Public Comment

Proposed Amendments

1993
VOLUME III

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Food and Drug Division
Rockville, MD 20857

March 12, 1993

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Mr. Courlander:

On behalf of the Food and Drug Administration ("FDA"), I wish to submit the following comments on proposed amendments to the sentencing guidelines for United States courts, published in 57 Fed. Reg. 62832 (1992).

Proposed Amendment Five:

(a) The FDA opposes proposed amendment five, which would eliminate from Sections 2B1.1 (theft) and 2F1.1 (fraud and deceit) "more than minimal planning" as a specific offense characteristic providing for a two-level increase in sentence. The amendment would also eliminate from Section 2F1.1 "a scheme to defraud more than one victim" as a specific offense characteristic requiring a two-level increase in sentence. Instead, the amendment would modify the loss tables in Sections 2B1.1 and 2F1.1 to incorporate gradually an increase for "more than minimal planning" with a two-level increase for losses in excess of $40,000.

The "more than minimal planning" and "scheme to defraud more than one victim" specific offense characteristics have special significance in offenses involving the public health and safety, which often consist of coordinated or carefully planned schemes to defraud that result in substantial non-monetary harm to consumers and to health patients. Indeed, fraud offenses frequently include planned efforts to conceal the wrongful conduct from regulatory agencies and from the public. Therefore, the FDA believes that these characteristics should remain as specific offense characteristics rather than being considered only in terms of economic loss under Sections 2B1.1 and 2F1.1.

(b) Under the heading "Additional Issues for Comment," the Notice also invites comment on various alternatives to proposed amendment five. The FDA opposes eliminating the "more than minimal planning" and "scheme to defraud" specific offense characteristics from Section 2F1.1, or any of the proposals to

otherwise alter the definition of "more than minimal planning" in Section 1B1.1. However, the agency strongly supports increasing the base offense level of Section 2F1.1, and other guidelines that contain an enhancement for "more than minimal planning," in recognition of the pervasiveness and seriousness of fraudulent criminal conduct. The agency also supports setting forth more examples of the application of "more than minimal planning" in fraud and theft cases, specifically including examples of fraud involving the manufacture, distribution, or use of food, drug, device, or cosmetic products.

The FDA believes that the current base offense level six in Section 2F1.1 is disproportionately low in comparison to other guideline offenses. In addition, the agency believes that the guidelines do not sufficiently reflect the serious, non-monetary harm that frequently results from fraud-related offenses within the purview of the Federal Food, Drug, and Cosmetic Act. Accordingly, while the FDA supports the proposal to restructure the loss tables for fraud offenses to provide higher offense levels for losses at the lower end of the loss table, the agency believes that the guidelines' offense levels should be substantially increased for health-related fraud offenses that do not result in substantial economic harm. One way to partially address this concern would be to adopt the proposals set forth in proposed amendment six and issue for comment (no. seven), as set forth below.

Proposed Amendment Six:

The FDA strongly supports proposed amendment six, which would amend Application Note 10 of Section 2F1.1 to (a) provide guidance for an upward departure in cases in which the fraud caused substantial non-monetary harm and to (b) include an example of a fraudulent blood bank operation. Other "guidance" examples of health-related fraud offenses warranting an upward departure would exist in the case of a pharmaceutical manufacturer that conducted or reported fraudulent or false testing to determine the identity, strength, quality, or purity of a drug, or of a person or persons that created, sold or dispensed a counterfeit drug. In each example, the quality or safety of the drug may be seriously deficient based on the improper or inadequate manufacturing operations or processes. Such offenses might result in substantial harm to innocent health victims that is not adequately addressed by considering economic loss alone.

Issue For Comment (No. Seven):

For the reasons set forth in the preceding two paragraphs, the FDA strongly supports amending Sections 2B1.1, 2B1.2, and 2F1.1 to identify specific offense characteristics for circumstances in which the "loss" does not fully capture the harmfulness and seriousness of the conduct, thereby warranting an increased offense level. In particular, the agency suggests establishing respective specific offense characteristics to provide for (a) a two-level increase (or level 13) for circumstances in which some or all of the harm caused by the offense was non-monetary, (b) a four-level increase (or level 24) when the defendant knowingly or recklessly endangered the health or safety of one or more persons, (c) a four-level increase (or level 24) when the offense involved the knowing or reckless risk of serious bodily injury or death to one or more persons, and (d) a six-level increase (or level 26) when the offense results in death. Alternatively, the FDA supports amending the commentary to these sections to include the above examples as circumstances in which an upward departure may be warranted.

Issue For Comment (No. 65):

The FDA supports amending Section 2F1.1 to include the risk of loss as a factor in determining the guideline range for fraud and related offenses when the amount of the risk is greater than the actual or intended loss. The risk of loss should increase the guideline range to the same extent as actual or intended loss, irrespective of whether or not the risk was reasonably foreseeable. Currently, Section 2F1.1 provides that the intended loss shall be used if it is greater than the actual loss. Presumably, this is to hold defendants accountable for the loss intended by their wrongful acts. The agency believes that defendants should likewise be held fully accountable for the risk of loss associated with their intentional wrongful acts.

Additional FDA Comments:

The FDA recommends that the Statutory Index (Appendix A), which specifies the guideline section or sections ordinarily applicable to the statute of conviction, be amended. With respect to the Federal Food, Drug, and Cosmetic Act, the current appendix lists Sections 2F1.1 and 2N2.1 as being applicable to offenses under 21 U.S.C. §333(a)(2), but only Section 2N2.1 as being applicable to 21 U.S.C. §§331, 333(a)(1), and 333(b). The agency believes that Section 2F1.1 is also applicable to offenses under 21 U.S.C. §§331, 333(a)(1), and 333(b) (as amended August 26, 1992), and that this information should be included as a Consolidation and Simplification of Chapter Two Offense Guidelines amendment.

Thank you for this opportunity to comment on the proposed amendments to the sentencing guidelines. If the Sentencing Commission has any questions concerning these comments, please feel free to contact me (301-443-4370) or James S. Cohen, Associate Chief Counsel for Enforcement (301-443-7272).

Sincerely,

Margaret Jane Porter
Chief Counsel
Food and Drug Administration

FEDERAL PUBLIC DEFENDER
ROOM 174, U.S. COURTHOUSE
MINNEAPOLIS, MN 55401

DANIEL M. SCOTT
FEDERAL PUBLIC DEFENDER
SCOTT F. TILSEN
KATHERIAN D. ROE
ANDREW H. MOHRING
ANDREA K. GEORGE
ROBERT D. RICHMAN

PHONE: (612) 348-1755
(FTS) 777-1755
FAX: (612) 348-1419
(FTS) 777-1419

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.

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

746 U.S. POST OFFICE
AND COURT HOUSE
5th AND MAIN STREET
CINCINNATI 45202-3980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

February 23, 1993

U. S. Sentencing Commission
One Columbus Circle, N. E., Suite 2-500
Washington, D. C. 20002-8002
Attention: Public Information

Dear Judge Wilkins

Attached hereto are personal comments regarding certain proposed guideline amendments. I have written a separate document for each of the issues on which I commented. Understand that the comments provided are only my own and are not representative of this agency or the Court for which I work.

Thank you for the opportunity to comment on the proposed amendments.

Sincerely

David E. Miller

David E. Miller, Deputy Chief
U. S. Probation Officer

746 U.S. POST OFFICE
AND COURT HOUSE
5th AND MAIN STREET
CINCINNATI 45202-3980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

Date: February 16, 1993

To: United States Sentencing Commission
Public Information

From: David E. Miller, Deputy Chief
U. S. Probation Officer

Re: More than minimal planning

The Commission should remove this as a specific offense characteristic from guidelines in which it is presently incorporated. There is vast disparity in the application of this factor and it is often a bone of contention for the Court to resolve at sentencing.

The intent of the Commission to take this factor into consideration by building it in to loss table when the loss increases means the factor will be adequately considered.

I also think the Commission should adopt an amendment that creates a specific offense characteristic that provides that if the offense, <u>including all relevant conduct</u>, involved a single opportunistic act, a 2 level decrease may be given. It is important the guideline or commentary emphasize all relevant conduct is to be considered in making this determination, otherwise controversy over it and the act underlying the offense of conviction will be rampant.

Making these changes will reduce the amount of time taken by all parties in the dispute resolution process; will more fairly penalize those at higher offense levels, and; will allow a reduction for the true situational offender, thus allowing the straight probation option more often for such defendants.

PACDL

POST OFFICE BOX 189
LIMA, PA 19037
(215) 566-8250
FAX (215) 566-8592

Pennsylvania Association of Criminal Defense Lawyers

NACDL Affiliate

March 12, 1993

Honorable William Wilkins, Jr.
Federal Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
South Lobby
Washington, DC 20002-8002

In Re: Proposed Amendments By The Practitioners Advisory Group

Dear Judge Wilkins:

The Board of Directors of the Pennsylvania Association of Criminal Defense Lawyers wishes to express our approval of the proposed amendments to the Federal Sentencing Guidelines as submitted by the Practitioners Advisory Group. As practitioners, we experience first-hand the impact of the Guidelines not only on our clients but on the entire judicial system.

In stating our support, we draw particular attention to the following:

Proposed Amendment 35. Treatment of acquitted conduct under §1B1.3 Relevant Conduct. PACDL prefers Option 1 yet recognizes that the majority of conduct deemed relevant conduct for sentencing purposes is generally not included in acquitted counts but is most often "uncharged conduct". Further, we believe that any conduct used for sentencing should meet the beyond a reasonable doubt standard and should be submitted to the trier of fact during trial.

✳ Proposed Amendment 36. Rule 11 procedure. PACDL supports the recommendation in this comments. It should also be noted that the Federal Court section of the Allegheny County Bar Association is recommending that the local rules for the Western District of Pennsylvania be amended to require a pretrial conference including the Government prosecutor, the defendant and the probation officer in order to disclose the facts and circumstances of the offense and the offender characteristics applicable to the Sentencing Guideline range.

Proposed Amendment 39. Reduction of offense level for drug quantity. PACDL supports the overall scheme of this proposed amendment and believes that a maximum offense level of 36 achieves the purpose of the Sentencing Guidelines system.

The proposed amendments by the Practitioners Advisory Group are a definite improvement upon the Federal Sentencing Guidelines as they presently exist. The input of attorneys who work with the Guidelines on "the front line" must always be given high priority. PACDL supports the efforts of the Advisory Group.

Very sincerely,

Caroline M. Roberto

Caroline M. Roberto
Board Member and Chair of the
Sentencing Committee

CMR:abs

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

Technical corrections to the proposed amendment are needed to clarify the application of the guideline for its purpose. The amendment would read as follows:

> 8. If the offense involved a scheme to steal multiple pieces of undelivered United States Mail and the offense level determined above is less than level 14, increase to level 14.

Proposed Amendment 45, (§ 3A1.4). The Postal Service remains committed to the principle of victims' rights and supports more guidelines which emphasize victim impact in the sentencing process. We believe the sentencing level should reflect the total harm caused by the defendant's criminal misconduct. Our proposed guideline accomplishes this by including a victim-related adjustment based on the number of victims. For example, in volume mail theft crimes, and in consumer fraud crimes, substantial numbers of victims are directly harmed. We believe that the number of victims impacted by the defendant's relevant conduct should warrant an increase in the offense level. Furthermore, we feel such a guideline should be applied to any offense which results in multiple victims for these reasons.

As proposed, our amendment would give a two-level increase for a crime which results in two or more victims; those crimes affecting more than 100 victims would be subject to an additional two-level increase for each 250 victims, up to a maximum eight-level increase.

Because our proposed amendment is a Chapter 3 adjustment, it would impact on other offenses beyond those which are postal related, which requires a more comprehensive analysis of multiple victim crimes. Accordingly, we urge the Commission to include the study and formulation of a multiple victim guideline as a priority issue for 1994.

Your consideration of these issues is appreciated. If additional information is needed, please contact me at (202) 268-4267.

Sincerely,

K. J. Hunter

K. J. Hunter

701 Pennsylvania Avenue, N.W.
Washington D.C. 20004-2696
Telephone 202-508-5620

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

FEDERAL PUBLIC DEFENDER
ROOM 174, U.S. COURTHOUSE
MINNEAPOLIS, MN 55401

DANIEL M. SCOTT
FEDERAL PUBLIC DEFENDER
SCOTT F. TILSEN
KATHERIAN D. ROE
ANDREW H. MOHRING
ANDREA K. GEORGE
ROBERT D. RICHMAN

PHONE: (612) 348-1755
(FTS) 777-1755
FAX: (612) 348-1419
(FTS) 777-1419

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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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".

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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.

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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

Specific Offense
Characteristics

University of Colorado at Boulder

School of Law

Campus Box 401
Boulder, Colorado 80309-0401
(303) 492-8047
FAX (303) 492-1200

March 12, 1993

Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002-8002

Re: Proposed Amendments 1 and 34

Dear Mr. Courlander:

I thank the Sentencing Commission for the opportunity to offer written comments on the Proposed Amendments to the Federal Sentencing Guidelines, dated January 12, 1993. My comments are directed exclusively to Proposed Amendments 1 and 34, both of which concern the "relevant conduct" provision of U.S.S.G. § 1B1.3.

For the past two years I have made a close study of the policy issues surrounding various practices of real-offense sentencing, not only within the federal system, but in states across the country. The results of that work have recently been published as *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 Stan. L. Rev. 523-73 (February 1993). (A reprint is enclosed.) Because the analysis of *Sentencing Facts* is pertinent to your present deliberations, I wanted to make it available to you.[1]

Proposed Amendment 1. I applaud the Commission's proposed amendment to § 1B1.3(c) that **"Conduct of which the defendant has been acquitted after trial shall not be considered under this section."** A number of states bar the use of acquittal conduct at sentencing, even while retaining a real-offense orientation to sentencing in other respects. *See State v. Marley*, 364 S.E.2d 133, 138-39 (N.C. 1988); *State v. Cote*, 530 A.2d 775, 783-85 (N.H. 1987); *McNew v. State*, 391 N.E.2d 607, 612 (Ind. 1979). Still other states forbid the consideration of acquittal conduct as part of their general approach of conviction-offense sentencing. *See Sentencing Facts*, 45 Stan. L. Rev. at 535-41 (surveying the experience of three state guidelines systems). *See also id.* at 552 ("Among the recommendations in this article, the foremost is the restoration of the legal force of acquittals at sentencing through a prohibition of the consideration of facts embraced in charges for which the defendant has been acquitted").

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[1] Also, since 1989 I have served with my father as Co-Reporter to the American Bar Association's effort to promulgate a third edition of its *Criminal Justice Standards for Sentencing Alternatives and Procedures*, which were adopted formally by the ABA on February 9, 1993. This letter, however, represents my own views and not necessarily those of the ABA.

In conjunction with the proposed amendment to § 1B1.3(c), I suggest a parallel amendment within Part K ("Departures") -- perhaps in the policy statement of § 5K2.0, perhaps in a new policy statement -- providing that **"Conduct of which the defendant has been acquitted after trial shall not be considered as grounds for departure from the guidelines."** I recognize that this suggestion conflicts with Proposed Amendment 1 insofar as the Commission would amend § 1B1.3, comment (n. 11) to provide that acquittal conduct *may* provide basis for departure in an exceptional case. The Commission proposal, to this extent, would permit the result in *United States v. Juarez-Ortega*, 866 F.2d 747 (5th Cir. 1989) (per curiam), and similar cases. As outlined in *Sentencing Facts*, 45 Stan. L. Rev. at 531-33, 550-52, the policies supporting a bar on acquittal conduct at sentencing extend equally to departure and to guideline sentences. On this ground, I would delete the second sentence of proposed § 1B1.3 comment (n. 11).

Proposed Amendment 34. The Commission has invited comment on a further amendment to § 1B1.3 as submitted by the American Bar Association's Sentencing Guidelines Committee (the "SGC amendment"). The SGC amendment would **"restrict the court's consideration of conduct that is relevant to determining the applicable guideline range to (A) conduct that is admitted by the defendant in connection with a plea of guilty or nolo contendere and/or (B) conduct that constitutes the elements of the offense of which the defendant was convicted."** I wish to comment in favor of the SGC amendment, which should be adopted in addition to Proposed Amendment 1.

First, the SGC amendment would alter the basic operation of § 1B1.3, changing it from a modified "real-offense" provision into a modified "conviction-offense" provision. The policy choices relevant to such a decision are complex. In *Sentencing Facts*, 45 Stan. L. Rev. at 547-65, I have argued that the conviction-offense program is far preferable to the real-offense alternative. I do not reproduce that argument here. I will note, however, that state guidelines jurisdictions have been uniform in their endorsement of conviction-offense sentencing. *See* Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 Fed. Sent. Rptr. 355, 356-57 (June 1992) (recommending that the federal commission adopt a conviction-offense scheme); *Sentencing Facts*, 45 Stan. L. Rev. at 535-41.

Finally, the SGC amendment is consistent with the newly adopted ABA Criminal Justice Standards, *Sentencing Alternatives and Procedures* (3d ed., approved February 9, 1993). The applicable Standard, § 18-3.6, provides as follows:

Standard 18-3.6. Offense of conviction as basis for sentence.

The legislature and the agency performing the intermediate function [e.g., the sentencing commission] should provide that the severity of sentences and the types of sanctions imposed are to be determined by sentencing courts with reference to the offense of conviction in light of defined aggravating and mitigating factors. The offense of conviction should be fixed by the charges proven at trial or established as the factual basis for a plea of guilty or nolo contendere. Sentence should not be based upon the so-called "real offense," where different from the offense of conviction.

* *

In conclusion, Proposed Amendment 1 represents a significant improvement upon existing law, although its reach should be extended to departure sentences. Proposed Amendment 34 is also an important advance, and should be adopted in addition to Proposed Amendment 1.

Sincerely,

Kevin R. Reitz
Associate Professor of Law

VIA FEDERAL EXPRESS

cc: Members of the United States Sentencing Commission

PACDL

Pennsylvania Association of Criminal Defense Lawyers

POST OFFICE BOX 189
LIMA, PA 19037
(215) 566-8250
FAX (215) 566-8592

NACDL Affiliate

March 12, 1993

Honorable William Wilkins, Jr.
Federal Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
South Lobby
Washington, DC 20002-8002

In Re: Proposed Amendments By The Practitioners Advisory Group

Dear Judge Wilkins:

The Board of Directors of the Pennsylvania Association of Criminal Defense Lawyers wishes to express our approval of the proposed amendments to the Federal Sentencing Guidelines as submitted by the Practitioners Advisory Group. As practitioners, we experience first-hand the impact of the Guidelines not only on our clients but on the entire judicial system.

In stating our support, we draw particular attention to the following:

* Proposed Amendment 35. Treatment of acquitted conduct under §1B1.3 Relevant Conduct. PACDL prefers Option 1 yet recognizes that the majority of conduct deemed relevant conduct for sentencing purposes is generally not included in acquitted counts but is most often "uncharged conduct". Further, we believe that any conduct used for sentencing should meet the beyond a reasonable doubt standard and should be submitted to the trier of fact during trial.

Proposed Amendment 36. Rule 11 procedure. PACDL supports the recommendation in this comments. It should also be noted that the Federal Court section of the Allegheny County Bar Association is recommending that the local rules for the Western District of Pennsylvania be amended to require a pretrial conference including the Government prosecutor, the defendant and the probation officer in order to disclose the facts and circumstances of the offense and the offender characteristics applicable to the Sentencing Guideline range.

Proposed Amendment 39. Reduction of offense level for drug quantity. PACDL supports the overall scheme of this proposed amendment and believes that a maximum offense level of 36 achieves the purpose of the Sentencing Guidelines system.

The proposed amendments by the Practitioners Advisory Group are a definite improvement upon the Federal Sentencing Guidelines as they presently exist. The input of attorneys who work with the Guidelines on "the front line" must always be given high priority. PACDL supports the efforts of the Advisory Group.

Very sincerely,

Caroline M. Roberto

Caroline M. Roberto
Board Member and Chair of the
Sentencing Committee

CMR:abs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH, PENNSYLVANIA 15219

CHAMBERS OF
DONALD E. ZIEGLER
U.S. DISTRICT JUDGE
412-644-3333

March 10, 1993

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

Dear Judge Wilkins:

Re: United States Sentencing Guidelines

I am responding to the invitation of the Sentencing Commission to comment on the proposed amendments to the Guidelines and the proposals of various groups. I have served as a state court trial judge for five years and a federal district court judge for 15 years in a metropolitan area. Hence, I bring to my work a fair understanding of the best and worst of both criminal justice systems in reviewing the Proposed Guideline Amendments. In my judgment, the federal sentencing guidelines are inferior to the state court guidelines in Pennsylvania, and therefore I have scanned the Proposed Amendments in an attempt to select the amendments that will improve the federal sentencing scheme.

Proposed Guideline Amendment No. 1, Pg. No. 1 should be adopted as urged by the Practitioners Advisory Group in Option 1 at Pg. 56. Most citizens and virtually every juror would be shocked to learn that a court is required to include conduct in the sentencing equation that their representatives have found not proven by the prosecution. In addition, any exception to a complete bar of such evidence strikes most informed observers as unfair and one-sided. Prior to the guidelines, federal trial judges did not consider acquitted conduct at the time of sentencing, and the supporters of the guidelines have failed to sustain their burden of proving that § 1B1.3, as constituted, has had any deterrent effect upon aberrant conduct, or has promoted uniformity in sentencing.

Proposed Guideline Amendment No. 10, Pg. 20 should be adopted to promote uniformity of law and introduce common sense in a difficult area of sentencing. The inclusion of uningestible mixtures in the weight of a controlled substance promotes public cynicism and contempt by the offender. It also leads to grossly disproportionate sentences in certain cases and therefore undermines the foundation on which the guidelines are bottomed.

Proposed Amendments 29 and 30 (Judicial Conference) are long overdue. The members of the Commission and staff are fond of stating at various Circuit Judicial Conferences and in other fora that departures are authorized in appropriate cases under the guidelines. The courts of appeals are often blamed by members of the Commission for being too rigid in interpreting the departure provisions. The Criminal Law Committee of the Judicial Conference has now provided the Sentencing Commission with the opportunity to stand up and be counted on this issue.

Proposed Amendments 31, 32 and 33 (American Bar Association) are progressive proposals that recognize that prisons are limited resources that should be reserved for the most serious offenders. They also recognize that for many non-violent offenders there are effective alternative sentences. For many years prior to the guidelines, I kept a record concerning the number of offenders that violated a probationary sentence. The number of violators totalled 15% This means that 85% of the defendants did not violate probation and for these offenders a non-prison sentence was successful, effective and obviously less expensive.

Proposed Amendments 37 and 38 (Practitioners Advisory Group) are sensible and deserve adoption. They advance uniformity of application and fairness for offenders who do not profit from an offense. This is especially important for non-violent offenders for whom alternatives to total confinement may be entirely appropriate.

Amendment No. 40 (Practitioners Advisory Group) correctly captures the disparate impact of the guidelines upon minorities. The 100 to 1 quantity ratio is irrational and leads to unfair sentences. Quantity based sentencing involving crack cocaine produces sentences, in many cases, that are harsh, have no deterrent impact and are grossly disproportionate. The same reasoning applies to Amendment No. 50 (Federal Offenders Legislative Subcommittee). Congress could not have intended such results.

Thank you for giving me the opportunity to comment on the matters pending before the Sentencing Commission.

Yours very truly,

Donald E. Ziegler

Donald E. Ziegler

ef

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
FTS / 799-2055

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 1

§ 1B1.3 (c) should definitely be adopted.

Application Note 11 contains an unnecessary and undesirable second sentence. Absent direction about what constitutes an "exceptional case" for purposes of §1B1.3(c), this sentence about "basis for an upward departure" injects another uncertainty where, finally, something in these Guidelines can be declared certain.

LAW OFFICES OF
RITCHIE, FELS & DILLARD, P.C.
SUITE 300, MAIN PLACE
606 W. MAIN STREET
P. O. BOX 1126
KNOXVILLE, TENNESSEE 37901-1126

ROBERT W. RITCHIE
CHARLES W. B. FELS
W. THOMAS DILLARD
DAVID M. ELDRIDGE

WAYNE A. RITCHIE II
KENNETH F. IRVINE, JR.

TELEPHONE
615-637-0661
FAX
615 524-4623

February 25, 1993

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

Dear Sentencing Commission:

I have reviewed with great interest your 1993 Proposed Amendments to the Sentencing Guidelines. The opportunity to express my concerns, on a few of the proposed amendments, is greatly appreciated. This particular group of amendments addresses several important areas:

A. Relevant Conduct: Amendments #1 and 35 propose two different ways to deal with acquitted conduct. Amendment #35, option 1, proposes a total ban on the use of acquitted conduct. I personally favor this approach. In addition to my personal preference, this is an area that I have discussed with numerous people. Lawyers and non-lawyers alike are often shocked when they learn that conduct, for which a defendant is acquitted, can still be used as relevant conduct. It is fundamental to our system of justice that persons acquitted of criminal charges are not directly or indirectly punished for that conduct.

B. Substantial Assistance: Amendments #24, 31, and 47 suggest several ways to change the current system for determining when substantial assistance has been rendered. This is an area which should be decided by the sentencing court after the government has had an opportunity to state its position. Without question the government's position should be given careful consideration but the ultimate decision should be the court's. It has been my experience that "substantial assistance" varies from one U.S. Attorney's Office to the next and even from one AUSA to the next. Also based on my experiences the decision not to move for a downward departure, based on substantial assistance, has occasionally been arbitrary.

C. Specific Offender Characteristics: Amendment # 29 would give the sentencing courts some flexibility in fashioning an appropriate sentence. While uniformity is an important objective, it should not be the only consideration.

D. Sentencing Options; Non-violent, first offenders: Amendment # 32 would also give sentencing courts more flexibility. Of the two options suggested in this amendment, it seems that an additional ground for departure would be the most effective way to reach this type of offender.

While many other proposed amendments are equally deserving of comment, I am going to limit myself to the four listed above. If the Commission wishes for any additional input from me I am available at your convenience.

Sincerely yours,

Kenneth F. Irvine Jr.

KENNETH F. IRVINE, JR.

Executive Director and Administrator
Charles and Pauline Sullivan

NATIONAL OFFICE:
PO Box 2310
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!

Role in the Offense

FEDERAL PUBLIC DEFENDER
ROOM 174, U.S. COURTHOUSE
MINNEAPOLIS, MN 55401

DANIEL M. SCOTT
FEDERAL PUBLIC DEFENDER
SCOTT F. TILSEN
KATHERIAN D. ROE
ANDREW H. MOHRING
ANDREA K. GEORGE
ROBERT D. RICHMAN

PHONE: (612) 348-1755
(FTS) 777-1755
FAX: (612) 348-1419
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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

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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

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
FTS / 799-2055

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

Amendments 8, 9, 11, 39, 48, and 60

The mere existence of all these options suggests that changes concerning greater latitude for minimal criminal participation (and therefore less harsh sentences) and, possibly, a distinction among offenders involved with "less dangerous" types of controlled substance are widely thought to be desirable.

Hearing the discussion of the members of the Working Group is essential to be able to cast a well-informed vote on any of these. At least one, however, seems unnecessary, and that is **Amendment 60**. One can only infer that "ghost" co-defendants have been invoked so as to justify comparative role status in some single-defendant cases.

Amendments 9 and 39 are more extensive in their reach than **Amendment 8**, but they are more complicated. If the Working Group concludes that emphasis on the role of firearms is required, then **Amendment 9** is on target.

Adoption of **Amendment 8** and possibly **Amendment 48** would show movement in the apparently desirable direction. We could work with cases under the refined definitions of "mitigated role" defendants and those whose offenses do not concern heroin and cocaine, and see if the goal for more "individualized" sentences might be achieved.

Finally, I find **Amendment 11** arbitrary. I think it was meant to be, but I prefer *status quo*.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH, PENNSYLVANIA 15219

CHAMBERS OF
DONALD E. ZIEGLER
U.S. DISTRICT JUDGE
412-644-3333

March 10, 1993

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

Dear Judge Wilkins:

Re: United States Sentencing Guidelines

I am responding to the invitation of the Sentencing Commission to comment on the proposed amendments to the Guidelines and the proposals of various groups. I have served as a state court trial judge for five years and a federal district court judge for 15 years in a metropolitan area. Hence, I bring to my work a fair understanding of the best and worst of both criminal justice systems in reviewing the Proposed Guideline Amendments. In my judgment, the federal sentencing guidelines are inferior to the state court guidelines in Pennsylvania, and therefore I have scanned the Proposed Amendments in an attempt to select the amendments that will improve the federal sentencing scheme.

Proposed Guideline Amendment No. 1, Pg. No. 1 should be adopted as urged by the Practitioners Advisory Group in Option 1 at Pg. 56. Most citizens and virtually every juror would be shocked to learn that a court is required to include conduct in the sentencing equation that their representatives have found not proven by the prosecution. In addition, any exception to a complete bar of such evidence strikes most informed observers as unfair and one-sided. Prior to the guidelines, federal trial judges did not consider acquitted conduct at the time of sentencing, and the supporters of the guidelines have failed to sustain their burden of proving that § 1B1.3, as constituted, has had any deterrent effect upon aberrant conduct, or has promoted uniformity in sentencing.

Proposed Guideline Amendment No. 10, Pg. 20 should be adopted to promote uniformity of law and introduce common sense in a difficult area of sentencing. The inclusion of uningestible mixtures in the weight of a controlled substance promotes public cynicism and contempt by the offender. It also leads to grossly disproportionate sentences in certain cases and therefore undermines the foundation on which the guidelines are bottomed.

Proposed Amendments 29 and 30 (Judicial Conference) are long overdue. The members of the Commission and staff are fond of stating at various Circuit Judicial Conferences and in other fora that departures are authorized in appropriate cases under the guidelines. The courts of appeals are often blamed by members of the Commission for being too rigid in interpreting the departure provisions. The Criminal Law Committee of the Judicial Conference has now provided the Sentencing Commission with the opportunity to stand up and be counted on this issue.

Proposed Amendments 31, 32 and 33 (American Bar Association) are progressive proposals that recognize that prisons are limited resources that should be reserved for the most serious offenders. They also recognize that for many non-violent offenders there are effective alternative sentences. For many years prior to the guidelines, I kept a record concerning the number of offenders that violated a probationary sentence. The number of violators totalled 15% This means that 85% of the defendants did not violate probation and for these offenders a non-prison sentence was successful, effective and obviously less expensive.

Proposed Amendments 37 and 38 (Practitioners Advisory Group) are sensible and deserve adoption. They advance uniformity of application and fairness for offenders who do not profit from an offense. This is especially important for non-violent offenders for whom alternatives to total confinement may be entirely appropriate.

Amendment No. 40 (Practitioners Advisory Group) correctly captures the disparate impact of the guidelines upon minorities. The 100 to 1 quantity ratio is irrational and leads to unfair sentences. Quantity based sentencing involving crack cocaine produces sentences, in many cases, that are harsh, have no deterrent impact and are grossly disproportionate. The same reasoning applies to Amendment No. 50 (Federal Offenders Legislative Subcommittee). Congress could not have intended such results.

Thank you for giving me the opportunity to comment on the matters pending before the Sentencing Commission.

Yours very truly,

Donald E. Ziegler

Donald E. Ziegler

ef

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
FTS / 799-2055

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

Amendments 29 and 30

Amendment 29 presents this direct question to the Sentencing Commission: do you want to be more popular with the federal judiciary? Then, adopt the proposed third paragraph for § 5H1.1. Do you wish, instead, to declare a national policy for sentencing offenders and punishing offenses on an objective basis? Then turn down this amendment.

Unpopular though it is, I decline to endorse the JCUS Committee's suggestion. Every judge's sense of justice is different and will predictably vary given even the same case. Every judge notes these "5H" factors anyway but may or may not let them sway her/him. When the factors mount up to that judge's threshhold, then that judge is already departing anyway. While I tend to agree with Judge Becker that perhaps judges erroneously feel that they are restrained from departing when they might wish, this amendment does not provide a "remedy."

Amendment 30 should likewise be rejected.

LAW OFFICES OF
RITCHIE, FELS & DILLARD, P.C.
SUITE 300, MAIN PLACE
606 W. MAIN STREET
P. O. BOX 1126
KNOXVILLE, TENNESSEE 37901-1126

ROBERT W. RITCHIE
CHARLES W. B. FELS
W. THOMAS DILLARD
DAVID M. ELDRIDGE

WAYNE A. RITCHIE II
KENNETH F. IRVINE, JR.

TELEPHONE
615-637-0661
FAX
615 524-4623

February 25, 1993

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

Dear Sentencing Commission:

I have reviewed with great interest your 1993 Proposed Amendments to the Sentencing Guidelines. The opportunity to express my concerns, on a few of the proposed amendments, is greatly appreciated. This particular group of amendments addresses several important areas:

A. Relevant Conduct: Amendments #1 and 35 propose two different ways to deal with acquitted conduct. Amendment #35, option 1, proposes a total ban on the use of acquitted conduct. I personally favor this approach. In addition to my personal preference, this is an area that I have discussed with numerous people. Lawyers and non-lawyers alike are often shocked when they learn that conduct, for which a defendant is acquitted, can still be used as relevant conduct. It is fundamental to our system of justice that persons acquitted of criminal charges are not directly or indirectly punished for that conduct.

B. Substantial Assistance: Amendments #24, 31, and 47 suggest several ways to change the current system for determining when substantial assistance has been rendered. This is an area which should be decided by the sentencing court after the government has had an opportunity to state its position. Without question the government's position should be given careful consideration but the ultimate decision should be the court's. It has been my experience that "substantial assistance" varies from one U.S. Attorney's Office to the next and even from one AUSA to the next. Also based on my experiences the decision not to move for a downward departure, based on substantial assistance, has occasionally been arbitrary.

C. Specific Offender Characteristics: Amendment # 29 would give the sentencing courts some flexibility in fashioning an appropriate sentence. While uniformity is an important objective, it should not be the only consideration.

D. Sentencing Options; Non-violent, first offenders: Amendment # 32 would also give sentencing courts more flexibility. Of the two options suggested in this amendment, it seems that an additional ground for departure would be the most effective way to reach this type of offender.

While many other proposed amendments are equally deserving of comment, I am going to limit myself to the four listed above. If the Commission wishes for any additional input from me I am available at your convenience.

Sincerely yours,

Kenneth F. Irvine Jr.

KENNETH F. IRVINE, JR.

Relevant Conduct

UNITED STATES COURT OF APPEALS
WASHINGTON, DC 20001

PATRICIA M. WALD
CIRCUIT JUDGE

(202) 273-0632

Acq. Cond.
Colin b. of foutes
Intro. lang.

January 19, 1993

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

Dear Sir or Madam:

I would like to endorse two of the proposed amendments set forth in your December 31, 1992 Federal Register and explained in the booklet Proposed Guidelines Amendments for Public Comment. They are amendments dealing with Substantial Assistance (31 and 47) and Prohibition of Acquitted Offenses in Relevant Conduct (1 and 56).

I believe it would be preferable to allow a downward departure for substantial assistance where the judge deems it justified even without a government motion. I would not limit the judge's discretion to first offender nonviolent cases as does 24. This amendment would allay the much-voiced frustration of district judges over leaving the issue of substantial assistance solely in the government's hands and dependent on how much information the accused may have to provide, so that the higher up in the enterprise he is, the more eligible he is for the departure. Lower fish have no access. Obviously, the district court would have to make a record by preponderance of the evidence that assistance had been provided to a substantial degree. I note that the draft Sentencing Standards of the ABA Criminal Justice Standards Committee, of which I am a member, has taken this approach.

I have long thought that the notion that conduct which has been the subject of a criminal prosecution and acquittal can be counted as relevant conduct for sentencing purposes is so counterintuitive as to bring the whole Guidelines into disrepute. It is the single most cited example of their arbitrariness. Certainly the few instances in which it is invoked cannot overcome the inherent distaste it arouses in everyone who learns of it. I would, however, accept the exception that in some unusual cases it could form the basis for an upward departure by the judge as suggested in Amendment 1.

Let me also add some support for 29 and 30. I would go along with the Judicial Conference's suggestion that a combination of offender characteristics should qualify for downward departure and, Yes, I do think the introductory language on Departures is currently confusing. As I have suggested at the Sentencing Institute in Tallahassee and to Commissioner Nagel, the general impression purveyed is that the Commission does not favor departures. Although former Commissioner Breyer and others have written that a judge can usually depart when he thinks the sentence is not just, most judges I know feel just the opposite. A fuller and more balanced explanation of the role departures play in the overall Sentencing Guidelines' scheme is in order along with some material setting out examples of where courts have gotten it right in making departures. The Institute showed dramatically the need for such a presentation by the Commission, and more emphasis on the instances in which the "ordinarily relevant" ban need not apply.

Thank you for your consideration of these thoughts.

Sincerely,

Patricia M. Wald

Patricia M. Wald

PMW:ejc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CHAMBERS OF
JON O. NEWMAN
U. S. CIRCUIT JUDGE
450 MAIN STREET
HARTFORD, CONN. 06103

March 12, 1993

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Commissioners:

This letter concerns Proposed Amendment 1, included in the Guideline amendments proposed for public comment by the Commission on December 31, 1992. The amendment would prohibit conduct of which the defendant has been acquitted from being considered as relevant conduct; an application note suggests that such "acquitted conduct" may, in an exceptional case, provide a basis for an upward departure.

I strongly urge the adoption of this amendment. It would eliminate one of the most indefensible features of the current guideline system, a feature that has yielded bizarre results and brought the guideline system into disrepute.

For purposes of determining conduct that counts as "relevant conduct," the Guidelines currently make no distinction between uncharged conduct and conduct for which the defendant has been charged, tried, and acquitted. Both categories of conduct are not only included as "relevant conduct," but they both are priced at the same level of severity.

An extraordinary example of the effect of the current practice is contained in a case recently decided by the Court of Appeals for the Second Circuit, United States v. Concepcion, ___ F.2d ___ (2d Cir. Dec. 28, 1992). One defendant, Nelson Frias, was charged with two weapons offenses and a narcotics conspiracy offense. A jury convicted him of the weapons offenses and acquitted him of the drug conspiracy offense. His guideline range based solely on the conduct of which he was convicted was 12 to 18 months. Because the acquitted conduct was considered relevant conduct, his guideline range was increased to a range of from 210 to 262 months, exactly the same range that would have applied if he had been convicted of the narcotics conspiracy. He was sentenced to 20 years, the maximum statutory sentence available for the two weapons offenses. His sentence is thirteen times higher than the sentence he would have received had he been sentenced in the guideline range applicable to the conduct of which he was convicted.

The Second Circuit felt compelled, by the Guidelines and existing case law, to rule the guideline calculation lawful. However, the Court also ruled that the circumstances permitted consideration of

a downward departure from the enhanced guideline range that resulted from the inclusion of acquitted conduct as relevant conduct.

Use of acquitted conduct to achieve the same guideline range that would result if a defendant were convicted is a serious flaw in a guideline system that endeavors to promote confidence in a rational system of sentencing. The Second Circuit's permission for a departure downward from the guideline range enhanced by the acquitted conduct is not an adequate substitute for the proposal in amendment 1 to eliminate acquitted conduct from relevant conduct while permitting, in exceptional cases, an upward departure from the guideline calculated without regard to the acquitted conduct.

Acquitted conduct was recognized as relevant to sentencing in the pre-Guidelines era on the theory that the jury's acquittal indicated only that the conduct had not been proven beyond a reasonable doubt, whereas the sentencing judge was entitled to find the conduct established by a preponderance of the evidence, the standard generally applicable to aggravating circumstances weighed at sentencing. But courts that had permitted such use of acquitted conduct did so only to permit a sentencing judge to "consider" acquitted conduct. See United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972). They did not contemplate that, under a guidelines regime, an acquittal would subject a defendant to the same severity of punishment as a conviction. It is the current inclusion of acquitted conduct as relevant conduct, priced at the same severity as convicted conduct, that achieves the Kafkaesque result illustrated by the case of Nelson Frias.

Amendment 1 should be adopted and explicitly made available retroactively, see U.S.S.G. § 1B1.10. If the Commission is unwilling at this time to eliminate acquitted conduct from consideration as relevant conduct, as proposed in amendment 1, then the Commission should consider, as an alternate, permitting the sentencing judge to count the acquitted conduct at some reduced level of severity, perhaps between one-third and two-thirds (in the judge's discretion) of the level appropriate for convicted or uncharged conduct.

Amendment 1 probably will apply to only a small number of defendants. But its elimination will greatly enhance public confidence in the Commission.

Sincerely,

Jon O. Newman
United States Circuit Judge

United States District Court
for the District of Columbia
Washington, D. C. 20001

Chambers of
Charles R. Richey
United States District Judge

(202) 273-0684
FAX: (202) 273-0329

January 6, 1993

FYI

Commissioner Michael S. Gelacak
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Commissioner Gelacak:

I understand you have published an Amendment to Section 5K1.1 of the Sentencing Guidelines to allow for departures for substantial assistance where the government does not present such a motion for departure from the Guidelines. I am taking the opportunity of sending to you what I think would be more appropriate for use in the 1993 Amendment Cycle. While it may be somewhat inconsistent with the strict mandate 18 U.S.C. 3553(e), the Commission could adopt my version and then let Congress delete it if they so chose. My guess is that Congress would pay no attention to it and not bother, just as they often do with respect to amendments to the Rules of Civil or Criminal Procedure when submitted to them by the Supreme Court, and it would effectively become law.

My suggestion for the new language would read as follows:

> "Upon motion of the government or the defendant stating that the defendant has provided substantial assistance in the investigation or prosecution of another person or persons who has (have) committed an offense, the court may depart from the Guidelines if such departure is supported by a preponderance of the evidence."

With respect to your Application Notes #3 of the same Guidelines. I would change that to read as follows:

> "Due deference should be given to the government's evaluation of the extent of the defendant's assistance provided such evaluation is supported by competent evidence presented to the sentencing judge."

The later phrase would prevent attorneys for the government from allocuting and merely presenting argument instead of proof.

I would appreciate your reaction to the foregoing.

Sincerely and cordially yours,

Charles R. Richey

701 Pennsylvania Avenue, N.W.
Washington D.C. 20004-2696
Telephone 202-508-5620

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

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CHAMBERS OF
JON O. NEWMAN
U. S. CIRCUIT JUDGE
450 MAIN STREET
HARTFORD, CONN. 06103

March 12, 1993

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Commissioners:

This letter concerns Proposed Amendments 24, 31, and 47, included in the Guideline amendments proposed for public comment by the Commission on December 31, 1992. The amendments would modify the current provision of section 5K1.1 requiring a Government motion as a condition for a sentencing judge's consideration of a downward departure for a defendant's cooperation.

I strongly support the elimination of the Government motion requirement, as recommended in Amendments 31 and 47, and, only as a fall-back alternative, favor the modification proposed in Amendment 24.

The Governmment motion requirement is required by Congress for cooperation departures from statutory mandatory minimum sentences, but is not congressionally required for cooperation departures from guideline sentences not subject to mandatory minimum sentencing provisions. See 18 U.S.C. § 3553(e). The clear implication is that Congress did not expect a Government cooperation motion to be a requirement for cooperation departures from sentences not subject to mandatory minimum provisions. This implication is reenforced by the explicit provisions of 28 U.S.C. § 994(n) requiring the Commission to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

Prior to the Guidelines, sentencing judges retained full authority to reduce a sentence below what would otherwise be imposed to reflect a defendant's cooperation. Prior to the adoption of section 5K1.1, the Government had no power to prevent a sentencing judge's consideration of such a reduction. The Government motion requirement in section 5K1.1 is a sharp and unwarranted break from past practice that has several unfortunate consequences.

First, it appears to run counter to the congressional preference to permit courts to reward a defendant's cooperation, regardless of the prosecutor's wishes, in all cases except those subject to mandatory minimum provisions. Second, it shifts enormous power to the prosecutor to pressure a defendant into what may be perjurious cooperation allegations as the price of obtaining the prosecutor's consent to a

cooperation departure. Third, the Commission's current insistance on vesting this unprecedented power in the hands of the Executive Branch seriously calls into question whether the Commission is abiding by its statutory mandate of functioning "as an independent commission in the [J]udicial [B]ranch of the United States." 28 U.S.C. § 991(a).

Sincerely,

Jon O. Newman
United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH, PENNSYLVANIA 15219

CHAMBERS OF
DONALD E. ZIEGLER
U.S. DISTRICT JUDGE
412-644-3333

March 10, 1993

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

Dear Judge Wilkins:

Re: United States Sentencing Guidelines

I am responding to the invitation of the Sentencing Commission to comment on the proposed amendments to the Guidelines and the proposals of various groups. I have served as a state court trial judge for five years and a federal district court judge for 15 years in a metropolitan area. Hence, I bring to my work a fair understanding of the best and worst of both criminal justice systems in reviewing the Proposed Guideline Amendments. In my judgment, the federal sentencing guidelines are inferior to the state court guidelines in Pennsylvania, and therefore I have scanned the Proposed Amendments in an attempt to select the amendments that will improve the federal sentencing scheme.

Proposed Guideline Amendment No. 1, Pg. No. 1 should be adopted as urged by the Practitioners Advisory Group in Option 1 at Pg. 56. Most citizens and virtually every juror would be shocked to learn that a court is required to include conduct in the sentencing equation that their representatives have found not proven by the prosecution. In addition, any exception to a complete bar of such evidence strikes most informed observers as unfair and one-sided. Prior to the guidelines, federal trial judges did not consider acquitted conduct at the time of sentencing, and the supporters of the guidelines have failed to sustain their burden of proving that § 1B1.3, as constituted, has had any deterrent effect upon aberrant conduct, or has promoted uniformity in sentencing.

Proposed Guideline Amendment No. 10, Pg. 20 should be adopted to promote uniformity of law and introduce common sense in a difficult area of sentencing. The inclusion of uningestible mixtures in the weight of a controlled substance promotes public cynicism and contempt by the offender. It also leads to grossly disproportionate sentences in certain cases and therefore undermines the foundation on which the guidelines are bottomed.

Proposed Amendments 29 and 30 (Judicial Conference) are long overdue. The members of the Commission and staff are fond of stating at various Circuit Judicial Conferences and in other fora that departures are authorized in appropriate cases under the guidelines. The courts of appeals are often blamed by members of the Commission for being too rigid in interpreting the departure provisions. The Criminal Law Committee of the Judicial Conference has now provided the Sentencing Commission with the opportunity to stand up and be counted on this issue.

Proposed Amendments 31, 32 and 33 (American Bar Association) are progressive proposals that recognize that prisons are limited resources that should be reserved for the most serious offenders. They also recognize that for many non-violent offenders there are effective alternative sentences. For many years prior to the guidelines, I kept a record concerning the number of offenders that violated a probationary sentence. The number of violators totalled 15% This means that 85% of the defendants did not violate probation and for these offenders a non-prison sentence was successful, effective and obviously less expensive.

Proposed Amendments 37 and 38 (Practitioners Advisory Group) are sensible and deserve adoption. They advance uniformity of application and fairness for offenders who do not profit from an offense. This is especially important for non-violent offenders for whom alternatives to total confinement may be entirely appropriate.

Amendment No. 40 (Practitioners Advisory Group) correctly captures the disparate impact of the guidelines upon minorities. The 100 to 1 quantity ratio is irrational and leads to unfair sentences. Quantity based sentencing involving crack cocaine produces sentences, in many cases, that are harsh, have no deterrent impact and are grossly disproportionate. The same reasoning applies to Amendment No. 50 (Federal Offenders Legislative Subcommittee). Congress could not have intended such results.

Thank you for giving me the opportunity to comment on the matters pending before the Sentencing Commission.

Yours very truly,

Donald E. Ziegler

Donald E. Ziegler

ef

BROWN & MOREHART
ATTORNEYS AT LAW
Suite 222
133 West Fourth Street
Cincinnati, Ohio 45202

...atrick L. Brown
Douglas M. Morehart*

(513) 651-9636
Fax (513) 381-1776

*Also Admitted in Kentucky

March 8, 1993

Mr. Mike Courlander
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

RE: Proposed Amendments to Sentencing Guidelines

Dear Mr. Courlander,

This letter is to provide my input on several of the proposed changes and amendments to the sentencing guidelines. I hope that these are of some use to you as these changes are contemplated. I am limiting my comments to three proposals, but on a broader scale would suggest that the Commission give favorable consideration to all changes which result in a more equitable situation.

Prior to expressing my views I wanted to give some background on myself. I am an attorney in Cincinnati, Ohio. The majority of my practice involves federal criminal sentencings and post-conviction motions related to sentencing. I handle cases in federal court across the country. Because of my work I have become familiar with the contents of the guidelines. It is with this understanding that I provide the following comments.

The proposal that would permit a District Court Judge to make a downward departure, without the United States Attorney making the request, if the Judge believes the Defendant has provided substantial assistance is one which should be approved. The current scenario permits the United States Attorney to plea bargain with the Defendant and decide after the Defendant provides information whether to make a request for a downward departure. Absent unconstitutional motivation on the part of the U.S. Attorney, there is nothing a Defendant or Judge can do, if the U.S. Attorney does not request a downward departure. This system smacks of unfairness. The U.S. Attorney, gains the information and then can decide not to give the Defendant any credit for it. The Defendant may have already put himself at grave personal risk and additionally is not able to retrieve what he has provided to the U.S. Attorney. Permitting the Judge to have control on this situation would level the playing field and result in a more just situation.

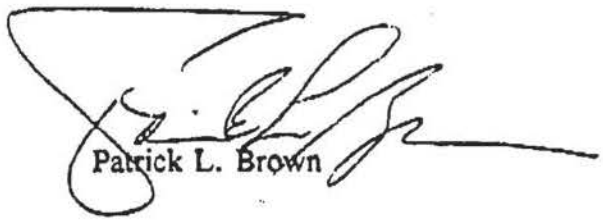
The proposal reducing the top guideline from 43 to 32 is another one which should be approved. The length of sentences in drug cases has simply gotten out of hand. As a society we can not continue to pay the costs of warehousing individuals for twenty and thirty years, especially when they are first time offenders. The comparison is made repeatedly

between violent offenders and drug offenders and the relative disparity is sentences received. The proposed amendment would help alleviate this disparity and more importantly result in sentences, especially for first time drug offenders, which are more in keeping with a system of fairness and justice.

The third proposal I am writing about relates to eliminating the weight of the carrier in LSD cases when calculating the weight of the drugs involved. It is difficult for me to understand the rationale behind adding to the weight of the actual drug the weight of the carrier paper. This would easily result in a situation of a supplier or manufacturer who has not separated the drug into doses and thereby not placed it on carrier paper being treated the same as the street seller because of the added weight of the paper the drug is placed on. Simply, a person should be held accountable for the drugs involved, not the material it is carried on.

I thank you for the opportunity to comment on these specific proposed amendments, and the amendments in general. I hope that the amendments will receive favorable consideration. Additionally, I would welcome the opportunity to provide testimony or additional information at any scheduled hearings on these proposed amendments. If I can be of further assistance please do not hesitate to contact me at (513) 651-9636.

Very Truly Yours,



Patrick L. Brown

PLB\wpf
cc: Congressman David S. Mann

Richard D. Besser
13 Arrowhead Way
Clinton, NY 13323

TEL (315) 853-4370 FAX (315) 853-4371

March 4, 1993

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

Gentlemen:

I am writing to voice my opinion on the amendments to the sentencing guidelines that are currently under consideration by your Commission.

While I believe that the entire concept of mandatory minimums is abhorrent and unconstitutional, there are three amendments that I believe rise above the others in importance:

1. Eliminate the carrier in determining sentencing in LSD cases.

2. Reduction in the top guideline level from 43-32.

3. Allow Federal Judges to depart from guidelines if he believes the defendant has provided substantial assistance without the approval of the prosecutor.

I am sure you are aware of the inequities in sentencing that result from application of the current guidelines in LSD cases. If not I would offer the following:

One gram of pure LSD (no carrier)=63-78 months, guideline level 26
One gram of LSD on 100 grams of paper=188-235 months, guideline level 36

Reduction of the highest sentence for a first time offender to 121-151 months is a modest reduction at best. Where else in our legal system does a first time offender for a nonviolent crime receive a 10

Richard D. Besser
13 Arrowhead Way
Clinton, NY 13323

TEL (315) 853-4370 FAX (315) 853-4371

year plus sentence, without parole? People who commit armed robbery are let off with less severe sentences. Should the Federal Courts apply sentences that are more severe for nonviolent crimes than the state courts do for violent crimes? I think not.

As to allowing judges to have latitude in sentencing, I would postulate that the justice system was designed to have prosecutors prosecute and judges and juries determine guilt and impose sentences. In Federal drug cases discretion is taken from the judges and given to the prosecutor who's motives are typically self-serving. It appears that in their zealousness to apply justice even-handedly they created a system that recognizes no extenuating circumstances and have denied judges the ability to perform their judicial responsibilities.

It appears to me that your Commission could do a lot to correct these and other inequities in sentencing, to say nothing of what you would do for prison over-crowding and the drain on the Country's resources, both financial and human, by passing these amendments.

As someone who has been personally impacted by these guidelines I would be more than happy to offer additional testimony.

Sincerely,

/ R.D. Besser

R.D.Besser

cc: Families Against Mandatory Minimums

LAW OFFICES OF
RITCHIE, FELS & DILLARD, P.C.
SUITE 300, MAIN PLACE
606 W. MAIN STREET
P. O. BOX 1126
KNOXVILLE, TENNESSEE 37901-1126

ROBERT W. RITCHIE
CHARLES W. B. FELS
W. THOMAS DILLARD
DAVID M. ELDRIDGE

WAYNE A. RITCHIE II
KENNETH F. IRVINE, JR.

TELEPHONE
615-637-0661
FAX
615 524-4623

February 25, 1993

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

Dear Sentencing Commission:

I have reviewed with great interest your 1993 Proposed Amendments to the Sentencing Guidelines. The opportunity to express my concerns, on a few of the proposed amendments, is greatly appreciated. This particular group of amendments addresses several important areas:

A. Relevant Conduct: Amendments #1 and 35 propose two different ways to deal with acquitted conduct. Amendment #35, option 1, proposes a total ban on the use of acquitted conduct. I personally favor this approach. In addition to my personal preference, this is an area that I have discussed with numerous people. Lawyers and non-lawyers alike are often shocked when they learn that conduct, for which a defendant is acquitted, can still be used as relevant conduct. It is fundamental to our system of justice that persons acquitted of criminal charges are not directly or indirectly punished for that conduct.

B. Substantial Assistance: Amendments #24, 31, and 47 suggest several ways to change the current system for determining when substantial assistance has been rendered. This is an area which should be decided by the sentencing court after the government has had an opportunity to state its position. Without question the government's position should be given careful consideration but the ultimate decision should be the court's. It has been my experience that "substantial assistance" varies from one U.S. Attorney's Office to the next and even from one AUSA to the next. Also based on my experiences the decision not to move for a downward departure, based on substantial assistance, has occasionally been arbitrary.

C. Specific Offender Characteristics: Amendment # 29 would give the sentencing courts some flexibility in fashioning an appropriate sentence. While uniformity is an important objective, it should not be the only consideration.

D. Sentencing Options; Non-violent, first offenders: Amendment # 32 would also give sentencing courts more flexibility. Of the two options suggested in this amendment, it seems that an additional ground for departure would be the most effective way to reach this type of offender.

While many other proposed amendments are equally deserving of comment, I am going to limit myself to the four listed above. If the Commission wishes for any additional input from me I am available at your convenience.

Sincerely yours,

Kenneth F. Irvine Jr.

KENNETH F. IRVINE, JR.

746 U.S. POST OFFICE
AND COURT HOUSE
5th AND MAIN STREET
CINCINNATI 45202-3980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

February 23, 1993

U. S. Sentencing Commission
One Columbus Circle, N. E., Suite 2-500
Washington, D. C. 20002-8002
Attention: Public Information

Dear Judge Wilkins

Attached hereto are personal comments regarding certain proposed guideline amendments. I have written a separate document for each of the issues on which I commented. Understand that the comments provided are only my own and are not representative of this agency or the Court for which I work.

Thank you for the opportunity to comment on the proposed amendments.

Sincerely

David E. Miller

David E. Miller, Deputy Chief
U. S. Probation Officer

746 U.S. POST OFFICE
AND COURT HOUSE
5th AND MAIN STREET
CINCINNATI 45202-3980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

DATE: February 16, 1993

RE: 24. Issue for Comment.

FROM: David E. Miller, Deputy Chief
U. S. Probation Officer

TO: U. S. Sentencing Commission
Public Information

Often the Government is reluctant to discuss the issue of cooperation with the probation officer beyond an indication that they may file a motion for downward departure to reflect a person's substantial assistance. In this District, the inclusion of this potential as a provision of the plea agreement is all but standard language.

I question how the Court will be able to determine the extent and level of a defendant's cooperation if the Government is not inclined to file a motion. Will the defendant move the Court for such consideration in all cases? The Court will have to hear and litigate all of these motions. The defendant will attempt to prove a mitigating sentencing factor that can only be substantiated by the Government (what, if any benefit it derived from the substantial assistance).

Why does the Commission introduce "first offenders" involved in "non-violent" crimes into the mix since those variables are not mentioned in 18 USC 3553 or Rule 35?

Are we not discussing semantics here. The Court can depart if it finds a factor not adequately considered and that factor should result in a sentence different than the one set out in the guidelines. The Court's departure will stick if it is not appealed or if it can provide ample justification on the record.

Does the avenue to departure really matter? Perhaps you should create a policy statement in Chapter 5, Part K suggesting the Court may depart in cases involving first time offenders involved in non-violent crimes. Care must be taken to clearly define both "first offender" and "non-violent crimes". In the end, this course may easier.

LAW OFFICES OF
RITCHIE, FELS & DILLARD, P.C.
SUITE 300, MAIN PLACE
606 W. MAIN STREET
P. O. BOX 1126
KNOXVILLE, TENNESSEE 37901-1126

ROBERT W. RITCHIE
CHARLES W. B. FELS
W. THOMAS DILLARD
DAVID M. ELDRIDGE

WAYNE A. RITCHIE II
KENNETH P. IRVINE, JR.

TELEPHONE
615-637-0661
FAX
615 524-4623

February 18, 1993

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, D.C. 20002-8002

Attention: Public Information

Re: Proposed Guideline Amendments for Public Comment
Amendment Proposal Nos. 24, 31, and 47

Ladies and Gentlemen:

As a former United States Attorney and current criminal defense practitioner, I wholeheartedly endorse the proposed guideline amendments which would restore sentence reduction authority to the judicial branch.

There is currently no uniformity among the various United States Attorneys' offices with regard to the determination of substantial assistance. Some offices require that the assistance received from a defendant result in an actual conviction of another individual. Such an interpretation can be totally unfair, as it requires both the investigative agency and the prosecutor to agree to the subsequent prosecution--a result which often is determined by factors totally separate and apart from the level of cooperation attributed to the cooperating defendant.

Other U. S. Attorneys' offices appear to have no set policy, and an individual may risk life and limb to obtain the benefits of substantial assistance, only to find that his particular efforts are deemed unworthy.

We need to return to a criminal justice system where prosecutors prosecute and judges judge. An Article III federal judge is the individual who should determine the merit of substantial assistance performed by a defendant. Otherwise,

prosecutors and agents may require an unrealistic level of achievement from a defendant. I therefore heartily endorse this concept and hope that the Commission does approve such an amendment.

Sincerely yours,

W. THOMAS DILLARD

WTD:srw

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

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

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.

Technical corrections to the proposed amendment are needed to clarify the application of the guideline for its purpose. The amendment would read as follows:

> 8. If the offense involved a scheme to steal multiple pieces of undelivered United States Mail and the offense level determined above is less than level 14, increase to level 14.

Proposed Amendment 45, (§ 3A1.4). The Postal Service remains committed to the principle of victims' rights and supports more guidelines which emphasize victim impact in the sentencing process. We believe the sentencing level should reflect the total harm caused by the defendant's criminal misconduct. Our proposed guideline accomplishes this by including a victim-related adjustment based on the number of victims. For example, in volume mail theft crimes, and in consumer fraud crimes, substantial numbers of victims are directly harmed. We believe that the number of victims impacted by the defendant's relevant conduct should warrant an increase in the offense level. Furthermore, we feel such a guideline should be applied to any offense which results in multiple victims for these reasons.

As proposed, our amendment would give a two-level increase for a crime which results in two or more victims; those crimes affecting more than 100 victims would be subject to an additional two-level increase for each 250 victims, up to a maximum eight-level increase.

Because our proposed amendment is a Chapter 3 adjustment, it would impact on other offenses beyond those which are postal related, which requires a more comprehensive analysis of multiple victim crimes. Accordingly, we urge the Commission to include the study and formulation of a multiple victim guideline as a priority issue for 1994.

Your consideration of these issues is appreciated. If additional information is needed, please contact me at (202) 268-4267.

Sincerely,

K. J. Hunter

K. J. Hunter

Tax Loss

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, DC 20004
(202) 626-8500
FAX (202) 662-7631

November 3, 1992

MEMORANDUM

TO: *Judge Wilkins*
Commissioners
Paul Martin
John Steer
Susan Kuzma

FROM: *Brenda Allen*

Attached is a letter to Judge Wilkins from Shirley D. Peterson, IRS, with enclosures, dated November 2, 1992, for your information.

Attachment

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

COMMISSIONER

NOV - 2 1992

Honorable William W. Wilkins, Chairman
United States Sentencing Commission
Federal Judiciary Building
Suite 2500, South Lobby
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Chairman Wilkins:

I am delighted to have the opportunity to provide input in regard to the 1993 Amendment cycle as it relates to offenses involving taxation. To this extent, members of my staff, working with representatives from the Office of Chief Counsel for the Internal Revenue Service and the Tax Division, Department of Justice, reviewed the guidelines as they pertain to offenses involving taxation and the eventual sentence which could result from a conviction of a tax crime.

This group centered its attention on the tax loss definition, the tax table and the multiple count guidelines as they affect tax offenses. The results of this group's efforts, which I endorse, are enclosed herewith and represent a sentencing solution which will provide appropriate prison sentences for serious tax offenses that will complement the Internal Revenue Service's attempts to enhance voluntary compliance with the nation's tax laws. The enclosed material contains two distinct parts. The first part deals with recommended changes to the Chapter Two guidelines pertaining to offenses involving taxation. The second part concerns recommended changes to the multiple counts portion of Chapter Three, as they relate to tax convictions.

It is particularly noteworthy that the proposed changes are consistent with Congress' intent to provide different sentences for crimes of differing severity and the Commission's intent to avoid pre-guideline sentencing practices whereby courts gave only sentences of probation to an inappropriately high percentage of defendants convicted of tax crimes. Furthermore, in light of the modification of the Sentencing Table as a result of the 1992 Amendments, the proposed amendments are consistent with the Commission's conclusion that the certainty of even a short prison term will serve as a more effective deterrent than the prospect of probation.

The Honorable William W. Wilkins

In conclusion, I would like to emphasize the importance of this matter as it relates to the Service's efforts to ensure voluntary compliance. To this end, I or my designee, will be available to address the Commission and answer questions concerning our proposals, at the Commission's meetings which we understand are scheduled for November 17, 1992, and December 7 and 8, 1992. In the interim, please feel free to contact me, or if you prefer, members of your staff may contact Ed Federico (622-3750) of the Legislative Affairs Division.

Best regards.

Sincerely,

Shirley D. Peterson

Shirley D. Peterson

Enclosure

PROPOSAL FOR THE 1993 AMENDMENTS TO THE SENTENCING GUIDELINES RELATING TO TAX OFFENSES

I. Repeal § 2T1.1 through and including § 2T1.9 and replace with the following:[1]

§ 2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents.

(a) Base Offense Level:

(1) if the defendant is convicted of tax evasion, **10**.

(2) if the defendant is convicted of filing fraudulent or false statements under penalty of perjury, **10**;

(3) if the defendant is convicted of failure to file a return, supply information, or pay tax, **9**;

(4) if the defendant is convicted of the misdemeanor of filing fraudulent returns, statements, or other documents not required to be signed under penalty of perjury, **6**;

(b) Specific Offense Characteristics

(1) If the "tax loss" exceeded $10,000, increase the offense level as follows:

Tax Loss		Increase in Level
(A)	$10,000 or less	no increase
(B)	More than $10,000	add 1
(C)	More than $20,000	add 2
(D)	More than $40,000	add 4
(E)	More than $70,000	add 5
(F)	More than $120,000	add 6
(G)	More than $200,000	add 7
(H)	More than $350,000	add 8
(I)	More than $500,000	add 9
(J)	More than $800,000	add 10

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[1]Unless otherwise provided, we are adopting, without restating, the Commentary applicable to each guideline.

For purposes of the guidelines in Part T, Offenses Involving Taxation, "tax loss" shall mean the loss that was the object of the evasion or fraud.

(2) If the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity, increase by 2 levels.

(3) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.

Statutory Provisions: 26 U.S.C. §§ 7201, 7203 (other than a willful violation of 26 U.S.C. § 6050I), 7206 (other than a willful violation of 26 U.S.C. § 6050I and not including § 7206(2)) and 7207.

Application Notes:

1. For purposes of this guideline, the tax loss is the amount of **loss** that was the object of the evasion or fraud. The amount of loss that would have resulted had the scheme or fraud succeeded is properly considered the amount of loss that was the object of the scheme or fraud. The success or failure of a tax evasion or fraud scheme is irrelevant. In typical circumstances, loss should be calculated as indicated in the following examples:

(i) If the offense involved improperly claiming a deduction or an exemption or causing another to improperly claim a deduction or exemption, the tax loss shall be the amount of the improper deduction or exemption multiplied by the applicable tax rate(s).

(ii) If the offense involved filing a return in which gross income was under reported, the tax loss shall be the amount of income omitted from the return multiplied by the applicable tax rate(s).

(iii) If the offense involved improperly claiming a deduction designed to provide a basis for tax evasion or tax fraud in the future, the tax loss shall be the amount of the deduction multiplied by the applicable tax rate for the tax year for which the return was filed.

(iv) If the offense involved failing to file a tax return, the tax loss shall be gross income minus the applicable amount for personal exemption(s) and the amount of the applicable standard deduction, multiplied by the applicable tax rate(s).

(v) If the offense involved improperly claiming a tax credit (i.e., an item that reduces the amount of tax directly), the tax loss is the amount of the improper tax credit.

(vi) If the offense involved improperly claiming a refund to which the claimant was not entitled, the tax loss shall be the amount of the claimed refund.

2. In calculating tax loss, there shall be a rebuttable presumption that the tax loss is the amount calculated under these provisions. If the defendant provides credible evidence that the actual tax loss in the case was different than the amount calculated under these provisions, the tax loss shall be the actual amount established by the defendant. However, the defendant may not attempt to show that the actual tax loss was less than the amount calculated under these provisions by asserting that the intended loss was less than that which would have resulted had the scheme succeeded.

3. In calculating tax loss, the court should utilize as many of the methods set forth in paragraph 1. as fit the circumstances of the case and as most nearly approximate the greatest harm which would have resulted had the scheme succeeded. Where none of the methods of calculating loss fit the circumstances of the particular case, the court should utilize any method which appears appropriate to most nearly calculate the loss which would have resulted had the scheme succeeded.

Delete application note 4 and renumber existing application note 3 as application note 4.

§ 2T1.2. Failing to Collect or Truthfully Account for and Pay Over Tax

(a) Base Offense Level: 10

(b) Specific Offense Characteristic

(1) If the amount of tax not collected or accounted for and paid over exceeds $10,000, increase the offense level as specified in § 2T1.1.

(c) Cross Reference

(1) Where the offense involved embezzlement by withholding tax from an employee's earnings and willfully failing to account to the employee for it, apply § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) if the resulting offense level is greater than determined above.

Statutory Provision: 26 U.S.C. § 7202.

§ 2T1.3. Offense Relating to Withholding Statements

(a) Base Offense Level: 4

Statutory Provision: 26 U.S.C. §§ 7204, 7205.

§ 2T1.4. Aiding, Assisting, Procuring, Counseling or Advising Tax Fraud

(a) Base Offense Level: 10

(b) Specific Offense Characteristics

(1) If the resulting tax loss as defined in § 2T1.1 exceeds $10,000, increase the offense level as specified in § 2T1.1.

(2) If the defendant committed the offense as part of a pattern or scheme from which he derived a substantial portion of his income, increase by 2 levels.

(3) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.

(4) If the defendant was in the business of preparing or assisting in the preparation of tax returns, increase by 2 levels.

Statutory Provision: 26 U.S.C. § 7206(2).

§ 2T1.5. Corrupt Endeavors

(a) Base Offense Level: 10

(b) Specific Offense Characteristic

(1) If the tax loss as defined in § 2T1.1 exceeds $10,000, increase the offense level as specified in § 2T1.1.

Statutory Provision: 26 U.S.C. § 7212(a)(omnibus clause)

Application Notes:

1. This section applies to the omnibus clause of 26 U.S.C. § 7212(a) concerning corrupt endeavors to obstruct or impede the due administration of the internal revenue laws. It does not apply to offenses under 26 U.S.C. § 7212(a) involving corrupt or forcible interference with an officer or employee of the United States acting in an official capacity. Such offenses will be sentenced under § 2A2.2 or § 2A2.3.

§ 2T1.6. Failing to Deposit Collected Taxes in Trust Account as Required After Notice

(a) Base Offense Level: 4

(b) Specific Offense Characteristic

(1) If the amount of tax not deposited exceeds $10,000, increase the offense level as specified in § 2T1.1.

Statutory Provision: 26 U.S.C. §§ 7215, 7512(b).

§ 2T1.7. Conspiracy to Impair, Impede or Defeat Tax

(a) Base Offense Level: 10

(b) Specific Offense Characteristics

(1) If the tax loss as defined in § 2T1.1 exceeds $10,000, increase the offense level as specified in § 2T1.1.

(2) If the offense involved the planned or threatened use of violence, increase by 4 levels.

(3) If the conduct was intended to encourage persons in addition to co-conspirators to violate the internal revenue laws or impede or impair the Internal Revenue Service in the assessment and collection of revenue, increase by 2 levels.

(4) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.

Statutory Provision: 18 U.S.C. § 371.

BACKGROUND AND EXPLANATION
TO THE PROPOSAL FOR THE SENTENCING
GUIDELINES RELATING TO
TAX OFFENSES

The Service is making every effort to foster voluntary compliance through a new tax initiative known as Compliance 2000. One of the main focuses of Compliance 2000 is taxpayer education. Consequently, the Service is increasing its efforts to help taxpayers comply rather than relying solely on after-the-fact enforcement. However, Compliance 2000 also recognizes that despite our efforts, some taxpayers will not voluntarily comply. Therefore, Compliance 2000 also includes a focused use of our traditional enforcement tools and sanctions against intentional noncompliance. The Service believes that our enforcement actions directly and positively affect compliance and are an essential part of our voluntary compliance efforts.

Inherent in our enforcement efforts are criminal sanctions which include the possibility of confinement for those taxpayers who engage in willful noncompliance with the tax laws. The Service believes that some type of confinement (e.g., prison, intermittent imprisonment or community confinement) will serve to enhance compliance with the tax laws. The prospect of confinement, even if only for a short period of time, is a more effective deterrent to most people contemplating a violation of the revenue laws than is the prospect of probation or a fine.

Assuming that the guidelines pertaining to tax offenses remain as they are, the proposed revisions to the Sentencing Table of the Federal Sentencing Guidelines, which are scheduled to go into effect on November 1, 1992, undermine the core of our enforcement program. The revisions produce devastating results to our efforts to enforce the tax laws by reducing sentences for tax offenses. Because there has been no corresponding adjustment to the tax table applicable to criminal tax defendants and because many of our cases fall into the lower ranges, a substantial number of those convicted of violating the internal revenue laws will be eligible to receive a sentence of probation under these revisions. With the implementation of the 1992 amendments to the guidelines, only a small portion of tax violators face the potential of some type of confinement. In order to ensure compliance and to have any deterrent value, the guidelines must provide for some type of confinement for a greater portion of those individuals who violate the revenue laws.

The Guidelines calculate sentences for tax crimes primarily on the amount of "tax loss" resulting from the offense. Under the guidelines as amended by the 1992 amendments, a taxpayer convicted of tax evasion in violation of I.R.C. § 7201 would need to generate a tax loss of more than $40,000 and a taxpayer convicted of failing to file a tax return under I.R.C. § 7203 would need to have a tax loss of more than $70,000 to

receive any type of confinement (since criminal tax cases are generally prosecuted for a three year period, this would mean an annual tax loss of $13,334 for a § 7201 conviction and an annual tax loss of $23,334 for a § 7203 conviction).[2] For example, in a failure to file case where the defendant is given credit under the Guidelines for acceptance of responsibility, tax losses between $40,001 and $70,000, which represent unreported incomes of approximately $143,000 to $250,000 will be eligible for sentences of probation without service of any jail time.[3] According to statistics of income maintained by the Service for tax year 1990, only 2.8% of the returns filed had an adjusted gross income in excess of $100,000. Moreover, less than 1% of the returns filed will show a tax due of more than $40,000 (See, Table 2).

Data from the Service's Taxpayer Compliance Measurement Program ("TCMP") (Table 1), reveals that tax fraud involving legally earned income causes approximately $1.146 billion in tax loss each year. The TCMP data indicates, however, that under the present guidelines, only 24.5% of those individuals who willfully understate income on their tax returns would generate sufficient levels of tax loss to be subject to any type of mandatory confinement. Specifically, the TCMP reveals that only 24.5% of individuals filing fraudulent returns would generate the necessary $13,334 tax loss per year. Assuming the TCMP data would be representative of failure to file cases, only 10.6% of the individuals who fail to file their returns would generate a tax loss of $23,334 per year and be subject to mandatory confinement. Clearly, the revisions significantly reduce any meaningful deterrence in tax cases.

Our proposal serves a two-fold purpose: (1) deterring tax offenses and (2) encouraging tax offenders to accept responsibility and get back into our nation's tax system. Our proposal fosters deterrence by providing some type of confinement for those felony tax violators responsible for a tax loss greater than $10,000, and for those felony tax violators responsible for a smaller loss who are not willing to accept responsibility. At the same time, our proposal will serve to encourage the great majority of tax violators to accept responsibility by rejoining

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[2] According to the United States Sentencing Commission 1991 Annual Report, 79.9% of the defendants convicted of a tax offense receive the two level reduction for acceptance of responsibility allowed under U.S.S.G. § 3E1.1. Therefore, these tax loss levels are based on the assumption that the defendant will receive a two level reduction for acceptance of responsibility.

[3] Assuming a tax rate of 28%, adjusted gross income of 143,000 generates tax of approximately $40,000.

the tax system. It does so by making a purely probationary sentence available at offense level 8 to any felony tax violator who has generated a tax loss of $10,000 or less and who is willing to accept responsibility.

Our proposal recommends abandoning the tax table in § 2T4.1 and setting specific base offense levels for each tax offense. Thereafter, where the tax offense involves a substantial loss of revenue to the government, we recommend using specific offense characteristics to adjust the offense level according to the amount of the tax loss. In calculating the base offense level, our proposal shifts the focus from the tax loss related to a particular offense to the criminal act.

The following table summarizes our proposed changes to the approach taken under the existing guidelines and provides a comparison of the base offense levels attributable to each tax offense:

	BASE OFFENSE LEVEL UNDER	
I.R.C. OFFENSE	EXISTING GUIDELINES	PROPOSED GUIDELINES[4]
§ 7201	Tax Table	10
§ 7202	Tax Table	10
§ 7203 (except § 6050I)	One level less than tax table	9
§ 7204	4	4
§ 7205	4	4
§ 7206 (except § 6050I and § 7206(2))	Tax Table or 6	10
§ 7206(2)	Tax Table or 6	10
§ 7207	6	6
§ 7212(a)[5]	No guideline	10
§ 7215/7512(b)	4 or 5 less than tax table	4
18 U.S.C. § 371	10	10

[4] The offense levels applicable to the specific tax offense will be subject to specified level increases depending upon the amount of tax loss.

[5] This section applies to the omnibus clause of 26 U.S.C. § 7212(a) concerning corrupt endeavors to obstruct or impede the due administration of the internal revenue laws.

In examining the base offense levels applicable to tax offenses, we noted that the present guidelines lack symmetry in the application of the offense levels. For example, under the present guidelines, the base offense level applicable to a violation of I.R.C. § 7207, a misdemeanor, is 6, whereas the base offense level applicable to a violation of I.R.C. § 7206(1), a felony, is also 6. Therefore, in reaching our conclusions, we have examined each tax offense in the guidelines with a view toward providing symmetry in the application of the base offense levels. In determining our base offense levels, we have attempted a gradation in base offense levels according to what is perceived as Congress' view of the seriousness of the tax offense, as reflected by the maximum statutory punishment which may be imposed for a particular violation. For example, if a defendant is convicted of tax evasion under I.R.C. § 7201, we recommend a base offense level of **ten** where the tax loss does not exceed $10,000. In cases where the defendant is given credit under the Guidelines for acceptance of responsibility, the resultant offense level, assuming no other adjustments, would be eight. Under the 1992 amendments to the sentencing table, a base offense level of eight results in a sentence of 0 to 6 months.

As the TCMP data (Table 1) indicates, our proposal would focus on taxpayers who generate an average tax loss in excess of $10,000 for a three-year period. This would allow 27.9% of those taxpayers filing fraudulent returns to receive probation. These are generally taxpayers who generate an average tax loss of $817.00 per year and therefore, for a three-year period would generate a tax loss of less than $10,000. While the Service believes that to ensure compliance, criminal tax prosecutions must be directed at all income levels, we recognize that given our limited resources, only a small number of tax violations can be prosecuted. Therefore, we propose focusing on the 72.1% of taxpayers who generate more than $2,000 of tax loss due to fraud per year and account for 97.4% of the tax fraud on the government. We believe the sentencing guidelines should impose some type of confinement for these individuals. Further, our proposal recognizes that the primary interest protected by the internal revenue laws is the collection of taxes and, therefore, provides for an additional adjustment to the base offense level based on the amount of tax evaded.

In determining the offense levels applicable to other tax offenses, we have started with the premise that tax evasion is a serious tax crime which is punishable as a felony and adjusted the offense level applicable to tax evasion to reflect the difference in the degree of seriousness for each tax offense. Therefore, we have set the offense level applicable to I.R.C. §§ 7202, 7206 and 18 U.S.C. § 371 at ten to reflect that violations of these provisions are also felonies. Yet, we have

proposed a base offense level of 9 for violations of I.R.C. § 7203 to reflect that while these offenses are misdemeanors, they are usually serious misdemeanors that are similar to tax evasion. To maintain consistency, we have retained the existing base level of 4 for violations of I.R.C. §§ 7204, 7205, 7215 and 7512(b) and a base level of 6 for violations of I.R.C. § 7207. Moreover, we have proposed an amendment to the guidelines to include a guideline for violations of I.R.C. § 7212(a), the omnibus clause, concerning corrupt endeavors to obstruct or impede the due administration of the internal revenue laws. With respect to violations of I.R.C. § 7212(a), involving corrupt or forcible interference with an officer or employee of the United States acting in an official capacity, we recommend that those offenses still be sentenced under § 2A2.2 or § 2A2.3.

Consistent with our proposed approach to sentencing in criminal tax cases, we have proposed consolidation of several of the tax guidelines. Consolidation of several of the existing tax guidelines (i.e., 7201, 7203 (other than a willful violation of 26 U.S.C. § 6050I), 7206 (other than a willful violation of 26 U.S.C. § 6050I and not including 7206(2)) and 7207) into a revised § 2T1.1 is a concept that was considered by the Sentencing Commission in the 1992 Proposed Amendment 13. The issue was ultimately deferred for consideration by the Commission's White Collar Working Group during the 1992-1993 amendment cycle. Consistent with our proposed approach to sentencing in criminal tax cases, consolidation of several of the tax guidelines is a natural consequence.

Our proposal also redefines the concept of "tax loss." Since the November 1, 1987, advent of the Sentencing Guidelines, the core of sentencing in criminal tax cases has been the concept of "tax loss." However, rather than a single definition, "tax loss" has been defined differently in various provisions of Chapter 2, Part T of the Guidelines. These variations in the definition of "tax loss", as well as cross-references between the definitions within the guidelines, have caused confusion and difficulties in application of the tax guidelines.

Difficulty in applying the concept of "tax loss" has arisen in a number of different contexts. Areas of confusion involving "tax loss" include: (1) whether the determination of base offense level under § 2T1.3 requires proof of an "actual tax loss" (compare United States v. Schmidt, 935 F.2d 1440, 1450-1451 (4th Cir. 1991) with United States v. Hirschfeld, 964 F.2d 318, 324-325 (4th Cir. 1992); see also, United States v. Telemaque, 934 F.2d 169 (8th Cir. 1991); United States v. Krause, 786 F.Supp. 1151, 1152-1158 (E.D.N.Y. 1992)); (2) language in § 2T1.3, which, on its face, requires that "the offense was committed in order to facilitate evasion of a tax" in order to use the tax loss table (see United States v. Krause, 786 F.Supp. at 1156-1157); (3) in

Spies-evasion prosecutions under 26 U.S.C. § 7201, refusing to use the tax loss as defined in § 2T1.3 (i.e., 28% of greater of understatement of gross income and taxable income) on the ground that there is no "understatement" where no return is filed (United States v. Warren L. Pickett, (W.D. Pa. 1991) (unreported district court decision); (4) in Klein-conspiracy prosecutions, construing the "as applicable" language contained in § 2T1.9(a)(1) to mean that the Government must show that either § 2T1.1 or § 2T1.3 is applicable to the offense in order to use "tax loss" in calculating base offense level, rather than utilizing the alternative base offense level of 10 pursuant to § 2T1.9(a)(2) (United States v. Schmidt, 935 F.2d at 1450-1451); and, (5) in cases involving previously assessed, but unpaid, taxes, whether "tax loss" means the assessed tax or only the "hidden assets" which form the basis for the false statement involved (compare United States v. Brimberry, 961 F.2d 1286, 1292 (7th Cir. 1992) (unambiguous, explicit definition of "tax loss" under § 2T1.3 and § 2T1.1 as the amount of tax owed to the Government) with United States v. David W. Maestas, (D. N.M. 1991) (unreported district court determination finding tax loss to be only what Government could not execute against because of defendant's concealment rather than greater amount defendant either evaded or attempted to evade).

In its 1992 Guideline amendment cycle, the Sentencing Commission proposed a redefinition of "tax loss." We believe that a simplification of this concept is appropriate and that the Commission's 1992 Proposed Amendment 13 provides a model on which to predicate a simplified and consolidated "tax loss" definition. We recommend that it be utilized with some minor clarifications and adjustments. Thus, our proposal provides the sentencing court with methods for calculating tax loss in most instances. It also provides, however, that the court may utilize the actual loss if the defendant provides credible evidence that the actual loss is less than the amount calculated through application of the various methods set forth in the commentary for determining loss. Under our proposal, however, the defendant may not show that the loss is less than that calculated by asserting that the loss intended was less than the loss which would have resulted had the scheme succeeded. Finally, our proposal includes within the definition of tax loss any loss that was the object of the evasion or fraud. This should eliminate any dispute over the question whether there was any tax loss where the defendant was clearly attempting to defraud the Government through use of the internal revenue laws.

We are also proposing a new guideline for prosecutions under the "omnibus" clause of 26 U.S.C. § 7212(a) (corrupt endeavor to obstruct or impede the due administration of the internal revenue laws) which have increased in frequency since the Guidelines were first promulgated. This proposed Guideline also utilizes the consolidated "tax loss" definition proposed herein.

TABLE 1[1]

Tax Loss Due to Fraud	Average Tax Loss Due to Fraud[2]	Number of Fraudulent Returns	Total Tax Loss Due to Fraud	% of Total Tax Loss	% of Total Fraudulent Returns
less than $2K	$ 817	37,251	$ 30,462	2.6%	27.9%
2K < 5K	3,527	40,985	144,561	12.6%	30.7%
5K < 10K	7,190	21,192	152,383	13.2%	15.9%
10K < 20K	13,561	18,584	252,031	21.9%	13.9%
20K < 40K	24,009	9,448	226,836	19.7%	7.1%
40K < 70K	48,674	4,560	221,939	19.3%	3.4%
70K < 120K[3]	100,302	1,176	117,958	10.2%	.1%
	Total	133,528	1.146 (billion)	100%	100%

TABLE 2[4]
Individual Returns Filed - 1990

Tax Due On Taxable Income Shown On Return	Number of Returns	% of Returns
$2,000 or less	42,924,472	46.12111
>2,000 to $5,000	28,958,954	31.11488
>5,000 to 10,000	13,136,333	14.11441
>10,000 to 20,000	5,616,522	6.03429
>20,000 to 40,000	1,529,429	1.64288
>40,000 to 70,000	472,999	.50715
>70,000 to 120,000	236,199	.25357
>120,000 to 200,000	108,775	.11604
>200,000 to 350,000	51,837	.05479
>350,000 to 500,000	16,513	.01719
>500,000 to 800,000	11,582	.01181
>800,000 to 1,500,000	6,710	.00644
>1,500,000 to 2,500,000	2,268	.00214
>2,500,000 to 5,000,000	1,171	.00107
>5,000,000 to 10,000,000	380	.00040
>10,000,000 to 20,000,000	120	.00012
>20,000,000	35	.00003
	93,068,742	100%

[1] This data is compiled by the Service's Taxpayer Compliance Measurement Program. The most recent year for which this data was compiled is tax year 1988.

[2] This column represents the average tax loss per year. Since Criminal prosecutions for tax cases are generally based on three years, the average tax loss should be multiplied by three years to determine the tax loss that will be used for sentencing purposes. So for example, an average tax loss of $817.00 would generate an average tax loss of $2451.00 over a three year period.

[3] We have determined that tax loss $120,000 or greater is not statistically significant.

[4] The data in this Table represents statistics of income which is maintained by the Service's Research Division.

PROPOSALS FOR THE 1993 AMENDMENTS TO THE SENTENCING GUIDELINES RELATING TO THE MULTIPLE COUNT RULES

I. Amend guideline § 3D1.3 to add the following provision:

(c) In the case of offenses grouped together pursuant to § 3D1.2(c), where the count that has a specific offense characteristic has an offense level less than the offense level applicable to the group under this provision, the offense level determined in (a) shall be increased by two levels.

OR

Amend guideline § 2D1.1(b) to add the following provision:

(3) If the defendant failed to report income exceeding $10,000 in any year from the unlawful manufacturing, importing, exporting, trafficking, or possession of drugs, increase by 2 levels.

AND

Amend guideline § 2S1.1(b) to add the following provision:

(3) If the defendant failed to report income exceeding $10,000 in any year, increase by two levels.

II. (1) Amend § 3D1.4 to read as follows:

(b) Count as one-half Unit any Group that is 5 or more levels less serious than the Group with the highest offense level.

(2) Delete § 3D1.4(c)

BACKGROUND AND EXPLANATION TO THE PROPOSAL FOR THE SENTENCING GUIDELINES RELATING TO THE MULTIPLE COUNT RULES

Generally, our concern is that the multiple count rules fail to increase the offense level to account for certain tax offenses that result in conviction. Our primary concern is the application of the multiple count rules discussed below in determining sentences in cases which involve both drug or money laundering offenses and tax offenses.

I. § 3D1.2(c) - Grouping of Closely Related Counts Based on Specific Offense Characteristic

Pursuant to § 3D1.2(c) counts are grouped together into a single group when one count embodies conduct that is treated as a specific offense characteristic in the guideline applicable to another count. The multiple count rules fail to increase the sentence when counts are grouped under this rule but the count that has a specific offense characteristic carries a **lower** offense level than the offense level applicable to the group. Our concern is the distortion that results when there is a conviction for a drug or money laundering offense and a tax offense for which the drug or money laundering offense is a specific offense characteristic.

For example, if a defendant is convicted for both tax evasion and a drug offense, the drug offense will constitute a specific offense characteristic resulting in a two level increase, if the defendant failed to report or to correctly identify the source of income exceeding $10,000 from criminal activity. § 2T1.1(b)(1). In situations where the drug offense is a specific offense characteristic, § 3D1.2(c) would operate to group the tax and drug counts. In most cases, the offense level for the drug count will exceed the offense level for the tax count (even after the two-level increase for criminally-derived income) and therefore, pursuant to § 3D1.3(a), the offense level applicable to the grouped counts would be the offense level for the drug offense. The tax count would not be included in the sentencing calculation. Thus, there is no corresponding increase in the offense level to reflect the tax offense. The result is that a defendant convicted for both drug and tax counts which are grouped, is sentenced to the same sentence as a defendant convicted of a drug offense alone.

We recognize that § 3D1.2(c) is designed to prevent "double counting" of offense behavior. As stated however, the tax offense is often not taken into account to any extent in determining the offense level. Also, we do not believe circumstances for potential double counting exist where the offenses constitute two distinct offenses and seek to protect

different societal interests. In light of the Commission's statement that deterring others from violating the tax laws is a primary consideration underlying the tax guidelines and our interest in protecting the integrity of the tax system, we believe an amendment to the guidelines is necessary.

II. § 3D1.4 - Determining the Combined Offense Level

In determining the combined offense level, § 3D1.4 disregards any group of closely related counts that has an offense level nine or more levels less serious than the group with the highest offense level. In cases involving counts which include serious offenses and significantly less serious offenses (in terms of offense levels) this provision may operate to ignore the less serious count in calculating the combined offense level.

If a defendant is convicted for both tax evasion and drug offenses but the counts are not grouped under § 3D1.2(c) (i.e., the income is not criminally-derived), there is potential for the tax offense to be excluded from the guideline calculation. As noted above, in a majority of cases, the drug offense will carry a higher offense level than the tax offense. Under § 3D1.4, the tax offense will not be taken into account if it is nine or more levels less serious than the drug offense. Since there is great disparity between the offense levels applicable to drug offenses and the offense levels applicable to tax offenses, in many cases the offense level applicable to the tax count will be 9 levels less serious than the offense level applicable to the drug count. As the following example illustrates, the result is that a tax count and drug count which are not grouped may produce the same sentencing range as a defendant convicted of a drug count alone.

> A is convicted of selling 50 G of cocaine and tax evasion (with a tax loss of $2,800). B is convicted of selling 50 G of cocaine. The offense level for the drug offense is 16. The offense level for the tax evasion is 7. The offense level with respect to B would be 16. Assuming the drug offense and tax offense are not grouped, the offense level with respect to A, would also be 16. Since the tax offense is 9 levels less serious than the drug offense, it is disregarded under § 3D1.4. The guidelines, in effect, treat A and B similarly even though A was also convicted of tax evasion.

The present guideline is inadequate to ensure proper punishment for the tax offense. Our proposal would assure that all groups of closely related counts of conviction contribute

toward the sentence. Pursuant to this amendment, tax offenses which are 9 or more levels less serious than drug offenses would contribute to the sentencing calculation in that it would increase by one level the offense level applicable to the drug offense. While the amendment does not require that the tax offense be fully accounted for, it ensures that some punishment is given for the tax offense. In the above example, the amendment would have the following effect:

> Under § 3D1.4, both A and B would receive one unit for the drug count. In addition, A would also receive one-half unit for the tax count for a total of 1 1/2 units. This would cause an increase of one level in the offense level applicable to the drug offense. Therefore, the offense level with respect to A would be 17 and the offense level with respect to B would be 16. The offense level assigned to A would reflect to some extent the fact that A was also convicted of tax evasion.

LAW OFFICES

HOCHMAN, SALKIN AND DEROY
A PROFESSIONAL CORPORATION
9150 WILSHIRE BOULEVARD
SUITE 300
BEVERLY HILLS, CALIFORNIA 90212-3414

(310) 281-3200
(310) 273-1181

BRIAN P. GERTENSTEIN
BRUCE I. HOCHMAN
SANFORD HOLO
JAMES V. LOOBY
DENNIS L. PEREZ
MICHAEL POPOFF
CHARLES P. RETTIG
AVRAM SALKIN
STEVEN R. TOSCHER
JOANNA J. TULIO

OF COUNSEL
GEORGE DEROY

FACSIMILE
(310) 859-1430

DIRECT DIAL NO.

March 9, 1993

Mr. Michael Corlander
Public Information Specialist
United States Sentencing Commission
1 Columbus Circle, NE, Suite 2-500 South Lobby
Washington, DC 20002-8002

RE: Comment to Proposed Sentencing Guideline Amendments/ Tax Provisions

Dear Mr. Corlander:

This letter is written in response to the Commission's solicitation for public comment regarding proposed amendments to the United States Sentencing Guidelines.

Our practice primarily consists of criminal and civil tax litigation. We would like to comment on the proposal to redefine tax loss and specifically the provision which would provide for a "rebuttable presumption" that the tax loss will be equal to the specified percentage (i.e., 28% or 34%) of unreported gross income or improperly claimed deductions.

We believe the proposal is a good change and should be favorably considered by the Commission. Under the existing guidelines, tax loss is generally determined merely by applying the specified percentage (e.g., 28%) against the omitted items of gross income. Legitimate deductions which were not claimed on the return may not be taken into account. Accordingly, under the guidelines, there may be situations where there is little or no criminal tax deficiency, but a very large "tax loss."

For example, assume a taxpayer omitted income of $200,000 from his or her return with the intent to evade the tax on such income. Also assume that the taxpayer had other deductions of $100,000 which were not claimed on the return. Under the existing guidelines, the tax loss is 28% of the $200,000, or $56,000. The actual deficiency, assuming a 28% bracket, would be approximately one-half that amount, or $28,000.

Since the underlying premise of the guidelines is to sentence based upon tax loss, it seems appropriate to attempt to determine, within practical limitations, what the tax loss is. An individual who has evaded $56,000 of tax should be sentenced differently than an individual who evaded $28,000 of tax.

We believe the "rebuttable presumption" approach contained in the proposal strikes the proper balance. Once the Government has demonstrated the omission of gross income, the tax defendant has the obligation to come forward with evidence showing a reduction in the tax deficiency. While it is true that allowing consideration of offsetting deductions complicates the determination of tax loss, it is a complication which is nevertheless required to be addressed by the Internal Revenue Service for civil tax purposes and should be addressed in determining the appropriate sentence under the guidelines.

We would appreciate your placing this comment in the public record of the Commission's proceedings.

Sincerely yours,

Bruce I. Hochman

BRUCE I. HOCHMAN

STEVEN TOSCHER

ST/jmr

746 U.S. POST OFFICE
AND COURT HOUSE
5th AND MAIN STREET
CINCINNATI 45202-3980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

February 23, 1993

U. S. Sentencing Commission
One Columbus Circle, N. E., Suite 2-500
Washington, D. C. 20002-8002
Attention: Public Information

Dear Judge Wilkins

Attached hereto are personal comments regarding certain proposed guideline amendments. I have written a separate document for each of the issues on which I commented. Understand that the comments provided are only my own and are not representative of this agency or the Court for which I work.

Thank you for the opportunity to comment on the proposed amendments.

Sincerely

David E. Miller

David E. Miller, Deputy Chief
U. S. Probation Officer

746 U.S. POST OFFICE
AND COURT HOUSE
5th AND MAIN STREET
CINCINNATI 45202-3980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

DATE: February 16, 1993

RE: Amendment #21. Additional Issue for Comment.

FROM: David E. Miller, Deputy Chief
U. S. Probation Officer

TO: U. S. Sentencing Commission
Public Information

* The Commission invites comment on whether the tax table should be amended to offset the potential impact of other amendments that increased the potential for sentences of probation for low level tax offenders.

I do not think tax offenders should be treated differently than other property offenders and the Court should have available the same sentencing options for these similar offenders.

Multiple Victims

U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

MAR 2 1993

Honorable 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 Judge Wilkins:

As you know, the Department of Justice strongly opposes the Sentencing Commission's proposed amendment of guideline sections 2S.1 and 2S.2, (Amendment 20 of the published proposals), which would (without in our view any justification) greatly reduce the sentences for virtually all money laundering offenses. As an alternative to Amendment 20, the Department has developed a proposal (enclosed herein) which addresses the class of money laundering cases popularly referred to as "receipt and deposit", which seem to be the area of greatest concern under the current guidelines.

I would be pleased to discuss this matter further at your convenience.

Sincerely,

Roger A. Pauley

Roger A. Pauley
Director, Office of Legislation

Enclosure

cc: Honorable Julie E. Carnes
Honorable Michael S. Gelacak
Honorable A. David Mazzone
Honorable Ilene H. Nagel

DEPARTMENT OF JUSTICE PROPOSAL

Section 2S1.1 is amended by redesignating subsection (c) as subsection (d) and inserting the following after subsection (b):

"(c) Special Instruction for Certain Forms of Money Laundering

(1) Notwithstanding subsections (a) and (b), the offense level shall be 8 plus the number of offense levels from the table in §2F1.1 corresponding to the value of the funds if--

(A) the defendant was convicted under 18 U.S.C. §1956(a)(1)(A)(i), (a)(2)(A), or (a)(3)(A);

(B) the specified unlawful activity did not involve a matter of national security or munitions control, a risk of serious bodily injury or death, a crime of violence, a controlled substance or precursor chemical, a firearm, or an explosive; and

(C) the money laundering conduct was limited to the deposit of non-currency proceeds of specified unlawful activity into a domestic financial institution account that is clearly identifiable as belonging to the person(s) who committed the specified unlawful activity."

The Commentary to §2S1.1 is amended by inserting the following at the end thereof:

"The lower offense level provided by the special instruction in subsection (c) is reserved for offenses which meet the specified criteria. First, the count of conviction for money laundering must have been for a violation of 18 U.S.C. §1956(a)(1)(A)(i), (a)(2)(A), or (a)(3)(A), relating to an intent to promote specified unlawful activity. If the defendant was also convicted under one of the other provisions of section 1956 for the same conduct, the reduced offense level provided by subsection (c) does not apply. Next, the underlying unlawful activity must not have involved a matter of national security or munitions control, a risk of serious bodily injury or death, a crime of violence, a controlled substance or precursor chemical, a firearm, or an explosive. Finally, the money laundering conduct must have been limited to the deposit of non-currency proceeds into a domestic financial institution account, and the account must be clearly identifiable as belonging to the person(s) who committed the specified unlawful activity. For example, a defendant who deposits a check constituting the proceeds of his or her spouse's specified unlawful activity into the spouse's account would qualify for the reduced offense level of subsection (c) if all the other limitations are present.

The term "money laundering conduct" as used in subsection (c)(1)(C) is not limited to the conduct comprising the offense of conviction but includes transactions which are part of the same course of conduct or common scheme or plan as the offense of conviction and which themselves independently

establish any money laundering offense. The withdrawal of proceeds does not constitute money laundering conduct unless carried out in a manner that would violate a money laundering statute (see, e.g., 18 U.S.C. §1957 regarding withdrawals and other transactions in an amount over $10,000). Therefore, the withdrawal of the proceeds for legitimate purposes, such as the payment of living expenses, in a manner that does not constitute money laundering conduct is consistent with application of the reduced offense level of subsection (c). However, if there are indicia of further money laundering activity by the defendant involving the proceeds deposited into the account, the higher offense levels provided in subsections (a) and (b) apply."

Section 2S1.2 is amended by redesignating subsection (c) as subsection (d) and inserting the following after subsection (b):

"(c) Special Instruction for Certain Forms of Money Laundering

(1) Notwithstanding subsections (a) and (b), the offense level shall be 8 plus the number of offense levels from the table in §2F1.1 corresponding to the value of the funds if--

(A) the specified unlawful activity did not involve a matter of national security or munitions control, a risk of serious bodily injury or death, a crime of violence, a

controlled substance or precursor chemical, a firearm, or an explosive; and

(B) the money laundering conduct was limited to the deposit of non-currency proceeds of specified unlawful activity into a domestic financial institution account that is clearly identifiable as belonging to the person(s) who committed the specified unlawful activity."

The Commentary to §2S1.2 is amended by inserting the following at the end thereof:

"The lower offense level provided by the special instruction in subsection (c) is reserved for offenses which meet the specified criteria. First, the underlying unlawful activity must not have involved a matter of national security or munitions control, a risk of serious bodily injury or death, a crime of violence, a controlled substance or precursor chemical, a firearm, or an explosive. Next, the money laundering conduct must have been limited to the deposit of non-currency proceeds into a domestic financial institution account, and the account must be clearly identifiable as belonging to the person(s) who committed the specified unlawful activity. For example, a defendant who deposits a check constituting the proceeds of his or her spouse's specified unlawful activity into the spouse's

account would qualify for the reduced offense level of subsection (c) if all the other limitations are present.

The term "money laundering conduct" as used in subsection (c)(1)(B) is not limited to the conduct comprising the offense of conviction but includes transactions which are part of the same course of conduct or common scheme or plan as the offense of conviction and which themselves independently establish any money laundering offense. The withdrawal of proceeds does not constitute money laundering conduct unless carried out in a manner that would violate a money laundering statute (see, e.g., 18 U.S.C. §1957 regarding withdrawals and other transactions in an amount over $10,000). Therefore, the withdrawal of the proceeds for legitimate purposes, such as the payment of living expenses, in a manner that does not constitute money laundering conduct is consistent with application of the reduced offense level of subsection (c). However, if there are indicia of further money laundering activity by the defendant involving the proceeds deposited into the account, the higher offense levels provided in subsections (a) and (b) apply."

LAW OFFICES

LYONS AND SANDERS

CHARTERED

DALE R. SANDERS
BRUCE M. LYONS
HOWARD L. GREITZER

EDWARD D. BERGER
(1959-1987)

600 NORTHEAST 3RD AVENUE
FORT LAUDERDALE, FLORIDA 33304
TELEPHONE (305) 467-8700
TELEFAX (305) 763-4856

MAILING ADDRESS
P. O. BOX 1778
FORT LAUDERDALE, FL 33302-1778

March 23, 1993

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8003

Dear Mr. Courlander:

I practice criminal law in Fort Lauderdale, Florida, and I am currently on the Criminal Justice Section of the American Bar Association, and formerly was president of the National Association of Criminal Defense Lawyers. As a practitioner, I am writing to express my comments on the proposed amendments to the sentencing guidelines published in the December 3, 1992 edition of the Federal Register. I express my concern in regards to proposed amendment numbers 20 and 58, and set forth my thinking on these matters below.

I would strongly recommend adoption of amendment number 20, which would amend U.S.S.G. Sections 2S1.1 and 2S1.2 governing money laundering offenses. I feel this amendment is much needed in light of the fact that the government has been able to obtain significantly higher guideline sentencing ranges around the country by adding a violation of 18 U.S.C. Sections 1956 and 1957 to an indictment.

We have been made aware of instances where the government threatens to include money laundering counts in an indictment in an effort to force a plea on a defendant. The proposed amendment goes a long way toward addressing this concern and ultimately will help to achieve the commission's stated goals when the guidelines were first formulated.

I would strongly urge the Commission to reject the proposed amendment number 58, which would amend section 2S1.3 governing the violations of currency transactions and IRS Form 8300. The proposal to set the base offense level at 9 is much too high for these offenses, and I would urge the Commission to seriously consider the base offense level of 6 for both section 2S1.3 and section 2S1.4 for failure to follow Currency

Transaction Reports, IRS Forms 8300 and Currency and Monetary Instrument Reports. Obviously, the fraud table in section 2F1.1 can be used if the defendant knew or believe that the funds were intended to be used to promote criminal activity.

I appreciate you taking the time to consider my thoughts on this matter, and I urge the reforms suggested.

Very truly yours,

BRUCE M. LYONS

BML:bjm

STANLEY I. GREENBERG
A LAW CORPORATION

CERTIFIED SPECIALIST, CRIMINAL LAW
CALIFORNIA BOARD OF
LEGAL SPECIALIZATION

11845 WEST OLYMPIC BOULEVARD SUITE 1000
LOS ANGELES, CALIFORNIA 90064

(310) 444-5999
(310) 473-3333
TELECOPIER (310) 444-5910

March 23, 1993

Mr. Michael Courlander
Public Information Specialist
U.S. SENTENCING COMMISSION
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8003

Dear Mr. Courlander:

I am a federal criminal defense practitioner in Los Angeles, California. I am writing in response to the United States Sentencing commission's request for public comment upon the proposed amendments to the Sentencing Guidelines published in the December 31, 1992, edition of the Federal Register (Vol. 57, No. 252, Part IV). The purpose of this letter is to comment on proposed amendment numbers 20 and 58, which govern money laundering offenses and violations for failing to file certain currency and monetary instrument reports.

I strongly recommend adoption of amendment number 20, which would amend U.S.S.G. §§ 2S1.1 and 2S1.2 governing money laundering offenses. This amendment would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds.

This constitutes a much needed reform. As the report of the commission staff on money laundering demonstrates, there are cases around the country in which the government has been able to obtain a significantly higher guideline sentencing range than the underlying offense would yield simply by adding a violation of 18 USC §§ 1956 or 1957 to the indictment. As the proposed amendment seems to recognize, these statutes are quite broad and can apply even in relatively simple fraud and other cases. Such cases often involve monetary transactions that are normally not thought of as sophisticated "money laundering," but which nonetheless are proscribed by §§ 1956 and 1957. United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991), is a perfect example. In that case, a state public official was convicted for money laundering under 18 USC § 1956 based upon the deposit into his personal checking account of a single $3,000 check representing a bribe.

There also are instances when the government can substantially influence plea bargaining negotiations by merely threatening to include in the indictment a count charging a violation of § 1956 or § 1957. The proposed amendment goes a long way towards addressing this problem and ultimately will help to achieve the

Commission's stated goal of "eliminating unfair treatment that might flow from count manipulation." U.S.S.G., Chapter 1, Part A, Paragraph 3.

While I strongly recommend adoption of amendment number 20, I strongly urge the Commission to reconsider amendment number 58, which would amend §2S1.3 governing violations of the currency transaction and IRS Form 8300 reporting requirements. Although I support the Commission's efforts to harmonize its treatment of violations under § 2S1.3 with violations under § 2S1.4, I think that a base level of 9 is too high for all of these offenses, particularly if the currency is not the proceeds of, or being used to further, criminal activity. To be consistent with the base offense level for structuring transactions to evade these same reporting requirements and the commission's overall goal in harmonizing its treatment of similar offenses, I strongly urge the Commission to seriously consider a base offense level of 6 for both §2S1.3 and § 2S1.4 for failures to file Currency Transaction Reports, IRS Form 8300 and Currency and Monetary Instrument Reports. As with structuring, the offense level could be increased by the number of offense levels in the fraud table (§ 2F1.1) if the defendant knew or believed that the funds were intended to be used to promote criminal activity.

I support the Commission's effort to make the Sentencing Guidelines uniform and fair.

Yours very truly,

STANLEY I. GREENBERG

SIG:jp

Firearms

DEPARTMENT OF THE TREASURY
WASHINGTON

March 19, 1993

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1 Columbus Circle, N.E.
Suite 2500
South Lobby
Washington, D.C. 20002-8002

Dear Judge Wilkins:

The United States Sentencing Commission has proposed changes to the sentencing guidelines concerning sentences for money laundering crimes and violations of currency reporting laws. The changes proposed by the Commission would reduce the base offense level for these crimes and violations, and increase this offense level only based upon particularized characteristics of the offense or the state of mind of the offender. The Commission has advanced these suggested changes in response to some perceived excessive sentences with respect to "minor" money laundering offenses, and violations of regulatory reporting requirements.

The efforts of the Commission to change the sentencing guidelines to ensure that the sentence imposed is commensurate with the seriousness of the offense are laudatory. However, Treasury believes that the proposed changes to the sentencing guidelines for money laundering and currency reporting violations are contrary to both the Commission's past efforts and the intentions of Congress in enacting the money laundering and currency reporting laws. Therefore, Treasury opposes the Commission's proposed changes to the sentencing guidelines.

The two major money laundering statutes, 18 U.S.C. 1956 and 1957, provide for 20 and 10 year terms of imprisonment, respectively. It is apparent that Congress recognized money laundering as an offense separate from the underlying predicate crime that is deserving of independent and lengthy punishments.

The proposed changes to the sentencing guidelines for money laundering offenses would lower the base offense level and result in shorter sentences. At a time when the available information and statistics suggest that the volume of currency being laundered has grown tremendously and the methods and schemes of laundering money have proliferated and become increasingly more complicated, to lower the sentences for money launderers would be counter productive to all other law enforcement efforts.

The Department of Justice has submitted comments that include alternatives to the changes proposed by the Commission. While the alternatives suggested by the Justice Department proposal, and the analysis and reasoning offered in support thereof, acknowledge the Commission's concern for lower sentences in certain types of cases, the Justice proposal recognizes the serious nature of the money laundering offense and maintains a base offense level commensurate with the seriousness of the offense. Treasury believes that the Justice Department proposal accommodates the current need for the majority of money laundering offenses.

With respect to the currency reporting violations, 26 U.S.C. 7203 (26 U.S.C. 6050I), 31 U.S.C. 5313, 5314, 5316 and 5324, the Commission proposes to combine current sentencing guidelines 2S1.3 and 2S1.4 and create a base offense level of 8 or 6 with an adjustment for the value of funds involved. Merging 2S1.3 and 2S1.4 would treat the failure to file a monetary instrument report(31 U.S.C. 5316), the same as the failure to file other financial transaction reports. Representatives from Justice and Treasury discussed this alternative prior to its submission to the Commission and concur that the base offense levels proposed by the Commission are too low. Accordingly, the Justice Department has proposed an alternative, enclosed herewith, which combines current sentencing guidelines 2S1.3 and 2S1.4 with a base offense level of 13, 9, or 5.

The Commission considered currency reporting violations to be regulatory violations that need not be sentenced as severely as other money laundering offenses. For the reasons advanced by the Justice Department in its proposed alternative on currency reporting violations and for the additional reasons advanced below, Treasury does not agree that the base offense level for these violations should be reduced from 13 to 8.

The Bank Secrecy Act and its legislative history demonstrate that Congress believed certain reporting violations are criminal in nature and should be punished as such. This Congressional intent is reflected in 31 U.S.C. 5322, the criminal offense section, where enhanced violations are punishable by a term of imprisonment of up to ten years.

The principal anti-money laundering law enforcement effort currently is directed at detecting currency upon its entry into the financial system, the placement stage. The placement stage is acknowledged to be the most vulnerable phase of the money laundering operation. Presently, virtually every regulatory reporting requirement is aimed at recording funds at the placement stage of the money laundering scheme.

The enforcement of financial transaction reporting requirements has created a simple, wide-ranging process which identifies large

transactions in currency and monetary instruments. Congress recognized the value in this process and enacted a separate provision, penalizing the structuring of transactions to avoid the reporting requirements. Sentences must be severe enough to ensure the compliance necessary to support the overall anti-money laundering law enforcement effort; a base offense level of 8 or 6 is insufficient for this purpose.

The United States has participated in the meetings and discussions of the Financial Action Task Force (FATF). Through its membership, the United States has encouraged other nations who participate in the FATF to adopt currency reporting requirements as an important part of an overall anti-money laundering program. Indeed, some of the FATF member nations have begun considering currency reporting requirements.

At the same time that the value of currency reporting is being advanced by the United States in the international forum, the Commission proposes to reduce the sentencing guideline offense levels for failing to comply with those reporting requirements. The Commission's proposal to reduce the base offense level for failing to comply with the currency reporting guidelines is not the appropriate signal to send to the other FATF members and the international law enforcement community, who are eager to join in the fight against money laundering.

The Commission's proposed changes would only increase the level of the offense based upon the value of the funds involved in the reporting offense. The Commission should be mindful, however, that the value of the funds involved in a money laundering offense may not be an accurate measure of the harm caused.

For the reasons advanced above and for the reasons advanced by the Department of Justice, the Department of the Treasury endorses and supports the Department of Justice's proposals concerning the sentencing guidelines for money laundering offenses and for currency reporting violations.

Treasury appreciates the opportunity to share its views with the Sentencing Commission.

Sincerely,

John P. Simpson
Deputy Assistant Secretary
(Regulatory, Tariff and Trade Enforcement)

Enclosure

Proposed Guideline (changes appear in bold)

§2S1.3 Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements

(a) Base Offense Level:

(1) 13, if the defendant:

(A) structured transactions to evade reporting requirements; or

(B) knowingly filed, or caused another to file, a report containing materially false statements; or

(2) 9, for a wilful failure to file; or

(3) 5, otherwise.

(b) Specific Offense Characteristics

(1) If the defendant knew or believed that the funds were criminally derived property, increase by 4 levels. If the resulting offense level is less than level 13, increase to level 13.

(2) If the base offense level is from (a)(1) **or (a)(2)** above and the value of the funds exceeded $100,000, increase the offense level as specified in §2S1.1(b)(2).

(c) Special Instruction for Fines -- Organizations
[unchanged]

Commentary

Statutory Provisions: 26 U.S.C. § 7206 (if a willful violation of 26 U.S.C. § 6050I); 31 U.S.C. §§ 5313, 5314, **5316**, 5322, 5324. For additional statutory provision(s), see Appendix A (Statutory Index).

Background:
[add as indicated:] A base offense level of 13 is provided for those offenses where the defendant either structured the transaction to evade reporting requirements or knowingly filed, or caused another to file, a report containing materially false statements. **A base level of 9 is provided for willful failure to file and for the mere denial of reportable assets, in response to routine questioning at a border crossing.** A lower alternative of 5 is provided in all other cases.

[§2S1.4 IS DELETED]

PORTER, WRIGHT,
MORRIS & ARTHUR
Attorneys & Counselors at Law

41 South High Street
Columbus, Ohio 43215-3406
Telephone: 614-227-2000
Fax: 614-227-2100
Telex: 6503213584

Daniel A. Brown
614-227-2171

March 17, 1993

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8003

Dear Mr. Courlander:

I am a federal criminal defense practitioner in Columbus, Ohio. I am writing in response to the United States Sentencing Commission's request for public comment upon the proposed amendments to the Sentencing Guidelines published in the December 31, 1992 edition of the Federal Register (Vol. 57, No. 252, Part IV). The purpose of this letter is to comment on proposed amendment numbers 20 and 58, which govern money laundering offenses and violations for failing to file certain currency and monetary instrument reports.

I strongly recommend adoption of amendment number 20, which would amend U.S.S.G. §§2S1.1 and 2S1.2 governing money laundering offenses. This amendment would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds.

This constitutes a much needed reform. As the report of the Commission staff on money laundering demonstrates, there are cases around the country in which the government has been able to obtain a significantly higher guideline sentencing range than the underlying offense would yield simply by adding a violation of 18 U.S.C. §§1956 or 1957 to the indictment. As the proposed amendment seems to recognize, these statutes are quite broad and can apply even in relatively simple fraud and other cases. Such cases often involve monetary transactions that are normally not thought of as sophisticated "money laundering," but which nonetheless are proscribed by §§1956

and 1957. United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991), is a perfect example. In that case, a state public official was convicted for money laundering under 18 U.S.C. 1956 based upon the deposit into his personal checking account of a single $3,000 check representing a bribe.

There also are instances when the government can substantially influence plea bargaining negotiations by merely threatening to include in the indictment a count charging a violation of §1956 or 1957. The proposed amendment goes a long way towards addressing this problem and ultimately will help to achieve the Commission's stated goal of "eliminating unfair treatment that might flow from count manipulation." U.S.S.G., Chapter 1, Part A, Paragraph 3.

While I strongly recommend adoption of amendment number 20, I strongly urge the Commission to reconsider amendment number 58, which would amend §2S1.3 governing violations of the currency transaction and IRS Form 8300 reporting requirements. Although I support the Commission's efforts to harmonize its treatment of violations under §2S1.3 with violations under §2S1.4, I think that a base level of 9 is too high for all of these offenses, particularly if the currency is not the proceeds of, or being used to further, criminal activity. To be consistent with the base offense level for structuring transactions to evade these same reporting requirements and the Commission's overall goal in harmonizing its treatment of similar offenses, I strongly urge the Commission to seriously consider a base offense level of 6 for both §2S1.3 and §2S1.4 for failures to file Currency Transaction Reports, IRS Forms 8300 and Currency and Monetary Instrument Reports. As with structuring, the offense level could be increased by the number of offense levels in the fraud table (§2F1.1) if the defendant knew or believed that the funds were intended to be used to promote criminal activity.

I support the Commission's effort to make the sentencing guidelines uniform and fair.

Very truly yours,

Daniel A. Brown

PORTER • WRIGHT • MORRIS & ARTHUR

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.

Technical corrections to the proposed amendment are needed to clarify the application of the guideline for its purpose. The amendment would read as follows:

> 8. If the offense involved a scheme to steal multiple pieces of undelivered United States Mail and the offense level determined above is less than level 14, increase to level 14.

Proposed Amendment 45, (§ 3A1.4). The Postal Service remains committed to the principle of victims' rights and supports more guidelines which emphasize victim impact in the sentencing process. We believe the sentencing level should reflect the total harm caused by the defendant's criminal misconduct. Our proposed guideline accomplishes this by including a victim-related adjustment based on the number of victims. For example, in volume mail theft crimes, and in consumer fraud crimes, substantial numbers of victims are directly harmed. We believe that the number of victims impacted by the defendant's relevant conduct should warrant an increase in the offense level. Furthermore, we feel such a guideline should be applied to any offense which results in multiple victims for these reasons.

As proposed, our amendment would give a two-level increase for a crime which results in two or more victims; those crimes affecting more than 100 victims would be subject to an additional two-level increase for each 250 victims, up to a maximum eight-level increase.

Because our proposed amendment is a Chapter 3 adjustment, it would impact on other offenses beyond those which are postal related, which requires a more comprehensive analysis of multiple victim crimes. Accordingly, we urge the Commission to include the study and formulation of a multiple victim guideline as a priority issue for 1994.

Your consideration of these issues is appreciated. If additional information is needed, please contact me at (202) 268-4267.

Sincerely,

K. J. Hunter

K. J. Hunter

LAW OFFICES
OF
J. W. COYLE III, INC.
A PROFESSIONAL CORPORATION
ROBINSON RENAISSANCE
119 NORTH ROBINSON, SUITE 380
OKLAHOMA CITY, OKLAHOMA 73102

J. W. COYLE III
GLOYD L. McCOY

TELEPHONE
(405) 232-1988
TELECOPIER
(405) 272-0859

March 15, 1993

VIA FAX (202) 273-4529

United States Sentencing Commission
1 Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
ATTN: Public Information

To: Honorable Sentencing Commission:

I am an active criminal defense lawyer and am writing to comment on two of the most serious areas of abuse that I have personally witnessed in my law practice.

AMENDMENT NO. 20 - (pg. 25) - Money Laundering (Chapter Two, Part S) - Consolidate Sections 2S1.1 and 2S1.2 in Sections 2S1.4 and 2S1.4; Ties offense level closer to seriousness of offenses.

In the area of white collar crime this area of the guidelines is the one most frequently abused by prosecutors. In plea bargaining negotiations, we are frequently told "if you don't plead to the mail fraud, then we will charge him with money laundering". It is very unfair when someone can get 6 to 10 months for a mail fraud scheme, and then 40-something months for depositing the check that was the object of the mail fraud. In the first place it does not make good sense, and in the second place it is a very unfair advantage for the Government. Further, it does not in any way mete out fair punishment.

It is very simply an arrow that should be removed from the Government's quiver.

AMENDMENT NO. 40 - (pg. 63) - 100 to 1 Ratio of Crack vs. Powder Cocaine; There is in fact little scientific support for the 100 to 1 Ratio, and unquestionably black persons are impacted by this very unfair requirement. I proved in the case of United States v. Hutchinson, in the United States District Court for the Western District of Oklahoma, Case No. CR-92-31-T, that of all

crack cases since the guidelines (November 1, 1987) in the Western District, 94.39% of the defendants were black.

The enormous disparity in sentences, and the unduly harsh requirements of the guidelines have resulted in the life imprisonment of many persons who deserve a substantially shorter sentence. This should be done immediately, and retroactively.

Thank you for the opportunity to comment on the guidelines.

Respectfully yours,

J. W. Coyle, III

JWC/sm
L-JW.SC

BAKER & MOSCOWITZ
ATTORNEYS AT LAW
3130 SOUTHEAST FINANCIAL CENTER
200 SOUTH BISCAYNE BOULEVARD
MIAMI, FLORIDA 33131-5306

JANE W. MOSCOWITZ

TELEPHONE
(305) 379-6700
FACSIMILE
(305) 379-2215

March 15, 1993

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8003

Dear Mr. Courlander:

I am a federal criminal defense practitioner in Miami, Florida. I am writing in response to the United States Sentencing Commission's request for public comment upon the proposed amendments to the Sentencing Guidelines published in the December 31, 1992 edition of the Federal Register (Vol. 57, No. 252, Part IV). The purpose of this letter is to comment on amendment numbers 20 and 58, which govern money laundering offenses and violations for failing to file certain currency and monetary instrument reports.

I strongly recommend adoption of amendment number 20, which would amend U.S.S.G. §§ 2S1.1 and 2S1.2 governing money laundering offenses. This amendment would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds.

This constitutes a much needed reform. As the report of the Commission staff on money laundering demonstrates, there are cases around the country in which the government has been able to obtain a significantly higher guideline sentencing range than the underlying offense would yield simply by adding a violation of 18 U.S.C. §§ 1956 or 1957 to the indictment. As the proposed amendment seems to recognize, these statutes are quite broad and can apply even in relatively simple fraud and other cases. Such cases often involve monetary transactions that are normally not thought of as sophisticated "money laundering," but which nonetheless are proscribed by §§ 1956 and 1957. United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991), is a perfect example. In

that case, a state public official was convicted for money laundering under 18 U.S.C. 1956 based upon the deposit into his personal checking account of a single $3,000 check representing a bribe.

There also are instances when the government can substantially influence plea bargaining negotiations by merely threatening to include in the indictment a count charging a violation of § 1956 and 1957. The proposed amendment goes a long way towards addressing this problem and ultimately will help to achieve the commission's stated goal of "eliminating unfair treatment that might flow from count manipulation." U.S.S.G., Chapter 1, Part A, Paragraph 3.

While I strongly recommend adoption of amendment number 20, I strongly urge the Commission to reconsider amendment number 58, which would amend § 2S1.3 governing violations of the currency transaction and IRS Form 8300 reporting requirements. Although I support the Commission's efforts to harmonize its treatment of violations under § 2S1.3 with violations under § 2S1.4, I think that a base level of 9 is too high for all of these offenses, particularly if the currency is not the proceeds of, or being used to further, criminal activity. To be consistent with the base offense level for structuring transactions to evade these same reporting requirements and the Commission's overall goal in harmonizing its treatment of similar offenses, I strongly urge the Commission to seriously consider a base offense level of 6 for both § 2S1.3 and § 2S1.4 for failures to file Currency Transaction Reports, IRS Forms 8300 and Currency and Monetary Instrument Reports. As with structuring, the offense level could be increased by the number of offense levels in the fraud table (§ 2F1.1) if the defendant knew or believed that the funds were intended to be used to promote criminal activity.

I support the Commission's effort to make the sentencing guidelines uniform and fair.

Yours very truly,

Jane W. Moscowitz

JWM:cnt

LAW OFFICES OF
KATRINA C. PFLAUMER
2300 SMITH TOWER
506 SECOND AVENUE
SEATTLE, WA 98104
(206) 622-5943
FAX: (206) 682-9937

March 15, 1993

Via Facsimile
(202) 273-4529

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500 South Lobby
Washington, D.C. 20002-8003

Dear Mr. Courlander:

I strongly recommend adoption of amendment number 20, which would amend U.S. Sentencing Guidelines §§ 2S1.1 and 2S1.2 governing money laundering offenses. My experience with the Sentencing Reform Act convinces me that it is critical to bring the sanctions for money laundering into proportion with the underlying offense. Because the language of the money laundering laws is so broad, federal prosecutors use it as a threat in a significant proportion of underlying cases, with inequitable results. Defendants are then simply not in a position to contest the underlying offense because of the enormous threat of the money laundering sanctions.

I also strongly urge the Commission to adopt the modification of the Guidelines which would preclude a court from considering conduct on which a defendant was acquitted at the sentencing phase.

Very truly yours,

Katrina C. Pflaumer

KCP:nz

BAROCAS & SCHMIDT, P.C.

ATTORNEYS AT LAW
35 WORTH STREET
NEW YORK, NEW YORK 10013

LAWRENCE ALAN BAROCAS
SAM A. SCHMIDT

TEL: (212) 941-0775
FAX: (212) 431-7431

March 11, 1993

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

Re: Public comment on sentencing guideline proposals

Dear Chairman Wilkins:

It is my understanding that one of the proposals up for consideration to amend the sentencing guidelines involves the money laundering section, §2S1.1. I am writing because the present money laundering guideline requires sentences, in some cases, that are totally out of line with the underlying crime itself. I am an attorney that represents someone who faces this problem.

My client is alleged to have participated as an assistant in a company that allowed escort services to use their merchant number to process credit card charges. The company also assisted in processing the charges for the escort services and paid them the face value of the charge less a percentage for their service. The Government's position is that this is money laundering because following certain sections in the racketeering chapter of the United States Code, the specified criminal conduct leads to the travel act violation, 18 U.S.C. §1952, promoting prostitution by interstate conduct.

This is a unique case. All previous prosecutions concerning this type of activity, using merchant numbers to process credit card charges for escort services, have been prosecuted under the travel act as a travel act violation under 18 U.S.C. §1952.

Travel act violations under §2E1.2 would have a base offense level of 6 or the 14 under §2G1.1, transportation for the purpose of prostitution, if applicable under §2E1.2(2). The relevant guideline for that, without any adjustment for acceptance of responsibility, would either be 0-6 under offense level 6 or 15 to 21 months under offense level 14.

However, since defendant is charged under 18 U.S.C. §1956(a)(1)(A), the base offense level is 23. Moreover, since the amount of funds that have passed through the company on the way to the credit card companies is substantial, approximately 5 or 6 additional points would be added on.[1]

Thus, the base offense level for my client would be 28 or 29. This offense level would require my client to be sentenced to either 78-97 months or 87-108 months.

It is my understanding that the proposed amendment to the sentencing guidelines would cause the offense level of money laundering to relate to the underlying offense. This is reasonable and rational. Money laundering of proceeds from gambling should be treated differently than money laundering of proceeds from drug dealing. The same thing is true with money laundering of prostitution proceeds.

It goes without explanation that escort services are rarely, if ever, prosecuted for promoting prostitution. On the rare cases that they are, such as the Mayflower Madam case, the charges are misdemeanors, punishable with a maximum of one year in jail. To punish someone for assisting a misdemeanor offense as they would punish someone assisting a large scale drug operation, makes no sense and is repugnant to our sense of fairness and justice.

I implore you and the sentencing commission to adopt the proposal that will relate the offense level for money laundering to the offense level of the underlying criminal activity.

Thank you for your consideration of this matter.

Sincerely yours,

Sam A. Schmidt

SAS/jr

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1. It is important to note that there is no claim of loss to any party.

MILBANK, TWEED, HADLEY & McCLOY

INTERNATIONAL SQUARE BUILDING
1825 EYE STREET, N.W.
WASHINGTON, D.C. 20006

(202) 835-7500
FAX: (202) 835-7586
I. T. T. 440667

1 CHASE MANHATTAN PLAZA
NEW YORK, N. Y. 10005-1413

NIPPON PRESS CENTER BUILDING
2-1 UCHISAIWAI-CHO 2-CHOME
CHIYODA-KU, TOKYO 100

ALEXANDRA HOUSE
16 CHATER ROAD
HONG KONG

ROPEMAKER PLACE
25 ROPEMAKER STREET
LONDON, EC2Y 9AS

1903/04 SHELL TOWER
50 RAFFLES PLACE
SINGAPORE 0104

601 SOUTH FIGUEROA STREET
LOS ANGELES, CA 90017

AMY G. RUDNICK
OF COUNSEL
DIRECT DIAL NUMBER
(202) 835-7554

March 11, 1993

BY TELECOPY AND REGULAR MAIL

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8003

Dear Mr. Courlander:

I am a federal criminal defense practitioner in Washington, D.C. and Co-chair of the American Bar Association, Criminal Justice Section, White Collar Crime Committee, Money Laundering Subcommittee. I am writing in my individual capacity to respond to the United States Sentencing Commission's request for public comment on the proposed amendments to the Sentencing Guidelines published in the December 31, 1992 edition of the Federal Register (Vol. 57, No. 252, Part IV). The purpose of this letter is to comment on proposed amendment numbers 20 and 58, which govern money laundering offenses and violations for failing to file certain currency and monetary instrument reports.

I strongly recommend adoption of amendment number 20, which would amend U.S.S.G. §§ 2S1.1 and 2S1.2 governing money laundering offenses. This amendment would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds.

This constitutes a much needed reform. As the report of the Commission staff on money laundering demonstrates, there are cases around the country in which the government has been able to obtain a significantly higher guideline sentencing range than the underlying offense would yield simply by adding a violation of 18 U.S.C. §§ 1956 or 1957 to the indictment. As the proposed amendment seems to recognize, these statutes are quite

broad and can apply even in relatively simple fraud and other cases. Such cases often involve monetary transactions that are normally not thought of as sophisticated "money laundering," but which nonetheless are proscribed by §§ 1956 and 1957. United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991), is a perfect example. In that case, a state public official was convicted for money laundering under 18 U.S.C. § 1956 based upon the deposit into his personal checking account of a single $3,000 check representing a bribe.

There also are instances when the government can substantially influence plea bargaining negotiations by merely threatening to include in the indictment a count charging a violation of § 1956 or § 1957. The proposed amendment goes a long way towards addressing this problem and ultimately will help to achieve the commission's stated goal of "eliminating unfair treatment that might flow from count manipulation." U.S.S.G., Chapter 1, Part A, Paragraph 3.

While I strongly recommend adoption of amendment number 20, I strongly urge the Commission to reconsider amendment number 58, which would amend U.S.S.G. § 2S1.3 governing violations of the currency transaction and IRS Form 8300 reporting requirements. Although I support the Commission's efforts to harmonize its treatment of violations under § 2S1.3 with violations under § 2S1.4, I think that a base level of 9 is too high for all of these offenses, particularly if the currency is not the proceeds of, or being used to further, criminal activity. To be consistent with the base offense level for structuring transactions to evade these same reporting requirements and the Commission's overall goal in harmonizing its treatment of similar offenses, I strongly urge the Commission to seriously consider a base offense level of 6 for both § 2S1.3 and § 2S1.4 for failures to file Currency Transaction Reports, IRS Forms 8300 and Currency and Monetary Instrument Reports. As with structuring, the offense level could be increased by the number of offense levels in the fraud table (§ 2F1.1) if the defendant knew or believed that the funds were intended to be used to promote criminal activity.

I support the Commission's effort to make the sentencing guidelines uniform and fair.

Very truly yours,

Amy G. Rudnick

440908

richard crane
attorney at law • corrections & sentencing law
[redacted] hillsboro road • suite 310
nashville, tennessee 37212
(615) 298-3719 • FAX 298-2467

February 18, 1993

U.S. Sentencing Commission
1 Columbus Circle, N.E.
Suite 2500
Washington, D.C. 20002-8002

Re: Amendments 28(G), 37 and 38
Amendment 25

Gentlemen:

I am writing in support of proposed amendment 28 (G). Some of the problems with the loss definition under § 2B1.1 and § 2F1.1 have been resolved because of the 1992 amendment to the statutory index specifying that either of these guidelines could be appropriate for violation of 18 § 656.

But, the problem persists in other areas. For example, I had a client convicted this past year for conspiring to embezzle from an employee benefit plan. (18 § 371) The offense involved the use of a certificate of deposit from a union pension fund as collateral for a loan. The CD greatly exceeded the amount of the loan, so when the loan was defaulted on, only a portion of the CD was seized to cover the loss. Because the offense involved pension fund money, my client's sentenced was calculated under § 2B1.1 using the full value of the CD , rather than the actual loss. Your proposed amendment 28(G) would, hopefully, resolve this problem.

I also very much favor amendment No. 25 regarding disclosure of information relative to guideline calculations. I practice around the country and there are great differences from one U.S. Attorney's Office to another in providing this information.

Additionally, I think that the amendment should include a requirement

that the government stipulate as often as possible in plea agreements to any facts which impact on guideline calculations. Again, as I practice in various states, some U.S. Attorney's offices are readily agreeable to incorporating stipulations or a separate statement of the offense, while other U.S. Attorney's offices have a "policy" of never stipulating to anything. This only increases the work for the probation officer and for the court, when these matters could easily be resolved during plea negotiations.

Sincerely,

Richard Crane

RC/cm

Substantial Assistance

CUA

THE CATHOLIC UNIVERSITY OF AMERICA

Columbus School of Law
Office of the Faculty
Washington. D.C. 20064
(202) 319-5140

March 8, 1993

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

RE: Proposed Guideline Amendments
for Public Comment - 1993 Cycle

Dear Chairman Wilkins:

On behalf of the Practitioner's Advisory Group (hereinafter called "PAG"), I am writing to you concerning the upcoming amendment cycle. As in the past, I thank you for the opportunity to express the views of the PAG on pending amendments and requests for comments.

TO AMEND OR NOT TO AMEND THE GUIDELINES

A significant debate has begun both within and outside of the Sentencing Commission concerning the propriety of continuously amending the Guidelines. 28 U.S.C. §991(b)(1)(C) requires that "The Commission develop means of measuring the degree to which the sentencing, penal and corrections practices are effective in meeting the purpose of sentencing ... " 28 U.S.C §994 (o) requires the commission to "periodically review and revise.... the guidelines promulgated pursuant to this section." This same statute requires an annual review of the operation of the Guidelines with suggested changes.

It appears that Congress contemplated continued fine tuning of the guidelines sentencing process with at least an annual review of that process culminating in amendments if appropriate. It appears that Congress did not intend that amendments be required annually but such amendments are clearly permitted.

The arguments put forth in support of the practice of amendments is that at least during the initial period of guidelines application there is a need for adjustments in the process which completely altered how sentencing is accomplished in Federal court. The guidelines

are still relatively young; indeed, one of the attributes of a guidelines system is the ability to change practices based on experience gained from the application of the guidelines, while at the same time continuing to promote uniformity in sentencing.

Those who have begun to voice concerns about the continuing amendment process have criticized a perceived IRS-type code mentality with constant changes resulting in confusion, misapplication and the reappearance of disparate sentencing practices based upon institutional disparity resulting from continual Commission and congressional action. The critics point out that for sentencing to be an effective crime deterrent punishment must be certain and consistent, and a system which continually changes cannot be either.

The PAG finds merit in both of the above arguments. Continuous substantive changes in guidelines would result in institutional disparity with one's sentence being potentially dependent upon substantive changes taking place in the amendment cycle immediately preceding one's crime. On the other hand Congress clearly intended for the guidelines sentencing process to be dynamic and not stagnant with changes occurring as dictated by experience, especially in the initial application period in response to actual guidelines utilization.

The Commission's five-year practice of restrained change appears to appropriately balance these competing interests. In fact, the PAG has recommended less restraint and more substantive changes during past cycles than we are advocating during this amendment cycle. It would be unfortunate if the argument against any change prevailed in this amendment cycle in that many of the current proposals represent the culmination of area review or working groups final reports which have taken either one year or several cycles to complete. Changes which experience has shown are necessary to promote the purposes of sentencing should be enacted if the Commission is to truly abide by the duties which were entrusted to it by Congress in enabling legislation.

SPECIFIC AMENDMENT PROPOSALS

The PAG has broken down its comments into three areas: (1) Proposed Drug Amendments (numbered paragraph 1); (2) Proposed Tax Amendments (numbered paragraph 2); and (3) other proposed amendments which are covered sequentially (numbered paragraphs 3-22).

COMPREHENSIVE PROPOSAL FOR DRUG OFFENDERS

1. Proposed Amendments 8-12 - Drug Trafficking and Role in the Offense - The PAG prefers the Comprehensive Proposal for Drug Offenders that forms the basis of our Proposed Amendment number 39. Our original proposed amendment number 39 was published as pages 57-63 of the "reader friendly" proposed guideline

amendments. Attached to this letter is our "new" proposed amendment number 39, which contains changes as a result of further reflection and as a result of a consensus reached at the Practitioners' Advisory Group meeting held on February 22, 1993. The PAG rational for our proposed amendments in the drug area is as follows:

One of the most troublesome aspects of the sentencing guidelines revolves around controlled substances. Judges, defense lawyers, probation officers and even prosecutors have focused criticism on four major areas. First, it is argued that by centering drug sentences on the quantity of controlled substances, other aspects of drug crimes such as violence, organization, profits and obstruction of justice are inappropriately diminished as factors which influence sentencing, especially at the higher ranges where these aggravating characteristics are most likely to occur. Second, critics have argued that the establishment of drug crime mandatory minimum sentences in the Crime Control Acts of 1986 and 1988 inappropriately influenced the sentencing levels set by the Sentencing Commission for all drug crimes, even those not subject to the congressional mandate. Third, it has been argued that the Commission's failure to more fully define the mitigating factors of minor and minimal participants has resulted in a disparate application of this critical aspect of drug sentencing. Finally, there has been vocal protest that the drug guidelines treat less significant participants in concerted drug activity too harshly. Critics argue that usually overkill results when a lower level defendant, because of the application of relevant conduct principles, is credited with most or all of the substances distributed by all the participants in jointly undertaken drug activities.

The PAG believes that many of these criticisms have merit. Because the critical interplay between role in the offense adjustments, specific offense characteristics and drug quantity significantly influences the final sentence in drug crimes, the PAG believes that a comprehensive integrated proposal which addresses all of these critical aspects is the approach most likely to correct what currently is an imperfect system for sentencing drug offenders.

The PAG has closely examined various proposals and has synthesized those changes which would have the most impact on current inequities. The central guiding principles of the changes proposed are the underlying justifications for sentencing codified in 18 U.S.C., §3553(a)(2). Only changes which offer significant increases in deterrence, protection and just punishment should be adopted by the Commission now that the guidelines have in large part been successfully tested in the Courts. The PAG believes that the changes proposed are necessary when considered in light of these guideposts of deterrence, protection and just punishment.

SPECIFIC OFFENSE CHARACTERISTICS

The increasing possession, display and use of firearms in drug crimes remains a societal problem which demands increased protection. The PAG believes that an incremental rise of 2 and 4 levels for increasingly serious conduct involving firearms can provide increased protection and deterrence which is needed and warranted when firearms are used to facilitate drug offenses. In fact, 15% of all drug offenders sentenced in 1991 in Federal Court possessed firearms. In contrast, only 3% were career offenders. The current two-level increase for possession, or the threat of a 924(c) prosecution for use or carrying, does not adequately address the use of weapons in drug crimes. Our new incremental proposal (a 2 level increase for possession of a dangerous weapon and a 4 level increase for use of a dangerous weapon) forms an important link to the proposal which follows to emphasize aggravating and mitigating factors in drug crime sentencing.

As quantity somewhat decreases in importance in drug crimes, role in offense increases in importance. The PAG does not believe any further distinction should be drawn between organizations which employ more than 5 individuals. It may take only a few pilots to smuggle large amounts of cocaine, while it may take 225 off-loaders to smuggle a large amount of marijuana, so that at the upper levels, numbers of participants become less relevant. The result is that persons who qualify for level 38 quantity, who are organizers, but who fully accept responsibility, would not receive the maximum penalty unless they obstructed justice or otherwise engaged in other aggravating conduct. Again, quantity is adequately considered under the PAG proposal, but leadership and obstruction are also re-established as critically important factors, as they should be, in a system grounded on protection and deterrence.

DRUG TABLE

When the Commission originally structured §2D1.1, the drug quantity tables ended at level 36, but the table was later amended to level 42. The Commission also keyed the offense levels for drug amounts which corresponded to the 10-year (1 kilogram of Heroin, 5 kilograms of Cocaine, 1,000 kilograms of Marijuana, etc.) and 5 year (100 grams of Heroin, 500 grams of Cocaine, 100 kilograms of Marijuana, etc.) mandatory minimums at guideline ranges so that the mandatory minimums were encompassed by the low point in the corresponding range rather than the high point in that range. The result of these two fundamental decisions have made drug quantity the linchpin in federal sentencing for controlled substances violators. The PAG recognizes that mandatory minimums must play a role in designing sentences for all drug defendants and that because mandatory minimums focus on drug quantity, the guidelines must reflect such a focus. The PAG thus rejects proposals which inappropriately diminish these aspects. However, both the selection of a low point keyed to the mandatory minimum and the increase of the tables up to the

maximum level of 42 have severely overemphasized quantity in achieving the final sentence for the drug offender. The PAG believes that this overemphasis on quantity provides less rather than more protection to citizens of the United States.

The guidelines system is significantly built on the underlying theoretical justification of deterrence. Potential defendants are discouraged from committing crimes, and persons who committed lesser offenses are deterred from aggravating their conduct because increasing penalties are prescribed.

The Commission has identified certain specific aggravating factors which increase a defendant's sentence so as to deter persons from engaging in such acts.

The entire guidelines system presupposes that the more aggravated a crime becomes the higher the sentence should be so that the system is designed to punish in a graduated manner with incremental increases as conduct becomes more serious so that society is protected from the serious offender.

Unfortunately, the current guidelines contain no incentive for persons distributing larger quantities of substances to desist from engaging in aggravating conduct, because at the upper end of the guidelines quantity determines the maximum sentence without regard to aggravating factors. There is no differentiation between the large quantity dealer who uses a firearm (15%), who obstructs justice (5%), who uses special skills (1%), or who realizes substantial gain, from the large scale dealer who does not engage in such conduct. In essence, for the level 42 dealer, the guidelines speak words of encouragement to obstruct justice because the dealer's sentence is only determined by quantity, and if the dealer successfully obstructs justice, the dealer may receive no sentence at all.

The larger scale, non-violent drug dealer who uses no weapon, pays no hush money, bribes no official, and uses no special skill should not receive the same sentence, simply because of quantity, as the dealer who does engage in such aggravating conduct.

By adjusting the guidelines downward so as to further punish those upper end drug defendants who committed egregious acts in furtherance of their drug enterprises, the Commission can reestablish deterrence as an element of sentencing for these offenders without violating the intent of Congress which established mandatory minimums. The PAG proposal would establish level 38 as the upper end for quantity. The proposed departure is eliminated for truly unusually large quantities so as to emphasize aggravating factors which are also expanded under our proposal. The PAG proposal also would key the mandatory minimum to the upper end of the guideline range so that persons below that range would be sufficiently deterred from larger scale distributions and to provide more emphasis on aggravating factors. These proposals preserve quantity as an important factor

but contain the additional benefits of protecting society by discouraging offenders from aggravating their conduct. Only 3% of all drug offenders are career offenders, yet Congress and the Commission have focused attention on this group. The PAG proposal impacts upon 15% to 20% of offenders while preserving congressional mandates.

Finally, a base offense level cap of level 32 for serious drug offenses and a base offense level cap of 26 for offenses involving all other controlled substances for those defendants who qualify for a mitigating role adjustment, protects against overly harsh sentencing for defendants who are only peripherally involved in the offense.

ROLE IN OFFENSE

Mitigating Role

The PAG believes its proposal to clarify by example those who qualify for mitigating treatment in concerted activity will significantly end disparity in this area.

Deleting the language concerning the lack of knowledge of the scope of the activity, which is contained in the subgroup proposal, was accomplished because such knowledge and lack thereof can play a significant role in the newly redesigned rules of application for relevant conduct and should therefore play no part in determining mitigating role. If the defendant is responsible for all jointly undertaken activities, but played a minor or minimal role, he qualifies for a reduction. If he was only aware of a small part of the offense conduct, but was not a minor participant in the conduct he was aware of, his overall offense level may be diminished but not because of a downward role adjustment.

Also, the PAG sees no reason to treat "mules" any differently than sellers, financiers, or owners and includes transporters so that they are treated in the same manner as these persons.

Because of the increases proposed for firearms possession as specific offense characteristics, the PAG believes a disqualification for firearms possession is no longer appropriate. Using the "Pinkerton" theory to saddle a significantly minimal participant with the principal organizer's weapon is a concept which should be rejected because it blurs the organizational lines between such participants. Minimal offenders who actual possess weapons will receive incremental increases as a deterrent to weapon possession. Persons who induce others to possess or use weapons also are included in this specific offense characteristic.

The PAG believes that the changes proposed enhance the underlying purposes of sentencing, diminish disparate treatment and ameliorate the sentences for minor and

minimal participants in drug distribution activity while continuing to provide significantly just punishment for these serious federal offenders. The PAG believes that the changes proposed substantially contribute to forming a more perfect guidelines sentencing structure. The PAG believes that if this package of amendments is adopted as a whole, the concerns articulated by the Judicial Advisory Group resulting from a simple reduction in base offense levels are in large part eliminated because of the re-emphasis on aggravating factors created by the balance of the provisions in this package of amendments.

PROPOSALS RELATING TO TAX OFFENSES

This report comments on the proposed amendments to the federal sentencing guidelines affecting prosecutions for tax offenses. The amendments published by the Sentencing Commission for public comment would delete the enhancements for "more than minimal planning" and "sophisticated means" used in connection with fraud-related and tax offenses in Sections 2B, 2F and 2T, and substitute increases in the loss tables, consolidate the guidelines for tax offenses in Section 2T, and create a uniform definition of "tax loss." The proposals published at the request of the Internal Revenue Service would restructure the guidelines applicable to most tax felonies to provide for a fixed base offense level and an incremental enhancement for tax losses. All reference to the tax loss table in §2T4.1 is deleted. The IRS also seeks to modify the Chapter 3 grouping rules to increase offense levels for certain grouped offenses, proposes a new offense guideline for the non-violent aspects the omnibus criminal provision in 26 U.S.C. §7212(a), and puts forth proposed enhancements to the narcotics and money laundering offenses that would apply when there is evidence of unreported income.

SUMMARY

The PAG opposes the Commission's proposal to delete the enhancements for "more than minimal planning" and "sophisticated means" used to calculate the sentencing range for fraud-related and tax offenses and use an increase in the loss tables as a surrogate. The PAG favors the proposal to consolidate the tax guidelines and to simplify the definition of "tax loss" by using a uniform standard that allows the actual loss of revenue to the government to rebut an artificial construction of a defendant's tax liability. The PAG opposes new commentary in Section 2T that would cumulate the tax loss on individual and corporate returns involved in a single course of conduct on the grounds it constitutes invidious double counting.

The PAG takes no position on the IRS proposals that generally increase the sanctions for tax crimes and increase the offense levels determined when two or more counts are grouped. The PAG prefers the tax loss definition suggested in the amendments for public comment over the IRS formulation which relies more heavily on

artificial constructs of a defendant's tax liability than on the actual tax loss suffered by the government. The PAG expresses no opinion on the IRS' proposed guideline for violations of 26 U.S.C. §7212(a). Finally, the PAG opposes the IRS proposal to add an enhancement to the narcotics and money laundering guidelines for unrelated and uncharged tax offenses.

Proposed Amendment number 5 - Fraud, Theft, Tax -

1. Summary of Guideline

The guidelines for larceny, fraud-related offenses, and tax crimes include an enhancement when the defendant's conduct involves more planning or sophistication in committing the offense than would otherwise be typical or required to support a conviction. In the larceny and fraud-related guidelines the enhancement applies to "more than minimal planning."[1] In the tax context, the enhancement applies when a defendant uses "sophisticated means" to prevent the offense from being detected.

The General Application Principles in Chapter One instruct that the "more than minimal planning" enhancement for larceny and fraud offenses is appropriate in three situations: (1) where the offense involves "more planning than is typical for commission of the offense in a simple form," (2) where "significant affirmative steps were taken to conceal the offense," and (3) "in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." U.S.S.G. §1B1.1, comment. n.1(f). See also United States v. Rust, 976 F.2d 55 (1st Cir. 1992).

In the guidelines for tax offenses, the enhancement is to be used "if sophisticated means were used to impede discovery of the nature or extent of the offense." See, e.g., U.S.S.G. §2T1.1(b)(2). Like the enhancement for "more than minimal planning" the standard is subjective and only generally defined. See United States v. Brinson, No. 90 CR 273-1, 1991 WL 235925 at *4 (N.D. Ill. Oct. 30, 1991) ("whether 'sophisticated means' were employed (§2T1.1(b)(2)") requires a subjective determination similar to that in §2F1.1(b)(2) (citation omitted)). It "includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case." U.S.S.G. §2T1.1, comment. (n.6). By way of illustration, the guidelines suggest that the enhancement is applicable "where the defendant used offshore bank accounts, or transactions through corporate shells." Id.

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[1]Under the fraud and deceit guideline the enhancement is worded in the disjunctive and applies either to "more than minimal planning" or "a scheme to defraud more than one victim." U.S.S.G. §2F1.1(b)(2).

Amendment No. 5 would delete entirely the specific offense characteristic for "more than minimal planning" employed in the guidelines for larceny, fraud and insider trading[2] and the correlative specific offense characteristic for "sophisticated means" employed in the guidelines for tax offenses.[3] As a surrogate, changes would be made to the applicable loss tables resulting in a two level increase over the November 1, 1992, guidelines for loss amounts greater than $40,000. Additionally, this amendment would modify the loss tables in Sections 2B, 2F and 2T to use a more constant rate of increase in the loss increments and to increase the offense levels for cases that involve exceptionally high losses. The proposed changes to the loss tables are set forth below:

Larceny, §2B1.1(b)(1)

Increase in Level	Loss (Current)	Loss (Proposed)
No increase	$100 or less	$600 or less
Add 1	More than $100	More than $600
Add 2	More than $1,000	More than $1,000
Add 3	More than $2,000	More than $1,700
Add 4	More than $5,000	More than $3,000
Add 5	More than $10,000	More than $5,000
Add 6	More than $20,000	More than $8,000
Add 7	More than $40,000	More than $13,500
Add 8	More than $70,000	More than $23,500
Add 9	More than $120,000	More than $40,000
Add 10	More than $200,000	More than $70,000
Add 11	More than $350,000	More than $120,000
Add 12	More than $500,000	More than $200,000
Add 13	More than $800,000	More than $325,000
Add 14	More than $1,500,000	More than $550,000
Add 15	More than $2,500,000	More than $950,000
Add 16	More than $5,000,000	More than $1,500,000
Add 17	More than $10,000,000	More than $2,500,000
Add 18	More than $20,000,000	More than $4,500,000
Add 19	More than $40,000,000	More than $8,000,000

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[2] See U.S.S.G. §§ 2B1.1, 2B1.2, 2B1.3, 2B4.1, 2B5.1, 2B6.1, 2F1.1, and 2F1.2.

[3] See U.S.S.G. §§ 2T1.1(b)(2), 2T1.2(b)(2), 2T1.3(b)(2); 2T1.3(b)(2), 2T1.4(b)(2), and 2T1.3(b)(1).

Add 20	More than $80,000,000	More than $13,500,000
Add 21		More than $23,500,000
Add 22		More than $40,000,000
Add 23		More than $70,000,000
Add 24		More than $120,000,000

Fraud and Deceit, §2F1.1(b)(1)

Increase in Level	Loss (Current)	Loss (Proposed)
No increase	$2,000 or less	$1,700 or less
Add 1	More than $2,000	More than $1,700
Add 2	More than $5,000	More than $3,000
Add 3	More than $10,000	More than $5,000
Add 4	More than $20,000	More than $8,000
Add 5	More than $40,000	More than $13,500
Add 6	More than $70,000	More than $23,500
Add 7	More than $120,000	More than $40,000
Add 8	More than $200,000	More than $70,000
Add 9	More than $350,000	More than $120,000
Add 10	More than $500,000	More than $200,000
Add 11	More than $800,000	More than $325,000
Add 12	More than $1,500,000	More than $550,000
Add 13	More than $2,500,000	More than $950,000
Add 14	More than $5,000,000	More than $1,500,000
Add 15	More than $10,000,000	More than $2,500,000
Add 16	More than $20,000,000	More than $4,500,000
Add 17	More than $40,000,000	More than $8,000,000
Add 18	More than $80,000,000	More than $13,500,000
Add 19		More than $23,500,000
Add 20		More than $40,000,000
Add 21		More than $70,000,000
Add 22		More than $120,000,000

Tax Table, §2T4.1

Offense Level	Tax Loss (Current)	Tax Loss (Proposed)
6	$2,000 or less	$1,700 or less
7	More than $2,000	More than $1,700
8	More than $5,000	More than $3,000
9	More than $10,000	More than $5,000
10	More than $20,000	More than $8,000
11	More than $40,000	More than $13,500
12	More than $70,000	More than $23,500
13	More than $120,000	More than $40,000
14	More than $200,000	More than $70,000
15	More than $350,000	More than $120,000
16	More than $500,000	More than $200,000
17	More than $800,000	More than $325,000
18	More than $1,500,000	More than $550,000
19	More than $2,500,000	More than $950,000
20	More than $5,000,000	More than $1,500,000
21	More than $10,000,000	More than $2,500,000
22	More than $20,000,000	More than $4,500,000
23	More than $40,000,000	More than $8,000,000
24	More than $80,000,000	More than $13,500,000
25		More than $23,500,000
26		More than $40,000,000
27		More than $70,000,000
28		More than $120,000,000

We oppose the portion of this proposed amendment that would delete the enhancement for "more than minimal planning" and "sophisticated means" and substitute a two level increase in the loss tables. This proposal is philosophically, practically, and legally flawed. Deleting the enhancement is inconsistent with the underpinnings of the guidelines because it removes a valid sentencing variable from consideration and increases the opportunities for sentencing disparity. Moreover, phasing out the planning and sophistication enhancements undercuts the effort to increase offense levels where extremely high losses are involved. As a practical matter, the amendment erroneously presumes that a measure of the quantitative monetary loss suffered by the victim or society is a rational surrogate for the qualitative acts of the defendant when he commits the offense. In the context of the case law, the proposed amendment appears to

eliminate a double counting problem that to date has gone unrecognized in the published opinions. The problem that appears in the application of this enhancement is its overuse where there are "repeated acts" otherwise already taken into consideration by the loss tables, and the tendency to confuse the number of acts with thorough planning.

The proposed amendment is philosophically inconsistent with the Sentencing Commission's goals of increasing deterrence, reducing sentencing disparity, and distinguishing between offenses committed on the spur of the moment and those that require forethought and preparation. See, e.g., U.S.S.G. §1B1.1, comment. (n.1(f)). If there is validity to the proposition that "[t]he extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm," the enhancement for more than minimal planning and sophistication should be retained so that the courts have an articulated basis in the guidelines for distinguishing such offenses at sentencing. See U.S.S.G. §2F1.1, comment. (backg'd.) (emphasis added). The current guidelines contain a framework that the courts can use to assess the defendant's conduct. When a defendant's criminal activity involves only minimal planning, no enhancement is called for under the guidelines. When a defendant's preparations for carrying out the offense are "more than" minimal or the defendant utilizes sophisticated means to avoid detection, the guidelines provide for a two level increase in the offense level. Finally, when a defendant takes "extraordinary" measures to conceive, execute and conceal the offense of conviction and the relevant conduct, an upward departure is warranted. Eliminating the sentencing variable for planning and sophistication risks losing sight of the goal of deterring sophisticated criminals by punishing them more severely than those who commit the typical offense and offers a greater opportunity for sentencing disparity. See U.S.S.G. §2T1.1, comment. (backg'd.); United States v. Werlinger, 894 F.2d 1015, 1018 (8th Cir. 1990) ("a major purpose of providing individualized, conduct-related adjustments is to ensure different sentences for criminal conduct of different severity.... [D]ouble counting is inconsistent with this goal").

Monetary loss is not a rational surrogate for forethought, planning and sophistication. There is no rational basis for assuming that it necessarily takes more planning to steal $10 by false pretenses than it takes to steal $10,000. See United States v. Meek, 972 F.2d 1346 (9th Cir. 1992), pet. for cert. filed, _____ U.S.L.W. _____ (U.S. Nov. 16, 1992) (text in Westlaw). Similarly, when a defendant submits a false travel voucher to the state for reimbursement, there is no qualitative difference between a $1,700 alteration and a $17,000 alteration. See United States v. Rust, 976 F.2d 55, 56 (1st Cir. 1992). Yet, under the proposed amendment, there would be no enhancement for the former and a four level increase for the latter. There can be large loss cases where no planning, no repetitive acts, and no significant acts to conceal the conduct were involved. Cf. U.S.S.G. §2F1.1, comment. (n.10) ("[i]n a few instances the loss determined

[from the loss table] may overstate the seriousness of the offense"). By like token, a well-planned and concealed fraud may produce little or no monetary loss.

Reviewing the proposed amendment in light of the published case law suggests that this proposal seeks to eradicate a non-existent double counting problem. The guidelines acknowledge that certain offenses, even in their "simple form," require more than minimal planning. For example, where the offense "substantially jeopardize[s] the safety and soundness of a financial institution," courts are instructed there shall be a rebuttable presumption that the offense involved "more than minimal planning." U.S.S.G. §2F1.1, comment. (n.18) (emphasis added). In the tax guidelines, the commentary observes that "tax evasion always involves some planning." U.S.S.G. 2T1.1, comment. (backg'd.). See United States v. Beauchamp, _____ F.2d _____, 1993 WL 30804 at *4 (1st Cir. Feb. 16, 1993) ("[c]rimes of fraud and deceit by their very nature may, and often do, compel, quite predictably, later efforts at a cover-up"); United States v. Lennick, 917 F.2d 974, 979 (7th Cir. 1990) (applying enhancement "to factual scenarios involving clear examples of ... complex criminal activity"); United States v. Fox, 889 F.2d 357, 361 (1st Cir. 1989); ("[we] cannot conceive of how obtaining even one fraudulent loan would not require more than minimal planning"); United States v. Kaufman, 800 F. Supp. 648, 655 (N.D. Ind. 1922) (refusing to find that a scheme involving a second set of corporate books to facilitate tax evasion "was more complex or demonstrated greater intricacy ... than a routine tax evasion case"). Cf. United States v. Sanchez, 914 F.2d 206, 207 (10th Cir. 1990) (upholding enhancement because the offense involved "several calculated falsehoods"). Compare United States v. Maciaga, 965 F.2d at 408 ("a simple step to hide [the] crime ... does not amount to 'more than minimal planning'").

Accordingly, the base offense level for larceny, fraud-related and tax offenses already incorporates the "simple form" planning in the conception, execution or concealment phases. The enhancement is appropriate only when this basic degree of planning has been exceeded. See United States v. Georgiadis, 933 F.2d 1219, 1226 (3d Cir. 1991) ("§2B1.1(b)(1) calibrates punishment to the magnitude of victim injury and criminal gains ... 'more than minimal planning' considers the deliberative aspects of a defendant's conduct and criminal scheme"). Since the base offense level contemplates the ordinary planning necessary to commit the offense, and the enhancement applies only to incremental additional planning, there is no double counting. See United States v. Wilson, 955 F.2d 547, 550 (8th Cir. 1992); Cf. United States v. Curtis, 934 F.2d 553, 556 (4th Cir. 1991). Finally, this proposal is unnecessary. Prison sentences for those whose crimes result in greater losses can effectively be lengthened by adopting that portion of the amendment that modifies the loss tables and leaving the "more than minimal planning" and "sophisticated means" enhancements in place to be independently evaluated.

Rather than eliminating the enhancement, the PAG suggests that it be clarified so that it focuses on the kinds of planning and sophistication that cannot be quantitatively measured. The "repeated acts" prong can be deleted without disturbing the purpose of the enhancement because where there are repeated acts of fraud by definition there will be increases in the losses and concomitant increases in the offense level.

Proposed Amendment number 21 - Tax -

Summary of Guidelines

In the sentencing guidelines as amended on November 1, 1992, there are 12 tax guidelines in Section 2T. Nine relate to income tax offenses, including tax evasion, tax perjury, willful failure to file or supply information, aiding and assisting in the preparation of a false return, and conspiracy to defraud the United States.[4] U.S.S.G. §§2T1.1- 2T1.9. Two deal with non-payment of taxes and regulatory offenses in connection with alcohol and tobacco tax offenses. U.S.S.G. §§2T2.1 - 2T2.2. One relates to evading import duties, smuggling and receiving or trafficking in smuggled property. U.S.S.G. §2T3.1.

There is substantial overlap in the five guidelines related to tax evasion, willful failure to file, tax perjury, aiding and abetting tax fraud, and filing false returns (U.S.S.G. §2T1.1 - 2T1.5). All but the guideline for filing a false return use the tax loss table in §2T4.1 to determine the base offense level and enhance the level if the offense involves more than $10,000 of income from criminal activities or "sophisticated means" were used to impede discovery of the nature or extent of the offense.[5] However, each guideline utilizes a different definition of "tax loss," which is the key determinant of the sentence.

This amendment would consolidate the guidelines for tax evasion, willful failure to file, tax perjury, and false tax returns into one guideline. The base offense level would be the greater of the level taken from the tax table in §2T4.1, or six, in instances where

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[4]Although the conspiracy statute does not appear in the Internal Revenue Code, tax-related indictments often include a charge of defrauding the United States by impeding or obstructing the lawful governmental functions of the IRS in ascertaining and collecting taxes in violation of 18 U.S.C. §371. See United States v. Klein, 247 F.2d 908 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958).

[5]The PAG's comments on the proposed amendments affecting the specific offense characteristic related to "sophisticated means" appear in the discussion of Amendment No. 5, supra.

there is no tax loss. There would be two specific offense characteristics each calling for a two level enhancement. One would apply "if the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity" (the same as in the current guidelines). A second would apply "if sophisticated means were used to impede discovery of the existence or extent of the offense."

This proposal would adopt a uniform definition of "tax loss" based on a series of rebuttable presumptions tailored to the nature of the offense or the actual amount that was the object of the evasion, or that the taxpayer owed and did not pay. The amendment also contains two new Application Notes related to the "tax loss" definition. As proposed, the commentary would provide that "the rebuttable presumption is to be used unless the government or defense provides sufficient information for a more accurate assessment of the actual tax loss." The proposed commentary would also provide that "if the offense involves both individual and corporate tax returns, the tax loss is the cumulative tax loss from the offenses taken together."

Finally, this Amendment contains minor clarifications of the specific offense characteristics related to professional return preparers convicted of aiding and abetting tax fraud in §2T1.4, and conduct to encourage others to commit tax crimes or participate in Klein conspiracies encompassed in §2T1.9. The amendment also contains proposals to conform the grouping guidelines in §3D1.2(d) to the proposed consolidation in Section 2T.

The PAG favors simplifying the guidelines for tax offenses. The proposed consolidation does not alter the structure of the tax guidelines or their substantive operation. The only change that would result would be a one level increase in the base offense level applicable to convictions for willful failure to file a return currently set at one level less than the amount derived from the tax table or five where there is no tax loss.

The PAG also favors adoption of a more workable definition of the "tax loss" to be used in calculating the base offense level. The current framework -- with four different definitions and numerous variables -- has led to inconsistent interpretations. Some courts look to the actual tax loss; some use other formulations. Compare United States v. Schmidt, 935 F.2d 1440 (4th Cir. 1991) with United States v. Brimberry, 961 F.2d 1286 (7th Cir. 1992).

The PAG favors the adoption of a uniform definition of "tax loss." A single tax loss definition that utilizes presumptions rebuttable by evidence of the actual tax loss to the government would eliminate the confusion and allow sentences to be determined based on the actual tax loss as computed in accordance with the Internal Revenue Code.

The only aspect of this amendment that the PAG opposes is the new Application Note that provides "if the offense involves both individual and corporate tax returns, the tax loss is the cumulative tax loss from the offenses taken together." This provision constitutes blatant double counting when applied to a single course of criminal conduct and flies in the face of the changes to the "tax loss" definition in which the actual loss of revenue to the government is preferred over an artificial construction of the loss based on rebuttable presumptions.

Assume the following factual scenario: The defendant skims money from his employer and alters the corporate books and records to conceal the amount diverted. He fails to report the diverted income on his individual income tax return and causes the corporation to file a false return that understates its corporate revenue. He pleads guilty to one count of income tax violation in connection with his individual tax return. There is only one source of income, i.e., the $1 paid to the corporation is the same $1 diverted by the defendant.

The proposed application note presumes that each $1 diverted by the defendant constitutes $2 taxable income: $1 of income on which the corporation is liable for taxes and $1 of taxable income to the defendant. A "tax loss" based on this formulation double counts one course of conduct to arrive at an artificial "tax loss" incurred by the government.

The Supreme Court requires a clear expression of legislative intent before sentence enhancement provisions can be applied cumulatively. See Busic v. United States, 446 U.S. 398, 403-404 (1980); Simpson v. United States, 435 U.S. 6, 12-13 (1978). Coupled with the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," Id. at 14 (citation omitted), in the context of determining a sentencing factor cumulative punishment for the same conduct would be impermissible absent specific recognition and authority from the Commission and the Congress. The rule, to date, has been that one course of conduct should not be cumulatively punished under the guidelines. See United States v. Lamere, 980 F.2d 506, 517 (8th Cir. 1992); (an enhancement based on "conduct that [is] coterminous with the conduct for which [the defendant is] convicted" constitutes impermissible double counting); United States v. Romano, 970 F.2d 164, 167 (6th Cir. 1992) ("the Commission did not intend for the same conduct to be punished cumulatively"); United States v. Werlinger, 894 F.2d 1015, 1018 (8th Cir. 1990) ("the Sentencing Commission did not intend for multiple Guidelines sections to be construed so as to impose cumulative punishment for the same conduct"). There is no basis for departing from this rule to calculate a tax loss especially where the result would overstate the actual loss of revenue to the government.

PROPOSED TAX AMENDMENTS PUBLISHED AT THE REQUEST OF THE IRS

Proposed Amendment number 41 - Tax - (I.R.S. Proposal)

Summary of Guideline

The IRS proposes to rewrite §2T1 in its entirety. The guidelines in Sections 2T1.1 through 2T1.9 would be replaced in toto. The commentary would also be revised. The IRS would increase base offense levels, adopt a uniform definition of "tax loss," and create a new offense guideline for certain non-violent violations of 26 U.S.C. §7212(a). The IRS would abandon the current structure of the tax guidelines which uses tax losses and the tax table in §2T4.1 to determine a base offense level where there is a tax loss, and a fixed level where there is no loss. In its place, the IRS proposes to fix the base offense level for felonies at nine for failure to file and ten for tax evasion, tax perjury and Klein conspiracies. A new specific offense characteristic would enhance the base offense level where the "tax loss" from the defendant's conduct exceeded $10,000. Using the same incremental increases employed in the November 1, 1992, tax table (not the increments appearing in proposed Amendment No. 5), the enhancement ranges from a low of one additional level for a tax loss of more than $10,000 but less than $20,001 to a high of 10 additional levels when the tax loss exceeds $800,000. The IRS would define "tax loss" for the purposes of this guideline as "the amount of loss that was the object of the evasion or fraud." A simple set of facts will illustrate the differences between the IRS proposal and the combined impact of proposed Amendments No. 5 and 21. Assume that a defendant is convicted of one count of tax evasion. Although the indictment alleges that the defendant attempted to evade $1.0 million of tax, at the sentencing hearing, the defendant establishes that the actual tax loss to the government was only $600,000. All of the income at issue is from legal sources. The defendant did not use sophisticated means to impede discovery of his offense, and no other guideline adjustments are applicable. Under the IRS proposal, the tax loss would be the entire $1 million, and the base offense level would be 20 (10 for tax evasion plus an enhancement of 10 for a tax loss greater than $800,000). Under proposed Amendment No. 21, the tax loss would be $600,000. Using the tax loss table appearing in proposed Amendment No. 5, a tax loss of $600,000 would yield a base offense level of 18.

The commentary proposed by the IRS provides for a rebuttable presumption that the tax loss would be determined by applying the defendant's applicable tax rate to the total amount that the defendant attempted to evade, the amount of omitted income, the improper deduction or tax credit, and so forth. Furthermore, while these calculations could be overcome by "credible evidence" produced by the defendant that the tax loss "was different," the defendant would be prohibited from showing "that the actual tax loss was less than the amount calculated ... by asserting that the intended loss was less than

that which would have resulted had the scheme succeeded." The IRS also proposes a new offense guideline to be used for violations of 26 U.S.C. §7212(a), pertaining to "corrupt endeavors to obstruct or impede the due administration of the internal revenue laws" excluding those involving forcible threats or interference which would continue to be addressed by the assault guidelines in §2A2.2 and §2A2.3, as suggested in the Commission's statutory appendix.

While the PAG expresses no opinion on whether there should be an increase in the base offense levels for tax crimes, it prefers the "tax loss" formulation appearing in proposed Amendment No. 21 over the IRS proposal. The IRS proposal ignores the actual impact of the defendant's conduct and would put artificial constraints on a defendant's ability to rebut tax loss calculations made by the government. The PAG expresses no opinion on whether it is necessary or desirable to adopt a new offense guideline for violations of 26 U.S.C. §7212(a).

Proposed Amendment number 42 - Grouping Rules - (I.R.S. Proposal)

Summary of Guideline

Guideline §3D1.2 sets forth the criteria for grouping multiple counts involving "substantially the same harm". The specific section addressed by proposed Amendment No. 42 provides that two (or more) counts shall be grouped when one embodies conduct that is treated as a specific offense characteristic in (or other adjustment to) the guideline applicable to another count. U.S.S.G. §3D1.2(c). The rules for determining the offense level applicable to counts grouped in accordance with §3D1.2(c) appear in §3D1.3(a). When counts are grouped pursuant to §3D1.2(c), the offense level applicable to the group is the offense level for the most serious single count within the group. Guideline §2D1.1 applies to certain narcotics crimes and violation of the continuing criminal enterprise ("CCE") statutes. Guideline §2S1.1 applies to certain money laundering activities.

This Amendment has two options. In Option One, the IRS proposes an amendment to §3D1.3 to address the situation where the count that gives rise to a grouping requirement pursuant to §3D1.2(c) has a lower base offense level than the other count(s) with which it is grouped. In this circumstance, the IRS proposes that two levels be added to the applicable base offense level determined in accordance with §3D1.3(a). Option Two proposes the addition of a special offense characteristic to the narcotics and CCE guideline in §2D1.1(b) and the §2S1.1(b) money laundering guidelines to be employed "if the defendant failed to report income exceeding $10,000 in any year." The proposed amendment to the narcotics and CCE guideline specifically refers to unreported income from the "unlawful manufacturing, importing, exporting,