UNITED STATES POSTAL INSPECTION SERVICE

OFFICE OF THE COUNSEL

March 9, 2001

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

Attention: Michael Courlander
Public Information Officer

SUBJECT: 2001 Proposed Guideline Amendments

Dear Mr. Courlander:

The United States Postal Inspection Service respectfully submits its comments to the proposed guideline amendments published in the January 26, 2001 Federal Register.

The proposed economic crime package amendment, which covers the consolidation of Theft, Property Destruction and Fraud calls for a base offense level of 6. The current "floor" offense level of 6 for the theft of United States mail is proposed to be deleted, because the proposal raises the base offense from level 4 to level 6 for such offenses. However, as the Commission points out, if the enhancement providing a two-level reduction, if loss is less than $2,000 is adopted, it will be necessary to retain the floor level of 6.

Under the proposed amendment, along with the increase of the base offense level to 6, the amendment calls for a decrease by 2 levels if the loss is $2,000 or less. The current guidelines provide in §2B1.1 (b)(3), that the theft of undelivered mail is not less than 6, regardless of the value of the loss. The proposed guidelines would reduce the level for the theft of mail with a value of less than $2,000, to a level of 4. For this reason alone it appears necessary to retain the floor of level 6. The United States Postal Inspection Service urges the Commission to maintain a two-level increase for the theft or destruction of United States mail above the proposed base level of 6, or in the alternative, retain the floor level of 6.

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The federal statutes governing the theft and obstruction of mail differentiate United States mail from other stolen or destroyed property. We believe this distinction was the basis for §2B1.1(b)(3) when it was promulgated, and feel strongly that it should be maintained in any general offense level increase proposed for the consolidated guidelines. The current guidelines consider the inherent fiduciary role in this public communications service, and the mail as an integral part of our nation's commerce. The theft of undelivered mail interferes with an important government function, and the scope of the theft may be difficult to ascertain.

We support the consolidation of guidelines for theft, destruction of property, and fraud, provided the specific offense characteristics for the theft or destruction of mail are preserved in any new guideline. If you have any questions, or need additional information, please feel free to contact me at (202) 268-7732.

Sincerely,

Lawrence Katz
Counsel/ Inspector in Charge

United States Department of Agriculture | Forest Service | Washington Office | 14th & Independence SW
P.O. Box 96090
Washington, DC 20090-6090

File Code: 5300

Date:

United States Sentencing Commission
Attention: Public Information
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Suite 2-500
Washington, DC 20002-8002

Dear Commissioners:

As Directors of Law Enforcement and Investigations, and Recreation, Heritage and Wilderness Resources for the USDA Forest Service, one of our primary responsibilities is the protection and management of heritage and cultural resources on all National Forest System Lands in the United States. As such, we are responding to the United States Sentencing Commission's call for comment on issues involving sentencing for crimes affecting cultural heritage (66 Fed. Reg. 7962, 7991, 92 (2001)). We believe the U.S. Sentencing Guidelines are deficient as applied to crimes affecting the archeological resources, historic properties, and other cultural items that are part of our heritage. We urge the Commission to incorporate Guidelines provisions in the Economic Crimes Package that will redress those deficiencies.

Heritage resources crime is serious because it deprives people of things that satisfy their emotional and spiritual needs, and intellectual curiosities, but it also is serious in terms of economics and the Governments ability to exercise its legal responsibilities. In terms of economic impact, according to INTERPOL, "the annual dollar value of art and cultural property theft is exceeded only by trafficking in illicit narcotics, money laundering, and arms trafficking." In terms of legal responsibilities, heritage resources crime adversely affects property and other items for which the United States has a perpetual duty to act whether as a trustee for the public, generally, or as a fiduciary on behalf of American Indians, Alaska Natives, and Native Hawaiian Organizations. However, we believe that the U.S. Sentencing Guidelines, as currently applied, inadequately fulfill the basic purposes of criminal punishment for these crimes.

We offer five suggestions for remediation of the inadequacies. As part of the Economic Crime Package, we respectfully urge the Commission to address them. This could be done either through a new guideline or through amendments to existing guidelines, specific offense characteristics, and application notes.

First, the Commission should remedy the disparity over Guidelines that apply to crimes committed in violation of the Native American Graves Protection and Repatriation Act (NAGPRA; 18 U.S. C. 1170), and the Archeological Resources Protection Act (ARPA 16 USC 470aa-mm). The Commission should address the issue that when the same offenses are committed against the same resource the sentences can be different dependent upon what the defendants are charged with. The principal example of this is offenses charged under ARPA where the cultural resources are archeological resources by definition (and sentenced under the Guidelines), while in other similar offenses; the cultural resources are treated as fungible property and are charged under NAGPRA (and thus, sentenced under 19 U.S.C. 3553(b)). Because of this discrepancy we believe that the Guidelines should also be made to apply to violations of NAGPRA as well as ARPA.

Second, the Commission should remedy the Guidelines' disparate treatment of dead bodies. An enhancement exists for crimes committed in a national cemetery, but no enhancement exists for crimes committed against other human remains, funerary objects, or funerary architecture that comes within the scope of Federal law. We believe that the same sentencing enhancements used for crimes involving national cemeteries should be used for offenses against all interments and funerary property, wherever federal law applies.

Third, the Commission should remedy the equal treatment, by the Guidelines, of commercial and noncommercial looters, which risks providing the same sentence for criminal conduct of differing severity. As a result the purposes of criminal punishment are thwarted. We believe the Guidelines should provide an enhancement for crimes involving heritage resources committed for pecuniary gain or commercial purpose, just as they do for other offenses.

Fourth, because heritage resource crimes affect important interests such as social identity, spiritual and emotional well-being, academic pursuit, economics, and the fiduciary responsibilities of the government to the public in general, and native peoples in particular, the Commission should correct the policy engendered by the Guidelines: namely, that crimes against heritage resources are among the <u>least</u> repugnant for our nation. We believe the base offense level should be raised for crimes involving defined "archaeological resources" (16 USC 470bb(l)), "historic properties or resources" (16 U.S.C. 470w(5)), "sacred objects" (25 U.S.C. 3001(3)(C)). and "cultural patrimony" (25 U3.C, 3001(3)(D), regardless of the statute used to convict. or, alternatively, that there be an enhancement.

Fifth, the Commission should include "archaeological value", as defined by the ARPA uniform regulations, in the application notes. Doing so will accomplish three things. First, it will remedy the refusal of some courts to apply this statutory measure to determine loss for purposes of sentencing. Second, it will prevent the use of arbitrary loss determinations that risk-creating disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, it will eliminate the use of archeological value to determine whether an offense is a felony, only to ignore it at sentencing. We believe that archeological value is the proper measure of loss in an offense involving an archeological resource, regardless of the statute used to convict, where the Government proves archeological value to a jury.

The looting of, and injury to, heritage resources, robs our citizens of part of their cultural identity. It drives significant illegal markets and undermines important fiduciary responsibilities. The Department of Agriculture is the steward responsible for an enormous number of archeological sites and historic areas on public lands. Because the issues concerning sentencing for crimes involving heritage resources are fundamental to effective protection of our nations archeological heritage, we respectfully urge the United States Sentencing Commission to address them within the framework of the Economic Crime Package. I invite you to call on either of our staffs for any assistance you might require.

WILLIAM F. WASLEY
Director
Law Enforcement and Investigations

DENNY BSCHOR
Director
Recreation, Heritage and Wilderness Resources

United States Department of the Interior

NATIONAL PARK SERVICE
1849 C Street, N.W.
Washington, D.C. 20240

IN REPLY REFER TO:

MAR - 9 2001

W4819(2275)

United States Sentencing Commission
Attention: Public Information
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

Dear Commissioners:

As the official delegated the responsibility of carrying out the Secretary of the Interior's leadership responsibilities for the Federal archeology and historic preservation program, I am responding to the United States Sentencing Commission's call for comment on issues involving sentencing for crimes affecting cultural heritage, as part of the Economic Crime Package (66 Fed. Reg. 7962, 7991-92 (2001)). I believe that, as applied, the Guidelines are deficient concerning crimes affecting the archeological resources, historic properties, and other cultural items that are an irreplaceable part of our heritage. I urge the Commission to incorporate Guidelines provisions to redress those problems in the Economic Crime Package.

Archeological resources, historic properties, and cultural items

> ". . .are important to us on many different levels: providing our scientists with information which is both fascinating and important to us all; and giving ordinary modern peoples a sense of respect and kinship with ancient peoples. . .Our heritage resources serve as the ultimate model of what we are capable of accomplishing. . .The universal fascination with traces of our past is evident in every community in the nation. Americans from all walks of contemporary life agree that we must defend our heritage resources as fiercely as we defend our natural resources. The law is one of our most powerful tools." [Former Attorney General Janet Reno, Foreword to *Heritage Resources Law* (John Wiley and Sons Publishers, 1999)]

Crimes against these cultural resources are serious because they deprive people of commemorative associations that provide for reflection, remembrance, and stability in our modern world. Such crimes also prevent us from learning about the past through education programs, scientific research, and traditional stories. Cultural resource crime also has serious economic aspects and inhibits the Government's ability to carry out its legal responsibilities. Interpol has estimated that "the annual dollar value of art and cultural property theft is exceeded only by trafficking in illicit narcotics, money laundering, and arms" (see *About the Cultural Property Program*, <www.usdoj.gov/usncb/cultprop/about/cultureabout.htm> (accessed January 25, 2001)). I believe that the U.S. Sentencing Guidelines, as currently applied, inadequately fulfill the basic purposes of criminal punishment for these crimes.

There are a number of specific topics that should be addressed to improve the Sentencing Guidelines. The Departmental Consulting Archeologist in a letter to the Commission, dated March 7, 2001, has described these in some detail. I add my endorsement of the recommendations in his letter (Enclosure).

In particular, it is important that cultural resource crimes be considered as serious offenses against all Americans. In order to reflect this general perspective, the base offense level should be raised for crimes involving "archaeological resources" (Archaeological Resources Protection Act (ARPA); 16 U. S. C. 470bb(1)), "historic properties or resources" (16 U. S. C. 470w(5)), and "cultural items" (Native American Graves Protection and Repatriation Act (NAGPRA); 25 U. S. C. 3001(3)), regardless of the statute used to convict, or, alternatively, there should be an enhancement.

The Commission should include "archaeological value", as defined by the Archaeological Resources Protection Act uniform regulations (43 C.F.R. Part 7), in the application notes in order to remedy the problem experienced in some courts of applying this statutory measure to determine loss for purposes of sentencing. This also would prevent the use of arbitrary loss determinations that risk creating disparity in sentences imposed for similar criminal offenses committed by similar offenders. Archeological value is the proper measure of loss in an offense involving an archeological resource, regardless of the statute used to convict, where the Government proves archeological value to a jury.

The Commission should provide for variation in the Guidelines for sentencing of commercial and non-commercial looters and/or traffickers. I believe that the Guidelines should provide an enhancement for crimes involving heritage resources committed for pecuniary gain or commercial purpose, just as they do for other offenses.

The looting of cultural resources robs all citizens of part of their national identity. It drives significant illegal markets and undermines important public responsibilities. The Department of the Interior is the steward responsible for the greatest number of archeological sites and historic properties on public lands. Congress has charged the Secretary of the Interior with leadership and coordination responsibilities in our national archeology and historic preservation program. The National Park Service acts for the Secretary in this important national leadership role.

I urge you to consider these matters seriously and to take full account of the suggestions made here and in the Departmental Consulting Archeologist's letter to you of March 7, 2001. I invite you to call on the Departmental Consulting Archeologist for any assistance you might require. You can contact Dr. McManamon and his staff at 202/343-4101.

Sincerely,

Denis P. Galvin
Acting Director

Enclosure

United States Department of the Interior

NATIONAL PARK SERVICE
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United States Sentencing Commission
Attention: Public Information
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Washington, DC 20002-8002

Dear Commissioners:

I am responding to the United States Sentencing Commission's call for comment on issues involving sentencing for crimes affecting cultural heritage, as part of the Economic Crime Package (66 Fed. Reg. 7962, 7991-92 (2001)). I believe that the Guidelines are deficient concerning crimes affecting the archeological resources, historic properties, and other cultural items that are an irreplaceable part of the cultural heritage of all Americans. I respectfully urge the Commission to incorporate Guidelines provisions to redress those problems in the Economic Crime Package.

I am submitting the following comments and suggestions as the National Park Service and Department of the Interior official delegated to carry out the Secretary of the Interior's responsibilities for the Federal archeology program, including implementation of the Archaeological Resources Protection Act (ARPA, 16 U.S.C. 470aa-mm), archeological aspects of the Native American Graves Protection and Repatriation Act (NAGPRA, 25 U.S.C. 3001), and other laws related to archeological matters.

Crimes affecting cultural resources deprive the American public of access to places, objects, and information of commemorative, educational, and scientific value. Such crimes also are serious in terms of economics and the Government's ability to exercise its legal responsibilities. In terms of economic impact, according to INTERPOL, "[t]he annual dollar value of art and cultural property theft is exceeded only by trafficking in illicit narcotics, money laundering, and arms trafficking" (INTERPOL-USNCB, Cultural Property Program, About the Cultural Property Program, <www.usdoj.gov/usncb/cultprop/about/cultureabout.htm> (accessed Jan. 25, 2001)).

In terms of legal responsibilities, cultural resource crime adversely affects property and other items for which the United States government acts on behalf of the American public. However, the U.S. Sentencing Guidelines, as currently applied, inadequately fulfill the basic purposes of criminal punishment for these crimes. My staff and I have prepared the following analysis and suggestions for improvements to the Sentencing Guidelines. There are five areas that should be addressed.

First, courts currently use the Guidelines to constructively treat defined archeological resources (16 U.S.C. 470bb(1)) and historic properties (16 U.S.C. 470w(5)) as mere fungible property. In the absence of a specific guideline addressing crimes that affect archeological resources and historic properties, they have chosen to use the theft of property guideline as the most analogous. However, with no specific enhancement for archeological resources and historic properties in the theft guideline, the resulting base offense level for heritage resources crimes is the lowest in the entire Guidelines. Thus, as applied, the

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Guidelines stand for the proposition that offenses involving odometers and contraband cigarettes are more repugnant than crimes affecting our non-renewable, irreplaceable cultural heritage.

Second, the Sentencing Guideline application notes omit the statutorily prescribed measure of "archaeological value" to determine loss for offenses committed in violation of the Archaeological Resources Protection Act (ARPA; 16 U.S.C. 470ee). This omission has resulted in at least one court refusing to follow the will of Congress. In 1979, Congress enacted the Archaeological Resources Protection Act, believing that "archeological resources . . .are an accessible and irreplaceable part of the Nation's heritage" which are "increasingly endangered because of their commercial attractiveness", and that "existing Federal laws did not provide adequate protection to prevent their loss and destruction" (16 U.S.C. 470aa). Congress realized that any disturbance of an archeological site always results in archeological destruction because removing an archeological resource from its original location always destroys the context of the artifact. Recognizing that fair market value and the costs of repair and restoration, or both, to gauge loss would be inadequate to measure this irreparable harm, Congress provided a means to determine the value of the loss to humanistic science caused by an ARPA offense. That measure of loss, called "archaeological value" (16 U.S.C. 470ee(d) & ff(2)(A)), is defined in the ARPA uniform regulations. Archaeological value is

> "the value of the information associated with the archaeological resource. This value shall be appraised in terms of the costs of the retrieval of the scientific information which would have been obtainable prior to the violation. These costs may include, but need not be limited to, the cost of preparing a research design, conducting field work, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential."
> (43 C.F.R. 7.14(a); 36 C.F.R. 296.14(a); 18 C.F.R. 1312.14(a); 32 C.F.R. 229.14(a)).

The definition of archeological value in the ARPA uniform regulations is a reasonable interpretation of the Act. It is consistent with the purpose of the statute and the authority given by Congress to the Secretaries of the Interior, Agriculture, and Defense, and the Chairman of the Tennessee Valley Authority to promulgate regulations. Moreover, archeological value (combined with costs of restoration and repair) has been held to be an appropriate method of determining loss for an offense involving an archeological resource (see U.S. v. Shumway, 112 F.3d 1413, 1425-26 (10th Cir. 1997)). Nevertheless, at least one court constructively rejected the use of archeological value to measure loss. In U.S. v. Hunter (48 F. Supp.2d 1283 (D. Utah 1998)), the court accepted the Government's valuation of damage to archeological sites managed by the Bureau of Land Management and the Forest Service, based on the cost of repair and restoration. However, the court rejected the archeological value offered by the United States for the destroyed resources at all the sites as a "speculative assessment", "fictional scholarship", and "absurd." Instead, the court assigned an admittedly subjective and arbitrary measure of loss to the destroyed resources that it called "aesthetic diminishment."

The sentencing basis, termed "aesthetic diminishment" used in U.S. v. Hunter, is broadly subjective and relies heavily upon personal inference. Its use has a potentially chilling effect on the deterrent value of ARPA which archaeological value provides. Also, it raises further legal issues about the use of archeological value. For example, courts might rely on Hunter to hold that they have discretion to use commercial value or archeological value for purposes of determining whether a violation is a misdemeanor or a felony. Similarly, administrative law judges might rely on Hunter to find that they have discretion to use archeological value or commercial value to determine the amount of a civil penalty.

Contrary to the court in Hunter, in enacting ARPA, Congress mandated that the value of the destroyed archeological resources is either the commercial value or the archeological value of the resources for purposes of sentencing defendants convicted of violating the Act, and that Congress gave the Executive Branch the authority to choose which value to use to determine loss. There is no justification for using

archeological value when determining whether an ARPA offense is a felony (or the actual damages recoverable in a civil penalty), and yet ignore this value when assessing loss for purposes of sentencing. Nevertheless, Hunter stands for the proposition that the Sentencing Guidelines can be used to deny the Executive Branch the authority it derives from Congress through ARPA, to decide how archeological resources are to be valued when they are destroyed in violation of the Act.

Third, the Guidelines as applied do not distinguish between cultural resources crimes committed for non-pecuniary gain and offenses committed for pecuniary gain or commercial purpose, as they do for other crimes. Commercial looters and dealers who traffic in looted objects, earn all or part of their income from looting and the subsequent sales of these objects. They might make substantial sums of money from their activities. Non-commercial looters engage in these activities because of their interest in the past and their desire to possess archeological, historic, and other cultural items. When the courts apply the Guidelines uniformly to commercial and non-commercial looters, they risk imposing the same sentence for criminal conduct of different severity. Consequently, as applied to cultural resources crimes, the Guidelines could be undermining some of the basic purposes of criminal punishment, namely just punishment and rehabilitation.

Fourth, the courts are split regarding use of the Guidelines for sentencing criminal violations of the Native American Graves Protection and Repatriation Act (NAGPRA; 18 U.S.C. 1170). NAGPRA protects defined Native American cultural items (25 U.S.C. 3001(3)). In U.S. v. Corrow (941 F. Supp. 1553, 1566-67 (D.N.M. 1996), aff'd, 119 F.3d 796 (10th Cir. 1997), cert. denied, 522 U.S. 1133 (1998)), the sentencing court found that, beside there being no specific guideline addressing NAGPRA crimes, no analogous offense guideline existed for use to determine the base offense level. Consequently, the court was guided by the general sentencing provisions of 18 U.S.C. 3553(b). Other courts, however, have applied the Guidelines by analogy to NAGPRA crimes (see U.S. v. Garcia, No. 92-515-LFG (D.N.M. 1993); U.S. v. Stephenson, No. CR 95-82-LH (D.N.M. 1995); U.S. v. Kramer, No. CR-96-337-BB (D.N.M. 1997); U.S. v. Tidwell, No. CR-97-00093-02-EAC (D. Ariz. 1998), aff'd, 191 F.3d 976 (9th Cir. 1999); U.S. v. Fragua, No. 1:97 CR 00482-001 (D.N.M. 1998); U.S. v. Tosa, No. 1:97 CR 00482-002 (D.N.M. 1998)). To compound the issue of the split of authority as to whether the Guidelines are applicable to NAGPRA crimes, some cultural items subject to NAGPRA also are archeological resources subject to the Archaeological Resources Protection Act (ARPA; 16 U.S.C. 470aa-mm). The Guidelines are used by analogy to sentence defendants convicted of violating ARPA. Thus, the same item(s) might fall inside or outside the Guidelines, depending on the court and the statute used to convict. This confusion regarding the applicability of the Guidelines for crimes involving Native American cultural items that also are archeological resources appears to frustrate the underlying rationale of the Guidelines, namely reasonable uniformity in sentencing.

Finally, the Guidelines, as applied, give disparate treatment to national cemeteries, on the one hand, and other human remains, burials, and cemeteries on "public lands" (16 U.S.C. 470bb(3)), "Federal lands" (25 U.S.C. 3001(5)), "Indian lands" (16 U.S.C. 470bb(4)), "tribal lands" (25 U.S.C. 3001(15)), and wherever else Federal law applies (see 16 U.S.C. 470ee(c)). The Guidelines provide an enhancement for crimes affecting national cemeteries, but not other interments. Consequently, to the extent that the Guideline enhancement applies to human interments in national cemeteries, they do not stand for the equal protection of other human burials that are within the scope of Federal law. Here again, they do not satisfy the objective of reasonably uniform sentences for similar criminal offenses.

Below, I suggest five ways in which the Sentencing Guidelines can be improved to address these issues as part of the Economic Crime Package. Improvements might be made through a new guideline, or through amendments to existing guidelines, specific offense characteristics, and application notes.

First, cultural resources crimes diminish important social interests, such as the direct connections, through commemoration, education, scientific understanding, or personal spiritual and emotional well-being, that every American can make to our ancient and historic past. The base offense level should be raised for crimes involving "archaeological resources" (16 U. S. C. 470bb(1)), "historic properties or resources" (16 U. S. C. 470w(5)), and "cultural items" (25 U. S. C. 3001(3)), regardless of the statute used to convict, or, alternatively, there should be an enhancement. Unfortunately, as they currently exist, the relatively low sentences for cultural resource crimes engendered by the Guidelines suggest that crimes against these kinds of resources are among the least repugnant for our nation.

Second, the Commission should include "archaeological value", as defined by the ARPA uniform regulations, in the application notes. Doing so will accomplish three things. First, it will remedy the refusal of some courts to apply this statutory measure to determine loss for purposes of sentencing. Second, it will prevent the use of arbitrary loss determinations that risk creating disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, it will eliminate the absurdity of the use of archeological value to determine whether an offense is a felony, but to ignore it at sentencing. Archeological value is the proper measure of loss in an offense involving an archeological resource, regardless of the statute used to convict, where the Government proves archeological value to a jury.

Third, the Commission should remedy the equal treatment by the Guidelines of commercial and non-commercial looters which risks providing the same sentence for criminal conduct of differing severity. As a result, the purposes of criminal punishment are thwarted. I believe the Guidelines should provide an enhancement for crimes involving heritage resources committed for pecuniary gain or commercial purpose, just as they do for other offenses

Fourth, the Commission should remedy the split of authority over whether the Guidelines apply to crimes committed in violation of the Native American Graves Protection and Repatriation Act (NAGPRA; 18 U.S.C. 1170). The Commission should address the inconsistent outcomes, where the same offenses committed against the same resources result in different sentences. A principal example of this is offenses charged under ARPA (and sentenced under the Guidelines), while other offenses are charged under NAGPRA (and thus, sentenced under 18 U.S.C. 3553(b)). The Guidelines should be made to apply to violations of 18 U.S.C. 1170.

Finally, the Commission should remedy the Guidelines' disparate treatment of human burials. An enhancement exists for crimes committed in a national cemetery, but no enhancement exists for crimes committed against other human remains, funerary objects, or funerary architecture that come within the scope of Federal law. The same sentencing enhancements used for crimes involving national cemeteries should be used for offenses against all interments and funerary property, wherever Federal law applies.

The looting of cultural resources robs our citizens of part of their cultural identity. It drives significant illegal markets and undermines important fiduciary responsibilities. The Department of the Interior is the steward responsible for the greatest number of archeological sites and historic properties on public lands. Further, Congress has charged the Secretary of the Interior with leadership and coordination responsibilities throughout Federal archeology and historic preservation. These responsibilities include providing advice, technical information, and regulations, standards, and formal guidelines for programs throughout the nation. To accomplish this important charge, each Secretary of the Interior since 1991 has declared and contributed to implementation of the "National Strategy for Federal Archeology". This is a policy that emphasizes, among other things, education; efforts to fight looting and preserve the archeological record; and interagency cooperation in information exchange at the Federal, State, and local levels. Because the issues concerning sentencing for crimes involving heritage resources are fundamental

to effective protection of our nation's archeological heritage, I respectfully urge the United States Sentencing Commission to address them within the framework of the Economic Crime Package. I invite you to call on the office of the Departmental Consulting Archeologist for any assistance you might require.

Sincerely,

Francis P. McManamon, Ph.D.
Chief Archeologist, National Park Service
Departmental Consulting Archeologist, Department of the Interior

U.S. Department of Justice
Immigration and Naturalization Service

2035 N. Central Avenue
Phoenix, Arizona 85004

February 27, 2001

Office of Public Affairs
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Information

RE: Amendment 18 Relating to Sentencing Guidelines for Illegal Re-entry After Deportation

To the Commission:

The purpose of this letter is to provide input for consideration by the Commission regarding the re-structuring of sentencing guidelines for violations of Title 8 United States Code, Section 1326(b)(2), Illegal Re-entry After Deportation, Subsequent to Conviction for an Aggravated Felony.

I am a Special Agent with the United States Immigration and Naturalization Service (INS) and have been an Immigration Officer for over twelve years. I am one of two agents assigned to the Violent Gang Task Force in Phoenix, Arizona and have been so assigned since 1996.

The largest and most active street gang in the state of Arizona is Wetback Power. Wetback Power street gang consists of 19 separate sets which operate as independent gangs. Of the 6527 active gang members contained in the Phoenix Police Department's gang database, 1206 of the documented members are Wetback Power. These numbers do not include documented gang associates. As the name implies, the majority of Wetback Power gang members are undocumented, removable or deportable aliens. Wetback Power gangs are involved in traditional gang crimes such as homicides, drive-by shootings, aggravated assaults, home invasions, armed robberies, gang threats and intimidation, theft, auto theft, burglary, firearms offenses and narcotics offenses. Because of their ties to Mexico, Wetback Power gangs are uniquely involved in alien smuggling, other criminal immigration violations, importation of narcotics and interstate trafficking of stolen vehicles. Once convicted of crimes which result in prison sentences, Wetback Power gang members routinely "patch over" to Border Brothers prison gang. Border Brothers prison gang, or Security Threat Group (STG) as it is referred to by corrections officials, is the largest and fastest growing STG in the Arizona Department of Corrections (ADOC). It consists of 245 validated members who are currently incarcerated and 171 inactive members who have been released and deported as aggravated felons. Most of these deported Border Brothers return to the United States to perpetrate more crime. Recently, the majority of their contributing membership has come from Wetback Power street gang. As a

result, their activities have become more violent, proactive and similar to other STG's. As with other prison gangs, recent intelligence has shown that Border Brothers STG is unifying and organizing Wetback Power street gang members for the purpose of dictating street gang criminal activity in furtherance of the Border Brothers organization. In some instances, former Wetback Power gang members who have been sent to prison and have become Border Brothers, are charged with organizing their set of Wetback Power upon release from prison.

One of the most valuable tools available to the gang enforcement community in combating these alien gangs is prosecution for Illegal Re-entry After Deportation. Most of these members are career criminals who have been convicted of aggravated felonies and deported from the United States. They typically return to the United States illegally and are encountered by law enforcement by arrest or investigation for new crimes. Criminal prosecution for Illegal Re-entry After Deportation is consequently pursued. In virtually all cases, defendants are offered a standard plea bargain which typically results in a three to five year prison sentence. For that time period, these violent criminal aliens are incapacitated and unable to victimize United States Citizens and lawful residents. Because of this effective law enforcement tool, gang related crime has decreased every year for the past four years in Phoenix, Arizona. I am concerned that if sentencing guidelines are reduced for some aggravated felons, the ability to incapacitate these violent, career criminal aliens, who return to the United States for no other reason than to commit more crime, will be negated.

If you would like more information or have any questions regarding this matter, please contact me at (602) 379-6517, ext. 166.

Sincerely,

Claude Arnold
Special Agent

U.S. Department of Justice

United States Attorney
District of New Mexico

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COPY

March 5, 2001

VIA FEDERAL EXPRESS

Michael E. Horowitz
Chief of Staff to the Acting Assistant Attorney General
U.S. Department of Justice
Criminal Division
950 Pennsylvania Avenue N.W., Room 2712
Washington, D.C. 20530

RE: Heritage Resources Crimes and the Sentencing Guidelines

Dear Mr. Horowitz:

I recently received a copy of a letter sent by my colleague, Paul M. Warner, U.S. Attorney for the District of Utah, to the Department of Justice's representative on the Sentencing Commission. As the U.S. Attorney for the District of New Mexico, I want to add my wholehearted support to Mr. Warner's comments. The rich heritage resources contained in New Mexico are almost exclusively protected through federal prosecutions, yet the United States Sentencing Guidelines (U.S.S.G.) do not address these statutes.

The cases we have prosecuted in the District of New Mexico have made it clear to me that the effects of crimes prosecuted under the Archaeological Resources Protection Act (ARPA), 16 U.S.C. § 470 et seq., and the Native American Graves Protection and Repatriation Act (NAGPRA), 18 U.S.C. § 1170, fall heavily on Native American populations and on all future generations. The U.S. Attorney's Office is called upon not only to preserve archaeological resources, but also to prevent destruction of sacred sites and trafficking in sacred items transformed into art objects by greedy dealers.

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Our efforts are often less successful than desired because the U.S.S.G. do not dictate a certain punishment. I would like to add my support as the U.S. Attorney for the District of New Mexico to that of my colleague, Mr. Warner. I urge the Sentencing Guidelines Commission to adopt guidelines consistent with Mr. Warner's thoughtful and important recommendations.

Sincerely,

NORMAN C. BAY
United States Attorney

NCB:ks
cc: Paul M. Warner
United States Attorney
District of Utah
185 S. State Street, Suite 400
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PLEASE REPLY TO: TALLAHASSEE

February 13, 2001

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

Re: Proposed Amendment 13
Aggravating and Mitigating Factors in Fraud and Theft Cases

Dear Sir/Madam:

I have reviewed proposed Amendment 13 that deals with aggravating and mitigating factors in fraud and theft cases and would like to present my concerns to you. I applaud the Commission's efforts to create comprehensive specific offense characteristics for fraud and theft cases, including the non-exhaustive list of factors to be considered when applying one of the specific offense characteristics dealing with aggravating and mitigating factors.

I have written over 300 presentence investigation reports over the past eight years and I am very familiar with the Federal sentencing guidelines. I currently write a few presentence investigation reports but my primary role is to review presentence investigation reports written by probation officers. My experience has shown me that the less complicated a guideline process is, the greater likelihood that it will be applied consistently by all parties dealing with the sentencing process. When I review options 1 and 2 of proposed Amendment 13, I see numerous problems with its application. I analogize applying the provisions of Amendment 13 to aggravating and mitigating roles as set forth in U.S.S.G. §§3B1.1 and 3B1.2. You do not have to look far at the problems these adjustments have presented the district courts and appellate courts. It was not until recently that the 11th Circuit gave significant guidance on how to apply mitigating role. See U.S. v. DeVaron, 175 F.3d 930 (11th Cir. 1999). As it currently stands, the standards for applying mitigating and aggravating role vary substantially between circuits and districts.

If you consider the average criminal defense attorney only handles five to 10 federal cases per year, I think it would be very difficult for them to apply the factors listed in proposed Application Note 17. Even experienced attorneys, probation officers and judges would find applying the provisions of Amendment 13 extremely difficult. The guidelines scheme is difficult enough in its current form. I would respectfully request that we not complicate it any further. Specific offense characteristics should be based on objective criteria whenever possible in the effort to avoid unwarranted disparity.

If the Commission believes there is a need to increase or decrease a sentence based on the factors incorporated in Amendment 13, I would recommend that you include these factors as an encouraged departure in the Application Notes to the current §2F1.1 and §2B1.1, or the future §2F1.1.

Thank you for allowing me to submit comments for your consideration. I hope you have found these comments useful in your efforts to determine the appropriateness of Amendment 13. If you should require any additional information, please do not hesitate to contact me at (850) 521-3556.

Sincerely,

E. Jerry Moore, Jr.
Supervising U.S. Probation Officer

cc: W. Stephen Townley
Chief U.S. Probation Officer

ejm/

NEW YORK / NEW JERSEY HIDTA
HIGH INTENSITY DRUG TRAFFICKING AREA

March 13, 2001

U.S. Sentencing Commission
One Columbus Circle, NE
Washington D.C. 20002-8002

To Whom It May Concern,

I am writing to you in regard to your proposed amendment #18. The attached signed petition is in support of not amending the guidelines which would reduce the sentences of Illegal Aliens who have Illegally Re-entered the United States after being convicted of aggravated felonies prior to being deported. The attached list of Deputy U.S. Marshals, New York City Police Officers, DEA Special Agent, U.S. HUD Special Agent and USINS Special Agents are all assigned to the New York New Jersey High Intensity Drug Trafficking Area (H.I.D.T.A.) Fugitive Task Force.

At H.I.D.T.A. one of our primary responsibilities is the investigation and apprehension of Fugitves who have been identified as high level, narcotic traffickers and or Felons who have committed violent crimes with a narcotic nexus. Over the last five years we have been extremely successful in obtaining cooperation agreements from Illegal Re-entry Aggravated Felons based on the guidelines that are currently in effect. If the Sentencing Commission were to reduce the guidelines we (the attached signators) are all convinced that we would get little or no cooperation from any of these defendants. Not to mention, the cases would not be accepted for prosecution by The United States Attorneys Offices in the Southern or Eastern District of New York nor the District of New Jersey as a matter of policy in each of those Districts.

The level of cooperation that we have received in the past from Illegal Re-entry defendants has led us to apprehend some of the nations "MOST Wanted Fugitives". Some of these Most Wanted Fugitives are murderers of both Federal and local Law Enforcement Officers. These Fugitives were apprehended by our Task Force as a direct result of the guidelines now in affect. We respectfully request that the Guidelines regarding Illegal Reentry Cases (8USC 1326) remain the same.

PLEASE SEE ATTACHED PETITION

Respectfully Submitted, Thomas J. Kilbride

Thomas J. Kilbride
USINS Special Agent
HIDTA Fugitive Task Force

[115]

26 Federal Plaza, Suite 29-117 • New York, New York 10278 • (212) 637-6500 • Fax: (212) 637-6621

NEW YORK / NEW JERSEY HIDTA
HIGH INTENSITY DRUG TRAFFICKING AREA

ALL OF THE BELOW ARE ASSIGNED TO THE NEW YORK/NEW JERSEY HIDTA FUGITIVE TASK FORCE WHO ARE OPPOSED TO ANY CHANGE TO GUIDELINES REGARDING VIOLATION OF TITLE 8 USC 1326.

MATTHEW HEALEY, ACTING INSPECTOR IN-CHARGE U.S. MARSHALS SERVICE

MICHAEL HOLLANDER, SUPERVISORY DEPUTY U.S MARSHAL

THOMAS BARRETT, SERGEANT, NEW YORK CITY POLICE DEPARTMENT

JOHN DUNCAN, DEPUTY U.S. MARSHAL

JOSEPH LOBUE, DEPUTY U.S. MARSHAL

DOUGLAS MACLEOD, DEPUTY U.S. MARSHAL

PETER BRESLOW, SPECIAL AGENT, DRUG ENFORCEMENT ADMINISTRATION

ALGARIN, DETECTIVE, NEW YORK CITY POLICE DEPARTMENT

ARCHIBALD AUSTIN, DETECTIVE, NEW YORK CITY POLICE DEPARTMENT

THOMAS GERVASI, DETECTIVE, NEW YORK CITY POLICE DEPARTMENT

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SCOTT ROSENTHAL, DETECTIVE, NEW YORK CITY POLICE DEPARTMENT

CARL SKOGLUND, DETECTIVE, NEW YORK CITY POLICE DEPARTMENT

CHAREE CAREY, SPECIAL AGENT U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT

ROY WRIGHT, DEPUTY U.S. MARSHAL

ELIZABETH CONNER, SPECIAL AGENT, U.S. INS

MARKO ANTICEV, DEPUTY U.S. MARSHAL

COMMENTS OF

THE NEW YORK COUNCIL OF DEFENSE LAWYERS

REGARDING PROPOSED JANUARY 26, 2001 AMENDMENTS TO

THE SENTENCING GUIDELINES

Respectfully Submitted,

NEW YORK COUNCIL OF
DEFENSE LAWYERS

711 Fifth Avenue
New York, New York 10022
(212) 906-8795

Victor J. Rocco, President
Brian E. Maas, Chairman, Sentencing Guidelines Committee

March 13, 2001

NEW YORK COUNCIL OF DEFENSE LAWYERS

COMMENTS OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS REGARDING PROPOSED JANUARY 26, 2001 AMENDMENTS TO THE SENTENCING GUIDELINES

Once again, we would like to thank the Sentencing Commission for the opportunity to present our views on the proposed amendments. The New York Council of Defense Lawyers ("NYCDL") is an organization comprised of approximately 200 attorneys whose principal area of practice is the defense of criminal cases in federal court. Many of our members are former Assistant United States Attorneys, including previous Chiefs of the Criminal Division in the Southern and Eastern Districts of New York. Our membership also includes attorneys from the Federal Defender Services offices in the Eastern and Southern Districts of New York.

Our members thus have gained familiarity with the Sentencing Guidelines both as prosecutors and as a defense lawyers. In the pages that follow, we address those of the proposed amendments published in the Federal Registry on January 26, 2001 which are of interest to our organization.

These comments were prepared by the members of the NYCDL Sentencing Guidelines Committee, as follows: Abraham Clott, Nicholas DeFeis, Nicholas Gravante, Keith Krakaur, Steven Kimelman, Brian Maas, Amy Millard, Michael Miller and Jacqueline Wolff.

I. AMENDMENT 9 - SAFETY VALVE

We support proposed amendment 9 which would eliminate the arbitrary limitation of the two-level downward adjustment for the "safety valve" to defendants with a base level of 26 or greater. The proposed amendment, which will extent the benefit of this reduction to defendants in less serious controlled substances cases, will put less culpable defendants on a level playing field

with defendants now eligible for the safety valve.

The present guideline, which does not permit the reduction if the quantity of controlled substances is too low to trigger applicability of a mandatory minimum sentencing law, has two perverse effects. First, the present guideline discourages even limited cooperation with the authorities in less serious cases because the downward adjustment is not available even if the cooperation is provided. Second, the present guideline results in defendants whose offenses involve greater quantities of controlled substances corresponding to a base offense level of 26 receiving the same sentence as defendants whose offenses involve a lower quantity of controlled substances corresponding to a base offense level of 24, even if the latter defendants also provided information. For example: Under the present guideline, a defendant who distributed 1.8 kilos of cocaine and satisfies the "safety valve" receives the same guideline sentence as one who distributes 400 grams of cocaine, even if the 400 gram defendant has also met the criteria for the "safety valve." The defendant in the 400 gram case should receive the same benefit from providing full and complete information as does the defendant in the 1.8 kilo case, and the presumptive sentence for distributing 400 grams should be lower than for distributing 1.8 kilos. The proposed amendment will excise this anomaly from the Guidelines.

II. AMENDMENT 12 - ECONOMIC CRIME PACKAGE

Part A. Proposals for Consolidation of Theft, Property Destruction and Fraud Guidelines.

The NYCDL supports the consolidation of §§ 2B1.1, 2B1.3 and 2F1.1. We also support the use of the use of the base offense level of six for the consolidated guideline. As stated in our comments regarding the proposal to create a new table, we believe that the existing fraud table should be used with some modification to address the thefts under $1,000 that are currently treated

at offense level 5.

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

As to the remaining proposals included in Part A, the NYCDL joins in the comments of the Federal Defender.

Part B. Proposals to Revise Consolidated Loss Table.

The NYCDL is opposed to the Commission's proposal to revise the consolidated loss table. Each of the three tables proposed by the Commission would substantially increase the punishments meted out to defendants convicted of theft, property destruction or fraud. While the revisions in the three options vary in emphasis, each would expose a defendant to a two level increase for any loss exceeding $70,000, a four level increase for any loss exceeding $200,000, and a six level increase for any loss exceeding $20 million. Surprisingly, the Commission offers no rationale for these changes.

All available data indicates that the Guideline's existing loss ranges more than adequately meet the needs of the criminal justice system. They are also perfectly compatible with the Commission's objective of seeking a consolidated loss table. As it is, however, each of the three proposed options goes well beyond what is required to cure any potential for disparate penalties for theft and fraud cases with similar economic harm. For example, currently a ten level increase is imposed for a theft where loss exceeds $200,000 and a fraud where loss exceeds $500,000. Under the proposed revisions, this disparity would be resolved by imposing a ten level increase on a loss

of as little as $80,000 (see Option 3) or $120,000 (Options 1 and 2). This result, which will be replicated throughout the consolidated loss table if any of the three proposed tables is adopted, has nothing to do with ironing out the disparities which exist between the theft and fraud tables.

Similarly, these increases in penalties for losses cannot be justified by the Commission's statement that the proposed revisions are "designed to minimize fact-finding and the appearance of false precision" in connection with the calculation of loss. In our view, the small broadening of the categories included in each proposal will not have this otherwise desirable result while the substantial increase in the offense levels is unrelated to this goal.

The NYCDL urges the Commission to reject each of the three options set forth in Part B of the proposed amendment. Instead the NYCDL recommends adoption of the current fraud loss table for use in the consolidated table. This makes considerable sense for several reasons. First, as discussed above, the three proposed options would impose a thoroughly unjustified increase in penalties associated with particular levels of loss. Second, although the current fraud table does present a potentially "false precision," the participants in the system have successfully adapted the table to the reality of specific cases so that the judges who employ the table every day, and frequently sentence defendants at or near the bottom of the applicable guideline range, are apparently satisfied with the sentencing ranges being presented. Third, the theft table does not offer an appropriate template since it is keyed off of a base offense level of four. Fourth, adoption of the current fraud table would eliminate the need for the blizzard of one level adjustments identified in Part D of the proposed amendment which exist only because the Commission has proposed eliminating the current one level increase for losses between $2,000 and $5,000.

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

Part C. Revised Definition of Loss Consolidation of Loss Definition for Theft, Fraud and Property Destruction Crimes

The NYCDL endorses the Commission proposal to consolidate the loss definition for Theft, Fraud and Property Destruction offenses into a single loss definition guideline. In terms of individual harm, defendant culpability, and breach of societal norms, these offenses are largely synonymous. Most thefts could be charged as frauds, and vice versa, the motives for such offenses are typically the same, and the same social and individual harm is caused. Such offenses are punished under their different guidelines in such similar fashion that it is doubtful that the Commission intended to create different outcomes in the first place. The minor variations in definitions and application notes under the different sections have led to disparate results and endless speculation as to the Commission's intention in drawing such fine distinctions.

Since a single loss definition would eliminate the confusion surrounding the current model, streamline application of the guidelines, and impose consistency of definition and application, the NYCDL endorses this aspect of Amendment 12C.

(a) Proposed Change in Definition of "Loss"

The Commission invites comment regarding two Options for a new definition of "actual loss." The NYCDL objects to the definition proposed in Option 1 whereby actual loss is defined as "reasonably foreseeable pecuniary harm that resulted or will result from the conduct for which the defendant is accountable under § IBI.3 (Relevant Conduct)," and further defining such harm as that "the defendant knew or under the circumstances of the particular case, reasonably should have known, likely would result in the ordinary course of events, from that conduct." This position is in accordance with our prior submission to the Commission in March of 1998.

It is fundamentally sound to hold a defendant accountable for factors over which he has control. The current guidelines do just that. The change proposed by the Commission

in Option 1 departs dramatically from this sound approach because it imports into the calculation notions of foreseeable harm and consequential damages, thus introducing the concept that a defendant might deserve a longer prison sentence because of factors over which he had no control. This is contrary to current case law where losses resulting from acts over which the defendant had no control are routinely excluded. See e.g., United States v. Marlatt, 24 F.3d 1005 (7th Cir. 1994) ("The reason for the distinction is no doubt to prevent the sentencing hearing from turning into a tort or contract suit."); United States v. Barker, 89 F.3d 851, 1996 WL 294141, at *2 (10th Cir.) (Mem.) ("We acknowledge that consequential damages, except in a few instances inapplicable to this case, are not to be included in the calculation of loss for purposes of § 2F1.1. ... This policy prevents a sentencing proceeding from becoming a tort or contract action, and promotes uniformity in sentencing."); United States v. Dadonna, 34 F.3d 163, 170-72 (3d Cir. 1994); United States v. Izydore, 167 F.3d 213, 223 (5th Cir. 1999).

In short, the proposed Option 1 appears to run counter to established precedent where there does not appear to be real conflict in the Circuits. Indeed, the October 20, 1998 Report to the Commission regarding the Field Test of Proposed Revisions to the Definition of Loss in the Theft and Fraud Guidelines admits that the proposed "foreseeability" definition "largely avoids concepts in current case law concerning 'intervening acts', 'multiple' or 'but-for' causes and other terms defining the causal nexus required to attribute loss to a defendant." p. 10 (emphasis added.) While there may be many cases in which foreseeable consequential damages are so significant that an upward departure may be warranted, the NYCDL opposes the proposal to make consequential damages part of the definition of loss.

Furthermore, adding consequential damages to the loss definition will generate a significant burden of litigation and fact-finding, to be borne by parties, attorneys,

probation officers, district judges and circuit judges. See United States v. Newman, 6 F.3d 623, 630 (9th Cir. 1993) ("if we were to include consequential losses, each crime such as arson or theft would have its own peculiar valuation problems, regardless of the value of the property itself. Under this system, determining a defendant's offense level would be too complex and would not necessarily reflect the defendant's culpability accurately"); United States v. Wilson, 993 F.2d 214, 217 (11th Cir. 1993) ("avoiding the calculation of consequential injury relieves the district court of a potentially onerous fact-finding burden and may also promote the objective of uniformity in sentencing outcomes").

Indeed, participants in the 1998 Field Test found "unworkable" the ability to determine the limits of "reasonably foreseeable." As a result of the Field Test we already know that this proposed definition will do nothing to cure sentencing disparities; rather, disparities may well be increased.[1] The unusual case in which the loss determination does not adequately capture the "harmfulness and seriousness of the conduct" is already accounted for under Application Note 11 of the existing guideline, where a variety of possible upward departures are invited. The NYCDL therefore opposes Option 1 of Amendment 12C's proposed definition of loss.[2]

The NYCDL favors Option 2, which defines actual loss as "the pecuniary harm that resulted or will result from conduct for which the defendant is accountable," further

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[1] The participants in the Field Test were asked to apply the foreseeability standard to a hypothetical loss scenario. Four different "indirect" or "consequential" losses were posited. Of the 19 judges participating, 10 included all four losses as "reasonably foreseeable," 4 judges included three indirect losses, 3 judges included only two of the indirect losses, and 1 judge included two of the indirect losses but different losses from the two losses included by the group of 3 judges.

[2] For the same reasons, the NYCDL favors the deletion of the special rule in procurement fraud and product substitution cases. Instead, courts should have discretion to depart upward in cases where reasonably foreseeable consequential damages and administrative costs are so substantial that the direct damages sustained by the victim do not adequately reflect the defendant's culpability.

defining "pecuniary harm" using the loss definition currently found in Application Note 2 to § 2B1.1. The NYCDL does, however, object to the inclusion in this definition of loss which "will result" from the defendant's conduct. It invites speculation and burdensome litigation similar to that caused by Option 1, as to how to determine what losses "will result" from a defendant's conduct and how far in the future a court should look to make such a determination. The NYCDL, therefore, endorses Option 2 of the proposed loss definition with the caveat that it be limited to loss that has already resulted.

With respect to the balance of Amendment 12C, the NYCDL endorses the following options:

(b) Time of Measurement for Computing Loss

The Commission seeks comment on two Options regarding when loss should be measured. The NYCDL believes that the time of detection is too subjective a test and will lead to unnecessary litigation. Thus, of the two options, the NYCDL generally favors Option 1 measuring loss at the time of sentencing. See United States v. Kopp, 951 F.2d 521, 535 (3d Cir. 1992) ("actual loss incurred at the time of sentencing remains the basic 'loss'"). However, we also recognize that for certain theft crimes, where property either appreciates or depreciates after the theft, the appropriate point for measuring loss may be the date of the theft itself.

(c) Exclusions From Loss - Interest and Other Opportunity Costs

The Commission invites comments regarding two proposed Options for "Exclusions from Loss" governing when interest and other opportunity costs should be excluded from loss. The NYCDL favors Option 1. As discussed above, actual loss should ordinarily drive the calculation of the loss enhancement, if any. The length of a jail sentence under the Guidelines should not be determined upon consequential damages, and the same principle, we submit, precludes

the inclusion of interest and other opportunity costs. Sentencing should not be based upon frustrated expectations. For purposes of calculating loss, we do not believe there is a meaningful distinction between the time-value of money diverted from a victim who could otherwise have invested his funds, and the interest another victim expected to receive on a fraudulent transaction itself. This is particularly true when the bargained for return is itself part of the fraudulent misrepresentation. A defendant who fraudulently borrows $100 on the promise to repay $150 is no more culpable than the defendant who steals $100 on the promise to repay $125. Even if the rule were otherwise, in most cases interest would be only a small portion of the overall loss figure.

We therefore endorse Option 1, excluding all opportunity costs from loss, as an appropriate exclusion which will also resolve a conflict in the Circuits.

(d) Additional Exclusions From Loss: Government Costs, Victim Costs and Value of Economic Benefit Transferred to Victim

Although the NYCDL favors the inclusion of government costs, victim costs incurred to aid the government, and the value of the economic benefit the defendant transferred to the victim in "exclusions from loss," we are concerned that the list of excludable items be construed as exhaustive. As the list of excludable items stands now, should the Commission adopt the "reasonably foreseeable" language in its loss definition, courts will find their hands tied should they wish to exclude unlisted items from the loss definition even where it is unlikely the Commission would have intended such costs be included. For example, should the victim's legal fees, i.e. those not incurred to aid the government, be included or excluded in the loss amount? What about the food and transportation costs incurred by the victim's lawyer in prosecuting the civil action against the defendant? The language of the proposed exclusion could indicate to a Court that it must include all such indirect costs because they are not specifically listed as exclusions and could be construed as "reasonably foreseeable." This would appear contrary to the Commission's recognition that, "the

sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence." See proposed Guideline regarding Estimation of Loss.

The NYCDL thus proposes adding language similar to that in the proposed Guideline regarding Upward Departure Considerations; that is, that the list of Exclusions from Loss is "a non-exhaustive list."

(e) Specific Situations Where Economic Benefit to the Victim Is Included in Loss

The Commission also proposes to include several specific examples of scenarios where an economic benefit transferred to a victim cannot be considered by the Court as an exclusion from loss. We believe that these examples would be better placed in Upward Departure Considerations than presented as essentially exclusions to the Exclusions in the loss definition.

The Commission proposes the following two alternative scenarios: (1) if the benefit transferred is *de minimus* in value it cannot be excluded from the loss amount or (2) if the benefit "has little or no value to the victim because it is substantially different from what the victim intended to receive," it cannot be excluded from the loss amount. The NYCDL is opposed to the latter formulation for the same reason it supports the exclusion of interest and opportunity costs from the loss calculation; the criminal law is not there to address frustrated expectations. That is best handled in the civil arena where extensive discovery without the involvement of the judiciary can resolve these types of issues. Punishment of the defendant must focus on his actions and his intent; the defendant should not be subject to greater punishment simply because the particular victim is unhappy with an economic benefit conferred on him where objectively it is a true economic benefit. In the unusual case where the economic benefit is so drastically different in kind from what the victim bargained for, an upward departure may well be warranted. But adding an exclusion to an exclusion may prove more confusing than illuminating, unnecessarily complicating an attempt to

simply and clarify a definition for loss.

Another proposed subsection [IV(2)] precludes courts from excluding from loss "services fraudulently rendered to victims by persons falsely posing as licensed professionals or goods falsely represented as approved by a government regulatory agency or goods for which regulatory approval by a government agency was obtained by fraud." We believe that this is an inappropriate response to cases such as United States v. Maurello, 76 F.3d 1304 (3d 1996) and United States v. Barnes, 125 F.3d 1287 (9th Cir. 1997) which held that the value of the services rendered should be offset against the cost of the service. All loss definitions, those currently in the Guidelines and those proposed here, turn on "pecuniary" harm. The value of the services as a factor in measuring "procuring harm" and the Guidelines should not be distinguishing between certain classes of frauds. Such factors which relate to the *nature* of the fraud relevant to departure considerations — not pecuniary harm. We therefore believe that such factors too would be more appropriately considered as factors possibly supporting an upward departure rather than creating a blanket exclusior incorporated into the definition of loss.

(f) Ponzi-scheme Exclusion

Option 1 in the special rule in the Exclusion from Loss section providing that in a Ponzi scheme, the gain to an individual investor in the scheme shall not be used to offset the loss to another investor, represents a thoughtful proposal which avoids both the over-punishment created by excluding all payments to victims, including the return of their principal, United States v. Mucciante, 21 F.3d 1228, 1237-38 (2d Cir.), cert. denied, 513 U.S. 949 (1994); United States v. Munoz, 9th Cir. No. 99-50195 (Dec. 6, 2000) and under-punishment by crediting certain victims' "profits" against others' losses. See, United States v. Holiusa, 13 F.3d 1043 (7th Cir. 1994). The NYCDL, therefore, endorses Option 1.

(g) Estimation of Loss

The definition of loss is grounded in "pecuniary harm" to the victim caused by defendant's actions. Although factors "such as scope and duration of the offense and revenues generated by similar operations" may have a place in departure considerations, they have limited relevance, if any, to actual or intended pecuniary harm and should thus be moved from the list of factors which may be considered in estimating the amount of the loss to the list of factors under Departure Considerations.

(h) Use of "Gain" as an Alternative to Loss

The Commission seeks comment on three proposals whereby gain to a defendant may be used as an alternative to loss in certain circumstances and one whereby gain to the defendant is considered as one of several suggested factors a court can consider in determining loss. We believe that the decision of the Third Circuit in United States v. Kopp, 951 F.2d 521, 530 (3d Cir. 1991), is correct. Thus, we endorse Option 4 where gain may be used as an alternative to loss only where actual loss cannot be calculated.

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

Note that the NYCDL does not endorse the proposed Upward Departure provision which speaks of gain in terms of defendant's "anticipated" profits. The NYCDL favors a provision in the Upward Departure Considerations, which would allow the courts to consider taking a defendant's actual gain into account under circumstances where the loss calculation does not fully capture the seriousness of the conduct. Actual gain can be determined in most instances without resorting to mini-hearings; using "anticipated profits" as a yardstick will naturally result in extensive litigation to determine which profits were "anticipated."

(i) Special Rules: Government Benefits

The Commission has made changes to the special rules governing government benefits cases. The new language, including an example as guidance, resolves a split in the Circuits. We believe the Commission's resolution is correct in that it follows the Fourth Circuit holding in United States v. Dawkins, 202 F.3d 711 (4th Cir. 2000), which states that the amount of loss is the amount of benefits the defendant actually received less the amount he would have received had he not committed the fraud. Furthermore, this reasoning is more in line with the Commission's proposal to remove from the loss calculation economic benefits received by the victim than the reasoning set forth in the conflicting Circuits (e.g. the Tenth Circuit) where the loss number includes all the benefits received, regardless of whether the defendant was entitled to at least a portion of them.

The NYCDL, therefore, endorses the Commission's additional guidance contained in the special rule governing government benefits.

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

This proposed amendment purports to resolve a circuit conflict between alternative approaches to a defendant's under-reporting of income on both individual and corporate tax returns.

The first approach identified in the proposed amendment is the approach in United States v. Cseplo, 42 F.3d 36 (6th Cir. 1994), in which the court aggregated the corporate tax liability with the individual tax liability without giving any credit for the corporate tax exposure. The second approach is set out in United States v. Harvey, 996 F.2d 919 (7th Cir. 1993), in which the court held that the proper computation of tax loss requires first that the corporate tax be computed and then, before the individual tax is computed, that the corporate tax liability be subtracted from the gross unreported corporate income to determine the gross unreported income at the individual level.

The proposed amendment claims to be adopting the United States v. Harvey approach through the addition of new sub-paragraph (B) to § 2T1.1(c)(i) and the addition of clarifying language to Application Note 7. Although we agree that the Harvey approach is the fairer of the two, we note first that absent the clarifying language of proposed Application Note 7, the new amendment does not make clear that the Commission is adopting the Harvey approach. The language of the proposed amendment states that the tax loss is "the aggregate tax loss from the offenses taken together." This language does not on its face make clear that the corporate tax exposure is to be deducted from the gross unreported income at the corporate level before the gross unreported income at the individual level is computed. While new Application Note 7 presents an example based upon the Harvey facts which clarifies the Commission's intent, we would urge that the Commission, before it adopts any amendment of this sort, find clearer language in which to state its intent.

However, before the Commission adopts any amendment on this point, we would urge the Commission to consider the discussion of this issue by Judge Newman in United States v. Martinez-Rios, 143 F.3d 662 (2d Cir. 1998). Judge Newman noted that the 1995 amendments to Guidelines § 2T1.1(c)(1)(A) allows the defendant to claim "the benefit of legitimate but unclaimed deductions." As Judge Easterbrook noted in the Harvey decision, this approach was not available

under the 1991 amendments so that the Harvey court could not consider whether the corporate tax liability would be properly decreased by the deduction of the amount of the unreported income that could properly have been paid to the individual defendant.

Thus, it is inaccurate to present the Harvey and the Cseplo approaches as the only two possible approaches to the situation where a defendant fails to report the same dollars on both corporate and individual returns. As Judge Newman points out in Martinez-Rios, there may well be circumstances where the unreported corporate income would, when disbursed to the corporate owner, be subject to a corresponding proper deduction thereby making it inappropriate to aggregate both corporate and individual income tax liability. Therefore, before the Commission adopts any amendment purporting to address the circuit conflict on this issue, the Commission should make clear that the defendant is entitled to a proper deduction from the corporate income of the payment of the funds to the individual defendant before calculation of the corporate tax liability.

III. AMENDMENT 13: AGGRAVATING AND MITIGATING FACTORS IN FRAUD AND THEFT CASES

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

In our view, the framework of proposed Option 2 is preferable to Option 1. Option 1, which entails four levels of aggravating and mitigating factors and substantial weighing by the judge, is inherently more complicated than Option 2 and unnecessarily so. Such a complex standard is not in keeping with the policies underlying the Sentencing Guidelines. See United States Sentencing Commission, Guidelines Manual, Ch. 1, Pt. A, § 3 (Nov. 2000) ("[T]he greater the complexity . . . the less workable the system."). Option 1 thus places a greater burden on the courts

and thereby may necessitate more factual hearings. Most importantly, Option 1 provides for a 4-level increase or decrease in sentencing, as opposed to Option 2, which provides for a 2-level increase or decrease. We believe that in adopting a new sentencing scheme, starting out with a more conservative two-level adjustment is the more prudent course of action.

We note that Option 1 contains a list of non-exhaustive aggravating and mitigating factors, while the factors listed in Option 2 are purportedly exhaustive. While the overall framework of Option 2 is generally preferred, we nevertheless favor an approach that provides for a non-exhaustive list of factors. As a matter of policy, it has been the Commission's intent before now "not . . . to limit the kinds of factors . . . that could constitute grounds for departure in an unusual case." See United States Sentencing Commission, Guidelines Manual, Ch. 1, Pt. A., § 4(b) (Nov. 2000). Indeed the Commission has noted the difficulty in "prescrib[ing] a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision." Id. For example, the factors listed in Chapter 5, Part K of the Guidelines are not exhaustive. See id. Amending the theft and fraud statutes pursuant to Option 2, but with a list of non-exhaustive factors would enable judges to apply the principles embodied in the spirit of the amendment to situations involving facts and circumstances that may not have been contemplated. This would allow judges more flexibility and more opportunity to exercise their discretion in a given case thereby making the Guidelines a constantly evolving framework based on both a statutory scheme and common law.

With respect to several of the aggravating factors that are suggested by the proposed amendment, we are concerned that several of them are highly generic and could lead to unwarranted sentence enhancements. Aggravating factors such as those having to do with "national security or military readiness", or "irreplaceable items of cultural, historical, or archeological significance" seem appropriately considered. However, factors dealing with the "non-monetary" e.g., psychological

effect on victims or the effect on the "solvency" of the victims are so generic that they likely will apply in virtually every case. Accordingly, they should not be treated as separate aggravating factors. These types of considerations may be more appropriately left to specific offense characteristics.

The last factor listed as a proposed aggravating factor (dealing with the amount of loss) is of particular concern. This factor allows a sentence level increase or decrease depending upon where in the range of loss (determined by the loss table) the loss amount falls. Accordingly, a sentence could be increased two levels beyond the loss table range simply because the loss was on the high end of the specified range. Conversely, a sentence could be decreased two levels simply because the loss was on the low end of the range. Such a provision undercuts the purpose of the loss tables. The loss tables were presumably thoughtfully and carefully devised and sufficiently meet the desire to step up sentences in proportion to the amount of loss. Adding an additional loss factor to be considered in aggravation or mitigation of a sentence is therefore unwarranted.

IV. AMENDMENT 14 - SENTENCING TABLE AMENDMENT AND ALTERNATIVE SENTENCING AMENDMENT

This proposed amendment includes as Option 1 an expansion of Zones B and C in the Sentencing Table by expanding Zone B through Offense Level 12 and by redefining Zone C as covering Offense Levels 13-16 for offenders in Criminal History Category I with a similar expansion for defendants in Criminal History II. The NYCDL strongly supports this proposed amendment as it will provide sentencing judges with greater flexibility in the sentencing of first time offenders as well as of offenders whose offense levels fall at the lower end of the Guidelines. The expansion of the use of probation and house arrest for first offenders is generally consistent with the consideration of the factors set forth in 18 U.S.C. § 3553 to be considered when imposing sentence. We believe that the requirement of incarceration that currently exists for defendants whose offense levels are as

low as level 11 results in short periods of incarceration for individuals for whom the use of probation and house arrest more appropriately satisfies the goals of sentencing.

As to proposed Option 2 which proposes the addition of a new § 5A1.2 allowing for a 2 point offense level decrease for less serious economic crimes, the NYCDL believes that an addition to the Guidelines of this sort is long overdue to address the sentencing of first time non-violent offenders. We believe that this proposed amendment in conjunction with the proposed amendment providing for a mitigation reduction in fraud cases will result in more appropriate sentencing of persons who play a minor role in a large scale fraud. These defendants currently face sentences disproportionate to their actual involvement because of the application of the fraud tables and the frequent unavailability of the minor role adjustment pursuant to § 3B1.2.

The NYCDL does not believe that this Option 2 need necessarily be an alternative to the otherwise salutary expansion of Zones B and C of the Sentencing Table and urges the Commission to adopt both Options.

V. AMENDMENT 18 - ILLEGAL RE-ENTRY

We support amending the illegal re-entry guideline to limit applicability of the 16-level enhancement to only the most aggravated cases of illegal re-entry and to provide a more graduated approach so that the length of sentence for re-entry subsequent to deportation following conviction of an aggravated felony depends, in part, on the relative seriousness of the aggravated felony. We agree with the comments submitted on behalf of the Federal Public and Community Defenders who recommend against adoption of either options 1 or 2 and who explain at length why the seriousness of the aggravated felony cannot be measured adequately by categorizing offenses and why time actually served is a better measure of seriousness than the sentence actually imposed.

We recognize, however, that the Commission may question whether time actually served can always be determined easily or whether time actually served may be a factor that varies widely from jurisdiction to jurisdiction and, as a result, may seek some measure of the seriousness of the aggravated felony other than its category or time actually served. We suggest that the Commission has already addressed the issue of measuring the seriousness of a prior conviction in the formulation of the Criminal History Table in § 4A1.1 and that this measure may provide an alternative measure for the seriousness of a prior aggravated felony. Accordingly, as an alternative to proposed subsection (b)(1)(A), the Commission may wish to consider the following:

(A) If the conviction was for an aggravated felony; and -

(i) the defendant is in Criminal History Category VI, and the aggravated felony gives rise to 6 Criminal History points as determined by § 4A1.1, increase by 16 levels;

(ii) if subsection (i) does not apply and the defendant is in Criminal History Category VI, increase by 10 levels;

(iii) if neither subsections (i) nor (ii) apply and the aggravated felony offense gives rise to 6 or more Criminal History point as determined by § 4A1.1, increase by 8 levels;

(vi) otherwise increase by 6 levels.

VI. AMENDMENT 20 - MONEY LAUNDERING

The proposed revisions of the money laundering guidelines would divide defendants into two categories: those who committed underlying offenses from which the laundered funds were derived (so-called "direct" money launderers); and other offenders ("third party" money launderers).

Direct money launderers, comprising approximately 86% of the offenders convicted of money laundering offenses according to the Sentencing Commission, would be generally be subject to punishment at the base offense level assigned to the underlying offense. Third party offenders would be subject to a base offense of 8 plus offense levels based on the amount of laundered funds corresponding to the tables set out in Section 2F1.1 ("Fraud and Deceit").

The NYCDL generally approves this approach. The existing guidelines, which punish some varieties of money laundering at base offense level 23, have sometimes created a "tail wagging the dog" situation where the money laundering charge can involve greater penalties than the underlying criminal conduct that generated the funds. This is especially troubling in situations where the money laundering involves little more than the receipt and deposit of funds that were illegally generated. The prospect of charging ordinary receipt and deposit cases as money laundering charges has given prosecutors improper leverage in plea negotiations and undermined the intent of the sentencing guidelines. The proposed amendments effectively address this problem.

We note, however, that the proposed amendments do not require a conviction on the underlying offense for the generally higher base offense level for direct money laundering to apply. Conceivably, in instances where proof is insufficient to convict beyond a reasonable doubt of the underlying offense, but sufficient to prove this offense by a preponderance of the evidence, a sentencing court could still sentence a defendant as a "direct" money launderer. While the courts are still sorting out the impact of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), we merely note the potential due process issue raised where a defendant has not been convicted of the underlying offense. The application notes provide no guidance on how the sentencing court is to determine whether the defendant has "committed the underlying offense." To ameliorate potential *Apprendi* and due process concerns, we believe that an acquittal of the underlying offense should preclude

sentencing under the guidelines for direct money laundering.

The NYCDL is concerned that certain specific offense characteristics, contained in the proposed amendments, may also implicate *Apprendi* issues or unduly complicate sentencing proceedings. For example, the upward adjustment under proposed (2)(B) (if the laundered funds were used to promote further criminal activity) should be permitted only if a defendant is convicted under 18 U.S.C. § 1956 (a)(3)(A) (requiring, *inter alia*, that the defendant have the intent "to promote the carrying on of specified unlawful activity"). Notably, proposed upward adjustment (2)(D) avoids this potential issue by requiring, in order for the adjustment to apply, that the defendant first be convicted of certain provisions of § 1956.

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

We take no position on the proposed upward adjustment for those "in the business of laundering funds." See proposed § 2S1.1(b)(2)(A). Since convictions for both third party and direct money laundering will often require reference to tables reflecting the amount of the fraud and/or laundered funds, professional money launderers will often be subject to higher guidelines than other offenders, without need for a further adjustment. Nonetheless, those "in the business" do seem

to implicate different and potentially more serious conduct than that posed by the occasional money launderer. The application notes provide helpful guidance for determining whether a defendant should be subject to the adjustment. The Commission has specifically asked for comments on whether the adjustment should also apply to direct money launderers. While we take no position on the need for an upward adjustment, we are unaware of any reasons to exempt direct money launderers from its scope.

The Commission has also requested comment about a potential enhancement of one-level that would apply to direct money launderers who launder at least $10,000 in funds but are not subject to any other enhancements. The wisdom of this enhancement may turn on whether any or all of the other proposed enhancements are enacted. If all of the proposed enhancements are enacted, this additional enhancement will punish only the direct money launderers who have engaged in the least serious conduct, i.e., money laundering that does not otherwise warrant an enhancement. Thus, less culpable offenders may be subject to greater punishment under the money laundering guidelines than they would be subject to for committing the underlying offense. We question the need for reintroducing a feature of the money laundering guidelines that the amendments otherwise corrected – the possibility that money laundering could be punished more severely than underlying criminal conduct.

The NYCDL approves the proposed two level decrease for certain offenders convicted solely of violating 18 U.S.C. § 1957. This approach seems consistent with the intent to reduce penalties for offenders who are involved in less serious types of money laundering. For the same reason, we oppose the amendment referencing convictions under 18 U.S.C.§ 1960 (relating to, *inter alia*, unlicenced money transmitting businesses) to § 2S1.3 (Structuring Transactions) in place of the current reference to § 2T2.2 (Regulatory Offenses). The amendment would subject less

serious offenders – who have not even been convicted of money laundering offenses – to appreciably more serious penalties, determined in part by the amount of funds involved. The proposed amendments will subject money transmitters that are in the business of laundering funds to enhanced penalties. The commentary provides no reason for subjecting regulatory offenders to penalties more severe than those imposed under § 2T2.2. Indeed, this cannot be an area of pressing concern, as the background to this guidelines states, "Prosecutions of this type are infrequent." In sum, there is no apparent need for this dramatic change.

The Commission sets forth three possible options for dealing with the rare case where a third party money launderer may be subject to a greater penalty than a direct money launderers, i.e., a defendant who committed the underlying offense. This may happen where the value of the loss, in a case involving fraud, for example, is less than the value of the funds that were laundered. Of the three options, the NYCDL prefers Option 2, which would permit a Court to substitute the amount of the loss under the fraud tables for the amount of the laundered funds in cases involving this anomaly. Our next favored option is 3, which is not to address this unlikely situation (the Commission's analysis has uncovered no case implicating this potential problem), and to assume the anomaly would be grounds for a departure motion. Option 1, which would permit a departure, but limit the departure to the guidelines applicable to direct money laundering, seems contrary to the intent of punishing direct money launderers more severely than third party offenders.

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

VII. COMMENTS ON PROPOSED AMENDMENT 13: AGGRAVATING AND MITIGATING FACTORS IN FRAUD AND THEFT CASES

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

In our view, the framework of proposed Option 2 is preferable to Option 1. Option 1, which entails four levels of aggravating and mitigating factors and substantial weighing by the judge, is inherently more complicated than Option 2 and unnecessarily so. Such a complex standard is not in keeping with the policies underlying the Sentencing Guidelines. See United States Sentencing Commission, Guidelines Manual, Ch. 1, Pt. A, § 3 (Nov. 2000) ("[T]he greater the complexity . . . the less workable the system."). Option 1 thus places a greater burden on the courts and thereby may necessitate more factual hearings. Most importantly, Option 1 provides for a 4-level increase or decrease in sentencing, as opposed to Option 2, which provides for a 2-level increase or decrease. We believe that in adopting a new sentencing scheme, starting out with a more conservative two-level adjustment is the more prudent course of action.

We note that Option 1 contains a list of non-exhaustive aggravating and mitigating factors, while the factors listed in Option 2 are purportedly exhaustive. While the overall framework of Option 2 is generally preferred, we nevertheless favor an approach that provides for a non-exhaustive list of factors. As a matter of policy, it has been the Commission's intent before now "not . . . to limit the kinds of factors . . . that could constitute grounds for departure in an unusual case." See United States Sentencing Commission, Guidelines Manual, Ch. 1, Pt. A., § 4(b) (Nov. 2000). Indeed the Commission has noted the difficulty in "prescrib[ing] a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision." Id. For example, the factors listed in Chapter 5, Part K of the Guidelines are not exhaustive. See id.

Amending the theft and fraud statutes pursuant to Option 2, but with a list of non-exhaustive factors would enable judges to apply the principles embodied in the spirit of the amendment to situations involving facts and circumstances that may not have been contemplated. This would allow judges more flexibility and more opportunity to exercise their discretion in a given case thereby making the Guidelines a constantly evolving framework based on both a statutory scheme and common law.

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

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March 26, 2001

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

Re: Proposed Amendment: Money Laundering

Dear Judge Murphy:

We write on behalf of the National Association of Criminal Defense Lawyers to express our position regarding the proposed Money Laundering Guideline Amendments. We commend the Commission staff for the extensive work that it has done in an effort to resolve current application problems with the existing money laundering guidelines. It is the experience of our membership that the existing money laundering guidelines often result in significantly enhanced levels of punishment over the underlying offense from which illegal proceeds were derived and that prosecutors have utilized this disparity to exert leverage in the plea bargaining process. The Commission has recognized this potential for abuse in its past analysis of the money laundering guidelines.

The NACDL endorses the provisions of the proposed guidelines which tie the offense level for direct money laundering to the underlying criminal conduct that was the source of the criminally derived funds. We believe that this structure will

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dramatically decrease the potential for anomalous applications and coercive plea bargaining practices. While the proposed amendment is a marked improvement over the existing guidelines, there are several features of the proposal that we believe should be changed. Although the proposed amendment fails in several respects to cure underlying problems with the money laundering guidelines, we do wish to indicate our strong support for an amendment following the basic structure proposed by the Commission during this amendment cycle.

In this regard, we urge the Commission to reject the position of the United States Department of Justice expressed in a February 8, 2001, letter to you by Robert S. Mueller, Acting Deputy Attorney General. In his letter, Mr. Mueller indicated that while he shared the concern that some sentences under the existing guideline were too severe, especially in small scale fraud cases, the Department of Justice could not support the current proposal. Mr. Mueller suggested that the Commission refrain from acting on a money laundering amendment in order to allow the Department of Justice to more fully examine the proposal and provide alternative proposals. Mr. Mueller's comments ignore the extensive six year effort by the Commission to deal with this problem.

The Department of Justice suggestion that additional review is necessary disregards the significant effort by the Commission staff, the Department of Justice, and the Defense Bar in the drafting of these amendments. We urge the Commission to act upon and adopt amendments this cycle and to reject the Department's suggestion for deferral until the next amendment cycle. The current guidelines produce unnecessarily harsh sentences in a variety of cases. Given the recognition of this problem, the guidelines should not be permitted to continue in their current form.

The Commission has requested comments on whether application of subsection (a)(1) should

be expanded to include offenders who otherwise would be accountable on the basis of section 1B.3(a)(1)(B). While the Commission's proposal to extend the reach of section (a)(1) to relevant conduct under section 1B1.3(a)(1)(A) is consistent with the structure of the guideline and would tie culpability for underlying offenses to the offense level for money laundering, the provisions of section 1B1.3(a)(1)(B) would expand the reach of this section beyond the limits apparently intended by the drafters of the amendment. Application Note Two to section 1B1.3 clarifies that jointly undertaking criminal activity encompasses a range of conduct beyond that normally encompassed within the concept of direct responsibility for criminal activity, which underlies the concept of direct money laundering.

The proposed Specific Offense Characteristic under § (b)(2)(A) provides for an increase in the offense level if "the defendant was in the business of laundering funds." Proposed Application Note 4 suggests a totality of the circumstances test to determine whether a defendant was engaged in "the business of laundering funds." Subparagraph (B) of Application Note 4 sets forth four factors which a court can consider in applying the totality of circumstances test. The definition of "engaging in the business" is inherently vague and may lead to disparate applications of the guideline. The NACDL favors an adjustment that would lend itself to more precise determination. For example, Application Note 4(B)(iv) would increase the offense level for prior money laundering convictions. Relevant conduct will also draw in other related money laundering offense conduct. Under the Guidelines's real offense sentencing structure, these determinations should be left to relevant conduct and prior criminal history. Otherwise, this guideline would represent a marked departure from the overall structure of the Guidelines, which utilize criminal history and relevant conduct to

deal with the breadth of a defendant's criminal activities. Use of an "engaging in the business" standard would lead to potential duplicative counting for these elements and would be at odds with other guidelines' treatment of career or repeat offenders.

Proposed § (b)(2)(B) adds as a Specific Offense Characteristic promoting further criminal conduct. The NACDL opposes a promotional Specific Offense Characteristic. While true promotional money laundering as statutorily defined — for example, in § 1956(a)(1)(A)(i) or § 1956(a)(2)(A) — is dealt with as a serious offense, the proposed guidelines would expand the reach of promotional money laundering. In the event that the Commission includes the Specific Offense Characteristic, the NACDL favors the addition of the bracketed language to require that such activities significantly promote further criminal conduct; similarly, the bracketed language in proposed Application Note 5 should be included to limit the reach of the promotional enhancement. These additions do not eliminate our concerns or alter our position that the Commission should entirely delete the Specific Offense Characteristic relating to promotion.

Subsection (b)(2)(C) provides as a Specific Offense Characteristic sophisticated concealment. Both the language of the Specific Offense Characteristic and Application Note 6 should include language indicating that the conduct was intended to conceal. The inclusion of an intent element is necessary since several of the examples of sophisticated concealment in Application Note 6 could be regular course of business transaction unrelated to any intent to conceal a transaction. For example, layering of transactions may be a legitimate business purpose in certain types of commercial transactions that should not give rise to a sophisticated concealment enhancement unless it was done with the intent to conceal. Similarly, transmission of funds derived in the United States