offense characteristic for "more than minimal planning" (and, for § 2F1.1, the alternative enhancement for a "scheme to defraud more than one victim"); and adopt a specific offense characteristic that provides that if the offense involved a single, opportunistic act (explained in the commentary as conduct undertaken on the spur of the moment in response to temptation or sudden opportunity) a two level decrease may be given?

___Yes, because

___NO, because

___Other, because

2) Should the Commission amend the definition of "more than minimal planning" in § 1B1.1(f) to:

a) Delete references to repeated acts

b) Delete the references to concealment

c) Define the planning necessary to establish the enhancement as "extensive or sophisticated planning"

d) Set forth more examples of the application of the definition of "more than minimal planning"

___all of the above

___none of the above

___circle the ones most appropriate

(check one)

A) With regard to the proposals in Group I and Group II, I think in general ____Group I, ____Group II are preferable.

B) After consideration of all the proposals in Group I and Group II, I think the Commission **should not** pass Amendment # 5.

____Agree

____Disagree

C) I agree that "more than minimal planning" should be deleted, but in the following manner:

Comment on any other matter related to "more than minimal planning":

AMENDMENT # 6 Synopsis: This amendment expands the Commentary to § 2F1.1 Fraud and Deceit to provide guidance in cases in which the monetary loss does not adequately reflect the seriousness of the offense. (Related amendment proposals: 7, 37, 65).

AMENDMENT # 7 Issue for Comment: (Related proposals at 6, 37 and 65)

1) After reading amendment # 6, do you think the Commission should amend the commentary at §§ 2B1.1, 2B1.2, and 2F1.1 to identify circumstances in which loss does not fully capture the harmfulness and seriousness of the conduct and therefore an upward departure may be warranted (e.g., when some of the harm caused by the offense was nonmonetary; the offense caused particularly significant emotional trauma to, or consciously or recklessly endangered the health or safety of one or more persons; the offense involved the risk of death; or the offense involved the knowing or reckless risk of serious bodily injury or deal to more than one person)?

___Yes, because

___No, because

___Other, because

2) Should any or all of the circumstances described in question 1 (or others bearing on whether loss reflects the seriousness of the offense) be adopted as specific offense characteristics that provide for one-level or two-level increases instead of an invited upward departure?

___Yes, because

___No, because

___Other, because

AMENDMENT # 20 Synopsis: This amendment revises the guidelines in Chapter Two, Part S Money Laundering and Monetary Transaction Reporting. When the Commission promulgated §§ 2S1.1 and 2S1.2 to govern sentencing for the money laundering and monetary transaction offenses found at 18 U.S.C. 1956 and 1957, these statutes were relatively new and, therefore, the Commission had little case experience upon which to base the guidelines. Additionally, court decisions have since construed the elements of these offenses broadly.

This amendment consolidates §§ 2S1.1 and 2S1.2 for ease of application, and provides additional modifications with the aim of better assuring that the offense levels prescribed by these guidelines comport with the relative seriousness of the offense conduct.

The amendment accomplishes the latter goal chiefly by tying base offense levels more closely to the underlying conduct that was the source of the illegal proceeds. If the defendant committed the underlying offense and the offense level can be determined, subsection (a)(1) sets the base offense level equal to that for the underlying offense. In other instances, the base offense level is keyed to the value of funds involved. The amendment uses specific offense characteristics to assure greater punishment when the defendant knew or believed that the transactions were designed to conceal the criminal nature of the proceeds or when the funds were to be used to promote further criminal activity. A further increase is provided under subsection (b)(2) if sophisticated efforts at concealment were involved.

The amendment also consolidates existing §§ 2S1.3 and 2S1.4 for ease of application and modifies these guidelines to assure greater consistency of punishment for similar offenses and greater sensitivity to indicia of offense seriousness. Specifically, the proposed amendment links base offense levels for the reporting violations covered by these guidelines to the defendant's state of mind with respect to the source of the funds, and, in instances where the defendant knew, believed or acted with reckless disregard of the fact that the funds were the proceeds of the unlawful activity, to the value of the funds involved. (Related amendment proposal: 58)

Question:

1) After reading the amendment, do you think these revisions should pass?

___Yes, because

___No, because

___Other, because

AMENDMENT # 21 Synopsis: This amendment consolidates §§ 2T1.1 Tax Evasion, 2T1.2 Willful failure to File Return, Supply Information, or Pay Tax, 2T1.3 Fraud and False Statements Under Penalty of Perjury, and 2T1.5 Fraudulent Returns, Statements, or Other Documents, thereby eliminating the confusion that has arisen in some cases regarding which guideline applies. In addition, by adopting a uniform definition of tax loss, this amendment eliminates the anomaly of using actual tax loss in some cases and an amount that differs from actual tax loss in others. Furthermore, this amendment clarifies the circumstances under which the specific offense characteristics of § 2T1.9 apply and the relationship between the loss calculation under §§ 2T1.4 and 2T1.9. (Related amendment proposal: 41)

Questions:

1) After reading the proposed amendment, should the revisions be passed?

___Yes, because

___No, because

___Other, because

2) In addition to the amendment, should the tax table at § 2T4.1 be amended by increasing each offense level by one or two levels. This amendment would offset the potential impact of Commission amendments to the Sentencing Table and Chapter Five, Part C, effective November 1, 1992, that increased the potential for sentences of probation without confinement conditions for lower-level tax offenders (i.e., offenders in Criminal History Category I with final offense levels of 7 or 8).

___Yes, by one level, because

___Yes, by two levels, because

___No, because

___Other, because

3) In the alternative to passing the amendment, the tax table at § 2T4.1 should be amended as outlined in question 2.

___Yes, by one level, because

___Yes, by two levels, because

___No, because

___Other, because

4) Given the choice between questions 2 and 3, the most desirable outcome would be: (choose one)

___(question 2) Amend and increase by 1 level

___(question 2) Amend and increase by 2 levels

___(question 2) Amend but no increase

___(question 3) Do not amend but increase by 1 level

___(question 3) Do not amend but increase by 2 levels

AMENDMENT # 23 Synopsis: Numerous questions have arisen regarding the application of § 3B1.3 Abuse of Position of Trust or Use of Special Skill in respect to the intended scope of the abuse of trust prong of this adjustment. This amendment reformulates the definition of an abuse of position of trust to provide a more detailed definition that better distinguishes cases warranting this

enhancement. (Related Amendment proposal: 46)

Questions:

1) After reading the amendment, do you think the proposal should pass?

___Yes, because

___No, because

___Other, because

2) As an alternative to modifying § 3B1.3, should the Commission amend §§ 2B1.1 and 2B1.2 to add a specific offense characteristic relating to enhancement for abuse of trust in embezzlement cases and provide that the enhancement in § 3B1.3 would not apply if the proposed specific offense characteristic was applied.

___Yes, because

___No, because

___Other, because

AMENDMENT # 28(g) Synopsis: This amendment makes the definition of loss in §§ 2B1.1 Larceny, Embezzlement, and Other Forms of Theft and 2F1.1 Fraud and Deceit more consistent.

Application Note 3 of the Commentary to § 2B1.1 and Application Note 8 of the Commentary to § 2F1.1 address the same issue using different language. Although the term "reasonably reliable information" is deleted from § 2B1.1 (there is no corresponding term in § 2F1.1), no substantive change results because the reliability of the information considered in respect to all cases is already addressed in § 6A1.3 Resolution of Disputed Factors.

In addition, this amendment provides additional guidance for the determination of loss in cases that are referenced to § 2B1.1 but have loss characteristics closely resembling offenses referenced to § 2F1.1, and provides additional guidance for cases in which simply adding the amounts from a series of transactions does not reflect the amount taken or put at risk.

This amendment also clarifies the operation of § 2F1.1(b)(3), which currently can be read to authorize counting conduct that is also addressed by other guideline sections. Consequently, questions arise such as whether a defendant who was on probation at the time of the offense receives an enhancement under this subsection as well as from § 4A1.1; or whether a defendant who commits the offense while on release receives an enhancement under this section as well as under § 2J1.7. This amendment addresses this issue in a manner consistent with the Commission's general principle on double counting.

In addition, the reference in current Application Note 11 of the Commentary to § 2F1.1 is not clear. This amendment clarifies the operation of this provision and conforms the language to the phraseology used elsewhere in the guidelines.

In addition, this amendment clarifies the operation of § 2B6.1 Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts with Altered or Obliterated ID Numbers. In U.S. v Thomas (5th Cir. 9/16/92), a panel of the Fifth Circuit interpreted this phrase to mean that once the retail value of the stolen vehicles or parts exceeded $2,000, the court should apply the fraud table based upon "loss," rather than "retail value." This interpretation is inconsistent with the way this phrase is used throughout the guidelines. For example, § 2B5.1 Counterfeiting references the table in § 2F1.1, but the amount to be used is the face value of the counterfeit currency, not "loss"; § 2B5.1 Criminal Infringement of a Copyright references the table in § 2F1.1, but the amount to be used is the retail value of the infringing items, not "loss."

Question:

1) After reading the proposed amendments, do you think the proposals should all pass?

___Yes, because

___Yes, with the exception of_____, because

___No, because

___Other, because

AMENDMENT # 28 (I) Synopsis: This amendment makes conforming changes pertaining to the interaction of Chapter Two Offense Conduct and Chapter Eight Sentencing of Organizations. The

amendment conforms the language of the special instructions in §§ 2B4.1 Bribery in Procurement of Bank Loan and Other Commercial Bribery, 2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right, 2E5.1 Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee or Pension Benefit Plan, and 2E5.6 Prohibited Payments or Lending Money by Employer or Agent to Employees, Representatives, or Labor Organizations to the language of subsection (c)(3) of § 8C2.4 Base Fine. In addition, the amendment adds a conforming special fine instruction at §§ 2C1.6 Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper and 2C1.7 Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions.

Further, in § 2R1.1, this amendment moves the test for determining an organization's volume of commerce in a bid-rigging case in which the organization submitted one or more complementary bids to subsection (b) where it logically fits.

Finally, the amendment extends to individual defendants the same standard for determining the volume of commerce in a bid-rigging case involving complementary bids as is now used for organizational defendants.

Question:

After reading the amendment, do you think the proposal should pass?

___Yes, because

___No, because

___Other, because

AMENDMENT # 37 Issue for Comment: Should the commentary at § 2B1.1 be conformed to § 2F1.1 by stating that: (Related amendment proposals: 6 and 7)

A) The amount of the loss is the actual or intended loss, whichever is greater.

B) Loss figures should be reduced to reflect the amount the victim has recovered prior to discovery of the offense or which the victim expects to recover from any assets originally pledged by the defendant.

C) The loss may in some cases significantly overstate or understate the seriousness of the defendant's conduct. In such cases, a departure from the guidelines may be considered.

Question:

Do you agree with the above commentary?

___Yes, because

___Yes, with the exception of,_____because

___No, because

___Other, because

AMENDMENT # 38 Issue for Comment: Should § 2B1.1 contain specific offense characteristics adjusting a defendant's offense level downward because he did not personally profit from the theft (e.g., an accountant who is aware of embezzlement by a company president, but does not personally gain).

___Yes, because

___No, because

___Other, because

Should there be a cap on the offense level for minor or minimal participants sentenced under § 2B1.1?

___Yes, because

___No, because

___Other, because

AMENDMENT # 41 Synopsis: This amendment consolidates current §§ 2T1.1, 2T1.2, and 2T1.5 into one offense guideline, increases the minimum base offense levels for offenses currently covered by §§

2T1.1 and 2T1.3 from level 6 to level 10, increases the minimum offense level for offenses currently covered by § 2T1.2 from level 5 to 9, adopts a uniform definition of tax loss, and creates a new offense guideline to cover violations of the omnibus clause of 26 U.S.C. § 7212(a). (Related amendment proposal 21).

Question:

After reading the amendment, do you agree to the consolidation and changes?

___Yes, because

___No, because

___Other, because

AMENDMENT # 58 Synopsis: This amendment to § 2S1.3 harmonizes the treatment of violations involving various financial reports required by law. Currently, the base offense level under § 2S1.3 for a failure to file a Currency Transaction Report (CTR) or an IRS Form 8300 is 5, absent structuring to evade reporting requirements, while the base offense level under § 2S1.4 for a failure to file a Currency and Monetary Instrument Report (CMIR) is 9. A CTR must be filed by a financial institution engaging in a cash transaction greater than $10,000; a Form 8300 must be filed by a trade or business receiving more than $10,000 in cash; and a CMIR must be filed by a person who transports more than $10,000 in cash into or out of the United States. In each instance, these reporting requirements act as check on large cash transactions that may be rooted in criminal conduct and permit monitoring of suspicious financial activities. This amendment reflects a judgment that these three types of reports are similar in purpose and that comparable violations involving them should be treated similarly. (Related amendment proposal: 20)

Question:

After reading the amendment, do you agree that the distinctions between the guidelines should be harmonized and that the changes should be made?

___Yes, because

___No, because

___Other, because

AMENDMENT # 59 Synopsis: This amendment creates a new guideline applicable to violations of the Computer Fraud and Abuse Act of 1988 (18 U.S.C. § 1030). Violations of this statute are currently subject to the fraud guidelines at § 2F1.1, which rely heavily on the dollar amount of loss caused to the victim. Computer offenses, however, commonly protect against harms that cannot be adequately quantified by examining dollar losses. Illegal access to consumer credit reports, for example, which may have little monetary value, nevertheless can represent a serious intrusion into privacy interests. Illegal intrusions in the computers which control telephone systems may disrupt normal telephone service and present hazards to emergency systems, neither of which are readily quantifiable. This amendment proposes a new Section 2F2.1, which provides sentencing guidelines particularly designed for this unique and rapidly developing area of the law.

Question:

After reading the new guideline, do you think new section 2F2.1 adequately covers the issues raised by computer fraud and should therefore be incorporated into the guideline manual?

___Yes, because

___No, because

___Other, because

AMENDMENT # 62 Issue for Comment: (Related Proposal: 26)

Do you think §§ 2B1.1 Larceny, Embezzlement, and other forms of Theft, and 2B4.1 Bribery in Procurement of Bank Loans or Other Commercial Bribery, and 2F1.1 Fraud and Deceit should be amended to provide a 4 level enhancement in the base offense level for all offenses which affect a financial institution? An enhanced offense level would reflect the dramatic increases by Congress during the past several years in the maximum terms of imprisonment from 20 to 30 years for violations of ten major bank fraud and embezzlement offenses.

___Yes, because

___No, because

___Other, because

In the event such a 4 level enhancement is adopted, should the guidelines provide an exception for minor thefts by low level employees?

___Yes, because

___No, because

___Other, because

AMENDMENT # 65 Issue for Comment: (Related proposals: 6, 7 and 57)

Should § 2F1.1 include the risk of loss as a factor in determining the applicable guideline range for fraud and related offenses when the amount at risk is greater than the amount of the actual or intended loss?

___Yes, because

___No, because

___Other, because

If risk of loss is included as a factor, should the risk of loss increase the applicable guideline range to the same extent as actual or intended loss?

___Yes, because

___No, because

___Other, because

Should the risk of loss be limited to that which is reasonably foreseeable (e.g., the amount of the loan in a fraudulent loan application)?

___Yes, because

___No, because

___Other, because

PROPOSED AMENDMENTS QUESTIONNAIRE

MISCELLANEOUS AMENDMENTS

MISCELLANEOUS AMENDMENTS

AMENDMENT #1: Excludes acquitted behavior from relevant conduct consideration. In exceptional case, such conduct would be basis for upward departure.

(A) Are you in favor of adding language under §1B1.3 that would exclude acquitted behavior from consideration in guideline calculation?

____ Yes

____ No

Comments:

AMENDMENT #24: Requests whether court should be able to depart on its own motion in substantial assistance cases for first time offenders?

(A) Do you believe the Court should be able to depart downward on its motion in cases where the **(1)** the defendant is a first offender, **(2)** there is no violence associated with the offense, **(3)** the Government does not present a motion for substantial assistance, and **(4)** the Court believes that such a motion is appropriate?

____ Yes

____ No

(B) What problems, if any, would you envision with the Court having this capability?

(C) Can you think of a compromise between the present procedure of §5K1.1 and the suggestion in Question (A) that would allow more discretion than the present system without the full ramifications contained in Question (A)?

____ Yes

____ No

(E) Do you believe the present version of §5K1.1 needs to change at all?

AMENDMENT #25: Adds language to §6B1.2, Standards for Acceptance of Plea Agreements, that would encourage Government to disclose to defendant information relevant to guideline application to encourage plea negotiations.

(A) Do you believe that such a change should be made at the point of plea discussions?

____ Yes

____ No

(B) Or, should such a change be made prior to the Rule 11 colloquy?

____ Yes

____ No

Comments:

AMENDMENT #27: Pertains to the consolidation and simplification of Chapter II. It deletes 27 offense guidelines and consolidates them with guidelines that contain similar conduct.

(A) Do you consider the deletion of any of the 27 offense guidelines problematic? If so, which one(s)?

____ Yes

____ No

If so, which one(s)?

Comments:

AMENDMENT #29: Provides in Chapter Five, Part A that departure may be appropriate when offender characteristics are present to an unusual degree.

(A) Are you in favor of this language being added to the Introductory Commentary?

____ Yes

____ No

Comments:

AMENDMENT #30: Comment invited on whether language in Chapter I, Part A,4(b) overly restricts the court's ability to depart.

(A) Do you believe the current language is too restrictive in allowing court to depart?

____ Yes

____ No

Comments:

AMENDMENT #32: Requests comment on whether Commission should amend guidelines to allow the court to impose a non-imprisonment sentence on the first offender convicted of a non-violent or non-serious offense.

(A) Are you in favor of an amendment that would allow the court to impose a non-imprisonment sentence on the first offender convicted of a non-violent or non-serious offense?

____ Yes

____ No

(B) If so, should Chapter Five, Part K provide an additional ground for departure?

____ Yes

____ No

(C) Or, should Zone A be expanded under Criminal History Category I in the Sentencing Table?

____ Yes

____ No

Comments:

AMENDMENT #33: Requests comment on whether the Commission should increase availability of Zone A and B sentences to more offense levels with all criminal history categories.

(A) Should Zones A and B of the Sentencing Table be expanded under all of the criminal history categories?

____ Yes

____ No

(B) If so, to what offense levels? (attach copy of table if helpful)

Comments:

AMENDMENT #34: Requests comments on whether §1B1.3, Relevant Conduct, should be restricted to conduct admitted by defendant in connection with plea or conduct that constitutes offense of conviction.

(A) Are you in favor of language added to §1B1.3, Relevant Conduct, that would restrict guideline calculation to conduct admitted by defendant in plea or conduct cited in offense of conviction?

____ Yes

____ No

Comments:

AMENDMENT #35: Addresses the consideration of conduct of which the defendant has been acquitted after trial.

(A) Should §1B1.3, Relevant Conduct be amended to restrict consideration of conduct of which the defendant has been acquitted after a trial?

____ Yes

____ No

(B) Should §1B1.3, Relevant Conduct, be amended to allow consideration of conduct of which the defendant has been acquitted only if the Government proves by clear and convincing evidence that the defendant committed the conduct for which he/she has been acquitted?

____ Yes

____ No

Comments:

AMENDMENT #42: Increases an offense level for offenses grouped under §3D1.2(c) in certain circumstances (Option 1). It would add a 2-level increase in §§2D1.1 and 2S1.1 in certain circumstances.

(A) Are you in favor of an amendment to §3D1.3. that would increase the offense level for offenses grouped together under §3D1.2(c) when the count that has the specific offense characteristic requiring such grouping has a lower offense level than the other count? (Option 1)

____ Yes

____ No

(B) Are you in favor of an amendment that would add a 2-level increase in §§2D1.1 and 2S1.1 when the defendant fails to report income exceeding $10,000 in any one year? (Option 2)

____ Yes

____ No

Comments:

AMENDMENT #43: Revises the multiple count rules in §3D1.4 to allow for count groups more nine or more levels less serious than the most serious count group to be assigned one-half unit each.

(A) Are you in favor of assigning one-half unit to each count group that is nine or more levels less serious than the most serious count group?

____ Yes

____ No

Comments:

AMENDMENT #44: Increases offense levels for theft of mail by two levels and creates a floor of level 14 if the offense involved an organized scheme to steal mail.

(A) Do you favor an amendment to §2B1.1(b)(4) that would increase the offense level for theft of mail by 2 levels in addition to the monetary value of the property stolen?

____ Yes

____ No

(B) Do you favor a new offense characteristic to §2B1.1 that would create a floor of level 14 if the offense involved an organized scheme to steal undelivered U.S. mail?

____ Yes

____ No

Comments:

AMENDMENT #45: Creates a new victim related adjustment to take into account more than one victim.

(A) Are you in favor of a new Chapter Three guideline (§3A1.4) that would address multiple victims?

____ Yes

____ No

Comments:

AMENDMENT #46: Adds language to §3B1.3, Abuse of Trust, that would include all postal employees.

(A) Do you favor a new application note under §3B1.3 that would assign a two-level increase to a postal employee who is convicted of theft, obstruction of mail, or embezzlement?

____ Yes

____ No

Comments:

AMENDMENT #52: Requires the sentencing court to sentence the defendant to straight probation, if eligible, without a confinement condition unless the court finds that imprisonment is required to achieve purposes of sentencing.

(A) Do you favor an amendment to §5B1.1 that would require the court to sentence the defendant in Zone A to straight probation, unless the finds that imprisonment is required to achieve the purposes of sentencing?

____ Yes

____ No

Comments:

AMENDMENT #56: Adds §3E1.1, Acceptance of Responsibility to the those amendments that are retroactive under §1B1.10. Also would authorize the court to reduce a sentence when a guideline has been changed(lowered), but not listed under §1B1.10.

(A) Do you favor the addition of the 1992 amendment of §3E1.1, Acceptance of Responsibility, to the list of retroactive guidelines?

____ Yes

____ No

Comments:

(B) Do you favor a change in §1B1.10 that would allow the court to reduce a sentence of a defendant if the guideline has been lowered, but the amendment is not listed under §1B1.10, and the court finds that such a reduction would be consistent with the purposes of sentencing?

____ Yes

____ No

Comments:

AMENDMENT #53: Simplifies application of related case rule in §4A1.2(a)(2).

(A) Are you in favor of this amendment that:

- would require separate counting of prior sentences whenever the offenses from which the sentences resulted were separated by intervening arrest; and

- require prior sentences for offenses not separated by an intervening arrest to be considered one sentence? (The length of the term of imprisonment determined, in the case of concurrent sentences, by the longest term of imprisonment or, in the case of consecutive sentence, by the aggregate term of imprisonment)

____ Yes

____ No

Comments:

AMENDMENT #54: Clarifies the term "instant offense" to include relevant conduct.

(A) Do you favor an amendment to §4A1.2(a)(1) that would add "and its relevant conduct" after "the instant offense?"

____ Yes

____ No

Comments:

AMENDMENT #55: Requires the court to impose a sentence at the top end of the guideline range for all career offenders under §4B1.1.

(A) Do you favor an amendment that would require the court to sentence a career offender to the top end of the imprisonment range?

____ Yes

____ No

Comments:

AMENDMENT #57: Clarifies the Commission's intent pertaining to the right of defendant to attack prior convictions collaterally at sentencing.

(A) Do you favor an amendment that clarifies the Commission's intent on the defendant's right to attack prior convictions collaterally at sentencing?

____ Yes

____ No

Comments:

AMENDMENT #61: Revises definition of "crime of violence", under §4B1.2, for purposes of career offender guidelines to include all burglaries. It also revised Application Note 2 to make it clear that "crime of violence" includes possession of a firearm by a felon.

(A) Do you favor the addition of all burglaries to the definition of "crime of violence" under Career Offender (§4B1.2)?

____ Yes

____ No

(B) Are you in favor of possession of a firearm by a felon being added to an offense considered a "crime of violence" under Career Offender (§4B1.2)?

____ Yes

____ No

Comments:

PROBATION OFFICERS ADVISORY GROUP
TO THE UNITED STATES SENTENCING COMMISSION

Ms. Francesca D. Bowman Deputy Chief U. S. Probation Officer District of Massachusetts	617-223-9188	1st Circuit
Mr. Thomas J. Downey Deputy Chief U. S. Probation Officer Southern District of New York	212-791-0218	2nd Circuit
Ms. Mary O'Neill Marsh Supervising U. S. Probation Officer Eastern District of Pennsylvania	215-597-7950	3rd Circuit
Mr. Thomas N. Whiteside Deputy Chief U. S. Probation Officer District of South Carolina	803-253-3330	4th Circuit
Mr. Jerry Denzlinger Deputy Chief U. S. Probation Officer Southern District of Texas	713-250-5266	5th Circuit
Mr. Billy D. Maples Deputy Chief U. S. Probation Officer Western District of Louisiana	318-226-5295	5th Circuit
Mr. Fred S. Tryles Supervising U. S. Probation Officer Eastern District of Michigan	313-766-5163	6th Circuit
Ms. Barbara Roembke Guideline Specialist, U. S. Probation Officer District of Indiana	317-226-6751	7th Circuit
Ms. Jay Meyer Guideline Specialist, U. S. Probation Officer District of Minnesota	612-348-1980	8th Circuit
Ms. Nancy I. Reims Deputy Chief U. S. Probation Officer Central District of California	213-894-3600	9th Circuit
Mr. Joshua M. Wyne Supervising U. S. Probation Officer District of Alaska	907-271-5492	9th Circuit

Mr. Robert W. Jacobs Deputy Chief U. S. Probation Officer District of Colorado	303-294-7000	10th Circuit
Mr. James B. Bishop Supervising U. S. Probation Officer Middle District of Florida	813-228-2901	11th Circuit
Mr. Robert C. Hughes, Jr. Deputy Chief U. S. Probation Officer Middle District of Georgia	912-752-8106	11th Circuit
Ms. Gennine Hagar U. S. Probation Officer District of Columbia	202-535-3106	D.C. Circuit
Ms. Magdeline E. Jensen Probation Administrator Probation Division Washington, DC	202-786-3554	Administrative Office
Mr. John S. Koonce, III Supervising U. S. Probation Officer Eastern District of North Carolina	919-343-4906	FPOA Representative

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

CHAMBERS OF
JAMES B. ZAGEL
JUDGE

TELEPHONE
312-435-5713
FTS-387-5713

March 17, 1993

The Honorable Ann C. Williams
United States District Judge
219 South Dearborn, Chambers 1988
Chicago, IL 60604

Dear Ann:

I have comments on three aspects of the proposed amendments. Actually, I have comments on others, but I care particularly about these three.

I. I disagree very strongly with the proposed amendments Nos. 1 and 35. I do not believe that the rule barring evidence of acquitted conduct ought to be adopted. If the standard of proof at sentencing hearings is to remain preponderance of the evidence for all or nearly all purposes, the standard should not be changed for prior acquitted conduct. The proposed amendment can only be founded on the theory that for this one sort of evidence proof beyond a reasonable doubt is required and estoppel occurs because there has been a prior judicial determination that such proof had not been made out. Why is there a different rule for criminal conduct which has not been charged (and for which defendant had no chance to be acquitted)? And what is acquittal? The failure to convict of a particular offense when a jury fails to decide it while convicting or acquitting of related offenses? As a matter of policy I also object and I do so because of cases like those of United States v. Fonner, 920 F.2d 1330 (7th Cir. 1990) and United States v. Masters, 978 F.2d 281 (7th Cir. 1992).

II. I agree with Amendments 23 and 29. The prior rule and its commentary were at war with each other as I noted in United States v. Odoms, 801 F. Supp. 59 (N.D. Ill. 1992). The Commission should propose this amendment, it is a better course of action than the efforts of courts to read into the guideline what is not there.

III. The proposals (24, 31, 47) to allow departure for substantial assistance without government recommendation are ones I would like to support but the administration of such a rule would be difficult. I foresee subpoenas against federal agencies and Assistant U.S. Attorneys in order to secure testimony about how valuable the assistance was. There is a real risk of prolonging hearings of and compromise of confidential information under this new rule. Suppose defendant X says he gave valuable information about dope dealer Y, what happens if the reason this was of no assistance is that Y is an undercover agent still in the field. Y has committed no crime so departure is not justified. Does the government have to reveal this?

Subst. assistance

Very truly yours,

James B. Zagel
District Judge

JBZ:fo
cc: John Steer, General Counsel
U.S. Sentencing Commission

UNITED STATES POSTAL SERVICE
ROOM 3100
475 L'ENFANT PLAZA SW
WASHINGTON DC 20260-2100

CHIEF POSTAL INSPECTOR
INSPECTION SERVICE

March 15, 1993

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Attention: Public Information

Gentlemen:

The U.S. Postal Service respectfully submits its comments on the 1993 proposed guideline amendments. As an overview, we disagree with the proposed guidelines on money laundering (Amendment 20) and the guideline commentary on public trust (Amendment 23), and request the adoption of the proposed amendments submitted by the Postal Service relating to the theft of mail (Amendment 44), and the public trust enhancement for offenses committed by postal employees (Amendment 46). In addition, we strongly urge the Commission to consider the future formulation of a "multiple victim" adjustment guideline (Amendment 45). Our comments are explained more fully in the following:

Proposed Amendment 20, § 2S1.1, § 2S1.2. We disagree with the proposed revisions to the money laundering guideline based on the statutory purpose of 18 U.S.C. §§ 1956, 1957. The legislative intent of these statutes is to create a separate crime offense to deter criminals from attempting to profit from their illegal activities and to impose a higher penalty for this type of criminal misconduct. To accomplish this, the statutes prescribe criminal penalties separate from and higher than those of the underlying criminal offense which gave rise to the monies, property or proceeds involved in the money laundering. This legislative intent would in effect be vitiated by the revision to the guideline. Because the underlying offense and the money laundering are two separate crimes, we believe the guidelines should likewise maintain this

separateness and that the concept of "closely related" offenses should not apply. The commentary of the proposed guideline also draws a distinction which is not supported by the legislative intent or statutory definitions of "actual money laundering" as compared to "other money laundering." Simply stated, we believe if the government proves the elements of the statute, the defendant should be sentenced accordingly, without a further analysis of the criminal intent by the sentencing court. In view of our concerns with these proposed amendments, we support the existing guidelines which provide for a separate and higher offense level for money laundering not tied to the offense level of the specified unlawful activity. For the above reasons, the Postal Service endorses the position of the Department of Justice to maintain higher levels for money laundering offenses.

* **Proposed Amendment 23, § 3B1.3.** We disagree with this proposed amendment's application to employees of the Postal Service, and submit in the alternative a revision to the commentary portion of this section which would make the public trust guideline specifically applicable to postal employees **(Amendment 46)**. Historically, postal employees have held a special fiduciary relationship with the American public because their personal correspondence is entrusted to the care and custody of the agency. This special trust is corroborated in the oath of employment and the long-standing federal criminal statutes which relate to the theft or obstruction of mail and embezzlement which apply exclusively to postal employees. In addition, these types of crimes significantly impair the Postal Service function and negatively impact on the public's trust in the institution.

Our proposed revision to the commentary would make the public trust guideline apply to employees of the Postal Service sentenced for theft or obstruction of United States Mail, (18 U.S.C. §§1703, 1709); embezzlement of Postal Service funds (18 U.S.C. §1711); and

theft of Postal Service property (18 U.S.C. §§1707, 641). To make this amendment comport to guideline commentary format, the statute citations are deleted. Application Note 1 is amended by inserting the following paragraph at the end:

> "This adjustment, for example, will apply to postal employees who abuse their position to steal or obstruct U.S. Mail, embezzle Postal Service funds, or steal Postal Service property."

It is our opinion the enhancement is justified because these crimes disrupt an important governmental function--the nation's postal system--as prescribed in § 5K2.7. Moreover, without the offense enhancement provided by § 3B1.3, the monetary value of the property damaged or destroyed may not adequately reflect the extent of the harm caused by the offense under similar rationale discussed in § 2B1.3, comment (n.4). For example, the theft or destruction of mail by employees of the Postal Service necessarily impacts numerous victims, while the total dollar loss may be minimal.

Our proposal clarifies that the special trust relationship a postal employee has with the public and its written correspondence is significantly different from that of the employment relationship of the ordinary bank teller as cited by example in §3B1.3, comment (n.1), of the current guideline. Adoption of our proposed amendment would also provide for consistency in the application of this guideline in light of several court decisions, United States v. Milligan, 958 F.2d 345 (11th Cir. 1992) (court held that a postal clerk who embezzled funds had occupied a position of trust); United States v. Lange, 918 F.2d 707 (8th Cir. 1990) (postal employee who had access to certified and Express Mail was in a position of trust); United States v. Arrington, 765 F. Supp. 945 (N.D.Ill 1991)(a casual mail handler

was not in a trust position), and obviate the need of detailed analysis by the court of the specific duties and responsibilities of the defendant as qualifying the particular position occupied as one of "public trust."

Proposed Amendment 44, § 2B1.1(b)(4). The current guidelines applicable to mail theft are based on the dollar value of the loss. Although the guideline increases the offense level if mail is involved, we do not feel this adequately addresses the seriousness of the offense and its impact on the victims and on the essential governmental function of mail delivery. The proposed amendments take these factors into consideration by initially increasing the offense level to a level 6, and then adding the appropriate level increase corresponding to the total dollar loss associated with the theft. In order to conform with similar guideline language, the amendment should be reworded to read:

> "If undelivered United States Mail was taken, increase by two levels. If the offense is less than level 6, increase to level 6."

In addition to this amendment to the mail theft guideline, we have proposed § 2B1.1(b)(8) to address theft schemes involving large volumes of mail. Frequently, these volume thefts are conducted as a gang-related crime to steal the mail and then fraudulently negotiate or use those items contained within. In most instances, a substantial volume of stolen mail is necessary to obtain a minimal number of checks, credit cards, negotiable instruments or other items of value. The dollar loss of these types of thefts does not accurately reflect the scope of the crime in terms of the number of victims affected and the operations of the government's postal system. Our proposed amendment would address the more serious nature of these schemes to steal large volumes of mail by increasing the offense level to a 14.

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EDISON ELECTRIC INSTITUTE

PETER B. KELSEY
Vice President,
Law and Corporate Secretary

March 15, 1993

The Honorable William W. Wilkins, Jr., Chairman
Members of the U.S. Sentencing Commission
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Chairman Wilkins and Members of the Commission:

The Edison Electric Institute ("EEI") is grateful for the opportunity to present comments to the Commission on the proposed amendments to the sentencing guidelines.[1] EEI is the association of electric companies. Its members serve 99 percent of all customers served by the investor-owned segment of the industry. They generate approximately 78 percent of all the electricity in the country and service 76 percent of all ultimate customers in the nation. Its members are pervasively regulated at the federal and state level in all aspects of their business. These electric utilities range in size from ones employing less than 100 employees to ones employing more than 10,000 employees. Our member companies have a real and direct interest in the content of the proposed amendments to the individual guidelines given enforcement trends toward the prosecution of corporate managers and supervisors.

I. Amendment No. 23, Abuse of Position of Trust

The Commission invites comment on a proposed amendment to § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).[2] The proposed amendment attempts to reformulate the definition of what constitutes a "special trust."

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[1] Sentencing Guidelines for United States Courts; Notice, 57 Fed. Reg. 62,832 (December 31, 1992)(hereinafter "Notice").

[2] Amendment No. 23, Notice at 62,842.

EEI believes that the proposed application note focuses too narrowly on a person's status in the employment context. In relevant part, the proposed note provides that:

> "Special trust" refers to a position of public or private trust characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than an employee whose responsibilities are primarily ministerial in nature.

EEI recommends that the reference to "professional or managerial discretion" be eliminated from the proposed amendment. This reference is likely to confuse a sentencing court because it focuses on employment-related abuses of trust and does not mention non-employment abuses of trust. There are numerous situations where a personal "special trust" is violated (for example, sexual abuse of a child by a relative or clergyperson). But such situations are not reflected in the proposed amendment.

Furthermore, the proposed amendment suggests that persons in professional or managerial positions in companies generally are in positions of trust that would warrant a sentence enhancement, provided that their positions "contributed in some significant way to facilitating the commission or concealment of the offense." This seems too casual a linkage between a person's status in a company and enhancement of that person's sentence. At a minimum, there should be some intent by an individual to use a position of special trust to further commission or concealment of an offense before this forms the basis for enhancing their sentence.

The proposed application note also should be clarified to ensure that the provision does not automatically imbue corporate managers with an aura of "special trust." For example, a corporate manager who is responsible for compliance with a particular area of the law should not be in a position of special trust with respect to violations of other areas of the law. The proposed amendment should require that the individual be in a position of special trust directly relevant to the underlying offense before this sentence enhancement is applicable.

Also, the trust should be one owed to the victim of the offense for which a sentence is being imposed, and should be reasonably relied on by the victim in the context of the offense. Corporate managers should not be liable for a perceived

special duty owed to the general public by them or their corporation. The special trust should arise directly between the individual and the victim of the crime before it can lead to sentence enhancement.

For all of these reasons, EEI would recommend the following as an alternative to Amendment No. 23:

> "Special trust" refers to violation of a duty of trust between the defendant and the victim or victims of an offense for which a sentence is being imposed. The duty of trust may arise from a fiduciary relationship or a position of substantial discretionary judgment that is legitimately given considerable deference by the victim. (In an employment context, such positions ordinarily are subject to significantly less supervision than those held by employees whose responsibilities are primarily ministerial in nature.) For this enhancement to apply, the violation of the duty of trust must have contributed in some significant way to facilitating the commission or concealment of the offense and not merely provided an opportunity that could have been afforded to other persons. Also, the defendant must have intended or known that the victim would rely on the duty of trust, and the victim must in fact have reasonably relied on that duty, in a way that contributed to the commission or concealment of the offense.

II. Issue For Comment No. 24 and Amendments Nos. 31 and 47, Substantial Assistance to Authorities

The Notice also contains an issue for comment and two proposed amendments regarding the elimination from § 5K1.1 of the requirement that the government make a motion requesting a departure from the guidelines before allowing a court to reduce a sentence as a result of substantial assistance by the defendant in the investigation or prosecution of another person.[3] EEI answers the question for comment in the affirmative and supports Amendments Nos. 31 and 47, which would allow the court to consider a departure from the guidelines for substantial assistance provided by a defendant at its own discretion, and urges the

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[3] Issue For Comment No. 24 and Amendments Nos. 31 and 47, Notice at 62,842, 62,848, and 62,853, respectively.

Commission to adopt the same amendment to § 8C4.1 of the Guidelines, which is the same provision as it applies to organizations.

There is a significant potential for unfairness when the prosecutor is given complete control over substantial assistance departures. Furthermore, the substantial assistance departure is currently the only ground for departure from the guidelines that requires a government motion before the court may consider it. Even if the amendment is adopted and a court is allowed to consider the issue at its own discretion, the government will still be the principal source of evidence regarding whether "substantial assistance" was in fact provided by the defendant. But prosecutors should not have sole discretion whether to raise the issue of substantial assistance for a court's attention, especially given that a prosecutor's exercise of this discretion generally is unreviewable. In order for this section to achieve its goal of encouraging defendants to aid law enforcement authorities in the prosecution of offenses, defendants must perceive that the section will be fairly applied. This requires courts to be able to consider the issue of substantial assistance of their own accord and in response to motions by defendants as well as in response to motions by prosecutors.

On a related subject, the limitations suggested by Issue for Comment No. 24 (i.e., must be a first offender and no violence must be associated with the offense) are unnecessary. Courts should be allowed to consider substantial assistance by defendants in all cases where such assistance has been rendered. First offender status and non-violent nature of the crime should be left as facts to be taken into account at the discretion of the court. They should not be used as a basis for universally limiting consideration of substantial assistance.

As noted above, § 8C4.1 of the Guidelines contains language that applies to the sentencing of organizations analogous to that contained in § 5K1.1, and it contains the identical governmental motion requirement. The purpose of the sections is the same. Therefore, an amendment to one should prompt an amendment to the other, as there is no policy justification for doing otherwise. Thus, EEI urges the Commission to strike the government motion requirement from both § 5K1.1 and § 8C4.1 of the guidelines.

III. Issue For Comment No. 30, Departures

Amendment No. 30 requests comment as to whether the language in Chapter One, Part A4(b) may be read to be overly restrictive of a court's ability to depart

from the guidelines.[4] EEI supports the suggestion made by the Committee on Criminal Law of the Judicial Conference of the United States that the language contained in Part A4(b) should be changed to the extent that it discourages departures by encouraging courts of appeals to find that sentences that depart from the guidelines are "unreasonable."[5]

While the language of Part A4(b) concedes that the initial guidelines will be the subject of refinement over time, and that the departure policy was adopted because "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision[,]" the language that follows nevertheless suggests that departures from the guidelines are improper.[6] The courts must be allowed to exercise reasonable judgment with respect to application of the guidelines, and must not be required to adhere inflexibly to specified types of departures and departure levels. At a minimum, EEI recommends that Part A4(b) be amended to strike the last sentence of the fourth paragraph and the last sentence of the fifth paragraph.

IV. Issue For Comment No. 32, First Time Offenders

The Commission has requested comment as to whether it should promulgate an amendment that would allow a court to impose a sentence other than imprisonment in the case of a first offender convicted of a non-violent or otherwise non-serious offense.[7] EEI believes that there should be a specific provision for departures in the sentencing of first offenders of non-violent offenses. Judges need this departure to prevent the possibility of offenders receiving punishment that does not fit the crime. This departure should be accomplished through providing an additional ground for departure in Chapter Five, Part K.

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[4] Issue For Comment No. 30, Notice at 62,848.

[5] Letter of Vincent L. Broderick, Chairman, Committee on Criminal Law of the Judicial Conference of the United States, to the Honorable William W. Wilkins, Jr., dated November 30, 1992.

[6] Federal Sentencing Guidelines Manual (1992 Ed.) at 6.

[7] Issue For Comment No. 32, Notice at 62,848.

V. Amendment No. 45, Multiple Victims

The United States Postal Service requests that the Commission create in Chapter Three, Part A, a new victim-related general adjustment to take into account increased harm caused when there is more than one victim.[8] The proposed amendment is as follows:

> If the offense affected more than one victim, increase the offense level by 2 levels. If the offense affected 100 victims or more, increase the offense by 2 levels for every 250 victims.

No. of victims	Increase in offense level
2 - 99	2
100-349	4
350-649	6
more than 650	8

The Postal Service specifically recommended that this departure be included as a victim-related adjustment applicable to all offenses involving multiple victims rather than limited to specific types of offenses.[9]

First of all, courts need to look to the statute and regulations that define the offense for which a defendant is being sentenced to determine whether "number of victims" is a relevant factor in sentencing. If the statute or regulations identify factors for the court to consider in setting the level of fine or imprisonment for an offense, and do not list "number of victims" as a relevant factor, it may not be appropriate for the court to consider. Furthermore, even if number of victims is a relevant factor, in many cases it will have been addressed by the prosecutor bringing multiple counts against the defendant. For the court to enhance the defendant's sentence based on "number of victims" in such cases would be to penalize the defendant twice for the same conduct.

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[8] Amendment No. 45, Notice at 62,853.

[9] Letter to the Honorable William W. Wilkins, Jr. from Chief Postal Inspector K.J. Hunter, dated November 27, 1992.

In addition, EEI is concerned that the proposed amendment would prove too vague and, thus, difficult for sentencing courts to apply. Specifically, the proposed amendment does not define under what circumstances an "affected" party would be deemed a victim or the degree to which a party would have to be "affected" in order to be deemed a victim. In this regard, EEI is particularly concerned about the impact of the proposed amendment on persons convicted of offenses involving the environment. In such cases, more than one individual may be affected by an offense, but this may not correlate to degree of actual harm experienced by any of those individuals, and the effects may be an indirect consequence of the conduct for which the defendant is being sentenced.

Moreover, unlike other adjustments in Chapter 3, Part A -- vulnerable victims, official victims, and restraint of victims -- the proposed amendment deals not with knowing conduct aimed at particular victims but with possible unforeseen impacts on unintended victims. While such an adjustment may be desirable when applied to specific offenses, particularly offenses intended to affect multiple victims, its application across a wide variety of offenses without such constraints would inject an unacceptable degree of uncertainty into the sentencing process.

Therefore, EEI recommends that the Commission reject the proposed amendment as being too broad and ill-defined. At a minimum, the Postal Service should be required to identify the types of offenses directly of concern to it in proposing the amendment, and the amendment should be limited to those types of violations. Also, even as to those types of violations, the Commission needs to provide guidance about who qualifies as a victim. Furthermore, courts should be instructed to consider whether "number of victims" is relevant under the statute and regulations being enforced and given the facts of the case, including the number of counts brought by the prosecutor and the defendant's state of mind in committing the offense.

Thank you for considering our views on these matters.

Very truly yours,

Peter B. Kelsey

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March 10, 1993

United States Sentencing Commission
ATTN: PUBLIC INFORMATION
One Columbus Circle North East
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Washington, D.C. 20002-8002

Re: Comment on Proposed Amendments

To The Honorable United States Sentencing Commission:

I write to you, in as brief a form as possible, to express my comments on the proposed amendments in the sentencing guidelines. The fact that I am an assistant federal public defender for approximately 13 years makes me both a well informed and biased source, of which I am sure you are cognizant.

I applaud and encourage the thought and effort made to amend the loss tables and deal with the problem of more "than minimal planning" insofar as it has resulted in disparate treatments and a considerable amount of litigation. With respect to the additional issues for comment in this section, I definitely believe that the loss tables should have fewer and larger ranges in the lower ends. The loss tables at the higher ends are so large as to be beyond my experience and have no opinion as to whether they need adjustment.

Although more work would need to be done, I would encourage the Commission to modify the definition and approach to a more than minimal planning enhancement as opposed to building it into the loss table or, alternatively, building it into the loss table further from the bottom ranges, maintaining the lesser enhancement as long as possible and perhaps adding a third and additional level increase at the far end.

With respect to redefining more than minimal planning, I do have some suggestions:

1. Build in a two level decrease for spur of the moment or sudden temptation conduct;

2. Do not provide for multiple victim enhancement until the number of victims has reached an appreciably large level i.e. 15 or 20 and perhaps make this enhancement an additional one or two levels at an additionally large number such as 40 or 50;

3. Require, by example, truly more than the ordinary conduct to commit the offense before an enhancement is added. Few if any types of fraud or theft escape the current definition.

The proposal with respect to U.S.S.G. § 3B1.2 (role in the offense) is also an improvement. I would suggest option one is the most preferable of the options under Note 7 reading as follows: Option 1 is prefered because it affords the sentencing judge the most flexibility in determining whether or not to apply the two level adjustment for minor role and, unlike option 2, does not repeat the Application Note position contained in Note 8 concerning burden of pursuasion.

The firearms amendments are mostly technical and it would be useful for the Commission to have a period where it does not amend the firearms guideline. I do believe that an appropriate differentiation can be made between different weapons including weapons that fall within 26 U.S.C. § 5845 and its various subdivisions. Whether the differentiation should be made by different offense levels, by placement of the sentence within a the guideline range, or by a Commission-guided departure, depends on the weapon involved. It would seem that a fully automatic machine gun is different from a sawed-off shotgun which is different from a sawed-off rifle which is different from other weapons such as tear gas "pen guns," all of which are prohibited in Title 26.

I have no great critism of the proposed amendment § 3B1.3 abuse of position of special trust or use of special skill. However, perhaps the time has come to separate these two concepts into separate adjustment sections. It would seem to me be best to leave special trust as a Chapter 3 adjustment with appropriate illustrations in the application notes rather than adding it as a specific offense characteristic in a hit or miss fashion to various guidelines relating to fraud or embezzlement or in general to the embezzlement guideline. Certainly the proposed amendment is superior to the additional issue for comment, particularly as it relates to deleting the example regarding "ordinary bank tellers".

The proposal relating to 5K1.1 - issue 24 - will apply to very few cases if it is intended to exclude "crimes of violence" where that concept includes drug offenses. It also has limited usefulness because of the exclusion of anyone who is not a "first offender".

At least it should include all category I offenders and perhaps all category I and category II offenders. The injustice which it is intended to address is not related or necessarily related to whether the defendant is category I or category VI, but the proposal is at least some improvement over the current requirement for a government motion.

I should add with respect to § 5K that I have, as have other attorneys, experienced cases in which this proposed amendment could well have made a difference.

With respect to the proposal number 25 relating to § 6B1.2 the idea is commendable. Perhaps a stronger word than "encourages" should be utilized. I would suggest a policy statement that requires the government to make such the disclosures at either option point and provides as a ground for downward departure the intentional failure of the government to do so. Experiences has taught that toothless platitudes rarely modify prosecutorial behavior in an adversary system.

The Commission should act on issue for comment number 40 relating to the mandatory minimum and distinction between cocaine and cocaine base. Significant support exists not only from the interjection of the Commissions expertise, but also other sectors of the criminal justice system for the elimination of this distinction.

Proposed numbers 44, 45 and 46 are all poor ideas, poor policy, and should not result in favorable action. They would increase unwarranted disparities and would not further the purposes of sentencing indicated by Congress.

Proposal number 57 submitted by the Department of Justice should not be acted upon. It is an attempt to accomplish exactly the opposite of what it purports to do. The Department of Justice obviously intends to utilize its proposed amendment, if it becomes the guideline, as the Commission's position which ought to be followed by the Courts in prohibiting attacks on prior convictions. It is my understanding that the Commission wishes to take no position and allow the courts to develop their own procedures. If the Commission does intend to take a position on this procedural question, it should study the matter, invite additional comment, and it is hoped, ultimately recommended that the courts permit collateral attacks on prior convictions utilized to enhance sentences.

I had promised to make this letter brief. There are many other things I could or should say, but will not. I will say that the last two cycles of amendments have been encouraging insofar as they have addressed problems of harshness and not simply been "fixes" of guidelines which appear to be too low to some other components of the criminal justice system.

Sincerely,

SCOTT F. TILSEN
Assistant Federal Defender

SFT/tmw

Abuse of Trust

National Association
of Manufacturers

James P. Carty
Vice President, Government Regulation,
Competition & Small Manufacturing

March 4, 1993

The Honorable William Wilkins
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Chairman Wilkins:

On behalf of the more than 12,000 members of the National Association of Manufacturers (NAM), we are submitting this comment letter in response to a request for comments that appeared in the December 31, 1992, *Federal Register*. We have confined our comments to Amendments # 23, 24, 31, 45 and 47.

Amendment # 23 -- Abuse of Position of Trust

It appears the intent of the amendment is to clarify that the Abuse of Position of Trust (Sec. 3B1.3) adjustment should be used only in certain narrow circumstances. As drafted, it is not clear the amendment achieves that goal. We believe the amendment wrongly focuses on the employment sphere to define the process of determining special trust cases. Although there are cases involving defendants who have abused their managerial or professional discretion, there are any number of cases outside the employment realm involving abuse of special trust. For example, sexual abuse of a minor by a "big brother" or "big sister" would clearly violate a special trust as would similar abuse of a parishioner by a clergyman, or a boy scout by his troop leader. None of these examples falls directly within the workplace, yet each plainly implicates relationships of special trust. To use the employment situation as a global explanation of abuse of special trust is, therefore, potentially confusing and could be misleading to a court. As an alternative, we recommend the following.

> " 'Special trust' refers to a position of public or private trust characterized by substantial discretionary judgment that is ordinarily given considerable deference. Positions of special trust are often within an employment context involving professional or managerial discretion, but may frequently fall outside the employment context. For this section to apply, the position of special trust must have contributed in some substantial way to facilitating the commission or concealment of the offense. This section will apply to a narrow class of

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where the trust relationship is special and where breach of that trust is ordinarily met with heightened societal opprobrium."

Amendments # 24, 31 and 47 -- Substantial Assistance to Authorities

Each of these amendments raises the legitimate issue of whether the government should be interposed as a "gatekeeper" between the defendant and the court on questions of fact bearing on sentence administration. At present, the question of whether the defendant has rendered substantial assistance to authorities can be placed before the court if and only if the government so moves. This ground for departure stands alone in requiring a government motion to put the issue before the court.

The NAM believes there is no compelling reason to treat this basis for departure different from all others. Although we are unaware of any empirical evidence suggesting that wrongdoing is occurring to an appreciable degree, the current system holds the potential for abuse. The prosecutor can act arbitrarily and capriciously toward the defendant, and can erect unreasonably high hurdles for agreeing to move for a reduction of sentence. It strikes us that the possibility for abuse is sufficiently great so as not to outweigh any countervailing need to retain the government in the role of "gatekeeper."

It is not sufficient to argue, furthermore, that the exclusive government motion is necessary because the government's testimony is crucial in arriving at a factual determination that the defendant has rendered substantial assistance. Current guidelines provide that "[s]ubstantial weight should be given to the government's evaluation of the extent of the defendant's assistance." Sec. 5K1.1, comment (n.3). There is thus an existing mechanism that assures that departures will occur only in cases where there is sufficient evidence that the defendant has in fact rendered substantial assistance.

To preclude abuse and assure fairness, the court should be permitted in all cases to consider a motion to depart by the defense as well as the government. We therefore believe that either amendment # 31 or 47 will accomplish the goal but that amendment # 24 is overly narrow in its application and would exclude such motions in far too many deserving cases.

Amendment # 45 Multiple Victims

Amendment # 45 would establish a new adjustment based upon the number of persons "affected" by the offense. We oppose its adoption. The language of the amendment is exceedingly and dangerously vague and the amendment introduces a novel concept into sentencing policy that is of questionable wisdom. Is an "affected" party a victim? Can one be "affected" and not be a victim? What is the definition of "affected." Can it entail emotional effects?

Focusing on the consequences of an offense is problematic. Punishment based on unforeseeable outcomes wrongly interjects chance into the criminal justice system and, as a result, undermines the purpose of sentencing guidelines. Cases involving multiple victims are currently, and should continue to be, dealt with by increasing the number of counts leveled against the defendant. See, e.g., Sec. 2N1.1(d)(1)(Tampering With Consumer Products).

We appreciate having the opportunity to comment. If we can be of any assistance in the future, please do not hesitate to call on us.

Sincerely,

James P. Carty
Vice President
Government Regulation
Competition and Small Manufacturing

United States District Court
Central District of California
751 West Santa Ana Boulevard
Santa Ana, California 92701

Chambers of
Alicemarie H. Stotler
United States District Judge

714 / 836-2055
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March 03, 1993

Judge Billy W. Wilkins, Jr.
Chairman
U. S. Sentencing Commission
One Columbus Circle, N.E., Ste. 2-500
Washington, D.C. 20002-8002

Re: 1993 Proposed Amendments

Dear Chairman Wilkins:

I wish you and the Commission and the Judicial Working Group a productive March 8th conference.

I submit herewith comments on the proposed amendments for the 1993 cycle. As always, silence is ambiguous and may signify one or more of the following: approval; no opinion; deference to others more knowledgeable; no experience; no clue. One almost overriding consideration governs my responses: everyone complains when changes occur and therefore only absolutely necessary changes should be made. Those, we recognize by the vague notion of "consensus," untoward appellate attention, and by the insights contained in comments by Sentencing Commission "consumers."

On separate pages, then, numbered to match with the number of the proposed amendment, I comment where (1) I cannot restrain myself; (2) where I feel certain that reasonable minds will differ and I want my vote recorded; (3) where I feel qualified to take issue with the need for any change at all; and, (4) where I disagree for reasons stated.

If any member of the Commission/staff reviewing these remarks wishes further explanation, please call.

Sincerely,

Alicemarie H. Stotler

Alicemarie H. Stotler
United States District Judge

Amendment 27

This is a vote for the **Synopsis.** I have not the time, patience, or skill to spin out each proposed change; but I like what the Synopsis says it will do.

These giant "healing" amendments are going to be scarce, I hope. Now that the Section 3582(c) "Motions for Modification" are upon us (primarily on account of the additional level for early acceptance of responsibility -- which motions, of course, do not beget sentence modification), the prospect of tinkerings with numerous substantive offense levels makes me nervous.

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March 10, 1993

United States Sentencing Commission
ATTN: PUBLIC INFORMATION
One Columbus Circle North East
Suite 2-500 - South Lobby
Washington, D.C. 20002-8002

Re: Comment on Proposed Amendments

To The Honorable United States Sentencing Commission:

I write to you, in as brief a form as possible, to express my comments on the proposed amendments in the sentencing guidelines. The fact that I am an assistant federal public defender for approximately 13 years makes me both a well informed and biased source, of which I am sure you are cognizant.

I applaud and encourage the thought and effort made to amend the loss tables and deal with the problem of more "than minimal planning" insofar as it has resulted in disparate treatments and a considerable amount of litigation. With respect to the additional issues for comment in this section, I definitely believe that the loss tables should have fewer and larger ranges in the lower ends. The loss tables at the higher ends are so large as to be beyond my experience and have no opinion as to whether they need adjustment.

Although more work would need to be done, I would encourage the Commission to modify the definition and approach to a more than minimal planning enhancement as opposed to building it into the loss table or, alternatively, building it into the loss table further from the bottom ranges, maintaining the lesser enhancement as long as possible and perhaps adding a third and additional level increase at the far end.

With respect to redefining more than minimal planning, I do have some suggestions:

1. Build in a two level decrease for spur of the moment or sudden temptation conduct;

2. Do not provide for multiple victim enhancement until the number of victims has reached an appreciably large level i.e. 15 or 20 and perhaps make this enhancement an additional one or two levels at an additionally large number such as 40 or 50;

3. Require, by example, truly more than the ordinary conduct to commit the offense before an enhancement is added. Few if any types of fraud or theft escape the current definition.

The proposal with respect to U.S.S.G. § 3B1.2 (role in the offense) is also an improvement. I would suggest option one is the most preferable of the options under Note 7 reading as follows: Option 1 is prefered because it affords the sentencing judge the most flexibility in determining whether or not to apply the two level adjustment for minor role and, unlike option 2, does not repeat the Application Note position contained in Note 8 concerning burden of pursuasion.

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Sincerely,

SCOTT F. TILSEN
Assistant Federal Defender

SFT/tmw

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January 26, 1993

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

Bill Osteen, Jr., has discussed with me his letter to you regarding the Section 4B1.1 career offender enhancement. I would like to second his proposal that the Government give notice that such an enhancement may be applied.

This would facilitate frank discussion between attorneys and their clients and between attorneys and U.S. Attorneys seeking to resolve cases.

As Bill notes, the Government has better and easier access to a defendant's record and this disclosure would not be an undue burden.

Sentences fashioned under the Guidelines are sufficiently stunning without the surprise application of this enhancement. Anything the Commission might do to alleviate this situation would be helpful to all parties concerned.

Very truly yours,

HARRISON, NORTH, COOKE & LANDRETH

A. Wayland Cooke

AWC:cak

United States District Court
Middle District of North Carolina
Post Office Box 3485
Greensboro, North Carolina 27402

Chambers of
William L. Osteen, Sr.
Judge

January 15, 1993

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D. C. 20004

Dear Judge Wilkins:

Not too long ago while I was still engaged in defense practice I realized that the "career offender guideline" posed a real difficulty in dealing with my clients. I should have mentioned it to the Sentencing Commission at the time, but for some reason failed to do so.

It was interesting recently to find that my son, Bill, has run into the same difficulty. I asked him to write for your consideration. He has done so and after reading his letter, I have no additional comments except that I concur completely with his analysis of the problem and suggested solution. This should not impose an additional effort upon the U. S. Attorney, but even if it does, when compared to the tremendous adverse effect on the defendant under the system, it seems that such effort could be justified.

Please give the enclosed letter the consideration which it richly deserves.

Thanks for all the good efforts your Commission brings to the sentencing process.

Sincerely,

William L. Osteen

William L. Osteen, Sr.

WLO,sr:ajv

Acceptance of Resp.

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January 13, 1993

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
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Washington, DC 20004

Dear Judge Wilkins:

I am writing to request that the Sentencing Commission consider amending the guidelines to correct what I believe is a difficult, if not unfair, situation under the career offender guideline.

Section 4B1.1 of the guidelines deals with the career offender. The penalties pursuant to that section result in greatly increased guideline ranges for certain defendants. It is my belief that a defendant should be given notice by the government prior to entry of plea or trial if such penalties may be imposed. This could be done pursuant to a framework similar to that required under 21 U.S.C. §841 and §851 for enhanced penalties.

I bring this to the Commission because of a recent difficulty encountered in one of my own cases. My client was charged with bank robbery. My preliminary calculations led me to believe a sentencing range of six to eight years was possible, unless the career offender enhancement applied. If applicable, my defendant's sentence could be in the 17 to 20 year range, close to the maximum possible. I was unable to advise my client effectively with respect to his alternatives.

Knowledge of a defendant's prior criminal record is a matter almost exclusively within the government's control prior to trial or plea. Neither a criminal defendant nor his counsel have access to resources such as the NCIC or other records of criminal convictions. Most defendants, as a practical matter, do not have a clear recollection of prior convictions. There is not sufficient time, prior to trial or plea, for a defense attorney to accurately investigate prior records particularly if a defendant has lived in another jurisdiction.

I recognize that the guidelines treat a defendant that accepts responsibility favorably. Nevertheless, acceptance is a factor determined following entry of a plea; a defendant is not assured of that reduction. Realistically, most defendants want to understand their maximum exposure in making a decision as to whether to plead or go to trial. Defense counsel wants to inform the defendant of his alternatives to the fullest extent possible.

Although the enhanced penalties pursuant to 21 U.S.C. §841 increase the minimum and maximum sentences applicable, I believe the notice theory contained therein should apply to §4B1.1 as well. There is no practical distinction between §841 and §4B1.1.

One of the problems defense attorneys run into if they recognize that the career offender provisions apply is that often a defendant cannot believe or accept their applicability after being so advised. Notice by the government prior to entry of a plea would alleviate that problem, at least in part.

Second, when a defendant is caught by surprise at the career offender adjustment in the presentence report, he is often antagonistic to both his lawyer and the system, and will subsequently seek appellate or other relief. I believe a notice requirement would alleviate this problem by giving a defendant advance notice of the stricter penalty.

Rather than cause more cases to go to trial, I believe prior notice of a career offender enhancement will induce more defendants to cooperate. It would give a defendant a tangible reason to believe he will receive such a sentence.

Even in cases in which the government failed to notify a defendant, criminal history points would be assessed to take into account the convictions; a trial court could depart upward if the career offender guideline was not noticed based on the trial court's discretion. I believe the trial court should have some discretion in dealing with these sentences.

It is my belief that such a provision of notification would promote more fairness in the criminal process, and lead to more informed pleas.

I further believe that such notice could be given with relatively little 'extra work' by the United States. Usually government agents will make some effort to ascertain a defendant's

record during the investigation. Following indictment, the probation office investigates a defendant's record for purposes of pretrial release. These probation records may or may not be disclosed to the defendant; if disclosed, they have to be returned to that office immediately following the detention hearing. The United States Attorney can order an NCIC check; any information contained therein which is unclear can be checked out quickly through law enforcement resources.

I realize courts have generally held that application of the career offender guidelines is not a basis for the defendant to withdraw his plea. I do not believe that such a holding means the current system cannot be changed to promote additional fairness.

My bank robbery case is awaiting resolution. I am still uncertain as to whether the career offender adjustment will apply. Before entry of the plea, the government ordered an NCIC check, but would not voice an opinion on the applicability of the career offender adjustment. One conviction noted a burglary arrest but said "adj. wth." I contacted an attorney in Florida; their investigator could only find four adult convictions which did not give rise to the career offender adjustment. My client assures me he only has one adult felony conviction for a crime of violence or drug offense. I remain uncertain. We will wait and see.

Thank you for your time and consideration.

Sincerely,

William L. Osteen, Jr.

William L. Osteen, Jr.

WLO:cam

Before the
UNITED STATES SENTENCING COMMISSION
One Columbus Circle, N.E., Suite 2-500
Washington DC 20002-8002
Attention: Public Information

----------X

In the Matter of

Proposed Amendment of the Sentencing Guidelines for the United States, Section 2F2.1, Applicable to Violations of the Computer Fraud and Abuse Act

----------X

TO: The Commission

COMMENTS OF THE SOCIETY FOR ELECTRONIC ACCESS

The Society for Electronic Access ("SEA") submits these comments in the above-captioned proceeding, which concerns the proposed amendments to the United States Sentencing Guidelines ("U.S.S.G.") concerning Computer Fraud and Abuse [57 Fed. Reg. 62832 (1992) (to be codified at U.S.S.G sec. 2F2.1) (proposed Dec. 31, 1992)]. We strongly urge you not to adopt these amendments because the penalties specified therein are unduly harsh, overly broad, and vague.

These amendments violate due process by providing harsher penalties for activities more properly related to computing than to crime. For example, proposed U.S.S.G. sec. 2F2.1.b.1 states:

"If the defendant altered information, increase by 2 levels"

where alteration is defined in Commentary #9 as including:

> "...all changes to data, whether the defendant added, deleted, amended or destroyed any or all of it."

It is almost impossible to use a computer without performing one or more of these functions. Merely logging on to another

computer fits--this definition of alteration because this changes the information kept in its system logs, even if the user never requested that a specific file or record be accessed. Furthermore, the effect of these data alterations may not be directly related to severity of a crime: if a voyeur looks at protected files and leaves a note telling that he or she was there, that is very different from a vandal's deletion of a credit file. Yet, under these amendments both situations are treated as activities of equal seriousness. It is absurd to think that the alteration itself, absent other factors, requires an increase in the severity of the minimum sentence, or that all alterations affect criminality equally.

These amendments violate due process by including overly broad standards for determining the severity of a crime. For example, proposed U.S.S.G. sec. 2F2.1.b.5 states:

> "If an offense was committed for the purpose of malicious destruction or damage, increase by 4 levels."

where malicious destruction or damage, as defined in Commentary #11:

> ". . . includes injury to business and personal reputations."

The effect of so broad a category of activity being contained in a single sentencing adjustment would be to group the trivial with the heinous, and punish them equally. Breaking into a person's computer account and publicly posting information which disrupts his or her ability to conduct business is very different matter

from copying and publicly posting materials from that person's account that simply make the person look foolish, yet the amendment groups these actions together as offenses of equal seriousness.

Furthermore, this language allows for the punishment of speech without requiring a determination that the speech does not enjoy the protection of the First Amendment. The Supreme Court has always erected extremely stringent standards for the kinds of speech that can be found unprotected by the First Amendment, and these amendments to the Sentencing Guidelines err by allowing speech to be punished if it is found to damage someone's "personal reputation" under less stringent standards of proof, which would be introduced at the sentencing, rather than at the trial itself.

These amendments violate due process by mandating overly harsh punishments. To use an example derived from the recent past (see Salinger v. Random House, 811 F.2d 90 (2d Cir.), cert. denied, 484 U.S. 890 (1987)), if a defendant (willfully and for the purposes of commercial advantage or private financial gain) wrote something for publication which included sections of J.D. Salinger's private correspondence, the defendant could be convicted of criminal copyright infringement, and fined. See 17 U.S.C. sec. 506 and 18 U.S.C. sec. 2319. It stretches the imagination, however, to suggest that if the defendant had either obtained or distributed these materials electronically, no matter how limited the scope of the distribution, this copyright

infringement would be transformed into a crime so severe that the defendant would, as a first time offender, face a sentence of fifteen to twenty-one (15-21) months in prison.

Proposed U.S.S.G. sec. 2F2.1.b.2 states:

> "...if the defendant disclosed protected information to the public by means of a general distribution system, increase by six levels."

where the definition of "general distribution system" as defined in Commentary #10 includes:

> "...electronic bulletin board and voice mail systems, newsletters and other publications, and any other form of group dissemination, by any means."

These amendments suggest that crimes for which the trial judge has heretofore had the latitude to impose probationary sentences or fines or both must now receive minimum sentences harsher than those mandated by the Federal Sentencing Guidelines for assault where the use of a dangerous weapon was threatened [U.S.S.G. sec. 2A2.3.a.1], sexual abuse of a ward [U.S.S.G. sec. 2A3.3.9.a] or trespassing on government property with a firearm [U.S.S.G. sec. 2B2.3.B.1 - .2]. Of all the potential violations of due process contained in these amendments, this potential for mandating unduly harsh sentences is the most shocking and the most clear.

In President Clinton's statement, "Technology for America's Economic Growth: A New Direction to Build Economic Strength" he says "Government telecommunication and information policy has not kept pace with new developments in telecommunications and computer technology. As a result, government regulations have

tended to inhibit competition and delay deployment of new technology." These amendments are part of that problem.

By simultaneously rendering the Guidelines both harsher and more vague, these amendments would create a chilling effect on perfectly legal uses of computers by private citizens, by creating an environment in which the potential criminality of an action would be impossible to ascertain in advance. Therefore, the SEA strongly urges you not to adopt the amendments to United States Sentencing Guidelines proposed at 57 Fed. Reg. 62832.

Respectfully submitted,

Society for Electronic Access
c/o Steven E. Barber
595 West End Avenue, Apt. 9D
New York, New York 10024
(212) 787-8421
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Date: March 15, 1993

Individual Signers

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March 15, 1993

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-9002
Attention: Public Information

Re: Proposed Amendent #59 to the Sentencing Guidelines for United States Courts, which creates a new guideline applicable to violations of the Computer Fraud and Abuse Act of 1988 (18 U.S.C. 1030)

Dear Commissioners:

The Electronic Frontier Foundation (EFF) writes to state our opposition to the new proposed sentencing guideline applicable to violations of the Computer Fraud and Abuse Act of 1988, 18 U.S.C. 1030 (CFAA). We believe that, while the proposed guideline promotes the Justice Department's interest in punishing those who engage in computer fraud and abuse, the guideline is much too harsh for first time offenders and those who perpetrate offenses under the statute without malice aforethought. In addition, promulgation of a sentencing guideline at the present time is premature, as there have been very few published opinions where judges have issued sentences for violations of the CFAA. Finally, in this developing area of the law, judges should be permitted to craft sentences that are just in relation to the facts of the specific cases before them.

The Proposed Guideline Is Too Harsh.

The proposed CFAA sentencing guideline, with a base offense level of six and innumerable enhancements, would impose strict felony liability for harms that computer users cause through sheer inadvertence. This guideline would require imprisonment for first time offenders who caused no real harm and meant none. EFF is opposed to computer trespass and theft, and we do not condone any unauthorized tampering with computers -- indeed, EFF's unequivocal belief is that the security of private computer systems and networks is both desirable and necessary to the maintenance of a free society. However, it is entirely contrary to our notions of justice to brand a computer user who did not intend to do harm as a felon. Under the proposed guideline, even a user who painstakingly attempts to avoid causing harm, but who causes harm nonetheless, will almost assuredly be required to serve some time in prison.

The proposed guideline, where the sentencing judge is given no discretion for crafting a just sentence based on the facts of the case, is too harsh on less culpable defendants, particularly first time offenders. As the Supreme Court has stated, the notion that a culpable mind is a necessary component of criminal guilt is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250 (1952). In the words of another court, "[u]sually the stigma of criminal conviction is not visited upon citizens who are not morally to blame because they did not know they were doing wrong." *United States v. Marvin*, 687 F.2d 1221, 1226 (8th Cir. 1982), *cert. denied*, 460 U.S. 1081 (1983).

There Is Not Yet Enough Caselaw to Warrant a Guideline.

The Sentencing Commission itself has recognized the importance of drafting guidelines based on a large number of reported decisions. In the introduction to the Sentencing Commission's *Guidelines Manual*, the Commission states:

> The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that were the basis for a

> significant number of prosecutions and sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions, and it applied sentencing ranges to each resulting category. In doing so, it relied upon pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented pre-sentence reports, the parole guidelines, and policy judgments.

United States Sentencing Commission, *Guidelines Manual*, Chap. 1, Part A (1991).

At the present time, there are only five reported decisions that mention the court's sentencing for violations of the Computer Fraud and Abuse Act. *See*, *United States v. Lewis*, 872 F.2d 1030 (6th Cir. 1989); *United States v. Morris*, 928 F.2d 504 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 72 (1991); *United States v. Carron*, 1991 U.S. App. LEXIS 4838 (9th Cir. 1991); *United States v. Rice*, 1992 U.S. App. LEXIS 9562 (1992); and *United States v. DeMonte*, 1992 U.S. App. LEXIS 11392 (6th Cir. 1992). New communications technologies, in their earliest infancy, are becoming the subject of precedent-setting litigation. Overly strict sentences imposed for computer-related fraud and abuse may have the effect of chilling these technologies even as they develop. Five decisions are not enough on which to base a guideline to be used in such an important and growing area of the law.

The Commission itself has recognized that certain areas of federal criminal law and procedure are so new that policy statements, rather than inflexible guidelines, are preferable. *See, e.g.*, United States Sentencing Commission, *Guidelines Manual*, Chap. 7, Part A (1990) (stating the Commission's choice to promulgate policy statements, rather than guidelines, for revocation of probation and supervised release "until federal judges, probation officers, practitioners, and others have the opportunity to evaluate and comment. . . ."). A flexible policy statement, rather than a specific sentencing guideline, is a more appropriate way to handle sentencing under the Computer Fraud and Abuse Act until there has been enough litigation on which to base a guideline.

Judges Must Be Permitted to Craft Their Own Sentences for Cases Involving Special Circumstances.

Individual sentencing decisions are best left to the discretion of the sentencing judge, who presumably is most familiar with the facts unique to each case. To promulgate an inflexible sentencing guideline, which would cover all crimes that could conceivably be prosecuted under the Computer Fraud and Abuse Act, is premature at this time.

As discussed above, there have only been five reported decisions where the Computer Fraud and Abuse Act has been applied. In three of these reported CFAA cases, the judges involved used their discretion and fashioned unique sentences for the defendants based on the special facts of the case. *See, Morris,* 928 F.2d at 506 (where the judge placed Defendant Morris on probation for three years to perform 400 hours of community service, ordered him to pay fines of $10,050, and ordered him to pay for the cost of his supervision at a rate of $91 a month); *Carron* at 3 (where the judge found that Defendant Carron's criminal history justified a sentence of 12 months incarceration followed by 12 months of supervised release and restitution to the two injured credit card companies); and *DeMonte* at 4 (where the trial court judge held that Defendant DeMonte's "extraordinary and unusual level of cooperation" warranted a sentence of three years probation with no incarceration). Judges must be permitted to continue fashioning sentencing that are just, based on the facts of a specific case.

Computer communications are still in their infancy. Legal precedents, particularly the application of a sentencing guideline to violations of the Computer Fraud and Abuse Act, can radically affect the course of the computer technology's future, and with it the fate of an important tool for the exchange of ideas in a democratic society. When the law limits or inhibits the use of new technologies, a grave injustice is being perpetrated. The Electronic Frontier Foundation respectfully asks the Commission to hold off promulgating a sentencing guideline for the Computer Fraud and Abuse Act until there are enough prosecutions on which to base a guideline.

Thank you in advance for your thoughtful consideration of our concerns. We would be pleased to provide the Commission with any further information that may be needed.

Sincerely yours,

Shari Steele

Shari Steele
Staff Attorney

The Electronic Frontier Foundation is a privately funded, tax-exempt, nonprofit organization concerned with the civil liberties, technical and social problems posed by the applications of new computing and telecommunications technology. Its founders include Mitchell Kapor, a leading pioneer in computer software development who founded the Lotus Development Corporation and developed the Lotus 1-2-3 Spreadsheet software.

CPSR

March 15, 1993

Chairman William W. Wilkins, Jr.
US Sentencing Commission
One Columbus Circle, NE
Suite 2-500
South Lobby
Washington, DC 20002-8002

Dear Mr. Chairman:

We are writing to you regarding the proposed amendments to sentencing guidelines, policy statements, and commentary announced in the Federal Register, December 31, 1992 (57 FR 63832). We are specifically interested in addressing proposed item 59, regarding the Computer Fraud and Abuse Act of 1988 (18 U.S.C. 1030).

CPSR is national membership organization of professionals in the computing field. We have a particular interest in information technology, including the protection of civil liberties and privacy. We have sponsored a number of public conferences to explore the issues involving computers, freedom, and privacy.[1]

We have also testified before the House of Representatives and the Senate regarding the federal computer crime law.[2] It is our position that the government must be careful not to extend broad criminal sanctions to areas where technology is

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1 See, e.g., The First Conference on Computers, Freedom & Privacy (IEEE Computer Society Press 1991), The Second Conference on Computer, Freedom & Privacy (Association for Computing Machinery 1992). A third report will soon be out on the third Conference on Computers, Freedom & Privacy. All three volumes contain "reports from the field" that may be helpful in understanding more fully the issues related to the protection of computer systems, the conduct of computer crime investigations, and the appropriate penalties for computer crime.

2 Computer Virus Legislation, Hearing before the Subcomm. on Criminal Justice, Comm. on the Judiciary, U.S. House of Rep., 101st Cong., 1st Sess. 62 (1989), The Computer Abuse Amendments Act of 1990, Hearing before the Subcomm. on Technology and the Law of the Comm. on the Judiciary, United States Senate, 101st Cong., 2d Sess. 62 (1990).

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rapidly evolving and terms are not well defined.[3] We believe ~~that~~ such efforts, if not carefully considered, may ultimately jeopardize the use of new information technology to promote education, innovation, commerce, and public life.

We also remain concerned that criminal sanctions involving the use of information technologies may unnecessarily threaten important personal freedoms, such as speech, assembly, and privacy. It is the experience of the computing profession that misguided criminal investigation and the failure of law enforcement to fully understand the use of computer technology will have a detrimental impact on the entire community of computer users.

For example, you may wish to review the recent decision of Steve Jackson Games v. Secret Service,[4] involving a challenge to the government's conduct of a particular computer crime investigation. The court found that the Secret Service's conduct "resulted in the seizure of property, products, business records, business documents, and electronic communications equipment of a corporation and four individuals that the statutes were intended to protect."[5] The court, clearly concerned about the government's conduct, recommended "better education, investigation, and strict compliance with the statutes as written."

Clearly, the decisions made by the Sentencing Commission regarding those factors that may increase or decrease a criminal sentence will have an important impact on how computer crime is understood and how the government conducts investigations. We therefore appreciate the opportunity to express our views on the propose changes to the guidelines for 18 U.S.C. 1030.

For the reasons stated below, it our belief that the proposed guidelines regarding the Computer Fraud and Abuse Act now under consideration by the Sentencing Commission place emphasis upon the wrong factors, and may discourage the use of computer technology for such purposes as publication, communication, and access to government information. For these reasons, CPSR hopes that the current proposal will not be adopted.

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3 S. Rep. 544, 101st Cong., 2d Sess. 4 (1990).

4 No. A-91-CA-346-SS (W.D. Tex. Mar. 12 1993).

5 Id. at 26-27.

The Proposed Guidelines Will have a Chilling Effect on Constitutionally Protected Activities

The proposed amendment would treat as an aggravating factor the alteration, obtaining, or disclosure of "Protected information." This term is defined in the proposed guidelines as "private information, non-public government information, or proprietary commercial information." The term is nowhere mentioned in the statute passed Congress.

We oppose this addition. It has been the experience of the computer profession that efforts to create new categories of information restriction invariably have a chilling impact on the open exchange of computerized data. For example, National Security Decision Directive 145, which gave the government authority to peruse computer databases for so-called "sensitive but unclassified information," was widely opposed by the computing community, as well as many organizations including the Information Industry Association and the American Library Association. The reason was that the new designation allowed the government to extend classification authority and to restrict the free flow of information and ideas.[6]

Clearly, this proposal to increase the sentence for a violation of a particular federal statute is not as sweeping as a Presidential order. Nonetheless, we believe that the problems posed by efforts to create new categories of computer-based information for the purpose of criminal sentencing will raise similar concerns as did NSDD-145. It is not in the interest of those who rely on information systems for the purpose of public dissemination to encourage the development of such classifications.

The proposed guidelines would also treat as an aggravating factor the alteration of public record information. This proposal may go directly against efforts to promote public access to electronic information and to encourage the use of computer networks for the conduct of government activities. For example, computer bulletin boards have been established by agencies, such as the Department of Commerce and Environmental Protection Agency, precisely for the purpose of encouraging public use of on-line services and to facilitate the administration of agency business.

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6 See Military and Civilian Control of Computer Security, Hearing before the Legislation and National Security Subcomm. of the Comm. on Government Operations, House of Rep., 101st Cong., 1st Sess. (1989).

Much of the problem may well be with the use of the term "alter" without any further discussion of the nature of the alteration. Computer systems are by nature interactive. Any user of a computer system "alters" the data on the system. System operators may control the status of a particular file by designating it as a "read only" file or a "read-write" file. When a file is "read only," a user may access the file but is technically unable to alter the files contents. However a file that is "read-write" may allow users to both review files and to alter them.

Certainly, there are many other factors that relate to computer system security, but this particular example demonstrates that in many instances altering a public file may in fact be the intended outcome of a system operator. Failing to distinguish between permissible and impermissible alterations of a computer file in the sentencing guidelines misses entirely the operation of many computer systems.

The proposed amendment would also discourage the publication of information in electronic environments. The amendment recommends that the sentence be increased by 4 levels where "the defendant disclosed protected information to any person" and by six levels where "the defendant disclosed protected information to the public by means of a general distribution system."

Both of these proposals would punish the act of publication where there is no economic advantage to the defendant nor any specific harm indicated. Such provisions could be used to discourage whistle-blowing in the first instance, and subsequent dissemination of computer messages by system operators in the second.[7]

For this reason, we strongly oppose the inclusion of comment 10 which states that a "general distribution system" includes electronic bulletin boards and voice mail systems. This particular comment could clearly have a chilling effect on operators of electronic bulletin boards who may become reluctant to disseminate information where such dissemination could be considered an aggravating factor for the purpose of the federal computer crime law.

Current guidelines

It is our view that the current guidelines are a reasonably fair articulation of the specific harms that might warrant additional stringency, at least in the area of computer crime. We believe that it is appropriate to impose additional sanction where there is "more than minimal

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7 See Steve Jackson v. Secret Service, supra.

planning" or "scheme to defraud more than one victim," as currently stated in the Guidelines. One of our concerns with the application of 18 U.S.C. 1030 after the decision in U.S. v. Morris, 928 F.2d 504 (2d Cir. 1991) is that the provision does not adequately distinguish between those acts where harm is intended and those where it is not. For this reason, provisions in the sentencing guidelines which help to identify specific harms, and not simply the disclosure of computerized information, may indeed be helpful to prosecutors who are pursuing computer fraud cases and to operators of electronic distribution systems.

For similar reasons, we support the current §2F1.1(4) which allows an upward departure where the offense involves the "conscious or reckless risk of serious bodily injury." Again, it is appropriate to impose a greater penalty where there is risk of physical harm

The Commission may wish to consider at some future date a provision which would allow an upward departure for the disclosure of personally identifiable data that is otherwise protected by federal or state statute. We believe that privacy violations remain an important non-economic harm that the Commission could address. For instance, the disclosure of credit reports, medical records, and criminal history records, by means of an unauthorized computer use (or where use exceeds authorization) may be an appropriate basis for the imposition of additional sanctions.

We suggest that the Commission also consider whether a downward departure may be appropriate for those defendants who provide technical information about computer security that may diminish the risk of subsequent violations of the computer fraud statute. Such a provision may lead to improvements in computer security and the reduced likelihood of computer-related crime.

We recognize that the Commission is currently considering factors that should be considered in the imposition of federal sentencing, and that this process should not be equated with the creation of new criminal acts. Nonetheless, the decisions of the Commission in this area may well influence subsequent legislation, and the ability of computer users to make use of information systems, to access government information, and to disseminate electronic records and files. It is for these reasons that we hope the Sentencing Commission will give careful consideration as to potential impact on the user community of these proposed changes to the federal sentencing guidelines.

We appreciate the opportunity to provide these comments to the Commission and would be pleased to answer any questions you might have. Please contact me directly at 202/544-9240.