New York Council of Defense Lawyers
711 Fifth Avenue
New York, NY 10022

The New York Council of Defense Lawyers (NYCDL) supports proposed amendment 9 which would eliminate the arbitrary limitation of the2-level downward adjustment for the "safety valve" defendants with a base level of 26 or greater. NYCDL states that the proposed amendment, which will extend the benefit of this reduction to defendants in less serious controlled substances cases, will put less culpable defendants on a level playing field with defendants now eligible for the safety valve.

George P. Kazen, Chief U.S. District Judge
Southern District of Texas
P.O. Box 1060
Laredo, TX 78042

Judge Kazen's primary concern with this proposal is with subsection (5) of §5C1.2. In the large volume of cases with which he is familiar, there is often a problem with scheduling "debriefing" hearings with the defense counsel, the prosecutor, and the law enforcement officer assigned to the case. Requested continuances to reschedule the hearing are not uncommon. Nor are subsequent disagreements on whether the defendant has truthfully provided all of the information known to him. The judge, who did not attend that debriefing, can either hold a hearing on the matter or ask the probation officer to interview the parties and make a recommendation. Judge Kazen states that this effort is worth the result at the higher offense levels, but he is not convinced that it will be useful at lowers levels where the sentencing ranges overlap and the marginal differences in sentences are not large. He questions how diligently subsection (5) will be administered under those circumstances.

Proposed Amendment 10 – Anhydrous Ammonia

[No public comment submitted for this amendment.]

Proposed Amendment 11 – GHB

[No public comment submitted for this amendment.]

Proposed Amendment 12 – Economic Crime Package

Part A. Consolidation of Theft, Property Destruction and Fraud

United States Postal Inspection Service
Office of the Counsel
Lawrence Katz, Counsel/Inspector in Charge
475 L'Enfant Plaza S.W., Room 3411
Washington, D.C. 20260-2181

The USPIS supports the consolidation of guidelines for theft, destruction of property, and fraud, provided the specific offense characteristics for the theft or destruction of mail are preserved in any new guideline.

The United States Postal Inspection Service (USPIS) urges the Commission to retain a2-level increase for the theft or destruction of United States mail above the proposed base offense level of 6, or in the alternative, retain the floor level of 6. The USPIS states that the federal statutes governing the theft and obstruction of mail differentiate United States mail from other stolen or destroyed property. The USPIS believes this distinction was the basis for §2B1.1(b)(3) when it was promulgated and feel strongly that it should be maintained in any general offense level increase proposed for the consolidated guidelines.

Probation Officers Advisory Group
Ellen S. Moore, Chairman
U.S. Probation Office
P.O. Box 1736
Macon, GA 31202

POAG prefers Option 1 for the proposed Loss Tables for the consolidated guideline. POAG's collective opinion is that the penalties in all of the proposed tables are too low. POAG routinely receives comment from the courts that the sentencing ranges calculated under §§2B1.1 and 2F1.1 do not provide significant punishment at the lower levels – where the majority of defendants fall. In Option 1, the majority of defendants would receive greater sentences, keeping in line with the concern of the courts.

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The NYCDL supports the consolidation of §§2B1.1, 2B1.3 and 2F1.1. NYCDL also supports the use of the base offense level of six for the consolidated guideline. Also, the NYCDL believes that the existing fraud table should be used with some modification to address the thefts under $1,000 that are currently treated at offense level 5.

The NYCDL also supports the elimination of the more than minimal planning enhancement which is being reflexively applied in most fraud cases irrespective of the relative amounts of planning engaged in by the particular defendant or underlying the actual scheme. NYCDL believes that the other sentencing enhancements already available to sentencing courts, including the loss enhancement under §2F1.1(b)(i), provide adequate tools to punish participants in complex frauds.

Regarding all other portions of Part A, the NYCDL joins in the comments of Federal Public and Community Defenders.

National Association of Criminal Defense Lawyers
Martin G. Weinberg, Chair
Samuel J. Buffone, Vice Chair
1025 Connecticut Avenue, NW, Suite 901
Washington, DC 20036

The National Association of Criminal Defense Lawyers (NACDL) supports consolidating §§2B1.1, 2B1.3, and 2F1.1. Further, the NACDL supports use of the existing fraud table with a base offense level of 6, as long as a one or two point decrease is adopted for cases involving a loss less than or equal to $1,000. The lower levels should be adopted because consolidation requires a choice between the higher levels for fraud and the lower levels for theft at amounts of $1,000 or less, and because the courts are currently sentencing in the minimum range in both theft and fraud cases.

The NACDL also supports the elimination of the "more than minimal planning" enhancement and opposes incorporating the enhancement in a consolidated Loss Table. To do so would impose unwarranted punishment on those few defendants who engage in minimal or no planning. Additionally, if the enhancement is incorporated in a consolidated Loss Table, a specific offense characteristic providing for a two point decrease should be added for those cases in which it does not exist.

With respect to the other proposals and issues for comment, the NACDL joins the Federal and Community Defenders and the New York Council of Defense Lawyers.

Jeffrey S. Parker, Professor
George Mason University
School of Law
Arlington, Virginia 22201

Professor Parker recommends that Amendment 12 be rejected in its entirety. In his opinion, the proposed modifications are likely to make the guidelines more difficult to apply and less effective in meeting the statutory sentencing purposes.

Part B. Loss Tables for Consolidate Guideline and §2T4.1

Department of Justice
Statement of Robert S. Mueller, III
Acting Deputy Attorney General

The Department of Justice (DOJ) believes that sentences in white collar crime cases are far too lenient and need to be increased, not decreased. Accordingly, the Department strongly supports the Commission's effort to change the Loss Tables to increase sentences for mid- and high-level white collar crimes.

Department of Justice
Criminal Division
Michael Horowitz, Ex-Officio Commissioner

DOJ urges the Commission to amend the Loss Table so that the sentencing guidelines more accurately capture the magnitude and seriousness of each offense. Three options for increasing the Loss Table are included in the proposed amendment, all of which raise offense levels for high dollar amounts. However, the proposed Loss Tables would actually lower offense levels or produce the same level as the current guideline at the low end of the dollar scale but begin to climb at $40,000 of loss in the case of Options 1 and 3 and at $120,000 in the case of Option 2.

DOJ believes that Option 3 of the proposed amendments, with a slight modification, would go far in solving the problem of inadequate white collar sentences. The modification DOJ recommends is incorporating into Option 3 the 1-level increase for offenses involving between $2,000 and $5,000 from Option .

DOJ opposes the proposed2-level decrease in the offense level in proposed §2B1.1(b)(7) for offenses that involve $2,000 or less.

DOJ states that Option 3 is preferable to Option 1 for offenses involving between $160,000 and

$1 million, an important range of losses for mid-level frauds. Option 3 is preferable to Option 2 for offenses at somewhat lower levels—another category encompassing a significant number of offenses.

More than Minimal Planning. DOJ states that a balanced approach would be for the Commission to adopt language prohibiting a downward departure on the basis of minimal planning and an upward departure on the basis of more than minimal planning. The promulgation of such language would signal to all parties that the Commission has adequately taken into account the issue of minimal planning and more than minimal planning.

[Note: the following summary of DOJ comment is from the Appendix which DOJ submitted as a supplement to its public comment.]

As a general matter, Option 1 of the proposed Tax Table increases offense levels for tax offenders throughout the guideline ranges, and Option 2 decreases offense levels for tax offenders at the low end of the guidelines and generally increases offense levels for tax offenders whose tax loss exceeds $70,000. As DOJ's focus in tax cases consistently has been on increasing punishment for low-end offenders in order to maximize deterrence, Option 1 is preferred. DOJ has no objection to moving from1-level increments to2-level increments.

Without regard to the Commission's proposal to expand the Zones, which would have a devastating effect on tax enforcement, Option 1 will lower the tax loss levels at which offenders will fall in Zones C and D. For example, under the existing Tax Table, an offender with a tax loss between $5,001 and $13,500 will fall in Zone B, and thus be eligible for a probationary sentence, while under Option 1, Zone B will end at a tax loss level of $12,500. Similarly, the break points between Zone C, where a split sentence is possible, and Zone D will be lowered under Option 1 from $40,000 to $30,000. Thus, under Option 1, a sentence of imprisonment only will be required for a tax loss in excess of $30,000. In view of Option 1's greater impact on lower level tax loss offenders, DOJ favors its adoption.

Judicial Conference Committee on Criminal Law (CLC)
300 East Washington Street, Suite 222
Greenville, South Carolina 29601

Although the CLC prefers its own table, any of the proposed Loss Tables is an improvement over the current table.

Department of the Treasury
James F. Sloan, Acting Under Secretary (Enforcement)
Washington, DC

Tax Table: Treasury supports the Option 1 Tax Table because it appropriately reflects of the seriousness of tax offenses. Treasury prefers Option 1 because it provides a lower loss amount that triggers the first increase above the base offense level ($2000) and achieves mandatory imprisonment at a lower loss amount than Option 2.

Treasury strongly objects to using the same Loss Table for tax, theft, property destruction, and fraud crimes. It argues that the consolidated table would effectively erase the current sentencing policy that tax crime are serious crimes and, as a result, have historically received higher penalties than theft, property destruction, and fraud crimes.

Department of the Treasury
Internal Revenue Service
Charles O. Rosotti, Commissioner of Internal Revenue
Washington, D.C. 20224

The IRS supports the Option 1 of the Tax Table; this provides for a base offense level of six for tax loss amounts equal to or less than $2,000. The IRS stated that Option 1 is an appropriate reflection of the seriousness of tax offenses, provides a lower base offense level loss amount and achieves the current mandatory imprisonment offense level of thirteen at a lower loss amount than Option 2. Additionally, they noted that while the proposed amendment is silent on the issue, there is language in the synopsis of Amendment Twelve, Part B, which discusses using Option 1 Loss Table for theft, property destruction, fraud and tax crimes. The IRS strongly objects to this proposal because it is wholly at odds with long-standing policies that treat tax crimes as serious crimes, warranting higher penalties than theft, property destruction, and fraud crimes.

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The NYCDL is opposed to the Commission's proposal to revise the consolidated Loss Table. Each of the three options would substantially increase the punishments meted out to defendants convicted of theft, property destruction or fraud. The NYCDL states that the Commission offers no rationale for these changes.

The NYCDL urges the Commission to reject each of the three options set forth in Part B of the proposed amendment. Instead, the NYCDL recommends adoption of the current fraud Loss

Table for use in the consolidated table. In sum, while the NYCDL believes a consolidated Loss Table should be created, the NYCDL is firmly opposed to adopting any of the three proposed revisions to the consolidated table.

Practitioners' Advisory Group
Jim Felman & Barry Boss, Co-Chairs
c/o Asbill, Junkin, Moffitt & Boss, Chartered
1615 New Hampshire Avenue, NW
Washington, DC 20009

PAG does not believe that any increase in the Loss Table is justified. Although some judges and prosecutors appear to believe strongly that economic offenders are being punished too leniently, especially when compared with drug offenders, PAG believes that the empirical data (e.g. high percentages of defendants sentenced at the bottom of the possible range) refutes this proposition. In addition, PAG argues that using the drug sentences as a base line in determining sentences in economic crime cases merely incorporates an irrational sentencing scheme (driven largely by mandatory minimums) into economic crime sentences. PAG is opposed to both Options 1 and 2 but, if forced to choose, would prefer Option 2.

National Association of Criminal Defense Lawyers
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§2B1.1(b): The NACDL opposes any revision to the consolidated Loss Table by increasing offense levels beyond those contained in the current fraud table. The NACDL opposes any increase in the Loss Tables for economic crime cases, stating that there is no justification supported in fact or logic for any increase at any level. Amendments to the economic crimes guidelines have kept pace with any real or perceived need for increased sentences. Further, the Loss Tables set in 1989, the specific offense characteristics added subsequently, and the use of the departure power have been more than adequate to reflect the seriousness of economic crime.

Further, the NACDL believes there is no need based on simplification of otherwise to increase current offense levels in order to consolidate the Loss Tables. Concerns about complexity step primarily from inconsistent and unclear definitions and ambiguous instructions in the guidelines rather than the number or breadth of offense levels.

Part C. Revised Definition of Loss for Offenses Sentenced Pursuant to §2B1.1, the Consolidated Guideline

Department of Justice
Criminal Division
Michael Horowitz, Ex-Officio Commissioner

DOJ agrees with the notion of amending the definition of loss to set forth a comprehensive approach for purposes of applying the fraud, theft, and property destruction guideline. DOJ also agrees with the effort to expand the reach of consequential damages beyond the limited classes of offenses now covered—defense procurement fraud, product substitution, and computer crime. Consequential damages should apply to all offenses covered by proposed §2B1.1. However, the options published for comment all have inherent problems. If these problems can be resolved in the time remaining this amendment cycle, the DOJ favors finalizing amendments to the definition. However, DOJ cautions against adopting amendments that may breed increased litigation in the future and recommends that the Commission operate in a very deliberate manner. DOJ suggests that if necessary, the Commission should delay the redefinition of "loss" until the next amendment cycle.

DOJ favors a definition of "loss" that expressly includes the value of the property taken, damaged, or destroyed and that includes additional reasonably foreseeable pecuniary harm. Only consequential damages would be subject to a reasonable foreseeability test. This concept would apply to all fraud, theft, and property destruction cases with a modification necessary for certain computer crime cases. Specifically, with respect to offenses involving the unauthorized access of "protected" computers as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), loss should include all harms currently covered. For such offenses, "loss" currently includes "the reasonable cost to the victim of conducting a damage assessment, restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service." §2B1.1, Application Note 2. While the costs must be "reasonable" in such cases, they need not be reasonably foreseeable. DOJ states that a reasonable foreseeability test would be particularly difficult to apply in such computer crime cases and could lead to uneven results.

Gain. Gain is an important component of a new "loss" definition. DOJ finds this new component particularly important in food and drug offenses and other crimes that violate a regulatory scheme. Actual loss may be little in such cases, but the risk of severe harms and loss may be great—which is why the regulatory scheme exists. The gain produced by the offense is one means of measuring the extent of the offense and the defendant's culpability.

DOJ disagrees with the notion of limiting gain to "pecuniary gain" (before tax profit). Gain as a substitute for loss should reflect the magnitude of the offense, not the level of efficiency of a criminal in operating a fraudulent scheme. In this regard, we also oppose the proposed downward departure for offenses in which the loss significantly exceeds the greater of the

defendant's actual or intended personal gain. A court should not be encouraged to reduce a sentence because a defendant's fraud did not result in the profit he desired or expected.

Department of the Treasury
James F. Sloan, Acting Under Secretary (Enforcement)
Washington, DC

As to the question of *when* loss should be measured for sentencing purposes, Treasury believes that the loss at the time of sentencing (Option 1) is more appropriate and more accurate. The full loss amount of fraud schemes often cannot be measured accurately at the time the offense is detected, additional harm may result as a direct result of the defendant's actions but after his arrest, and the end victim of a fraud scheme (*e.g.*, a credit card holder) may not be notified of the loss until after the fraud has been detected. Treasury believes that these losses would be discounted or ignored under Option 2.

Department of the Treasury
Internal Revenue Service
Charles O. Rosotti, Commissioner of Internal Revenue
Washington, D.C. 20224

Regarding the proposed amendment concerning the definition of tax loss, the IRS opposes adoption of an amendment that would exclude state and local tax loss from consideration. In the IRS's view, basing the sentence exclusively upon federal tax losses does not adequately take all relevant conduct into consideration.

The IRS does, however, support the amendment that would include interest and penalties in the definition of tax loss for evasion of payment cases, because it accurately reflects the total harm to the government in an evasion of payment case.

Judicial Committee on Criminal Law
Honorable Sim Lake
Chair, Sentencing Guideline Subcommittee
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Greenville, South Carolina 29601

a. Loss Definition

The CLC supports its proposed loss definition in Option 2 because it is complete, workable and easy to apply. It also supports the approach taken by the Commission in the two minor issues not previously addressed by the CLC.

In Option 1, the CLC believes it is not desirable to include examples, because examples may be over-construed, becoming the focus instead of the language remaining the focus. It recommends that the computer crime example be placed instead in the background commentary, and believes the second example is so complex it will produce more confusion than clarification.

The CLC suggests that including in the definition of "loss" all pecuniary harms that "resulted or will result" from the criminal conduct in Option 2, thereby including every adverse financial consequence of the crime, regardless of how remote, would be unworkable and unjust because the defendant would be held responsible for harms he could not have foreseen. Instead, the CLC adheres to a definition for "loss" which includes a) whether the harm resulted from the crime and b) whether the harm was reasonably foreseeable.

b. Time Measurement

In the proposed Application Notes for §2B1.1, the CLC recommends that "loss" should be measured at the time of detection, and not, as stated in Option 1, at the time of sentencing. Option 1, which proposes that "loss" be measured at the time of sentencing, could not be applied to many common theft and fraud cases. The CLC states that if both Option 1 in the "Time of Measurement" subsection and Option 2 in the "Exclusions from Loss" subsection (which states that interest that is accrued and unpaid "as of the time the defendant knew or should have known that the offense had been detected") were adopted together, the result would be rules in different sections of the definition measuring different components of "loss" on different dates.

c. Interest

The CLC recommends excluding interest of any kind from "loss." The CLC further opposes including "bargained-for" interest in "loss," because there is no rationale for including this interest while excluding from loss imputed interest and other benefits promised by the defendant simply because the defendant did not use the word "interest" in describing the promised benefits.

CLC is also concerned with the use of the phrase "other opportunity costs" in Option 1. The meaning of the phrase is unclear, and no definition is provided, inviting confusion and inconsistent judicial interpretations.

d. Other Exclusions from Loss

The CLC opposes expanding the *de minimis* exclusion to include benefits that have "little or no value to the victim" because they are "substantially different from what the victim intended to receive." The provision would nullify the crediting rules if a defendant received no credit against loss unless the benefit was what the victim expected. Further, this option would require probation officers and judges to determine the victim's subjective expectations, complicating the sentencing process.

e. "Ponzi Schemes" and Other Investment Frauds

The CLC supports the "loss to the losing victims" approach to measuring loss in multi-victim investment frauds in Option 1.

f. Gain

With respect to "gain," the CLC supports Option 2. As long as "gain" is merely an occasionally useful way of estimating "loss," treating a gain of x dollars as a "loss" of x dollars makes sense because the defendant's gain is some victim's loss. Further, the CLC does not see the justification for sentencing a defendant to the same punishment he would have received if he had caused a harm equal to his gain.

g. Departure Considerations

The CLC prefers its own description of the general considerations for departure, which refers to the seriousness of the offense and to the culpability of the defendant. In addition, the CLC does not believe that interest, or the other items listed in Option 4, should be departure considerations.

h. Insider Trading

According to the CLC, the insider trading provision would result in higher sentences than the current guideline for some offenses. Further, because the current insider trading base offense level of 8 includes more than minimal planning, the CLC believes the base offense level for insider trading should be lowered to 6 if a new sentencing table is adopted that incorporates more than minimal planning.

New York Council of Defense Lawyers
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a. Proposed Change in Definition of "Loss"

The NYCDL objects to the definition proposed in Option 1 whereby actual loss is defined as "reasonably foreseeable pecuniary harm that resulted or will result from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) . . . ."

NYCDL states that Option 1 departs dramatically from the approach of holding a defendant accountable for that over which he had control. This is because it imports into the calculation the notions of foreseeable harm and consequential damages, thus introducing the concept that a defendant might deserve a longer prison sentence because of factors over which he had no control.

NYCDL states that proposed Option 1 appears to run counter to established precedent where there does not appear to be real conflict in the Circuits. While there may be many cases in which foreseeable consequential damages are so significant that an upward departure may be warranted, the NYCDL opposes the proposal to make consequential damages part of the definition of loss.

Additionally, adding consequential damages to the loss definition will generate a significant burden of litigation and fact-finding, to be borne by parties, attorneys, probation officers, district judges, and circuit judges.

NYCDL favors Option 2, however NYCDL objects to the inclusion in this definition of loss which "will result" from the defendant's conduct. This invites speculation and burdensome litigation similar to that caused by Option 1, as to how to determine what losses "will result" from a defendant's conduct and how far in the future a court should look to make such a determination. The NYCDL, therefore, endorses Option 2 of the proposed loss definition with the caveat that it be limited to loss that has already resulted.

b. Time of Measurement for Computing Loss

NYCDL generally favors Option 1 for measuring loss at the time of sentencing. However, NYCDL also believes that for certain theft crimes, where property either appreciates or depreciates after the theft, the appropriate point for measuring loss may be the date of the theft itself.

c. Exclusions from Loss – Interest and Other Opportunity Costs

The NYCDL favors Option 1 because actual loss should ordinarily drive the calculation of the loss enhancement, if any. The length of a jail sentence under the Guideliness should not be determined upon consequential damages, and the same principle, precludes the inclusion of interest and other opportunity costs. The NYCDL submits that sentencing should not be based upon frustrated expectations. For the purposes of calculating loss, the NYCDL does not believe there is a meaningful distinction between time-value of money diverted from a victim who could otherwise have invested his funds, and the interest another victim expected to receive on a fraudulent transaction itself. Therefore, the NYCDL endorses Option 1, excluding all opportunity costs from loss, as an appropriate exclusion which will also resolve a conflict in the circuits.

d. Additional Exclusions from Loss: Government Costs, Victim Costs, and Value of Economic Benefit Transferred to Victim

Although the NYCDL favors the inclusion of government costs, victim costs incurred to aid the government, and the value of the economic benefit the defendant transferred to the victim in "exclusions from loss," the NYCDL is concerned that the list of excludable items may be construed as exhaustive. If the Commission adopts the "reasonably foreseeable" language in its

loss definition, courts will find their hands tied should they wish to exclude unlisted items from the loss definition even where it is unlikely the Commission would have intended such costs be included. The language of the proposed exclusion could indicate to a court that it must include all indirect costs, such as the victim's legal fees, because they are not specifically listed as exclusions and could be construed as "reasonably foreseeable." Thus, the NYCDL proposes adding language similar to that in the proposed guideline regarding Upward Departure Considerations; that is, that the list of Exclusions from Loss is a "non-exhaustive list."

e. Specific Situations Where Economic Benefit to the Victim is Included in Loss

NYCDL suggests that theses examples would be better placed in Upward Departure Considerations than presented as essentially exclusions to Exclusions in the loss definition. Of the two alternative scenarios, NYCDL is opposed to the scenario that states that if the benefit "has little or no value to the victim because it is substantially different from what the victim intended to receive," it cannot be excluded from the loss amount. NYCDL is opposed to this formulation for the same reason it supports the exclusion of interest and opportunity costs from the loss calculation; the criminal law is not there to address frustrated expectations.

NYCDL states that proposed subsection [IV(2)] is an appropriate response to cases such as United States v. Maurello, 76 F.3d 1304 (3d Cir. 1996) and United States v. Barnes, 125 F.3d 1287 (9th Cir. 1997) which held that the value of the services rendered should be offset against the cost of the service. All loss definitions, those currently in the Guidelines and those proposed here, turn on "pecuniary" harm. The value of the services as a factor in measuring "procuring harm" and the Guidelines should not be distinguishing between certain classes of frauds. Therefore, NYCDL believes that such factors too would be more appropriately considered as factors possibly supporting an upward departure rather than creating a blanket exclusion incorporated into the definition of loss.

f. Ponzi-scheme Exclusion

The NYCDL endorses Option 1.

g. Estimation of Loss

The NYCDL states that although factors "such as scope and duration of the offense and revenues generated by similar operations" may have a place in departure considerations, they have limited relevance, if any, to actual or intended pecuniary harm and should thus be moved from the list of factors which may be considered in estimating the amount of the loss to the list of factors under Departure Considerations.

h. Use of "Gain" as an Alternative to Loss

The NYCDL endorses Option 4 where gain may be used as an alternative to loss only where

actual loss cannot be calculated. The NYCDL does not believe that the Guidelines should be amended to permit gain to be used whenever it is greater than actual or intended loss. NYCDL states that the calculations under the existing tables typically lead to adequate sentences, and there is no need to change the rule. However, the discretion now given to the courts in Application Note 11 to consider an upward departure where the loss calculation does not fully capture the harmfulness or seriousness of the conduct should be amended to make explicit reference to cases in which the defendant's gain far exceeds the victim's loss. NYCDL states that such a change will help assure that unjust results are avoided where, in the court's view, the defendant's gain is a more reliable indicator of culpability than the victim's loss.

NYCDL does not endorse the proposed Upward Departure provision which speaks of gain in terms of defendant's "anticipated" profits. The NYCDL favors a provision in the Upward Departure Considerations, which would allow the courts to consider taking a defendant's actual gain into account under circumstances where the loss calculation does not fully capture the seriousness of the conduct.

i. Special Rules: Government Benefits

The NYCDL believes that the Commission's resolution is correct in that it follows the fourth circuit holding in United States v. Dawkins, 202 F.3d 711 (4th Cir. 2000). Furthermore, this reasoning is more in line with the Commission's proposal to remove from the loss calculation economic benefits received by the victim.

Practitioners' Advisory Group
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PAG recognizes that there are significant problems with the current loss definitions, and they echo the opinions voiced at the economic crimes symposium that the current guidelines overemphasize "loss" as a basis for determining overall culpability. In this regard, PAG welcomes the "flex proposals" that have been promulgated as Amendment 13.

PAG addresses several specific issues:

Intended loss: The PAG respectfully urges the Commission to reconsider whether "intended loss" is needed at all, especially given the amount of work it entails, and the confusion and potential for error that it creates. Sentences are generally based on the actual amount of loss, not on the intended amount of loss. If this change is intended to apply to inchoate offenses, then the PAG suggests that §2X1.1 already accomplishes that goal. Additionally, the amendment seems to require that intended loss be calculated in every fraud and theft case, whether inchoate or not.

If the Commission believes that a special inchoate offense rule is needed for fraud and theft cases, the PAG recommends a rule such as the following:

> For all offenses except inchoate offenses, loss means actual loss. For inchoate offenses, loss is the greater of actual loss and intended loss. "Inchoate offenses" are those offenses in which the defendant is apprehended before the offense has been completed.

The approach also focuses on inchoate offenses that "intended loss" was always meant to cover without creating extra work for the courts by requiring them to determine intended loss in every case.

If the Commission requires intended loss to be calculated in every case, the PAG recommends that the number used be the average, not the greater, of the two losses. If intended loss matters, the PAG argues that it should always matter. Therefore, a defendant who caused more loss than intended, should not be punished as severely as if she had intended the full amount of loss. This is the case for other crimes, such as homicide/manslaughter and some drug cases (§2D1.1, comment (n.12)).

If the "whichever is greater" rule is adopted, the PAG recommends four points of clarification:

1. The definition should be modified to clarify that it measures harm that the defendant intended to cause. A defendant should not be held responsible for what goes on in the heads of other offenders.
2. The definition should be explicit as to the *mens rea* necessary for something to qualify as intended loss. Adding the word "purposely" before the term "intended to result" will avoid a lowering of the standard to reasonable foreseeability.
3. The guidelines should make it clear that no "impossible" intended loss is to be included in the calculation of intended loss. At a minimum, the bracketed language in the proposed amendment needs to be included, so as to distinguish between harm that was intended in a sting operation and harm that was intended in an overly ambitious fraud. A parenthetical should be provided to spell out the difference for those unfamiliar with this issue.
4. The definition should make clear that the credit principle applies to intended loss. If the defendant intended to transfer any economic benefit to the victim, the value of the intended benefit should be deducted from the intended loss.

Interest: PAG believes that interest should be excluded from loss calculation. Defining interest will be complicated and its inclusion would result in increased litigation without noticeable effect on the sentencing outcomes. It also may lead to further disparities in sentencing by making inappropriate distinctions among similar defendants. The PAG states that, even if the Commission chooses not to include interest in the calculation, payments against interest should be allowed. This avoids creating extra work for the courts and will not substantially effect the

defendant's base offense level.

Net Loss: PAG addresses various subsections of Proposed Amendment 12, Part C:
Subsection (IV)(1): The PAG recommends that *de minimus* be defines so as to avoid litigation and potential circuit conflicts on the issue. It also recommends that the portion concerning the victim's determination of "no value" be deleted.
Subsection (IV)(2): The PAG opposes Paragraph (2) of this subsection. This paragraph precludes a reduction in the loss calculation by the value of services competently performed or of adequately functioning goods if the fraud involved persons posing as licensed professionals or if the goods were falsely represented to be legitimately approved by a governmental agency. If the goal of the loss function is to measure economic harm, the loss calculation should be reduced by the value of such goods and services. Whether the defendant's fraud has harmed a specified licensing or regulatory scheme is a separate question and should be resolved accordingly.
Subsection V: The PAG supports Option 1. The PAG further supports the idea that all amounts returned to the investors as a whole should be deducted from the calculation of loss.

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The NACDL opposes intended loss as an alternative measure of loss in completed crimes. The NACDL opposes the General Rule proposed for the commentary to a consolidated guideline that would make loss the greater of actual or intended loss in all cases, and supports instead maintaining the current system of using intended loss if greater than actual loss only in sentencing inchoate crimes. The NACDL supports a proposal for the commentary to a consolidated guideline that reads "For all offenses except inchoate offenses, loss means actual loss. For inchoate offenses, loss is the greater of actual loss and intended loss. "Inchoate offenses" are those offenses in which the defendant is apprehended before the offense has been completed."

The NACDL believes that if intended loss is adopted as an alternative measure of loss if greater than actual loss in sentencing all fraud and theft crimes, the definition of intended loss should be amended to state that "(1) the loss must be 'the pecuniary harm that the *defendant purposely* intended to cause,' (2) the bracketed language concerning impossible intended loss be included at minimum and clarified to ensure that a fraudulent insurance claim seeking $50,000 for a $10,000 car would not be counted, and (3) the credits principle applies."

The NACDL supports the definition of "actual loss" in Option 1 if a limitation is added to the concept of reasonable foreseeability. Further, the NACDL proposes that in the first sentence of the second paragraph, the phrase "as the defendant knew them" be added after "circumstances of

the particular case," and further proposes that an example based on United States v. Marlatt, 24 F.3d 1005 (7th Cir. 1994) be added.

With respect to Exclusion of Interest, the NACDL supports Option 1.

Concerning Unlicenced Services, Unapproved Goods, the NACDL opposes proposed Application Note 2(C)(iii)(IV)(2).

The NACDL supports Option 1 of the Ponzi Scheme proposal.

With respect to Estimation of Loss, the NACDL believes in Application Note 2(D), the language which currently states "the court need only make a reasonable estimate of loss," the word "only" and the absence of reference to the evidence of the case denigrates the court's fact finding function. Instead, the NACDL proposes that the first sentence be replaced with "In order to determine the applicable offense level, the court must make a reasonable estimate of the los based on the evidence in the case."

Further, the NACDL opposes the commentary in Estimation of Loss which purport to dictate a deferential standard or review on appeal. Instead, the NACDL supports deletion of the second and third sentences of proposed Note 2(D) and the citation of 18 U.S.C. § 3742(e) and (f).

Regarding Gain, the NACDL supports Option 4.

Jeffrey S. Parker, Professor
George Mason University
School of Law
Arlington, Virginia 22201

Professor Parker recommends that "gain" should be eliminated from any consideration in the guidelines, except as an estimate of "loss."

Professor Parker also believes there is no current inconsistency regarding the treatment of "loss" as among the various guidelines that use loss as a primary sentencing factor, but instead believes the purported "inconsistencies" are products of the basic policy decision to use a "charge offense" sentencing system. Therefore, every proposal to consolidate guidelines undercuts the logic of this charge-based sentencing system, and would undermine the structural integrity of the existing system. Professor Parker states that a case charged as simple theft should not be treated the same as a case involving fraud because the proof requirements for each on liability are not identical and the interests served by the prohibition of each are not the same.

Further, Professor Parker states that a treatment of direct versus indirect harm is not inconsistent. There is a necessity in most of remedial law of focusing on the direct and immediate harm and

largely excluding the indirect or speculative harm. Thus, the current proposal, which substitutes a vague foreseeability concept for a straightforward loss test, is the worst possible proposal. Focusing on remote effects which may or may not have been foreseeable would increase the cost and complexity of the sentencing system.

Part F. Computing Tax Loss under §2T1.1

Department of Justice
Criminal Division
Michael Horowitz, Ex-Officio Commissioner

DOJ shares the concerns expressed by the Internal Revenue Service in this regard. DOJ states that without any explanation, the Commission has adopted the Harvey sequential approach, but it does seek comment on whether the Cseplo approach should be adopted.

DOJ states that the Tax Division has sought to have the Commission address this issue since late 1998 and, in fact, Mary Harkenrider, the Department's then-*ex officio* member of the Commission, sent a letter to the Commission to that effect. DOJ states that it has long urged the Commission to adopt the Cseplo approach to the resolution of this conflict. DOJ believes that Cseplo is the better approach. The flaw in the Seventh Circuit's reasoning in Harvey is its focus on the situation where the taxpayer "obeys the tax laws." United States v. Harvey, 996 F.2d at 921.

Grouping. DOJ opposes this amendment as inconsistent with the basic premise of the grouping rules and the reason for the §2T1.1(b)(1) enhancement. However, DOJ does not disagree with the proposition that clarification of the grouping rules for tax cases is necessary because courts that have faced the question have reached varying conclusions on the need and method for grouping. DOJ states that the proposed addition to the application notes is not an appropriate solution to the grouping issue. Instead, the proposal is inconsistent with the premise underlying the grouping rules of Chapter 3, Part D.

DOJ does not oppose clarification of the grouping question in criminal tax cases. In fact, as evidenced by the varying approaches applied by courts that have considered the question, clarification is needed. But rather than a proposal that produces, in some cases, results at odds with the purpose of the grouping rules and does not serve the reason underlying the specific offense characteristic that is the catalyst for the grouping, DOJ suggests the need a proposal that results in incremental punishment for significant criminal conduct and reflects in the offense level the enhancement giving rise to the grouping, at least where the amount of income from the criminal activity would support the enhancement under §2T1.1(b)(1).

DOJ states that the proposed amendment should not be adopted. Rather, the Commission, with

help from the Department and others, should attempt to come up with a fair proposal. If, however, the Commission is inclined to adopt some proposal during this amendment cycle, language should be added to the effect that when the offense level for the group is no greater than it would have been had the most serious offense been sentenced alone, the offense level of the group should be increased by up to two levels to recognize the significant additional criminal conduct reflected in the other offense or offenses in the group.

Sophisticated Concealment. DOJ strongly urges the Commission to adopt an amendment to the tax guidelines using the broader "sophisticated means" language in tax offenses in place of "sophisticated concealment" and also to provide a floor offense level of 12 when the requisite level of sophistication is present in tax cases. The fraud guidelines, unlike the tax guidelines, provide for a floor level of 12 when sophisticated means are used. DOJ states it can discern no reason why fraud cases should be treated as more serious than tax offenses where a certain level of sophistication is involved. Consequently, DOJ believes that the tax guidelines should provide for a similar floor level of 12, and that this should be the case even if the Commission does not amend the tax guidelines to change "sophisticated concealment" to "sophisticated means."

Department of the Treasury
James F. Sloan, Acting Under Secretary (Enforcement)
Washington, DC

Treasury believes that the Commission should resolve this circuit conflict in favor of the sixth circuit's position that evasion of individual tax and corporate tax are two separate violations. United States v. Cseplo, 42 F.3d 360 (6th Cir. 1994). Similarly, Treasury opposes the proposal to except state and local tax loss from consideration because it under represents the relevant conduct involved in the offense. Treasury supports the inclusion of interest and penalties in the definition of tax loss for evasion of payment tax cases, because it accurately reflects the total harm to the government.

Department of the Treasury
Internal Revenue Service
Charles O. Rosotti, Commissioner of Internal Revenue
Washington, D.C. 20224

Regarding the proposed amendment concerning the computation of tax loss, the IRS stated that adoption of this amendment would confer an unfair sentencing advantage to the convicted tax criminal because the totality of the criminal conduct is not adequately counted. Two separate crimes are committed when an offender executes a scheme to evade taxes or files false returns that affect two taxpayers: one crime arises from the evasion of tax by the corporation. The IRS recommends that because the crimes are separate, tax losses should be calculated separately and then added together to achieve the aggregate loss to the government. Evading one's individual

tax and evading corporate tax are separate violations, and the total tax loss should not be calculated as if only one offense was committed.

Grouping
The IRS opposes adoption of the amendment that mandates grouping tax offenses with other crimes committed in connection with the tax crimes. The amendment in its current form eliminates any incentive to charge a tax crime separately from the crime from which the income for the tax crime was derived. Although clarification is necessary on this issue because of the circuit conflict, this proposed amendment reaches the wrong conclusion. The proposed amendment requires that tax counts be grouped with counts relating to the source of funds that were the subject of the tax crimes. This resolves the circuit conflict in favor of the defendant, because it effectively eliminates the separate tax crime conduct and harm, and only holds the individual responsible for the underlying criminal conduct from which the income was derived.

Sophisticated Concealment
The IRS supports the amendment that would apply "sophisticated means" to the tax guideline to conform with the fraud guideline. This amendment would provide clarity and consistency in application. As recently as two years ago, §2T1.1 had a "sophisticated means" enhancement which was changed to "sophisticated concealment." The IRS has previously advocated the need for clarification to ensure consistent application of the two terms.

Judicial Committee on Criminal Law
Honorable Sim Lake
Chair, Sentencing Guideline Subcommittee
300 East Washington Street, Suite 222
Greenville, South Carolina 29601

The CLC supports the proposal as explained in New Application Note 7.

New York Council of Defense Lawyers
711 Fifth Avenue
New York, NY 10022

Although NYCDL agrees that the Harvey approach is the more fair of the two options, NYCDL notes that absent the clarifying language of proposed Application Note 7, the new amendment does not make clear that the Commission is adopting the Harvey approach. The language of the proposed amendment does not on its face make clear that the corporate tax exposure is to be deducted from the gross unreported income at the corporate level before the gross unreported income at the individual level is computed. The NYCDL urges that the Commission find clearer language in which to state its intent before adopting any amendment of this sort.

The NYCDL urges the Commmission to consider the discussion by Judge Newman in United States v. Martinez, 143 F.3d 662 (2d Cir. 1998) before adopting any amendment on this point. Before the Commission adopts any amendment purporting to address the circuit conflict on this issue, the Commission should make clear that the defendant is entitled to a proper deduction from the corporate income of the payment of the funds to the individual defendant before calculation of the corporate tax liability.

Economic Crime Package – Issue for Comment on Items of Cultural Heritage, Archeological, or Historical Significance

Department of Justice
Criminal Division
Michael Horowitz, Ex-Officio Commissioner

DOJ favors a guideline enhancement for offenses that result in the destruction of, or substantial damage to, property of environmental, cultural, historical, or archeological significance—one of the enhancements listed in the amendment. DOJ would also expand it to include items of biological significance in order to include certain wildlife offenses. Monetary loss is an inadequate measure of the harm caused by these categories of crime, which include thefts of unique items from historic burial sites. We urge the Commission to adopt an amendment in this area.

Judicial Committee on Criminal Law
Honorable Sim Lake
Chair, Sentencing Guideline Subcommittee
300 East Washington Street, Suite 222
Greenville, South Carolina 29601

Because it believes that this type of conduct occurs enough to warrant either an alternative loss calculation or a suggested upward departure, the CLC prefers that such conduct remain unmentioned grounds for departure.

The Suquamish Tribe
Bennie Armstrong, Chairman
P.O. Box 498
Suquamish, Washington 98392

The Suquamish Tribe strongly encourages the Commission to provide an enhancement as well as an upward departure for the damage or destruction of unique or irreplaceable items of cultural

heritage, archeological, or historical significance. At a minimum, the Suquamish believe the Commission should adopt a combination of an upward departure provision and the alternative loss calculation formula used in United States v. Shumway, 47 F.3d 1413 (10th Cir. 1997). The Suquamish believes that an alternative loss calculation alone is insufficient because much of the cultural and archeological information that is lost has little or no "fair market" value, but is nonetheless priceless to the tribe. The Suquamish Tribe also strongly supports amending the current enhancement for damage to or destruction of property of a cemetery so that it includes

offenses involving human remains and/or funerary objects located on both federal and Indian lands.

Swinomish Tribal Community
Martin C. Loesch, Office of Tribal Attorney
P.O. Box 817
11404 Moorage Way
LaConner, Washington 98257

The Swinomish Tribe believes that the Commission should expressly recognize an additional category of loss for damage to cultural heritage. Commercial value rarely reflects the significance of the loss suffered by Native communities as a result of grave looting and artifact theft. The proposal improves upon the limited analysis currently permitted by the guideline.

The Swinomish Tribe thinks that the guideline should allow for a methodology through which a sentencing court could appropriately analyze the extent of harm done to a Native community through damage to or theft of their ancestral remains or artifacts. The methodology should require, at a minimum, that the pre-sentence investigation include: 1) an attempt to identify the most closely associated Native community, 2) consultation with that community regarding the facts underlying the charges, and 3) a conclusion reached through that consultation regarding the significance of the fact-specific harm suffered and, if appropriate, required remedies.

In addition to an alternate loss category, the Swinomish Tribe supports both a base level enhancement and an upward departure.

The Swinomish Tribe supports amending the current enhancement for damages to, or destruction of, property of a national cemetery in §§2B1.1 and 2B1.3 to include, for example, offenses involving human remains and funerary objects located on federal land.

United States Department of the Interior
Denis P. Galvin, Acting Director
1849 C St., NW
Washington, D.C. 20240

Mr. Galvin urges the Commission to incorporate guideline provisions in the Economic Crime Package. He endorses the recommendations of the Departmental Consulting Archeologist (summarized below).

United States Department of the Interior
Francis P. McMahon, Ph.D., Departmental Consulting Archeologist
Chief Archeologist, National Park Service
1849 C St., NW
Washington, D.C. 20240

Mr. McMahon makes five recommendations to the Commission, including increasing the base offense level for crimes affecting the archeological resources, historic properties, and other cultural items that are an irreplaceable part of the cultural heritage of all Americans.

Next, Mr. McMahon recommends that the Commission include "archeological value," as defined in the Archeological Resources Protection Act (ARPA) regulations, in the application notes. This will prevent the use of arbitrary loss determinations and promote consistent application of the guideline. He also believes that archeological value is the proper measure for determining if the offense is a felony and for sentencing.

Third, Mr. McMahon argues that the Commission should provide an enhancement for crimes involving cultural heritage resources committed for pecuniary gain or commercial purpose.

Fourth Mr. McMahon argues that the guideline should apply to the Native American Graves Protection and Repatriation Act (NAGPRA), settling a split of authority on the topic.

Finally, Mr. McMahon requests that the Commission remedy the guidelines' disparate treatment of human burials. The same sentencing enhancements used for crimes involving national cemeteries should be used for offenses against all internments and funerary property, wherever federal law applies.

David Tarler
1209 12th St., NW
Washington, DC 20005

Mr. Tarler is an attorney and an archeologist. He serves as a consultant to the Department of the Interior's Consulting Archeologist. His opinions do not reflect the position of the Department of the Interior.

Mr. Tarler reiterates the five recommendations made in Mr. McMahon's letter (summarized above). Mr. Tarler adds that, in addition to an increased base offense level for cultural heritage

crime, there should be an enhancement when the resources effected have special significance (e.g. designation as a national landmark or a national monument). He believes there should be an even larger enhancement for resources from World Heritage Sites.

United States Department of Agriculture

Denny Bschor, Director
Recreation, Heritage and Wilderness Resources
14th & Independence Sts., SW
P.O. Box 96090
Washington, DC 20090

William F. Walsey, Director
Law Enforcement and Investigations

Mr Walsey and Mr. Bschor reiterate the five recommendations made in Mr. McMahon's letter (summarized above).

Society for American Archeology

Keith Kintigh, President
900 Second St., NE #12
Washington, DC 20002

The Society of American Archeology (SAA) strongly recommends that the Commission adopt specific sentencing guidelines for violations of ARPA, NAGPRA, and other statutes protecting our nation's heritage resources. In addition to specifically addressing these offenses, SAA strongly supports sentence enhancements for archeological and other heritage offenses which involve the following aggravating factors or circumstances: 1) human remains; 2) pecuniary gain or commercial motivation; 3) more than minimal planning; 4) using sophisticated means; and 5) discharging, brandishing, or possessing a dangerous weapon.

The SAA also thinks that the Commission should adopt the ARPA statutory and regulatory scheme by assessing loss in term of archeological value or commercial value, whichever is greater, plus the cost of restoration and repair. For cultural offenses not involving archeological resources (a small minority under the new specific guideline), a cross-reference to the loss provisions under §2B1.1 would be sufficient.

Additionally, the SAA specifically endorses the December 7, 2000 letter from Paul M. Warner, United States Attorney for the District of Utah, to Laird Kirkpatrick, Commissioner *Ex-Officio* of the United States Sentencing Commission.

Norman Bay, United States Attorney
District of New Mexico
P.O. Box 607
Albuquerque, NM 87103

Mr. Bay expresses his support for the December 7, 2000 letter from Paul M. Warner, United States Attorney for the District of Utah, to Laird Kirkpatrick, Commissioner *Ex-Officio* of the United States Sentencing Commission.

Economic Crime Package – Issue for Comment on Inchoate Fraud and Theft

Judicial Committee on Criminal Law
Honorable Sim Lake
Chair, Sentencing Guideline Subcommittee
300 East Washington Street, Suite 222
Greenville, South Carolina 29601

The CLC prefers its own proposed loss definition which eliminates the current references to §2X1.1 in the theft and fraud guidelines as confusing and unnecessary.

Jeffrey S. Parker
Professor, George Mason University School of Law
3400 Fairfax Drive
Arlington, VA 22201

Professor Parker states that changes to the treatment of intended or inchoate crimes are slightly less objectionable than the other proposals because they focus attention on the criminal state of mind of intent instead of the standard of foreseeability. However, Professor Parker believes it is wrong to expand the inclusion of potential harms in the proposals because for the most part, the guidelines seek to focus on actual as opposed to imagined possible harms. To Professor Parker, this is the appropriate focus. Therefore, potential harms should always be discounted in sentencing, and any loss considered, actual or potential, should be "net" loss to the victim rather than "gross" loss.

Proposed Amendment 13 – Aggravating and Mitigating Factors in Fraud and Theft Cases

Department of Justice
Criminal Division
Michael Horowitz, Ex-Officio Commissioner

DOJ strongly opposes this amendment. It is a particularly problematic amendment applicable to fraud and theft offenses that could affect thousands of cases. DOJ states that the judicial discretion this amendment would provide is reflected by the fact that it presents a number of factors for "consideration," but the list of factors is not exclusive, nor is there sufficient guidance regarding the interaction of the factors. The proposed guideline merely instructs the court to consider the "presence and intensity" of aggravating or mitigating factors in making the determination whether to add or subtract two or four offense levels.

DOJ states that the loose standard means that identical cases could result in substantially different sentences, depending upon whether the court found the relevant factors to be of sufficient importance to affect the sentence. That is, even if the same factor were present in two cases to the same degree, the standard provided could arguably allow a court to increase or decrease the sentence by a different amount, or possibly not at all. From a policy standpoint this level of judicial discretion is inconsistent with the goal of the Sentencing Reform Act of 1984 of reducing unwarranted disparity.

Another problem indicated by DOJ is that the factors listed in many cases are not appropriate. For example, an offender's effort to limit the pecuniary harm caused by the offense is little consolation to a victim of a retirement fraud who loses his or her life savings. Similarly, a reduction in sentence based on minimal or no planning makes little sense under either the current fraud guideline or the proposed version.

While DOJ prefers Option 2 to Option 1 with respect to the issue of judicial discretion, DOJ believes it could generate substantial litigation surrounding the relative weights of the various factors. Moreover, its effect is to treat a number of unrelated aggravating or mitigating factors as non-cumulative. DOJ is also troubled by some of the proposed mitigating factors listed. For example, a reduced sentenced based on the lack of a profit motive or intent to cause monetary harm could result in an unnecessary benefit to computer hackers and traditional joy riders.

DOJ suggests that the Commission study the list of aggravating factors proposed in Option 2 to determine which are appropriate for inclusion in the fraud and theft guidelines, but it should treat them as cumulative bases for enhancement unless they are closely related to each other.

As a means of striking an appropriate balance, DOJ provides additional language for the Commission to consider:

The Commentary to §3B1.2 is amended in Application Note 3(A) by striking the second paragraph and inserting:

> "A defendant convicted of a drug or chemical trafficking offense whose Chapter 2 offense level is based only on the quantity of drugs or chemicals with which he personally was involved is precluded from consideration for an adjustment under this guideline, with a single exception. Such a defendant may be considered for an adjustment where his role is significantly less than that of another participant, and the other participant's involvement was limited to the same drugs or chemicals for which the defendant is accountable. The adjustment to be applied in the rare case described herein is limited to a2-level minor role reduction."

The Commentary to §3B1.2 is amended in Application Note 3(B)--

1) by striking the title and inserting "Conviction of Significantly Less Serious Offense or Sentencing Based on Reduced Relevant Conduct."; and

2) by striking the first sentence and inserting:

> "If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct or by virtue of being held accountable for a quantity of drugs less than that for which he would be accountable under §1B1.3, a reduction for a mitigating role under this section is not warranted."

The Commentary to §3B1.2 is amended in Application Note 3 by adding the following new paragraph:

> "(C) Relevant Conduct Applicable to Role.--For a mitigating role adjustment to apply, the defendant's role must be determined on the basis of the criminal conduct for which he was held accountable under §1B1.3."

The Commentary to Application Note 4 is amended by inserting at the end:

> "It is intended that the downward adjustment for a minimal participant will be used infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marihuana shipment because that person's relevant conduct would include the entire shipment."

Department of the Treasury
James F. Sloan, Acting Under Secretary (Enforcement)
Washington, DC

Treasury opposes both options in this proposal. Treasury argues that allowing for such a range of potential adjustments will loosen the entire sentencing scheme, leave too much discretion to the courts, and result in very different sentences for defendants with the same pre-adjustment offense level and the same criminal history. Option 1 allows an eight level range. Under this approach, a $50,000 fraud could be sentenced like a $15,000 fraud or a $350,000 fraud, depending on the circumstances. Though Option 2 provides only a four level range, Treasury believes it too will have serious consequences.

Treasury states that both options ignore the importance of the Loss Table to sentencing. Both options would place a considerable burden on courts, prosecutors, defense counsel, and others to analyze, justify, and argue the aggravating and/or mitigating circumstances of each offense – a burden which could not be ignored because of the significant impact the final decision would have on sentences. Additionally, Treasury argues that certain of the aggravating and mitigating factors countervail other elements of the sentencing guidelines or ignore certain law enforcement realities. It believes that these factors are simply not a fair reflection of the harm to the victims or the intent of the criminals.

Treasury also believes that the fact that the defendant's attempted offense was "impossible or extremely unrealistic" should not be a mitigating factor. Many fraud schemes are impossible or unrealistic, but victims are duped and suffer losses nonetheless. Treasury opposes allowing defendants to enjoy a reduced sentence if their "actual or intended gain was substantially less than the loss" amount determined using the Loss Tables. Treasury also opposes a reduction in sentence if "the offense was not committed for commercial advantage or personal gain." For example, a computer hacker who breaks into a bank's system "just to see if he can" still cause serious harm, even if pecuniary gain was not the object of the offense.

George P. Kazen, Chief U.S. District Judge
Southern District of Texas
P.O. Box 1060
Laredo, TX 78042

Judge Kazen questions whether the proposal achieves the stated purpose of providing that a single defendant is not precluded from receiving a mitigating role adjustment. The new language still requires that there must be more than one "participant" in the offense and that the adjustment does not apply to a defendant unless the "offense involved other participants." At the Mexican border, the vast majority of narcotics cases involve persons handling the transportation leg of the overall narcotics trafficking operation. Although the defendant is usually a solo driver, everyone in the system understands that the defendant is not working alone (e.g. growers, manufacturers,

financiers, wholesalers, distributers, etc.). Judge Kazen asks if this is this a case where "other participants" are involved under Proposal 7. If so, then Judge Kazen suggests that there are few, if any, narcotics cases in which the defendant would not be eligible for consideration as a minor participant. If this is not a case with "other participants," then Judge Kazen supports the proposal and believes that it leaves intact the Seventh Circuit's decision in United States v. Isienyi, 207 F.3d 390 (March 20, 2000).

Federal Defenders of San Diego, Inc.
Home Savings Tower
225 Broadway, Suite 900
San Diego, CA 92101

The Federal Defenders of San Diego (FDSD) believe that defendants who transport or store drugs should be entitled to mitigating role adjustments. The Commission should not limit the ability of the judge to adjust downward on the basis of minor or mitigating role. The analysis should be made on a case-by-case basis with input from defense counsel, the government, and the probation officers.

Likewise, the FDSD believe that the downward adjustment for mitigating role should not just apply to drug smugglers. Specifically, the FDSD think it should apply to alien smuggling cases. Often an alien smuggler plays no more substantial role than a drug courier. The FDSD believes the crimes are comparable as far as the mitigating role adjustment and recommends that the guideline indicate that the drug smuggling examples are illustrative only and not exclusive.

Practitioners' Advisory Group
Jim Felman & Barry Boss, Co-Chairs
c/o Asbill, Junkin, Moffitt & Boss, Chartered
1615 New Hampshire Avenue, NW
Washington, DC 20009

PAG welcomes the "flex proposals" of this amendment and strongly supports Option 1, assuming the bracketed language in (B) is included in the final amendment.

New York Council of Defense Lawyers
711 Fifth Avenue
New York, NY 10022

The NYCDL believes that this proposed amendment reflects a positive step by allowing judges more flexibility in considering both aggravating and mitigating factors in their sentencing decisions beyond those already listed as specific offense characteristics. NYCDL prefers Option

2 over Option 1 because Option 1 is inherently more complicated.

While Option 2 is generally favored, NYCDL prefers an approach that provides for a non-exhaustive list of factors. This would allow judges more flexibility and more opportunity to exercise their discretion in a given case thereby making the Guidelines a constantly evolving framework based on both a statutory scheme and common law.

With respect to several of the aggravating factors that are suggested by the proposed amendment, NYCDL is concerned that several are highly generic and could lead to unwarranted sentence enhancements. NYCDL states that aggravating factors such as those having to do with "national security or military readiness," or "irreplaceable items of cultural, historical, or archeological significance" seem appropriately considered. However, factors dealing with the "non monetary" e.g., psychological effect on victims or the effect on the "solvency" of the victims are so generic that they likely will apply in virtually every case. Accordingly, NYCDL states that they should not be separate aggravating factors.

NYCDL is particularly concerned about the aggravating factor which deals with the amount of loss because it allows a sentence level increase or decrease depending where in the range of loss (determined by the Loss Table) the loss amount falls. NYCDL states that adding an additional loss factor to be considered in aggravation or mitigation of a sentence is unwarranted.

National Association of Criminal Defense Lawyers
Martin G. Weinberg, Chair
Samuel J. Buffone, Vice Chair
1025 Connecticut Avenue, NW, Suite 901
Washington, DC 20036

The NACDL opposes both proposed options concerning aggravating and mitigating factors with corresponding two or four level increases and decreases. While it agrees that loss is not the only or necessarily the best indicator of culpability, other factors are better left to individual determinations available through the departure power.

Additionally, the NACDL has serious misgivings about the use of the listed factors as specific offense characteristics, believing that a number of these factors are too broad in definition, creating the danger of being applied as routinely and meaninglessly as the "more than minimal planning" enhancement. Further, many of the aggravating factors present double counting, significant overlap, and inconsistencies with other guideline provisions.

Moreover, NACDL believes all of the proposed factors are already available as bases for departure in an unusual case, and Application Note Eleven and Chapter Five provide as much guidance as needed. However, an expanded list of suggestions for both upward and downward departure in the commentary is preferable to the proposals defining these factors as specific

offense characteristics.

Specifically, the NACDL proposes amending proposed Application Note 2(G)(i)(I) as follows: "A primary objective of the *defendant in committing the offense* was an aggravating, non-monetary objective. For example, a primary objective of the *defendant in committing the offense* was to inflict emotional harm." This would make clear that only the defendant's intent may be considered, and not that of someone for whose conduct he is accountable under §1B1.3.

The NACDL proposes amending further proposed Application Note 2(G)(i)(I) to state "The offense caused substantial non-monetary harm *of a kind or to a degree that is extraordinary and that was reasonably foreseeable to the defendant under the circumstances as he or she knew them.* For example, the offense caused *reasonably foreseeable* physical harm, *severe* psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest." This Note would invite departure in a case that is not out of the ordinary. Deleting the word "risked" and inserting the reasonably foreseeable concept, along with the other italicized language, would cover only those situations that may warrant departure.

The NACDL opposes proposed Application Note 2(G)(i)(III) for all the same reasons the proposed upward departure factors should not be included in loss; including the difficulty of definition and measurement and because it would treat similar defendant's differently.

The NACDL also opposes proposed Application Note 2(G)(i)(V) because it is too broadly applicable and therefore does not describe an unusual case. The NACDL suggests a replacement of "The *defendant knowingly* created a *significant* risk of substantial loss beyond the loss determined for purposes of subsection(b)(1)."

The NACDL does not oppose the upward departure concerning irreplaceable items of cultural, historical or archeological significance.

The NACDL also does not object to the inclusion of the remaining factors in current Application Note Eleven.

The NACDL supports proposed Application note 2(G)(ii)(I). However, the NACDL recommends that proposed 2(G)(ii)(I) be amended to read "The loss significantly exceeds the greater of the defendant's actual or intended personal gain *or otherwise* significantly overstates the culpability of the defendant."

Additionally, the NACDL proposes the following suggestions for downward departures:

"Prior to detection of the offense, the defendant made significant efforts to limit the harm caused by the crime."
"The defendant's attempted offense was impossible or extremely unrealistic."
"The defendant did not commit the offense for commercial advantage or financial gain."

"The defendant committed the offense because of extreme financial hardship not caused by the defendant and beyond the defendant's control."
"The defendant neither intended to profit nor actually profited from the offense, and did not commit the offense for the purpose of inflicting non-monetary harm."

Judicial Committee on Criminal Law
Honorable Sim Lake
Chair, Sentencing Guideline Subcommittee
300 East Washington Street, Suite 222
Greenville, South Carolina 29601

The CLC favors the concept of flexibility in these amendments, but does not believe that either proposed amendment option merits adoption.

E. Jerry Moore. Jr., Supervising U.S. Probation Officer
United States District Court, Northern District of Florida, Probation Office
17 S. De Villiers Street, Suite 200
Pensacola, FL 32501

Mr. Moore opposes the proposed amendment as set forth in both Options 1 and 2. Mr. Moore states that the less complicated a guideline is, the greater the likelihood that it will be applied correctly and consistently by all parties involved in the sentencing process. He believes the proposed amendment will introduce unnecessary complications to the guideline.

If the Commission believes there is a need to increase a sentence based on the factors incorporated in Amendment 13, Mr. Moore recommends that they be incorporated as an encouraged departure in the Application Notes to §2F1.1 and §2B1.1.

Terence L. Lynam,
Akin, Gump, Stauss, Hauer & Feld, L.L.P.
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Washington, D.C. 20036

Mr. Lynam is a white collar criminal defense attorney and a former prosecutor for the Fraud Section of the Department of Justice. Section 2B1.1 was applied in a number of his cases.

Mr. Lynam opposes changing the Loss Table to increase the offense level for fraud cases. For sentencing purposes, a probation officer, who did not attend the trial and is not familiar with the complex financial transactions involved in the case, has the task of applying the guideline and

calculating the loss. The probation officer is simply not familiar enough with the evidence to determine a reasonably reliable dollar amount. Often, they use the government's estimate of loss, putting the defense at an immediate disadvantage. Because this determination drives the offense level calculation, it can be more important than the actual trial. Mr. Lynam believes that increasing the offense levels in the fraud table will merely exacerbate these problems.

Mr. Lynam enthusiastically supports elimination of the more than minimal planning enhancement. He would recommend that the sophisticated means and leader/organizer enhancements be eliminated, arguing that they are redundant and result in double counting.

Finally, Mr. Lynam argues that the proposed amendment represents a major change to the guideline and should be applied retroactively.

Proposed Amendment 14 – Sentencing Table and Alternative to Sentencing Table Amendment

Department of Justice
Criminal Division
Michael Horowitz, Ex-Officio Commissioner

DOJ strongly recommends against the adoption of either option in Amendment 14. They would unnecessarily lower sentences for many defendants. DOJ states that the Commission has failed to evaluate the combined effect of these options with other substantive proposals it has put forward in such areas as economic crime and money laundering. DOJ understands the desire of the Commission to increase judicial discretion and flexibility under the guidelines, but this must be accomplished in accordance with the Sentencing Reform Act. The Commission, of course, is free to propose amendments to the statute, and DOJ would be willing to examine whether any amendments to enhance flexibility and reduce the incidence of departures are needed.

Department of Justice
Statement of Robert S. Mueller, III
Acting Deputy Attorney General

DOJ is adamantly opposed to proposed amendments that would have the effect of reducing the sentences for white collar defendants who are eligible for probationary sentences. In particular, DOJ is opposed to expanding Zones B and C of the sentencing table because this will allow for unwarranted flexibility options in white collar cases and would have a severe adverse impact on white collar prosecutions. Acting Deputy Attorney General Mueller states that the public has a right to expect that people with privileged backgrounds who commit crimes will not be exempt from the full force of the law and will not be treated with inappropriate leniency.

Department of the Treasury
James F. Sloan, Acting Under Secretary (Enforcement)
Washington, DC

Treasury strongly opposes both of the options proposed to make changes to the Sentencing Table or provide an alternative to reduce sentences. Currently, a defendant does not qualify for mandatory imprisonment in Zone D unless a tax loss greater than $40,000 is established, which translates into an estimated taxable income of $142,857. If Option 1 is adopted, imprisonment would not be required until an offense level of 17 is established. This corresponds to a tax loss of at least $325,000 and an estimated taxable income of $1.16 million – an eight-fold increase. This would reduce to almost nothing the number of tax criminals who qualify for mandatory jail sentences of imprisonment for their offenses.

Option 2 similarly operates in opposition to long-standing sentencing policy that tax offenses are serious economic crimes. A first time offender would have a good chance of having his or her offense categorized as a "less serious economic crime" – not only contradicting long standing policy, but also defeating any offense level increases in the proposed new Tax Tables.

Department of the Treasury
Internal Revenue Service
Charles O. Rosotti, Commissioner of Internal Revenue
Washington, D.C. 20224

The IRS strongly opposes adoption of either alternative detailed in the proposed amendment. Both options operate to undermine the goals served by criminal tax enforcement and should not be adopted.

a. Option 1
If Option 1 is adopted, expanding Zones B and C, imprisonment would not be required until an offense level of seventeen is established. In other words, Option 1 of Amendment 14 would raise by eight-fold the amount of tax loss (and the amounts of income involved in the criminal scheme) that would be required before imprisonment would be mandatory, at least for the minimum term. This would dramatically reduce the number of tax criminals who would face such a term of imprisonment for their offense and would seriously undermine the deterrent effect of the criminal tax laws.

b. Option 2
The IRS states that Option 2 would categorize a substantial number of tax crimes as "less serious economic crimes." If a tax offender is not violent, does not use a firearm at the time of the tax offense, does not merit enhancements under §§2T1.1 and 2T1.4, has no prior criminal history, and volunteers to make restitution, the offense level will be reduced by two. Although the specific offense adjustments in §§2T1.1 and 2T1.4 will operate to exclude some tax offenders from this adjustment, the fact that a first-time tax offender stands a good chance of being characterized by the guidelines as a "less serious economic offender" directly contradicts the Sentencing Commission's philosophy that tax offenses are serious offenses. Additionally, the application of the adjustment also defeats any offense level increases in the proposed Tax Tables.

Judicial Committee on Criminal Law
Honorable Sim Lake
Chair, Sentencing Guideline Subcommittee
300 East Washington Street, Suite 222
Greenville, South Carolina 29601

Although the CLC favors greater sentencing alternatives for the least serious offenders, it states

that it lacks sufficient information to determine the effect of the proposed change given the anticipated new Loss Table for economic offenses. Further, the CLC is uncertain whether the proposed changes to Zones B and C are advisable for non-economic crimes. The CLC does not want to endorse either option until it can gain experience with the anticipated new loss definition and Loss Table.

New York Council of Defense Lawyers
711 Fifth Avenue
New York, NY 10022

The NYCDL strongly supports Option 1 of the proposed amendment as it will provide sentencing judges with greater flexibility in the sentencing of first time offenders as well as offenders whose offense levels fall at the lower end of the guidelines. NYCDL believes that the requirement of incarceration that currently exists for defendants whose offense levels are as low as level 11 results in short periods of incarceration for individuals for whom the use of probation and house arrest more appropriately satisfy the goals of sentencing.

As to proposed Option 2, the NYCDL believes that an addition to the guidelines of this sort is long overdue to address the sentencing of first time non-violent offenders. NYCDL believes that this proposed amendment in conjunction with the proposed amendment providing for a mitigation reduction in fraud cases will result in more appropriate sentencing of persons who play a minor role in a large scale fraud.

NYCDL urges the Commission to adopt both Options 1 and 2; Option 2 does not necessarily need to be an alternative to the otherwise salutary expansions of Zones B.

National Association of Criminal Defense Lawyers
Martin G. Weinberg, Chair
Samuel J. Buffone, Vice Chair
1025 Connecticut Avenue, NW, Suite 901
Washington, DC 20036

The NACDL supports both Options 1 and 2, and urges the adoption of both proposals. However, if only one is adopted, the NACDL supports Option 1.

Proposed Amendment 15 – Firearms Table

Department of the Treasury
James F. Sloan, Acting Under Secretary (Enforcement)
Washington, DC

Although Option 1 of this amendment is Treasury's original proposal, Treasury prefers Option 2. Because Option 2 would provide higher sentences than Option 1 in certain cases involving fewer than 50 firearms and in all cases involving more than 100 firearms, Treasury thinks that it better reflects the serious threat that firearms trafficking poses to public safety. Treasury also points out that Option 2 has the added benefit of diminishing some of the fact-finding required to determine how many firearms were involved in the offense.

Proposed Amendment 16 – Prohibited Person Definition

[No public comment submitted for this amendment.]

Proposed Amendment 17 – Prior Felonies

[No public comment submitted for this amendment.]

Proposed Amendment 18 – Immigration

Department of Justice
Criminal Division
Michael Horowitz, Ex-Officio Commissioner

DOJ states that Amendment 18 would create significant difficulties in sentencing a large group of offenders, fail to differentiate among offenders on the basis of the seriousness of their offense, and reduce sentences sharply in some cases.

DOJ strongly opposes this amendment. First, it could lower sentences severely in some cases and send a message that unlawful reentry by previously deported aggravated felons is not a serious offense. Next, a guideline based on the time served for past offenses is ill-conceived because time served is not a particularly good measure of the seriousness of an offense. Not only may time served understate the seriousness of a prior offense because of prison crowding problems, but establishing time served for past offenses is difficult. It could substantially slow the prosecution of alien offenders and increase litigation at sentencing and appeal. DOJ states that the proposed change to time served would seriously hamper the Department's ability to process thousands of criminal alien cases along the southwest border.

In sum, DOJ reiterates its request that the Commission refrain from acting on any amendments in the areas described above until the next amendment cycle so as to allow the Department to examine the ramifications of these important proposals fully, and to provide the Commission with alternative approaches.

Department of Justice
Statement of Robert S. Mueller, III
Acting Deputy Attorney General

Acting Deputy Attorney General Mueller urges the Commission to delay consideration of this amendment until next year. DOJ appreciates the Commission's concern that the present guideline does not measure the seriousness of the underlying aggravated felony in illegal re-entry cases. While DOJ agrees that some distinction may be appropriate, DOJ also agrees with Congress that the penalty for any illegal re-entrant should be substantial.

Acting Deputy Attorney General Mueller asserts that, as a practical matter, the attempt to distinguish between aggravated felonies by considering the defendant's time served is extremely problematic and will result in significant delay in disposing of illegal re-entry cases while prosecutors, defense lawyers, and probation officers all attempt to determine what portion of a sentence the defendant actually served. DOJ suggests that it would be more appropriate and easier to implement if the guideline distinguished between aggravated felons based on the character of the underlying offense rather than on the sentence served or imposed.

New York Council of Defense Lawyers
711 Fifth Avenue
New York, NY 10022

NYCDL supports amending the illegal re-entry guideline to limit applicability of the 16-level enhancement to only the most aggravated cases of illegal re-entry and to provide a more graduated approach so that the length of sentence for re-entry subsequent to deportation following conviction of an aggravated felony depends, in part, on the relative seriousness of the aggravated felony. NYCDL agrees with the comments submitted on behalf of the Federal Public and Community Defenders who recommend against adoption of either Options 1 or 2.

NYCDL suggests that the Commission has already addressed the issue of measuring the seriousness of a prior conviction in the formulation of the Criminal History Table in §4A1.1 and that this measure may provide an alternative measure for the seriousness of a prior aggravated felony. Accordingly, as an alternative to proposed subsection (b)(1)(A), NYCDL suggests the following:

(A) If the conviction was for an aggravated felony; and -
- (i) if the defendant is in Criminal History Category VI, and the aggravated felony gives rise to 6 Criminal History points as determined by §4A1.1, increase by 16 levels;
- (ii) if subsection (i) does not apply and the defendant is in Criminal History Category VI, increase by 10 levels;
- (iii) if neither subsections (i) nor (ii) apply and the aggravated felony offense gives rise to 6 or more Criminal History points as determined by §4A1.1, increase by 8 levels;
- (iv) otherwise increase by 6 levels.

Federal Defenders of Eastern Washington & Idaho
Judy Clark
Spokane Office
10 North Post, Suite 700
Spokane Washington, 92201

Ms. Clark writes to express her strong support for the proposed amendment to the illegal reentry guideline. The proposed amendment would provide graduated sentencing enhancements based on the seriousness of the prior conviction so that the resulting sentence is more individually tailored to reflect the defendant's history and circumstances.

Ms. Clark states that it would be appropriate not to apply the aggravated felony enhancement to felonies committed more than fifteen years prior, or not counted under §4A1.2. This change would be consistent with guideline application in other contexts, such as the use of prior

convictions for the Career Offender guidelines. Finally, Ms. Clark urges the Commission to implement the proposed amendment to ameliorate the unfairness of the current sentencing scheme for illegal reentry offenses.

Thomas W. Hillier, II
Federal Public Defender
1111 Third Avenue, Room 1100
Seattle, Washington 98101

Mr. Hillier states that there is no need to delay consideration of the proposals, as suggested by the Department of Justice (DOJ) through Robert S. Mueller. Mr. Hillier is especially concerned that DOJ requested deferment of the proposal that addresses the illegal reentry guideline. Mr. Hillier states that improvement in this guideline is long overdue.

Mr. Hillier writes that downward departures for illegal reentry on a percentage basis outnumber downward departures for any other offense type. The amendment addresses the unfairness of the current guideline through the graduated sentencing enhancement approach. This amendment would mitigate the problem that arises when different districts encourage "fast track" prosecutions in exchange for downward departures while other districts discourage the practice.

Additionally, Mr. Hillier states that the proposed amendment will address another serious defect in the current guideline. In thousands of cases, the application results in inappropriately severe sentences. Virtually all of these sentences are imposed against people of color, usually citizens of countries in Latin America. Mr. Hillier states that the present guideline offends our constitutional principle of equal justice.

Administrative Office of the United States Courts
John M. Hughes
Chief, Federal Corrections and Supervision Division
Washington, D.C. 20544

As the A.O. understands the proposal, it is intended to reflect sentencing enhancements based on the period of time the defendant actually served in prison for a prior aggravated felony conviction. In an effort to determine how this proposed amendment will work in the field, the A.O. polled several Chief Probation Officers. The A.O. submits that several chiefs on the border report that obtaining reliable information pertaining to the time a defendant actually served is impractical and very time consuming.

The A.O. states, however, that there is not agreement among those Probation Officers polled about the difficulty of obtaining this information.

U.S. Department of Justice
Immigration and Naturalization Service
Claude Arnold, Special Agent
2035 N. Central Avenue
Phoenix, Arizona 85004

Special Agent Arnold is concerned that if sentencing guidelines are reduced for some aggravated felons, the ability to incapacitate violent, career criminal aliens, who return to the United States for no other reason than to commit more crime, will be negated.

Special Agent Arnold writes to describe the violent gang problem in Phoenix, Arizona. He states that of the 6527 active gang members listed in the Phoenix Police Department's gang database, 1206 of these are members of the Wetback Power gang; the street gang consists of 19 separate sets which operate as independent gangs. Wetback Power gangs are involved in traditional gang crimes such as homicides, drive-by shootings, aggravated assaults, home invasions, armed robberies, gang threat and intimidation, theft, auto theft, burglary, firearms offenses and narcotics offenses.

Special Agent Arnold states that once these gang members are convicted of crimes, they routinely "patch over" to Border Brothers prison gang. According to correction officials, the Border Brothers prison gang is the fastest growing Security Threat Group in Arizona. The Border Brothers prison gang consists of 245 validated members who are currently incarcerated and 171 inactive members who have been released and deported as aggravated felons. Most of these Border Brothers return to the United States to perpetrate more crime.

U.S. Department of Justice
Immigration and Naturalization Service
Karen Smith, Deportation Clerk
4620 Overland Road, Suite 8
Boise, ID 83705

Ms. Smith writes to voice her concern about the proposed amendment. She suggests that the Commission reconsider Amendment 18 and keep the sentencing guidelines as they are.

Probation Officers Advisory Group
Ellen S. Moore, Chairman
U.S. Probation Office
P.O. Box 1736
Macon, GA 31202

POAG concurs that the term "aggravated felony" is broadly defined and that some aggravated

felonies are "less serious," but POAG nonetheless has reservations about the proposed remedy. POAG articulates 3 concerns with the tiered approach based on time served.

1. Ascertaining reliable information pertaining to the time the defendant actually served is believed to be impractical and, in some cases, impossible. POAG is of the opinion that probation officers already perform an admirable job ferreting available information within a reasonable period of time.
2. Using the time served methodology would be contrary to the philosophical underpinnings of chapter four.
3. Even if it were practical or possible to determine time served, it may not be the most fair measure of severity. There is great inconsistency in charging and plea practices among jurisdictions and differences in time served in parole and non-parole systems. In addition, there is no clear way to deal with alternative sentencing, early releases as a result of prison overcrowding, time served for revocation of probation, and premature releases to detainees.

POAG recommends looking into predicating the enhancement of the type of aggravated felony involved, an approach that is alluded to in Option 1. POAG opposes relying on departures as an approach because it will invite an unacceptable degree of disparity.

POAG generally favors consistency and recommends that the enhancement should follow the same counting rules at §4A1.2. POAG also recommends that there be a "shelf-life," even for aggravated felonies in Chapter Two.

Walter L. Connery, Esq.
39 Harbor Circle
Centerport, New York 11721

Mr. Connery states that he is the original author of the Aggravated Felon Removal Act, which was enacted by Congress as part of the Omnibus Crime Control Act in November 1988. Mr. Connery strongly agrees with the concept that the current uniformly applied 16-level enhancement is inappropriate.

Mr. Connery states that the term "Aggravated Felon" was designed by him to only apply to non-citizens convicted of murder, robbery, rape, kidnaping and felony sale of narcotics. The U.S. Sentencing Commission appropriately set a 16-level enhancement for these types of cases. Unfortunately, over the last 12 years, Congress has substantively expanded the original narrow definition of what should constitute an Aggravated Felony.

Mr. Connery supports Option 1 and suggests the addition of rape and robbery to the listing. Also, Mr. Connery states that kidnaping does not occur so often that it could be deleted.

Judge Royal Furgeson
United States District Court
Western District of Texas
200 East Wall, Suite 301
Midland, Texas 79701

Judge Furgeson strongly supports the proposed amendment to §2L1.2. He states that the amendment will achieve a more proportionate punishment than the present guideline provision in connection with unlawful re-entry cases involving a prior aggravated felony conviction. Judge Furgeson also believes that aggravated felonies committed beyond a certain number of years prior to the instant offense should not count.

Judge Deborah A. Batts
United States District Court
Southern District of New York
New York, NY 10007

Judge Batts submitted suggestions for changing several levels in the proposed guideline:
Under Option 1, §2L1.2(b)(1)(A)(ii), she suggests an increase of 10 levels.
Under Option 1, §2L1.2(b)(1)(A)(iii), she suggests an increase of 6 levels.
Under Option 1, §2L1.2(b)(1)(A)(iv), she suggests an increase of 4 levels.
Under Option 1, §2L1.2(b)(1)(B), she suggests an increase of 2 levels.

Regarding the first issue for comment, Judge Batts states that the enhancement should be graduated based on the type of aggravated felony involved; also, the approach of Option 1 for subsection (b)(1)(A)(i) should be extended to subdivisions (ii) through (iv).

Judge Batts suggests aggravated felonies only count for the five years prior to the instant offense.

George P. Kazen, Chief U.S. District Judge
Southern District of Texas
P.O. Box 1060
Laredo, TX 78042

Judge Kazen believes that this proposal is an unnecessarily cumbersome way to address the perceived problem of disproportionate sentences for aggravated felons under §2L1.2. Generally, the maximum sentences range from 60-72 months for defendants with rather extensive criminal records and 45-55 months for most other defendants. Judge Kazen states that the ability to find that a defendant's criminal history was overstated, under §4A1.3, together with the current Application Note 5 to §2L1.2, usually allow him to appropriately mitigate sentences when necessary.

As an alternative to the current proposal, Judge Kazen recommends a modest change to Application Note 5. Subpart (C) precludes a downward departure if the "term of imprisonment imposed" exceeded one year. This language has been interpreted to apply to a suspended sentence. Judge Kazen has seen many cases involving extremely small quantities of narcotics or petty assault or theft where the sentence "imposed was several years, but the defendant was immediately placed on probation." Judge Kazen recommends that these sentences should be considered the equivalent of federal probation, as long as the probation has not been revoked. Note 5 should be modified so that the limitation on departures is controlled by the non-suspended sentence portion of the term. Judge Kazen further recommends that the limitation be changed from one year to two or three years. If needed, a floor could be added to limit judicial discretion (i.e. "not more than ___ levels" or "to not lower than level ___").

Judge Kazen stresses that using the non-suspended portion of the sentence is not the same as the time-served approach of Option 1. Judge Kazen states that actual time served can be very difficult to determine and may increase litigation.

With respect to Option 2, Judge Kazen opposes a departure for a defendant who supposedly was not advised of the "criminal consequences" of an illegal reentry. The term is undefined and unclear. Furthermore, it would be very difficult to verify what a particular defendant was told upon deportation.

Judge Kazen indicated concern about the lack of a definition for "crime of violence." He feels that this could lead to confusion and inconsistency in the application of §2L1.2. He also expressed concern over the term "controlled substance offense," as it only appears in subsection (b)(1)(B) which pertains to convictions of three or more misdemeanors. This would rarely be a misdemeanor offense, and might lead to further confusion.

Judicial Committee on Criminal Law
Honorable Sim Lake
Chair, Sentencing Guideline Subcommittee
300 East Washington Street, Suite 222
Greenville, South Carolina 29601

The CLC endorses the approach in Option 1 as an improvement over the current guideline, and specifically opposes Option 2's proposed downward departure in cases in which the defendant was not advised of the consequences of the prior deportation. The CLC believes Option 2 will unduly overburden courts in litigating issues which arose in the deportation procedure.

Judge Filemon B. Vela
United States District Court
Southern District of Texas
600 E. Harrison Street, #305
Brownsville, Texas 78520-7114

Judge Vela supports proposed §2L1.2, stating it will promise a more fair and just approach in the sentencing scheme, whereas under the current guidelines, judges are caused to sentence persons who illegally come back to this country for longer periods of time than very serious drug situations of enormous magnitude.

Judge David Briones
United States District Court
Western District of Texas
511 E. San Antonio, Courtroom Two
El Paso, Texas 79901

Judge Briones supports the proposed changes to §2L1.2, but has a concern that the guidelines and commentary fail to address the issue of concurrent sentences. He also favors 15 years as the cut-off date to trigger the enhancement if the person does not have any other felony convictions subsequent to the aggravated felony.

Judge Ewing Werlein, Jr.
United States District Court
Southern District of Texas
515 Rusk Avenue, Room 9136
Houston, Texas 77002-2605

Judge Werlein favors the concept of Option 1 of proposed amendment §2L1.2, because it is better to have a prescribed tiered sentencing enhancement than to make upward departures a necessary consideration in these cases.

In Option 1 (b)(1)(A)(i)(I), Judge Werlein strongly urges that the 16 level enhancement apply if the defendant actually served a period of imprisonment of at least five years for such conviction, rather than ten years as proposed. Further, if this recommendation is accepted, Judge Werlein believes Option 2 should be deleted.

Judge Werlein suggests modifying §(b)(1)(A)(iii) to provide a 10 level enhancement rather than the 8 levels, if the defendant actually served a period of imprisonment of at least two years but less than five years. Judge Werlein believes that those who have served two to five years of actual imprisonment and yet still return, will not be deterred from further illegal reentry unless

there is an effective incremental amount of punishment.

In Option 2 (B), Judge Werlein suggests the deletion of the proposed provision encouraging downward departure if a defendant was not advised, at his previous deportation, of the criminal consequences of reentry after deportation or removal. Further, Judge Werlein would not place a limitation upon the time that has passed since commission of the aggravated felony.

Finally, Judge Werlein concurs that an automatic 16 level enhancement is too much for some defendants who have been convicted of aggravated felonies, been deported, and then illegally reentered the country. However, he would prefer to see no change in §2L1.2 rather than see this guideline made so lenient as to render it out of proportion to 8 U.S.C. § 1326(b)(2), suggesting that congressional treatment of this crime requires a sentencing guideline which is proportionally severe.

Judge Hayden W. Head, Jr.
United States District Court
Southern District of Texas
1133 N. Shoreline Blvd.
Corpus Christi, Texas 78401

Judge Head states that the proposed amendment to §2L1.2 is preferable to the present guideline.

USINS, High Intensity Trug Trafficking Area Task Force
Thomas J. Kilbride, Special Agent
26 Federal Plaza, Suite 29-117
New York, New York 10278

Agent Kilbride and other law enforcement personnel who signed the letter support not amending the guideline which would reduce the sentences of illegal aliens who have illegally reentered the United States after being convicted of aggravated felonies prior to being deported. These law enforcement officers are convinced that with reduced guidelines, they would get little or no cooperation from any of these defendants, and are further convinced that the cases would not be accepted for prosecution by the United States Attorneys Offices in the Southern or Eastern Districts of New York or the District of New Jersey, as a matter of policy in these districts.

Senior Judge Barefoot Sanders
United States District Court
Northern District of Texas
1100 Commerce Street
Dallas, Texas 78242

Judge Sanders supports the graduated offense level enhancements contained in proposed Option 1, stating that this four-tiered system appropriately links the amount of enhancement to the amount of time served by a defendant for the prior aggravated felony. Judge Sanders also supports the consideration of the type of prior aggravated felony as an additional basis for determining the offense level, reserving the current 16 level enhancement for only the most serious offenses. However, Judge Sanders believes it preferable that the enhancement in Option 1 be graduated based on the type of aggravated felony rather than the amount of time served.

Further, Judge Sanders recommends that a specified time period beyond which a prior aggravated felony conviction would not be considered for offense level enhancement be included in the amendment. In his view, a period of 10 years prior to commencement of the instant offense is sufficient for purposes of criminal sentencing for unlawful reentry or remaining in the country.

Judge Bruce S. Jenkins
United States District Court
United States Courthouse
Salt Lake City, Utah 84101

Regarding §2L1.2, Judge Jenkins states that for some defendants, a long time in federal prison is less onerous, more attractive, and sometimes more profitable than returning home. If the ultimate result is to send the miscreant home, perhaps the sooner he be sent home the better. According to Judge Jenkins, the cost of housing a person convicted of illegal reentry for ten years could cost in the neighborhood of $300,000.

Instead of the proposed §2L1.2, , Judge Jenkins believes the power to sentence such a defendant should be restored to the Court, and this could be accomplished by having the guidelines be guidelines and not mandates, empowering the court to make case by case determinations.

Judge William J. Rea
United States District Court
Central District of California
Los Angeles, California 90012

Judge Rea is in favor of the proposed §2L1.2 because he believes that the level of commitment is

too high. He endorses the language to increase the offense level by 4 if the conviction was for any felony other than an aggravated felony, or for three or more misdemeanors that are crimes of violence or controlled substance offenses.

Judge Terry R. Means
United States District Court
201 United States Courthouse
501 West Tenth Street
Fort Worth, Texas 76102

Judge Means believes the enhancement in §2L1.2(b)(1) for previous conviction for an aggravated felony offense should be graduated based on a factor other than the period of imprisonment the defendant actually served for the aggravated felony, because using the period of imprisonment actually served will lead to a greater disparity between sentences. Instead, Judge Means believes the enhancement should be graduated based on the type of aggravated felony involved. As an example, Judge Means states the approach of Option 1 for Subsection (b)(1)(A)(i) should be extended to Subdivisions (ii) through (iv) of Subsections (b)(1).

Further, Judge Means does not believe the enhancement in §2L1.2(b)(1) for a previous conviction for an aggravated felony should take into consideration only aggravated felonies that were committed within a specified time period. A person in the United States illegally and who has committed a previous aggravated felony should not receive any grace for having committed the crime much earlier during his unwelcome stay in the United States.

Judge Manuel L. Real
United States District Court
312 North Spring Street
Los Angeles, California 90012

Judge Real agrees with the removal of §2L1.2(b)(1)(A), yet has some disagreement with the proposed §2L1.2(b)(1)(A). Specifically, regarding §2L1.2(b)(1)(A)(i)(1), Judge Real has experienced many illegal aliens who were "mules" who are caught up in 10 year mandatory minimum. Judge Real believes this situation should be distinguished from those who are principals in the drug traffic.

Judge Real also agrees with proposed §2L1.2(b)(1)(A)(i)(II).

However, Judge Real believes that §2L1.2(b)(1)(A)(ii)(iii)(iv) should also be lowered by two levels each and graduated by the degree of culpability in the prior convictions.

Finally, Judge Real believes that §2L1.2(b)(1)(B) should be no more than a 2-level increase.

Honorable Harold Baer, Jr., United States District Court Judge
Southern District of New York
500 Pearl Street
New York, NY 10007

Judge Baer enclosed a copy of his recent decision in United States v. Darling Paulino-Duarte. In it he discusses §2L1.2 at some length. Footnote 3 on page 8 indicates that Judge Baer supports a tiered approach which recognizes variation in the seriousness of aggravated felonies. In the case at hand, Judge Baer departed downward because he felt that Paulino-Duarte's criminal history was overstated by placement in Criminal History Category V.

Agent James Fuller
United States Immigration and Naturalization Service
Newark, New Jersey

Agent Fuller, assigned to the Institutional Removal Program of the INS, which encounters incarcerated felons and processes them for immigration hearings, believes that the current sentencing guidelines are the only deterrent to these convicted felons. If the guidelines are relaxed, Agent Fuller states the United States Attorneys' Offices will not accept prosecution in his district. Additionally, because the current prison system, recognizing this deterrent, paroles these felons early, if the guidelines are relaxed, it will force the state system to keep the felons longer, which will impose a greater strain on this already over-burdened system.

Federal Defenders of San Diego, Inc.
Home Savings Tower
225 Broadway, Suite 900
San Diego, CA 92101

The FDSD agrees with the proposal to graduate the increase in adjustment by time served. The FDSD supports Option 2 because it is easy to apply and will have predictable results. Because Option 1 is based on the type of crime and will result in further litigation regarding the definitions of the crime, it makes it more difficult to advise clients and negotiate pleas.

The FDSD believes that the guideline should only allow a court to consider aggravated felonies that count for criminal history purposes under Chapter 4. Other factors that FDSD recommends the court should be allowed to consider include: recency of deportation, cultural assimilation, prior legal status, grounds for deportation, and evidence of rehabilitation.

Lastly, the FDSD asks that petty theft be included in the category of felonies counted under §4A1.2.