level enhancement under §2T1.1(b)(1) for the tax count for failing to report criminal activity income in excess of $10,000. The appellate court noted that if the counts were grouped under USSG §3D1.2(c), the offense level would be determined by the higher offense level of 25 applicable to wire fraud and would result in the tax conviction having no effect on the sentencing. Thus, grouping would have defeated one of the purposes of the grouping rules -- to provide incremental punishment for significant additional criminal conduct. It also would have undercut the purpose for inclusion in the tax guidelines of the specific offense characteristic (§2T1.1(b)(1)) for the failure to report more than $10,000 in income in any one year from criminal conduct. "Failure to report criminally derived income is included as a factor for deterrence purposes." (USSG §2T1.1, comment. (backg'd).) Because the offense level for the fraud became the offense level for the group, the two-level enhancement to the tax offense level for failure to report more than $10,000 in income from the fraud had no deterrent effect as it played no part in the final offense level.

Similarly, in a telemarketing fraud that produces $550,000 in one year, the fraud offense might have an offense level of 20 (base offense level of 6 (§2F1.1(a)), increased by 10 levels for a loss of more than $500,000 (§2F1.1(b)(1)(K)), by 2 levels for a scheme to defraud more than one victim (§2F1.1(b)(2)(B)), and by 2 levels for commission of the offense through mass marketing (§2F1.1(b)(3))). If the defendant evaded taxes on the $550,000, the offense level might be 19 (base offense level of 17 (§2T1.1(a)(1) and (c)(1)(A), §2T4.1(L)), increased by 2 levels for failure to report income exceeding $10,000 from criminal activity (§2T1.1(b)(1))). If these two offenses were grouped together under §3D1.2(c), the result again would be no impact on the offense level of the group from the tax violation. Rather than preventing double counting, the result is no counting at all - in other words, no incremental punishment as a result of significant additional criminal conduct and absolutely no deterrence from application of the enhancement for failing to report more than $10,000 in any one year from criminal activity.

We do not oppose clarification of the grouping question in criminal tax cases. In fact, as evidenced by the varying approaches applied by courts that have considered the question, clarification is needed. But rather than a proposal that produces, in some cases, results at odds with the purpose of the grouping rules and does not serve the reason underlying the specific offense characteristic that is the catalyst for the grouping, we need a proposal that results in incremental punishment for significant criminal conduct and reflects in the offense level the enhancement giving rise to the grouping, at

least where the amount of income from the criminal activity would support the enhancement under §2T1.1(b)(1).

The proposed amendment should not be adopted. Rather, the Commission, with help from the Department and others, should attempt to come up with a fair proposal. If, however, the Commission is inclined to adopt some proposal during this amendment cycle, language should be added to the effect that when the offense level for the group is no greater than it would have been had the most serious offense been sentenced alone, the offense level of the group should be increased by up to two levels to recognize the significant additional criminal conduct reflected in the other offense or offenses in the group.

**Inclusion of Interest and Penalties in "Tax Loss" in Evasion of Payment Cases**

The Commission has invited comment on whether the definition of "tax loss" should include interest and penalties in 26 U.S.C. 7201 evasion of payment cases, which the Commission notes are distinguishable from evasion of assessment tax cases. As we have previously indicated, the Tax Division would like the Commission to amend USSG §2T1.1 to provide that, in both evasion of payment cases prosecuted under 26 U.S.C. 7201 and willful failure to pay cases prosecuted under 26 U.S.C. 7203, interest and penalties are included in the definition of "tax loss." This is an issue of substantial significance in the criminal tax area, and its applicability is limited to a discrete and readily distinguishable type of criminal case.

In an evasion of payment case, the defendant's offense is attempting to evade the payment of not only the amount of taxes originally owed but interest and penalties as well. These cases usually arise only after many attempts by the IRS over several years to collect the taxes due and owing. They involve repeated acts of concealment and evasion by the defendant, not only to evade the original tax liability but also to evade the interest and penalties that have accrued as a direct result of the defendant's evasive acts. These are not cases where interest has accrued as a result of delay by the government, as might be the case in an evasion of assessment case (i.e., where the defendant is charged with attempting to evade the underlying tax liability). Instead, these are cases where the full amounts at issue are attributable to the defendant's criminal acts and are part of the amount that the defendant has attempted to willfully evade paying.

Unfortunately, the language now contained in the Guidelines ("tax loss does not include interest or penalties" (USSG §2T1.1, comment. (n.1)) does not distinguish between evasion of assessment cases and evasion of payment cases, and has resulted in courts excluding from the calculation of the "tax loss" (i.e., base offense level) in evasion of payment cases all of the amount the defendant has attempted to evade that is attributable to interest and penalties. See United States v. Hunerlach, 197 F.3d 1059, 1070 (11th Cir. 1999)(clear commentary language to Section 2T1.1 provides "unequivocally" that the "[t]ax loss does not include interest and penalties"); United States v. Hopper, 177 F.3d 824, 832 (9th Cir. 1999) (given the "plain language" of the Guidelines, district court erred in including interest and penalties).

In Hunerlach, the evidence at trial overwhelmingly established that defendant attempted to evade payment of interest and penalties in addition to his basic tax liability. He signed two agreements in which he promised to pay the IRS income tax deficiencies, penalties, and interest due for taxable years 1981 through 1988 of approximately $770,000. Instead of fulfilling his promises to pay, defendant embarked on a course of conduct that lasted until after the indictment was returned and that was designed to evade the payment of all of the taxes due from him, including the penalties and interest he had agreed to pay. As of the date of his indictment, the total of the taxes, penalties, and interest due from defendant exceeded $3,000,000, despite the fact that the initial tax liability amounted to only about $540,000. [8]

In Hopper, defendant initially failed to pay more than $100,000 in employment taxes. By the time the IRS obtained a judgment against him, the amount had grown to more than $416,000, including interest and penalties. While agreeing with the Government that subtracting the amount of interest and penalties failed to adequately address the nature of the conspiracy (177 F.3d at 832), the Ninth Circuit nevertheless felt confined by the plain language of the Guidelines and reversed the district court's inclusion of interest and penalties in the amount of tax loss. [9]

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[8] In Hunerlach, the court noted (197 F.3d at 1070, n.5) that excluding interest and penalties from the tax loss calculation in evasion of payment cases might not achieve maximum accountability on the part of a defendant.

[9] In United States v. Pollen, 978 F.2d 78 (1992), the Third Circuit recognized the problem arising from application in an

Although the possibility exists that a sentencing court could grant an upward departure where the exclusion of interest and penalties results in a base offense level determination which substantially understates the seriousness of the offense, we would prefer to see the Commission address this issue as an amendment to the Guidelines. In evasion of payment cases (and willful failure to pay cases), unlike more traditional tax evasion prosecutions where a defendant understates income or overstates deductions in filing a tax return, interest and penalties on the unpaid tax assessment are part of the amount which the defendant attempts to evade. Where "tax loss" is defined in USCG §2T1.1(c)(1) as "the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed)," interest and penalties would be included in "tax loss" in evasion of payment cases, but for the commentary language which is aimed at more traditional tax evasion cases. (i.e., evasion of assessment). The possibility of an upward departure does not seem to us to be an effective or systematic way of addressing this issue. Thus, we favor a guideline amendment. We suggest that Application Note 1 to §2T1.1 could be amended by deleting the period at the end of the second sentence and adding the phrase, "except in willful evasion of payment cases under 26 U.S.C. § 7201 and willful failure to pay cases under 26 U.S.C. § 7203."

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evasion of payment case of a definition of "tax loss" that excluded interest and penalties.

> While such a limitation may be appropriate in an evasion of assessment case, it is not always so when imposing sentence for tax evasion committed through the evasion of payment.
>
> Pollen's actions aptly illustrate this point: his repeated attempts to conceal assets wee intended to evade the payment of his total debt of over $3,000,000. The Guidelines' requirement that his sentence be calculated based on only his evasion of the $488,000 in raw taxes owed, and not also on his evasion of the payment of the interest and penalties, fails to reflect accurately the criminal behavior involved in this type of evasion of payment of taxes offense.

978 F.2d at 91, n.29.

**Conforming Sophistication Enhancements in Tax and Fraud Guidelines**

The Commission has invited comment on whether the "sophisticated concealment" enhancement in the tax guidelines should be revised to conform to the "sophisticated means" enhancement in the fraud guidelines, including imposition of a minimum offense level of 12. In an effort to prevent dilution of this sophistication enhancement in tax cases, the Tax Division has asserted strong and consistent views since the Commission first raised this "conformity" issue during the 1997 amendment cycle. We have consistently argued that sophisticated means, which had been a tax enhancement since the inception of the Guidelines, is not only broader than sophisticated concealment but also that any conforming change be made in favor of sophisticated means, rather than sophisticated concealment, to take advantage of the existing body of case law on sophisticated means in the tax area. While we have been unsuccessful to date in this regard, and, indeed, have suffered a virtual reversal of positions vis-a-vis the sophistication enhancement in the fraud guidelines, nevertheless, the Commission itself has acknowledged our central position that "sophisticated means" is broader than "sophisticated concealment." In Amendment 595, the Commission repromulgated and made permanent a temporary amendment (Amendment 587) adopted to conform to the 1998 telemarketing fraud legislation. By this change, the Commission substituted throughout the fraud guideline an enhancement for "sophisticated means" for the former "sophisticated concealment" enhancement. As a reason for the change, the Commission stated:

> This amendment broadens the "sophisticated concealment" enhancement to cover "sophisticated means" of executing a fraud offense.

The telemarketing fraud legislation specifically directed the Commission to provide "an additional appropriate sentencing enhancement, if the offense involved sophisticated means, including but not limited to sophisticated concealment efforts."

The first dilution of the sophistication enhancement in the tax guidelines occurred in the 1998 amendment cycle when the Sentencing Commission, over strong Department and Division objection, weakened our enhancement for "sophisticated means," which had been in place since the inception of the Guidelines, to "conform" the definition to a "sophisticated concealment" enhancement it proposed for the fraud guidelines. At the same time, again over our opposition, the Commission provided a floor

level of 12 where the requisite sophistication was present in fraud cases, but failed to provide such a floor level for tax cases.

Then, in response to the directive in the above-referenced telemarketing fraud legislation, the Commission adopted a temporary amendment (Amendment 587) to the fraud guideline that substituted the term "sophisticated means" for "sophisticated concealment" in all fraud cases. No "conforming" change was made to the tax guideline. Finally, during the last amendment cycle, the Commission repromulgated and made permanent (Amendment 595) the temporary, emergency telemarketing amendment adopted in 1998 in response to a congressional directive regarding telemarketing fraud. This amendment not only made permanent the floor offense level of 12 for all offenses covered by the fraud guidelines when, among other things, the execution or concealment of the offense involved a certain level of sophistication, but also "broaden[ed]" the language from "sophisticated concealment" to "sophisticated means" for all offenses sentenced under the fraud guideline. See USSG Supp. to App. C., Amend. 595 (Nov. 1, 2000).

The Commission's actions in this area were done in the face of consistent and persistent commentary by the Tax Division, both in the form of comments on proposed changes and, during the 1998 amendment cycle, testimony by the Deputy Assistant Attorney General of the Tax Division. During the 1998 amendment cycle, we voiced support for a comprehensive option that, among other things, provided a "sophisticated means" enhancement with a floor offense level of 12 for both fraud and theft offenses, and a floor offense level of 12 for tax offenses. We specifically stated that "'sophisticated means' had been a part of the Chapter 2, Part T guidelines since their inception, and interested parties had become accustomed to dealing with it." Moreover, we stated that, other than mere consistency, no claim was made, nor could it be made, that the dramatic changes proposed in a second option for "sophisticated concealment" were necessary. We pointed out that the proposed change in this regard "narrow[ed] the scope of the sophisticated means enhancement to sophisticated concealment" and diluted the language of the existing tax guideline that the enhancement applies where the offense involved the use of foreign bank accounts or foreign transactions, or transactions through corporate shells or fictitious entities by substituting language providing that such actions "ordinarily indicate" sophisticated concealment."

Thus, over a three-year period, the Commission enacted an amendment whose "primary purpose" was "to conform the language of the current enhancement for 'sophisticated means' in the tax

guidelines to the language of the new sophisticated concealment enhancement provided in the fraud guideline," by substituting "sophisticated concealment" for "sophisticated means in the tax guidelines. USSG Supp. to App. C., Amend. 577 (Nov. 1, 1998). Then, without regard to the conformity that prompted the earlier change, the Commission substituted "sophisticated means" for "sophisticated concealment" throughout the fraud guidelines, but not the tax guidelines. And the Commission now recognizes, as we pointed out three years ago, that "sophisticated means" is broader than "sophisticated concealment." See USSG Supp. to App. C., Amend. 595 (Nov. 1, 2000). This change almost insures that a court will do what we predicted in opposing the change in the tax guidelines to sophisticated concealment - i.e., construe "sophisticated concealment" more narrowly than "sophisticated means."

Unless the "sophisticated concealment" enhancement in the tax guidelines is changed to conform to the "sophisticated means" enhancement in the fraud guidelines, two similar, yet seemingly distinct, definitions will be in place. In that situation, it may be that a court will conclude that sophisticated concealment applies only to efforts to hide the crime after its commission and that sophistication in commission of a tax offense does not amount to "sophisticated concealment" even when the sophistication helps conceal the tax offense from the authorities . Or a court may conclude that the use of a computer program to file a large number of false claims for refund amounts to the use of sophisticated means but not to sophisticated concealment. Although it may be difficult to hypothesize a case in which a court concludes that the circumstances establish the use of sophisticated means but not the use of sophisticated concealment, we have no doubt that defendants will frequently argue for such a distinction and that some court will find one. This is the inevitable result of having two similar, yet distinct, phrases to describe sophisticated actions.

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

Office of the Deputy Attorney General
Washington, D.C. 20530

# STATEMENT

OF

ROBERT S. MUELLER, III
ACTING DEPUTY ATTORNEY GENERAL

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

PROPOSED SENTENCING GUIDELINE AMENDMENTS

MARCH 19, 2001

[47]

Testimony before U.S. Sentencing Commission
Robert S. Mueller, III
Acting Deputy Attorney General
March 19, 2001

Thank you for allowing me this opportunity to testify on behalf of the Department of Justice regarding the proposed amendments to the sentencing guidelines. I wrote to you last month to express the Department's serious concerns over the proposed amendments; especially in the areas of white collar crime, money laundering, and immigration. I understand that the Commission staff has attempted to address some of those concerns. We believe, however, that serious problems still remain with many of the pending amendments. I will focus my brief comments today on those remaining issues.

White Collar Crime Issues

Let me begin with the proposed white collar and economic crime amendments. Simply stated, the Department believes that sentences in white collar crime cases are far too lenient and need to be increased, not decreased. Accordingly, the Department strongly supports the Commission's efforts to change the loss tables to increase sentences for mid- and high-level white collar crimes.

Unfortunately, the Commission is also considering various amendments that would significantly expand the number of white collar defendants who are eligible for probationary sentences. The Department is adamantly opposed to proposed amendments that would have the effect of reducing the sentences for this privileged group of defendants. I am confident that Congress will share this view.

In particular, the Department firmly believes that the proposals to expand Zones

B and C of the sentencing table and to allow for flexibility options in white collar cases are unwarranted and would have a severe adverse impact on white collar prosecutions. For example, under the expanded zones and flexibility options, a stock broker who stole up to $500,000 from investors would be eligible for probation under certain circumstances. Commissioner Rossotti will discuss the devastating impact these changes would have on tax prosecutions. I have reviewed his testimony and agree completely with the points he makes. I understand some might argue that these changes would only give the sentencing judge discretion to impose probation, but my experience as a line prosecutor and U.S. Attorney has been that if white collar defendants are eligible for probation, they will likely receive probation.

At a time when vigorous white collar crime prosecution is needed, these flexibility options and changes to the sentencing zones send entirely the wrong message. After all, many white collar defendants have generally benefitted from society, have strong educational backgrounds and are often successful professionals. When these individuals break the law, they should not be excused from serving a prison sentence simply because they did not commit crimes of violence. 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. Accordingly, the Department strongly opposes these amendments.

Money Laundering

The Department is also extremely concerned about many of the proposed changes to the money laundering guidelines. This is an extremely important issue that the Justice Department, the Treasury Department, and the Congress have spent much

time on over the past few years. Unfortunately, some of the changes being proposed would lower sentences for even the most serious forms of money laundering. This the Department strongly opposes.

As an initial matter, I want to make clear that the Department agrees with the Commission that prosecutors should not be using the threat of money laundering charges – which carry with it much more serious guidelines – in order to induce guilty pleas in lower-level fraud cases. Accordingly, we have 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. That is entirely inappropriate and the Justice Department will strenuously oppose any proposal that would reduce penalties for individuals who launder drug proceeds. Again, I believe that Congress will share these views.

Immigration

Let me briefly mention my concerns about the immigration amendment. I again urge the Commission to delay consideration of this amendment until next year.

We appreciate the Commission's concern that the present guideline does not measure the seriousness of the underlying aggravated felony in illegal re-entry cases. And we agree that some distinction may be appropriate, although we also agree with Congress that the penalty for any illegal re-entrant should be substantial.

The pending amendment attempts to distinguish between aggravated felonies by considering the defendant's time served. As a practical matter, this 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. We believe that it would be more appropriate – and would be 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. We are certainly willing to work with the Commission over the next several months to fashion such a guideline, but we oppose the amendment as it presently reads.

Narcotics

Next, I want to comment briefly on the Commission's proposed amendments dealing with ecstacy and an extension of the safety valve.

As we previously advised the Commission, the Department strongly supports the proposed amendment increasing the penalties for ecstacy. Ecstasy is a Schedule I controlled substance that has a high potential for abuse, causes widespread actual abuse, and has no acceptable medical use. The target population consists of teenagers and young adults, and the drug is quickly becoming one of the most abused drugs in the United States. Medical evidence demonstrates the serious dangers it poses to users, including the death of brain cells. The damage this drug can produce is significant and long-term. We have an opportunity to stop this growing problem before it becomes an epidemic, and the proposal put forth by the Commission would very much help with that effort. We urge its adoption.

With regard to an extension of the safety valve, the Department opposes any such expansion. The "safety valve" exemption from mandatory minimum sentences

was enacted to provide relief for persons who received high sentences but who were identified by Congress as the least culpable group of such offenders. The guidelines therefore reduce an otherwise severe sentence in recognition of the "safety valve" criteria. By contrast, a low-level drug dealer, whose relevant conduct results in an offense level below 26, is subject to a sentence of less than five years, even before consideration of mitigating factors that can reduce the sentence further, factors such as acceptance of responsibility and role in the offense. The proposed two-level reduction is simply not needed for this offender.

Nuclear, Biological, and Chemical Weapons

One final point I would like to make concerns the proposed amendment relating to nuclear, biological, and chemical weapons. The amendment the Commission has proposed fills a gap by addressing several relatively new statutes concerning biological and chemical weapons, for which there has been no sentencing guideline in the past. It is an excellent amendment, and we urge the Commission to adopt it.

Conclusion

In conclusion, thank you for the opportunity to express our views. We in the Department look forward to continue working with the Commission in the years ahead to ensure that the guidelines are just and fair, and that the sentences proposed by the guidelines are commensurate with the crimes committed.

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
300 East Washington Street, Suite 222
Greenville, South Carolina 29601

Honorable Donetta W. Ambrose
Honorable William M. Catoe, Jr.
Honorable William F. Downes
Honorable David F. Hamilton
Honorable Sim Lake
Honorable James B. Loken
Honorable John S. Martin
Honorable A. David Mazzone
Honorable William T. Moore, Jr.
Honorable Wm. Fremming Nielsen
Honorable Gerald E. Rosen
Honorable Emmet G. Sullivan

Honorable William W. Wilkins, Jr., Chair

TELEPHONE
(864) 233-7081

FACSIMILE
(864) 242-0489

March 8, 2001

To: The Chair and Members of the Sentencing Commission:

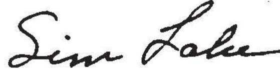
The Judicial Conference Committee on Criminal Law respectfully submits the attached comments on certain proposed guideline amendments that the Commission may soon consider.

The Committee understands that when the Commission considers these proposed amendments it may also consider whether any of them should be made retroactive. Although one member of the Committee believes that the proposed immigration amendment (Proposed Amendment No. 18) should be made retroactive, the other members of the Committee either oppose making any amendments retroactive or, at a minimum, believe that before the Committee comments on retroactivity it should first have the benefit of the Commission's assessment of the impact of making a particular amendment retroactive and the practicability of doing so.

The members of the Sentencing Guideline Subcommittee appreciate the opportunity of meeting with the Commission on March 20, 2001, and will be prepared to answer any questions

about these comments and to discuss any other matters of interest with the Commission.

Yours very truly,



Chair
Sentencing Guideline Subcommittee

Attachments
cc: Members of the Committee on Criminal Law
Honorable J. Phil Gilbert
John Hughes, Chief, FCSD

**Proposed Amendment No. 5 -- Sexual Predators**

The Committee is concerned with the Application Note 2., the "Sexual Predator Determination," in Option Two at page 34. (Unless otherwise noted, all page references are to the Commission's January 24, 2001, compilation of Proposed Amendments.) This note, which requires the sentencing court to decide if the defendant "is likely to continue to engage in prohibited sexual conduct with minors in the future . . .," is broad and subjective, and making such a determination could be especially difficult in cases where no expert psychosexual evaluation of the defendant has been prepared.

The Committee notes that Option Two, Background, at page 34, recommends that the maximum term of supervised release be imposed for all offenders sentenced under guideline § 4B1.6; and that Option 4 at page 41, dealing with § 5D1.2, "Term of Supervised Release," would mandate the maximum term for all offenders sentenced for the "sex offenses" identified in Application Note 1. at page 41. Although the Committee agrees that for most offenders covered by these guidelines the maximum term of supervised release will be justified, the Committee is concerned with requiring that the maximum term of supervised release be imposed in every case given the limited resources available to probation officers. If the Commission feels that language of this nature is desirable, the Committee recommends, as an alternative, language such as, "In the majority of cases the Commission believes that the maximum term of supervised release should be imposed."

Proposed Amendment No. 12 -- Economic Crime Package

Loss Definition

The Committee supports the adoption of its proposed loss definition (Option Two at p. 124). This option addresses each of the issues noted in the Commission Proposal (Option One at p. 118). The Committee's proposed definition is complete, workable, and easy to apply. It builds upon and improves the draft that was successfully field tested and found to be superior to the current application notes in organization, workability, and resolution of circuit conflicts. (For the two minor issues not addressed in the Committee Proposal, noted in footnotes 10 and 11 on page 27 of Andy Purdy's December 21, 2000, memorandum submitting the amendments for discussion during the January 2001 Commission meeting, the Committee supports the approach taken in the Commission Proposal.)

In many instances the Commission Proposal presents alternative options. The Committee believes that certain of the Commission's alternative options are less desirable than the alternative options incorporated in the Committee's proposed loss definition.

The Basic Definition of "Loss"

Section 2.(A) Option 1 of the Commission Proposal (pp. 118-19) sets out a basic definition of "loss" that mirrors the definition in the Committee Proposal. "Loss" should be the greater of the actual or intended loss.

"Actual loss" should be the pecuniary harm that resulted from the conduct attributable to the defendant under § 1.B1.3 (Relevant Conduct) and that was reasonably foreseeable to the defendant.

Option 1 contains two examples of reasonably foreseeable pecuniary harms that are absent from the Committee Proposal. The Committee does not believe it desirable to include these examples as part of the basic definition of "loss." Although examples can be helpful to courts, when only one or two examples are provided they may be over-construed so that the focus becomes the example rather than the language of the guideline itself. The computer crime example provides a helpful illustration, but the Committee found it preferable in its own proposal to include that example in the background commentary. The second long example in the Commission Proposal is so complex that it is likely to produce more confusion than clarification.

Section 2.A Option 2 of the Commission Proposal (p. 119) would include in "loss" all pecuniary harms that "resulted or will result" from the defendant's criminal conduct. This definition would include in "loss" every adverse financial consequence of a defendant's crime, no matter how causally remote. Such an expansive causation standard would be unworkable because it would require courts to consider even

the most unlikely events and would be unjust because it would hold defendants responsible even for harms they could not have foreseen. The Committee adheres to its position that the touchstones of a proper "loss" definition are: (1) whether the harm resulted from the defendant's crime, and (2) whether it was reasonably foreseeable to him.

<u>Time of Measurement</u>

A rule for determining when "loss" should be measured is essential. To the extent possible, such a rule should be equally applicable to all cases and should provide that all the components of "loss" be measured and valued on the same date. The Committee recommends that "loss" be measured at the time of detection. (Option Two § 2.D at p. 126)

The Commission's § 2.B Option 1 at p. 120 proposes that "loss" generally be measured at the time of sentencing. This rule could not be applied to many common theft and fraud cases. For example, in a car theft the vehicle may have been recovered and returned to the owner with no damage by the time of sentencing. In a check kite, by the sentencing date the bank may have recovered all or some portion of the overdraft in existence at the date of discovery through voluntary repayment or by proceeding against the defendant's other assets. In neither case would it be accurate to say that the loss was zero, or even that it had been diminished

for sentencing purposes by post-detection recoveries or repayments. The Commission Proposals would partially alleviate this problem if Option 2 under "Exclusion from Loss" were adopted. This option states in § 2.(C)(iii)(II) at p. 120 that the "value of any 'economic benefit' transferred to the victim by the defendant ordinarily shall be measured at the time the offense was detected." However, the result of adopting these two options would be rules in different sections of the loss definition that measure different components of "loss" on different dates. The Committee believes its proposal provides a more coherent, consistent rule for measuring loss.

Interest

The Committee's loss definition recommends excluding interest of any kind from "loss." (Option Two § 2.B(i) at p. 125)

The Committee opposes including "bargained-for" interest in "loss." (§ 2.(C)(i) [Option 2] at p. 120) There is no readily apparent rationale for including bargained-for "interest" in loss, while excluding from loss imputed interest and other benefits promised by the defendant to the victims, merely because the defendant used some word other than "interest" -- "profits," "dividends," or "return on investment" -- to describe the promised benefits.

The Committee is also concerned about the use of the phrase "other opportunity costs" in § 2.(C)(i) [Option 1] at p. 120. In general, terms of art from fields outside the law should only be incorporated into the law with extreme caution. It is unclear to the Committee what "opportunity costs" means, and no definition is provided. The Committee believes that including this term in the guideline would invite confusion and inconsistent judicial interpretations.

Other Exclusions from Loss

The Committee Proposal does not credit a defendant for items of de minimis value transferred by a defendant to a victim (§ 2.(C)(i)(a) at p. 125). This rule is also incorporated in the Commission Proposal (§ 2.C(iii)(IV)(1) (first option) at p. 121). The Committee opposes expanding the de minimis exclusion to include benefits that have "little or no value to the victim" because they are "substantially different from what the victim intended to receive." (§ 2.(C)(iii)(IV)(1) (second option) at p. 121) The essence of fraud is that victims receive something different from what they expected. If a defendant were to receive no credit against loss unless the benefit he gave the victim was exactly what the victim expected, this provision would effectively nullify the crediting rules. This option would also complicate the sentencing process by requiring

probation officers and judges to determine the victim's subjective expectations.

"Ponzi Schemes" and Other Investment Frauds

The Committee supports the "loss to the losing victims" approach of measuring loss in multi-victim investment frauds adopted in United States v. Orton, 73 F.3d 331 (11th Cir. 1996), which is incorporated in the Commission Proposal (§ 2.(C)(iii)(V) [Option 1] at p. 121). The Committee opposes the approach in § 2.(C)(iii)(V) [Option 2], which includes as part of the loss economic benefits transferred to victims by defendants when such benefits were "designed to lure additional 'investments' in the scheme."

Gain

The Committee believes that "gain" should be considered as an "alternative measure of loss when loss cannot otherwise reasonably be determined, but the defendant's gain can reasonably be determined." (Option Two § 2.(F) at p. 127)

The Committee urges the Commission to view with caution proposals that treat "gain" as having independent significance. The loss tables are established on the assumption that they measure relative amounts of economic harm inflicted on victims of crime. As long as "gain" is merely an occasionally useful way of estimating "loss,"

treating a "gain" of $X the same as a "loss" of $X makes sense because the defendant's gain is some victim's loss. Some of the pecuniary gain options in the Commission Proposal assume, however, that there are cases in which the defendant receives a "gain," but does not cause a corresponding amount of economic harm, either because he causes no economic harm at all or because the amount of the gain is greater than the amount of the loss. (§ 2.(E) [Options 2 and 3] at p. 122) If such cases exist, then in such cases it seems doubtful that gain should have the same effect on punishment as loss. In any case in which the "loss" is truly zero, or in which a defendant's gain exceeds the economic loss to all identifiable victims, gain is no longer a true measurement of economic harm. The Committee is unsure of the justification for sentencing the defendant to the same punishment he would have received if he had caused a harm equal to his gain.

<u>Departure Considerations</u>

The Committee prefers its own description of the general considerations for departures, which refers not only to the seriousness of the offense, but also to the culpability of the defendant. In addition, the Committee does not believe that interest or the other items listed in § 2.(G)(i)(III) at p. 123 should be departure considerations.

The Insider Trading Amendment (§ 2.B1.4 at page 110)

This provision would result in higher sentences than would the current guideline for some offenses. Because the current insider trading base offense level of 8 includes more than minimal planning, the Committee believes the base offense level for insider trading should be lowered to 6 if a new sentencing table is adopted that incorporates more than minimal planning. This change would better preserve the status quo and avoid a double enhancement for more than minimal planning in some areas.

Loss Tables

Although the Committee prefers its own table (Option Three at p. 115), any of the published proposed loss tables is an improvement over the current table. The differences among the three proposed tables are not significant, and the Committee defers to the Commission's judgment as to the most preferable table.

Proposed Amendment (Part F) to § 2T1.1

In response to Issue for Comment No. 1 at p. 157, the Committee supports the Commission's proposal as explained in new Application Note 7 at p. 156.

**Proposed Amendment No. 13 -- Aggravating and Mitigating Factors in Fraud and Theft Cases**

The Committee favors the concept of flexibility embodied by these amendments, but does not believe that either amendment currently merits adoption. Most of the factors in the two options are addressed as encouraged departures in either the current guidelines or in the Committee's proposed loss definition. The Committee suggests that the loss definition reform be implemented and that the Commission gain experience with it before determining whether other factors should be codified in this manner.

**Proposed Amendment No. 14 -- Sentencing Table Amendment and Alternative to Sentencing Table Amendment**

While the Committee favors greater sentencing alternatives for the least serious offenders (as reflected in the Committee's proposed loss table, which lowers offense levels for low-loss offenses), the Committee lacks sufficient information to determine the effect of this proposed change given the simultaneously anticipated new loss table for economic offenses. The Committee is also uncertain whether the proposed changes to Zones B and C are advisable for non-economic crimes. The Committee would prefer to gain experience with the anticipated new loss definition and loss table before endorsing either option.

**Proposed Amendment No. 18 -- Immigration**

Although it is not clear how Option 2 fits with Option 1, the Committee endorses Option 1's approach as an improvement over the current guideline. The graduated adjustment approach will result in more proportional sentences than the departure approach. The Committee specifically opposes Option 2.(B)'s proposed downward departure in cases in which the defendant was not advised of the consequences of the prior deportation. The Committee believes that this provision would unduly overburden courts in litigating issues that arose in the deportation procedure.

Additional Issue for Comment No. 1. Items of cultural heritage

The Committee does not believe that this type of conduct occurs often enough to warrant either an alternative loss calculation or a suggested upward departure. The Committee prefers that such conduct remain unmentioned grounds for departure.

Additional Issue for Comment No. 4. Inchoate fraud and theft

The Committee's proposed loss definition eliminates the current references to § 2.X1.1 in the theft and fraud guidelines as confusing and unnecessary.

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

UNDER SECRETARY

March 9, 2001

The Honorable Diane E. Murphy
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500 South
Washington, DC 20002-8002

Re: Proposed Changes to Sentencing Guidelines

Dear Judge Murphy:

On behalf of the Department of the Treasury, I would like to note our appreciation for the efforts of the Commission and its staff to address the ambitious range of important sentencing guideline proposals in this amendment cycle. As you know, we enjoyed a good working relationship with the staff as the Commission addressed counterfeiting issues, and we look forward to continuing to exchange views freely as the current package of proposals moves ahead. This letter addresses proposed amendments published by the Commission in January, 66 Fed. Reg. 7962 (Jan. 26, 2001).

Firearms

The Commission published two proposals to amend Guideline 2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms or Ammunition), 66 Fed. Reg. 8006. As you know, in 1998, then-Treasury Under Secretary for Enforcement James E. Johnson and then-Director of the Bureau of Alcohol, Tobacco and Firearms John W. Magaw, each wrote to the Commission to recommend that Guideline 2K2.1(b)(1) be amended to provide an additional one-level increase for crimes involving 100 to 199 firearms, and a two-level increase for crimes involving 200 or more firearms. Under the current guidelines, unless an upward departure is issued, a defendant who traffics 200 firearms receives the same base offense level as a defendant who traffics 50 firearms.

The most recent package of proposed amendments contained our suggested amendment (Option One), as well as a second proposal for amending Guideline 2K2.1, which would provide increases in two-level increments (Option Two). Compared to the current guidelines, Option Two would result in a one-level increase for crimes involving 3-4 firearms, 8-12 firearms, and 25-49 firearms; a two-level increase for crimes involving 100-199 firearms; and a four-level increase for crimes involving 200 or more firearms.

Although Option One (our original proposal) and Option Two each would improve the guidelines' approach to firearms trafficking, we prefer Option Two. Because Option Two would provide higher sentences than Option One in certain cases involving less than 50 firearms, and higher sentences than Option One in all cases involving 100 or more firearms, it better reflects

the serious threat firearms trafficking poses to public safety. Option Two has the added benefit, pointed out in the Commission's proposal, of diminishing some of the fact-finding required to determine how many firearms were involved in an offense.

In addition to these comments, Bradley Buckles, the Director of the Bureau of Alcohol, Tobacco and Firearms, will send the Commission a letter which provides even more case-related details relevant to the two proposals to amend Guideline 2K2.1. Also, John P. Malone, ATF's Assistant Director of Firearms, Explosives and Arson, will speak in support of these proposals (in particular, Option Two) at the Commission's public hearing on this matter.

Economic Crime Package

The Commission's Economic Crime Package, 66 Fed. Reg. 7985, addresses a broad variety of sentencing issues and guidelines, including a proposed overhaul of the loss table for certain crimes. The appropriate base amount in a loss table for the offenses addressed in this proposal (theft embezzlement, fraud, etc.) is $2,000. The Commission invited comment on whether the proposed enhancements in 2B1.1(b)(1) should begin at the $2,000 or the $5,000 level, 66 Fed. Reg. 7987; we support the former. Along the same lines, we favor Option One of the three proposed loss tables, 66 Fed. Reg. 7994, as it begins at $2,000 (rather than the $5,000 base amount in Options Two and Three). In addition to our general preference for appropriately graduated penalties for increasing levels of fraud, the Commission is aware that counterfeiting offenses, in particular, now tend to involve smaller loss amounts which can be linked definitively to the defendant, so Treasury favors a lower base for enhancements to address this growing problem.

The Commission also invited comment on when loss should be measured for sentencing purposes, 66 Fed. Reg. 7994. Treasury strongly favors Option One, measuring harm at the time of sentencing, rather than Option Two, which would measure loss at the time the offense is detected. Option Two has numerous practical pitfalls. Most notably, for offenses involving the manufacturing of counterfeit checks or credit cards, the counterfeit items manufactured by a defendant can still be used by unidentified co-conspirators to inflict additional loss after the crime is detected, and even after the defendant has been arrested; yet these are losses for which the manufacturer/defendant is directly responsible. Also, the full loss amount of involved fraud schemes often cannot be measured accurately at the time the offense is detected. For example, it takes time to determine how many fraudulent checks the defendant passed, or how many fraudulent transactions the defendant made with counterfeit credit cards. Lastly, the end victim of a fraud scheme may not be notified of a loss until well after the fraud is detected. For example, if a defendant used a stolen credit card to commit fraud and is arrested (thus the fraud is detected), the true cardholder may not be aware of the fraud until she or he receives a monthly statement or is contacted by the government or an issuing bank. In these circumstances, loss might not be identified, nor the end victim known, until well after the crime was detected. All of

these pitfalls would be avoided with the adoption of Option One, which measures harm at the time of sentencing.

Both the Commission's and the Criminal Law Committee's proposals contain definitions of "Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes." We strongly prefer the definition in the Commission's proposal, 66 Fed. Reg. 7994, as it includes a minimum loss amount for unauthorized access devices which were only possessed, and not used, during the commission of the offense. The Criminal Law Committee's proposal, 66 Fed. Reg. 7996, excludes this important element.

Tax Table

The Commission proposed two options to replace the current Tax Table, § 2T4.1, 66 Fed. Reg. 7992. Each option would compress the current Tax Table by moving from one level to two level increments, thus increasing the range of losses that correspond to an individual increment. We support the Option One Tax Table.

Option One provides a base offense level of six for tax loss amounts up to $2,000. The offense levels increase by two levels thereafter, depending on the tax loss amount. The current mandatory imprisonment offense level of thirteen is reached with more than $30,000 in loss. Option Two also provides a base offense level of six, but keeps this base level for tax loss amounts up to $5,000. Option Two achieves the current mandatory imprisonment offense level of thirteen at a loss amount of more than $70,000. We prefer Option One, as it is an appropriate reflection of the seriousness of tax offenses. Option One provides a lower base offense level loss amount ($2,000 or less); and achieves the current mandatory imprisonment offense level of thirteen at a lower loss amount than Option Two.

In addition, we note that while the proposed tax table amendment itself is silent on this issue, the synopsis of the amendment discusses using one loss table for theft, property destruction, fraud and tax crimes. As that synopsis notes, "If a decision is made to use the same table, the effect would be to sentence the offenses under both guidelines in a similar manner. This would represent a change from the current relationship in which tax offenses generally face slightly higher offense levels for a given loss amount than fraud and theft offenses." 66 Fed. Reg. 7992. We strongly object to this proposal, as it would effectively erase the current sentencing policy that tax crimes are serious crimes and, as a result, have historically received higher penalties than theft, property destruction, and fraud crimes.

Computing Tax Loss

The Commission proposed an amendment to Guideline 2T1.1(c)(1) to address cases that involve a defendant's underreporting of income on both individual and corporate tax returns. The proposed amendment, 66 Fed. Reg. 8004, resolves the circuit conflict regarding the method

of calculating aggregate tax loss in accord with the Second and Seventh Circuits, United States v. Martinez-Rios, 142 F.3d 662 (2d Cir. 1998); United States v. Harvey, 996 F.2d 919 (7th Cir. 1993); and against the Sixth Circuit. This result bestows an unfair sentencing advantage to the convicted tax criminal because the totality of the criminal conduct is not adequately counted.

Application Note 2 to Guideline 2T1.1 states that "[i]n determining the total tax loss attributable to the offense, all conduct violating the tax laws should be considered as part of the same course of conduct..." Two separate crimes are committed when an offender evades his or her taxes or files false returns: one crime arises from the individual income tax being defeated and the second crime arises from the evasion of tax by the corporation. Therefore, since the crimes are separate, the tax losses should be calculated separately and then added together to achieve the aggregate loss to the government.

Evading one's individual tax and evading corporate tax are separate violations, and the total tax loss should not be calculated as if only one offense was committed. The Sixth Circuit reached that conclusion in United States v. Cseplo, 42 F.3d 360 (6th Cir. 1994), and we believe the Commission should resolve the circuit conflict in favor of the Sixth Circuit's decision.

Similarly, the proposal to except state and local tax loss from consideration does not adequately take all relevant conduct into consideration. Consequently, we oppose this proposed amendment to the application notes, 66 Fed. Reg. 8004. Currently, the Guidelines do not limit the computation of tax loss to federal tax loss, nor do the Guidelines limit relevant conduct to federal offenses. Where federal tax and state tax violations have occurred in the same years and for the same type of tax, the state and local tax loss is relevant conduct and therefore proper for inclusion in computing the base offense level. For the same reasons, we support the inclusion interest and penalties in the definition of tax loss for evasion of payment tax cases, because it accurately reflects the total harm to the government in an evasion of payment case. The Commission invited comment on this last issue, 66 Fed. Reg. 8004.

In addition to these comments, Internal Revenue Service Commissioner Charles O. Rossotti will write you a letter which includes even more detailed discussion of the tax-related sentencing proposals. Mark Matthews, Chief of Criminal Investigation at the IRS plans to testify at the Commission's hearing.

Aggravating and Mitigating Factors in Fraud and Theft Cases

Treasury opposes both options in this proposal, 66 Fed. Reg. 8004. Allowing for such a range of potential adjustments to sentencing levels would loosen the entire sentencing scheme, and leave too much discretion to the courts. Depending on the individual court's decision, defendants with the same pre-adjustment offense level and the same criminal history could be sentenced quite differently, which defeats consistency and fairness.

For example, Option One provides for an increase of two to four levels in the offense level, or an equivalent decrease, depending on the court's assessment of aggravating and mitigating factors. This creates the possibility that two defendants convicted of a fraud offense involving $50,000 could receive wildly disparate sentences because of the circumstances of the offense. If one were to receive a four level increase due to aggravating factors, he or she would have an adjusted offense level consistent with someone guilty of a $350,000 fraud that was absent unusual circumstances, whereas the other were to receive a four level decrease resulting in an adjusted offense level consistent with someone guilty of a $15,000 fraud with no unusual circumstances. In other words, the one $50,000 fraud could be sentenced like a $15,000 fraud, or like a $350,000 fraud, depending upon the circumstances. Option Two, 66 Fed. Reg. 8005, allows for a four-level range, rather than an eight-level range, which nonetheless has serious consequences.

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.

In addition to the overall problems with these proposals, certain of the specific aggravating and mitigating factors countervail other elements of the sentencing guidelines, or do not recognize law enforcement realities. For example, adjusting sentences based on whether the loss amount is at or near the highest or lowest amount possible for the range of loss amounts that corresponds to the applicable offense level in the loss table, 66 Fed. Reg. 8005, would be contrary to the purpose of using and revising the loss tables in the first place.

Treasury also believes that the fact that the defendant's attempted offense was "impossible or extremely unrealistic" should not be a mitigating factor, 66 Fed. Reg. 8005. Fraudsters often propose deals or transactions that are in reality schemes that could never really be carried out, yet victims are duped and suffer losses as a result. For example, criminals attempt to negotiate fictitious instruments or to use them as collateral for loans or lines of credit. Others propose schemes where the victim is promised a percentage of multi-million dollar payments in exchange for providing "up-front" money.

We also believe that defendants should not enjoy reduced sentences if their "actual or intended gain was substantially less than the loss" amount determined using the loss tables. Using this reasoning, a criminal who puts fraudulently-obtained cash in his mattress, from which some other criminal steals it, or a bank robber who drops some of the cash as she escapes, could get a reduced sentence. Similarly, we do not believe a reduction in sentence is appropriate if "the offense was not committed for commercial advantage or financial gain," 66 Fed. Reg. 8005. Computer hackers who break into a bank's system just to see if they can do it, can cause serious harm, regardless of whether they move funds to accounts they control. These proposed

mitigating factors obviously are not a fair reflection of the harm to the victims or the intent of the criminals.

Sentencing Table Amendment and Alternative to Sentencing Table Amendment

We strongly oppose both of the options proposed to make changes to the Sentencing Table or provide an alternative to reduce sentences, 66 Fed. Reg. 8006. Option One would expand Zones B and C of the sentencing tables, increasing the offense level at which Zone D starts to seventeen in Criminal History Category I. Currently, imprisonment would be required at offense level thirteen for a Criminal History Category I offender. If Option One is adopted, imprisonment would not be required until an offense level of seventeen is established.

Tax enforcement is just one area where this proposal would have a devastating effect. Under the current Sentencing and Tax Tables, a Criminal History Category I tax offender does not qualify for the mandatory imprisonment in Zone D unless a tax loss of greater than $40,000 is established, which translates into an estimated taxable income of approximately $142,857. To achieve that same result with the new proposed Sentencing Table, the tax loss would have to be greater than $325,000, which translates into an estimated taxable income of approximately $1.16 million. In other words, the proposed sentencing table amendment would require eight-fold greater tax loss and eight times the current adjusted gross income level to merit mandatory imprisonment for a tax offense. This would reduce to almost nothing the number of tax criminals who qualify for mandatory sentences of imprisonment for their offenses.

Option Two, the proposed alternative to changing the sentencing table, similarly operates in opposition to the long-standing sentencing policy that tax offenses are serious economic crimes. This proposal would reduce offense levels by two levels for economic criminals who meet certain criteria. To use a practical example, this would mean that a first-time tax offender stands a good chance of having his or her offense categorized as a "less serious economic crime" — contradicting not only long-standing policy, but also defeating any offense level increases in the proposed new tax tables.

Money Laundering

The United States Sentencing Commission has proposed conflating the sentencing guidelines that apply to violations of 18 U.S.C. § 1956 (laundering of monetary instruments) and 18 U.S.C. § 1957 (engaging in monetary transactions in property) by combining current Guideline sections 2S1.1 and 2S1.2. Treasury supports, in principle, holding a money launderer accountable for the underlying offense committed. However, Treasury has serious reservations about proposed changes to the guidelines that would decrease the seriousness of money laundering offenses. Treasury believes that the crime of money laundering is as grave, or graver, a crime as many of the possible underlying offenses that set the base offense level under (a)(1) of the proposal, since money laundering typically helps the criminals to fund their activities and to avoid detection. We

therefore believe that a minimum base offense level of 13 is appropriate for violations of 18 U.S.C. 1956 and 1957. This lower base offense level would balance the Commission's desire to reduce the perceived disparity between the sentencing guidelines for money laundering and the underlying offenses with a base offense level that recognizes the seriousness of a money laundering offense. Treasury supports increasing this base level where justified by the particular circumstances of the underlying offense.

Money laundering not only facilitates drug trafficking, organized crime, international terrorism, and other crimes, but it also poses a threat in and of itself, by tainting our financial institutions and undermining confidence in parts of the international financial system. Money laundering also facilitates foreign corruption, undermining U.S. efforts to promote democratic political institutions and stable vibrant economies abroad. The fight against money laundering allows the U.S. government to pursue those who commit the underlying crimes that produce dirty money and those who ensure that the money is available for criminal misuse.

While the U.S. is leading the international community in the fight against money laundering, the Commission's proposal risks sending the message that the U.S. Government no longer thinks that money laundering is as serious an offense as it once did. This is the wrong message to communicate both to those in the U.S. who are considering whether to launder monies and to our international partners in the effort to combat money laundering.

The Commission's proposal has the potential to result in significantly lower sentences for money laundering offenses. Treasury recommends that the Commission delay consideration of the proposed amendments for the money laundering guidelines until the next amendment cycle, especially since the Sentencing Commission is also considering proposals to revise the sentencing tables and the offense levels for fraud offenses. Our comments on the various specific proposals in the Commission's proposal follow.

*(a) Base Offense Level*

As discussed above, Treasury supports a minimum base offense level of 13 where money laundering offenses are involved. This lower base offense level balances the Commission's desire to reduce the perceived disparity between the sentencing guidelines for money laundering and the underlying offenses with a base offense level that recognizes the seriousness of a money laundering offense.

*(b) Specific Offense Characteristics*

Treasury supports the types of enhancements proposed in (b)(1) and (b)(2). Treasury believes that a 6 level enhancement is appropriate for the offenses detailed at (b)(1)(i, ii, and iii).

Treasury also supports enhancements for those engaged in the business of laundering criminal funds (b)(2)(A), laundering funds to promote additional criminal conduct (b)(2)(B), concealment of laundered funds (b)(2)(C), and for tax evasion or avoiding a transaction reporting requirement (b)(2)(D). However, we believe that a court should have the option to impose one or more of the enhancements in a given case instead of applying only the "greatest" enhancement as called for in the proposed (b)(2).

We believe that a 4-level enhancement, or higher, is appropriate for an individual engaged in the business of laundering funds. We do not object to the "totality of the circumstances" test proposed in Application Note 4(A) to determine whether an individual is subject to the enhancement, but we do not endorse the "Factors to Consider" language in Application Note 4(B) as it is currently written. Specifically, we recommend 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).

We also recommend that a 3-level enhancement apply in (b)(2)(B) if the laundered funds promoted further criminal conduct. The 3-level enhancement is consistent with the current 3-level difference in Guideline sections 2S1.1(a)(1) and (a)(2) for instances where the defendant intended "to promote the carrying on of specified unlawful activity." A 3-level enhancement also recognizes that society faces an additional harm from those who launder funds to fuel additional criminal activity. Treasury does not support modifying the word "promotion" with the adjectives "significant" or "material" as proposed in Application Note 5.

We support 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. We believe that the proposed enhancement should apply to cases involving any level of concealment, and should not be limited to those cases involving "sophisticated" concealment. Our suggestion comports with the statutory language in 18 U.S.C. § 1956(a)(1)(B)(i). Any attempt to conceal money laundering, regardless of the level of sophistication, makes money laundering more difficult to detect and increases the risk to the integrity and stability of U.S. financial institutions. The absence of an enhancement for concealment would also provide those who launder money with an additional incentive to conceal their illegal activity from government investigators since there would be no adverse consequence associated with the concealment activity.

Treasury also supports a 2-level enhancement for (b)(2)(D). The conduct penalized in (b)(2)(D) is directed at violations of laws that are not necessarily related to the specified unlawful activity, tax evasion and avoiding a transaction reporting requirement. These activities undermine the regulatory structure of the anti-money laundering laws, and providing an enhancement for tax evasion offenses reinforces the message that the commission of tax crimes is a serious matter.

Finally, Treasury does not support the proposed 2-level downward departure in (b)(4). A section 1957 violator who does not meet any of the proposed enhancement factors in (b)(2) does not need to have a lower sentence imposed for failure to be a worse offender than the person otherwise could have been by meeting the enhancement criteria.

*Referencing 18 U.S.C. 1960 Offenses to 2S1.3*

The proposed amendment currently provides that convictions under 18 U.S.C. § 1960 be referenced to §2T2.2 (Regulatory Offenses), but the Commission solicited comments on whether such violations are more appropriately referenced to §2S1.3 (Structuring Transactions to Evade Reporting Requirements). Section 2S1.3 (Structuring) carries a higher base offense level than §2T2.2 (Regulatory Offenses). FinCEN, the agency responsible for the registration and oversight of money services businesses such as wire transmitting businesses, believes that the reference to Structuring, with its higher base offense level, is more appropriate.

Under § 1960, it is a criminal offense intentionally to conduct, control, manage, or own an unlicensed money transmitting business. While such a violation might appear to be regulatory in nature, § 1960 offenses are more akin to the conduct involved in structuring and should be punished at that section's higher base offense level.

Money transmitters and other non-bank businesses providing money services can easily be exploited by criminal organizations laundering funds. As a practical matter, criminal proceedings brought under § 1960 will generally involve those money transmitters or similar businesses (i) that have intentionally failed to register in order to avoid detection and audit, (ii) that deal in large numbers of unreported, apparently structured, transactions, (iii) that are otherwise at high risk for manipulation by money launderers, or (iv) businesses whose regulatory compliance is so poor that they may be willfully blind to laundered funds passing through the business. The statutory violation requires a finding of willful failure to obtain a state license or, once the registration requirement goes into effect in January 2002, to register with the Department of the Treasury.

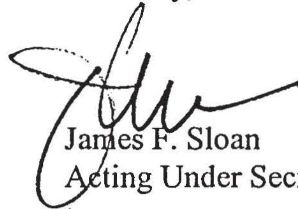
Congress intended to increase the pressure on money services businesses that operate at the fringe of legality, and to tighten control over underground money movement mechanisms. If the §2S1.3 guidelines applied to these offenses, the potentially higher sentences for offenders would track the Congressional intent to combat illegal activities by some money services businesses.

Federal registration and state licensing requirements are the first line of defense in dealing with the abuse of money services businesses by criminals. The preamble to recent federal regulations requiring the federal registration of some money services businesses notes that Congress has found that money services businesses "are largely unregulated and are frequently used in sophisticated schemes to transfer large amounts of money that are the proceeds of unlawful enterprises." 64 FR 45438 (August 20, 1999). As a result, a money services business' intentional failure to obtain a license is far more serious than another business' failure to comply with other types of regulatory requirements, and the punishment

level should reflect that fact. The Structuring Section, §2S1.3, is an appropriate reference because it deals with the punishment of an activity that can facilitate laundering by others.

On behalf of the Department of the Treasury, I thank the Commission and its staff for considering our comments on the proposed changes to the Sentencing Guidelines.

Sincerely,



James F. Sloan
Acting Under Secretary (Enforcement)

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

COMMISSIONER

March 12, 2001

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

Dear Madam Chairman:

I am writing to express my deep concern about proposed amendments to the United States Sentencing Guidelines. In my view and that of the officials in the IRS responsible for enforcing the criminal tax laws, adoption of amendments that lessen the likelihood that convicted tax offenders will be incarcerated will undermine our efforts to promote and achieve voluntary compliance with the tax laws. The criminal tax laws play a crucial role in deterring unlawful tax evaders and assuring the honest taxpayers that those who willfully and deliberately evade paying their fair share face very serious criminal sanctions. Unless the punishment meted out to those found guilty of violating those laws adequately reflects the gravity of criminal tax offenses, this vital message will be lost.

The proposed amendments, particularly both options proposed in amendment 14, communicate to the American public that no matter how much you cheat on your taxes, you will not go to jail. These amendments clearly indicate that tax crimes are "less serious economic crimes." If adopted, these amendments will undermine our efforts to enforce the tax laws.

There could not be a more dangerous time for the United States Sentencing Commission to devalue tax law enforcement. The most recent estimate of the tax gap is $195 billion dollars; this gap represents a hidden surcharge of $1,625 with respect to each return filed. The Sentencing Commission has, from its inception, recognized the special deterrence issues associated with tax crimes: the need to encourage over 200 million taxpayers to comply voluntarily with their affirmative tax obligations by seeking meaningful punishment for willful evasion. The Commission further recognized that priority by enhancing the tax loss table in 1993 (see, U.S.S.G. Appendix C, amendment 491 (2000).

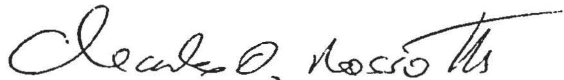
The current proposal to expand Zones B and C of the sentencing table or to characterize certain tax crimes as "less serious economic crimes" is wholly at odds with those prior messages. According to your most recent data, almost 70 percent of convicted tax

offenders are sentenced within the currently configured Zones A, B, and C of the sentencing table. (See, *Sourcebook of Federal Sentencing Statistics*, Table 12, 1999.)

By reducing Zone D by 4 levels, the number of convicted tax offenders who may be sentenced to serve less than at least the minimum term in prison will increase dramatically. The tax loss required for such a sentence of imprisonment will rise more than eight-fold (from $40,000 to $325,000), requiring evasion of taxes on approximately $1.1 million in income. This result is unconscionable given our current compliance predicament.

I have enclosed "Internal Revenue Service Comments On: 2001 Proposed Amendments to Federal Sentencing Guidelines," that sets forth our views on pending proposed amendments that will affect tax administration. I sincerely hope that you will consider the potentially devastating effect adoption of some of the proposed amendments will have on our tax compliance effort. I also ask that you consider the testimony of my Chief, Criminal Investigation, Mark E. Matthews, during your hearings on March 19 and 20, 2001.

Sincerely,



Charles O. Rossotti

Enclosure

**Internal Revenue Service Comments On:**
**2001 Proposed Amendments to Federal Sentencing Guidelines**

As the Sentencing Commission itself has recognized:

> The criminal tax laws are designed to protect the public interest in preserving the integrity of the nations's tax system. Criminal tax prosecutions serve to punish the violator and promote respect for the tax laws. Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines.[1]

**Proposed Amendment Twelve: Economic Crime Package**
**Part B: Loss Tables for Consolidated Guideline and § 2T4.1 (Tax Table)**

The amendment proposes three options for a consolidated loss table[2] and two options for a new Tax Table. Our discussion is limited to the proposed Tax Table options.

There are two options proposed to replace the current Tax Table, § 2T4.1. See Attachment One. Each option attempts to compress the current Tax Table by moving from one level to two level increments, thus increasing the range of losses that correspond to an individual increment. We support the Option One Tax Table. Option One provides a base offense level of six for tax loss amounts equal to or less than $2,000. The offense levels increase by two levels thereafter, depending on the tax loss amount. For example, a tax loss amount greater than $2,000 but less than $5,000 would receive an offense level of eight. The highest offense level for the Option One Tax Table is thirty-two, corresponding to tax loss amounts of more than $100,000,000. Option One is an appropriate reflection of the seriousness of tax offenses[3], provides a lower base offense level loss amount ($2,000 or less) and achieves the current

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[1] U.S.S.G. § 2T1.1, intro. commentary.

[2] The consolidated loss table is consistent with Amendment Twelve Part A, which consolidates the offenses of theft, property destruction and fraud offenses under one guideline.

[3]The Guidelines state that "[t]ax offenses, in and of themselves, are serious offenses." U.S.S.G. § 2T1.1, commentary.

mandatory imprisonment offense level of thirteen at a lower loss amount (more than $30,000) than Option Two.[4]

In addition, we note that while the proposed amendment is silent on this issue, there is language in the synopsis of Amendment Twelve, Part B, which discusses using one loss table for theft, property destruction, fraud and tax crimes.[5] We strongly object to this proposal because it is wholly at odds with long-standing policies that treat tax crimes as serious crimes, warranting higher penalties than theft, property destruction, and fraud crimes.

**Part F: Computing Tax Loss**

A. Computation

This amendment resolves the circuit conflict regarding the method of calculating aggregate tax loss in accord with the decisions of the Second and Seventh Circuits[6] and rejecting the contrary conclusion reached by the Sixth Circuit. Adoption of this amendment would confer an unfair sentencing advantage to the convicted tax criminal because the totality of the criminal conduct is not adequately counted. The amendment proposes to calculate tax loss as though an offender who failed to report diverted corporate funds on both the corporate return and his or her own individual return had obeyed the law and filed appropriate returns upon which he reported the income properly, even though he did not. The Seventh Circuit reasoned that the corporate tax should be deducted from the diverted monies before the individual tax was calculated,

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[4] Option Two Tax Table starts with a loss amount of $5,000 or less and achieves the current mandatory imprisonment offense level of thirteen at a loss amount of more than $70,000. Option Two also provides a base offense level of six, but establishes the base level at a tax loss amount of $5,000. The offense levels increase by two levels thereafter, with tax loss amounts greater than $5,000 but less than $10,000 establishing an offense level of eight. The highest offense level for Option Two is also thirty-two, corresponding to tax loss amounts of more than $100,000,000. 66 Fed. Reg. 7992 (Jan. 26, 2001).

[5] The synopsis of this amendment provides: "If a decision is made to use the same table, the effect would be to sentence the offenses under both guidelines in a similar manner. This would represent a change from the current relationship in which tax offenses generally face slightly higher offense levels for a given loss amount than fraud and theft offenses." 66 Fed. Reg. 7992 (Jan. 26, 2001).

[6] United States v. Martinez-Rios, 142 F.3d 662 (2d Cir. 1998); United States v. Harvey, 996 F.2d 919 (7th Cir. 1993).

because to do otherwise would overstate the loss to the government.[7] However, that analysis gives the defendant the benefit of an assumption that defies the reality of the evasion scheme.

U.S.S.G. § 2T1.1(c)(1) provides that ". . . tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed)."[8] § 2T1.1 also states that "[i]n determining the total tax loss attributable to the offense, all conduct violating the tax laws should be considered as part of the same course of conduct..."[9] Two separate crimes are committed when an offender executes a scheme to evade taxes or files false returns that affect two taxpayers: one crime arises from the individual income tax being defeated and the second crime arises from the evasion of tax by the corporation. Therefore, since the crimes are separate, the tax losses should be calculated separately and then added together to achieve the aggregate loss to the government.

Evading one's individual tax and evading corporate tax are separate violations, and the total tax loss should not be calculated as if only one offense was committed. In our view, the Sixth Circuit properly concluded in United States v. Cseplo, 42 F.3d 360 (6th Cir. 1994), that – "Mr. Cseplo had the opportunity and ability to limit the criminal consequences to one or other of the returns...[B]y choosing to falsify both returns, Cseplo made the deliberate decision to produce separate harm to the government with respect to both tax liabilities."[10] Even the Court in Harvey noted that "the Sentencing Commission wants the judge to consider the entire tax loss produced by the defendant's criminal conduct. If one person causes two taxpayers to understate their incomes, both underpayments count."[11] The Sixth Circuit's methodology results in a higher aggregate tax loss which is the more accurate reflection of the criminal behavior.

The Statutory Mission of the Sentencing Reform Act of 1984 is to provide "for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation."[12] In order to accomplish that mission the tax guideline uses tax loss to determine the seriousness of

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[7] Harvey, at 921.

[8] U.S.S.G. § 2T1.1(c)(1).

[9] Id., at application note 2.

[10] Cseplo, at 364-365.

[11] Harvey, at 921.

[12] U.S.S.G. Ch.1, Pt. A.2.

the offense and appropriate punishment, not to determine what the loss to the government would actually have been if the taxpayer had properly filed. *See* U.S.S.G. § 2T1.1, commentary. Moreover, the tax guideline provides that if the court is unable to calculate the exact tax loss, it should use "any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed."[13] Clearly, the Guidelines prioritize determining an appropriate offense level to reflect the criminal behavior of the tax offender over determining the actual loss to the government.

B. Definition of Tax Loss

We also oppose adoption of an amendment that would except state and local tax loss from consideration. In our view, basing the sentence exclusively upon federal tax losses does not adequately take all relevant conduct into consideration. Currently, the Guidelines do not limit the computation of tax loss to federal tax loss, nor do the Guidelines limit relevant conduct to federal offenses. Where federal tax and state tax violations have occurred in the same years and for the same type of tax, the state and local tax loss is relevant conduct and therefore should properly be included in computing the base offense level. *See* United States v. Powell, 124 F.3d 655 (5th Cir. 1997)(the text of the Guidelines permit consideration of state taxes evaded if they constitute relevant conduct), *cert. denied*, 522 U.S. 1130, 140 L. Ed. 2d 139, 118 S. Ct. 1082 (1998); United States v. Fitzgerald, 232 F.3d 315 (2nd Cir. 2000)(state and city tax losses included as relevant conduct to determine base offense level).

On the other hand, and for the same reasons outlined above, we support the amendment that would include interest and penalties in the definition of tax loss for evasion of payment tax cases, because it accurately reflects the total harm to the government in an evasion of payment case. *See* United States v. Pollen, 978 F.2d 78, at 91, n.29 (3d Cir. 1992)("while such a limitation [not to include interest or penalties in calculating tax loss] may be appropriate in an evasion of assessment case, it is not always so when imposing sentence for tax evasion committed through evasion of payment." Id.).

C. Grouping

We also oppose adoption of the amendment that mandates grouping tax offenses with other crimes committed in connection with the tax crimes. The amendment in its current form eliminates any incentive to charge a tax crime separately from the crime from which the income for the tax crime was derived, and we oppose it. Although

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[13] U.S.S.G. § 2T1.1, application note 1.

clarification is necessary on this issue because of the circuit conflict, this proposed amendment reaches the wrong conclusion.[14]

The purpose of grouping is to limit double counting while at the same time provide incremental punishment for significant additional criminal conduct.[15] The proposed amendment requires that tax counts be grouped with counts relating to the source of funds that were the subject of the tax crimes. This resolves the circuit conflict in favor of the defendant, because it effectively eliminates the separate tax crime conduct and harm, and only holds the defendant responsible for the underlying criminal conduct from which income was derived. In Vitale, for example, the court did not group the tax evasion count and the wire fraud count, because if the counts were grouped, the offense level would be determined by the higher offense level applicable to the wire fraud count and would result in the tax conviction having no effect on the sentencing.[16] A tax crime is significant additional criminal conduct which would be completely ignored under the proposed amendment.

D. Sophisticated Concealment

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

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[14] For case law reflecting the circuit conflict on this issue, *compare* United States v. Vitale, 159 F.3d 810 (3d Cir. 1998)(grouping separate wire fraud and tax evasion convictions was improper; the two counts were not so closely related that such grouping was required under the Sentencing Guidelines); United States v. Haltom, 113 F.3d 43 (5th Cir. 1997) (separate mail fraud and tax evasion convictions should have been grouped for sentencing purposes, as the offenses could be said to have caused substantially the same harm as required under the Guidelines). *See also* United States v. Astorri, 923 F.2d 1052 (3d Cir. 1991); United States v. Morris, 229 F.3d 1145 (4th Cir. 2000)(Table); United States v. McCormick, No. 98 CR 416, 1998 U.S. Dist. LEXIS 18010 (S.D.N.Y. Nov. 16, 1998).

[15] U.S.S.G. Ch. 3, Part D, Intro. Commentary, P 2).

[16] United States v. Vitale, 159 F.3d at 813-16.

**Proposed Amendment Fourteen: Sentencing Table Amendment and Alternative to Sentencing Table Amendment**

For reasons set forth in the transmittal letter, we strongly oppose adoption of either alternative detailed in proposed amendment fourteen. They each operate to undermine the goals served by criminal tax enforcement and should not be adopted.

A. Option One

Option One expands Zones B and C of the sentencing tables, increasing the offense level at which Zone D starts to seventeen in Criminal History Category I. Currently, imprisonment for at least the minimum term[17] would be required at offense level thirteen for a Criminal History Category I offender. If adopted, such imprisonment would not be required until an offense level of seventeen is established.

Under the current Sentencing and Tax Tables, a Criminal History Category I tax offender would face imprisonment for at least the minimum term in Zone D if his or her conduct resulted in a tax loss of greater than $40,000 -- a tax loss that would result from evasion of tax on taxable income of approximately $142,857.[18] Under the new proposed Sentencing Table, a convicted tax criminal would not face such imprisonment unless his or her conduct resulted in a tax loss greater than $325,000 -- a tax loss that would only result if the offender evaded taxation on approximately $1.16 million in income.

In other words, Option A of amendment fourteen would **raise by eight-fold the amount of the tax loss (and the amounts of income involved the criminal scheme) that would support mandatory imprisonment for at least the minimum term.** Adoption of this amendment would dramatically reduce the number of tax criminals who would face such a term of imprisonment for their offenses and would seriously undermine the deterrent effect of the criminal tax laws.

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[17] By illustration, currently a level 13 offender must be imprisoned for at least 12 months. Any additional sentence can be served through the varying alternatives set forth in U.S.S.G. § 5C1.1.

[18] We addressed a proposal to change the Tax Table (effectively changing the offense levels and relative loss amounts) in 1999 and noted then that, according to the Statistics Of Income Bulletin (Summer 1998) approximately four percent of all returns filed had an adjusted gross income of greater than $100,000. Thus, according to 1996 filing data, only four percent of Americans risk mandatory jail time for evading taxes under the current sentencing table. Under the proposed change (amendment 14 option one) that number would drop to less than one percent.

B. Option Two

The second option set forth in amendment fourteen would categorize a substantial number of tax crimes as "less serious economic crimes."[19] 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, then 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.[20] In addition, the application of the adjustment also defeats any offense level increases in the proposed Tax Tables.

**Proposed Amendment Twenty: Money Laundering**

Proposed Amendment Twenty would enhance the guidelines for violations of 18 U.S.C. § 1956(a)(1)(A)(ii) by one or two levels. This subsection of the Money Laundering laws concerns conducting financial transactions with proceeds of specified unlawful activity "with the intent to engage in conduct constituting a violation of section 7201 (tax evasion) or 7206 (filing false return) of the Internal Revenue Code of 1986."[21] We support this proposed Amendment.

All money laundering offenses are serious, and the guidelines treat them as such. Unlike the other types of money laundering addressed in Section 1956, the conduct proscribed in (A)(ii) is directed at violations of laws which are not necessarily related to the specified unlawful activity. By contrast, (A)(i) is directed at promoting the very specified unlawful activity that gave rise to the proceeds; (B)(i) is directed at concealment which is not necessarily separate criminal conduct; and, (B)(ii) is similarly directed at avoiding (as contrasted from evading) transaction reporting violations, which would also not necessarily constitute separate criminal conduct. Treating (A)(ii) more seriously would be consistent with its unique character.

Moreover, as discussed above, the Internal Revenue Service is attempting to address a

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[19] The Chapter Five, Part A would be titled "§ 5A1.2 Adjustment for Certain Less Serious Economic Crimes." 66 Fed. Reg. 8005 (Jan. 26, 2001).

[20] U.S.S.G. § 2T1.1, commentary, background.

[21] 66 Fed. Reg. 8013 (Jan. 26, 2001).

burgeoning tax gap currently estimated at $195 billion. Increasing the sentencing level for this part of the money laundering crimes will assist the Service in combating the tax gap by reinforcing the message that tax crimes are serious.

Attachment

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

# ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN M. HUGHES
Chief

Federal Corrections and
Supervision Division

March 12, 2001

Ms. Pamela Montgomery, Director
Office of Education and Sentencing Practice
U. S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, D.C. 20002

Re: Proposed amendment to the Immigration guideline

Dear Ms. Montgomery:

I write in response to your question concerning the difficulty probation officers would have obtaining reliable information about the amount of time a defendant had served in prison/jail on a prior conviction. Given the short turnaround we did not conduct a formal survey, and instead called a few members of the Chiefs Advisory Group and several chiefs in border courts to get their opinions.

As we understand 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. Several chiefs on the border reported that obtaining reliable information pertaining to the time a defendant actually served is impractical and very time consuming. For example:

Chief Probation Officer Martha Crockett (California, Southern) stated that reliable "time served" information is not readily available. She notes that if officers are required to obtain such information it would cause significant sentencing delays. Further, she adds that it would lead to unfair applications where such information is available for one defendant and not another. She added that she checked with two deputy chiefs and both say that using time served would be a "bad idea."

Chief Probation Officer Jerry Denzlinger (Texas, Southern), notes that his officers can get booking records from Harris County and the Texas Department of Criminal Justice (TDCJ), but are not usually able to get that information from other county facilities.

Further, he points out that the booking information from the Harris County Jail comes from a computerized database system which is not certified for accuracy and that if such information is to be used for sentencing it may require staff at county institutions to pull jail cards to verify the computerized dates when the database information is contested. Jerry doubts that county staff will cooperate and further cautions that his own office would likely be inundated with collateral requests to track down jail cards. Finally, he notes that "good time" credit varies greatly across jurisdictions, raising issues of fairness if time actually served is to be used for sentencing.

Chief Maggie Jensen (Arizona) echos these concerns. She states it would be potentially very difficult to obtain accurate information for actual time served on sentences. Given there is no time restriction on aggravated felonies for unlawful entry cases under 8 U.S.C. § 1326, obtaining sentencing information for old convictions/sentences could be problematic, if not impossible in some cases. Ms. Jensen suggests the use of time served as a measure to either increase or decrease the sentencing range is filled with numerous pitfalls. Instead she and her staff suggest that the length of sentences imposed would be an easier measure to obtain, and similar to current guideline application rules for criminal history and career offender.

However, there is not agreement among those polled about the difficulty of obtaining this information.

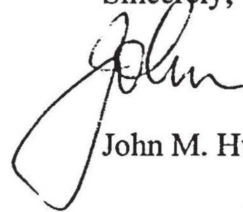
Chiefs Gilbert Montoya (New Mexico) and Dave Saunders (Nevada) reported that they do not believe that it would be appreciably more difficult to obtain the actual time served, and in many instances, this information is currently being provided to the court.

Chief Kenneth Laborde (Texas, Eastern) reports that it would not be too difficult to collect time served data for Texas cases, except in the smaller, rural counties. He notes that this information would be subject to objections by the parties and, therefore, needs to be documented and this will require additional effort. Chiefs Jensen and Laborde expressed concern about the difficulty of determining the time served per count where there are multiple counts of conviction. Both Chiefs Jensen and Laborde wondered why the commission proposes treating this offense differently from the typical application rule of basing the guideline calculation on the actual sentence imposed, not time served. Chief Laborde goes on to suggest if time served is used, the commission could ease the application problem by basing any adjustment on the number of months spent in incarceration and not asking for the exact number of days. Anything more than 15 days would be counted as a full month and anything less would not count.

Finally, as Chief Ruby Lehrmann of Texas, Western notes, securing this additional information can be done but will in many instances place an additional work burden on an already overburdened staff and may lead to disparity in application depending on the availability of the data.

I hope that this information is helpful to you and the Commission as you formulate sentencing policy. We appreciate the invitation to comment on this proposal. Let me know if I or my staff can be of further assistance.

Sincerely,



John M. Hughes