trafficking, or possession of drugs." The proposed amendment to the money laundering guideline has no such limitation.

The PAG believes that both Options One and Two are superfluous. Under §3D1.3(a), the ultimate offense level applicable to counts grouped pursuant to §3D1.2(c) will be that offense level which is the highest for any single count within the group. Any specific offense characteristic that constitutes a criminal activity will be considered as relevant conduct pursuant to §1B1.3(a). Similarly, the proposed enhancement for the tax offenses specified in Option Two will either be addressed as relevant conduct, or in the sentence calculations for unrelated charged offenses. Unrelated, uncharged conduct is not and should not be a basis for sentence enhancements.

Proposed Amendment number 43 - Grouping Rules (I.R.S. Proposal)

Summary of Guideline

Section 3D1.4 provides the framework for determining the offense level when there is more than one group of counts. The bench mark is the group with the highest offense level. Each additional group is assigned a unit value (that corresponds to an enhancement) depending on its seriousness (measured by its calculated offense level) relative to the bench mark. Under §3D1.4(b) any group that is five to eight levels less serious than the bench mark is assigned one-half Unit. Groups that are nine or more levels less serious than the bench mark are disregarded. U.S.S.G. §3D1.4(c).

The IRS proposal would delete §§3D1.4(b) and 3D1.4(c), and assign one-half Unit value to any group where the offense level is five or more units less serious than the bench mark. The PAG expresses no opinion on this proposed amendment.

3. Proposed Amendment number 1 - Relevant Conduct - The PAG favors Proposed Amendment numbered 1 (PAG #35) which would amend Section, 1 B1.3 by adding a new subsection (c) which would prohibit a sentencing court from including in the offense level alleged conduct of which the defendant has been acquitted after either a court trial or a jury trial. This amendment makes good sense. Although caselaw indicates that double jeopardy provisions do not prohibit a sentencing court from considering conduct of which the defendant has been acquitted, no defendant should be forced to run the gauntlet twice. The present sentencing mechanism allows the government to include counts in an indictment on which the evidence is marginal or weak, take the case to trial on all counts, lose some of the counts at trial because of insufficiency of the evidence on a "beyond a reasonable doubt" standard and then relitigate the matter at sentencing

(where hearsay evidence is allowed) and prevail on a preponderance of the evidence standard.

The government should be content with one bite at the apple. With the relaxed rules of evidence that apply at a sentencing hearing, the defendant should only be held accountable for those counts to which he has either pled guilty or been convicted of in a contested trial.

4. Proposed Amendment number 3 - Juvenile Delinquency Act - The PAG is in support of a new policy statement which would address the applicability of the guidelines to juveniles. We believe this policy statement is necessary in light of the recent Supreme Court decision in United States vs. R. L. C., 112 S. Ct. 1329 (1992).

5. Proposed Amendment number 6 - Fraud - This proposed amendment would add language to § 2F1.1, Application Note 10(a), authorizing upward departure where a fraud "caused substantial non-monetary harm." At present, Application Note 10(a) authorizes upward departure only where "the primary objective of the fraud was non-monetary", but fails explicitly to cover those situations where fraudulent activity results in unintended by nonetheless substantial non-monetary harm.

a. Mens Rea

Upward departure may be appropriate in those rare instances where monetary loss is an inadequate measure of the seriousness of an offense. Certainly, there such offenses including, for example, schemes "to deprive another of the intangible right of honest services" (18 U.S.C. §§ 1341 and 1346). However, ***unintended*** harm is an inappropriate measure of culpability. At a minimum, consideration should be limited to ***reasonably foreseeable*** harm.[9] The Commission's legitimate concern might be addressed by an application note which recognizes that reasonable foreseeability is a factor to be taken into account in determining whether the defendant intended a particular result.[10]

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[9] This sort of limitation obviously has occurred to the Commission in other contexts, as shown by the language of the existing guideline provisions discussed infra, and by one of the questions posed with respect to Amendment #65, also discussed infra.

[10] Perhaps it would be appropriate for the Commission to establish a single standard of culpability for all of the offense characteristics and adjustments based on the harm caused by the offense. It doesn't make much sense for a defendant to be held responsible under

b. Cumulativeness

This proposed amendment, if adopted, should note the existence of specific offense characteristics, adjustments and commentary which already take non-monetary harm into account, and therefore would make departure inappropriate in many cases of non-monetary harm. For example:

> § 2F1.1(b)(4) provides for an increase of two levels, to a minimum of level 13, for offenses which involve the conscious or reckless risk of serious bodily injury;[11]
>
> § 3A1.1 provides for a 2 level upward adjustment where the defendant knew or should have known that a victim was unusually vulnerable.

In addition, the commentary to this proposed amendment clearly is cumulative of existing provisions. The single example given in the proposed amendment is that departure:

> might be warranted in the case of a fraudulent blood bank operation that failed to preserve the donors' blood. Such an offense might cause substantial harm to numerous victims that is not adequately taken into account by the total monetary loss, which might be comparatively small.

Contrary to the language of the proposed amendment, departure would be inappropriate in that case because the harm caused by this sort of offense was adequately taken into account in the formulation of specific offense characteristics. The sentencing court likely would impose a 2 level increase because the offense involved more than one victim (§2F1.1(b)(2)(B)).[12] In addition, the court would impose an additional 2 level increase, to a minimum of 13, based on the obvious risk of serious bodily injury (§ 2F1.1(b)(4)).

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§ 3A1.1 when he "knew or should have known" that a victim was particularly vulnerable, while being held responsible under § 2F1.1 only for the "conscious or reckless" risk of serious bodily harm.

[11] Although §2F1.1(b)(4) is phrased in terms of "risk", such risk is inherent in every case where harm actually occurs. In any event, language relating to actual harm could easily be incorporated into particular provisions, where necessary.

[12] Although Application Note 3 is phrased in terms of "obtain[ing] something of value from more than one person", the offense characteristic probably would apply equally in cases of non-monetary fraud.

The court would also have available a 2 level upward adjustment because the offense described in the amendment commentary would involve obviously vulnerable victims (§ 3A1.1).

6. Proposed Amendment number 7 - Fraud & Theft - The Commission invites comment on whether certain guidelines (§§ 2B1.1, 2B1.2 and 2F1.1) should be amended to identify circumstances where upward departure may be appropriate to take into account circumstances where loss does not fully capture the seriousness of the offense. Proposed Amendment number 7 is related to number 6 and suffers from similar defects.

a. Cumulativeness

Most of the examples given in this proposed amendment often are covered by existing provisions. For example:

A fraud offense which "caused particularly significant emotional trauma to ...one or more victims" will, at least in some cases, be covered by the vulnerable victim adjustment (§3A1.1), which specifically refers to "mental condition", and victims who were "particularly susceptible to the criminal conduct".

An offense in which the defendant "consciously or recklessly endangered the solvency of...one or more victims" most often will be covered by § 2F1.1(b)(6) where the victim is a financial institution.

A fraud offense in which the defendant risked the health, bodily safety or life of one or more victims is covered by § 2F1.1(b)(2)(B) (2 level increase where more than 1 victim involved) and § 2F1.1(b)(4)(2 level increase, to a minimum of 13, if the offense involved conscious or reckless risk of serious bodily injury).

b. Mens Rea

As discussed above in connection with Proposed Amendment number 6, the examples given would authorize the court inappropriately to depart upward based on wholly unintended, and possibly unforeseeable, consequences.

c. Preference for Authorizing Departures

This proposed amendment poses the question whether the Commission should continue to add specific offense characteristics with 1 or 2 level increases, or simply authorize upward departure when unexpected situations arise. The latter approach is preferable. The government often advocates application of specific offense characteristics whenever there is any supporting evidence, however slight. The courts have developed an unsettling tendency of accepting the government's arguments uncritically. On the other hand, the courts seems more reluctant to depart without ample supporting evidence. Thus, by authorizing departure in unexpected situations, the courts would be given needed flexibility without inviting unwarranted increases in offense levels.

7. Request for Comment number 13 - Calculation of weight under negotiation in reverse sting cases - Should there be an amendment addressed to the offense level determination in such cases? Yes. Why? Because government agents should not be able to control, and increase, a defendant's potential punishment based on the agents' ability to set artificial market conditions. A defendant should not be punished for what he or she would like to be able to do, but rather on the basis of what he or she can do.

To determine an appropriate amendment to address the issue raised by the Commission, it is necessary to realize that the problem is actually broader than stated by the Commission. The problem exists not only where government agents set a below-market price, but whenever agents, in a reverse sting operation, create artificial market conditions that increase a defendant's purchasing power.

Two recent cases of which the PAG is aware help illustrate the scope of the problem. In one case, undercover government agents offered to sell the defendant 300 kilograms of cocaine. The defendant agreed to do so. The only problem was that he had no money (none). The agents, however, suggested that the defendant issue a quit claim deed to his house to the agents to serve as collateral for the cocaine purchase, which the defendant than did. (As a result, the house has been forfeited.) It turns out that the mortgage on the house exceeded the current appraised market value of the property--i.e., the house had negative equity. The government's position is that the defendant should be punished for a 300 kilogram offense.

In the second case, the defendant wanted to purchase 5 kilograms of cocaine and had the money to do so. The undercover FBI agents said they did not deal in such small quantities and that they would only sell the defendant 55

kilograms. Since the defendant did not have money for 55 kilograms, the agents told him the payment and delivery of the five kilograms would be the first installment on a 55 kilogram deal. If government agents were not the supposed sellers, there either would have been no deal (if the sellers were insistent upon only selling in quantities greater than 50 kilograms) or there would have been an agreed upon sale of 5 kilograms. Nevertheless, under the conditions set by the agents, the overall 55 kilogram deal proceeded and the defendant was arrested when he showed up with money for five kilograms. At sentencing, the government argued that the offense level should be based on 55 kilograms, because the defendant had agreed to purchase that amount. The district judge saw this as a transparent attempt by the agents to manipulate the guidelines and refused to sentence on the 55 kilogram amount. The judge ruled that the defendant had the ability to purchase five kilograms and that the offense level should be based on that amount.

It seems to the PAG that the judge in the second case adopted a reasonable method for resolving the artificial market problem. (While the judge's ruling in the second case might be seen as suggesting that an amendment is not necessary at all, we doubt that all or even most judges would feel free to adopt such an approach without an amendment providing authority to do so.) The guidelines should provide that in a reverse sting case, where the government sets or agrees to artificial market conditions which have the effect of increasing the defendant's purchasing power, the court shall determine the defendant's offense level on the basis of the amount of drugs that he or she could have purchased based on the agreement.

The amendment should provide that this method is mandatory (i.e., "shall determine") whenever artificial market conditions have been set or agreed upon for several reasons. First, no defendant should be sentenced on the basis of artificial market conditions. Second, if the amendment is not mandatory, disparity will result among similarly situated offenders. Third, the passage of such an amendment will probably reduce the frequency of such cases but it is less likely to have such a salutary effect unless it is mandatory (i.e., if agents know that it is still possible to increase a defendant's punishment by artificial market conditions).

There still remains the question of what constitutes artificial market conditions. That is not a difficult as it might seem. The DEA keeps statistics on the "going price" for different controlled substances according to geographic area and time period. The question of what constitutes artificial market terms for a sale could be established by expert testimony or common established practices familiar to the court or the parties. Perhaps the defendant should have the initial

burden of making a prima facie showing (by proffer or otherwise) that the price and/or terms were artificial and the government would have an opportunity to rebut the showing by a preponderance of the evidence standard. Alternatively, the defendant could have the burden of establishing, by a preponderance of the evidence standard, that there were artificial market conditions set or agreed to by the government agents which increased his or her purchasing ability.

One final note. The request for comment number 13 does not completely address the problem of "sentencing entrapment." There are cases where defendants are encouraged to purchase, or sell amounts that they had not intended to, but agreed to buy or sell at the encouragement of government agents. Even where the defendant has the ability to purchase or sell the increased quantity (which means they would be unaffected by the proposed amendment), it seems to me that a convincing case can be made for not sentencing the defendant on the amount which is the product of government inducement.

8. Proposed Amendment number 20 - Money Laundering - The PAG strongly supports the proposed amendments to §§ 2S1.1 through 1.4, pertaining to money laundering offenses and reporting violations. As noted by the Money laundering Working Group, the money laundering statute, 18 U.S.C. § 1956, has been used by prosecutors to "up the ante" in selected cases despite the fact that the charged financial transaction offenses do not differ substantially from the underlying unlawful activity. Money Laundering Working Group, "Explanation of Draft Amendments to §§ 2S1.1 through 1.4" at 1 (November 10, 1992) (footnote omitted). Also, as the Money Laundering Group recognizes, the existing guideline's high base offense level assumed that large scale, sophisticated money laundering would be the norm. The experience of the PAG is that money laundering counts are often added to other cases to increase prosecutorial leverage and obtain harsher sentences. Accordingly, from the perspective of the PAG, the most important aspect of the proposed amendments is that they remove the potential for actual or threatened sentence manipulation through charging practices. We agree with the Working Group that where "the defendant committed the underlying offense, and the conduct comprising the underlying offense is essentially the same as that comprising the money laundering offense[,] the sentence for the money laundering conduct should be the same for the underlying offense." Id.

Although we largely support the proposed amendment, we are concerned about two issues. First, the amendment would eliminate reliance on the table found in § 2S1.1(b)(2) and substitute reliance on the fraud table found in § 2F1.1, despite the substantial difference between loss in a fraud case and the value of

funds involved in a money laundering transaction. Second, the pervasive use of government stings in money laundering cases, in which the government largely controls the value of funds involved in the offense, provides continued opportunities for sentence manipulation and exacerbates the problem of using the elevated offense levels which would be dictated by the fraud table. Accordingly, the PAG recommends that the amendment be adopted with certain revisions: 1) that the incorporation of the fraud table be deleted with the existing money laundering table remaining in its place; and 2) that a lower base offense level be employed for violations of 18 U.S.C. § 1956(a)(3).

While we understand the Working Group's desire to use the fraud table in order to promote uniformity and consistency in economic crime cases, the attempt to equate the value of funds in a money laundering transaction and the loss involved from fraud is without any basis in logic. Fraud offenses almost invariably involve loss to a victim; and it is this loss which is the driving forcer behind the table. See § 2F1.1(b). Money laundering offenses involve financial transactions which do not involve loss to a discrete victim; and, at least under the current Guidelines, it is the value of the funds involved in the transaction which is the driving force behind the table. See § 2S1.1(b)(2).[13]

In addition to the difference in the "victim," the two offenses are completely different in terms of the amount of funds generally involved. While money laundering typically involves relatively large sums of money, fraud comes in all shapes and sizes: using a counterfeit telephone credit card to make long distance telephone calls or a scheme to fraudulently collect on a five million dollar insurance policy.

This difference in the amount of funds involved in each crime and in the nature of the "victim" of each crime makes any reliance on the fraud table ill-advised, and the PAG recommends that the Commission not eliminate the table currently found in § 2S1.1(b)(2), but rather use this table rather than the fraud table as the basis for the adjustments called for in the amendment, §§ 2S1.1(a)(2-3), 2S1.2(1)(1-2). This table should be used in connection with the amendments

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[13]Indeed, although fraud is far closer in nature to theft than to money laundering in that both involve a discrete victim who has lost something of economic value, the Third Circuit recently held that for sentencing purposes the differences between the nature of a theft and the nature of a fraud rendered the equation of these two crimes "flawed." United States v. Kopp, 951 F.2d 521, 535 (3d Cir. 1991).

proposed lower base offense level in light of the Money Laundering Working Group's recognition that low dollar amount, unsophisticated cases are prosecuted under this statute. In the event that the Commission believes that the existing table is inadequate a revised, money laundering specific table should be employed.

The proposed guideline amendments fail to recognize the unique nature of the money laundering sting provisions of 18 U.S.C. § 1956(a)(3). Under that section the crime is completed if a defendant with the intent (1) to promote specified unlawful activity; (2) to conceal or disguise property believed to be the proceeds of specified unlawful activity; or (3) to avoid a CTR requirement, engages in a financial transaction with property represented by a law enforcement official to be the proceeds of specified unlawful activity. This section has been used in an ever increasing number of undercover sting operations in which federal agents attempt to engage in money laundering activities and represent that their money comes from unlawful sources. As in drug sting operations the agents control the amount of money laundered. Accordingly, there is increased risk of prosecutorial manipulation of the guidelines by government agents increasing the amounts of tendered funds to increase the guideline range.

In such cases there will never be commission of the underlying offense by the defendant, since it is the government agents who are representing that they, or their confederates, committed that offense. Accordingly, while a defendant who commits an underlying offense and launders the funds will be sentenced under the guideline for the underlying offense, under proposed § 2S1.1(a)(1) in a sting operation the defendant will receive a potentially higher sentence for only engaging in the laundering offense.

For example, if a defendant engages in mail fraud with a loss of $1,600 then launders the proceeds, his offense level would be 6 under the proposed amendments to §§ 2F1.1 and 2S1.1. If agents merely represented that the funds were derived from mail fraud and the defendant believed them and engaged in a financial transaction designed to avoid a CTR requirement, his offense level would be 10 (assuming a (b)(1)(A) enhancement, 8 if no enhancement). It makes little sense to punish a defendant more severely for engaging in a sting than for actually committing of the underlying offense.

9. Proposed Amendment number 23 - Abuse of Position of Trust - This proposed Commission amendment would significantly narrow the existing 2 level "abuse of position of trust" adjustment, so that it applies only to abuse of "special trust." "Special trust" would be defined as referring to "a position of trust characterized

by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference)."

The PAG favors adoption of this amendment, because the current "abuse of position of trust" guideline is extremely broad and susceptible of varying and unfair interpretations, particularly in fraud and embezzlement cases where some form of breach of trust almost always exists. The fraud guidelines themselves already contain a number of add-on provisions, such as the 2 level increase for "more than minimal planning" or a scheme to defraud more than one victim, and the 2 level increase for misrepresentation that the defendant was acting on behalf of charitable, educational, religious or political organizations. § § 2F1.1(2), 2F1.1(3)(A). The embezzlement guidelines likewise contain a 2 level increase for more than minimal planning. § § 2B1.2. The proposed amendment makes it far more likely that the 2 level enhancement for abuse of trust appropriately would be limited to professionals, high ranking managers and others in a special position of trust, and would not be added to the typical fraud or embezzlement defendant's sentence.

The Commission has also invited comment on whether, as an alternative to modifying § 3B1.3, the Commission should amend § 2B1.1 and § 2B1.2 to add a specific offense characteristic relating to enhancement for abuse of trust in embezzlement cases and provide that the enhancement in § 3B1.3 would not apply if the proposed specific offense characteristic was applied. The PAG recommends against such an amendment, as that would not cure the overbreadth problem inherent in the current language of § 3B1.3, and would compound the problem by adding a vague offense characteristic to the guidelines.

10. Proposed Amendment number 24 - Substantial Assistance - Call for Comment- The PAG is in favor of amending section 5K 1.1 by providing that a sentencing court can, sua sponte, depart downward from the guidelines in those cases involving first offenders where no violence was associated with the criminal offense. This would apply in those cases where the government does not present a section 5K1.1 Motion For Substantial Assistance but where the court nonetheless finds from the evidence that such a motion would have been appropriate had it been filed by the government.

11. Proposed Amendments number 25 and 36 - Standards for Acceptance of Plea Agreements - The PAG strongly urges the commission to adopt its proposed amendment number 25 (PAG #36) by adding commentary which would recommend that the government disclose to the defendant information relevant to the application of the sentencing guidelines prior to entry of a guilty plea. This

commentary would create no new right for a defendant, but would add to "truth in sentencing" and improve the practice of federal criminal law around the country under the Sentencing Guidelines.

12. Proposed Amendment number 27 - Guideline Consolidation - The PAG favors this amendment as it would simplify the Guidelines by deleting 27 Chapter Two guidelines through consolidation with other guidelines that cover similar offense conduct.

13. Proposed Amendment number 28 - Miscellaneous Substantive, Clarifying, and Conforming Amendments Affecting White Collar Offenses - The PAG makes the following recommendations on some of the miscellaneous amendments proposed by the Commission:

§ 2B1.1 Larceny, Embezzlement, and Other Forms of Theft

The PAG recommends adoption of these changes, which conform the embezzlement Commentary on loss computation with the Commentary for fraud and deceit at § 2F1.1.

§ 2F1.1 Fraud and Deceit

The PAG agrees that the specific offense characteristic for violation of an order should apply only when not otherwise addressed in the guidelines. The PAG agrees that the Commentary for fraudulent loan applications and contract procurement cases should be changed to make clear that where the loss significantly overstates or understates the seriousness of the conduct, an upward or downward departure may be warranted. Similarly, we agree that the Commentary on loss determination should be amended to make clear that when loss overstates the seriousness of the offense, a downward departure may be warranted.

§ 2B4.1 Bribery in Procurement of Bank Loan and Other Commercial Bribery

§ 2C1.6 Loan or Gratuity to Bank Examiner for Adjustment of Farm Indebtedness, or Procuring Bank Loan or Discount of Commercial Paper

§ 2C1.7 Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

§ 2E5.1 Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan

§ 2E5.6 Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives or Labor Organizations

The PAG recommends adoption of the proposed amendments for determining the fines for organizations. These amendments would provide that consequential damages could be used in lieu of pecuniary loss only when "reasonably foreseeable." Without such a limitation, consequential damages are likely to distort the appropriate fine level by taking into account a myriad of unforeseen circumstances.

14. Proposed Amendment number 37 - Theft and Fraud - Although styled as an issue for comment, the PAG supports an amendment to the commentary about loss in the theft guideline which would conform the commentary in the theft guideline with the commentary on loss in the fraud guideline.

15. Proposed Amendment number 38 - Theft - Although listed as an issue for comment, the PAG would support an Amendment under section 2B .1 which would provide that the sentencing court has the discretion to make a downward adjustment in those cases where defendants do not personally profit from the offense.

16. Proposed Amendment number 40 - Cocaine and Cocaine Base - The PAG strongly supports this issue for comment which would provide that the Commission would ask Congress to modify or eliminate the provisions that distinguish between the punishment for powder and crack cocaine at the quantity ratio of 100 to 1. At a minimum, we would urge the Commission to do a study on this whole area as to whether or not the ratio of 100 to 1 accurately reflects current scientific research and whether, in fact, the ratio should be reduced.

17. Proposed Amendment number 44 - Theft - This amendment increases the offense level for theft of mail by 2 levels in addition to the monetary value of the property stolen, and provides a minimum offense level of 14 if the offense involved an "organized scheme" to steal mail. Without knowing the Postal Service's experience with theft of mail, it is difficult to comment on the advisability of increasing the offense level. Further, we recognize that the Postal Service's minimal level 14 approach has already been adopted by the Commission for "an organized scheme to steal vehicles or vehicle parts," because it often is difficult to fix a loss figure on stolen vehicles and parts. § 2B1.1(b)(6); comment. (backg'd.). However, the PAG recommends that the Commission not adopt at this time any additional guideline that utilizes the "organized scheme" language, as that term is vague and seems duplicative of the specific offense characteristic for "more than

minimal planning." Virtually any scheme involving more than one person is an "organized scheme," and the Commission should study whether that term can be modified to more precisely cover the activity which concerns the Postal Service.

18. Proposed Amendment number 45 - Multiple Victims - This broad proposal by the Postal Service would create a new victim-related adjustment of 2 levels if more than one victim is affected, and if the offense affected 100 victims or more, the offense level would be increased by 2 levels for every 250 victims, up to a total of 8 levels. The PAG recommends against this proposal, as the 2 level increase would apply in a large number of typical fraud and theft cases, where dollar value already acts as a proxy for impact on multiple victims. Also, the proposed step increase for every 250 victims is arbitrary, and there does not appear to be a need for such an adjustment, especially given the loss tables, and the likelihood that the 2 level increase for "more than minimal planning" would apply to any scheme involving a large number of victims.

19. Proposed Amendment number 46 - Abuse of Position of Trust - The Postal Service proposes to add to the Commentary for 3B1.1 an application note that would specify that the enhancement for abuse of a position of trust applies to all postal employees for theft or obstruction of the mails, embezzlement of Postal Service funds, and theft of Postal Service property. As noted above, the PAG supports the Commission proposal to amend § 3B1.3 so that it applies to abuse of position of special trust. The PAG agrees that Postal Service employees to hold such a position of special trust with regard to theft or obstruction of the mails, because they have special access to the mails and the public depends so heavily on their honesty. Therefore, the Commentary to the proposed Commission amendment could include a reference to such Postal Service employees. However, with regard to embezzlement of Postal Service funds and theft of Postal Service property, the employees do not enjoy a special position of thrust, and should not be subject to an enhancement for such offenses.

20. Proposed Amendment number 59 - This proposed amendment would create a new guideline, § 2F1.2, applicable to violations of the Computer Fraud and Abuse Act of 1988 (18 U.S.C. § 1030). As stated in the "Synopsis of Amendment", and as is apparent throughout the commentary, its emphasis is on dealing with non-monetary harm. This proposed guideline is overbroad and cumulative of existing provisions.

a. Overbreadth

The proposed guideline is drafted so that the base offense is largely meaningless in that one or more specific offense characteristics will apply to virtually every covered offense. Offense level increases are provided for virtually all computer crimes including, for example, the mere examination of business information "not meant for public distribution" (see proposed § 2F1.2(b)(2) and Application Notes 4 and 7).

Furthermore, inclusion of "consequential losses from trafficking in passwords" in the calculation of economic loss invites a host of problems. 18 U.S.C. § 1030(a)(6) makes it a separate crime to traffick in passwords only where there is also intent to defraud. There is, however, no such limitation in proposed § 2F1.2(b)(4)(B). "Trafficking" is defined broadly to include the mere "transfer" of a password (see 18 U.S.C. § 1030(a)(6) and 1029(e)(5)). Thus, less pernicious forms of trafficking in passwords may be included as relevant conduct under Guideline § 1B1.3(a)(2). This could include, for example, one "hacker" merely revealing a password to another without hope or expectation of economic gain. Inclusion of such consequential losses creates a real possibility that defendants will inappropriately be punished for acts by others that were not intended or reasonably foreseeable.

b. Cumulativeness

Violations of 18 U.S.C. § 1030 are presently subject to the fraud guideline, § 2F1.1, for which Application Note 10 authorizes upward departure where the primary objective of the fraud was non-monetary. In addition, Proposed Amendment number 6 would authorize upward departure where "the fraud caused substantial non-monetary harm", and Proposed Amendment number 7 addresses a similar issue. Thus, there is no need for a specific computer fraud guideline to deal with the sort of non-monetary injury discussed in connection with this proposed amendment.

In addition, particular parts of this proposed amendment are cumulative of existing provisions. For example:

> Proposed § 2F1.2(b) deals with offenses where the defendant obtained and/or altered protected information, which includes (under Application Notes 4 and 6) information "relat[ing] to military operations or readiness, foreign relations or intelligence, or law enforcement investigations or operations." This sort of harm is adequately covered by §2F1.1,

Application Note 10(d), which authorizes upward departure where "the offense endangered national security or military readiness."

Proposed § 2F1.2(b)(3)(A) deals with offenses which caused or were likely to cause "interference with the administration of justice." Such offenses often will constitute obstruction of justice, and be separately prosecutable, and punishable, under Title 18, Chapter 73 ("Obstruction of Justice"). In some circumstances (such as where a defendant enters false information in a law enforcement or court database), this sort of harm might also be covered by §2F1.1, Application Note 10(b), which authorizes upward departure where "false statements were made for the purpose of facilitating some other crime."

Proposed §2F1.2(b)(3)(A) also deals with offenses which caused or were likely to cause "harm to any person's health or safety." This sort of harm is adequately covered by § 2F1.1, Application Note 10(c), which authorizes upward departure where "the offense caused physical or psychological harm."

21. Proposed Amendment number 62 - Bank Fraud - Here, the Commission solicits comment on whether the guidelines principally applicable to bank fraud (§§ 2B1.1, 2B4.1 and 2F1.1) should be amended to provide a 4 level enhancement in the base offense level for all offenses which affect a financial institution. This proposal invites problems of both overbreadth and redundancy.

First, if the word "affects" is defined broadly, virtually all offenses involving financial institutions would be deemed to affect such institutions. Such a result cannot be justified by the potential consequence to the victim. There is no reason to believe that a garden variety bank fraud will cause greater damage than a comparable fraud on another kind of business. Furthermore, there is no philosophical reason why the former should be punished more harshly than the latter.

If, on the other hand, "affects" is limited to those frauds which have an impact on solvency, then the proposed amendments would be largely cumulative of existing offense characteristics. Sections 2B1.1, 2B1.4 and 2F1.1 already include as specific offense characteristics that the offense "substantially jeopardized the safety and soundness of a financial institution" (§§ 2B1.1(b)(7)(A), 2B4.1(b)(2)(A) and 2F1.1(b)(6)(A)); and that the offense "affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense" (§§ 2 B1.1(b)(7)(B), 2B4.1(b)(2)(B) and

2F1.1(b)(6)(B)). In either of those events, the offense level is increased by 4, to a minimum of 24. Thus, the Guidelines already make ample provision for those frauds which significantly affect financial institutions.

22. Proposed Amendment number 65 - The Commission requests comment on whether §2F1.1 should be amended to include "risk of loss" in determining the applicable guideline range for fraud when the amount at risk is greater than the actual or intended loss. As with Proposed Amendment number 6, ***unintended*** harm is an inappropriate measure of culpability. At a minimum, consideration should be limited to ***reasonably foreseeable*** harm. Also as with Proposed Amendment number 6, this sort of provision might be incorporated into an application note which recognizes that reasonable foreseeability is a factor to be taken into account in determining whether the defendant intended a particular result.

The PAG also supports amendments numbered 29 and 30 proposed by the Criminal Law Committee of the Judicial Conference of the United States. We especially support proposed amendment number 29 which would add a paragraph to permit a downward departure when offender characteristics are present to an unusual degree and combined in ways important to the purposes of sentencing.

The PAG also supports, in substance, Amendments numbered 31-34 which are being proposed by the American Bar Association Sentencing Guidelines Committee.

Finally, the PAG supports Amendments numbered 47 and 52-56 of the proposals submitted by the Legislative Subcommittee of the Federal Defenders. As to proposed Amendments numbered 48-51 proposed by the Legislative Subcommittee of the Federal Defenders we prefer our amendment #39 in the Drug trafficking area, but we do support proposed amendment number 50 which would separate the weight of the carrier from the actual weight of LSD to determine the offense level in LSD cases. In the same regard, we also support the concept proposed in amendment number 49 sponsored by the Legislative Subcommittee of the Federal Defenders which would clarify that the weight used to determine the offense level should not include the weight of substances involved in the manufacturing process or substances to which the drug is bonded.

I have confirmed with your Staff Director, Ms. Phyllis J. Newton, that the Sentencing Commission will allow representatives of the PAG to address the Commissioners at your Tuesday, March 23, 1993 meeting at 10:00 A.M. As in the past, the PAG will not be presenting oral comments at the March 22, 1993, public hearing being held at the Ceremonial Courtroom of the United States District Court of the District of Columbia.

I look forward to working with you during this amendment cycle.

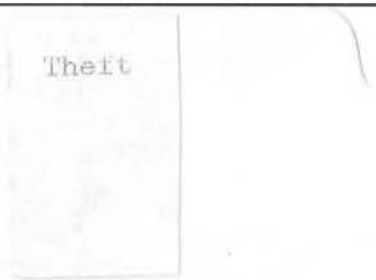
Sincerely,

Fred Warren Bennett, Chairman
Practitioner's Advisory Group

cc: Commissioners Nagel, Gelacak,
Carnes and Mazzone

Miscellaneous

Plea Agreements


Theft