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.
Robert S. Strauss Building
1333 New Hampshire Avenue, NW
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.

Michael Gannon, Immigration Inspector
Immigration and Naturalization Service
Los Angeles District
700 East Carson St., Unit 6
Long Beach, CA 90807

Mr. Gannon opposes proposed Amendment 18. He believes that effectively lowering the sentence for illegal reentry will result in fewer prosecutions and destroy the deterrent effect of the statute. He states that the US Attorney's office for the Eastern District of New York will not prosecute any crimes that carry a base offense level below 24. In addition, many aliens convicted of crimes in the US get reduced sentences or are released early on the condition that they be deported. Mr. Gannon argues that these problems reduce the deterrent effect of the current guideline. He believes the current guidelines offer an appropriate punishment, and are a successful deterrent and should be left intact.

William T. Malone
124 Udall Road
West Islip, NY 11795

Mr. Malone is a senior inspector employed by the INS.

Mr. Malone opposes proposed Amendment 18. He submitted the same letter as Mr. Gannon (summarized above).

William Jones
4405 Hornbeam Drive
Rockville, MD 20853

Mr. Jones is a career INS officer. During his career, he served as a deportation officer, a criminal investigator, and a supervisory detention and deportation officer.

Mr. Jones opposes proposed Amendment 18. He states that deported aliens are notified of the consequences of returning to the United States and that this notification serves as a deterrent in many cases. He believes that a reduction in the sentencing guidelines will eliminate any deterrent presently keeping the most dangerous illegal alien group, the aggravated felons, from returning to the United States.

Jennifer Duey
334 Bunker Hill Circle
Aurora, IL 60504

Ms. Duey is a special agent with the INS.

Ms. Duey believes that the reduction in sentences for illegal re-entry for an aggravated felon will fail to deter the behavior and may even encourage it. She believes that the problem is exacerbated by the treatment these defendants receive from the U.S. Attorney's and State's Attorney's offices. Any deterrent effect is further limited by giving defendants time served, shortened sentences, or early release so that they can be deported to their country of origin.

Edward Tomlinson
2908 Coldspring Way #321
Crofton, Md 21114

Mr. Tomlinson was an employee of the Department of Justice and was assigned to the Organized Crime Drug Enforcement Task Force (OCDETF).

Mr. Tomlinson strongly opposes lowering any of the sentencing guidelines relating to aggravated felon re-entrants. These guidelines serve as a strong deterrent to the most violent of alien criminals seeking to re-enter the United States. As it is, many of these criminals did not serve an appropriate sentence for the prior crime because they received an early release on the condition that they be deported. Mr. Tomlinson believes that it is imperative that after criminal conviction, society should not send the message that it will tolerate the convict's illegal return to this society without severe penalty for the offense.

Proposed Amendment 19 – Nuclear, Biological, and Chemical Weapons

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

DOJ strongly urges the Commission to adopt Amendment 19.

Importation and Exportation Offenses. The proposed amendments of §§2M5.1 and 2M5.2 respond to the National Defense Authorization Act for Fiscal Year 1997, which urged the Commission to provide increased penalties for offenses relating to importation, exportation, and attempted importation or exportation of nuclear, biological, or chemical weapons or related materials or technologies under specified provisions of law. The proposed amendments increase offense levels by four levels for these offenses and would recognize the seriousness of the unlawful importation and exportation of nuclear, biological, and chemical weapons and related items.

Amendment of §2M6.1. The proposed amendment to §2M6.1 incorporates offenses relating to biological weapons, 18 U.S.C. § 175, and those relating to chemical weapons, 18 U.S.C. § 229. These are relatively new statutes for which there is no applicable guideline. A guideline is needed to assure appropriate sentences for these serious offenses.

DOJ states that the proposed amendment to §2M6.1 appropriately addresses deficiencies in the current guidelines and, as a general matter, DOJ finds it very satisfactory.

DOJ states that threats involving nuclear, biological, chemical, and radiological (NBCR) materials are fundamentally different from other threat cases and merit individualized treatment under the guidelines. In DOJ's view, NBCR threats should not be treated under the generic guideline for threats, §2A6.1, which "includes a particularly wide range of conduct" (see Application Note 1 to that guideline), and whose base offense levels reflect that range. Unlike some of the offenses captured under §2A6.1, such as harassing telephone calls or threats to injure property or reputation, NBCR threats typically involve a threat of death or serious physical injury and unique psychological harm to victims. Further, unlike other threats, such as threats involving conventional explosives, the harm associated with a threat relating to NBCR is not dispelled by removing oneself from the targeted location.

While DOJ believes that threat offenses should be treated separately from §2A1.6, the differentiation in the proposed guideline between threat offenses and other conduct could be expanded somewhat, to a level 18 or 20, where there is no evidence of intent or ability to complete the threatened offense.

Regarding the issue for comment on whether attempts, conspiracies and solicitations should be

expressly covered by the proposed guideline or by §2X1.1, DOJ strongly urges the Commission to treat these offenses under the proposed guideline.

DOJ notes that the proposed guideline has bracketed the provisions relating to particularly dangerous materials. DOJ states that there should be additional punishment for offenses involving these most lethal substances. If the Commission is inclined to delete this provision, DOJ would favor the base offense level of 30 for all NBCR offenses.

DOJ suggests the deletion of Application Note 5 which exempts those who act in aid of a foreign terrorist organization from the upward adjustment under the terrorism enhancement, §3A1.4. This precludes the automatic application of Criminal History Category VI to such offenders.

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

Mr. Mueller states that this is an excellent amendment, and urges the Commission to adopt it.

Proposed Amendment 20 – Money Laundering

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

DOJ states that it asked the Commission to delay consideration of this amendment until the next amendment cycle so that the new Administration could be confident that the amendment assures adequate punishment and deterrence. Any change in this area occurs against a backdrop of existing money laundering guidelines that are relatively straightforward, easy to apply, and consistent with the purposes of the money laundering statutes.

DOJ states that the Commission has not studied the effect on the money laundering amendments or proposed amendments in the white collar crime package and the flexibility proposals in Amendments 13 and 14. In short, while the money laundering proposal would tie the offense level to that of the underlying crime in most cases, the underlying offense level itself and the sentencing table are the subject of possible changes that could significantly alter the sentencing outcome. DOJ states that if the Commission decides to move forward with an amendment to the money laundering guidelines despite its request for delay, there are several key provisions that require adjustment to address DOJ's concerns.

Retention of Current Offense Levels for Drug Money Launderers. DOJ states that those who launder proceeds derived from drug and other serious offenses identified in proposed §2S1.1(b)(1) should not receive a sentence below current guideline levels. DOJ regards this as essential both for first- and third-party money launderers. The proposed decrease in offense levels could send an unfortunate message that drug money launderers are less culpable than they were previously thought to be.

As to third party money launderers, DOJ suggests the following enhancements:

6 levels for drug/serious crime proceeds;
5 levels for being in the business of money laundering;
4 levels for promotion;
4 levels for concealment;
3 levels for evasion of reporting requirements;
2 levels for evasion of tax laws; or attempting, aiding or abetting, or conspiring to commit any offense referred to in subsection (b)(2)(subsection (b)(2)(D));
1 level for offenses greater than $10,000 where proposed subsection (a)(1) applies and (b)(2) does not.

DOJ states that any lower levels would fail to capture the seriousness of the harm to society generated by the use of criminal proceeds to promote further unlawful activity or to conceal the

proceeds of unlawful activity.

Specific Offense Characteristics. DOJ is concerned about some of the specific offense characteristics in the proposed amendment. It is imperative that if a defendant is convicted of an offense involving an aggravated form of money laundering—i.e., under 18 U.S.C. § 1956—an enhancement under the proposed guideline must apply, except in the rare case of an offense that involves only the receipt and deposit of proceeds of specified unlawful activity. Section 1956 carries a 20-year maximum prison term, while the statute for the less aggravated form of money laundering carries only a 10-year maximum term of imprisonment, 18 U.S.C. § 1957. However, as drafted, the proposed amendment would not assure that a money launderer convicted of promoting specified unlawful activity or concealing the proceeds of it would receive an enhancement. Under the proposal only "sophisticated concealment" and conduct that "significantly" or "materially" promoted further criminal conduct would result in an enhancement. DOJ states that these qualifiers should not be used, and the language of the proposed amendment should assure that an enhancement applies to a person convicted of an offense under section 1956.

DOJ also objects to the reduced sentence under proposed §2S1.1(b)(4) for defendants convicted under 18 U.S.C. § 1957 who did not commit the underlying offense and who did not receive any of the listed enhancements. This reduction is unnecessary since, by virtue of not being subject to the proposed enhancements, those who meet these criteria would receive proportional sentences based on the value of the laundered funds. By contrast, if the Commission adopted the proposed reduction in sentence for these section 1957 violators, a significant cliff would result between offenders who receive an enhancement and those who do not.

Guideline for Violations of 18 U.S.C. § 1960. Previously DOJ strongly recommended that the Commission assign violations of this statute to §2S1.3 (structuring and reporting offenses) rather than §2T2.2 (regulatory offenses). Violations of section 1960 are similar to structuring offenses and warrant treatment under §2S1.3, which not only has a higher base offense level than §2T2.2, but differentiates on the basis of the value of the funds and other factors, such as the defendant's knowledge or belief that the funds were proceeds of unlawful activity or were intended to promote such activity. Given the combination of an offense level of four in §2T2.2 and the absence of specific offense characteristics, that guideline fails to recognize that money transmitters can facilitate the efforts of organized criminals and money launderers.

Commentary. Several issues reflected in the proposed commentary are also important considerations for the Commission. Proposed Application Note 3(C) concerns the value of the funds and addresses the concern that in some third-party cases the value of the laundered funds may exceed the value of the loss that determines the sentence for the underlying offense. Option 1 provides for the possibility of a downward departure in such a case; Option 2 limits the value of the funds for the money laundering guideline to the loss amount under the fraud guideline if it is less than the actual value of the laundered funds; and Option 3 takes no position. DOJ understands that this type of case represents a small minority of money laundering

prosecutions. Therefore, DOJ recommends that the Commission adopt Option 3, particularly in light of the complexity of the other options and the confusion either would create.

DOJ states that as written, proposed Application Note 4 would make it very unlikely that the government could establish that a defendant was in the money laundering business. The note would require multiple sting operations over an extended period of time and cause many to go uncounted as being in the business of money laundering. The most meaningful consideration in identifying a person in the business of money laundering is that he had multiple sources of funds. DOJ suggests that the Commission should not complicate the definition with a great many factors.

Technical Amendments. DOJ recommends a technical amendment to prevent confusion is deletion of the words "because the defendant did not commit the underlying offense" from proposed subsections (b)(1)(A), (b)(2)(A), and (b)(4). These words are unnecessary since each provision in question specifically states that subsection (a)(2) must apply in order for the provision which follows this reference to apply. The words DOJ recommends deleting may suggest that the applicability of the above-listed provisions is limited to cases in which the defendant actually committed the underlying offense, as opposed to those in which he otherwise would be accountable for it under §1B1.3(a)(1)(A).

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

The DOJ is extremely concerned about many of the proposed changes to the money laundering guidelines. Acting Deputy Attorney General Mueller states that some of the changes being proposed would lower sentences for even the most serious forms of money laundering.

The DOJ does agree with the Commission that prosecutors should not be using the threat of money laundering charges in order to induce guilty pleas in lower-level fraud cases. Accordingly, DOJ has been supportive of the Commission's efforts to reduce the impact of the money laundering guidelines for that category of first-party money launderers. However the Commission's proposed amendment not only makes those appropriate changes, but also results in lower sentences for some first-party and third-party drug money launderers. DOJ will strenuously oppose any proposal that would reduce penalties for individuals who launder drug proceeds.

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

The IRS supports this amendment because enhancing the guidelines for violations of 18 U.S.C. § 1956(a)(1)(A)(ii) by one or two levels will assist the Service in combating the tax gap by reinforcing the message that tax crimes are serious.

The IRS also attached a chart comparing base offense levels under §2T4.1 for proposed Options 1 and 2 and the current tax Loss Table:

Loss	2T4.1 – Current	2T4.1 – Option 1	2T4.1 – Option 2
$10,000.00	10	10	8
$10,001.00	10	10	10
$13,500.00	10	12	10
$13,501.00	11	12	10
$23,500.00	11	12	10
$23,501.00	12	12	10
$40,000.00	12	14	12
$40,001.00	13	14	12
$70,000.00	13	14	12
$70,001.00	14	14	14
$120,000.00	14	16	14

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

Treasury supports, in principle, holding a money launderer accountable for the underlying offense committed, but has serious reservations about proposed changes to the guidelines that would decrease the seriousness of money laundering offenses.

Treasury supports a minimum base offense level of 13 for money laundering offenses. This level

represents a compromise between the Commission's desire to reduce the perceived disparity between money laundering and the underlying offense but still recognizes the seriousness of money laundering as a crime.

Treasury supports the types of enhancements proposed in (b)(1) and (b)(2). Treasury believes that a six-level enhancement is appropriate for the offenses detailed in (b)(1)(i, ii, and iii). Treasury also supports enhancements for those convicted under (b)(2)(A, B, C, and D). However, it believes that the court should have the option of imposing one or more of the enhancements instead of applying only the greatest as called for in the proposed (b)(2).

Treasury believes that a 4-level enhancement, or higher, is appropriate for an individual engaged in the business of laundering funds. Treasury has no objection to the "totality of the circumstances" test proposed in Application Note 4(A) but does not endorse the "Factors to consider" language in Application Note 4(B) as it is currently written. Specifically, Treasury recommends that the words "regularly [routinely]" be struck from 4(b)(i); the phrase "during an extended period of time" be struck from 4(B)(ii); and that the words "a substantial amount of" be struck from 4(B)(iii).

Treasury also recommends that a 3-level enhancement apply in (b)(2)(B) if the laundered funds promoted further criminal conduct. It does not support modifying the word "promotion" with the adjectives "significant" or "material" as proposed in Application Note 5.

Treasury supports a 3-level enhancement for concealment in (b)(2)(C) to reflect the fact that investigating and prosecuting complex money laundering cases involves a substantial investment of government resources. Treasury believes that the proposed enhancement should apply to any level of concealment, not just cases involving "sophisticated" concealment.

Treasury supports the two-level enhancement for (b)(2)(D) because these activities undermine the regulatory structure of the anti-money laundering laws, and providing an enhancement for tax evasion offenses reinforces the message that tax crimes are serious.

Finally, Treasury does not support the proposed two-level downward departure in (b)(4)

Referencing 18 U.S.C. § 1960 Offenses to §2S1.3: Treasury supports referencing these offenses to §2S1.3. While violations of § 1960 might appear regulatory in nature, these offenses are more akin to the conduct level involved in structuring and should be punished at that section's higher offense level. Congress intended to increase the pressure on money services businesses that operate at the fringe of legality, and to tighten control over underground money movement mechanisms. If the §2S1.3 guidelines were applied to these offenses, the potentially higher sentences for offenders would track the congressional intent to combat illegal activities by some money services businesses.

Probation Officers Advisory Group
Ellen S. Moore, Chairman
U.S. Probation Office
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Macon, GA 31202

The consensus of POAG is that relevant conduct should be limited to the defendant's accountability under §1B1.3(a)(1)(A), instead of expanded to include defendants who are otherwise accountable for the underlying offense under §1B1.3(a)(1)(B). The expansion would more than likely include "third party cases," blurring the distinction between the two groups.

POAG is of the opinion that concealment is inherent in the offense. Therefore, an enhancement should only be applicable if the offense used "sophisticated means." An enhancement treated as a Specific Offense Characteristic for tax issues would be appropriate because tax issues are not necessarily part of every money laundering case. POAG believes that the underlying offense appropriately address the seriousness of the amount of laundered funds. Should an aggravating or mitigating factor be present that was not accounted for in the computation, the court has the option of departing.

POAG is of the opinion that application of §(b)(2)(A) should be expanded so a defendant is held accountable for being a direct and third-party money launderer.

Practitioners' Advisory Group
Jim Felman & Barry Boss, Co-Chairs
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Washington, DC 20009

The PAG has long supported reforming this area of the guidelines. It believes that the existing guidelines grossly over-punish offenders and are used for plea leverage in many cases. Although they were designed for use against drug king-pins and organized criminals, they are actually used against garden variety criminals. The PAG believes that they are desperately in need of repair.

The PAG reiterates that, from the defense perspective, Amendment 20 is not perfect; but concedes that it is a vast improvement over the existing guideline. The PAG expresses disappointment that DOJ still opposes the amendment, but hopes that the Commission will amend these guidelines, bringing added rationality to sentencing in money laundering cases.

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

The NYCDL generally approves of the approach which would divide defendants into two categories: those who committed underlying offenses from which the laundered funds were derived; and other offenders. NYCDL notes, however, that the proposed amendments do not require a conviction on the underlying offense for the generally higher base offense level for direct money laundering to apply. Conceivably, in instances where proof is insufficient to convict beyond a reasonable doubt of the underlying offense, but sufficient to prove this offense by a preponderance of the evidence, a sentencing court could still sentence a defendant as a "direct" money launderer. Further, the application notes provide no guidance on how the sentencing court is to determine whether the defendant has "committed the underlying offense." NYCDL believes that to ameliorate potential *Apprendi* and due process concerns, an acquittal of the underlying offense should preclude sentencing under the guidelines for direct money laundering.

NYCDL is also concerned that certain Specific Offense Characteristics, contained in the proposed amendments, may also implicate *Apprendi* issues or unduly complicate sentencing proceedings. NYCDL notes that proposed upward adjustment (2)(D) avoids this potential issue by requiring that the defendant first be convicted of certain provisions of 18 U.S.C. § 1956.

NYCDL states that proposed section (2)(C) is probably undesirable because most money laundering involves some form of concealment. The adjustment will invite mini-trials concerning whether the concealment was sophisticated enough to qualify for the adjustment. Additionally, a direct money launderer whose base offense involved fraud or theft may already be subject to an upward adjustment for sophisticated means; thus, the proposed amendment risks double counting. For these reasons, NYCDL would disapprove even more forcefully an expansion of the enhancement to cover all forms of concealment, even where the concealment was not "sophisticated."

NYCDL takes no position on the proposed upward adjustment for those "in the business of laundering funds" because professional money launderers will often be subject to higher guideline sentences than other offenders, without need for a further adjustment. While NYCDL takes no position on the need for an upward departure, it is unaware of any reason to exempt direct money launderers from its scope.

The Commission sought comment on a potential enhancement of1- level that would apply to direct money launderers who launder at least $10,000 in funds but are not subject to any other enhancements. Regarding this issue for comment, NYCDL questions the need for reintroducing a feature of the money laundering guidelines that the amendments otherwise corrected – the possibility that money laundering could be punished more severely than underlying criminal conduct.

NYCDL approves of the proposed two-level decrease for certain offenders convicted solely of violating 18 U.S.C. § 1957.

NYCDL opposes the amendment referencing convictions under 18 U.S.C. § 1960 to §2S1.3. This amendment would subject less serious offenders to appreciably more serious penalties, determined in part by the amount of funds involved. NYCDL states that there is no apparent need for this dramatic change because prosecutions of this type are infrequent.

Of the thee options which address the rare case where a third party money launderer may be subject to a greater penalty than a direct money launderer, the NYCDL prefers Option 2. The next favored option is 3. Option 1 seems contrary to the intent of punishing direct money launderers more severely than third party offenders.

In sum, while NYCDL endorses the proposed division of offenders into direct and third party money launderers, NYCDL suggests reconsideration of certain proposed enhancements, the use of the structuring guidelines to punish mere unlicenced money transmission and the adoption of Option 2 to deal with situations where a third party money launderer may face greater penalties than a defendant responsible for the underlying offense.

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) endorses the proposed §2S1.1 to tie the base offense level to the underlying criminal conduct which was the source of the funds. The NACDL believes this proposal will decrease anomalous applications and coercive plea bargaining practices. Although the NACDL also believes several features of the proposal should be changed, they strongly support an amendment which follows the basic proposed structure. Additionally, the NACDL urges the Commission to reject the position of the Department of Justice to refrain from acting on a money laundering amendment to allow the Department to examine the proposal and provide alternative proposals. Because the current guidelines produce unnecessarily harsh sentences, the guidelines should not be allowed to continue in their current form. Relatedly, the NACDL requests that if consideration of the money laundering amendment is deferred, consideration of the Economic Crime Package should also be deferred because of the close relationship between the two.

Regarding whether to expand §2S1.1(a)(1) to include offenders who would otherwise be accountable under §1B1.3(a)(1)(B), the NACDL believes this inclusion would expand the reach of this section beyond the limits intended by the drafters of the amendment. The NACDL cites Application Note Two in §1B1.3, stating that "jointly undertaking criminal activity"

encompasses a range of conduct beyond that normally encompassed within the concept of direct responsibility for criminal activity, which underlies the concept of direct money laundering.

The NACDL supports an addition to proposed Application Note Three regarding the value of laundered funds for certain defendants. NACDL believes that a provision should be included which deals with the situation where the amount of laundered funds derived from the fraud transaction could be greater than the fraud loss itself, regardless of whether Option 1 or Option 2 is adopted. Stating that a failure to adopt one of these options would lead to anomalous application of the guideline, the NACDL also believes in that case, money laundering will become a more significant offense than the underlying offense.

The NACDL states that in proposed Application Note Four, subparagraph (B), the definition of "engaging in the business" is inherently vague and may lead to disparate applications of the guideline. Their belief is that use of this standard would lead to potential duplicative counting for the elements of criminal history and relevant conduct.

Further, the NACDL believes that proposed Application Note Five should include the bracketed language to limit the reach of the promotional enhancement.

With respect to the proposed §2S1.1(b)(2)(B), the NACDL opposes a promotional Specific Offense Characteristic, stating that the proposed guideline would expand the reach of promotional money laundering. However, if this Specific Offense Characteristic is included, the NACDL favors the addition of the bracketed language to require such activities significantly promote further criminal conduct.

Further, the NACDL suggests that the language in both §2S1.1(b)(2)(C) and Application Note Six should include language indicating that the conduct was intended to conceal. This is necessary since several of the examples of sophisticated concealment in Application Note Six could be regular course of business transactions unrelated to any intent to conceal a transaction, and the sophisticated concealment adjustment should be limited to only that intentional conduct.

The NACDL opposes including the Specific Offense Characteristic in §(b)(2)(D) because the list of subsections in § 1956 includes most of the major subsections contained in that statute, and it sees no rationale for increasing a sentence for the large majority of cases that will be prosecuted under the money laundering statutes through this proposed Specific Offense Characteristic.

The NACDL supports a 2-level downward departure as in proposed §(b)(4).

Finally, the NACDL believes the proposed amendments will effectively eliminate the circuit conflict because of the coupling of direct money laundering to the underlying offense. However, cases that will not be sentenced under the amended guideline prior to its adoption or because of ex post facto problems should be addressed.

Jefferson M. Gray, Member
Arent Fox Kintner Plotkin & Kahn, PLLC
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Mr. Gray is currently a white collar criminal defense attorney and a former federal prosecutor.

Mr. Gray supports proposed Amendment 20 because it eliminates the money laundering table in §2S1.1, and instead bases the offense level for money laundering offenses primarily on the underlying offense. He believes that this change is needed to correct certain anomalies that have crept into the interpretation of this guideline over the years. These anomalies have led to inconsistent, inequitable, and unpredictable results in the area of money laundering.

Mr. Gray also supports the amendment because it will remedy a circuit split on the question of whether fraud and money laundering should be "grouped" under §3D1.2(d). One problem with the grouping is that some prosecutors, believing the fraud tables are too lenient, use the money laundering statute as a way of circumventing the penalty structure that would otherwise apply in fraud cases under §2F1.1.

Mr. Gray thinks that it is very important that any additional enhancement for "promotion" money laundering require a showing to the court that the laundered funds "significantly" or "materially" promoted further criminal conduct. He states that many prosecutors do not clearly understand the difference between "promotion" or "reinvestment" and "concealment" money laundering, or prefer to charge both in order to increase the pressure on defendants to plead guilty ("promotion" money laundering leads to a higher base offense level). It is also difficult for juries to distinguish between the different kinds of money laundering. Therefore, an additional enhancement for "promotion" should be supported by a specific showing that the funds were used in such a manner.

Weston W. Marsh, Partner
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Freeborn & Peters (F&P) recommends that the application of (a)(1) of proposed §2S1.1 not be expanded to include defendants who are otherwise accountable for the underlying offense under §1B1.3(a)(1)(B). F&P believes that involvement by a defendant under §1B1.3(a)(1)(B) is substantially less than under §1B1.3(a)(1)(A).

F&P recommends that the enhancement referred to in (b), Specific Offense Characteristics (2)(C) not be expanded to include all forms of concealment. It believes that sophisticated concealment

should be a sufficient basis for concealment.

Regarding application of subsection (a)(2)(C), Value of Funds, F&P recommends Option 2 because it would more fairly and accurately assess the punishment of the crime than would the methods set forth in the other amendments.

F&P also recommends that the provisions of §2S1.1 be made retroactive to previously sentenced defendants, as were the previous amendments under §1B1.10. Only a limited number of cases would be affected and an equalization of sentencing would be achieved in those cases.

Terence L. Lynam,
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Washington, D.C. 200364

Mr. Lynam suggests that this amendment should be applied retroactively. Defendants who received enhanced base offense levels due to the separate grouping of the money laundering offense should be allowed to benefit from the change.

Proposed Amendment 21 – Miscellaneous New Legislation and Technical Amendments

[No public comment submitted for this amendment.]

Index

INDEX TO PUBLIC COMMENT 2001 AMENDMENTS

I. **Amendment 1: Ecstasy** ..... (page 1 of the Summaries)

Department of Justice, Criminal Division 1
Department of Justice, Robert S. Mueller, III 47
Federation of American Scientists 249
Mark A. Kroeker, Chief of Police, Portland, Oregon 297
Dustianne North & Francis DellaVecchia 307
Michael Greene 287
Dean Sheldon Serwin, Esq.. 305

II. **Amendment 2: Amphetamine**
[No public comment submitted for this amendment.]

III. **Amendment 3: Trafficking in List I Chemicals**
[No public comment submitted for this amendment.]

IV. **Amendment 4: Human Trafficking**
[No public comment submitted for this amendment.]

V. **Amendment 5: Sexual Predators** ..... (page 8 of the Summaries)

Department of Justice, Criminal Division 1
Federal Public and Community Defenders 185
Probation Officers Advisory Group 187
Judicial Conference Committee on Criminal Law 53

VI. **Amendment 6: Stalking and Domestic Violence**
[No public comment submitted for this amendment.]

VII. **Amendment 7: Re-promulgation of Emergency Amendment Regarding Enhanced Penalties for Amphetamine and Methamphetamine Laboratory Operators as Permanent Amendment**
[No public comment submitted for this amendment.]

VIII. **Amendment 8: Mandatory Restitution for Amphetamine and Methamphetamine Offenses**
[No public comment submitted for this amendment.]

IX. Amendment 9: Safety Valve ..... (page 15 of the Summaries)

Department of Justice, Robert S. Mueller, III 47
Department of Justice, Criminal Division 1
Probation Officers Advisory Group 187
New York Council of Defense Lawyers 119
George P. Kazen, Chief U.S. District Judge, S.D.Tex. 219

X. Amendment 10: Anhydrous Ammonia
[No public comment submitted for this amendment.]

XI. Amendment 11: GHB
[No public comment submitted for this amendment.]

XII. Amendment 12: Economic Crime Package ..... (page 19 of the Summaries)

United States Postal Inspection Service 93
New York Council of Defense Lawyers 119
National Association of Criminal Defense Lawyers 150A
Jeffrey S. Parker 299
Department of Justice, Robert S. Mueller, III 47
Department of Justice, Criminal Division 1
Judicial Conference Committee on Criminal Law 53
Department of the Treasury 69
Department of the Treasury, Internal Revenue Service 79
Practitioners' Advisory Group 151
Probation Officers Advisory Group 187
Suquamish Tribe 247
Swinomish Tribal Community, Martin C. Loesch 233
U.S. Department of the Interior, Denis P. Galvin, Acting Director 99
U.S. Department of Interior, Francis P. McMahon, Ph.D. 101
David Tarler 281
U.S. Department of Agriculture, William F. Walsey and Denny Bschor 95
Society for American Archeology, Keith Kintigh, President 241
Norman Bay, United States Attorney, District of New Mexico 109

XIII. Amendment 13: Aggravating and Mitigating Factors in Fraud and Theft Cases
(page 43 of the Summaries)

Department of Justice, Criminal Division 1
Department of Treasury 72
George P. Kazen, Chief U.S. District Judge 219
Federal Defenders of San Diego, Inc. 175
Practitioners' Advisory Group 151
New York Council of Defense Lawyers 119

National Association of Criminal Defense Lawyers 150A
Judicial Conference Committee on Criminal Law 53
E. Jerry Moore, Jr., Supervising U.S. Probation Officer 113
Terence L. Lynam 275

XIV. **Amendment 14: Sentencing Table Amendment and Alternative to Sentencing Table Amendment** ..... (page 51 of the Summaries)

Department of Justice, Criminal Division 1
Department of Justice, Robert S. Mueller, III 47
Department of the Treasury 69
Department of the Treasury, Internal Revenue Service 79
Judicial Conference Committee on Criminal Law 53
New York Council of Defense Lawyers 119
National Association of Criminal Defense Lawyers 150A

XV. **Amendment 15: Firearms Table** ..... (page 54 of the Summaries)

Department of the Treasury 69

XVI. **Amendment 16: Prohibited Person Definition**
[No public comment submitted for this amendment.]

XVII. **Amendment 17: Prior Felonies**
[No public comment submitted for this amendment.]

XVIII. **Amendment 18: Immigration** ..... (page 57 of the Summaries)

Department of Justice, Criminal Division 1
Department of Justice, Robert S. Mueller, III 47
New York Council of Defense Lawyers 119
Federal Defenders of Eastern Washington & Idaho 181
Thomas W. Hillier, II, Federal Public Defender 183
Administrative Office of the United States Courts 89
Immigration and Naturalization Service, Claude Arnold, Special Agent 107
Immigration and Naturalization Service, Karen Smith, Deportation Clerk 309
Probation Officers Advisory Group 187
Walter L. Connery, Esq. 273
Judge Royal Furgeson, U.S. District Court, W.D. TX 193
Judge Deborah A. Batts, U.S. District Court, S.D. NY 213
George P. Kazen, Chief U.S. District Judge, S.D. TX 219
Judicial Conference Committee on Criminal Law 53
Judge Filemon B. Vela, U.S. District Court, S.D. TX 223
Judge David Briones, U.S. District Court, W.D. TX 225
Judge Ewing Werlein, Jr., U.S. District Court, S.D. TX 227

Judge Hayden W. Head, Jr., U.S. District Court, S.D. TX 229
USINS, High Intensity Drug Trafficking Area, Thomas J. Kilbride, Special Agent ... 115
Senior Judge Barefoot Sanders, U.S. District Court, N.D. TX 231
Judge Bruce S. Jenkins 325
Judge William J. Rea 323
Judge Terry R. Means 209
Judge Manuel L. Real 211
Judge Harold Baer, Jr. 195
Immigration & Naturalization Service, Agent James Fuller 311
Federal Defenders of San Diego, Inc. 175
Michael Gannon, Immigration Inspector 313
William T. Malone 319
William Jones 315
Jennifer Duey 316
Edward Tomlinson 321

XIX. Amendment 19: Nuclear, Biological, and Chemical Weapons
(Page 71 of the Summaries)

Department of Justice, Criminal Division 1
Department of Justice, Robert S. Mueller, III 47

XX. Amendment 20: Money Laundering ..... (page 73 of the Summaries)

Department of Justice, Criminal Division 1
Department of Justice, Robert S. Mueller, III 47
Department of the Treasury, Internal Revenue Service 79
Department of the Treasury 69
Probation Officers Advisory Group 187
Practitioners' Advisory Group 151
New York Council of Defense Lawyers 119
National Association of Criminal Defense Lawyers 145
Jefferson M. Gray, Arent Fox Kitner Plotkin & Kahn 263
Weston W. Marsh, Freeborn & Peters 279
Terance L. Lynam, Akin, Gump, Strauss, Hauer & Feld 275

XXI. Amendment 21: Miscellaneous New Legislation and Technical Amendments
[No public comment submitted for this amendment.]

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

March 19, 2001

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

Dear Judge Murphy:

I am pleased to present the views of the Department of Justice on proposed amendments to the sentencing guidelines published in the Federal Register January 26, 2001. The Commission has embarked on a very ambitious amendment program during the current amendment cycle, ranging from economic crimes to drugs. While we will be offering comment on all of the proposed amendments through Commission meetings, our letter addresses the following areas: Amendment 1, Ecstasy; Amendment 5, Sexual Predators; Amendment 9, Safety Valve; Amendment 12, Economic Crime Package; Amendment 13, Aggravating and Mitigating Factors in Fraud and Theft Cases; Amendment 14, Sentencing Table Amendment and Alternative to Sentencing Table Amendment; Amendment 18, Immigration; Amendment 19, Nuclear, Biological and Chemical Weapons; and Amendment 20, Money Laundering. We also offer an amendment to the Commission's amendment concerning mitigating role, which was published in November 2000.

Amendment 1, Ecstasy

The proposed Ecstasy amendment would substantially raise penalties for this serious drug of abuse. As we indicated in prior written comments to the Commission, we strongly support this amendment since current Ecstasy penalties are too low to serve as an effective deterrent. We estimate that an Ecstasy offense subject to level 26 (roughly five years of imprisonment for a first offender) under the current guideline would involve approximately 11,500-46,000 pills, based on the typical weight of a pill of 250 mg. It is not surprising, given this penalty structure, that federal law enforcement officials have found the existing penalties for this dangerous drug to be woefully inadequate. By contrast, under the proposed amendment, offenses involving 100 grams of Ecstasy, or about 400-1,600 pills, would