Public Comment

Proposed Amendments

2003

INDEX TO PUBLIC COMMENT

March 17, 2003

Amendment No. 1 – Corporate Fraud

Practitioners' Advisory Group 17
National Association of Criminal Defense Lawyers, Kyle O'Dowd 26
District of Columbia Association of Criminal Defense Lawyers 31
New York Council of Defense Lawyers 39
U.S. Commodity Futures Trading Commission 65
LRN, The Legal Knowledge Company 71
Mercatus Center, George Mason University 77
Hunton & Williams, Steve Solow 83

Amendment No. 2 - Campaign Finance

The Department of Justice 1

Amendment No. 4 – Oxycodone

The Department of Justice 1
Purdue Pharma, L.P. 88
Amy Campbell 94

Amendment No. 5 – Use of Body Armor

The Department of Justice 1

Amendment No. 7 – Involuntary Manslaughter

The Department of Justice 1

Amendment No. 8 – Cybersecurity

The Department of Justice 1
National Association of Criminal Defense
Lawyers, The Electronic Frontier Foundation,
and the Sentencing Project 100
U.S. Internet Service Provider Association 114

Miscellaneous Comment (not summarized)

Anonymous Citizen 116
Harold Sargent 122
Sonya Sargent 123
John J. Shorter 124

Summaries

PUBLIC COMMENT SUMMARIES

March 18, 2003

Amendment No. 1, Corporate Fraud

Practitioners' Advisory Group (PAG)
Co-Chairs Barry Boss and Jim Feldman
Washington, D.C.

The Practitioners' Advisory Group (PAG) requests that its public comment serve as its written testimony for the public hearing scheduled for March 25, 2003. The PAG strongly opposes adoption of a new loss table (options 1A-1C) and a new base offense level keyed to statutory maximum sentences.

Issue 1A Loss Table Revisions

The PAG states that existing white collar sentences are sufficiently severe. Because the Department of Justice statistics show that property crime rates have dropped steadily since 1974, the PAG argues that increasing white collar sentences would not further reduce the crime rate. The PAG notes that as the hypothetical examples in Professor Bowman's February 10, 2003, letter reveal (previously provided to the Commission as public comment in February 2003), sentences for moderately serious white-collar offenses are substantial, even in comparison to sentences imposed for violent crimes and drug-related offenses.

Further, the PAG points out that Commission statistics demonstrate the rate of imprisonment for fraud offenses has increased in the past decade. In addition, the PAG states that white collar offenders are also less likely to receive downward departures than other offenders, specifically drug trafficking offenders. Finally, the PAG argues that amending the loss table is an overbroad response to the Sarbanes-Oxley Act because many other guidelines, many having nothing to do with white-collar crime, incorporate the §2B1.1 loss table by reference.

Base Offense Level Increase

In the PAG's view, increasing the base offense level invites charging abuse by increasing prosecutors' ability to decide sentences at the time of indictment through charging either mail fraud or wire fraud to increase the sentence, or another offense carrying a lesser maximum, to lower it. For this reason, the PAG argues, it cannot reliably be predicted whom this proposal would affect or how it would affect them. The PAG further states that there has been no meaningful opportunity to evaluate the effect of the 2001 Economic Crime Package amendments, and it is troubled that the Commission (and sentencing policy) seems to be succumbing to political pressure in what it terms is a fashion which is reminiscent of the "War on Drugs."

National Association of Criminal Defense Lawyers (NACDL)
Washington, D.C.

A. Sarbanes-Oxley Act

The NACDL believes that comprehensive loss tables are not justified. The NACDL states that there is no suggestion in either the legislative history or the statutory directive that Sarbanes-Oxley was designed to increase sentences for garden-variety fraud or economic offenses, much less those offenses subject to the application of the loss table that do not involve corporate crime. The NACDL believes that there is no basis or proof to suggest that the current guidelines are not serving as a severe enough penalty, or deterrent to, criminal conduct. Therefore, the NACDL states that neither the Department of Justice's proposals nor the three proposed loss tables in paragraph (1)(A) of the issues for comment follow the intent of Congress.

B. 2001 Economic Crime Package

The NACDL states that because there has not been sufficient time to study the effects and impact of the 2001 economic crime amendments and new loss table, there is absolutely no basis to revise the economic crime guidelines at this time. The NACDL suggests that it will take three to four years before the impact of the 2001 amendments can be fully realized in the legal community. The NACDL notes that the incremental increases in offense levels at the higher end of the consolidated theft and fraud tables instituted via the economic crime package significantly exceed those of the previous separate tables. Therefore, an upward trend in sentences for economic crime has already been established by the Commission.

C. Loss Amounts and Culpability

The NACDL believes that loss amounts frequently overstate defendant culpability; therefore, increasing offense levels will continue to exacerbate the overrepresentation of culpability in many cases.

D. Proposed Permanent Amendments

The NACDL states that while the Commission has adequately addressed the Sarbanes-Oxley directives through the targeted specific offense characteristics and upward departures it has enacted in the emergency amendment. However, the NACDL believes the Commission has gone too far with regard to the two level increase for offenses under §2B1.1(b)(2) involving 250 or more victims. The NACDL states that it is particularly concerned that this amendment, when employed in a cumulative fashion together with the new proposed amendment providing for an additional four level increase if the offense substantially endangers the solvency or financial security of a publicly traded company, is unduly harsh.

District of Columbia Association of Criminal Defense Lawyers (DCACDL)
Paul F. Enzinna, Chair, White Collar Defense Committee
Washington, D.C.

Issue 1A Loss Table Revisions

The District of Columbia Association of Criminal Defense Lawyers (DCACDL) states that the directives in the Sarbanes-Oxley Act merely require the Commission to "ensure" that the guidelines are "sufficient" to punish and deter the perpetrators of corporate and financial fraud. While it recognizes the need for sentences adequate to punish perpetrators of corporate and financial fraud, it believes the previous guidelines were sufficient for that purpose and that the proposed amendments simply implement a reflexive and unnecessary increase in penalties. This, according to the DCACDL, is likely to lead to unfairness and confusion in guideline application, and even the deterrence of socially-beneficial conduct, i.e., corporate officials increase earnings, and benefit shareholders, by taking lawful risks. Therefore, the DCACDL strongly urges the Commission not to recommend even greater increases.

The DCACDL's view is that these penalties will lead rational executives to be more risk-adverse, to the possible detriment of the shareholders the legislation is meant to protect. This is true given that the new amendments follow the November 2001 amendments which significantly increased the penalties faced by white collar defendants. According to the DCACDL, the system has had insufficient experience under the 2001 amendments to determine whether they are sufficient to deter and punish the conduct at which the new amendments are aimed.

The DCACDL suggests that a more efficient means of policing corporate conduct is to provide incentives for "good" behavior, such as the Department of Justice Antitrust Division which offers "amnesty" in order to encourage those who might otherwise be charged with criminal violations to make early disclosures of wrongful conduct and to cooperate with the government.

Issue 1B §2B1.1(b)(13)

Also, the DCACDL argues the rationale provided for the four-level enhancement where the offense involved a violation by an officer or director of a publically-traded company is identical to that for §3B1.1, however the Commission has failed to explain its rationale for providing a four-level enhancement for those participants, yet only providing a two-level enhancement for others who violate positions of trust that make their victims even more vulnerable.

Issue 2B §2B1.1(b)(12)

Further, the DCACDL states the offenses at issue in the proposal to increase from the four-level enhancement to a six-level enhancement where the crime involved more than 250 victims were considered by the Commission when it adopted the four-level increase for crimes involving more than 50 victims, and there appears to be no evidence to suggest the additional two-level enhancement is needed to punish those who would commit large-scale fraud. In fact, it argues

this provision will overlap to a great extent with the proposed §2B1.1.(b)(12)(B) which provides a four-level enhancement where an offense jeopardizes the solvency or financial security of publicly-traded companies, or those that employ more than 1,000.

Proposed Amendments to Application Notes in the Commentary to §2B1.1

Additionally, the DCACDL states the amendments are likely to bring new confusion in guideline application, particularly the loss table at §2B1.1, because the amendment's addition of the reduction in the value of equity securities to the list of factors that may be considered will only exacerbate the difficulties that already exist in calculating loss under the guidelines. It argues that the sheer stock market decline is not necessarily an accurate proxy for the reasonably foreseeable pecuniary harm specified in the guideline's definition for loss. Further, the amendments fail to account for the real impact of such "loss."

Finally, the DCACDL believes the Department of Justice's motive in seeking higher sentences, to compel the cooperation of less culpable offenders in prosecuting those who are higher up, is disturbing. In its view, the Department's proposals represent a major paradigm shift in sentencing philosophy which might well impair the basic truth-finding function of criminal trials.

New York Council of Defense Lawyers (NYCDL)
Brian E. Maas, Chairman,
Sentencing Guidelines Committee
New York, New York

Issue 1A Loss Table Revisions

The New York Council of Defense Lawyers (NYCDL) notes that when the Commission proposed the 2001 Economic Crime Package, it published data which it contended supported the change, that the public had ample opportunity to respond and comment, and that the changes were implemented as part of a comprehensive review of the guidelines governing economic crimes, creating public confidence in the process and result which it argues does not attend the current changes in the loss table. Because there was no Congressional direction given to amend the loss table for offenses other than for those with losses which exceed the current maximum loss amount of $100,000,000, the NYCDL argues that any change to the overall table would constitute inappropriate reaction to the general anger at business misconduct without any evidence that any further change in the tables is warranted.

Additionally, the NYCDL states that each of the three loss tables included in the issue for comment would lower the loss triggers from those included in the new table enacted less than eighteen months ago, which itself implemented a substantial lowering of the loss triggers from the loss table previously in effect. The NYCDL strongly urges the Commission to limit any amendment to the loss table to only two additional levels for losses in excess of $100,000,000.

Further, the NYCDL opposes any change in the base offense level for fraud offenses, stating that to the extent Congress increases the statutory maximum for certain fraud offenses, the current proposal to amend the loss table will insure that defendants convicted under these statutes will receive greater sentences than are now being imposed. It further argues that increasing the base offense level will impose an improper form of double counting.

Issue 1B §2B1.1(b)(13)

The NYCDL strongly urges the Commission not to make permanent the four-level enhancement for defendants who are officers or directors of publicly traded companies, and also urges the Commission not to extend this enhancement to other individuals with a fiduciary or statutory duty of trust to investors. Instead, the NYCDL proposes that to the extent the Commission believes the guidelines are unclear as to whether such persons in the securities or investment business are covered, an amendment to the Application Notes in §3B1.3 would clarify the applicability of this section.

The NYCDL further argues the four-level enhancement for any officer or director of a public company which was included in the emergency amendment as enacted is unnecessarily harsh. By failing to distinguish between the size of the company or the size of the fraud, the four-level enhancement can result in double counting for a participant of a $120,000 fraud while resulting in a much smaller proportionate sentence for a participant in a fraud on the scale of Enron. According to the NYCDL, this is inconsistent with the Sarbanes-Oxley Act.

Finally, the NYCDL requests that in considering an enhancement based on the equivalent of an abuse of position of trust, the Commission should create an enhancement that treats officers or directors who abuse their positions similarly to other fiduciaries who have abused their positions of trust. Because the Commission has not developed evidence suggesting that the two-level enhancement at §3B1.3 is inadequate for officers and directors, the NYCDL argues that the new enhancement should only be a two-level enhancement.

Issue 2B §2B1.1(b)(12)

The NYCDL does not object to the elimination of Application Note 10(E), stating that the elimination will reduce litigation over the meaning and application of the standard of "substantial jeopardy" and will promote more accurate fact-finding. However, the NYCDL believes this commendable change is overshadowed by negative and possibly unintended consequences of the amendments. The NYCDL states that the enhancement and minimum offense levels apply to too many potential defendants because they apply to fraudulent conduct at any publically traded company, whether it trades on a major exchange or only on the so-called "bulletin board" or "pink sheets," and reminds the Commission these are not the frauds that compelled the emergency amendments.

In the view of the NYCDL, these amendments lack any type of asset test or similar proxy for their application to publically traded companies, and it does not believe an offense that

contributed to layoffs at a small publically traded company warrants the punishment called for by the emergency amendments. Instead, it believes these amendments should require threshold levels of employment and/or assets for the enhanced penalties.

Also, the NYCDL objects to the factors listed in the Application Notes to support an enhancement for endangering the solvency and financial security of a public company or organization of over 1,000 employees on other grounds, as well. In its opinion, the imposition of enhancements for factors just as likely due to the current economic climate as due to the defendant's actions runs contrary to current case law where losses resulting from acts over which the defendant had no control are routinely excluded.

The NYCDL is additionally concerned that the amendments do not take into account the possibility there may be double counting when a victim of an offense involving multiple victims under §2B1.1(b)(2) counts as an employee for purposes of determining whether a company that had more than 1,000 employees was "substantially endangered" under §2B1.1(b)(12).

In addition, the NYCDL states there is a potential double counting issue because the amendments provide for enhanced punishment when an offense "substantially endangered the solvency or financial security of 100 or more victims." According to the NYCDL, there is a double counting issue when some of these victims are also victims for purposes of §2B1.1(b)(2).

Finally, the NYCDL objects to the lack of any guidance in the Application Notes, stating the lack of a definition of "financial security" would engender a major debate. Therefore, the NYCDL believes this provision should be stricken as confusing and redundant when viewed in light of other amendments.

Proposed Amendments to Application Notes in the Commentary to §2B1.1

The NYCDL believes the proposed method of valuation which would permit courts to estimate the loss by reference to "the reduction that resulted from the offense in the value of equity securities of other corporate assets" as it applies to equity securities is neither workable nor appropriate.

First, the NYCDL argues that an enormous number of factors effect the market valuation of a publically-traded company. Market value is often effected by general economic cycles, volatility in particular market sectors, the financial health and/or consolidation of peers, suppliers, and customers, or news unrelated to a specific company, like a threat of war or changes in the interest rates. According to the NYCDL, any effort to pin loss valuations on such a complex, multi-faceted analysis will require significant research, expert testimony, and complicated and lengthy sentencing hearings.

Second, even it if were feasible to efficiently and reliably link criminal conduct with stock value, the NYCDL argues this analysis will often offer an inappropriate measure of "loss." In those cases which triggered this proposed amendment, the share price of a company's stock falls to,

and often past, its true value when the accounting irregularities are eventually revealed to the public, and NYCDL argues that many shareholders will not suffer any real loss, having purchased shares before the value of the company was inflated.

Issue 3 §2J1.1 Fraud Related Contempt

The NYCDL urges the Commission to resist the Department of Justice's request to amend the guidelines so that all "fraud contempt" violations are governed by the fraud guidelines instead of the obstruction guidelines. It believes that such an amendment would in effect punish a defendant for committing a crime without the government having to prove its case beyond a reasonable doubt and would grossly distort the sentencing process so that a criminal contempt of a court order arising out of a civil fraud action would be sentenced more harshly than a criminal contempt arising out of a civil action unrelated to fraud.

The NYCDL argues the proposed changes contravene the spirit of the Application Notes and that the Department has failed to make the case that the Commission should limit the discretion it provided courts when it crafted §2J1.1

Issue 4§2J1.2 Obstruction of Justice

Notwithstanding Congress' recent mandate for increased maximum penalties for defendants guilty of destroying or altering documents material to an on-going investigation, the NYCDL argues that the combined effect of these guideline changes is both unnecessary and unwise.

Because §2J1.2 already provides a three-level enhancement for any "substantial interference with the administration of justice" and the emergency amendment added a two-level enhancement, the amendment would appear to subject a defendant to a potential five-level enhancement under subsections (b)(2) and (b)(3). The NYCDL argues that the conduct set forth in proposed subsection (b)(3) is already taken into account by the "substantial interference" enhancement in subsection (b)(2). Therefore, adding the (b)(2) enhancement to the (b)(3) enhancement would constitute double counting.

Further, the NYCDL argues subsection (b)(3)(B) should be removed entirely from the guideline, because its text introduces an unacceptable level of subjectivity and doubt into the sentencing process without any guidance from the Application Notes. Moreover, the conduct described seems to the NYCDL to already be covered as an "attempt" under the current guidelines.

U.S. Commodity Futures Trading Commission (CFTC)
Daniel A. Nathan, Chief, Office of Cooperative Enforcement
Washington, D.C.

The U.S. Commodity Futures Trading Commission (CFTC) is the federal agency that enforces violations of the commodity laws, found in the "Commodity Exchange Act," and refers such violations to the Department of Justice for criminal prosecution.

Issue 1B §2B1.1(b)(13)

Generally, the CFTC recommends that fraudulent conduct committed in the commodity futures and options industry be treated comparably to similar types of securities and corporate fraud that are explicitly referenced in the Sarbanes-Oxley Act and under the guidelines. More specifically, the CFTC recommends expanding the scope of §2B1.1(b)(13) to include individuals or entities other than officers and directors of public companies and entities and individuals who offer and manage securities or commodities futures or options but are not regulated under securities law. In addition, the CFTC states the Commission should extend the enhancements to bring these futures industry participants and futures-related acts within the guidelines, because the CFTC's regulatory scheme parallels the securities laws, and criminal prosecutions with respect to the futures and options industry often address the same types of fraud and abuse as those brought with respect to the securities industry. Finally, the CFTC argues that securities fraud and commodities fraud involve substantially similar criminal conduct, and should be treated similarly in the guidelines.

LRN, The Legal Knowledge Company (LRN)
Dov Seidman
Chairman and Chief Executive Officer

Issue 1A Loss Table Revisions

The Legal Knowledge Company (LRN) believes that modifying the lower loss amounts in the loss table will likely have little or no impact in addressing the conduct that was the focus of the Sarbanes-Oxley Act. The LRN claims that any fraud committed by an officer or director of a public company, once revealed, will result in substantial loss of shareholder value and the lower loss amounts in the loss table will be largely irrelevant.

The LRN agrees with the Commission's proposal to increase the base offense level in §2B1.1(a) from six to seven and suggests the following reading:

(a) Base Offense Level:

> *(1) 7, if the defendant was convicted of an offence referenced to this guideline for which the maximum term of imprisonment prescribed by law is 20 years or more; or*
> *(2) 6, otherwise.*

The LRN derives its twenty-year maximum from language in the Act it perceives as Congress's intent to address the most egregious cases.

Issue 1B. §2B1.1(b)(13)

The LRN believes the Commission should expand the scope of §2B1.1(b)(13) to include other individuals or entities that may have a fiduciary or similar statutory duty of trust and confidence to the investor, such as brokers, dealers, and investment advisors. According to the LRN, the "tone at the top" set by the most senior leaders of an organization plays a crucial role in how compliance and ethics are viewed by the rest of the organization. Therefore, the LRN agrees that a four-level enhancement for fraud offenses committed by officers and directors of publicly traded companies is appropriate.

The LRN, however, suggests that the Commission clarify certain elements of the emergency amendment. As currently drafted, it notes, the subsection applies in the case of a defendant convicted under a general fraud statute if the defendant's conduct also violated a securities law. Whether such "violation" must be proved by a preponderance of the evidence, the LRN claims, is not clear. The LRN notes that many securities prosecutions brought by the SEC may be settled without admitting or denying the allegations, but the SEC often makes findings in such settlements. Such findings, the LRN argues, could be tantamount to the *de facto* establishment of a securities law violation, without any additional evidence being presented. The LRN therefore suggests that the Commission provide guidance in the Application Notes as to its intent with regard to how a securities law "violation" is to be established.

In the opinion of the LRN, by including all "violations" of the securities laws, the amendment could have the effect of criminalizing the conduct that would otherwise purely be a technical violation. It would be possible that a single inaccurate, and possibly immaterial, record violation under Section 13 of the Exchange Act caused to be created by an individual could lead to an enhanced sentence. A technical violation, such as a one-day delay in making an appropriate filing, could lead to an enhanced sentence, it argues.

The LRN further argues that expanding the amendment to market professionals may have the unintended effect of bringing within it many persons who were not the focus of Congress when passing the Act. For example, the amendment would likely cover a registered representative employed at a broker-dealer who churns a single customer's account. The LRN suggests that, although this person may deserve punishment, the enhancement may not be consistent with congressional intent and it cites §3B1.3 as already addressing such scenarios. The LRN therefore suggests that the Commission narrowly apply the amendment to those market professionals who, because of their positions of trust, have the potential to cause the greatest amount of harm, and that for low-level employees, the Commission utilize already existing guidelines, as their status in the marketplace and their duties vis-a-vis the investing public do not rise to the same level as the officer or director of a public company.

If this argument is rejected and the Commission intends to extend the amendments to lower-level employees, the LRN notes that certain professionals, such as investment advisors, have statutorily-defined fiduciary duties under specified circumstances, and clearly are closer to the status of an officer or director of a public company because of their similar position of trust and confidence. However, other market professionals do not have statutory fiduciary duties, but may, under certain circumstances accept such a duty by offering certain products or services. The LRN therefore suggests that the Commission simply identify those market professionals to which the enhanced standard will apply, and that the Commission insert language into the guidelines explaining the intent for including these marketplace professionals and the types of duties or responsibilities the Commission expects would bring an individual into the provision as a "similar" person.

Mercatus Center
George Mason University
Regulatory Studies Program
Jonathan Klick, Ph.D.
Washington, D.C.

Dr. Klick states that the added loss categories at $200,000,000 and z$400,000,000 to address concerns in the Sarbanes-Oxley Act about "particularly extensive and serious fraud offenses" implies that the Commission sees value in, and imputes a mandate to, discourage larger frauds even more than relatively smaller frauds. While this makes sense, he argues that none of the proposed alternative loss tables is likely to achieve this goal.

Dr. Klick argues if the criminal sentences are to serve a deterrent value for corporate executives and there is a desire to deter especially egregious frauds at an even greater rate, one would expect that the incremental increase in the sentence would increase as the size of the fraud grows. However, he states that the options offered by the Commission show the exact opposite, and the average sentence per dollar of fraud loss is actually decreasing as the fraud grows. Dr. Klick provides three graphs to illustrate his points.

According to Dr. Klick, once a fraud is committed, is it rational for the executives to engage in more fraud because the punishment becomes cheaper on average as the fraud grows. However, he concedes that it might be true that larger frauds are more likely to be detected, which would dampen or reverse the declining average cost of fraud implied in the graphs. But, Dr. Klick argues that if the Commission holds the assumption that larger frauds are more likely to be detected, it should present some empirical evidence in support. However, he states that proving such a proposition would be difficult, as the data are effectively censored; we do not know the size of undetected frauds.

To Dr. Klick, it seems clear that none of the Commission's proposals does an adequate job of providing relatively high deterrence for "particularly serious or extensive fraud offenses."

Therefore, he believes that a superior loss table would provide increasing marginal deterrence whereby the average cost on the perpetrators of a fraud increases with the scale of the fraud, and that such a system would go a long way to discouraging especially egregious offenses.

Hunton & Williams
Steven P. Solow
Washington, D.C.

Mr. Solow writes as an individual attorney to address a particular issue that he believes is of substantial concern raised by one section of the Sarbanes-Oxley Act. Unlike other aspects of the Act, the section of the Act which added a new section 1519 is not limited to corporate accounting misconduct and its effects on capital markets that served as the instigation for the Act. Instead, Mr. Solow argues, Section 1519 creates a broad new law addressing obstruction of justice and does so in the broadest terms of any such statute to date.

As Mr. Solow indicates, Section 1519 now makes clear that the government can seek to prosecute an individual for document destruction prior to the existence of any official proceeding or investigation. In his view, this new language appears to expand the crime of obstruction to a new territory by creating potential criminal liability for the destruction of a document, even if done pursuant to an otherwise appropriate document retention policy and even if there was no federal proceeding or investigation under way at the time the document was destroyed. Because businesses routinely and legitimately destroy documents and other materials pursuant to document retention policies when such materials are no longer required to be maintained by law or business need, Mr. Solow argues it would impose a totally unreasonable burden if the retention of huge numbers of such records was thought to be required, perhaps indefinitely, because some future reviewer may conclude that it was "contemplated" at the time of destruction that such records might be of some interest to a then non-existent future government inquiry.

Mr. Solow states his belief that the Commission is well aware that provisions such as this Section and the direction provided to the courts under the guidelines have a powerful effect on corporate management practices. Further, it is his belief that the Commission sought to use the organizational guidelines to enroll organizations in the effort to prevent crime, by rewarding such efforts with meaningful reductions in liability when violations occur despite good faith efforts to comply. Mr. Solow urges the Commission to practice a similar effort regarding the implementation of Section 1519, stating that without further guidance regarding application of the Section, it will be extraordinarily difficult for companies to develop and implement appropriate document retention policies without fear that almost any failure to maintain a document could, in hindsight, be viewed as an act of obstruction.

Quoting from Senate Report 107-146, Mr. Solow agrees that Section 1519 "should be used to prosecute only those individuals who destroy evidence with the specific intent to impede or obstruct," and that it "should not cover the destruction of documents in the ordinary course of

business, even where the individual may have reason to believe that the documents may tangentially relate to some future matter within the conceivable jurisdiction of an arm of the federal bureaucracy." Mr. Solow therefore urges the Commission to directly address these concerns either in the form of commentary or in downward adjustments to the offense levels for violations of this Section, as it did with the organizational guidelines.

At the very least, Mr. Solow argues, the Commission should include an invited downward departure where the defendant has made efforts to implement a document retention policy. Mr. Solow provides a suggested non-exhaustive list of factors that a court should be invited to consider as indicators of a sound document retention policy: providing a written document policy to employees involved in or responsible for records management activities; clear direction to employees who are uncertain as to what to do with a particular document or record to seek advice from the company's counsel; and, a policy that directs that time periods set for destruction of records do not apply when there is a clear direction that certain records or categories of records should be retained.

Amendment No. 8, Cybersecurity

U.S. Department of Justice
Criminal Division
Eric H. Jaso, Counselor to the Assistant Attorney General
Washington, D.C.

The Department of Justice (DOJ) believes that several of the factors identified for review by Congress – specifically, level of sophistication and restitution – are adequately addressed by the current guidelines. The current guidelines do not reflect, however, the dramatic increase in reported computer crimes, Congress's express intent to increase penalties to better reflect the seriousness of cyber crime, and the fact that such crimes often cause egregious non-monetary harms. After summarizing the statutory scheme, recent amendments, and the guidelines' current treatment of 18 U.S.C. §§ 1030 and 2701, the DOJ suggests several specific amendments to the guidelines to address these issues. The DOJ also suggests amending Appendix A to reference violations of 18 U.S.C. § 2701 to §2B1.1.

- Loss: To avoid confusion and promote consistency, the DOJ believes the guideline loss definition should be amended to mirror the new definition contained in 18 U.S.C. § 1030. As amended, the definition of loss will be sufficiently broad to capture the monetary harm caused by computer crimes (it does *not*, however, adequately address non-monetary harms such as invasion of privacy, damage to critical infrastructures, and bodily injury or death, which are addressed specifically later in these comments). The DOJ thus recommends that §2B1.1, note 2(A)(v)(III) be amended as follows:

    <u>Protected Computer Cases.</u>–In the case of an offense involving unlawfully accessing, or exceeding authorized access to, a "protected computer" as defined in 18 U.S.C. § 1030(e)(2), actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: ~~reasonable costs to the victim of conducting a damage assessment, and restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service.~~ **any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service.**

    . . .

- Commercial Advantage or Private Financial Benefit: Because computer crimes committed with these purposes have higher statutory maximum sentences (*see* 18 U.S.C. §§ 1030(c)(2)(B)(I), 2701(b)(1), 2701(b)(2)), the DOJ recommends adding the following specific offense characteristic to §2B1.1(b) so as to place an offender in Zone C, at a minimum, of the sentencing table:

(__) If the offense involves violation of 18 U.S.C. §§ 1030 or 2701 and was committed for purposes of commercial advantage or private financial gain and the offense level is less than 12, increase to 12.

- Intent to Cause Harm: Congress provided in the USA-PATRIOT Act for higher statutory maximum sentences for violations of 18 U.S.C. § 1030(a)(5)(A)(I), which applies to computer criminals who act with intent to cause damage. For a first offense, Congress raised the maximum sentence to 10 years, *see* 18 U.S.C. § 1030(c)(4)(A); for any subsequent offense, Congress raised the maximum sentence to 20 years, *see* 18 U.S.C. § 1030(c)(4)(c). The DOJ recommends that the guidelines increase the offense level of such offenders by 4, to not less than 14, placing them in Zone D and assuring that, absent a departure, their sentence will include a term of imprisonment. The DOJ suggests that the following specific offense characteristic be added to §2B1.1:

  (__) If the offense involved intentionally causing or attempting to cause damage to a protected computer in violation of 18 U.S.C. § 1030(a)(5)(A)(I), increase by 4 levels; if the resulting offense level is less than 14, increase to 14.

- Violations of Privacy: The DOJ recommends increasing by two the offense level of offenders who obtain important private information. In addition, because a violation of the privacy of 50 people causes more harm than a violation of the privacy of a single person, the DOJ recommends amending the Application Note for §2B1.1(b)(2) to clarify that every individual about whom such information is obtained as a result of a computer intrusion is a "victim" for the purposes of the guidelines. Thus, if a hacker accesses a medical records database and steals 100 people's records, the number of victims would include these 100, not just the computer owner. The DOJ proposes (1) adding the following specific offense characteristic:

  (__)(A) If the offense involved knowingly accessing a computer without authorization or exceeding authorized access in violation of 18 U.S.C. §§ 1030 or 2701 and obtaining personal information as a result, increase by 2 levels.

(2) adding the following Application Note to the Commentary:

1. *Definitions.–For the purposes of this guideline:*

* * *

"Personal information" means sensitive or private information, including but not limited to medical records, financial records, social security numbers, wills, diaries, private correspondence including email, photographs of a sensitive or private nature, or similar information, including such information in the possession of a third party.

(3) amending application note 3(A)(ii) as follows:

(ii) *"Victim" means (I) any person who sustained any part of the actual loss determined under subsection (b)(1); ~~or~~ (II) any individual who sustained bodily injury as a result of the offense~~.~~**; or (III) any individual whose personal information was accessed during a violation of 18 U.S.C. §§ 1030 or 2701.** "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.*

- Computers Used by the Government in Furtherance of National Defense, National Security, or the Administration of Justice & Disruptions of Critical Infrastructures: The DOJ recommends the following amendment to apply cumulatively where appropriate with the specific offense characteristic for creating a risk of death or serious bodily injury and the specific offense characteristic for causing injury or death. The DOJ suggests the Commission also consider including as a ground for upward departure violations disrupting a critical infrastructure so severely as to incapacitate the economy, public health, or national defense or security.

The DOJ proposes adding the following specific offense characteristic:

(__)(A) If the offense violated 18 U.S.C. § 1030 and involved a computer system used to maintain or operate a critical infrastructure or a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by 4 levels.

(B) If the offense violated 18 U.S.C. § 1030(a)(5)(A)(I) and caused a substantial disruption of a critical infrastructure, increase by 6 levels. If the resulting offense level is less than level 28, increase to level 28.

The DOJ also suggests adding the following Application Notes to the Commentary:

1. *Definitions.–For the purposes of this guideline:*

* * *

"Critical infrastructure" means systems and assets vital to the national defense, national security, economic security, public health or safety, or any combination of those matters.

__. *Critical Infrastructures under Subsection (b)(16). – Examples of critical infrastructures to which subsection (b)(16) applies are systems and facilities, whether publicly or privately held, that provide essential services in support of the economy and national defense and national security. Such infrastructures include, but are not*

limited to, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services, medical care, and transportation links such as interstate highways, airlines, and rail systems. Substantial disruptions in the services provided by such infrastructures jeopardizes the health, safety, security, or economic welfare of a substantial number of people. The enhancement provided for in subsection (b)(16) reflects the seriousness of substantially disrupting a critical infrastructure such as by impairing 9-1-1 phone service to a town or city for several hours or by eliminating electrical power to a county for a similar period of time. Subsection (b)(16) should be applied cumulatively with subsections (b)(11) and (b)(17).

- Threat to Public Health & Safety; Risk of Bodily Injury and Death: The DOJ believes §2B1.1 should be amended to reflect both the wider scope of section 1030 violations that Congress intended to punish more severely, and the stronger penalties Congress intended for offenders whose conduct has such dire consequences. The DOJ recommends including a specific offense characteristic in §2B1.1 that reflects the physical harm caused by the offense.

  It suggests adding the following specific offense characteristic:

  > **(__) If the offense resulted in: (A) bodily injury, add 2 levels; (B) serious bodily injury, add 4 levels; (C) permanent or life-threatening bodily injury, add 6 levels; and (D) death, add 8 levels.**

  And adding the following cross reference:

  > **(__) If the offense involved a violation of 18 U.S.C. § 1030 and any person was killed under circumstances that would constitute homicide, apply the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the application of that section results in a higher offense level than application of this section.**

- Number of Victims: Because the DOJ believes the definition of "victim" should be amended to reflect that each computer damaged by a computer intrusion constitutes a victim for the purposes of subsection (b)(2), it suggests amending Application Note 3(A)(ii) as follows:

  (ii) *"Victim" means (I) any person* ***or computer that*** *~~who~~ sustained any part of the actual loss determined under subsection (b)(1); ~~or~~ (II) any individual who sustained bodily injury as a result of the offense~~.~~****; or (III) any individual whose personal information was accessed during a violation of 18 U.S.C. §§ 1030 or 2701.*** *"Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.*

National Association of Criminal Defense Lawyers
The Electronic Frontier Foundation
The Sentencing Project

The National Association of Criminal Defense Lawyers, the Electronic Frontier Foundation, and the Sentencing Project (hereinafter "the Group") collectively submit public comment regarding Cyber Security.

I. Special Factors Identified by Congress

The Group believes that the current sentencing guidelines adequately address the eight factors identified by Congress in 18 U.S.C. § 1030. The Group states that the heartland computer crime case is analogous to economic fraud; thus, §2B1.1 should continue to address the heartland case of a computer intrusion that causes economic harm. Extraordinary cases where the government proves that the defendant intended to cause physical harm or compromised national security may be enhanced pursuant to §3A4.1, or receive an upward departure. The Group further suggests that computer crime statutes should be referenced to specific guidelines in Appendix A, rather than by cross-referencing because they believe that cross-referencing undermines predictability in calculating loss.

A. Whether the Offense was Committed for Purposes of Commercial Advantage or Private Financial Benefit

The Group believes that the guidelines should not provide for a special enhancement for a computer criminal acting with a commercial purpose because such an enhancement would result in double-counting, as well as disproportionate sentencing as compared with other felony violations of section 1030. The Group asserts that there is no need for a specific offense characteristic for computer access crimes that are perpetrated for commercial advantage or private financial gain because the statute already provides for a heightened statutory maximum penalty if the crime was perpetrated for commercial gain; thus such an enhancement would amount to double punishment. The Group also suggests that providing an enhancement for commercial purpose would punish commercially motivated computer access crimes disproportionately in comparison with computer crimes committed for other purposes. The Group does not believe that a defendant acting with commercial motivation is more culpable than one acting in furtherance of another criminal or tortious act such that a special enhancement should apply.

B. Computer used by the Government in Furtherance of National Defense, National Security or the Administration of Justice

For computer access crimes involving computers used by the government in furtherance of national defense, national security, or the administration of justice, the Group states that upward departures pursuant to §5K2.7 (Disruption of Governmental Function) or §3A1.4 (Terrorism)

should be sufficient. If, however, the Commission believes this insufficient, then the Group suggests a targeted enhancement modeled after §3C1.1. The Group also suggests that the Commission may wish to increase the offense level by 2 levels if the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice or harming national defense or national security. The Group states that this enhancement only should apply to convictions under 18 U.S.C. § 1030(a)(5)(A)(i) that caused proven damage under section (a)(5)(B)(v).

C. Malicious Intent to Cause Harm

The Group believes that the guidelines should not provide for a special enhancement for sentencing a computer criminal that acted with the malicious intent to cause harm because such an enhancement would result in double counting. The Group asserts that because malice must be proved under 18 U.S.C. § 1039(a)(5)(A)(i), a defendant convicted under that subsection will face an increased statutory maximum; therefore, application of an additional enhancement will result in double counting.

D. Violation of Privacy Rights

The Group asserts that the guidelines already take into account violations of privacy rights by providing for an upward departure if the offense caused or risked substantial non-monetary harm.

E. Intent or Effect of Significant Interference with Critical Infrastructure and Intent to or Effect of Threat to Public Health or Safety or Injury

The Group states that the guidelines currently provide for a two level enhancement and a minimum offense level of 14 under §2B1.11 for offenses involving a conscious or reckless risk of death or serious bodily injury. The Group asserts that it would overstate a defendant's culpability to apply a greater enhancement in cases where the threat of harm was not intentional. The Group states that existing upward departures under §5K2.14 (Public Welfare) and §3A1.4 (Terrorism) provide sufficient punishment for defendants who both intend and succeed in causing harm to public health or safety through unauthorized computer access.

F. Level of Sophistication or Planning

The Group believes that a defendant's level of sophistication or planning is more than adequately accounted for in §2B1.1(b)(8)(C), which provides for a two level increase and a minimum offense level of 12. The Group asserts that any further enhancement would overstate the defendant's culpability because such defendants frequently receive an enhancement for use of special skill.

II. Loss Calculation in Computer Crime Cases

The Group believes that the Commission should abandon the special calculation of loss in computer crime cases and adopt a definition like that used in other economic crime cases. The Group states that the cost of conducting a damage assessment in computer crime cases depends more on the victim's actions than it does on the actions of the perpetrator or his intent to cause damage; thus, the definition of loss is susceptible to manipulation by victims, investigators, and prosecutors.

The Group identifies two separate problems with the assessment of loss in computer crime cases. First, the definition of loss results in computer crimes being treated more harshly than other crimes by including unforeseeable losses. The Group suggests that this problem can be alleviated by having the definition of loss for sentencing of computer crimes conform to the standard definition of loss for white-collar offenses. Second, the elements of loss are too difficult to accurately quantify. The Group believes that this problem is alleviated by adhering to an objective definition of loss that does not single out and encourage impractical measures of harm, but uses "reasonable foreseeability" as a guide to the sentencing court.

The Group suggests that the definition of "loss" should include "only pecuniary losses that were reasonably foreseeable to the defendant at the time of the offense and which were proximately caused by the defendant's actions." The Group believes that this will prevent erroneous loss calculations that might be based on, for example, the cost of upgrading a network system to make it *more* secure than before an attack.

The Group also suggests that the Commission consider placing a cap on damages where the defendant did not intend to cause harm under 18 U.S.C. § 1030(a)(5)(A)(iii). The Group suggests that the cap should be no more than a four level enhancement for the amount of loss.

Finally, the Group suggests that for violations of 18 U.S.C. § 2701, the Commission should establish a simple guideline with a base offense level of six and make clear that harm is taken into account in that base offense level.

U.S. Internet Service Provider Association (ISPA)

The United States Internet Service Providers Association (ISPA) is an organization comprised of major Internet Service Providers (AOL Inc., Cable & Wireless, eBay, EarthLink, Microsoft, SBC Communications, Teleglobe, Verizon Online, WorldCom, and Yahoo) throughout the United States.

The ISPA notes that computer crime has continued to steadily increase over the last decade, and that some estimates of economic loss as a result of recent virus attacks add up to billions of dollars. Aside from the economic loss, the ISPA notes that our society's increasing dependence

on computers means that the disruption of networks could seriously impair public safety, national security, and economic prosperity.

The ISPA further notes that current sentences for violations of the Computer Fraud and Abuse Act are treated primarily as white collar fraud cases, and sentences are determined by calculating actual or intended pecuniary harm, something that is often difficult to quantify in the typical computer crime case. As the ISPA points out, under §2B1.1, significant economic loss is required before a defendant would even be eligible for imprisonment, giving the example of the "Melissa" virus where a simple program caused worldwide damage to millions of computers and computer systems, yet the perpetrator faced less than four years in prison even after proven damages in excess of $80 million. The ISPA believes this lack of significant criminal penalty eliminates the deterrent effect of a conviction, and makes the crime less likely to be prosecuted in the future.

Further, the ISPA notes that newly emerging threats to the Internet, such as unsolicited bulk email, or spam, go largely unprosecuted because the type of harm spam causes is not currently addressed in the guidelines. Even though spammers send millions of unsolicited emails, the significant interference to the critical infrastructure caused by the abuse of spammers is not currently considered as a factor in the guidelines, as the ISPA points out. Similarly, the ISPA notes that a common method for spammers to send bulk email, in an effort to by-pass spam blocking technology, is to steal personal email accounts and use their identities. The ISPA argues this unauthorized access into the subscriber's account is a significant violation of the individual's privacy rights, yet neither the violation of the person's privacy rights nor the spammer's financial gain from this illegal activity is taken into account in the guidelines, making prosecution for this type of offense extremely unattractive.

Moreover, the ISPA argues, the guidelines do not take into account the potential or actual harm caused by other types of crimes that may not cause economic loss, but have profound societal consequences: crimes that involve interference with important governmental functions, such as national security, national defense, and the administration of justice. This type of substantial harm to the public cannot be quantified in economic terms; and, if the perpetrators who created these viruses are finally caught, the disruptions they caused to these emergency services will probably not be used during the sentencing, argues the ISPA.

Therefore, the ISPA believes cyber crimes should be viewed in the context of the overall incidence of the offense and the extent to which they contribute a threat to civil peace and economic prosperity. In its view, the guidelines should not look just at the monetary damage a violation may cause, but at the important intangible loss of personal privacy and critical services that often results from cyber crime.

The ISPA urges the Commission to amend the guidelines applicable to offenses under 18 U.S.C. § 1030 to take full account of the eight factors listed in Section 225(b) of the Homeland Security Defense Act of 2002, particularly those factors that are not accounted for anywhere else in the

applicable guidelines, such as whether the offense was committed for purpose of commercial advantage or private financial benefit; whether the defendant acted with malicious intent to cause harm in committing the offense; the extent to which the offense violated the privacy rights of individual harmed; whether the offense involved a computer used by the government in furtherance of national defense, national security, or the administration of justice; whether the violation was intended to or had the effect of significantly interfering with or disrupting a critical infrastructure; and whether the violation was intended to or had the effect of creating a threat to public health or safety, or injury to any person.

The Commission received letters from 5 inmates regarding criminal history, the retroactivity of §5G1.3, and crack cocaine.

Amendment No. 2, Campaign Finance

U.S. Department of Justice
Criminal Division
Eric H. Jaso, Counselor to the Assistant Attorney General
Washington, D.C.

Under emergency amendment authority, the Commission promulgated a temporary guideline amendment, effective January 25, 2003, to implement the Bipartisan Campaign Reform Act of 2002. The Department of Justice supports the temporary amendment and now favors the Commission's proposal to make the amendment permanent.

Amendment 4, Oxycodone

U.S. Department of Justice
Criminal Division
Eric H. Jaso, Counselor to the Assistant Attorney General
Washington, D.C.

The Department of Justice (DOJ) supports the Commission's proposal. However, it states that its support is with significant reservations, noting that the proposal will result in significantly lower sentences for combination (non-controlled release) formulations of oxycodone (*e.g.*, Percocet, Percodan, and Tylox). These pills, although weighing much more than the OxyContin formulations, each contain only approximately 5 mg of actual oxycodone. Thus, while approximately 460 Percocet pills presently corresponds to offense level 26, it would take almost 3,000 pills to achieve level 26 under the Commission's proposal. These sentence reductions are of significant concern to the DOJ.

The DOJ notes that given the significantly upward trends in OxyContin diversion and abuse, there is a significant federal interest in prosecuting those who illicitly distribute this frequently deadly drug. The higher sentences for the higher concentration OxyContin products that will result from the Commission's proposal will, it believes, more accurately reflect the harm attendant to offenses involving this drug and encourage appropriate federal prosecution.

However, the DOJ is concerned with the sentence reductions that would result with respect to the non-controlled release oxycodone products for several reasons, with a particular concern about losing the ability to effectively prosecute individuals who are registered to prescribe and dispense controlled substances (physicians, pharmacists, etc.) and who abuse this privilege by illicitly prescribing or distributing products such as Percocet and Tylox. In the DOJ's view, the ability to prosecute such defendants is key to maintaining the integrity of the registration system. Moreover, data from the Drug Abuse Warning Network (DAWN) indicate that, although emergency room mentions of "single-entity oxycodone" (OxyContin) have skyrocketed over the last several years, neither this nor any other data indicate that OxyContin abuse has supplanted the abuse of the combination oxycodone products.

With respect to oxycodone combination drugs, the DOJ states there is an obvious concern that the enforcement program related to these drugs will be significantly impacted if the guidelines sentences are grossly reduced, as was evidenced by the Commission's data analysis and recalculation of sentences for prior cases that would fit under its proposal. Nevertheless, even assuming that fewer prosecutions of cases involving combination (non-controlled release) oxycodone products would occur under the new guidelines, the DOJ states that it cannot at this time fully estimate how harmful the impact of such a loss would be.

Purdue Pharma L.P.
J. David Haddox, DDS, MD
Vice President, Health Policy
Stamford, CT

Purdue Pharma supports the proposed amendment regarding sentencing for oxycodone. Purdue Pharma states that the current sentencing scheme under-penalizes the illegal possession of oxycodone in the form of OxyContin and over-penalizes the illegal possession of oxycodone in the form of Percocet or similar formulations, because in the latter cases, a large part of the sentencing is due to the weight of non-opioid tablet constituents, the bulk of which is often acetaminophen. Further, Purdue Pharma states that the current scheme does not take into account the fact that tablets of OxyContin containing 10, 20, and 40 MG all weigh 135 MG, so sentencing under the current guidelines would be equivalent for the same number of tablets, despite the potential for a four-fold difference in the amount of oxycodone illegally possessed.

Purdue Pharma notes that the language in the proposed amendment only refers to oxycodone in tablet or capsule form. However, oxycodone also is available as an oral solution in the United States and is available in an injectable formulation in other countries. Therefore, Purdue Pharma suggests that the Commission alter the proposed language to cover all possible formulations of oxycodone as follows:

> *The term "oxycodone (actual)" refers to the total nominal weight of the controlled substance, its salts, esters, ethers, isomers and salts of isomers, esters and ethers contained in a licitly manufactured pharmaceutical formulation (including, but not limited to, solutions, tablets or capsules). In the case of oxycodone in any form that is not licitly manufactured for legitimate medical or scientific purposes, the term "oxycodone (actual)" shall refer to the total actual weight of the oxycodone salts, esters, ethers, isomers and salts of isomers, esters or ethers contained in the mixture.*

Amy Campbell
Houston, Texas

Ms. Campbell believes that the insertion of the new paragraph defining "Oxycodone (actual)" as the "weight of the controlled substance itself, contained in the pill or capsule" such that the sentences for offenses involving oxycodone will be calculated based on the weight of the actual narcotic rather than the weight of the entire pill, including non-narcotic substances, is clearly a step toward fairness in sentencing for oxycodone offenses. It is her belief that persons convicted of offenses involving this narcotic and sentenced under the existing guidelines have been subject to inequities in sentencing, as such sentences were based on total weight of the pills or capsules instead of the weight of the actual narcotic, such that a person convicted of trafficking in Oxycontin could receive a five-year sentence for an offense involving more than nine times the

amount of oxycodone as a person receiving the same sentence for trafficking in Percocet.

However, Ms. Campbell states by basing some equivalencies on actual narcotic weight and others on weight of the narcotic mixture, the Commission may run afoul of the prohibition in the Administrative Procedure Act on arbitrary and capricious actions, because in her opinion, it seems arbitrary to treat certain narcotic offenses in this manner while offenses involving other narcotics, including those such as morphine which has an almost identical medical equivalency gram for gram compared to oxycodone are evaluated using the weight of the narcotic mixture.

Ms. Campbell additionally requests that in addition to the insertion of the term "oxycodone" into Application Note 9, for purposes of consistency, the term "oxycodone (actual)" should also be added to Note B of the Drug Quantity Table after "Methamphetamine (actual)."

Further, Ms. Campbell would like to request the Commission strike "1 gram Oxycodone = 500 grams marijuana" and instead insert "1 gram Oxycodone (actual) = 6700 grams marijuana." She states that the proposed new equivalency appears to be based on the translation of the current equivalency using the actual oxycodone percentage by weight in 10-milligram dosages of Oxycontin branded oxycodone tablets. While this new equivalency clearly serves the stated purpose of substantially reducing penalties for trafficking in Percocet, the notice of proposed amendments provides no indication of the criteria considered in establishing this proposed equivalency.

Finally, Ms. Campbell requests that any amendment be retroactively applied to previously sentenced defendants.

Amendment 5, Use of Body Armor

U.S. Department of Justice
Criminal Division
Eric H. Jaso, Counselor to the Assistant Attorney General
Washington, D.C.

The Department of Justice (DOJ) supports the proposed amendment to provide a new adjustment at §3A1.5 for the use of body armor in an offense involving a crime of violence or drug trafficking crime. In response to the issue for comment, it believes the adjustment should be based on all conduct within the scope of relevant conduct but should be triggered only if the defendant (1) used body armor himself or (2) otherwise knew that the offense involved the use of body armor. According to the DOJ, this formulation would ensure that the adjustment apply only to those who knowingly participate in conduct involving body armor – conduct that significantly increases the risk of harm to law enforcement and the public at large – and thus limit the applicability of the adjustment to those culpable for such increased risk.

Submissions

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530-0001*

March 18, 2002

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

Dear Judge Murphy:

On behalf of the Department of Justice, I submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register on January 17, 2003. We look forward to continuing to work with the Commission during the remainder of this amendment year on all of the published amendment proposals.

* * * * *

CAMPAIGN FINANCE

Under emergency amendment authority, the Commission promulgated a temporary guideline amendment, effective January 25, 2003, to implement the Bipartisan Campaign Reform Act of 2002. The Department of Justice supports the temporary amendment and now favors the Commission's proposal to make the amendment permanent.

BODY ARMOR

The Department supports the Commission's proposed amendment to provide a new adjustment at §3A1.5 for the use of body armor in an offense involving a crime of violence or drug trafficking crime. In response to the issue for comment, we believe the adjustment should be based on all conduct within the scope of relevant conduct but should be triggered only if the defendant (1) used body armor himself or (2) otherwise knew that the offense involved the use of body armor. This formulation would ensure that the adjustment apply only to those who knowingly participate in conduct involving body armor – conduct that significantly increases the risk of harm to law enforcement and the public at large – and thus limit the applicability of the adjustment to those culpable for such increased risk.

<u>OXYCODONE</u>

Noting the marked increase in abuse and diversion of OxyContin and other forms of oxycodone, the Commission published a proposed amendment to adjust penalties for offenses involving oxycodone. The proposal would base sentences for such offenses on the <u>actual</u> weight of oxycodone involved in the offense and would set the marijuana equivalency at 1 gram oxycodone (actual) = 6,700 grams of marijuana. On February 20, 2003, Drug Enforcement Administration officials briefed Commission staff on the abuse and trafficking of products containing oxycodone.

After careful review, the Department of Justice supports the Commission proposal. The proposed equivalency would significantly increase sentences for OxyContin pills that are more potent than 10 mg strength. For example, under the current total pill weight-based sentencing scheme, approximately 1,500 OxyContin pills (10, 20 or 40 mg strength) correspond to a base offense level of 26 (63-78 months' imprisonment). Under the Commission's actual controlled substance weight-based proposal, far fewer 20 mg pills (746) and 40 mg pills (372) would correspond to level 26. The sentences would not change for 10 mg strength OxyContin pills.

Although we support the proposal, we do so with significant reservations. We note that the proposal will result in significantly lower sentences for combination (non-controlled release) formulations of oxycodone (*e.g.*, Percocet, Percodan, and Tylox). These pills, although weighing much more than the OxyContin formulations, each contain only approximately 5 mg of actual oxycodone. Thus, while approximately 460 Percocet pills presently corresponds to offense level 26, it would take almost 3,000 pills to achieve level 26 under the Commission's proposal. These sentence reductions are of significant concern to us.

The Commission has identified 39 cases sentenced in FY2000 and 2001 that involved OxyContin products. The Commission was able to recalculate the sentences using its proposal for 24 of those cases and determined that the present median sentence of 10 months would increase to 14 months under its proposal. Given the significantly upward trends in OxyContin diversion and abuse, there is a significant federal interest in prosecuting those who illicitly distribute this frequently deadly drug. The higher sentences for the higher concentration OxyContin products that will result from the Commission's proposal will, we believe, more accurately reflect the harm attendant to offenses involving this drug and encourage appropriate federal prosecution.

We are concerned over the sentence reductions that would result with respect to the non-controlled release oxycodone products for several reasons. We are particularly concerned about losing the ability to effectively prosecute individuals who are registered to prescribe and dispense controlled substances (physicians, pharmacists, etc.) and who abuse this privilege by illicitly prescribing or distributing products such as Percocet and Tylox. In our view, the ability to prosecute such defendants is key to maintaining the integrity of the registration system. Moreover, data from the Drug Abuse Warning Network (DAWN) indicate that, although

emergency room mentions of "single-entity oxycodone" (OxyContin)[1] have skyrocketed over the last several years, neither this nor any other data indicate that OxyContin abuse has supplanted the abuse of the combination oxycodone products.

As part of its data analysis, the Commission identified 25 cases sentenced in FY2000 and 2001 that involved oxycodone combination drugs. Upon recalculating the sentences for 22 of these cases under its proposal (assuming a 5 mg potency), the Commission determined that the average sentence would drop from 45 months to 17 months. The Commission further determined that at least six of the 25 cases sentenced involved DEA registrants (4 doctors and 2 pharmacists) although one of these cases was prosecuted for simple possession. Sentences in the remaining five registrant cases ranged from 24 months' probation to 72 months' imprisonment. There is an obvious concern that the enforcement program related to these drugs will be significantly impacted if the guidelines sentences are grossly reduced. Nevertheless, even assuming that fewer prosecutions of cases involving combination (non-controlled release) oxycodone products would occur under the new guidelines, we cannot at this time fully estimate how harmful the impact of such a loss would be.

In sum, we think the Commission's proposal appropriately corrects the disproportionately low sentences that offenses involving single-entity/controlled release oxycodone formulations such as the OxyContin formulations now incur. Due to the inherent complexities of alternative approaches that we and the Commission have considered, and the fact that we believe lowering the sentences for offenses involving combination/non-controlled release oxycodone formulations will affect relatively few cases, we support the Commission's proposal. We expect that the Commission will join the Department in carefully monitoring the sentences under the new guideline and, if appropriate, will revisit the issue in the future.

THREATS AND ASSAULTS ON FEDERAL OFFICIALS

While we recognize the factors that have led the Commission to defer action on this issue, we strongly urge the Commission to make a comprehensive review of the assault and homicide guidelines a top priority in the next amendment year. As we have stated on a number of occasions, we believe the guideline penalties for homicide, other than for first degree murder, are seriously inadequate. While the number of homicides prosecuted in federal court is relatively few because of the limitations of federal jurisdiction, the relevant guidelines are extremely important because of the seriousness of the crimes involved. Similarly, offense involving threats or assaults on federal judges and other federal officials, while very rare, are nonetheless of the utmost seriousness and should be appropriately addressed by the sentencing guidelines.

---

[1]There is one other line of relatively high-concentration oxycodone products that do not contain aspirin or acetaminophen. These products, however, are prescribed less often compared with, for example, the over 7 million prescriptions for OxyContin products in calendar year 2001 and the approximately 26.5 million prescriptions for all oxycodone products. Furthermore, there is no evidence of any significant diversion of these products.

We note that the Commission's Native American Working Group is specifically examining federal homicide and assault crimes. We think the Commission should ask the Native American Working Group to complete its work on these issue by this summer so that the Commission can promptly revisit all of the homicide and assault guidelines in the next amendment year and make adjustments to the guidelines as warranted and as required by recent legislation.

CYBERCRIME

I. Introduction

In the fall of 2002, Congress passed and the President signed into law the Cyber Security Enhancement Act of 2002, part of the Homeland Security Act of 2002, Pub. L. 107-296 (2002). In passing the Cyber Security Enhancement Act, Congress again increased some of the statutory maximum penalties for unauthorized access to or interference with computers, networked communications, and electronic information.[2]

Also as part of the Act, Congress expressed its intent with regard to the sentencing guidelines for these offenses unequivocally – that the Commission should "ensure that the sentencing guidelines and policy statements reflect the serious nature of [computer crimes], the growing incidence of such offenses, and the need for an effective deterrent and effective punishment to prevent such offenses."[3] To that end, Congress directed the Sentencing Commission to review and, if appropriate, amend the sentencing guidelines applicable to offenses against or involving computers and computer networks. Congress provided a list of eight discrete factors the Commission should consider in conducting its review. We comment here on the factors set forth by Congress and, more generally, on the guidelines applicable to computer crimes.

We believe several of the factors identified for review by Congress – specifically, level of sophistication, number of victims, and restitution – are adequately addressed by the current guidelines. The current guidelines do not reflect, however, the dramatic increase in reported

---

[2]In the USA-PATRIOT Act, Pub .L. No. 107-56 (2001), Congress increased the statutory maximum sentence for intentionally damaging a protected computer from five years to 10 years for first time offenders and from 10 years to 20 years for repeat offenders. *See* 18 U.S.C. § 1030(c)(4).

[3]*See also* 148 Cong. Rec. H4583 (daily ed. July 15, 2002) (statement of Rep. Smith) ("We must improve our Nation's cybersecurity and strengthen our criminal laws to prevent, deter and respond to [cyber] attacks."); 148 Cong. Rec. S8902 (daily ed. Sept. 19, 2002) (statement of Sen. Hatch) (stating Congress's intent to "give judges greater latitude to increase a defendant's sentence to better account for the seriousness of [a] cyber attack.").

computer crimes,[4] Congress's express intent to "increase[] penalties to better reflect the seriousness of cyber crime,"[5] and the fact that such crimes often cause egregious non-monetary harms. We believe that several specific amendments to the guidelines are appropriate to address these issues.

Congress amended 18 U.S.C. § 1030 expressly to account for some non-monetary harm (for instance, damage to a computer used in furtherance of the administration of justice, national defense, or national security, added by the USA PATRIOT Act as 18 U.S.C. § 1030(a)(5)(B)(v)) and directed the Commission to consider other specific factors that reflect the non-monetary harm that may be caused by computer crimes (such as harms to privacy, critical infrastructures, and public safety). Unlike most economic crimes, computer intrusions sometimes cause relatively little monetary loss, in part because computer offenders may act out of a variety of non-financial motives, including the challenge of penetrating a network, the ability to access private or confidential information, and the desire for "bragging rights" within the online community. Nevertheless, the consequences of computer crimes may be dire – egregious violations of privacy; damage to the computer systems that support national defense, national security, and the administration of justice; impairment of critical infrastructures; and even serious bodily injury or death. These crimes must be effectively deterred and severely punished.

Based on the substantial experience of the Criminal Division in preventing, investigating, and prosecuting computer crimes, we feel these amendments constitute an effective, measured implementation of Congress's intent to "ensure that the sentencing guidelines and policy statements reflect the serious nature of [computer crimes], the growing incidence of such offenses, and the need for an effective deterrent and effective punishment to prevent such offenses."

---

[4]The annual CSI/FBI Computer Crime Security surveys indicate that in 2000, 70 percent of the companies surveyed indicated that they had been the target of computer crime within the past 12 months; by 2002, that figure had risen to 90 percent. Both the 2000 and the 2002 surveys indicate that only about 40 percent of such victims feel that the harm resulting from the attacks may readily be expressed as "financial loss." In 2000, the total financial loss of the 273 responding companies that felt that they could quantify their loss was more than $265 million; in 2002, the total financial loss of the 223 companies that quantified their loss was more than $455 million. *See* "2000 CSI/FBI Computer Crime and Security Survey," in *Computer Security Issues & Trends*, Vol. VI, No. 1 (Richard Power ed. 2000); "2002 CSI/FBI Computer Crime and Security Survey," in *Computer Security Issues & Trends*, Vol. VIII, No. 1 (Richard Power ed. 2002).

[5]Statement of the Hon. Lamar Smith (R-TX), Chairman, Crime Subcommittee, House Judiciary Committee, hearing on H.R. 3482, the "Cyber Security Act of 2001," February 12, 2002.

II. The Statutory Scheme and Recent Amendments

Three portions of the criminal code proscribe unauthorized access to or interference with computers, networked communications, and electronic information. Section 1030 generally prohibits intentionally accessing a protected computer without, or in excess of, authorization, *see* 18 U.S.C. § 1030(a)(1)-(4); knowingly transmitting a computer command, code or program with intent to cause damage to a protected computer, *see* 18 U.S.C. § 1030(a)(5); knowingly trafficking in devices that facilitate unauthorized access to computers, *see* 18 U.S.C. § 1030(a)(6); and threatening to damage a protected computer, *see* 18 U.S.C. § 1030(a)(7). Section 2511(1) prohibits intentionally intercepting any wire, oral or electronic communication. And section 2701(a) proscribes obtaining, altering, or preventing access to undelivered e-mail by intentionally accessing without, or in excess of, authorization a facility through which an electronic communication service is provided.

The USA-PATRIOT Act, Pub. L. No. 107-56 (2001), included several important amendments of Section 1030. Three of those amendments may have implications for the sentencing guidelines. First, Congress increased the statutory maximum sentence for intentionally damaging a protected computer from five years to 10 years for first time offenders and from 10 years to 20 years for repeat offenders. *See* 18 U.S.C. § 1030(c)(4). Second, Congress prohibited damaging a computer system used by the government in furtherance of the administration of justice, national defense, or national security even if the aggregate damage falls short of $5,000. *See* 18 U.S.C. § 1030(a)(5)(B)(i). Third, Congress included a new, broad definition of "loss:"

> the term 'loss' means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service.

18 U.S.C. § 1030(e)(11). In sum, the USA-PATRIOT Act strengthened some of the statutory penalties for computer crimes, brought new destructive conduct within the purview of the federal criminal code, and expanded the definition of loss suffered by a computer crime victim.

Roughly a year after the USA-PATRIOT Act became law, Congress passed the Homeland Security Act of 2002, Pub. L. 107-296 (Nov. 25, 2002), again strengthening the penalties for many computer crimes. Congress increased the statutory maximum to 20 years for attacks on computer systems in which the defendant knowingly or recklessly causes or attempts to cause serious bodily injury. *See* 18 U.S.C. § 1030(c)(5)(A). Congress increased the statutory maximum sentence to life in prison if the defendant knowingly or recklessly causes or attempts to cause death. *See* 18 U.S.C. § 1030(c)(5)(B).

Congress also increased the statutory maximum penalty for obtaining, altering or preventing authorized access to a wire or electronic communication in electronic storage by accessing an electronic communication service without, or in excess of, authorization. *See* 18 U.S.C. §2701(a). An offender convicted of such conduct for the first time now faces a one-year maximum sentence, and an offender with a prior conviction faces a five-year maximum sentence as opposed to the six-month sentence provided for before the Homeland Security Act. *See* 18 U.S.C. § 2701(b)(2). Moreover, if such an offender is motivated by commercial advantage, malice, or private gain, Congress increased the maximum sentence from one year to five years for a first-time offender and from two years to ten years for a repeat offender. *See* 18 U.S.C. 2701(b)(1).

III. The Guidelines' Current Treatment of Sections 1030 and 2701

With a few notable exceptions, the guidelines currently treat 18 U.S.C. § 1030 violations as basic economic offenses for which §2B1.1 determines a defendant's sentence.[6] Section 2M3.2 determines the sentence for obtaining national defense information by accessing a protected computer in violation of 18 U.S.C. § 1030(a)(1). Section 2B2.3, the trespass section, determines the sentence for accessing without, or in excess of, authorization a computer of a department or agency of the United States. Section 2B3.2, the extortion guideline, determines the sentence for transmitting with intent to extort a threat to damage a protected computer in violation of 18 U.S.C. § 1030(a)(7). The guidelines currently provide no specific instruction as to how to sentence violations of 18 U.S.C. § 2701.

IV. Comments & Recommendations

Consistent with Congress's instruction to strengthen the penalties for computer crimes and to take into account non-monetary harm caused by such crimes, we recommend several specific Guidelines amendments. We address each of the enumerated factors set forth in the directive to the Commission in the Homeland Security Act and each of the questions posed by the Commission's solicitation for public comment.

A. Loss

The USA-PATRIOT Act amended 18 U.S.C. § 1030 to included a new definition of loss (see above). Application Note 2(A)(v)(III) of §2B1.1 currently instructs courts to include in a loss calculation "reasonable costs to the victim of conducting a damage assessment, and restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service." To avoid confusion and promote consistency, we believe the guideline loss definition should be amended to mirror the definition now contained in 18 U.S.C. § 1030.

---

[6]Guideline §2X1.1 determines the sentence for an attempt to violate any subsection of 18 U.S.C. § 1030(a). It generally instructs courts to apply the appropriate guideline for the substantive offense and then decrease the offense level by 3. *See* U.S.S.G. § 2X1.1(a), (b)(1).

As amended, the definition of loss will be sufficiently broad to capture the monetary harm caused by computer crimes (it does *not*, however, adequately address non-monetary harms such as invasion of privacy, damage to critical infrastructures, and bodily injury or death, which are addressed specifically later in these comments). We thus recommend that §2B1.1, note 2(A)(v)(III) be amended as follows:

> Protected Computer Cases.–In the case of an offense involving unlawfully accessing, or exceeding authorized access to, a "protected computer" as defined in 18 U.S.C. § 1030(e)(2), actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: ~~reasonable costs to the victim of conducting a damage assessment, and restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service.~~ **any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service.**

B. Level of Sophistication

The guidelines currently account for the level of sophistication of an offense in §2B1.1(b)(8). We believe this offense level increase is adequate and that no further amendment is needed.

C. Commercial Advantage or Private Financial Benefit

Congress directed the Commission to consider whether the guidelines should treat differently a violation of § 1030 that was motivated by commercial advantage or private financial benefit. Congress has expressly treated more severely computer crimes committed with these purposes. An offender who violates 18 U.S.C. § 1030(a)(2) by intruding into a protected computer and obtaining information generally faces a statutory maximum sentence of one year, *see* 18 U.S.C. § 1030(c)(2)(A); if, however, that same offender is motivated by the prospect of commercial advantage or private financial gain he faces a statutory maximum sentence of five years, *see* 18 U.S.C. § 1030(c)(2)(B)(i). In the Homeland Security Act, Congress established a similar increase in the statutory maximum penalty faced by an offender who violates 18 U.S.C. § 2701 with such motives. *See* 18 U.S.C. § 2701(b)(1) (establishing a statutory maximum sentence for offenses committed "for purposes of commercial advantage . . . or private commercial gain" of one year for first offenders and two years for repeat offenders); *cf.* 18 U.S.C. § 2701(b)(2) (establishing a statutory maximum sentence of six months where such motives are absent).

As a general matter, §2B1.1's loss table addresses monetary motives and harms by punishing an offense in proportion to the loss it causes or is intended to cause. However, in light of Congress's clearly expressed intent that crimes committed for such purposes by sentenced

more severely, we believe a minimum offense level floor of 12 for such offenses is appropriate (with no provision for any generally applicable penalty enhancement). Such a minimum would place an offender in Zone C of the sentencing table, absent the effect of other mitigating or extenuating specific offense characteristics. A short prison term is the appropriate penalty for these offenses, and, we believe, should be an effective deterrent for an offender who accesses without or in excess of authorization the computer of another in order to obtain commercial advantage or personal financial benefit.

We thus propose adding the following specific offense characteristic to §2B1.1(b):

> **(__) If the offense involves violation of 18 U.S.C. §§ 1030 or 2701 and was committed for purposes of commercial advantage or private financial gain and the offense level is less than 12, increase to 12.**

D. Intent to Cause Harm

Section 1030 violations committed with intent to cause harm are relatively commonplace; the disgruntled former employee who exacts revenge by attacking his former employer's network, for example, is a figure familiar to prosecutors. Punishing more severely offenders who intend to cause harm than offenders who cause harm unintentionally serves three of the four penological purposes recognized by federal law. Congress provided in the USA-PATRIOT Act for higher statutory maximum sentences for violations of 18 U.S.C. § 1030(a)(5)(A)(i), which applies to computer criminals who act with intent to cause damage. For a first offense, Congress raised the maximum sentence to 10 years, *see* 18 U.S.C. 1030(c)(4)(A); for any subsequent offense, Congress raised the maximum sentence to 20 years, *see* 18 U.S.C. 1030(c)(4)(C).

We believe the Commission should amend §2B1.1 to include a significant offense level increase and an offense level floor that reflects both the purposes of sentencing and Congress's unequivocal intent that the sentences for such crimes be increased. Individuals who violate the law with the intent to harm the life and livelihood of others are a threat to public safety and economic security. We recommend that the guidelines increase the offense level of such offenders by 4, to not less than 14, placing them in Zone D and assuring that, absent a departure, their sentence will include a term of imprisonment.

We suggest that the following specific offense characteristic to § 2B1.1:

> **(__) If the offense involved intentionally causing or attempting to cause damage to a protected computer in violation of 18 U.S.C. § 1030(a)(5)(A)(i), increase by 4 levels; if the resulting offense level is less than 14, increase to 14.**

E. Violations of Privacy

Personal information such as medical and financial records, diaries and personal correspondence, and other confidential information is increasingly stored on network-accessible digital media, either on networked personal computers or in the custody of third parties such as Internet service providers, credit reporting services, or data storage services. One objective of many computer intruders is to obtain such information. Given computer networks' roles as repositories for private and confidential information, computer intrusions have unprecedented potential to expose the personal information of hundreds or thousands of users at once. A computer intrusion in which the offender obtains personal information causes non-monetary harm that is difficult to capture in the loss table or elsewhere in the current guideline.

For instance, accessing without authorization a hospital's medical records in violation of 18 U.S.C. § 1030 and posting on the web a list of HIV-positive patients may be extremely harmful to both the hospital and the patients even though it may cause little or no measurable economic loss. In fact, at least one hospital has suffered such an intrusion. Several years ago, a hacker accessed a Pittsburgh hospital to obtain the medical records of a popular country western singer. Similarly, accessing a Hotmail web server in violation of 18 U.S.C. § 2701[7] and reading the personal correspondence of several of Hotmail's subscribers harms each subscriber, although that harm is difficult to quantify. We believe the guidelines should reflect the serious harm that such offenses cause.

Currently, §2B1.1 accounts for violations of privacy by including among a "non-exhaustive list of factors the court may consider" in making an upward departure from a defendant's sentencing range whether "[t]he offense . . . resulted in a substantial invasion of a privacy interest." §2B1.1, note 15(A)(ii). In practice, however, courts seldom depart upward from the guidelines. As a result privacy violations are left unpunished and under-deterred. In cases such as the intrusion into the hospital computer described above, the invasion of privacy is not a footnote to the monetary loss, it is the most significant harm caused by the intrusion. Moreover, even where an intrusion does involve a monetary loss (*e.g.*, where it results in the theft of financial records), the invasion of privacy is a separate and significant harm. In fact, it may be the harm regarded as most egregious by the individual victim.

We recommend increasing by two the offense level of offenders who obtain important private information. In addition, because a violation of the privacy of 50 people causes more harm than a violation of the privacy of a single person, we recommend amending the application note for section 2B1.1(b)(2) to clarify that every individual about whom such information is obtained as a result of a computer intrusion is a "victim" for the purposes of the guidelines.

---

[7]The guidelines do not currently reference violations of 18 U.S.C. § 2701 to a specific guideline. Section 2701, like section 1030, prohibits unauthorized access to certain computer systems. We believe Appendix A should be amended to reference violations of 18 U.S.C. § 2701 to §2B1.1.

Thus, if a hacker accesses a medical records database and steals 100 people's records, the number of victims would include these 100, not just the computer owner.

We propose (1) adding the following specific offense characteristic:

> **(__)(A) If the offense involved knowingly accessing a computer without authorization or exceeding authorized access in violation of 18 U.S.C. §§ 1030 or 2701 and obtaining personal information as a result, increase by 2 levels.**

(2) adding the following Application Note to the Commentary:

1. *Definitions.–For the purposes of this guideline:*

* * *

"Personal information" means sensitive or private information, including but not limited to medical records, financial records, social security numbers, wills, diaries, private correspondence including email, photographs of a sensitive or private nature, or similar information, including such information in the possession of a third party.

(3) amending application note 3(A)(ii) as follows:

*(ii) "Victim" means (I) any person who sustained any part of the actual loss determined under subsection (b)(1); ~~or~~ (II) any individual who sustained bodily injury as a result of the offense~~.~~; **or (III) any individual whose personal information was accessed during a violation of 18 U.S.C. §§ 1030 or 2701.** "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.*

F. <u>Computers Used by the Government in Furtherance of National Defense, National Security, or the Administration of Justice & Disruptions of Critical Infrastructures</u>[8]

Computer networks are used in furtherance of the administration of justice – by state, local, and federal law enforcement agencies, by jail and prison agencies, by probation and parol offices, and by local, state and federal courts. Such networks play a critical role in ensuring that the justice system performs effectively and efficiently and that dangerous criminals are kept off the streets. In one notable case, a convicted felon hacked into the computer network of a United States District Court in an effort to modify his sentence. Intrusion into networks used in

---

[8]Although Congress listed these as two separate factors, we believe they are so closely related that they are best addressed by a single amendment to the guidelines.

furtherance of the administration of justice should be appropriately accounted for in the guidelines. Accordingly, we believe a four level increase should be provided for intruding into such networks.

Computer networks are also used to maintain and operate the critical infrastructures upon which our society and economy rely. Such critical infrastructures, whether publicly or privately held,[9] include the provision of health care, the production and distribution of energy, public transportation, emergency response, national defense and national security, and the administration of justice. The prospect of attacks on, or intrusions into, these networks raises harrowing possibilities. For instance, in March 1997, a computer intrusion into a telephone company serving Worcester, Massachusetts disabled the night landing lights and communications with airport emergency services at Worcester's airport for six hours. Luckily, no one was injured.

In 1998, a young hacker broke into the computer system that runs Arizona's Roosevelt Dam, attaining complete command of the system controlling its massive floodgates. If the 1.5 million acre-feet of water restrained by the dam had been released, experts indicate that the consequences could have been disastrous for Mesa and Tempe Arizona, two communities with a population totaling nearly one million people that rest on the flood plain below the dam. Again, in 2000, in Australia, a computer hacker obtained complete control over the waste- and fresh-water system that served a large community, leaking hundreds of thousands of gallons of sludge that killed marine life, destroyed a riparian area, and subjected residents to an insufferable stench. The chief executive of the water station indicated that the consequences could have been much worse, stating, "He could have done anything he liked to the fresh water." Only two months ago, in January 2003, a computer virus disrupted operations for the Seattle-area 911 operations center that serves two suburban police departments and at least 14 fire departments.

Other dire scenarios are not hard to imagine:[10] attacks on, for instance, the computer systems that regulate and operate nuclear power plants, that control the orbit of telecommunications satellites, or that route calls to 911 operators could have truly disastrous

---

[9]Since many critical infrastructures in the United States are owned and operated by private companies, it is essential that the definition of critical infrastructures include such private concerns and not merely public or governmental entities.

[10]Computer attacks striking at the heart of the United States' critical infrastructures have fortunately been few in number. However, we agree with the statement of Senator Hatch that "[t]errorists and others who wish to harm our country recognize that cyber attacks on our vital computer and related technological systems can have a devastating impact on our country, our economy and the lives of our people." 148 Cong. Rec. S8901 (daily ed. Sept. 19, 2002) (statement of Sen. Hatch). In light of this threat, we believe it is essential for the guidelines to provide severe punishment for such cyber attacks to effectively deter and appropriately punish them.

consequences. For instance, a computer intrusion that compromised the integrity of databases reflecting troop and equipment locations could gravely harm national security. Computer intrusions that impede, or risk impeding, such critical infrastructures should be sentenced severely to deter effectively and punish appropriately conduct that risks such formidable consequences.

We do not believe these harms can be adequately quantified in monetary terms and therefore are not adequately accounted for by the section 2B1.1 loss table. Congress's concern with such attacks is evidence. The USA-PATRIOT Act added to the list of specific computer conduct prohibited by 18 U.S.C. § 1030 a computer intrusion or the transmission of a code or program that causes damage to "a computer system used by the government in furtherance of the administration of justice, national defense, or national security." 18 U.S.C. §§ 1030(a)(5)(A) & (a)(5)(B)(v). Such computer systems are integral to the proper functioning of government, and conduct that exposes them to damage should be strongly deterred and severely punished. We therefore propose a specific offense characteristics with a two-tiered offense level increase and a minimum offense level floor for the second tier. This structure provides for increased punishment for computer intrusions that risk harm to the computers that maintain and operate critical infrastructures, reflecting the notion that hacking into such computers is serious, risky conduct even if no harm results. The second tier punishes extremely severely computer intrusions that substantially disrupts critical infrastructures themselves.

The proposed amendment would apply cumulatively where appropriate with the specific offense characteristic for creating a risk of death or serious bodily injury and the specific offense characteristic for causing injury or death. The Commission may also want to consider including as a ground for upward departure violations disrupting so severely a critical infrastructure as to incapacitate the economy, public health, or national defense or security.

We propose adding the following specific offense characteristic:

> **(__)(A) If the offense violated 18 U.S.C. § 1030 and involved a computer system used to maintain or operate a critical infrastructure or a computer system used by or for a government entity in furtherance of the administration justice, national defense, or national security, increase by 4 levels.**
>
> **(B) If the offense violated 18 U.S.C. § 1030(a)(5)(A)(i) caused a substantial disruption of a critical infrastructure, increase by 6 levels. If the resulting offense level is less than level 28, increase to level 28.**

We also suggest adding the following Application Notes to the Commentary:

1. <u>*Definitions.*</u>*–For the purposes of this guideline:*

* * *

"Critical infrastructure" means systems and assets vital to the national defense, national security, economic security, public health or safety, or any combination of those matters.

__. *Critical Infrastructures under Subsection (b)(16).* – ***Examples of critical infrastructures to which subsection (b)(16) applies are systems and facilities, whether publicly or privately held, that provide essential services in support of the economy and national defense and national security. Such infrastructures include, but are not limited to, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services, medical care, and transportation links such as interstate highways, airlines, and rail systems. Substantial disruptions in the services provided by such infrastructures jeopardizes the health, safety, security, or economic welfare of a substantial number of people. The enhancement provided for in subsection (b)(16) reflects the seriousness of substantially disrupting a critical infrastructure such as by impairing 9-1-1 phone service to a town or city for several hours or by eliminating electrical power to a county for a similar period of time. Subsection (b)(16) should be applied cumulatively with subsections (b)(11) and (b)(17).***

H. Threat to Public Health & Safety; Risk of Bodily Injury, and Death

Both 18 U.S.C. § 1030 and the guidelines should take into account the potential that a computer intrusion may cause serious bodily injury or death.[11] Congress has recognized this potential by significantly increasing the maximum penalties for conduct that involves the risk of such consequences. The USA-PATRIOT Act doubled the maximum sentences for intentionally damaging a computer and, as a result, causing physical injury to any person or a threat to public health or safety. See 18 U.S.C. § 1030(c)(3)-(4). Congress further strengthened these penalties in the Homeland Security Act of 2002, increasing the statutory maximum to 20 years for an offender who knowingly or recklessly causes serious bodily injury and to life in prison for an offender who knowingly or recklessly causes death. Thus, Congress has unequivocally expressed its intent to punish and deter computer intrusions that cause death or serious bodily injury.

Section 2B1.1(b)(11) currently addresses conduct that *creates a risk* of death or serious bodily injury. It provides: "If the offense involved (A) the conscious or reckless risk of death or serious bodily injury . . . increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**." For a first time offender, an offense level of 14 results in a sentencing range of 15 to 21 months; even an offender with the highest possible criminal history points faces only a 46-month sentence, absent discretionary departure from the guidelines by the sentencing

[11] *See* 148 Cong. Rec. S8901 (daily ed. Sept. 19, 2002) (statement of Sen. Hatch) ("[I]t is not difficult to imagine an assault on a computer system which might cause death or serious bodily injury.").

court. Section 2B1.1 does not, however, provide guidance to a court confronted by a computer intrusion or the transmission of a computer virus that *actually causes* serious bodily injury or death. For example, a computer intrusion that disabled even for a moment the 911 emergency response system could easily deprive a medical patient of emergency treatment or a crime victim of timely protection.

We believe §2B1.1 should be amended to reflect both the wider scope of section 1030 violations that Congress intended to punish more severely, and the stronger penalties Congress intended for offenders whose conduct has such dire consequences. We recommend including a specific offense characteristic in section 2B1.1 that reflects the physical harm caused by the offense.

We suggest adding the following specific offense characteristic:

> **(__) If the offense resulted in: (A) bodily injury, add 2 levels; (B) serious bodily injury, add 4 levels; (C) permanent or life-threatening bodily injury, add 6 levels; and (D) death, add 8 levels.**[12]

And adding the following cross reference:

> **(__) If the offense involved a violation of 18 U.S.C. § 1030 and any person was killed under circumstances that would constitute homicide, apply the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the application of that section results in a higher offense level than application of this section.**

1. Number of Victims

The current guidelines treat the same a computer attack that damages one computer and a computer attack that damages 100 computers, so long as there is only one victim of the statutory violation. It is undeniable, however, that even if a computer intrusion victimizes only one government agency (*e.g.*, the armed forces), the intrusion is more egregious if it damages 100 of that agencies computers than if it damages only one of them. We believe the definition of"victim" should be amended to reflect that each computer damaged by a computer intrusion constitutes a victim for the purposes of subsection (b)(2).

---

[12]The offense level increases in this recommended amendment are drawn from §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) and other similar provisions.

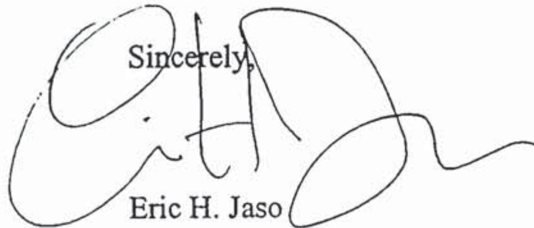
We suggest amending Application Note 3.(A)(ii) as follows:

(ii) *"Victim" means (I) any person* ***or computer that*** *~~who~~ sustained any part of the actual loss determined under subsection (b)(1); ~~or~~ (II) any individual who sustained bodily injury as a result of the offense~~.~~****; or (III) any individual whose personal information was accessed during a violation of 18 U.S.C. §§ 1030 or 2701.*** *"Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.* [13]

* * * * *

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to working further with you and the other Commissioners to refine the sentencing guidelines and to develop effective, efficient, and fair sentencing policy.

Sincerely,



Eric H. Jaso
Counselor to the
Assistant Attorney General

---

[13] This amended application note incorporates the amendment recommended in Part IV.E., supra.

PRACTITIONERS' ADVISORY GROUP
CO-CHAIRS BARRY BOSS & JIM FELMAN
C/O ASBILL MOFFITT & BOSS, CHARTERED
1615 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, DC 20009
(202) 234-9000 - BARRY BOSS
(813) 229-1118 - JIM FELMAN

March 17, 2003

VIA FACSIMILE

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

Re: January 17, 2003 request for comment (corporate fraud)

Dear Judge Murphy:

We write to add our views to others submitted in response to the Commission's January 17, 2003 request for comment. In addition, we ask that this letter serve as the Practitioners' Advisory Group's ("PAG") written testimony for the public hearing scheduled for March 25, 2003. [1]

The PAG has already commented extensively on the amendments proposed in response to Sarbanes-Oxley, including our correspondence dated December 12, 2002, November 15, 2002, and September 18, 2002. While we remain convinced that the Commission went too far in passing the emergency amendments on January 8, 2003, we have previously set forth those concerns at length and will not repeat them here. Instead, we will focus on the Issues for Comment set forth in the January 17, 2003 Federal Register notice. In that regard, we rely not only on our previous letters to the Commission but also on the thoughtful comments of Indiana University Law Professor Frank O. Bowman, III, contained in his February 10, 2003 letter to the Commission. The PAG strongly opposes the adoption of a new loss table (options 1A-1C) or a new base offense keyed to the statutory maximum of the offense of conviction.

---

[1] We wish to express our appreciation to PAG member David F. Axelrod for his assistance in drafting this letter.

REVISING THE LOSS TABLE

The Department of Justice's ("DOJ") arguments in support of the proposed increases in the loss table and/or the base offense level do not square with reality. For instance, it is at least implicit in DOJ's arguments in favor of increasing the loss table contained in U.S.S.G. §2B1.1 that sentences for white-collar offenders are not sufficiently severe. That is convincingly refuted by Profession Bowman, who points out, among other things, that there cannot be a general deterrent rationale for increasing the loss table, since DOJ's own statistics show that the rate of property crime has been dropping steadily since 1974 (Bowman letter at 2).

It is, of course, always possible to argue that more severe sentences would reduce the crime rate even more. However, common sense suggests that at least with respect to white-collar crimes, we are far beyond the point of diminishing returns in that regard. DOJ's limited resources would better be devoted to increased enforcement, rather than locking up a relatively small number of offenders and throwing away the key. Furthermore, the approach advocated by DOJ is counterproductive because it lulls policymakers, and the public, into thinking that meaningful action has been taken. To the contrary, where, as here, offenders are already facing extremely stiff sentences, increasing sentencing ranges does little to reduce criminal activity.

Nor is revision of the loss table justified by other commonplace arguments, such as that sentences for white-collar offenders are insufficiently severe to deter specific categories of potential offenders. As Professor Bowman points out, examination of the guidelines presently applicable to even moderately serious white-collar offenders – those at whom Sarbanes-Oxley is directed – reveals sentences that are substantial, even in comparison to those imposed for violent crimes and drug-related offenses (Bowman letter at 13). Professor Bowman illustrates the point with a series of hypothetical examples that we respectfully urge the Commission to examine carefully. They demonstrate, among other things, that when low-level offenders are excluded from the calculus, DOJ's statistics reveal that the present Guidelines are more than adequate to deal with white-collar crime. (*See* Bowman letter at 9, 12-13.)

Numerous other statistics are available to prove that the perception that white-collar offenders are treated leniently – vigorously promoted by DOJ – is just plain wrong. As you know, the guidelines for economic crimes have been increased repeatedly since 1987, causing very substantial increases in sentences, with the further result that the percentage of white-collar offenders who are sentenced to imprisonment increased dramatically throughout the 1990s. For instance, the Commission's own statistics demonstrate that the rate of imprisonment for fraud increased from 56.7% in 1992 to 69.2% in 2001.

The severity with which white-collar offenders are treated is also shown by the relatively low rate of departures for such offenders. For instance, while defendants who are convicted of drug trafficking receive downward departures 44% of the time, white-collar offenders who commit fraud, embezzlement and forgery/counterfeiting receive downward departures in just 28%, 18% and 19% of such cases, respectively. (Behre and Ifrah, *Courts not soft on fraud, theft crimes,* National Law Journal, March 10, 2003 attached as Exhibit A.) In other words, white-collar offenders are less likely than other classes of defendants to receive departures and avoid the high sentences mandated by the Guidelines. The authors of that article point out:

> This flies in the face of today's frenzied conventional wisdom concerning corporate wrongdoers, and draws into question whether reform is truly needed.

Finally, to revise the loss table would be a vastly overbroad response to the problems at which Sarbanes-Oxley was directed. The loss table obviously applies to many categories of offenses that have nothing to do with the sort of corporate fraud that motivated Congress. Furthermore, approximately 20 or so guidelines, many having nothing to do with corporate fraud, incorporate the 2B1.1 loss table by cross-reference. It does not appear that any consideration has been given to the significant increase in severity of this myriad of offenses, or its effect on sentencing policy.

INCREASING THE BASE OFFENSE LEVEL

The arguments for increasing the base offense levels for certain targeted economic crimes (those carrying statutory maximum sentences of ten or twenty years) are equally unpersuasive for the reasons cited above and for the additional reason that this proposed amendment invites charging abuse. For instance, the two violations that will most often be affected by this proposed amendment are mail and wire fraud (18 U.S.C. §§ 1341 and 1343, respectively), each of which now carries a maximum sentence of twenty years imprisonment. The malleability of those statutes is beyond dispute. This proposed amendment increases the prosecutor's ability to decide the sentence at the time of indictment through the simple expedient of charging mail or wire fraud to increase the sentence, or another offense carrying a lesser maximum, to lower it.

Additionally, the statistics cited in support of this proposed amendment are unreliable. Indeed, it is impossible to forecast the effect of this sort of proposal because of the change it would make in the prosecutor's incentives in filing charges and negotiating plea agreements. In that light, it cannot reliably be predicted whom this proposal would affect, or how.

Most importantly, the Commission should refrain from amending the Guidelines because there has been no meaningful opportunity to evaluate the

effect of the most recent amendments, contained in the Economic Crime Package of 2001. Those amendments will cause very significant sentencing increases for almost all white-collar offenders who have committed even moderately serious crimes. However, since those amendments apply only to offenses committed after November 1, 2001, there is not yet any meaningful data on their effect. (Bowman letter at 8.)

We implore the Commission not to succumb to pressure to amend the loss table merely to satisfy a public perception created by a few, high profile cases. The burden should be on DOJ to demonstrate through statistics or other reliable evidence a concrete need for amendment. It has failed to do so, choosing instead to rely on the overly simplistic – and incorrect – assumption that Sarbanes-Oxley requires such amendment.

The sort of constant tinkering advocated by DOJ threatens to undermine the Guidelines' fundamental purpose "to achieve reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." (U.S.S.G. Chapter 1, Part A, 2. *The Statutory Mission.*) Surely, Congress did not intend for two similarly situated defendants to receive significantly different sentences solely because their offenses occurred on different dates. Such temporal disparity, however, will inevitably result, especially if the Commission revises guidelines, such as those contained in the Economic Crimes Package, that have barely become effective.

The PAG is troubled by what we see as a "politicalization" of sentencing policy. There is a disturbing and counterproductive trend to respond to high profile criminal episodes with higher sentencing ranges for that "type" of offender. This enables politicians and DOJ officials to chant the mantra of "tough on crime," because he or she supported increasing sentencing ranges. As noted above, increased sentences do little to reduce criminal activity where, as here, sentencing ranges are already high. Even worse, this approach enables policymakers to avoid the difficult task of figuring out how to craft policies that might really work.

It seems to us that the Sentencing Commission's duty is to resist "political" approaches to criminal justice in general, and sentencing policy in particular. The Commission should ensure that the sentencing ranges available to district judges are fair and appropriate in light of the particular offender and offense. Unfortunately, we appear headed on a course reminiscent of the "war against drugs," where politics drove sentencing policy and it is now generally acknowledged that Congress and the Commission went too far.

In closing, we urge the Commission not to discard the five years of work that achieved the Economic Crimes Package of 2001. The guidelines applicable to economic crimes should not be amended unless and until the Commission has a concrete reason for doing so.

As always, we appreciate the opportunity to assist the Commission in understanding the perspective of practitioners regarding the difficult and important matters before the Commission.

Sincerely,

James E. Felman
Barry Boss

Enclosure

cc: All Commissioners
Charles Tetzlaff, Esq.
Timothy McGrath, Esq.
Kenneth Cohen, Esq.

EXHIBIT A

THE NATIONAL LAW JOURNAL | IN FOCUS | MONDAY, MARCH 10, 2003

WHITE-COLLAR CRIME

Courts not soft on fraud, theft crimes

Drug trafficking defendants have a greater chance of downward departures.

By Kirby D. Behre and A. Jeff Ifrah
SPECIAL TO THE NATIONAL LAW JOURNAL

THE DEPARTMENT of Justice (DOJ) claims that white-collar criminals are treated too leniently and is taking immediate steps to rectify this perceived inequality. In particular, DOJ recently claimed that white-collar defendants are granted far more departures from mandatory sentencing guidelines than the average criminal, and in some instances are permitted to serve their sentences in halfway houses. In a letter dated Oct. 1, 2002, to Diana E. Murphy, the chairwoman of the U.S. Sentencing Commission, DOJ has asked the commission—which established and modifies the guidelines that govern federal sentencing—to consider limiting the availability of exceptions to the application of those guidelines that DOJ contends are being "successfully invoked by white collar criminal defendants, who typically have sophisticated counsel." In that letter, the DOJ advocated for a policy that would make "prison time...the rule, not the exception, for those who violate the law in the course of doing business."

The problem is that reality does not confirm DOJ's perception. Exceptions to the sentencing rules can wreak havoc on the uniformity of the federal sentencing structure, and such exceptions, known as "departures," are doled out to a significant number of defendants in a wide variety of jurisdictions across the country. But DOJ's own statistics suggest that white-collar defendants don't benefit disproportionately from such departures. In fact, in several large jurisdictions, white-collar defendants receive departures less frequently than defendants overall. Nationally, drug dealers receive departures far more often than white-collar defendants. The problem that requires attention and study is the great disparity among different jurisdictions in the frequency with which departures are granted, and the disparity among defendants convicted of different types of crimes, which results primarily from the inconsistent standards and practices used by federal prosecutors across the country.

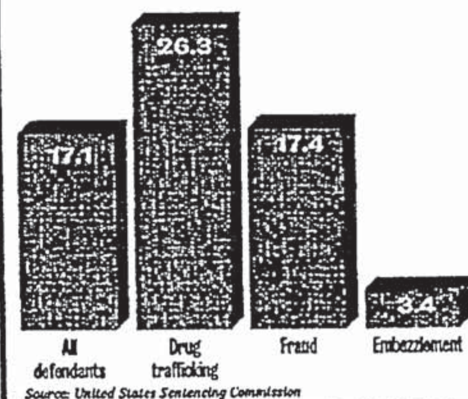
The Sentencing Reform Act of 1984 was designed to eliminate unwarranted sentencing disparity by establishing a consistent system of federal sentencing. See S. Rep. No. 98-225, at 39 (1983), reprinted in 1984 U.S.C.C.A.N. 3220. In order to implement this objective, Congress created the U.S. Sentencing Commission. In 1988, the commission promulgated the Federal Sentencing Guidelines, which today is over 500 pages long and the product of more than 600 amendments. The guidelines contain lengthy and complex provisions that attempt to cover almost every conceivable relevant, aggravating or mitigating circumstance that a judge is likely to consider in sentencing a defendant.

By applying the facts of a case and the defendant's criminal history and personal characteristics to the guidelines provisions, a judge arrives at an offense level from which a very narrow sentencing range is determined. Except when the court grants a departure, a defendant's sentence must be within that range.

The law permits deviation from the guidelines range only if the court finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." 18 U.S.C. 3553(b). Put another way, only if a case is outside "the heartland" of guidelines cases may a sentencing court depart from the rigid guidelines formula. *Koon v. United States*, 518 U.S. 81, 96 (1996). Thus, the guidelines were intended to be the rule, and departures the rare exception.

DOWNWARD DEPARTURES

Percentage of defendants receiving "substantial assistance" downward departures, by type of crime, in 2001.



Source: United States Sentencing Commission

Declining figures

With all the publicity surrounding a few high-profile corporate criminal and securities investigations, one might think that we were in the middle of a white-collar crime wave. Sentencing statistics strongly suggest that is not the case.

According to DOJ's Bureau of Justice Statistics, since 1994, economic crimes have declined steadily, despite the fact that the U.S. population grew by 20 million people. While the average length of sentences for violent offenders has declined since 1994, the average length of white-collar sentences has increased during that same period. During the 1990s the number of economic offenders sentenced to prison continually increased. The number of white-collar defendants sentenced to prison instead of probation is increasing as is the length of those prison terms. On the other hand, violent offenders have been receiving less significant sentences each year since 1994.

Significantly, one out of every three criminal defendants receives a downward departure. In practice, sentences above those dictated by the guidelines are extremely rare, so the vast majority of departures result in sentences below those dictated by the guidelines. Nationally, departures from the guidelines sentencing range have increased steadily over the past five years and are now granted in approximately 36% of all cases.

Contrary to the leniency myth, white-collar defendants in many regions are more likely to be sentenced within the guidelines range than the average defendant. For example, according to statistics compiled by DOJ's Bureau of Justice Statistics, 70% of the white collar defendants in

Kirby D. Behre is a partner and A. Jeff Ifrah is an associate at the Washington office of Paul, Hastings, Janofsky & Walker, are co-authors of the treatise Federal Sentencing for Business Crimes (LexisNexis/Matthew Bender). Behre is a former assistant U.S. attorney and Ifrah is a former military prosecutor.

the 9th U.S. Circuit Court of Appeals were sentenced within the guidelines range, despite the fact that, as noted below, only 50% of all defendants in that circuit received guidelines sentences. In other circuits, white collar defendants face greater odds of receiving a guidelines sentence than the average defendant. In the 2d Circuit, 62% of white-collar defendants were sentenced in accordance with the guidelines calculation range, while 57.5% of all defendants received guidelines sentences. In the 4th Circuit, more than four out of five white-collar defendants were sentenced within the guidelines range, while three out of four defendants overall received a guidelines sentence. In the 11th Circuit, 76% of all white-collar defendants were sentenced in accordance with the guideline calculation range, compared to 72% overall.

White-collar defendants fared no better than drug dealers. While defendants who are convicted of drug trafficking (22,882 nationally in fiscal year 2001) receive downward departures 44% of the time, white-collar defendants who commit fraud, embezzlement and forgery/counterfeiting receive downward departures in just 28%, 18% and 19% of such cases, respectively. Clearly, white-collar criminals receive departures at a rate far below the national average and far below the national average for drug dealers.

Whether white-collar defendants are compared nationally to all defendants, or regionally to all defendants, it is clear that they receive fewer departures from the sentences mandated by the guidelines. This flies in the face of today's frenzied conventional wisdom concerning corporate wrongdoers, and draws into question whether reform is truly needed.

Disparate treatment exists

The disparate, harsher treatment white-collar defendants receive is part of a larger disparity problem by circuit and courthouse. In some jurisdictions, the percentage of cases involving departures from the guidelines far exceeds 50%. In Arizona, federal criminal defendants were sentenced outside of the guidelines range more than 70% of the time in 2001. Defendants in southern California and eastern Washington were sentenced outside of the guidelines range 58% of the time. Half of all defendants in the entire 9th Circuit received departures from the guidelines range. Several other jurisdictions just missed a 50% departure rate. In central Illinois, southern Iowa and southern Ohio, defendants received departures in approximately 47% of all cases. And in the 2d Circuit, 42.5% of all defendants received departures. See www.ussc.gov/linktojp.htm (Table 26).

In contrast, for defendants in several other jurisdictions the odds were far greater that they would not receive a departure. Approximately 90% of all defendants in Utah, West Virginia and the Eastern District of Virginia were sentenced within the guidelines range. Several other jurisdictions apply the guidelines in approximately 80% of criminal cases: central California, Puerto Rico, the Middle District of North Carolina, eastern Louisiana, western Kentucky, southern Illinois, Wisconsin, eastern Arkansas, northern Oklahoma and southern Florida.

This wild fluctuation among jurisdictions creates obvious inequalities. Why should a defendant in central California face an 80% chance that the guidelines calculation will apply, when defendants in southern California face only a 41% chance that the guidelines will apply? Why should 90% of all defendants in eastern Virginia receive sentences pursuant to the guidelines calculation, when, just a few hours away in eastern Pennsylvania, only 52% of all defendants receive a sentence consistent with that calculation?

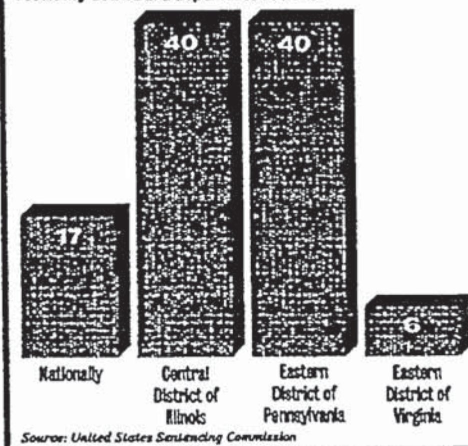
Prosecutors control the most important aspects of the sentencing process via the plea agreements they negotiate with 95% of all criminal defendants. See Bureau of Justice Statistics, Federal Criminal Case Processing, 2001, http://fjsrc.urban.org/noframe/comptbl.htm#other. Plea agreements often contain provisions regarding the government's promise to seek a departure from the guidelines if a defendant cooperates in the government's investigation. In 2000, two-thirds of all departures granted nationwide resulted from recommendations made by prosecutors that the sentencing judge depart downward for "substantial assistance." See U.S. Sentencing Guidelines § 5K1.1. (In 2001, that number dipped to approximately one-half of all departures.) The remainder of the departures are granted directly by the court at the request of the defendant.

Within prosecutor's discretion

The decision to request a departure is exclusively that of the prosecutor, and in the majority of states there are no national, specific rules or procedures for a prosecutor to follow in determining whether to make such a recommendation. Such prosecutorial discretion "if unchecked, has the potential to recreate the very disparities that the Sentencing Reform Act sought to alleviate." Stephen Schulhofer and Ilene Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Era*, 91 Nw. U. L. Rev. 1284 (1997).

Perhaps due to the lack of defined procedures governing the request for such a departure, inconsistencies exist in the way prosecutors exercise their departure power. Nationally, substantial assistance departures are granted in approximately 17% of all cases. In the central district of Illinois and the eastern district of Pennsylvania, 40% of all defendants receive a substantial assistance departure. In the 3d and 6th circuits such departures are granted almost 30% of the time. Yet in the 5th and 9th circuits they are generally granted in only 10% of all cases and in Arizona, South Dakota and the Eastern District of Virginia only 6% of defendants receive such departures.

Statistics on substantial assistance departures for white-collar defendants in these regions suggest they fare approximately the same or worse than the average criminal defendant. For example, in the 3d and 6th circuits white-collar defendants are granted substantial assistance departures in only 24% and 13%, respectively, of all cases. Nationwide, 17% of all defendants receive substantial assistance departures, those convicted of drug-trafficking offenses receive such departures at a 26% rate. But persons convicted of embezzlement offenses receive such departures at a 3.4% rate nationwide. Other white-collar defendants facing fraud (17%), forgery/counterfeiting (11.5%) and tax (17.5%) charges also fare worse than drug dealers.



The myth that white-collar defendants receive lenient sentences is belied by the government's own actions and statistics. But there is a larger underlying problem with the federal sentencing structure today. The guidelines have removed most of the judicial discretion in sentencing, but the sheer number of exceptions threatens to swallow those rules. The striking lack of uniformity in application nationwide strongly suggests that discretion is alive and well in the sentencing process. But it is federal prosecutors—employed by DOJ—who possess most of that discretion, not judges. NLJ

This article is reprinted with permission from the March 10, 2003 edition of THE NATIONAL LAW JOURNAL. © 2003 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information contact, American Lawyer Media, Reprint Department at 800-888-8300 x6111. #005-03-03-0006

FACSIMILE COVER PAGE

TO: The Honorable Diana E. Murphy
The Honorable Ruben Castillo
The Honorable William K. Sessions, III
John R. Steer, Vice Chair
Michael E. O'Neill, Commissioner
Timothy McGrath, Esq.
Charles Tetzlaff, Esq.
Ken Cohen, Esq.

FROM: Barry Boss on behalf of the Practitioners' Advisory Group

DATE: March 17, 2003

PAGES: 9 (including cover)

FAX: 202 502 4699

PRESIDENT
Lawrence S. Goldman
New York, NY
PRESIDENT ELECT
E. E. "Bo" Edwards
Nashville, TN
FIRST VICE PRESIDENT
Barry C. Scheck
New York, NY
SECOND VICE PRESIDENT
Barbara E. Bergman
Albuquerque, NM
TREASURER
Martin Pinales
Cincinnati, OH
SECRETARY
Joralyn E. Merritt
Denver, CO
PARLIAMENTARIAN
James A.H. Bell
Knoxville, TN
IMMEDIATE PAST PRESIDENT
Irwin H. Schwartz
Seattle, WA
DIRECTORS
Hal R. Arenstein
Cincinnati, OH
Steven D. Benjamin
Richmond, VA
Donald A. Bosch
Knoxville, TN
William H. Buckman
Moorestown, NJ
David Z. Chesnoff
Las Vegas, NV
Jerry J. Cox
Mt. Vernon, KY
Richard A. Cremer
Roseburg, OR
David A. Elden
Los Angeles, CA
Drew Findling
Atlanta, GA
Priscilla E. Forsyth
Sioux City, IA
Stephen R. Glassroth
Montgomery, AL
Leslie Hagin
Seattle, WA
John Wesley Hall, Jr.
Little Rock, AR
Carmen D. Hernandez
Washington, DC
Milton Hirsch
Miami, FL
Robert J. Hooker
Tucson, AZ
William "Bill" James, Jr.
Little Rock, AR
Kathryn M. Kase
Albany, NY
Jim E. Lavine
Houston, TX
Helen Leiner
Fairfax, VA
Jack T. Litman
New York, NY
J. Cheney Mason
Orlando, FL
William D. Massey
Memphis, TN
Randi McGinn
Albuquerque, NM
Daniel E. Monnat
Wichita, KS
E.G. "Gerry" Morris
Austin, TX
Cynthia Hujar Orr
San Antonio, TX
Ellen S. Podgor
Tucker, GA
Jeffery P. Robinson
Seattle, WA
Kent A. Schaffer
Houston, TX
Natman Schaye
Tucson, AZ
Marvin E. Schechter
New York, NY
Robin Shellow
Milwaukee, WI
Alan Silber
Charlottesville, VA
Howard M. Srebnick
Miami, FL
Lisa M. Wayne
Denver, CO
William Wolf
Chicago, IL
Ellen Zucker
Boston, MA
John K. Zwerling
Alexandria, VA
EXECUTIVE DIRECTOR
Ralph Grunewald

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

March 10, 2003

VIA FACSIMILE

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

Dear Judge Murphy:

I am writing to request that NACDL's President, Lawrence Goldman of New York, be permitted to testify at the Sentencing Commission's March 25 public hearing. As the leading organization devoted exclusively to the interests of the defense bar, we would greatly appreciate the opportunity to share our member's perspective with the Commission.

As you are aware, NACDL regularly submits comments regarding proposed amendments to the Sentencing Guidelines and has testified at past hearings. Mr. Goldman has an active white collar practice and, if permitted to testify, would address his comments to amendments proposed pursuant to the Sarbanes-Oxley Act.

Thank you for considering this request.

Sincerely,

Kyle O'Dowd
Legislative Director

"LIBERTY'S LAST CHAMPION"

1150 18th Street, NW ♦ Suite 950 ♦ Washington, DC 20036
(202) 872-8600 Fax (202) 872-8690 assist@nacdl.org www.nacdl.org

March 17, 2003

The Honorable Diana E. Murphy
Chairwoman
United States Sentencing Commission
One Columbus Circle, NE
Washington, DC 20002-8002

Re: NACDL Response to Request for Comment on Proposed Permanent Amendments

Dear Judge Murphy:

The National Association of Criminal Defense Lawyers ("NACDL") submits this response to the Commission's request for comment on the proposed permanent amendments to the Sentencing Guidelines. More specifically, the NACDL would like to take this opportunity to comment on published reports that the Justice Department is seeking marked across-the-board sentence increases for economic crime offenders at virtually all loss levels via an increase in the base offense level and/or the loss table of U.S.S.G. § 2B1.1. We also do not believe that any of the three options for a modified loss table set forth in paragraph 1(a) in the Issues for Comment should be adopted. In our view, such increases are not warranted and fly in the face of the specific targeted increases set forth in the Sarbanes-Oxley Act.

I. Comprehensive Loss Table Increases Are Not Justified

A. The Sarbanes-Oxley Act

The Sarbanes-Oxley Act was passed in 2002 in response to numerous corporate scandals, questionable accounting practices, and a variety of allegedly criminal behavior by senior officers of large corporations. Prior to the passage of the January 2003 amendments, the Justice Department argued that Sarbanes-Oxley contained an express or implied directive that sentences should be increased for virtually all economic crimes, regardless of loss amount or other indicia of seriousness. The Commission reviewed the language and legislative history of the Act and wisely rejected the view that it mandated across-the-board sentence increases. Instead, the Commission enacted a number of amendments targeting sentence increases at those serious corporate offenders whose misdeeds were the focus of the language and legislative history of the Act.

The Justice Department has now reasserted its attempts to institute across-the-board sentencing increases. For example, the Justice Department is working on draft legislation that would require those who commit white collar crimes involving at least $10,000 to face some jail time mixed with other punishment, and those with crimes involving at least $50,000 to serve a mandatory prison term. With regard to its proposed comprehensive increases in the base offense level and the loss tables, Justice Department official Drew Hruska argued that prosecutors need the leverage of jail terms against smaller defendants in order to persuade them to testify against

their bosses. "Sometimes we build our cases from the bottom up, and we need to be able to make clear to people at the low end of the range how serious the consequences are," Hruska said. "If we want to get the big fish, we have to start with the minnows." *Id.* Of course, the purpose of the Sentencing Guidelines is to promote fair and equitable sentences across the board. Increasing the leverage of the Justice Department against the "minnows" is not a valid reason to increase sentences. In fact, the Sentencing Guidelines are designed to reduce inequities based on the charging decisions of prosecutors.

Given that the statutory maximum constraints on the offense levels have been substantially revised by the Congress via Sarbanes-Oxley, the current loss table, supplemented by carefully-tailored specific offense characteristic enhancements (including those in the proposed permanent amendments), will more than adequately punish those offenders who operate at the highest levels of economic crime. Many of the offenses potentially affected by a wholesale revision of the loss table involve criminal statutes and scenarios untouched by the Sarbanes-Oxley amendments. Most of the cases affected by the economic guidelines and loss table involve individual defendants who are low-to-mid-level employees who engage in some unremarkable fraud scheme or involve defendants who are not corporate employees at all. There is no suggestion in either the legislative history or the statutory directive that Sarbanes-Oxley was designed to increase sentences for garden-variety fraud or economic offenses, much less those offenses subject to the application of the loss table that do not involve corporate crime. Nor is there any basis or proof to suggest that the current guidelines are not acting as severe enough penalty for, or deterrent to, criminal conduct. A generalized request to "get tough" on crime, arising in the middle of any wave of media stories about corporate or other types of wrongdoing should not be the grounds for changing sentences or guidelines. Indeed, it is precisely in times of passion and emotion that statutes and rules, including those addressing penalties and sentences, should remain constant so that balances that have been carefully struck over time are not tipped for the excitement of the moment.

The offenses and offenders targeted by the Act are those who engineer sophisticated and massive fraud by virtue of the positions they occupy in large, publicly-traded and regulated corporations. The intent of the Congress can best be carried out by the specific targeted enhancements set forth in the amendments that focus on the individual offenders who are at the top of an organization's corporate leadership or who possess substantial fiduciary positions. Neither the Justice Department's proposals nor the three proposed loss tables in paragraph 1(A) of the Issues for Comment follow the intent of the Congress.

B. The 2002 Economic Crime Package

The Justice Department's suggestion that the loss table should be completely revised to ratchet up offense levels across the board in economic crime cases is a transparent effort to re-visit the Economic Crime Package ("ECP") passed two years ago. The ECP, which included a revised loss table, was the result of years of careful study and discussion, including a two-day symposium in October of 2000. Given that there has been no opportunity to study the effects or impact of the new loss table, there is absolutely no basis to revise it at the present time. It will take at least three to four years before adequate response and information can be gleaned from

the legal community as to the impact of the ECP.

Furthermore, the fifteen-year history of the white collar guidelines, commencing in 1987 and culminating with the implementation of the ECP, reflects the relentless increases in the severity of these guidelines. While the average sentence imposed by federal judges in a number of major crime categories declined during the 1990s, Sentencing Commission statistics establish that the average sentence of white collar defendants actually increased from 19 months in 1994 to 20.8 months in 2001. As the Commission noted, the new loss tables implemented in 2001 were aimed at addressing the concerns articulated by the Justice Department for more severe sentences at the moderate and higher loss amounts. *See* 66 Fed. Reg. 30512 (June 6, 2001).

The incremental increases in offense levels at the higher end of the consolidated theft and fraud table instituted via the ECP significantly exceed those of their previous separate tables. For example, a $1 million loss in year 2000, even with application of the more than minimal planning offense characteristic, would result in a 30-37 month sentencing range; in contrast, the same offender after the implementation of the ECP loss tables is subject to a 41-51 month range, an approximately 25% increase. Thus, the upward trend will accelerate over the next few years as the sentence increases built into the ECP begin to take effect.

Other provisions also demonstrate how the ECP changes promoted increased sentences. Though the more than minimal planning enhancement has been eliminated - or, more accurately, incorporated into the loss table - the sophisticated means enhancement remains. Also, though generally excluded by the revised Guidelines, the Commission has noted that interest and similar costs may be the subject of an upward departure where an offender will otherwise be "under-punished." *Id.* On the other hand, gain realized by a victim in a fraudulent investment scheme cannot be used to offset losses incurred by other victims in that scheme. *Id.* In sum, the ECP has continued the steady progression of increases in the severity of sentences for white collar offenders.

C. Summary

Loss amounts already often overstate the culpability of defendants. Calculating loss under the relevant conduct guideline sweeps in the conduct of others, based on a preponderance standard, without the opportunity to confront the witness, and based on uncharged and/or dismissed conduct. Loss also includes intended loss no matter how economically unrealistic the intended loss may be. Sometimes, a defendant commits the offense just to retain his or her job, or for misguided loyalty or not personal profit and for motives that may be tinged with financial need rather than pure greed. Increasing the base offense level or increasing offense levels will just exacerbate the overrepresentation of culpability in many cases.

In sum, federal economic crime penalties have increased in the last fifteen years. The rate of imprisonment of economic crime defendants, the severity of sentences called for by the Guidelines, and the length of sentences of imprisonment actually imposed are now at all-time highs. Penalties for moderate-to-serious white collar offenses are now quite high, on parity with or in excess of sentences imposed for narcotics crimes and crimes of violence. Nonetheless, the

Justice Department insists that economic crime penalties are not high enough and that it needs the higher penalties for "leverage." Such reasoning creates dangerous precedent.

When there has been or is now under current guidelines a need to seek a more severe sentence, prosecutors have found numerous ways to do so whether by seeking the inclusion of more conduct oriented factors (planning, role in the offense, etc.) or even in seeking an upward departure where needed. There has been no demonstration that a change is needed now.

II. The Proposed Permanent Amendments

While the NACDL's greater concern involves the Justice Department's proposals addressed above, we would also like to take this opportunity to briefly comment on the proposed permanent amendments. For the most part, the Commission has adequately addressed the Sarbanes-Oxley directives through the targeted specific offense characteristics and upward departures it has enacted in the amendments. We do, however, believe the Commission has gone too far in one area.

With regard to the two level increase for offenses under 2B1.1(b)(2) involving 250 or more victims, we do not believe that such an amendment is necessary. We are particularly concerned that this amendment, when employed in a cumulative fashion together with the new proposed amendment providing for an additional four-level increase if the offense substantially endangers the solvency or financial security of a publicly traded company, is unduly harsh. It is likely that offenses which endanger the solvency of a publicly held company will, by definition, involve 250 or more victims. It is also likely that such offenses will involve sophisticated means, an abuse of trust, as well as a four-level upward adjustment for role in the offense. Thus, the proposed amendments would have the likely effect of providing an eighteen-level upward adjustment to the base offense levels provided in the loss tables for fraud involving a publicly held company. We do not believe that such rapid escalation of punishment is warranted. The current guidelines are more than adequate in this regard, and as stated above there are numerous means by which higher penalties can be achieved under current rules without making changing that could have consequences beyond those that are presently intended.

We appreciate the opportunity to provide these comments to the Commission.

Respectfully,

The National Association of Criminal Defense Lawyers

DCACDL

DISTRICT OF COLUMBIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

2500 Que Street, N.W.
No. 725
Washington, D.C., 20007

Vice President
June Perrone
202-333-1514 (tel & fax)

Secretary
Nina Masonson
202-667-2330
202-667-2302 (fax)

Treasurer
Andrew J.J. Delehanty
202-244-5551 (tel & fax)

President
Atiq R. Ahmed
(301) 587-8844
(301) 587-8171 (fax)
atiq@aralaw.net

Immediate Past President
Richard K. Gilbert

Board Of Directors

Cary Clennon

Pat Cresta-Savage

G. Allen Dale

Donald Dworsky

Elizabeth Kent

March 17, 2003

Michael Courlander
Public Affairs Officer
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002

RE: Comment on January 22, 2003 Temporary, Emergency Amendments To the Sentencing Guidelines and Commentary

Dear Mr. Courlander,

We are writing you in our capacities as Chairs of the White Collar Defense and Legislative Committees of the District of Columbia Association of Criminal Defense Lawyers, (DCACDL), a local affiliate of the National Association of Criminal Defense Lawyers. We write in response to the Request for Public Comment, published on January 22, 2003, relating to the Notice of Promulgation of Temporary, Emergency Amendments to the Sentencing Guidelines and Commentary published on that date. 68 Fed. Reg. 3080 (January 22, 2003). While DCACDL recognizes the need for criminal sentences that are adequate to punish and deter the perpetrators of corporate and financial fraud, we believe the previous Guidelines were sufficient for that purpose, and that the Commission's proposed Amendments simply implement a reflexive and unnecessary increase in penalties, which is likely to lead to unfairness and confusion in the application of the Guidelines, and even the deterrence of socially-beneficial conduct. Therefore, we urge the Commission not to recommend that the Temporary Emergency Guidelines become permanent. We also vigorously urge the Commission not to recommend even *greater* increases, which we understand the Department of Justice is requesting.

I. There Is No Need to Increase Sentences Across the Board for Economic Offenses

In terms of both length and incidence, "federal economic crime sentences are at an all-time high." Hearing of the Senate Subcommittee on Crime and Drugs, Senate Comm. on the Judiciary, Penalties for White Collar Crime: Are We Really Getting Tough on Crime? (July 10, 2002) (testimony of Frank Bowman). Last summer's legislative flurry made numerous changes to the criminal law, adding new crimes and increasing – significantly – the maximum penalties for violation of existing statutes. However, as some commentators have noted, these changes "may not add much to the existing scheme of criminal penalties," H. Bloomenthal, Sarbanes-Oxley Act in Perspective 128 (Thomson West 2002), and "the greatest practical impact of Sarbanes-Oxley's criminal provisions may ultimately be felt at sentencing." Falvey & Wolfman, The Criminal Provisions of Sarbanes-Oxley: A Tale of Sound and Fury?, Andrews Securities Litigation and Regulation Reporter 17 (October 9, 2002). Therefore, it is critical that any amendments to the Guidelines be carefully considered. According to the Commission, the new Amendments "implement directives to the Commission contained in sections 805, 905 and 1104 of the Sarbanes-Oxley Act of 2002." However, those directives merely required the Commission to "ensure" that the Sentencing Guidelines are "sufficient" to punish and deter the perpetrators of corporate and financial fraud. DCACDL believes that by reflexively increasing penalties, the Amendments proposed by the Commission are likely to lead to unfairness and confusion in the application of the Guidelines, and even to deter conduct that ought to be encouraged, rather than discouraged.

Barely a year ago, after the disclosure of events at Enron Corp., then-SEC Chairman Harvey Pitt testified before Congress that no new laws were needed to combat corporate and financial fraud. Hearing of the House Subcommittee on Capital Markets, Insurance and Government-Sponsored Enterprises, House Comm. on Financial Services, 107th Cong. (Feb. 4, 2002) (statement of Harvey L. Pitt, Chairman, U.S. Securities and Exchange Commission). Others have argued that the laws existing prior to the "legislative tidal wave [that] swept Washington" last summer, Falvey & Wolfman, supra, were sufficient to deter and punish this kind of malfeasance. For example, in testimony before the Senate Judiciary Committee's Subcommittee on Crime and Drugs, former Deputy Attorney General George Terwilliger described the laws existing prior to last summer as providing "ample tools with which prosecutors can address commercial crime," and penalties which "can be quite severe where the economic impact of the criminal activity is substantial." Hearing of the Senate Subcommittee on Crime and Drugs, Senate Comm. on the Judiciary, Penalties for White Collar Crime: Are We Really Getting Tough on Crime? (July 10, 2002) (testimony of George J. Terwilliger, III).

The perception that white collar defendants are "coddled" at sentencing and routinely receive a "slap on the wrist," Cong. Rec. S6547 (July 10, 2002) (statement of Senator Hatch), is largely, if not completely, unfounded. Even if it was once the case, "one can no longer look at white-collar sentencing and immediately pronounce it a travesty which reflexively favors defendants whose backgrounds look like those of the judges who sentence them," and there is "no persuasive evidence that would justify a blanket injunction from Congress to the Sentencing Commission to raise economic sentences across the board."[1] Bowman, supra. Arthur Andersen

---

[1] Of course, in the Sarbanes-Oxley Act, Congress did not mandate that the Sentencing Commission raise *any* sentences.

was indicted, convicted and put out of business under federal laws that predated the Sarbanes-Oxley Act, and WorldCom officers face up to 65 years in prison on charges that they violated pre-Sarbanes-Oxley law. See H. Bloomenthal, supra, at 128 ("[t]he adequacy of * * * existing penalties is illustrated by the charges filed against the WorldCom defendants").

Commentators have warned against the urge to overreact to recent disclosures of corporate and financial fraud, e.g., Terwilliger, supra, and even Congress recognized this danger in passing the Sarbanes-Oxley Act. See Cong. Rec. S6746 (July 10, 2002) (statement of Senator Biden). Such an overreaction would result not only in unduly harsh penalties, but will also deter socially-beneficial conduct. Corporate officials increase earnings – and benefit shareholders – by taking lawful risks. However, "[f]inancial accounting and reporting is not always an exact science," Terwilliger, supra, and "[i]n many cases, corporate 'wrongdoing' only gets labeled as such with the benefit of hindsight." Welsh, Sarbanes-Oxley and the Cost of Criminalization, 20 Andrews Securities Litigation and Regulation Reporter 16 (Feb. 26, 2003). Increasingly draconian penalties can only lead rational executives to be more and more risk-averse, to the possible detriment of the very shareholders legislation like the Sarbanes-Oxley Act is meant to protect.

This is particularly true given that the new Amendments follow hard on the heels of the November 2001 amendments, which significantly increased the penalties faced by white collar defendants. Simply put, the criminal justice system has had insufficient experience under the 2001 amendments to determine whether they are sufficient to deter and punish the conduct at which the new Amendments are aimed. It is worth bearing in mind that most, if not all, of the conduct that led to the Sarbanes-Oxley Act – including alleged malfeasance at Enron, WorldCom and Adelphia – occurred prior to the 2001 Guideline amendments.

And increased penalties can also discourage desirable conduct in the arena of the criminal justice system. For example, as penalties mount, potential defendants are less and less likely to examine their own (and their colleagues') conduct, or to disclose potential wrongdoing to authorities. See Terwilliger, supra. Perhaps, as one commentator has suggested, a more efficient means of policing corporate conduct is to provide incentives for "good" behavior in this regard. Id. For example, the Department of Justice Antitrust Division offers "amnesty" in order to encourage those who might otherwise be charged with criminal violations to make early disclosures of wrongful conduct, and to cooperate in its investigations.

II. Specific Amendments Contain Unwarranted, and Unfair, Increases

The Amendments would increase the punishments for certain offenses – in some cases significantly – as compared to the punishments applicable under current Guidelines. For example, under the Amendments, Guideline § 2B1.1 – which currently provides for a 4-level enhancement where the crime involved 50 or more victims – would provide for a 6-level enhancement where the crime involved more than 250 victims. The rationale offered by the Commission for this change is that it "reflects the extensive nature of, and the large scale victimization caused by, certain fraud offenses." However, the offenses at issue were certainly considered by the Commission in its adoption of a 4-level increase for crimes involving more

than 50 victims, and there appears to be no evidence to suggest that an additional 2-level enhancement (and, in Zone D of the Sentencing Table, a minimum additional 6-12 months' imprisonment) is necessary to punish and deter those who would commit large-scale fraud. Moreover, as a practical matter, this provision will overlap to a great extent with the proposed § 2B1.1(b)(12)(B), which provides a 4-level enhancement where an offense jeopardizes the solvency or financial security of publicly-traded companies, or those that employ more than 1000. See, e.g., Hearing of the Senate Subcommittee on Crime and Drugs, Senate Comm. on the Judiciary, Penalties for White Collar Crime: Are We Really Getting Tough on Crime? (July 10, 2002) (testimony of John C. Coffee, Jr.).

Similarly, the Amendments would provide for a 4-level enhancement where the offense involved a violation of securities law by an officer or director of a publicly-traded company. The rationale for this enhancement is identical to that for Guideline § 3B1.3, which provides an enhancement where the defendant abuses a position of trust, and the Commission notes that the new enhancement would obviate the need for courts "to determine specifically" whether a particular defendant abused a position of trust. However, the Commission fails to explain its rationale for providing a 4-level enhancement for corporate officers and directors who abuse that particular position of trust, while providing only a 2-level enhancement to others who violate positions of trust that may make their victims even more vulnerable.

The Amendments also would increase the Offense Level for obstruction of justice, Guideline § 2J1.2, by increasing the Base Offense Level from 12 to 14, and providing for a 2-level enhancement if the offense (A) involved the destruction, alteration or fabrication of a "substantial number" of records; (B) involved the selection and alteration or destruction of "any essential or especially probative record, document or tangible object;" or (C) was "otherwise extensive in scope, planning or preparation." The net effect of these changes will likely be a 4-level increase in the Offense Level in *all* cases involving destruction, alteration or fabrication of records, because in any such case, prosecutors will be able to argue either that the defendant affected a "substantial number" of records or, if not, that he selected an "essential or especially probative record." Again, in Zone D of the Sentencing Table, a 4-level increase in Offense Level increases a defendant's prison sentence by at least nine months, and often by much more, and there appears to be no evidence that such an increase is needed to deter or punish the obstruction of justice.

In addition to unfairly and unnecessarily increasing penalties, the Amendments also are likely to sow new confusion in the application of the Guidelines, and particularly the Loss Table at § 2B1.1. The Amendment's addition of the reduction in the value of equity securities to the list of factors that may be considered will only exacerbate the difficulties that already exist in calculating "loss" under the Guidelines. The Sarbanes-Oxley Act was no doubt passed, in some degree, in response to concern over the declines in value of equity securities during the late 1990s, see Cong. Rec. S7426 (statement of Sen. Biden), but those declines are more likely the result of legitimate market corrections than criminal activity. See Welsh, supra ("During the period 1994 to 2000, there was considerable focus in America on the second half of the investment equation – return. * * * The near-relentless downward march of the markets, from late 1999 to early 2002, was to a large extent the product of little more than that unavoidable other half of the investment equation – risk"). In civil litigation, a plaintiff must prove not only a

decline in stock price, but also "loss causation;" *i.e.*, that the decline was caused by the defendant's acts, and not other factors such as economic news or conditions facing an entire industry. Thus, "the sheer stock market decline is not necessarily an accurate proxy for the 'reasonably foreseeable pecuniary harm'" specified in the Guidelines' definition of "loss." Coffee, supra.

And even to the extent the decline in the value of equity securities is properly considered to be caused by a criminal defendant, the Amendments fail to account for the real impact of such "loss." As one commentator has noted, "[t]o the [G]uidelines, it does not matter whether the loss is incurred by a single pension fund that may be insured against the loss (thereby distributing the loss broadly throughout the economy), or the loss is incurred by hundreds of small investors whose life savings are wiped out." Hearing of the Senate Subcommittee on Crime and Drugs, Senate Comm. on the Judiciary, Penalties for White Collar Crime: Are We Really Getting Tough on Crime? (July 10, 2002) (testimony of Paul Rosenzweig).

III. The Increased Sentences Contemplated by the Amendments Are Not Necessary to Deter Corporate and Economic Crimes, or to Remedy Any Disparity in Sentences Received by "White Collar" and Other Defendants

The critical issue in these Amendments is the fate of non-violent, first time, economic offenders. The rationales most often cited for heightened penalties like those proposed in the Amendments are the supposed need to increase punishment in order to bolster deterrence, and the need to ameliorate a perceived "penalty gap" between the treatment received by "white collar" and "blue collar" defendants at sentencing. However, neither justification bears scrutiny.

In the public rush to strike out at economic crime, we must not lose sight of the fact that the reasons for incarcerating violent offenders do not apply with equal force to first-time, non-violent, economic offenders. See Bowman, supra. While it is no doubt a catastrophic loss to be swindled out of one's life savings, for most of us, no amount of money can compensate for the murder or sexual assault of, or crippling injury to, ourselves or our loved ones. The proverbial choice "your money or your life" is an easy one and no one seriously questions the need to lock up violent predators. The need for incarceration of non-violent, first time economic offenders is less clear.

The question whether the size of a sentence, or its likelihood, is more effective in deterring criminal conduct is one that has received considerable attention. However, "[t]he consensus of criminologists is that likelihood of apprehension is far more important than the severity of punishment." Coffee, supra. In his testimony before the Senate Judiciary Committee, Professor Coffee quoted Professor Daniel Nagin of Carnegie Mellon University:

> [C]ompliance is nearly perfect when detection risk is very certain, and compliance is nearly zero when detection risk is negligible. * * * The flip side of this conclusion * * * is that draconian penalties are unlikely to be an effective substitute for a more-difficult-to-achieve alternative of effective detection and prosecution.

Id.; see also Rosenzweig, supra ("Increasing maximum sentences and revising the [S]entencing [G]uidelines only go part way towards addressing the problem and are much the less important aspect where change is needed. What really drives the [deterrence] equation is the fraud that goes undetected."). As a result of research like this, the Sentencing Commission originally adopted a scheme of "short but definite" sentences. Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 23 (1988). By blindly increasing penalties, the Amendments abandon this principle in favor of "an election-year solution to crime." Coffee, supra.

Certainly, punishment is called for, and we believe the existing guidelines serve precisely that purpose. However, the threat of additional incarceration likely has little additional deterrence effect. For most potential first time economic offenders, the *realistic* threat of arrest and conviction is the most effective deterrent. Because the loss of reputation and resulting restitution and fines usually have a devastating effect on the ability to provide for one's family and self, we suspect few economic offenders would take the risk of committing their crimes, if they only thought there was a good chance they would be caught.[2] And while we believe that in most of these cases, the need for, and usefulness of, any incarceration is debatable, we believe it is certainly true that the increased penalties provided by the Amendments are not required.

Nor can any perceived "penalty gap" between "white collar" and "blue collar" defendants justify wholesale increases in Guideline sentences. This is so because, perceptions to the contrary notwithstanding, no such gap exists. Although nearly 95% of defendants convicted of crimes like drug trafficking are imprisoned, while only about 50% of those who commit fraud or embezzlement serve jail time, "whatever disparities exist are principally the product of the actions of Congress." Rosenzweig, supra. When research controls for the mandatory nature of certain statutes, and measures the percentage of defendants *who were eligible under law for non-prison sentences* and received jail time, "the data are much more equivocal," and suggest that courts are as likely to send a "white collar" defendant to prison as a "blue collar" defendant. Id. For example, when this adjustment is made, white collar defendants are incarcerated at rates greater than those who possess drugs or firearms. Id. Moreover, "the rates of departure from the [G]uidelines are roughly consistent for all offenses and there is even some suggestion that serious offenses such as robbery and firearms are more likely to have judges depart from the [G]uidelines than white-collar crimes."[3] Id.

---

[2] While there are, of course, economic offense recidivists, the Sentencing Guidelines by their very structure are intended to punish repeat offenders more severely, and District Courts retain the power to depart upward if the raw Criminal History score inadequately reflects the severity of an offender's criminal history.

[3] At least one commentator has suggested that the perception of a "penalty gap" stems from the draconian punishments mandated by certain drug statutes, and that the solution to the problem may lie in adjusting those drug sentences. Bowman, supra.

IV. The Commission Should Not Abandon the Accepted Paradigm for Determining a Just Sentence

Perhaps what is most disturbing to DCACDL is the, not so subtle, motive of the Department of Justice in seeking even higher sentences - to compel the cooperation of less culpable offenders in prosecuting those "higher up." What appears to trouble the Department is not that a first time non-violent economic offender will escape prison time, but that he or she might do so *without* formally cooperating with the government – in other words, that the key to jail cell might reside in the hands of the District Court and not the United States Attorney. In the view of DCACDL, these proposals, and this reason for them, represent a major paradigm shift in sentencing philosophy. We have understood the purpose and the structure of the Sentencing Guidelines to embrace the concept that application of the Sentencing Guidelines will result in an appropriate sentence for the offense, a sentence from which "substantial assistance" to the government may result in additional leniency. The Department appears to prefer a paradigm in which an appropriate, just sentence is achieved only *after* full cooperation with the government. Such a change in philosophy may well impair the basic truth-finding function of criminal trials.

This concern is particularly acute in the case of first time, non-violent offenders, for whom the real fear of prison is not simply the resulting loss of freedom and dignity, but the fear of assault – physical and even sexual – by more violent inmates. This threat, often highlighted by the media, is frequently and graphically conveyed to potentially vulnerable offenders by law enforcement agents during incommunicado interrogation, when the microphone is turned off and the prosecutor has stepped out of the room. What happens then is the transformation of a possibly genuinely remorseful offender, who would be an excellent potential witness, into a desperate man or woman who will say *anything* to stay out of jail.[4]

---

[4] As Judge Stephen Trott of the Ninth Circuit has observed:

> The use of informants to investigate and prosecute persons engaged in clandestine criminal activity is fraught with peril. This hazard is a matter "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" and thus of which we can take judicial notice. Fed. R. Evid. 201(b)(2); cf. Hudson v. Palmer, 468 U.S. 517, 526-27 (1984) (illegal activities of prisoners subject to judicial notice). By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom. As Justice Jackson said forty years ago, "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility." On Lee v. United States, 343 U.S. 747, 757 (1952). A prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system. See United States v. Wallach, 935 F.2d 445 (2d Cir. 1991) (convictions reversed because government should have known witness was committing perjury).

United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993):

While this dilemma affects all aspect of the federal criminal justice system, the danger in particularly acute in white collar cases. Investigations of white collar crime frequently, and understandably, begin with a document trail, and what the government often seeks to complete its case is the undocumented, unwitnessed admission by the major figures under investigation that will essentially establish any required criminal intent. However, due to the hierarchical nature of most economic institutions and the known existence of the documents, the lower level suspect, who is likely intelligent him or herself, will know precisely whom the government is seeking information about, even without any improper prodding by the government agents. It is then simple enough to provide a description of the damning private conversation, evidence otherwise incapable of proof, or disproof. Such credibility determinations are the very stuff of criminal trials, but there is, or should be, some realistic limit on the power of coercion. Existing appropriate sentences help provide those limits, while excessive sentences undermine them.

CONCLUSION

In sum, there is no doubt that large-scale criminal corporate and financial fraud that results in catastrophic losses to many victims should be punished. But reflexively hiking penalties for such acts is unlikely to be effective in combating such crime, while, at the same time, it is likely to create unfairness and confusion, while also discouraging lawful and beneficial conduct. DCACDL believes that the Amendments proposed by the Commission are not required by Congress, and are not warranted by the concerns that motivated Congress to issue those directives. More time is needed to assess the impact of the recent corporate fraud prosecutions, as well as the impact of the Commission's November 2001 amendments to the Guidelines. Those prosecutions, and those amendments, are likely to result in increased deterrence of corporate and financial fraud, without creating the difficulties identified in these comments.

Respectfully submitted,

Paul F. Enzinna
Chair, White Collar Defense Committee

Richard K. Gilbert
Chair, Legislative Committee

COMMENTS OF

THE NEW YORK COUNCIL OF DEFENSE LAWYERS

REGARDING PROPOSED JANUARY 17, 2003 AMENDMENTS TO

THE SENTENCING GUIDELINES

Respectfully submitted,
NEW YORK COUNCIL OF
DEFENSE LAWYERS

420 Fifth Avenue
New York, New York 10018
(212) 703-5430

Edward Shaw, President
Brian E. Maas, Chairman, Sentencing Guidelines Committee

March 14, 2003

NEW YORK COUNCIL OF DEFENSE LAWYERS

COMMENTS OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS REGARDING PROPOSED JANUARY 2003 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 more than 150 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 defense lawyers. In the pages that follow, we address those of the proposed amendments and Requests for Comment published in the Federal Registry on January 17, 2003 which are of interest to our organization.

The contributors to these comments, members of the NYCDL's Sentencing Guidelines Committee, are Brian Maas, Chairman and Jacqueline Wolff, Nick DeFeis, Steven Kimelman and Michael Miller.

OVERVIEW

The NYCDL applauds the Commission in its promulgation of emergency amendments to the Guidelines that respond to the Congressional directive in the Sarbanes-Oxley Act of 2002 (the "Act") to address the Enron debacle and other recent large-scale corporate frauds. However, we have substantial concerns that certain of the emergency amendments upon which the Commission seeks comment as well as some of the additional amendments requested by the Department of Justice in its December 18, 2002 letter to the Commission and are the subjects of Requests for Comment go far beyond Congress's directives under the Act. Specifically, the NYCDL objects to those emergency and proposed amendments that would (i) modify the fraud loss table to increase offense levels for lower loss amounts, (ii) increase the fraud base offense level, (iii) provide a four level enhancement, simply because the defendant is an officer or director of a public company, rather than the two level enhancement for "abuse of trust", without any consideration of the size of the company or number of victims, and (iv) require an enhancement based on endangering the financial security of an organization if such endangerment can be established by events common to most small and medium sized companies in the current economic climate, whether defrauded or not, such as, for example, a substantial reduction in a company's workforce or a substantial reduction in the value of the company's stock. In short, as discussed below in our specific responses to the Issues for Comment set out in both the December 18 and January 17 public notices, the NYCDL objects to any amendments to the guidelines or to the commentaries to any

specific guideline that do not target the sort of large scale massive fraud cases with multiple victims that was the primary focus of Sarbanes-Oxley..

Congress' directive to the Commission was made very clear when enacting Sarbanes-Oxley: that is, that the Commission is to "review and *consider* enhancing as *appropriate* criminal penalties in cases involving obstruction of justice and *serious* fraud cases." 148 Cong. Rec. § 7418 (emphasis supplied). Therefore, as a preliminary matter, enhancements are required only if "appropriate". This comports with the Commission's own view of one of its functions to amend the guidelines "as necessary". An Overview of the United States Sentencing Commission, at p. 4, available at http://www.ussc.gov/general.htm.

Amendments affecting smaller or "garden-variety" fraud cases can hardly be deemed "appropriate" or "necessary" given the Commission's recent amendments issued pursuant to the Economic Crime Package and effective only since November 1, 2001. The Commission, as is its responsibility, spent years gathering statistics, inviting comment and drafting enhancement provisions prior to promulgating those amendments. Now, we respectfully submit, the Commission must give the courts time to apply these amendments in order for the Commission to conduct further research to determine how the new amendments affect the various goals of sentencing including just punishment, deterrence, incapacitation, rehabilitation and certainty and fairness in sentencing. Only after such a review can the Commission determine whether enacting additional

enhancements or further modifying the loss table for smaller fraud cases is necessary to meet those goals.[1]

Furthermore, even if the lack of time to review the effect of the recent amendments would not stand as a bar to additional enhancements, the Commission has not had enough time to consider the need for and potential impact of any enhancements other than those specifically targeted by the Act's sponsors. Commissioner O'Neill himself stated when indicating his concern as to the lack of time Congress has given the Commission to study the issues, "we're not exactly sure what the proper course is." "Panel Clears Harsher Terms in Corporate Crime Cases," New York Times, p. C1, col. 5, at p. C4, col. 6 (January 9, 2003). Having recently enacted a comprehensive revision to the fraud guidelines, including an upward revision of the fraud table, the Commission, an independent agency in the judicial branch of the government, should not now allow current political concerns to prompt an increase in the punishment of financial crimes which will necessarily impact both victims and defendants alike for a lifetime.

Indeed, Congress did not suggest at the time it passed Sarbanes-Oxley that changes other than those specifically called for to address the "investor's crisis of confidence" caused by Enron and other grand scale frauds should be considered by the Commission at this time. As Congress stated, "*[S]pecifically* the Commission is

---

[1] The Commission's Report to Congress: Increased Penalties Under the Sarbanes-Oxley Act of 2002 repeatedly points out the lack of reliable data for recently enacted amendments that were used as the basis for the current emergency amendments. For example the amendment providing an enhancement for a fraud endangering the solvency or financial security of a public company or organization with over 1000 employees is based on the just recently enacted amendment providing an enhancement for jeopardizing the safety and soundness of a financial institution. The Report points out that it has no reliable data available on the latter as to its application by the Courts. p. 4. The same is true with respect to the significant changes made to the fraud loss tables in November 2001. The Commission is only receiving relevant data now. The NYCDL respectfully asks how can the commission determine whether an amendment is necessary if it has insufficient information as to the use and affect of the current guideline?

requested to review the fraud guidelines and consider enhancements for cases involving *significantly greater than 50 victims* and cases in which the solvency or *financial security of a substantial number of victims is endangered*." Id. [emphasis supplied] The legislative history of the Act is packed with references to Enron and the hope that the new legislation and accompanying guidelines will prevent cases like Enron from occurring in the future. As Commissioner Sessions himself recognized, "The law says 'serious' fraud case. We have to do what Congress says." Id. at p. C4, col. 5.

While it is generally accepted that the punishment for "serious" fraud should be influenced in part by the amount of the loss and the number of victims, some of the enhancements included in the emergency amendments as well as some of those suggested in the Issues for Comment run the risk of unnecessarily enhancing guideline sentences for small frauds leading only to more downward departures and inconsistent sentences. Thus, our overriding concern in these comments is that several of the aforementioned proposed and emergency amendments go far beyond the clear directives set forth in the Act, and were promulgated or are being contemplated without the Commission's usual careful review and study. Moreover, we are concerned that were certain of the emergency amendments to become permanent, the result would be a series of unintended consequences, all of which are contrary to the goals of the Commission.

ISSUES FOR COMMENT

1. (A) Proposed Modification of Loss Table for Lower Loss Amounts

Two years ago, criminal defense organizations like ours objected to many elements of the economic crime package proposed by the Commission including the proposal to modify the loss table to increase the penalties across the board. While some of the proposed changes were not adopted, the changes to the loss table were approved based on data collected by the Commission over a substantial period of time that the Commission and others interpreted as demonstrating that white collar defendants were not receiving sufficiently harsh sentences for fraud offenses. Before the changes in the loss table were approved, the Commission had proposed several variations of changes to the table, some more and some less harsh than the table that was ultimately approved.

Although the NYCDL was disappointed that the loss tables were changed as they were, because we did not believe that the data warranted the change, there is no question that the modifications were not enacted until there had been substantial opportunity for the Commission to analyze available data and for the public to comment on the proposals. Over multiple amendment cycles, the Commission clearly wrestled with the question of the fairness of the loss tables. The Commission published its data which it contended supported the change and the public had ample opportunity to respond and comment. Moreover, the changes were implemented as part of a comprehensive review of the guidelines governing economic crimes which created public confidence both in the process and in the result.

No such confidence can attend a change in the loss table at the present time. While Congress in the Sarbanes-Oxley Act directed that the loss table be amended

to add more severe offense levels for losses which exceed the current maximum loss amount of $100,000,000, no such direction was given to the rest of the loss table. While Congress' direction was based on a belief that massive frauds at companies like Enron and Worldcom, which resulted in losses in excess of $100,000,000, warranted greater penalties than currently available under the loss table, no belief was expressed that the current table, as amended in November 2001, was not adequately punishing offenders who participated in frauds where the losses were less than $100,000,000. Thus, any change at this time to the overall loss table would constitute inappropriate reaction to the general anger at business misconduct without any evidence whatsoever that any further change in the tables is warranted. We believe that the Commission's credibility built up over the many amendment cycles in which the Economic Crime Package evolved, will be jeopardized by any precipitous action at this time.

Each of the three loss tables included by the Commission in this Request for Comment as possible options lowers the amount of loss that would trigger particular offense level enhancements at all levels of the loss tables except for frauds with losses less than $10,000. These proposed changes would lower the loss triggers from those included in the new table that was enacted less than eighteen months ago in November 2001, which itself implemented a substantial lowering of the loss triggers from the loss table that had previously been in effect. Thus, as an example, the threshold for a ten point enhancement which required a loss of more than $500,000 prior to November 2001, and now requires a loss of more than $120,000, would be reduced to a loss of $100,000 under all three of the proposed tables. Such a defendant, even if she pleads guilty, and is subject to no other enhancements (an unlikely possibility), would be sentenced at an

offense level of thirteen (13) and would be sentenced to at least one year in prison. This same defendant would currently be sentenced at a level eleven (12) in Zone C, and prior to November 2001, would have been sentenced at offense level ten (10) in Zone B.

That it would be a mistake to change the loss table at this time is highlighted by the fact that the second Request for Comment is seeking input into whether the Commission should decouple the theft guidelines from the fraud guidelines. Having merged the two tables as recently as November 2001, the only reason that the Commission could be considering decoupling of the tables at this time is the concern that the fraud table is becoming inappropriately draconian for "mere" property crimes. In fact, the merging of the tables made sense in November 2001 as the loss factors supporting the sentencing for a property crime should not be affected by whether the loss resulted from fraud or from theft. Thus, the mere fact that the Commission is concerned that it may need to separate the Guidelines should be instructive as whether there is any basis for amending the table for fraud at this time.

The loss tables represent the central element in the guidelines for the sentencing of financial crimes. The legitimacy of the guidelines depends in no small degree on a belief among the participants in the system, including the judges, that the gradations in the loss table are based on empirical evidence and have resulted from a deliberative process in which all of the participants in the system have had ample input into the proposed changes. As there is no evidence to support any change to the loss table at this time, and since there has not been time for the sort of input from the public that such changes should warrant, any new change in the loss tables would substantially undermine the legitimacy of the process. Thus, we strongly urge the Commission to limit

its amendment to the loss table to the addition of two additional levels for losses in excess of $100,000,000.

For the same reason, the NYCDL opposes any change in the base offense level for fraud offenses. To the extent that Congress increases the statutory maximum for certain fraud offenses, the Commission is proposing other enhancements that will insure that defendants convicted under these statutes will receive greater sentences than are now being imposed. To also increase the base offense level at the same time is to impose an improper form of double counting. The base offense level of six (6) for all financial crimes has been in effect for many years and there is no evidence that it is not an appropriate starting point for the sentencing of economic crimes.

1. (B) Proposed Amendment to Guideline § 2B1.1(b)(13)

The NYCDL strongly urges the Commission not to make permanent the four-level enhancement for defendants who are officers or directors of publicly traded companies and also urges the Commission not to extend this enhancement to other individuals with a fiduciary or statutory duty of trust to investors. The guidelines have always included a two (2) point enhancement for abuse of positions of trust under § 3B1.3 which has regularly been applied to persons such as investment advisors and registered representatives. To the extent that the Commission feels that the guidelines are unclear as to whether such persons in the securities or investment business are covered, an amendment to the Application Notes would clarify the applicability of this section.

As to officers and directors of public companies, the Commission made the judgment in the initial proposed emergency amendments to add a two-point enhancement for such persons. The NYCDL recognizes that Sarbanes-Oxley specifically instructed the Commission to consider such an enhancement for officers and directors of public companies and perceived the proposed two-level enhancement as essentially a clarification that these classes of person are subject to the Abuse of Position of Trust enhancement.

However, the four-level enhancement for any officer or director of public company which was included in the emergency amendment as enacted is unnecessarily harsh. First, by failing to distinguish between the size of the company or the size of the fraud, the four-level enhancement can result in a doubling of the sentence for a participant in a $120,000 fraud while this enhancement will result in a much smaller proportionate increase in the sentence for a participant in a fraud on the scale of

Enron/Worldcom. Such a disparity is inconsistent with the goals of Sarbanes-Oxley to punish the perpetrators of the massive frauds that undermine the public's confidence in this economic system.

Second, as the Commission implicitly recognized by seeking comment on whether to expand the reach of the four-level enhancement to all fiduciaries in the investment community, a sentencing distinction between officers and directors of public companies and these other fiduciaries is difficult to justify. Just as the stockbroker participant in a $100,000 fraud warrants a certain enhancement for the loss and a two point enhancement for abuse of the position of trust, so the officer of a small public company whose misconduct results in a $100,000 loss should be subject to the same fraudulent enhancement.

Finally, although Sarbanes-Oxley was enacted in response to concerns about financial misconduct at publicly traded companies, the Sentencing Commission is charged with devising a sentencing system that minimizes disparity and creates parity within classes of defendants. Thus, in considering an enhancement based on the equivalent of an abuse of a position of trust, the Commission should create an enhancement that treats officers or directors who abuse their positions similarly to other fiduciaries such as attorneys or trustees who have abused their positions of trust. Given that the Commission has not developed evidence suggesting that the two-level enhancement at § 3B1.3 is inadequate for these people, the new enhancement for officers and directors should only be a two-level enhancement.

1. (B) Proposed Amendments to Guideline §2B1.1(b)(12)

The NYCDL generally opposes the amendments to Guideline § 2B1.1(b)(12), which, among other things, add 4 levels to the offense score for frauds that endanger the solvency or "financial security" (whatever this means) of (1) publicly traded companies or companies that have 1000 or more employees or (2) 100 or more victims. Additionally, such offenses are subject to a minimum offense level of 24, which level corresponds to imprisonment terms of 51 to 63 months. Prior to these amendments, only offenses that affected "financial institutions" qualified for such enhanced penalties under § 2B1.1 (or formerly, § 2F1.1). Now, offenses involving all publicly traded companies and large employers will be punished more harshly than offenses against other entities.

Although the application notes contain some helpful commentary regarding the amendments, they make no effort to mitigate the double-counting involved when the enhancements are applied to offense levels that have already been inflated by other emergency amendments that address the same harms. Moreover, they cover many more companies than the large publicly traded companies whose loose accounting and other problems prompted the emergency amendments in the first instance.

The amendments are not entirely objectionable. For instance, Application Note 10 (E) has been eliminated. This Note stated that the enhancement for "substantially jeopardizing the safety and soundness of a financial institution" should be applied whenever the institution was placed in "substantial jeopardy" of becoming insolvent (Note 10 (A)), or reducing benefits to pensioners or insureds (10 (B)), or being unable to refund deposits and the like (10 (C)), or merging with another institution because of asset depletion (10 (D)). Now the actual evils described in Notes 10 (A)

through 10 (D) must have occurred in order for the enhancements to apply. For example, actual insolvency (Note 10 (A)) rather than "substantial jeopardy" of insolvency (formerly permitted under Note 10 (E)) must be established. This change should reduce litigation over the meaning and application of the vague standard of "substantial jeopardy" and promote more accurate fact-finding. As such, it is one helpful feature of the amendments.

Unfortunately, this commendable change is overshadowed by several negative and possibly unintended consequences of the amendments. First, the enhancements and minimum offense levels (and consequent punishment) apply to far too many potential defendants. They apply to fraudulent conduct at *any* publicly traded company – whether the subject security is liquid or illiquid; whether it trades on a major exchange or only on the so-called "bulletin board" or "pink sheets." To be sure, frauds involving marginal or thinly-traded companies must be (and are) punished. The NYCDL, however, reminds the Commission that these are not the frauds that compelled the emergency amendments.

On a second and related note, these amendments lack any type of asset test or similar proxy for their application to publicly traded companies. (Notably, companies that are not publicly traded must have 1000 or more employees for the amendments to apply. Employment at these levels would be a reasonable proxy for a certain level of assets or revenue). Among the factors that now weigh in favor of enhanced punishment is whether the organization suffered a "substantial reduction in the value of its assets" or whether it "substantially reduced" its workforce. (See new Application Notes 10 (B) (ii) (I) and (IV)). Publicly traded companies can be quite small. The NYCDL does not

believe that an offense that contributed to layoffs at a small publicly traded company warrants the punishment called for by the emergency amendments. These amendments, if made permanent, should require threshold levels of employment and/or assets for the enhanced penalties.

The NYCDL objects to the factors listed in the application notes to support an enhancement for endangering the solvency and financial security of a public company or organization of over 1000 employees on other grounds as well. It is fundamentally sound to hold a defendant accountable for factors over which he has control. The imposition of enhancements for factors just as likely due to the current economic climate than due to the defendant's actions runs 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.) ("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).

The NYCDL is also concerned that the amendments do not take into account the possibility that there may be "double-counting" when a victim of an offense involving multiple victims under 2B1.1(b)(2) counts as an employee for the purposes of determining whether a company that had more than 1000 employees was "substantially endangered." The same person should not count as a victim for the purposes of 2B1.1(b)(2) and employee for the purposes of 2B1.1(b)(12).

Finally, the amendments also provide for enhanced punishment when an offense "substantially endangered the *solvency* or *financial security* of 100 or more victims." (emphasis supplied). Once again, we have a potential double-counting issue when some of these victims are also victims for the purposes of 2B1.1(b)(2) – or even triple-counting if these are employees for the purposes of 2B1.1(b)(12). More significantly, the Application Notes contain absolutely no guidance on the meaning of this language. The definition of "solvency" might not engender major debate, but the same cannot be said about "financial security." Is the test objective or subjective? Does it apply only when a victim's standard of living has been reduced to subsistence levels or whenever it has changed dramatically? Does the forced sale of one out of two (or more) vacation homes evidence a loss of financial security? Additionally, do dependents of victims also count as victims for the purposes of this provision? Unless the Commission can provide guidance on these fundamental issues, the NYCDL believes this provision should be stricken as confusing and redundant when viewed in light of other amendments, and thus unnecessary to achieve the ends of the emergency amendments.

Amendments to Application Notes in the Commentary to § 2B1.1

The U.S.S.G. Commission proposes to amend the Application Notes in the Commentary to Section 2B1.1 to permit courts to estimate loss by reference to "the reduction that resulted from the offense in the value of equity securities or other corporate assets." We believe that this method of valuation, particularly as it applies to equity securities, is neither workable nor appropriate.

First, an enormous number of factors effect the market valuation of a publicly-traded company. Without even attempting to offer an exhaustive list, we note that market value is often effected by general economic cycles, volatility in particular market sectors (e.g., semiconductor stocks are generally more volatile than consumer staple stocks), and the financial health and/or consolidation of peers, suppliers and customers. In addition, news unrelated to a specific company, like a threat of war or changes in interest rates, can have significant impact on its share price. Any effort to pin loss valuations on such a complex, multi-faceted analysis will require significant research, expert testimony, and complicated and lengthy sentencing hearings. Given this complexity, it seems likely that a vigorous defense will often demonstrate that the court lacks reliable proof linking a drop in market value to a specific criminal act. Not all defendants, of course, will be able to afford to mount such an effective defense at sentencing, which raises the prospect that defendants will receive vastly disproportionate sentences based on the economic status of the defendant.

Second, even if it were feasible to efficiently and reliably link criminal conduct with stock value, this analysis will often offer an inappropriate measure of "loss." This is particularly true with the accounting disclosure cases which have

triggered this proposed amendment. In those cases, the share price of a company's stock falls to, and often past, its true value when the accounting irregularities are eventually revealed to the public. Many shareholders will not suffer any real loss, however, having purchased shares before the value of the company was inflated. It would clearly work an injustice to any defendant whose term of incarceration is pegged to a drop in equity value where the actual investor did not realize a true loss.

This proposed amendment should not be adopted.

Fraud Related Contempt

With respect to the Commission's Request for Comment concerning the guideline treatment of fraud related contempt, the NYCDL urges the Commission to resist the Department of Justice request to amend this guideline so that all "fraud contempt" violations are governed by the fraud guidelines instead of the obstruction guidelines. We believe that such an amendment would in effect punish a defendant for committing a crime, to wit, fraud, without the government having to prove its case beyond a "reasonable doubt" and would grossly distort the sentencing process so that a criminal contempt of a court order arising out of a civil fraud action would be sentenced more harshly than a criminal contempt arising out of a civil action unrelated to fraud.

While conceding that courts normally and appropriately sentence defendants convicted of fraud-related contempts using fraud guideline, the government's submission nevertheless suggests that the application notes to the Contempt Guideline, § 2J1.1, should state clearly that the guideline for fraud and deceit applies to fraud-related contempts. Presently, the guideline for contempt directs courts to rely on § 2X5.1, which provides that where no express guideline exists for a particular offense, courts should use the most analogous offense guideline. The direction in § 2X5.1 is clear and it is also clear, as the government concedes, that most courts apply the most analogous guideline offense to fraud-related contempts: the fraud guideline. The government's reliance on only one obviously exceptional case (United States v. Kenneth Sterling, No. 0:99 Cr 06105-001 (S.D. Fla. Nov. 5, 1999) to demonstrate the need for change, moreover, fails to show that there is a widespread problem in the application of § 2J1.1 to the application

notes for fraud-related contempts. In fact, the government concedes that most courts apply the fraud offense guideline.

The government's proposed change contravenes the spirit of the Contempt Application Notes, which seek to provide courts flexibility in determining the appropriate offense guideline for contempts given the nature of that offense. The government has failed to make the case that the Sentencing Commission should limit the discretion it provided courts when it crafted § 2J1.1 and drafted the application notes. If the government is concerned about those rate instances where courts do not prudently exercise the discretion the Sentencing Commission provided for contempts, the government's remedy is to appeal those sentences.

The government argues that confusion exists over whether the enhancement set forth in § 2B1.1(b)(7) applies if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines, such as a violation of a condition of release (§ 2J1.7) or a violation of probation (§ 4A1.1). The government, however, cites only two cases in support of its view that courts are confused over when to apply the enhancement in § 2B1.1(b)(7). It is worth noting that one of the cases on which the government relies, United States v. Lonny Remmers, No. CR-98-4-LHM (C.D. Cal., Nov. 23, 1998) was decided nearly five years ago. Thus, whatever confusion may exist over the application of the enhancement is obviously limited to a handful of cases, at best.

We believe that § 2B1.1(b)(7) is clear that where a fraud offense is related to the violation of a prior judicial order, a two-point enhancement is warranted. Otherwise, a violation of a court order arising from a civil fraud claim should be punished

in a similar manner to violations of other court orders. In those rare instances where courts fail to appreciate the clear language of the guideline and its commentary, the government's remedy is to appeal the sentence.

Amendment to § 2J1.2, Obstruction of Justice

Following its emergency amendment of § 2J1.2, Obstruction of Justice, on January 25, 2003, the U.S. Sentencing Guidelines Commission invited public comment on the two primary changes instituted: (1) an increase in the offense base level from a 12 to a 14; and (2) an additional two point adjustment to be applied "if the offense (A) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; (B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation." *See* Supplement to the 2002 Sentencing Guidelines § 2J1.2(b)(3). Notwithstanding Congress' recent mandate for increased maximum penalties for defendants guilty of destroying or altering documents material to an on-going investigation (from ten to twenty years),[2] the combined effect of these guideline changes is both unnecessary and unwise.

Prior to the emergency amendment, the Sentencing Guidelines already provide the Courts ample resources to sentence defendants guilty of destroying or altering probative material or documents. Starting with U.S.S.G. § 2J1.2's existing base level of 12, the guideline already provided a three-level enhancement for any "substantial interference with the administration of justice." U.S.S.G. § 2J1.2(b)(2). Courts may apply this upward adjustment if the defendant's conduct resulted in (a) "a premature or improper termination of a felony investigation"; (b) "an indictment, verdict or any judicial determination based upon perjury, false testimony, or other false evidence"; or

---

[2] *Cf.* 18 U.S.C. §1519 and 18 U.S.C. §1503.

(c) "the unnecessary expenditure of substantial governmental or court resources." *Id.* at Application Note 1. In order to base this enhancement on an unnecessary expenditure of resources (U.S.S.G. § 2J1.2(b)(2), the government must merely "(1) identify a particular expenditure of governmental resources (time or money); (2) which but for the defendant's conduct would not have been expended; and (3) was 'substantial' in amount, as that adjective is used in common parlance." *United States v. Weissman*, 22 F. Supp. 2d 187, 196 (S.D.N.Y. 1998) (applying the collective holdings of various Circuit Court decisions, including the First, Second, Seventh and Tenth Courts of Appeal).

The emergency amendment added a <u>two-level enhancement</u> if (a) the defendant destroyed, altered or fabricated a substantial number of documents; (b) the defendant selected any "essential or especially probative" record to destroy or alter; or (c) the defendant's obstruction was extensive in scope or planning. *See* Supplement to the 2002 Sentencing Guidelines § 2J1.2(b)(3). Thus, the proposed amendment, if made permanent, would appear to subject a defendant to a potential <u>five-level enhancement</u> under subsections (b)(2) and (b)(3). In our view, the conduct set forth in proposed subsection (b)(3) is already taken into account by the "substantial interference" enhancement already set forth in subsection (b)(2). Adding the (b)(2) enhancement to the (b)(3) enhancement, therefore, would constitute impermissible double-counting.

We also believe subsection (b)(3)(B) of the emergency amendment should be removed entirely from the Obstruction Guideline. *See* § 2J1.2, Application Note 1; §3B1.1, Application Note 3; *Weissman*, 22 F. Supp. at 194-195. Its text, based on a defendant's "*<u>selection</u>* of any *essential or especially probative* record...to destroy or alter," introduces an unacceptable level of subjectivity and doubt into the sentencing

process without any guidance from the Sentencing Commission's Application Notes. Moreover, the conduct described would seem to be already covered as an "attempt" under the current Sentencing Guidelines. *See* Supplement to the 2002 Sentencing Guidelines § 2J1.2(b)(3)(B).

It is respectfully suggested that the Sentencing Commission (i) return the base level of § 2J1.2 to "12" in line with similar offenses (i.e., perjury); (ii) remove subsection (b)(3)(B) entirely; and (iii) make emergency amendment subsections (b)(3)(A) and (C) additional means by which a Court may impose a three-level enhancement under § 2J1.2(b)(2). *See* Appendix A. These changes achieve several important goals. They recognize and fairly reflect Congress' will to strongly deter and punish criminal defendants guilty of "substantial" or "extensive" document destruction or alteration as in the Enron/Anderson prosecutions. Two of the three suggested courses of conduct that most troubled Congress, i.e., the destruction and alteration of a substantial number of documents relevant to a criminal investigation and an extensively planned and executed obstruction of justice, would now specifically be appropriate candidates for <u>three-level enhancements</u>. By moving them into subsection (b)(2), the Sentencing Commission provides additional clarity and definition to these specific acts and avoids a potential double counting issue. Finally, by removing emergency amendment (b)(3)(B) from consideration, the Sentencing Commission spares the government, the defense bar and the Courts the inevitable problems of dealing with unduly subjective and undefined language already covered as an attempt by the Sentencing Guidelines.

APPENDIX A

§ 2J1.2. Obstruction of Justice

(a) Base Offense Level: 12

(b) Specific Offense Characteristics

(1) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by 8 levels.

(2) If the offense (A) resulted in substantial interference with the administration of justice; (B) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; or (C) was otherwise extensive in scope, planning, or preparation, increase by 3 levels.

(c) Cross Reference

(1) If the offense involved obstructing the investigation or prosecution of a criminal offense, apply § 2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1503, 1505-1513, 1516, 1519. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. "Substantial interference with the administration of justice" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.

2. For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation or trial of the obstruction of justice count.

3. In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense that is the object of the obstruction), see the Commentary to Chapter Three, Part C (Obstruction), and to § 3D1.2(c) (Groups of Closely Related Counts).

4. If a weapon was used, or bodily injury or significant property damage resulted, a departure may be warranted. See Chapter Five, Part K (Departures).

5. The inclusion of "property damage" under subsection (b)(1) is designed to address cases in which property damage is caused or threatened as a means of intimidation or retaliation (e.g., to intimidate a witness from, or retaliate against a witness for, testifying). Subsection (b)(1) is not intended to apply, for example, where the offense consisted of destroying a ledger containing an incriminating entry.

Background: This section addresses offenses involving the obstruction of justice generally prosecuted under the above-referenced statutory provisions. Numerous offenses of varying seriousness may constitute obstruction of justice: using threats or force to intimidate or influence a juror or federal officer; obstructing a civil or administrative proceeding; stealing or altering court records; unlawfully intercepting grand jury deliberations; obstructing a criminal investigation; obstructing a state or local investigation of illegal gambling; using intimidation or force to influence testimony, alter evidence, evade legal process, or obstruct the communication of a judge or law enforcement officer; or causing a witness bodily injury or property damage in retaliation for providing testimony, information or evidence in a federal proceeding. The conduct that gives rise to the violation may, therefore, range from a mere threat to an act of extreme violence.
The specific offense characteristics reflect the more serious forms of obstruction. Because the conduct covered by this guideline is frequently part of an effort to avoid punishment for an offense that the defendant has committed or to assist another person to escape punishment for an offense, a cross reference to §2X3.1 (Accessory After the Fact) is provided. Use of this cross reference will provide an enhanced offense level when the obstruction is in respect to a particularly serious offense, whether such offense was committed by the defendant or another person.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 172-174); November 1, 1991 (see Appendix C, amendment 401); January 25, 2003 (see Appendix C, amendment 647).

From: "Nathan, Daniel A." <dnathan@CFTC.gov>
To: "'pubaffairs@ussc.gov'" <pubaffairs@ussc.gov>, "'pdesio@ussc.gov'" <pdesio@ussc.gov>
Date: Tue, Mar 18, 2003 9:37 AM
Subject: Comment on proposed amendments to sentencing guidelines

<<Sentencing Commission Guidelines Comment.doc>>

We are sending you the comments of the Division of Enforcement of the Commodity Futures Trading Commission on the proposed amendments to the sentencing guidelines. We will also fax a copy. Thank you for your consideration.

Daniel Nathan
Chief, Office of Cooperative Enforcement
Division of Enforcement
Commodity Futures Trading Commission

(202) 418-5314

Division of
Enforcement

U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5320
Facsimile: (202) 418-5523
www.cftc.gov

March 18, 2003

Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-9002

The Division of Enforcement ("Division") of the Commodity Futures Trading Commission ("CFTC") appreciates the opportunity to comment on the proposal to repromulgate the temporary, emergency amendment implementing the Sarbanes-Oxley Act, Pub. L. 107-204 ("Sarbanes-Oxley"), as a permanent, non-emergency amendment to the sentencing guidelines. The Division also welcomes the chance to assist the Sentencing Commission by setting forth the CFTC's role in implementing, administering and enforcing the Commodity Exchange Act ("CEA"), 7 U.S.C. §1 et seq.

As the agency that enforces violations of the commodity laws and refers such violations to the Department of Justice for criminal prosecution, the Division is qualified to comment upon the appropriate sentencing levels for convictions based upon violations committed in the commodities arena. The Division is submitting this letter to recommend that fraudulent conduct committed in the commodity futures and options industry be treated comparably to similar types of securities and corporate fraud that are explicitly treated in Sarbanes-Oxley and under the guidelines.

The Division strongly supports the Sentencing Commission's proposed amendments that apply across the board to all forms of corporate and financial misconduct because, on their face, they provide for increased sentences against violators in the futures and options industry as well as against other perpetrators of white collar fraud. These amendments affect the sentences for, among other things: fraud offenses involving significantly greater than 50 victims; fraud offenses that endanger the solvency or financial security of a substantial number of victims; obstruction of justice offenses; and fraud offenses committed by officers and directors of publicly traded corporations.[1]

[1] For example, the Division has extensively investigated violations of the CEA committed by public companies involved in producing and trading energy products, including crude oil and electricity. In addition to alleged market manipulation, the conduct under investigation includes potentially fraudulent conduct such as uncompetitive or "wash" trading, and false reporting of trading volume. Some of these acts have been the subject of criminal prosecutions. If it is proven that criminal liability for fraud runs to the officers and directors of these public

In part 1.(B) of the Notice's "Issues for Comment: Corporate Fraud," the Sentencing Commission raises two related questions relevant to Sarbanes-Oxley's request that the Sentencing Commission consider providing "an enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses," Sarbanes-Oxley §1104: (1) whether the scope of the sentencing enhancement in §2B1.1(b)(13)[2] for violations of securities law should be expanded to include other individuals or entities besides officers and directors of public companies who also may have a fiduciary or similar statutory duty of trust and confidence to the investor; and (2) whether the enhancement should apply to entities or individuals that offer and manage securities or commodities futures or options but who are not regulated under securities law. The Division responds in the affirmative to both questions: the Sentencing Commission should extend the enhancements to bring these futures industry participant and futures-related acts within the guidelines, because the CFTC's regulatory scheme parallels the securities laws, and criminal prosecutions with respect to the futures and options industry often address the same types of fraud and abuse as those brought with respect to the securities industry.

I. The Enforcement Mission of the CFTC

The CFTC regulates the commodity futures and options markets. Its mission is to protect market users and the public from fraud, manipulation, and abusive practices related to the sale of commodity futures and options and to foster open, competitive, and financially sound commodity futures and options markets. In pursuit of that mission, the Division investigates and prosecutes alleged violations of the CEA and CFTC regulations.

The importance of the integrity of the futures and options markets to the United States economy is reflected by the CFTC's membership in the President's Working Group on Financial Markets and participation in the President's Corporate Fraud Task Force and the Enron Task Force, among other initiatives. Fraudulent investment schemes committed in the futures and options markets can have a devastating impact on the savings of individual ("retail") investors, and violations of the anti-manipulation provisions of the CEA can adversely affect broad sectors of the economy. Willful violations of the CEA are felonies under §9 of the Act. 7 U.S.C. §13.

Fraudulent conduct is contrary to one of the CEA's core regulatory protections. See, e.g., In re Nikkah, [2000-2001 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,129 at 49,892 (CFTC May 12, 2000)(civil monetary penalty imposed where respondent fraudulently allocated trades). The fraudulent conduct pursued by the Division and by criminal authorities encompasses a broad range of practices and sectors of the industry regulated by the CFTC. Certain prevalent

---

companies, then the enhancements could affect the sentences for these people as a result of their violation of the commodity laws.

[2] Section 2B1.1(b)(13) provides for a sentencing enhancement "if the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or a director of a publicly traded company . . . ."

fraudulent practices, that might merit sentencing enhancements in criminal prosecutions, are described below.[3]

Sales solicitation fraud: The Division regularly investigates fraud committed by intermediaries in the futures and options industry (such as introducing brokers, commodity trading advisors and commodity pool operators) in soliciting, selling, and providing advisory services concerning, commodity futures and options. Enforcement actions have alleged that introducing brokers, commodity trading advisors and commodity pool operators have lied to their customers (who often are individuals of modest means) about the profitability and risk of transactions in futures and options, about the intermediaries' track records and expertise, and about the nature of the transactions. Related criminal actions have charged that such fraudulent misrepresentations also constitute wire fraud, mail fraud and commodities fraud. In addition, the CFTC and the courts have found that a broker breaches a fiduciary duty to a customer by trading ahead of a customer's order.

The "Issue for Comment" inquires whether the Sentencing Commission should include in §2B1.1(b)(13) a registered broker or dealer, an investment adviser, or persons associated with either of those. Any affirmative response to that question with respect to participants in the securities industry should equally apply to registered intermediaries in the futures and options industry. These individuals and entities perform functions similar to those performed by brokers, dealers and investment advisers; some or all of them make sales solicitations, handle customer orders, provide trading advice, accept customer funds, and report to customers the status of their investments. As with securities brokers, dealers and investment advisers, they owe a duty of trust and confidence to their customers.

Commodity pool fraud: A commodity pool operator is a business similar to an investment trust or syndicate that raises funds for the purpose of trading commodity futures or options. Commodity pool operators have a fiduciary obligation to investors in the pools and are obligated to comply with statutes and regulations designed to ensure the safety and soundness of funds placed in the pools. The Division has civilly prosecuted commodity pool operators for running commodity pools as Ponzi schemes, in which much of the money raised from retail investors is misappropriated by the promoters of the scheme, and funds are used to pay purported profits to the earlier investors in order to create the appearance of profitability. The Department of Justice has brought related criminal actions alleging violations of the general fraud statutes as well as, in some cases, commodities fraud, against such pool operators.

Fraud involving sales of off-exchange instruments: The CFTC investigates, prosecutes and makes criminal referrals based upon fraudulent solicitations and sales of foreign currency (also known as "forex") and precious metals futures and options that are not traded on designated exchanges. While these investments might masquerade as "physical" or

[3] The CFTC's enforcement complaints from the past several years are available on the CFTC website at www.cftc.gov. The website also includes several CFTC Consumer Advisories alerting the public to warning signs of possible fraudulent commodity activity and offering precautions that individuals should take before committing funds, www.cftc.gov/cftc/cftccustomer.htm.

"spot" commodities, they often are futures or options as a legal matter, and thus are covered by

the CEA. The CFTC's actions prosecuting such fraud, and related criminal actions, often charge the promoters of these frauds with misappropriation as well as false and misleading representations.

II. Enhancements should apply to individuals and entities in the commodity futures and options industry

The Division recommends that the guidelines extend any enhancements for violations that involve breaches of a fiduciary or other statutory duty of trust and confidence to encompass violations by individuals and entities in the commodity industry that have similar duties. As demonstrated above, many of the acts of misconduct by individuals and entities regulated under the securities laws have their parallel in acts of misconduct by individuals and entities in the futures industry. As in the securities industry, futures and options professionals abuse their duties of trust and confidence to their customers through misrepresentation and misappropriation, among other things. The degree of criminal sentence should not vary depending on the particular investments that were the subject of the fraud, when the customers were similarly situated and the abuse involved similar duties and similar breaches of these duties. Indeed, many financial professionals stand with one foot in each of the securities industry and the futures and options industry under a system of dual regulation. It would be an odd result if a dual registrant's acts of defrauding a customer with respect to securities and futures transactions subjected the registrant to different sentences depending upon the financial instrument involved in the fraud.

For the same reasons, the scope of any enhancement should apply to entities and individuals that offer and manage commodity futures and options and are not regulated under the securities laws, but rather under the CEA. Significant to this conclusion is the provision in the "Application Notes" to §2B1.1(b)(13) which provides that "A conviction under a securities law is not required in order for subsection (b) to apply;" that is, even if the individual is convicted under a general fraud statute, if the defendant's conduct violated a securities law, it is appropriate for a sentencing enhancement. The fact that many futures and options violations also are prosecuted under general fraud statutes should warrant equivalent application of an enhancement when a criminal violation of the CEA is committed (but not necessarily charged), given the similar purposes and applications of the two statutory regimes.

Thank you for the opportunity to comment on the proposed amendments. Please call me at (202) 418-5314 if you have any questions about these comments.

Yours truly,

Daniel A. Nathan
Chief
Office of Cooperative Enforcement

March 12, 2003

US Sentencing Commission
C/O Office of Public Affairs
Suite 2-500 South Lobby
One Columbus Circle, NE
Washington, DC 20002
Attn: Michael Courlander

Dear Mr. Courlander:

LRN, The Legal Knowledge Company, is pleased to have the opportunity to respond to the U.S. Sentencing Commission's January 17, 2003 request for public comment. LRN commends the Commission for addressing the important issues raised in the proposed amendments to the sentencing guidelines, particularly given the short time--frame in which the Commission was required to act.

As a leading provider of Web-based legal, ethics, and compliance training, LRN has worked with many of the largest companies in the world to develop effective systems for communicating the organization's values and standards, as well as their compliance training. In addition, LRN's network of over 1,000 legal experts research legal and compliance issues across a broad range of topics for the law departments of many of these same companies. Based on LRN's experience and research, we provide the following comments with regard to Issue 1 of the Commission's Issues for Comment for consideration.

Issue 1(A): Corporate Fraud—The Loss Tables

As part of the emergency amendment, the Commission expanded the loss table in

LRN, Inc.
1100 Glendon Avenue, Suite 700
Los Angeles, CA 90024-3503
Telephone 310.209.5400
Facsimile 310.209.5401
www.lrn.com
The Legal Knowledge Company™

§2B1.1(b)(1), providing for two additional levels to the table: and increase of 28 levels for offenses in which the loss exceeded $200,000,000 and an increase of 30 levels for offenses in which the loss exceeded $400,000,000. The Commission asks whether, when it repromulgates the emergency amendment as a permanent amendment, the loss table should be modified more extensively to provide increased levels for offenses involving lower loss amounts and provides three alternatives for public comment. Additionally, the Commission requests comment regarding whether it should amend §2B1.1(a) to provide an alternative base offense level, either in conjunction with, or in lieu of, an amendment to the loss table, that would apply based on the statutory maximum term of imprisonment applicable to the offense of conviction—for example, five, ten, fifteen, or twenty years.

LRN believes that modifying the lower loss amounts in the loss table will likely have little or no impact in addressing the conduct that was the focus of the Sarbanes-Oxley Act (the Act). The corporate scandals that largely led to the Act's creation involved substantial losses to investors and employees, and the 28- and 30-level increases the Commission has promulgated for those substantial losses address, for the most part, the intent of the Act. Indeed, it is likely that any fraud committed by an officer or director of a public company, once revealed, will result in substantial loss of shareholder value and the lower loss amounts in the loss table will be largely irrelevant.

For example, public disclosure of securities fraud at a publicly traded company often leads to a material decrease in the company's share price. And as the guidelines now contemplate such a reduction as a "loss" for purposes of the loss tables, it is highly likely that the loss will quickly exceed the $1 million mark. Thus, a 10% drop in market value of a corporation with a $1 billion market capitalization, will result in a loss of $100 million. We therefore suggest that, if the Commission's purpose is to address the types of misconduct witnessed in the corporate scandals of 2002, the lower loss amounts are irrelevant. This is particularly true when the additional enhancements the Commission has promulgated for officers and directors of public companies who commit fraud offenses are applied.

However, the Commission's proposal to increase the base offense level in §2B1.1(a) from six to seven for offenses that the Congress deemed most egregious seems appropriate. We therefore suggest that §2B1.1(a) be amended to read as follows:

(a) Base Offense Level:

(1) 7, if the defendant was convicted of an offense referenced to this

guideline for which the maximum term of imprisonment prescribed by law is 20 years or more; or
(2) *6, otherwise.*

Again, our focus is on the intent of Congress in passing the Act. Our basis for the twenty-year maximum term provision is derived from what we perceive as Congress's intent to address the most egregious cases. For example, in the Act, Congress

- increased the maximum penalty for mail and wire fraud from five to twenty years,
- increased the criminal penalties for securities fraud from ten to twenty years,
- created new criminal laws for destroying documents or otherwise obstructing federal investigations with a maximum twenty years imprisonment
- created ten and, in the case of willful violations, twenty year prison terms for failure of corporate officers to certify financial reports
- created a ten-year maximum prison term for retaliating against a whistleblower, and
- created a new securities fraud statute with a twenty-five year maximum prison term.

The increase in the base offense level, coupled with the addition of the 28-and 30-level increases for very high losses, appears to satisfy Congress's intent that the sentencing guidelines adequately address those fraud offenses that are particularly extensive and serious. And it does so without a wholesale revision of the loss table, thereby avoiding a lengthy analysis of the appropriateness of the relatively incremental changes among the lower loss amounts.

Issue 1(B): Corporate Fraud—Enhancement at §2B1.1(b)(13)

As part of the emergency amendment, the Commission promulgated a new enhancement at §2B1.1(b)(13) that provides a four level enhancement if the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or director of a publicly traded company. The Commission asks whether, when it repromulgates the emergency amendment as a permanent amendment, it should expand the scope of at §2B1.1(b)(13) to include other individuals or entities that may have a fiduciary or similar statutory duty of trust and confidence to the investor. Possible examples included brokers, dealers, and investment advisers, as well as their associated persons, and other market professionals who may not be a regulated entity under the securities laws.

We have found that the successful implementation of an effective system to communicate the organization's standards and procedures largely depends on the commitment to the program by senior management. Thus, the "tone at the top" set by the

most senior leaders of an organization plays a crucial role in how compliance and ethics are viewed by the rest of the organization. In this regard, and based on LRN's experience and research, we agree that a four-level enhancement for fraud offenses committed by officers and directors of publicly traded companies is appropriate.

However, before addressing the proposed expansion of the emergency amendment to other persons, LRN first suggests that the Commission clarify certain elements of the emergency amendment. As currently drafted, the subsection applies in the case of a defendant convicted under a general fraud statute if the defendant's conduct also "violated" a securities law. We assume that such a "violation" must be proved by a preponderance of the evidence by the prosecution at sentencing, but this is not clear. Moreover, many securities prosecutions are brought parallel to civil actions brought by the Securities and Exchange Commission. In fact, many such cases may be settled with the SEC without admitting or denying the allegations. But the SEC still often makes findings in such settlements. Such a finding by the SEC could be tantamount to the *de facto* establishment of a securities law violation, without any additional evidence being presented. LRN therefore suggests that the Commission provide guidance in the application notes as to its intent with regard to how a securities law "violation" is to be established.

In addition, by including all "violations" of the securities laws, the amendment could have the effect of criminalizing conduct that would otherwise purely be a technical violation. For example, under §13 of the Securities Exchange Act of 1934, a company must keep accurate books and records of its financial transactions. The SEC may bring an action against individuals--typically an administrative proceeding--seeking an order that they cease and desist from "causing" the company to fail to keep accurate records. And while the materiality of a particular record is often examined by the SEC to determine whether to charge an individual or organization with a §13 violation, the statute does not require it. Thus, even a single inaccurate--and possibly immaterial--record caused to be created by an individual could lead to the enhanced sentence. Furthermore, under new disclosure and reporting requirements, a number of disclosures are required to be filed within short time periods. Even a one-day delay in making an appropriate filing--and thus a technical violation of the securities laws--could lead to the enhanced sentence. We do not believe this is the Commission's intent and we suggest the Commission provide further guidance as to its intent with regard to the application of this provision.

Furthermore, LRN notes that proposed expansion of the amendment to market professionals may have the unintended effect of bringing within it many persons who were not the focus of Congress when passing the Act. The expansion may thus have the effect of diluting the Act's emphasis on corporate governance. In passing the Act, Congress identified a particular problem--namely, that those at the very top of an organization set the tone for the entire organization. The potential for serious losses arising from the example they set is therefore much greater. These factors--the leadership role they play in the organization and the potential for great losses--caused Congress to

substantially increase regulations and sanctions to address these leadership shortcomings.

By expanding the amendment to others who are not officers or directors of their companies, that is, not the leasers of their organizations, the amendment casts a much wider net. For example, the amendment would likely cover a registered representative employed at a broker-dealer who churns a single customer's account. While the employee certainly deserves to be punished, is the application of the enhancement consistent with congressional intent? Furthermore, §3B1.3 (Abuse of Position of Trust or Use of Special Skill) seems to already address just this scenario, causing a 2 level increase to the employee's sentence, without having to go through the exercise of establishing a securties law violation at sentencing. LRN therefore suggests that the Commission narrowly apply the amendment to those market professionals who, because of their positions of trust, have the potential to cause the greatest amount of harm. In that regard, perhaps the amendment is appropriate for the leadership of market participants, such as the officers and directors of a brokerage firm or other regulated entity (which may or may not be a publicly traded company) because their illegal conduct could cause great losses and even threaten the integrity of the capital markets. But for the low- level employees who happen to work for such an entity, LRN suggests the Commission utilize already existing sentencing guidelines, as their status in the marketplace and their duties vis-à-vis the investing public do not rise to the same level as the officer or director of a public company.

If this argument is rejected by the commission and it is the intent to extend the amendments to lower-level employees, LRN notes that certain professionals, such as investment advisers, have statutorily-defined fiduciary duties under specified circumstances, and clearly are closer to the status of an officer or director of a public company because of their similar position of trust and confidence. However, other market professionals do not have statutory fiduciary duties, but may, under certain circumstances, accept such a duty by offering certain products or services.

For example, case law suggests that no fiduciary duty arises between a securities broker and his customer simply by virtue of the broker-customer relationship. Of course, because of their position in the marketplace, market professionals are held to high standards of business conduct and fair dealing. To avoid confusion, we therefore suggest the Commission simply identify those market professionals to which the enhanced standard will apply, based on the Commission's policy determination that such professionals are similar enough to the public company officer or director, and then offer the courts guidance for determining which additional individuals, not otherwise identified in the amendment, may be covered by it. We also suggest that the Commission insert language into the guidelines explaining the intent for including these marketplace professionals and the types of duties or responsibilities the Commission expects would bring an individual into the provision as a "similar" person.

* * * *

LRN appreciates the opportunity to respond to the Commission's request for

public comment. We hope the Commission finds our response helpful.

Sincerely,

Dov Seidman
Chairman and Chief Executive Officer

MERCATUS CENTER
GEORGE MASON UNIVERSITY

March 17, 2003

Michael Courlander
Public Affairs Officer
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Re: Sentencing Guidelines for United States Courts

Dear Mr. Courlander:

Please find enclosed comments on the United States Sentencing Commission's Guidelines for United States Courts

The Regulatory Studies Program (RSP) of the Mercatus Center at George Mason University is dedicated to advancing knowledge of regulations and their impact on society. As part of its mission, RSP produces careful and independent analyses of agency rulemaking proposals from the perspective of the public interest. The enclosed comments on the United States Sentencing Commission's Guidelines for United States Courts, do not represent the views of any particular affected party or special interest group, but are designed to evaluate the effect of the proposed guidelines on the public interest generally.

The Regulatory Studies Program appreciates the opportunity to comment. We hope that consideration of these comments will enhance the quality and development of regulations and policy regarding sentencing guidelines.

Wendy L. Gramm, Director
Regulatory Studies Program

Susan E. Dudley
Senior Research Fellow

3301 NORTH FAIRFAX DRIVE, SUITE 450, ARLINGTON, VIRGINIA 22201-4433
PHONE: (703) 993-4930 FAX: (703) 993-4935 www.mercatus.org

MERCATUS CENTER
GEORGE MASON UNIVERSITY

REGULATORY STUDIES PROGRAM

Public Interest Comment on
Sentencing Guidelines for United States Courts[1]

The Regulatory Studies Program (RSP) of the Mercatus Center at George Mason University is dedicated to advancing knowledge of the impact of regulation on society. As part of its mission, RSP conducts careful and independent analyses employing contemporary economic scholarship to assess rulemaking proposals from the perspective of the public interest. Thus, this comment on the United States Sentencing Commission's Guidelines for United States Courts does not represent the views of any particular affected party or special interest group, but is designed to evaluate the effect of the Agency's proposed guidelines on overall consumer welfare.

I. Introduction

The Sarbanes-Oxley Act of 2002 contains directives to the United States Sentencing Commission regarding fraud and obstruction of justice offenses committed by corporate executives that endanger the financial condition of a firm and adversely affect a large number of individuals. The Act contained language expressing particular concern for especially large corporate frauds. To address this concern, the Commission has proposed an amended table relating the dollar size of a fraud to the offense level to be consulted in the sentencing guidelines.[2]

The proposed options for the amended loss table, unfortunately, are likely to do little to discourage relatively large frauds and might encourage larger frauds, on the margin. This comment illustrates this perverse effect of the proposal and suggests that the Commission consider developing a structure that takes these incentive effects into account.

---

[1] Prepared by Jonathan Klick, Ph.D., Dorothy Donnelley Moller Research Fellow, The Mercatus Center. This comment is one in a series of Public Interest Comments from Mercatus Center's Regulatory Studies Program and does not represent an official position of George Mason University.

[2] The sentencing guidelines contain baseline "offense levels" for different crime categories, as well as adjustments for various aggravating factors. Judges then use the adjusted offense level to consult the sentencing table which indicates appropriate sentencing ranges, in months, by offense level.

II. Statutory Basis for Regulation

The corporate fraud amendment to the sentencing guidelines implements directives to the Commission contained in sections 805, 905, and 1104 of the Sarbanes-Oxley Act of 2002 (the "Act"), Pub. L. 107–204. The directives pertain to fraud and obstruction of justice offenses and require the Commission to promulgate amendments addressing, among other things, officers and directors of publicly traded companies who commit fraud and related offenses, offenses that endanger the solvency or financial security of a substantial number of victims, fraud offenses that involve significantly greater than 50 victims, and obstruction of justice offenses that involve the destruction of evidence. Under emergency amendment authority, the Commission promulgated guideline amendments, effective January 25, 2003, to implement these directives. The current proposal is meant to provide a permanent amendment concerning these issues.

III. Declining Cost of Fraud

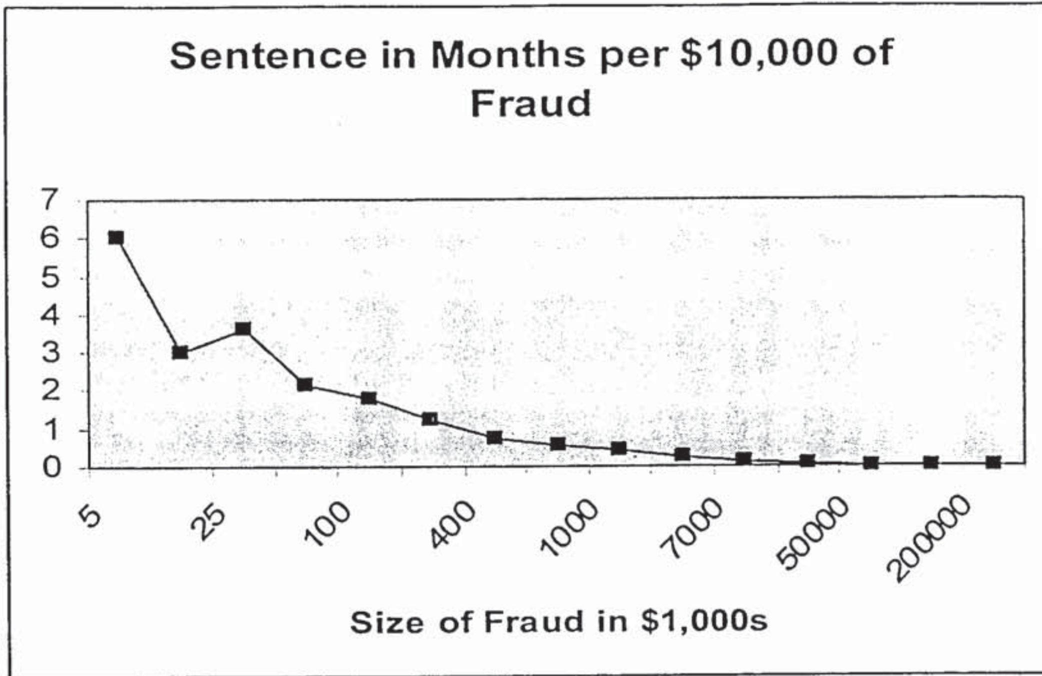
The Commission offers three options to amend the loss table in §2B1.1(b)(1), which provides guidance for determining the offense level to be used on the sentencing table in the case of a corporate fraud conviction. The options each offer varying degrees of gradation relating the dollar valuation of the loss resulting from the fraud to a corresponding offense level.

In its request for comments, the Commission notes that it added loss categories at $200,000,000 and $400,000,000 to address concerns articulated in the Sarbanes-Oxley Act of 2002 about "particularly extensive and serious fraud offenses." This implies that the Commission sees value in and, in fact, imputes a mandate to discourage larger frauds even more than relatively smaller frauds. While this certainly makes sense, none of the proposed alternative loss tables is likely to achieve this goal.

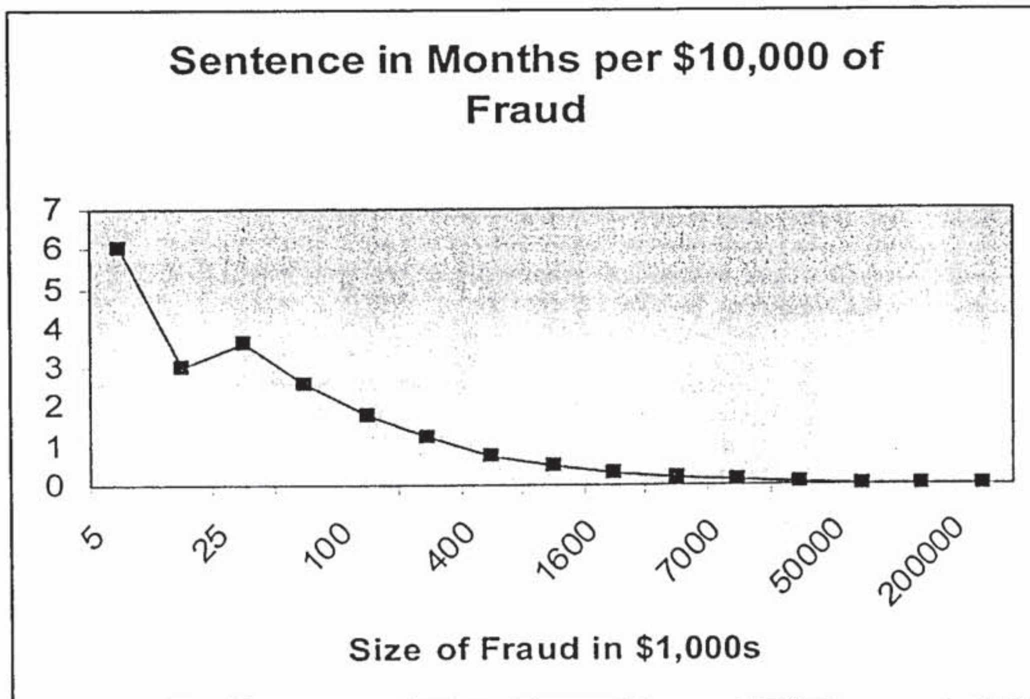
If the criminal sentences are to serve a deterrent value for corporate executives and there is a desire to deter especially egregious frauds at an even greater rate, one would expect that the incremental increase in the sentence increases as the size of the fraud grows. However, in the options offered by the Commission, we see the exact opposite. The average sentence per dollar of fraud loss is actually decreasing as the fraud grows. This is illustrated in the following graphs:[3]

[3] The data in these graphs come from the sentencing guidelines and the proposed amendment. The y axis measures the sentence in months given by the guidelines (taking the midpoint of the suggested sentence and assuming 0 or 1 criminal history points) divided by the upper limit of the loss category given in the proposed tables. This figure is multiplied by 10,000 to scale the numbers. The x axis is the upper limit of the loss category in the proposed tables (in thousands of dollars).

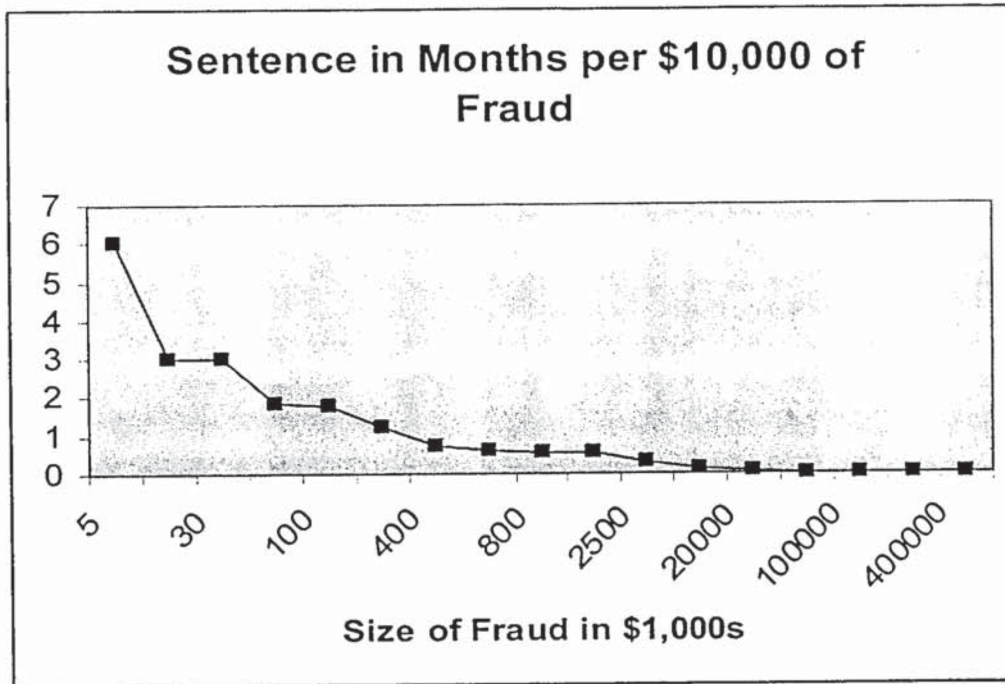
Option A



Option B



Option C



Assuming that the gain to corporate executives engaged in a fraud is proportional to the resulting loss from the fraud and that the probability of law enforcement officials detecting the fraud is constant, the proposed loss tables provide decreasing marginal deterrence. That is, once a fraud is committed, it is actually rational for the executives to engage in more fraud because the punishment effectively becomes cheaper on average as the fraud grows.

Perhaps the stated assumptions are unrealistic. Specifically, it might be the case that larger frauds are more likely to be detected. This would dampen or even reverse the declining average cost of fraud implied in the graphs above. This is an unanswered question. If the Commission holds the assumption that larger frauds are more likely to be detected, it should present some empirical evidence in its support. However, proving such a proposition would be difficult as the data are effectively censored. That is, we do not know the size of undetected frauds.

The foregoing analysis also implicitly assumes that the marginal cost of additional months on a sentence is linear to the executives. If, in fact, the marginal cost is increasing, then the declining average cost of fraud effect would again be dampened or reversed. However, if the marginal cost is decreasing, the effect is heightened. This too is an empirical question that is difficult to answer.

Noting those two caveats, it seems clear that none of the Commission's proposals does an adequate job of providing relatively high deterrence for "particularly serious or extensive fraud offenses."

IV. Conclusion and Recommendation

The Sentencing Commission attempted to answer congressional concerns regarding corporate frauds of an especially large magnitude. In its proposed changes to the loss table in §2B1.1(b)(1) the Commission sets up an incentive structure that achieves the exact opposite. The proposed sentencing structure actually induces a situation of declining marginal deterrence which has the potential to produce larger frauds on the margin.

A superior loss table would provide increasing marginal deterrence whereby the average cost imposed on the perpetrators of a fraud increases with the scale of the fraud. Such a system would go a long way to discouraging especially egregious offenses.

HUNTON & WILLIAMS

1900 K STREET, N.W.
WASHINGTON, D.C. 20006-1109

TEL 202 • 955 • 1500
FAX 202 • 778 • 2201

STEVEN P. SOLOW
DIRECT DIAL: 202-419-2065
EMAIL: ssolow@hunton.com

FILE NO: 99997.025428

March 17, 2003

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

Re: Sarbanes-Oxley Act

Dear Chair Murphy and Commissioners:

I am writing to provide the following public comment on the Commission's proposed amendment to implement the Sarbanes-Oxley Act of 2002 ("the Act"). Numerous commentators have submitted comprehensive comments. I am writing to address a particular issue of substantial concern that is raised by one particular aspect of the Act.[1]

Section 802 of the Act amended Chapter 73 of title 18, United States Code, by adding a new Section 1519, entitled "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." Unlike other aspects of the Act, this amendment is not limited to corporate accounting misconduct and its effects on capital markets that served as the instigation for the Act. Instead, it creates a broad new law addressing Obstruction of Justice and does so in the broadest terms of any such statute to date.

As others have noted, Section 1519 makes clear that the government can now seek to prosecute an individual for document destruction prior to the existence of any official proceeding or investigation.[2] Specifically, Section 1519 provides:

---

[1] I am a partner in the law firm of Hunton & Williams, and I present these comments as an individual attorney. The views expressed herein are my own and should not be construed to represent those of my firm, or of our clients, or of the Commission's Practitioners' Advisory Group (PAG) of which I am a member. However, these comments have been briefly reviewed by Barry Boss, co-chair of the PAG who believes that the invited downward departure proposed in this letter should be given serious consideration by the Commission.

[2] *See, e.g., Life After Sarbanes-Oxley: New Criminal Penalties for Fraud and Obstruction Affect All Companies*, Hamel, Kelly, Dolan, Legal Times, October 7, 2002. Vol. XXV, No. 39

> Whoever knowingly alters, destroys . . . or makes a false entry in any record, document or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . *or in relation to or contemplation of any such matter or case,* shall be . . . imprisoned not more than 20 years. (emphasis added).

Significantly for the purposes of these comments, Section 1519 makes it a crime to destroy documents "in relation to or contemplation of any such matter or case." This new language appears to expand the crime of obstruction to a new territory by creating potential criminal liability for the destruction of a document, even if done pursuant to an otherwise appropriate document retention policy and even if there was no federal proceeding or investigation under way at the time the document was destroyed.

Businesses routinely and legitimately destroy documents and other materials pursuant to document retention policies when such materials are no longer required to be maintained by law or business need. It would impose a totally unreasonable burden if huge numbers of such records were thought to be required to be retained, perhaps indefinitely, because some future reviewer may conclude that it was "contemplated" at the time of destruction that such records might be of some interest to a then non-existent future government inquiry.

Such concerns about the impacts of expanding document retention requirements are far from speculative. For example, the sheer impact of a vastly expanded record-keeping obligation has lead to reconsideration of the Environmental Protection Agency's (EPA) so-called CROMERRR rule, which was designed "primarily to ensure that . . . documents and records are preserved . . . so that they continue to provide strong evidence of what was intended by the individuals who created and/or signed and certified them."[3] The EPA is reconsidering the rule in light of, among other things, estimates that the overall cost to the affected organizations of initially implementing the rule could be as high as $68 billion dollars. [4]

---

[3] 66 Fed. Reg. at 46164.

[4] *See*, http://www.epa.gov/website1/cromerrr/propose/index.html, for the text of public comments filed with EPA regarding the proposed rule. Similarly, the Food and Drug Administration is considering curtailing enforcement of a rule regulating electronic filing of records and data by pharmaceutical manufacturers due to concerns about the costs involved in implementing and in the annual compliance with the rule; 21 CFR Part 11.

The Commission is well aware that provisions such as Section 1519, and the direction provided to U.S. courts under the Guidelines, have a powerful effect on corporate management practices. Since the Commission issued the Organizational Guidelines in 1991, there have been massive increases in the development and implementation of internal programs to prevent, detect and report violations by organizations. Moreover, the structure of these compliance programs have unquestionably been shaped by the language of the Organizational Guidelines.

The Organizational Guidelines have also profoundly influenced bargaining between prosecutors and defendant corporations. They have become central to the resolution of the vast majority of investigations involving alleged corporate crime and play a central (if not widely recognized) role in the fact and charge bargains struck between prosecutors and defendants.

These impacts far outweigh the role of the Organizational Guidelines in setting criminal sentences,[5] and that this broader role was in fact the Commission's goal. The Commission sought to use the Organizational Guidelines to enroll organizations in the effort to prevent crime, by rewarding such efforts with meaningful reductions in liability when violations occur despite good faith efforts to comply.

A similar effort by the Commission is warranted regarding the Guidelines implementation of Section 1519. Without further guidance from the Commission regarding the application of Section 1519 it will be extraordinarily difficult for companies to develop and implement appropriate document retention policies without fear that almost any failure to maintain a document could, in hindsight, be viewed as an act of obstruction. Moreover, without limiting language, Section 1519 may impose potentially impracticable if not impossible costs of keeping a seemingly limitless class of records for future review akin to those imposed by the EPA and FDA rules referenced above.

It is helpful, in this regard, to refer to the language found in the Senate Report on the Act[6]. Recognizing the broad reach of Section 1519, the Report notes:

---

[5] As recognized by one close observer who noted that the Guidelines "biggest influence may be behind the scenes, in plea negotiations . . .", *Sentencing Reformers*, NYLJ, March 18, 2002, p.A15.

[6] S. Rep. No. 107-146 (2002).

> In our view, section 1519 should be used to prosecute only those individuals who destroy evidence with the *specific intent* to impede or obstruct a pending or future criminal investigation, a formal administrative proceeding, or bankruptcy case. *It should not cover the destruction of documents in the ordinary course of business, even where the individual may have reason to believe that the documents may tangentially relate to some future matter within the conceivable jurisdiction of an arm of the federal bureaucracy.*

S. Rep. 107-146, at 27. (emphasis added). Without similar clarification in the Guidelines the Act in its naked form could punish exactly the conduct described in the Senate Report as not intended to be covered by Section 1519 and would fail to provide consideration for good faith efforts to implement a proper document retention policy.

As it did in the Organizational Guidelines[7], the Commission could directly address these concerns either in the form of Commentary or downward Adjustments to the Offense Level for violations of Section 1519. At the very least, the Committee should include an invited downward departure where the defendant has made efforts to implement a sound document retention policy. In considering whether to grant such a departure, the Commission should propose that a court consider the following non-exclusive factors as indicators of a sound document retention policy: providing a written document policy to employees involved in or responsible for records management activities; clear direction to employees who are uncertain as to what to do with a particular document or record to seek advice from the company's counsel; and, a policy that directs that time periods set for destruction of records do not apply when there is a clear direction that certain records or categories of records should be retained.

Moreover, courts should be encouraged to give recognition to the varying document retention policies that may be employed given the size of the organization involved; to the likelihood that a specific category of documents would be of interest; to the sensitivity of the document with respect to their impact on individual privacy concerns; and, to the prior history of the organization in consistently carrying out the requirements of its document policy as opposed to last-minute efforts aimed at destroying records. This general guidance would be consistent with the recognition in the context of the Organizational Guidelines by Chair Murphy, who noted that:

---

[7] United States Sentencing Commission, Guidelines Manual § 8A1.2, Commentary, Application Note 3(k); §8C2.5 (f) (November 2002).

> the guidelines must be general enough to be used by all types of organizations engaged in a wide variety of activities. The standards and procedures for effective compliance programs in one industry may not be the same in another.[8]

Such an invited downward departure for Section 1519 would accommodate concerns about destruction of inculpating records while providing recognition and encouragement in the Guidelines for efforts to implement a sound document retention policy; meaning a policy that has been reasonably designed, implemented and enforced so that it generally will be effective in preventing or detecting document destruction undertaken with the specific intent to obstruct justice.

In so doing, the Commission can provide guidance to those covered by Section 1519, and those given the discretion to use its seemingly overbroad language, so as to support the goals of the law while preventing abuse in the context of 20-20 hindsight that seeks to make otherwise innocent conduct appear criminal. Such liability without moderation could impose unreasonable expectations on efforts to manage the ever-expanding list of required record keeping covered by Section 1519.

I appreciate the opportunity to present these views on this important issue.

Sincerely,

Steven P. Solow

cc: Charles Tetzlaff, Esq.
Paula Desio, Esq.
Barry Boss, Esq.
Jim Felman, Esq.

---

[8] Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 Iowa L. Rev. 697, 715-16 (2002).

PURDUE

Purdue Pharma L.P.
One Stamford Forum
Stamford, CT 06901-3431
(203) 588 8000
Fax (203) 588 8850
www.purduepharma.com

6 March 2003

Lou Reedt, ScD
Acting Director, Office of Policy Analysis
United States Sentencing Commission
Thurgood Marshall Judiciary Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Facsimile: 202.502.4699

Dear Dr. Reedt:

Thank you for the opportunity to express our opinion on the "Revised Proposed Amendment: Oxycodone" (hereafter, Proposal, Appendix I) to amend the United States Sentencing Guidelines (USSG) for crimes involving oxycodone. Purdue Pharma L.P., the distributor of OxyContin® (oxycodone hydrochloride controlled-release) Tablets, is very concerned that persons with legitimate medical need have access to OxyContin and other controlled opioids, when indicated, and that persons engaged in criminal activities involving OxyContin, or any other prescription medication, be punished in a manner that is equitable within the federal sentencing schema.

The Proposal would change the USSG that currently equate one gram of oxycodone to 500 grams of marihuana (Drug Equivalency Tables). Under the current USSG, "oxycodone" is construed to mean a mixture containing oxycodone and other ingredients. The Proposal would have sentences involving oxycodone formulations calculated on the basis of the nominal weight of the oxycodone salts, as opposed to the weight of the oxycodone mixture, similar to the manner of calculation under the existing USSG for phencyclidine, amphetamine and methamphetamine.

To achieve the stated Congressional goals of honesty, uniformity and proportionality in sentencing, we agree with the intent and rationale of the Proposal. Our rationale for this decision is explained in Appendix II.

We fully understand the utility of using nominal weights of oxycodone in licit pharmaceutical formulations, as opposed to the precise weight of the oxycodone itself, since a 10 MG OxyContin tablet contains slightly less than 10 MG of oxycodone and a 5 MG tablet of Percocet contains slightly less than 5 MG of oxycodone. Acceptance of this convention will save time for the courts and will not, if applied uniformly, create any disparity in sentencing.

We would, however, like to raise an issue for consideration by the Commission. The language in the Proposal does not consider any licit formulation of oxycodone other than tablets or capsules. Oxycodone is available as an oral solution in the US and is available in an injectable formulation in other countries. These, and other as yet unmarketed novel formulations, could conceivably be involved in sentencing decisions. Likewise, if a crime involved trafficking in or possession of powdered oxycodone salts, the language of the Proposal might be unclear. There also exists the possibility of illegal manufacture of oxycodone for trafficking, as has occurred with fentanyl. We would suggest, therefore, that the language in the Proposal might be unnecessarily limiting. Contemplating these issues, and borrowing language from 21CFR 1300.01(b)(5)(i), we propose you consider modifying the Proposal by replacing the paragraph that reads:

The term "Oxycodone (actual)" refers to the weight of the controlled substance, itself, contained in the pill or capsule.

with:

The term "Oxycodone (actual)" refers to the total nominal weight of the controlled substance, its salts, esters, ethers, isomers and salts of isomers, esters and ethers contained in a licitly manufactured pharmaceutical formulation (including, but not limited to, solutions, tablets or capsules). In the case of oxycodone in any form that is not licitly manufactured for legitimate medical or scientific purposes, the term "Oxycodone (actual)" shall refer to the total actual weight of the oxycodone salts, esters, ethers, isomers and salts of isomers, esters, ethers contained in the mixture.

In reviewing the USSG, there are several other areas involving licitly manufactured opioids that also should be revised to adhere to the intent of Congress. If the Commission is to consider parity amendments for other forms of marketed opioids in the future, we would like to participate in those discussions.

I understand from our telephone call yesterday that there will be no opportunity for oral testimony on this issue at the hearings later this month. If testimony on these issues will occur at future hearings, I am willing to appear on behalf of Purdue.

Again, you have our thanks for being consulted on this important and timely issue.

Sincerely,

J. David Haddox, DDS, MD
Vice President, Health Policy

Appendix I

REVISED PROPOSED AMENDMENT: OXYCODONE

Synopsis of Proposed Amendment: *This proposed amendment responds to proportionality issues in the sentencing of oxycodone trafficking. Oxycodone is an opium alkaloid found in certain prescription pain relievers such as Percocet and Oxycontin. This prescription drug is generally sold in pill form and the sentencing guidelines currently establish penalties for oxycodone trafficking based on the entire weight of the pill. The proportionality issues arise (1) because of the formulations of the different medicines and (2) because different amounts of oxycodone are found in pills of identical weight.*

As an example of the first issue, the drug Percocet contains, in addition to the oxycodone, the non-prescription pain reliever acetaminophen. The weight of the oxycodone component accounts for a very small proportion of the total weight of the pill. This is in contrast to Oxycontin in which the weight of the oxycodone accounts for a substantially greater proportion of the weight of the pill. For example, a Percocet pill containing five milligrams (mg) of oxycodone weighs approximately 550 mg (oxycodone accounting for 0.9 percent of the total weight of the pill) while the weight of an Oxycontin pill containing 10 mg of oxycodone is approximately 135 mg (oxycodone accounting for 7.4 percent of the total weight). Consequently at sentencing, the same five year sentence results from the trafficking of 364 Percocet pills or 1,481 Oxycontin pills. Additionally, the total amount of the narcotic oxycodone involved in this example is vastly different depending on the drug. The 364 Percocets produce 1.6 grams of actual oxycodone while the 1,481 Oxycontin pills produce 14.8 grams of oxycodone.

The second issue results from differences in the formulation of Oxycontin. Three different amounts of oxycodone (10, 20, and 40 mg) are contained in pills of identical weight (135 mg). As a result, an individual trafficking in a particular number of Oxycontin pills would receive the same sentence regardless of the amount of oxycodone contained in the pills.

To remedy these proportionality issues it is proposed that sentences for oxycodone offenses be calculated using the weight of the actual oxycodone instead of the current mechanism of calculating the weight of the entire pill. Currently the Drug Equivalency Tables in '2D1.1 equates 1 gram of oxycodone ***mixture*** *to 500 grams of marijuana. The proposal would equate 1 gram of* ***actual*** *oxycodone to 6,700 grams of marijuana. This equivalency would keep penalties for offenses involving 10 mg Oxycontin identical to current levels but would increase penalties for all other doses of Oxycontin. At the same time, penalties for Percocet would be substantially reduced.*

Proposed Amendment:

'2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

---

*Notes to Drug Quantity Table:

(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

(B) The terms "PCP (actual)", "Amphetamine (actual)", and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

The term "Oxycodone (actual)" refers to the weight of the controlled substance, itself, contained in the pill or capsule.

* * *

Commentary

Application Notes:

* * *

9. *Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP, amphetamine, ~~or~~ methamphetamine, or oxycodone for which the guideline itself provides for the consideration of purity (see the footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant=s role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.*

* * *

10.

DRUG EQUIVALENCY TABLES

* * *

Schedule I or II Opiates*

1 gm of Morphine = 500 gm of marihuana

~~1 gm of Oxycodone = 500 gm of marihuana~~

1 gm of Oxycodone (actual) = 6700 gm of marihuana

Appendix II

Our reasoning for endorsing the "Revised Proposed Amendment: Oxycodone" to the USSG is as follows:

The USSG currently states that offenses involving at least 100 KG, but not more than 400 KG of marihuana, deserve a five-year sentence (sentencing level 26), assuming no other factors are in evidence to warrant adjusting the sentence. The amount of "oxycodone" (mixture) currently needed to equal 100 KG of marihuana is 200 G, so applying the factor of 200 to the "oxycodone" (mixture) equivalent yields 200 G, or 200,000 milligrams.) Thus, under current sentencing USSG, it requires only about 364 Percocet® tablets (containing nominally 5 MG of oxycodone and weighing 550 MG per tablet), but it takes 1481 OxyContin® (oxycodone hydrochloride controlled-release) Tablets 10 MG (weighing 135 MG per tablet) to yield 200,000 MG of total mixture weight, an amount that warrants a five-year sentence, without applying any adjustments.

This schema under-penalizes the illegal possession of oxycodone in the form of OxyContin and over-penalizes the illegal possession of oxycodone in the form of Percocet or similar formulations, since in the latter cases, a large part of the sentencing is due to the weight of non-opioid tablet constituents, the bulk of which is often acetaminophen, a medicine not controlled under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USC 801, et seq.).

The current scheme does not take into account the fact that tablets of OxyContin containing 10, 20 and 40 MG all weigh 135 MG, so sentencing under the current USSG would be equivalent for the same number of tablets, despite the potential of a four-fold difference in the amount of oxycodone illegally possessed.

To establish proportionality in sentencing, if one begins with the amount of OxyContin 10 MG tablets as a constant, that is, 1481 tablets (1481 x 135 MG per tablet = 199,935 MG or about 200 G), then the amount of "oxycodone (actual)", or oxycodone salt, required for a 5-year sentence is 14.8 grams.

If one then divides the amount of marihuana required for a 5-year sentence (100,000 G or 100 KG) by the amount of oxycodone required for a 5-year sentence (14.8 G), this yields 6756 G (rounded to 6700 G) of marihuana equivalent to one G of "oxycodone (actual)".

CAMPBELL
1905 Taft Street #2 • Houston, Texas 77006 • (713) 447-3351

March 8, 2003

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

Re: Proposed amendments to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses) that provide increased penalties for offenses involving oxycodone.

Gentlemen:

I would like to address three issues concerning your proposed amendments to the sentencing guidelines referenced above to provide increased penalties for offenses involving oxycodone: first, the addition of the new paragraph defining "Oxycodone (actual);" second, the addition of the term "oxycodone" to Application Note 9; third, the amendment to the Drug Equivalency Tables; and fourth, the retroactive application of the proposed amendments.

First, however, before addressing these substantive issues, I would like to note that the proposed amendments appear to fall within the legislative mandate to the Sentencing Commission as granted in 28 U.S.C. §994(a)(1), and thus are appropriately within the authority of the Sentencing Commission.

The insertion of the new paragraph defining "Oxycodone (actual)" as the "weight of the controlled substance itself, contained in the pill or capsule" such that the sentences for offenses involving oxycodone will be calculated based on the weight of the actual narcotic rather than the weight of the entire pill, including non-narcotic substances, is clearly a step toward fairness in sentencing for oxycodone offenses. Due to the significant differences in the amount, by weight,

of narcotic contained in the various branded prescription painkillers containing oxycodone, persons convicted of offenses involving this narcotic and sentenced under the existing guidelines have been subject to inequities in sentencing, as such sentences were based on total weight of the pills or capsules instead of the weight of the actual narcotic. Accordingly, an individual convicted of trafficking in Oxycontin could receive a five-year sentence for an offense involving more than nine times the amount of oxycodone as an individual receiving the same sentence for trafficking in Percocet. Such guidelines as exist currently clearly discriminate in favor of traffickers in Oxycontin. The insertion into the sentencing guidelines of the definition of "Oxycodone (actual)" will cure these inequities and more fairly base oxycodone-related sentences on the amount of actual narcotic involved in the offense.

However, I feel it important to point out that by basing some equivalencies on actual narcotic weight (Oxycodone, Amphetamine, Methamphetamine, and PCP) and others on weight of the narcotic mixture, the Commission may run afoul of the prohibition in the Administrative Procedure Act on arbitrary and capricious actions. Under §706(2)(A) of the Administrative Procedure Act, a court reviewing an agency action shall hold unlawful and set aside any arbitrary and capricious agency action, findings, or conclusions. While, as indicated above, I believe it is certainly appropriate to determine sentencing levels based on the actual amount of oxycodone involved, it does seem arbitrary to treat certain narcotic offenses in this manner while offenses involving other narcotics, including those such as morphine which has an almost identical medical equivalency gram for gram compared to oxycodone (See Exhibit A), are evaluated using the weight of the narcotic mixture. I would suggest further amendments to the Drug Equivalency tables such that all narcotic equivalencies are based on actual narcotic weight rather than mixture weight.