The Federal and Community Defenders thank the Commission for the consideration of our comments and welcome the opportunity to testify and provide additional information, if desired.

CORPORATE FRAUD PERMANENT AMENDMENTS

A. Increasing Sentences for the Less Serious Fraud Offenses Is Not Required by the Sarbanes-Oxley Act and Not Supported by Any Sound Policy Reasons

Defenders oppose increases in the white collar guidelines that would affect low-level offenders because there is no just or proper reason for requiring more severe sentences for persons convicted of these relatively less serious offenses. Although we have set out our reasons for this position in the comments we have previously submitted to the Commission, today we write to explain why we oppose the more particularized proposals the Commission has published that would: (1) raise the base offense level for all or for a designated segment of white collar offenses; and (2) increase the loss table, with three alternative proposals with differing increases starting at losses in excess of $25,000 (Options A & B); or in excess of $100,000 (Option C).

First, there is no dispute that these low-level offenses or offenders were not targeted by the Sarbanes-Oxley Act generally. We believe that it is just as clear that these low-level offenses were not the subject of the Biden-Hatch amendment that increased the statutory maximum penalties for mail and wire fraud offenses, the only provision of the Act that has been interpreted to suggest that the Commission is required to or should increase low-level penalties. *See* White-Collar Crime Penalty Enhancements Act of 2002, S. 2717, 107th Cong. (2002) (introduced by Senator Biden and Hatch, July 10, 2002, increasing penalties for mail and wire fraud and conspiracy to commit these offenses, which became a provision of the Sarbanes-Oxley Act, Pub. L. 107-204, §§ 901- 905); 148 Cong. Rec. S7426-01 (July 26, 2002) (statement of Sen. Biden). Indeed, the fact that the proposed offense level increases are targeted to offenses in the $25,000 to $100,000 category and not across-the-board to all offenses emphasizes the point that this proposal is not intended to respond in some proportional manner to all white-collar offenses as might be the case if it were a response to a penalty increase that reflected Congressional intent to increase all sentences across-the-board. The proposal rather appears to be formulated to undo the very changes the Commission crafted after extensive study when it overhauled the white collar guideline in November 2001.

1. White-Collar Crime Penalty Enhancements Act of 2002 Did Not Target Low-level Offenders

The increases in the statutory maximum penalties for mail and wire fraud do no justify increasing the penalties for low-level offenses. Low-level white collar offenses do not involve the types of complex corporate frauds that threaten retirement savings and undermine confidence in the markets. The high-end

loss table increases and other adjustments that the Commission adopted in the Emergency White-Collar amendments were the appropriate response to these congressional concerns and statutory changes.

The increased maximum penalties resulted from the Biden-Hatch amendment that became a provision of the Sarbanes-Oxley Act, known as the *White-Collar Crime Penalty Enhancements Act of 2002*. Pub. L. 107-204, §§ 901- 905. Both Senator Biden and Senator Hatch were concerned with "serious" white-collar offenses committed in connection with employment retirement plans, and those committed by corporate officers and other managers, people that Senator Biden likened to drug kingpins:

> I am proud to have sponsored, along with my good friend from Utah, Senator Hatch**,** S . 2717 , the White-Collar Penalty Enhancement Act of 2002. It grew out of a series of hearings I held this year in the Judiciary Subcommittee on Crime and Drugs in which we heard about the "penalty gap" between white collar offenses and other serious Federal criminal offenses. The Senate unanimously adopted our bill as an amendment to the Sarbanes bill several weeks ago, and we are pleased that its key provisions are in the legislation approved by the House-Senate conference. Let me briefly summarize those provisions which will become law once the President signs this legislation.
>
> Our bill significantly raised penalties for wire and mail fraud, two common offenses committed by white collar crooks in defrauding financial victims. It also created a new 10-year felony for criminal violations under the Employee Retirement Security Act of 1974 (ERISA). Under current law, a car thief who committed interstate auto theft was subject to 10 years in prison, while a pension thief who committed a criminal violation of ERISA was subject to up to 1 year in prison. Our bill now treats pension theft under ERISA like other serious financial frauds by raising the penalties to 10 years.
>
> Our bill also amended the Federal conspiracy statute which currently carries a maximum penalty of 5 years in prison. In contrast, in our Federal drug statutes, a drug kingpin convicted of conspiracy is subject to the maximum penalty contained in the predicate offense which is the subject of the conspiracy--a penalty which can be much higher than 5 years. **I say what is good for the drug kingpin is good for the white collar crook. Thus, our bill harmonized conspiracy for white collar fraud offenses with our drug statutes. Now, executives who conspire to defraud investors will be subject to the same tough penalties--up to 20 years--as codefendants who actually carry out the fraud.**
>
> Our bill also directed the U.S. Sentencing Commission to review our

> existing Federal sentencing guidelines. As you know, the sentencing guidelines carefully track the statutory maximum penalties that Congress sets for specific criminal offenses. **Our bill requires the sentencing commission to go back and recalibrate the sentencing guidelines to raise penalties for the white collar offenses affected by this legislation.**

148 Cong. Rec. S7426-01 (July 26, 2002) (statement of Sen. Biden) (emphasis added). Senator Hatch similarly referred to the amendment as

Witnesses at the hearings held by Senator Biden addressed themselves to complex corporate frauds that cost them their retirement savings. Government witnesses also focused on high-level frauds. For example, Assistant Attorney General for the Criminal Division Michael Chertoff primarily concentrated on significant and complex corporate crimes, including references to Enron, WorldCom, Arthur Andersen and other criminal cases involving multi-million dollar and even billion dollar losses. In referring to the President's proposal to increase available penalties for mail and wire fraud offenses, Mr. Chertoff made a statement that we think supports our view that increased penalties should be reserved to the more serious, or "grave" offenses, involving business greed not the low-level, theft-like offenses committed by persons who are not corporate executives.

> Too often the public perception has been that people who commit business-related crimes receive punishment **not based on the gravity of their offense**, but according to their social or economic stature. . . .
> Jail time performs two functions: it holds white collar criminals accountable for their past misdeeds, and it prevents future misbehavior by those **executives** who might toy with the idea of beating the system. Greed will ultimately overcome reason in some cases – after all, no criminal ever starts out with the intention of getting caught – but deterrence always works best at the margins of criminal behavior. The President believes in making the penalties for white collar crime tougher and especially in making real jail time more meaningful in business cases.

Testimony of Michael Chertoff, Assist. A.G., Crim. Div., before the Senate Judiciary Committee, Subcommittee on Crime and Drugs, July 10, 2002, 2002 WL 1481147.

We believe that the high-end loss levels and other enhancements that the Commission promulgated in the emergency amendments more than adequately address the "grave" offenses involving greed by corporate executives that Assistant Attorney General Chertoff referred to in his testimony and are the guidelines that Senator Biden believed needed to be recalibrated so as to bring the penalties in line with the "offenses affected by this legislation." The offenses that would be impacted by the proposed increases in

the base offense level and increased loss tables at the lower end do not involve these type of cases. The proposed increases will more greatly affect the less serious offenses. These offenses do not involve corporate executives but rather offenses committed by clerks, staff employees and others who commit fraud and theft offenses that more often result from circumstances of need and poor judgment rather than the premeditated massive greed about which Congress held hearings last year.

Furthermore, Senator Biden's analogy to drug offenses is apt in another manner. The white collar guideline, like the guideline for drug offenses, encompasses a wide range of wrongful conduct – from the mail carrier who steals an autographed t-shirt of the latest sports hero from mail entrusted to him for delivery to the corporate executive who embezzles millions of dollars. A fair and proportional sentence for that range of offense can be attained only if the base offense level remains where it stands. *Compare* 18 U.S.C. § 1709 (maximum 5-year penalty for theft of mail matter by postal employee) *with* 18 U.S.C. § 1341 (maximum 20-year penalty for mail fraud, as amended). Indeed, in combining the fraud and theft guidelines last year, the Commission already opted for the higher base offense level applicable to fraud offenses in 2F1.1 (offense level 6) rather than the base offense level that had applied under 2B1.1 (offense level 4) for theft. An increase in the base offense level for the revamped 2B1.1 will make sentences for the lowest level offenders unfair, not proportional and not in keeping with 28 U.S.C. § 991(b) or 994(j).

1. Current Guidelines are Sufficiently Severe and It Is Premature to Increase Low-Level White Collar Guidelines Without Evaluating Recent Amendments

Just last year after years of study, the Commission completely overhauled the guidelines for white collar offenses and the impact of those changes are not yet known. We believe that absent any indication from Congress that penalties should be raised for low-level offenses, it is premature for the Commission to once again make changes to this guideline without first gaining an understanding of the effects of the 2001 changes. Indeed, in his testimony on the issue of white collar offenses presented to the Senate Judiciary Committee last summer, the United States Attorney for the Southern District of New York acknowledged that it is too soon to evaluate the impact of the November 2001 changes to the white collar guidelines.

> We believe the Economic Crime Package generally improved and furthered federal sentencing policy, and both we and the Commission are now monitoring the impact of the Package to see what the real impact of the amendments will be. . . . Because the amendments were prospective only, it may be some time before complete data is available to fully evaluate the impact of the Package. Notwithstanding these concerns, we believe that the changes made by the Package are consistent with the principles of appropriate certainty and severity and are generally a step in the right direction.

Testimony of James B. Comey, Jr., US Attorney, S.D. N.Y., before the Senate Judiciary Committee, Subcommittee on Crime and Drugs, June 19, 2002, 2002 WL 20318315.

3. No Evidence that Increased Penalties Will Enhance Deterrence

Third, increased prison sentences for low-level offenders cannot be justified on the basis of deterrence. Indeed, we believe that empirical studies on deterrence shows no significant difference in cases where a person is placed on probation in lieu of a prison term. The Commission should not raise penalties for these type of offenses unless it finds empirical evidence that supports the notion that increased prison sentences will deter such low-level offenses. Indeed, the Commission should defer action on this proposal until it completes its Recidivism Study, which may shed light on whether increased prison terms deter these low-level white collar offenses.

4. Increasing Penalties to Accommodate Charging Practices of Smaller Districts Will Cause Unwarranted Disparities

Fourth, we believe that one of the justifications advanced by the Department of Justice for increasing penalties for low-level offenders – that because low-level offenders comprise the bulk of cases prosecuted in smaller districts, penalties must be increased – will cause unwarranted disparities and is not a sufficient justification for raising penalties. Indeed, one of the reasons why Congress established the sentencing guidelines was to eliminate such disparate treatment of like offenses throughout the nation. We believe that offenders who commit similar offenses will be treated disparately based on the size of the district where the offense is committed, with larger districts declining to prosecute such low-level offenses in federal court and smaller districts obtaining longer prison sentences for similar offenses. *See Id.*, Testimony of James Comey ("Plainly, to most people $70,000 is a lot of money, and in many areas of the country federal prosecutors bring cases against criminals based on those amounts. We also want to see if defendants who face lesser sentences in such cases will be more willing to roll the dice and go to trial rather than plead guilty.")

Another seeming justification for increasing penalties – the likelihood that increased penalties will deter people from exercising their constitutional right to go to trial and instead plead guilty to avoid taking the risk of longer prison terms – is equally flawed. In a system where nearly 97% of criminal convictions result from guilty pleas and where sentences are based on "reliable hearsay," this seems like a particularly bad reason for increasing penalties.

Guideline ranges should be based on just punishment not on the preferences of prosecuting attorneys in particular districts.

Conclusion

We have reviewed the law and the statistics published by the Commission; read the reasons put forward by the Department of Justice in support of the increases; and pragmatically considered the options but continue to see no basis to support the increases. The only reason for supporting the proposals would be to stave off a potentially worse alternative that may be mandated by Congress at the urging of the Department of Justice. Frankly, if we understood DOJ's proposal to be based on Congressional intent, believed that this compromise were otherwise justified, or at least were convinced that it would put an end to the latest request for increased penalties we might be more amenable to disregard what we believe to be the more just approach. After fifteen years of sentences that are ratcheted up every amendment cycle, however, we find no good reason for supporting yet one more increase.

Increasing penalties for low-level white collar offenses will not result in more certainty, or fairness nor will it avoid unwarranted disparities for the persons convicted of these offenses. It will not result in more just punishment, just more costly prison terms -- to the individual and to society. It will certainly not afford greater deterrence. Nor will it provide needed rehabilitation for this class of offenders, if anything it will take money that might otherwise be used for rehabilitative programs and use it to pay more costly prison space.

We see no basis for the Commission to compromise its statutory obligations and raise the terms of imprisonment for these offenses. An increase in the number of persons required to serve terms of imprisonment should not be undertaken lightly or without justification even if it affects just several thousand persons. The effect on each person, who must serve a term of imprisonment may be catastrophic to that person and family, if the additional two or three months imprisonment means that the person loses a job, home, health benefits with all the attendant disruption and increased recidivism that these types of disruptions cause.

Indeed, the reality is that judges will depart downwardly and the parties will find ways around the sentence if the guidelines are set to require imprisonment for first time, nonviolent offenders for whom a sentence other than imprisonment is more fair and practical. Based on the abilities of defense and government counsel, the judicial temperament of the judge and the happenstance of the circuit where the offense was committed, some defendants will receive downward departures and some will not; some of the departures will be affirmed and others reversed.

A number of these departures, plea and charge bargains, including fast-track and cooperation departures will serve only to transfer discretion from judges to prosecutors. This will raise other serious application problems not consistent with the statutory purpose of the Sentencing Reform Act. We urge the Commission, therefore, in accordance with its statutory obligations, not to increase these penalties. *See* 18 U.S.C. § 3553(a); and 28 U.S.C. §§ 991(b); 994(f), (g) and (j).

IMMIGRATION – U.S.S.G. § 2L1.2

We write to address the comments of Chief Judge George P. Kazen, who is concerned that the Commission's proposal to exclude drug offenses that do not include a trafficking element from the definition of aggravated felony will result in unwarranted disparities. Under the Commission's proposal, offenses that do not include a trafficking element would receive a four-level enhancement rather than the enhancement that applies where the prior offense is an "aggravated felony." The Commission's amendment simply proposes to correct problems with the application of this guideline, in line with the categorical approach applicable when considering prior offenses upheld by the Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990) and in line with the immigration code definition of aggravated drug felonies.

Judge Kazen writes to express his concerns that this proposal may bring about unfairly disparate treatment because in his experience some "Texas prosecutors almost never bother to charge the [trafficking element] since it is much simpler to prove" the offense and they can obtain equally lengthy sentences under the Texas statutory scheme without proof of a trafficking element. Texas does however have several drug trafficking statutes that contain a "trafficking" element.

We believe that the concern that Judge Kazen raises is caused not by the amendment the Commission proposes but is inherent in a guideline that imposes an enhancement, that is not sufficiently graduated, based on a prior offense without regard to particularized charging and sentencing practices of prosecutors throughout the United States and without regard to the actual differences in the severity of defendant's prior conduct. Unfair results are rampant, but we believe that this is most often in ways that overrepresent the severity of a defendant's prior conduct. As a result of local sentencing practices, for example, simple possession offenses are currently subject to the enhancement for aggravated felonies.

Also, in a number of jurisdictions, the standard sentence for an offense that involves a sale is a sentence in excess of 13 months regardless of the type or quantity of the drug involved or the anticipated parole of a defendant after service of a much shorter term but which will nevertheless trigger the 16-level bump. In these cases, even the Commission's proposal to graduate the enhancement for drug trafficking offenses does not help.

The potential for unfairness that infects this guideline would not be remedied by declining to adopt the amendment. Instead, it would just ratify a local practice in one jurisdiction. A problem which, if it exists at all, is caused by the practice of some prosecutors who apparently get around problems of proof while still seeking long sentences. If it is a problem, it is one that can be easily remedied by local prosecutors simply by proving the trafficking element.

The Supreme Court in *Taylor* recognized the very problem with the categorical approach that Judge Kazen seems to raise but upheld the practice as a better approach.

> [T]he practical difficulties and potential unfairness of a factual approach are daunting. In all cases where the Government alleges that the defendant's actual conduct would fit the generic definition of [drug trafficking], the trail court would have to determine what that conduct was. In some cases, the indictment or other charging paper might reveal the theory or theories of the case presented to the jury. In other cases, however, only the Government's actual proof at trial would indicate whether the defendant's conduct constituted generic [drug trafficking]. Would the government be permitted to introduce the trial transcript before the sentencing court, or if not transcript is available, present testimony of witnesses? Could the defense present witnesses of its own and argue that the jury might have returned a guilty verdict on some theory that did not require a finding that the defendant actually committed a generic [drug trafficking]? If the sentencing court were to conclude, from its own review of the record, that the defendant actually committed a generic [drug trafficking], could the defendant challenge this conclusion as abridging his right to a jury trial? Also, in cases where the defendant pleaded guilty, there often is no record of the underlying facts. Even if the government were able to prove those facts, if a guilty plea to a lesser, non[trafficking] offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to [drug trafficking].

Taylor, 495 U.S. at 601-02.

To make a piecemeal exception in this case without making similar exceptions in situations that are unfair to defendants would just unfairly aggravate the problems with the categorical approach and with this guideline without sufficient justification. We urge the Commission to adopt the proposed amendment to U.S.S.G. § 2L1.2 that would limit the aggravated felony enhancement to those cases where the prior offense included a "trafficking" element, a definition that comports with the definition in Title 8.

OXYCODONE

Defenders support the Commission's proposal to calculate these offense by using the weight of the actual oxycodone contained in the pills. We agree that it is a more fair way of calculating drug weight. We are concerned however with the increased marijuana equivalency that the Commission proposes to go hand in hand with the actual weight change for these offenses that will result in substantially increased penalties for some of the pills that contain Oxycodone. We understand that the Commission is raising the equivalency in reliance on concerns expressed by the Drug Enforcement Administration with respect to alleged increased use of this substance. As with Ecstasy offenses several years ago, it is our understanding that although there may a number of emergency room admissions and deaths associated with Oxycodone, studies reflect that these events are caused by multi-drug use rather than by the effect of Oxycodone alone.

We believe that increasing penalties based on drug enforcement or media reports of increased use result in sentences that are not rationally proportional to the actual harm caused. There is no real scientific method for determining with any degree of specificity a scaled listing of the different controlled substances. These are policy decisions based on predictions of how the increased penalties may affect trafficking and use patterns and often have more to do with the level of media attention in a particular market than with any real law enforcement or public health consideration. More importantly, there is no real empirical evidence that increased penalties in fact accomplish this. The continuing battles with drug distribution and addiction after years of severe mandatory penalties certainly proves that point. More particularly, even if in some broad sense increased penalties do affect patterns of drug trafficking and use there is no evidence that the fine recalibration that the Commission is about to undertake with oxycodone will accomplish much more than place more people in prison for longer terms.

We ask the Commission in effecting these changes to keep in mind the statement that the Federation of American Scientists ("FAS") submitted to the Commission several years ago when it was considering changes to the guidelines for ecstasy offenses. In that instance, in a paper submitted by Charles R. Schuster, a former Director of the National Institute on Drug Abuse during a Republican administration, the FAS suggested to the Commission that in setting the penalties it was important to compare the incidence of " death, addiction, infectious disease transmission, crime by users, or violence among dealers" with more serious drugs such as heroin. In particular, in that instance, the FAS emphasized that a substantial increase in sentencing for the ecstasy drugs "would have the effect of diverting enforcement resources away from heroin, cocaine, and methamphetamine toward MDMA. The result of such a diversion would be to make the overall drug abuse problem worse."

We believe that the observations of the Federation of American Scientists with respect to ecstasy penalties are equally appropriate when the Commission considers the current proposed increases for Oxycodone offenses.

INVOLUNTARY MANSLAUGHTER

Proportionate Sentencing

Defenders have recommended that in raising the base offense level for involuntary manslaughter to correspond to the increased statutory maximum penalty for the offense, now six years' imprisonment, the Commission retain the penalty at a level proportionally lower than the guideline penalties for aggravated assault. The maximum penalty for aggravated assault offenses is generally ten years' imprisonment or more. See, e.g. § 18 U.S.C. § 113(a)(2) (assault with intent to commit a felony);18 U.S.C. § 113(a)(3) (assault with a dangerous weapon or with intent to do bodily harm). For example, assault with intent to torture or main, one of the offenses sentenced under the aggravated assault guideline, carries a statutory maximum twenty years' imprisonment. See 18 U.S.C. § 114.

The *mens rea* for involuntary manslaughter is an absence of malice coupled with either negligent or reckless conduct. See 18 U.S.C. § 1112. This contrasts with the aggravated assault offenses which are based on a general or specific intent to cause harm or injury, sometimes of a serious nature to another person.

The current proportionality between the involuntary manslaughter guideline and the aggravated assault guideline is entirely consistent with the different maximum penalties and offense elements established by Congress.

Because involuntary manslaughter offenses result from negligent or reckless conduct rather than malicious intent, Defenders recommend that the Commission increase the base offense levels only slightly, to offense level 12 for criminally negligent conduct and offense level 16 for reckless conduct. Rather than set a higher base offense level that will overstate culpability in a number of cases, the Commission could include specific offense characteristics where the negligent or reckless conduct warrants it. For example, a 2-level increase could be applied where the defendant used a firearm, where the defendant risked injury to multiple victims, or where the vehicular homicide involved driving while intoxicated. Similar graduated enhancements in other guidelines has proved more workable and a fairer measure of culpability that gross increases that apply across the board.

We understand that the Native American Ad Hoc Committee has proposed a variation on the Defenders' recommendation. We believe the one of the most important aspect for the Commission to consider in amending this guideline is that certain offenses prosecuted under this guideline result from truly tragic circumstances, involving mere negligence. For those offenses, the Commission needs to retain a sufficiently low base offense level so as not to impose a sentence that overrepresents the culpability of the defendant. Defenders believe that the Ad Hoc Committee's recommendation is one that the Commission should give serious consideration to.