sentencing level established as appropriate by the Commission for offenders convicted of similar violent offenses under otherwise similar circumstances. Limiting the availability of the diminished-capacity departure to non-violent offenses in our view strikes the right balance.

A new option (included in the April meeting materials) attempts to address the balance between the goals of just punishment and protection of the public by allowing departures even for violent offenders "unless the nature and circumstances of the offense or the defendant's criminal history indicate a need for incarceration to protect the public." The problem with this language is that it provides as a departure factor not only the unusual factor of diminished mental capacity but also several heartland guideline considerations -- whether there is a need for incarceration to protect the public, as determined on the basis of the nature and circumstances of the offense and the criminal history of the defendant. These factors are among the central determinants used by the Commission to establish applicable offense levels and guideline ranges. For the Commission to encourage departures on the basis of factors that are central to the Commission's determination of sentencing ranges is problematic from a policy standpoint and likely to lead to unwarranted disparity.

The Commission recognizes even in the latest proposal that in some cases a departure should not be granted, despite diminished mental capacity. Because protection of the public is paramount, it is best for the Commission to define when this goal should prevail. The Commission can accomplish this result by excluding crimes of violence from consideration for a departure on the basis of diminished capacity.

Finally, we object to the inclusion in a definition of "significantly reduced mental capacity" the inability to control behavior the defendant knows is wrongful, as included in the revised proposal. Such inability is not a basis for a reduced sentence in our view since the defendant would have a normal level of understanding regarding the wrongful nature of the conduct. On the contrary, a sentence that affords the public needed protection is critical in the case of an individual who cannot control his or her own behavior.

PROHIBITED PERSONS

Proposed amendment 11 would modify the firearms guideline, §2K2.1, in three ways. First, it would amend the definition of "prohibited person" in Application Note 6 to add any person who has been convicted of a misdemeanor crime of domestic violence as defined in 18 U.S.C. §921(a)(33). In addition, the amendment would increase the applicable offense level for a person who transferred a firearm to a prohibited person and knew or had reasonable cause to believe that the transferee was a prohibited person. Finally, the revised amendment included in the April meeting materials would add a further amendment to make a technical correction to Application Note 12.

We urge the Commission to adopt these amendments. The first merely updates the definition of "prohibited person" to take into account recent amendments. The second is an

important substantive change. Under the current firearms guideline the offense of transferring a gun (other than a machinegun and certain other specified weapons) with knowledge or reasonable cause to believe that the purchaser is a convicted felon or other prohibited person, 18 U.S.C. § 922(d), is subject to a base offense level of 12 (10-16 months of imprisonment, of which the minimum may be met by a split sentence of just five months of incarceration). §2K2.1(a)(7). If the defendant accepts responsibility for his or her offense, the guidelines authorize a probationary sentence with conditions of confinement.

We believe the offense of knowingly arming convicted felons and other prohibited persons deserves more severe punishment than provided under the current guideline. Protection of the public and deterrence are key factors with respect to the appropriate sentence in such a case. Adoption of the proposed amendment, including the bracketed language that would apply the increased offense levels to a person who had reasonable cause to believe that the transferee was a prohibited person, would serve these sentencing purposes. The inclusion of the bracketed language would be consistent with the statutory prohibition in 18 U.S.C. §922(d).

We note that the staff analysis points out that sentencing courts are not currently applying the four-level increase in §2K2.1(b)(5) in connection with violations involving sales to prohibited persons. By virtue of Application Note 18, we do not believe that this enhancement is generally applicable in this context.

DEPARTURE

Amendment 7(a) would amend policy statement §5K2.0 on grounds for departure to include language aimed at informing guidelines users of the holding in Koon v. United States, 116 S.Ct. 2035 (1996). We believe that the proposed language goes well beyond the Koon holding and will raise issues for litigation whenever a court fails to depart. Instead, we would recommend merely the inclusion of a statement to the effect that Koon provides guidance on departures from the sentencing guidelines and sets forth the applicable standard of review for guidelines cases.

* * * *

We appreciate the opportunity to work with the Commission in addressing these important issues.

Sincerely,

Mary Frances Harkenrider

Mary Frances Harkenrider
Counsel to the Assistant Attorney General

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April 4, 1998

Honorable Richard P. Conaboy
Chairman, United States Sentencing commission
One Columbus Circle, N.E.
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Washington, D.C. 20002-8002

Dear Judge Conaboy:

We ask your permission to supplement our written response to this year's amendment cycle with this submission. We note that the defenders contend that within-range and departure data indicate there is no need to raise the loss tables. We did not compile for the record our oral testimonial response to that data from last spring, not realizing that the issue would be raised again. We therefore would like to supplement the record by submitting this information on why the tables should be raised, and why the within-range and departure data neither supports nor disproves the need to raise the loss tables. We would also like to use this opportunity to respond, as you have requested, to the recently drafted proposed amendment 7(A) (Grounds for Departure).

Raising the Tables

As you know, we have for two years strongly urged the Commission to raise the loss tables for theft, fraud, and tax. The proposals before the Commission accomplish that goal, to some degree. As we discussed at length last year at several hearings on the loss tables, there are significant reasons for raising the loss tables which go beyond, and are more fundamental, than sentencing data. These reasons involve 1) the need for proportionality among types of offenses and within fraud, theft, and tax offenses, 2) the need for adequate deterrence, and 3) the notion of just punishment.

Proportionality

The guidelines were intended, among other things, to produce proportionality in sentencing. This includes proportionality between offense types and among offenses of the same offense type. Another goal was to provide more significant sentences for white collar offenders than were previously imposed. However, white collar offenses still often result in sentences that are not proportional to other offenses, or among themselves. **Exhibit A**, attached, is "Figure E" from the Commission's 1996 Sourcebook of Federal Sentencing Statistics, which illustrates that penalties for white collar offenses are strikingly lower than those for violent offenses, drug offenses, and even "all offenses combined."

With regard to proportionality among white collar offenses, one of the persistent complaints about the guidelines has been that the loss tables are "flat." That is, they do not always reflect proper proportionality between high and low level offenses; the higher levels do not rise swiftly enough to provide proportionately greater sentences for significantly more serious offenses (in terms of loss amount). For example, there is only a one-level difference between the sentence for a $1.5 million fraud and that for a $2.5 million fraud, or between a sentence for a $2.5 million fraud and that for a $5 million fraud. By contrast, there are three levels between a $10,000 fraud and a $70,000 fraud. This can result in comparative over-punishment of lower level offenders and under-punishment of higher level offenders, relatively speaking.

Courts have sometimes tried to compensate for the loss table's "flatness" by departing upward for serious offenses or downward for less serious offenses, but the amount of loss cannot support a departure because it is not a factor that the Commission did not consider (see departure discussion, below). The current proposals before the Commission provide slightly more proportionality for moderate and serious white collar offenses, whether compared to other offenses of the same kind, or to other kinds of offenses.

Deterrence

Deterrence is also a crucial consideration in these kinds of offenses. Fraud offenses are escalating in number and proliferating in new, sophisticated means. The April 6, 1997 Washington Post reported that health care fraud quadrupled between 1992 and 1996. High level fraud or theft cases are among the most resource-intensive to try. Thus, fewer cases can be brought to completion and must serve as a deterrence for others. The moderate to higher fraud offenders are often high-profile individuals, whose sentences are widely published and thus have high deterrent (or counter-deterrent) value. Finally, these offenses often produce abundant proceeds which are difficult to find or to forfeit. (Such was the case with the $292,000 which the defendant in McDowell, below, had spent and which was not recoverable.) As the Commission is aware, in order for penalties to provide deterrence, they must keep pace with the potential rewards for committing the crime.

Just Punishment

Finally, there is the concept of just punishment. The Commission's Just Punishment Survey

showed that people believe that the sentences for a doctor submitting false medicare claims, or for a defendant selling worthless stocks should be significantly higher than the current resulting guideline ranges. See, for example, **Exhibit B**, attached, which is "Figure 5" from the Commission's study. Just punishment considerations surely include considerations of harm, potential rewards, and the overall cost to society, including the resources needed to enforce the kind of offense. The two offenses for which the public thought the sentences should be higher are complex, difficult kinds of offenses to investigate and prosecute, where one trial can utilize the resources that would otherwise be applied to several cases. For example, a complex, 5-month-trial of a multi-million dollar fraud can produce a 21-27 month sentencing range. Such sentences promote a disrespect for the system and arguably do not provide just punishment for the seriousness of the offense.

Within-Range Sentencing Data

Some respondents have contended that because judges sentence primarily in the low end of the range in fraud and theft cases, and because they do not frequently depart upward in such cases, the loss tables do not need to be raised (i.e., that most judges do not perceive the resulting sentences to be inappropriate for the offenses). We ask that the Commission consider the following information in deciding whether within-range and departure data are either reflective of courts' beliefs about the overall appropriateness of the penalties, or probative of the appropriateness of those penalty levels.

To begin with, regarding sentencing practice data generally, whether it is regarding within-range or departures, we believe that such data is of little value in determining whether the offense levels are appropriately set or not. Such data does not address proportionality, just punishment, and deterrence. The point within the range is often influenced by plea bargaining factors and other variables, such as dollar amount of loss cases - for which "average" sentencing data will not be informative. Departure data is not instructive on the appropriateness of the offense levels chosen by the Commission (or Congress), because courts cannot base a departure on such basis. Therefore, we suggest that the Commission temper its consideration of the various possible permutations of data regarding sentencing practices with the other perspectives which we raise herein.

Offense Seriousness

In our view, within-range sentencing data does not, by itself, prove or disprove whether the loss tables should be raised. Such data are subject to several variables, one of which is offense seriousness. In fact, such data actually lends some support to raising the higher offense levels of the loss tables. Any range-data not adjusted for loss amount might be misleading, because "average" sentencing practices are primarily reflective of sentencing practice for the lower loss offense levels, because most cases fall in the lower levels of the loss table - which are not the loss levels that the Committee seeks to raise. For example, the Commission data for FY 1995 show only 825 cases involving over $500,000 (out of 5,908 fraud cases), and only 609 of those involved a loss amount of over $800,000. Similarly, there were only 51 theft cases above $800,000 (out of 2, 492 theft cases) in FY 1995.

Exhibit C, attached, is a chart titled, "Distribution of Sentences Across Applicable Sentencing Range," prepared by Commission staff in April 1997. It seems to confirm that courts tend to sentence higher in the range for fraud and theft cases in the higher loss levels, than for cases in the lower loss levels. For example, in fraud cases, as the loss amount went from under $70,000 to over $1.5 million, sentences in the first quarter of the range decreased from 56.6% to 24.6%, and sentences in the fourth quarter of the range increased from 10.8% to 14.5%. There were even more marked shifts for theft cases: As theft cases went from under $70,000 to over $1.5 million, the sentences falling in the first quarter of the range decreased from 70.1% to 26.9%, and sentences falling in the fourth quarter of the range increased from 8.3% to 19.2%. Thus, the sentences which the Committee seeks to raise are those in which courts are currently more likely to sentence higher in the range.

Plea Bargaining

The other main factor that produces low-range sentencing is plea bargaining. In FY 1995, 92% of cases were resolved by plea. As you no doubt are aware, it is common for the government to promise to recommend a sentence at the low end of the range as a plea bargaining concession. This is common because it is often one of the few real bargaining benefits the government can offer (without distorting facts or the guidelines). If courts were to routinely take this bargaining chip away from the government - by frequently giving the government's recommendation little weight - surely the government's ability to obtain pleas would be affected to some extent. This is particularly of concern in cases which are resource-intensive to try, and in which the defendants are often articulate, with persuasive character references - as are many high level white collar crime defendants. In other words, courts are not going to take this bargaining chip away from the government lightly in cases that pose potential five-week or five-month trials. We simply ask the Commission to be mindful of these real, pragmatic forces, which play a part in shaping sentencing data.

Here again, the Commission's own data confirm that, as was the case with increasing offense level, within-range sentencing varies according to whether the case was a plea or a trial. **Exhibit D**, attached, is another chart entitled "Distribution of Sentences Across Applicable Sentencing Range," prepared by Commission staff in April, 1997. It illustrates that sentences in theft, fraud, and tax cases are significantly higher in the range when there was a trial than when there was a plea. Note that for all three kinds of cases, when there was a trial, there were <u>fewer</u> sentences in the <u>bottom</u> half of the range (including downward departures), and <u>more</u> sentences in the <u>top</u> half of the range (including upward departures). In fact, the sentences in the top half of the range nearly double for trials, compared to pleas.

While discussing sentencing ranges, it is worth noting that the width of a sentencing range does not always provide significant incentive for a court to refuse to honor the government's sentencing recommendation, particularly at the lower offense levels. To illustrate the dilemma courts often face, imagine a $1.5 million fraud case, with a 3-level acceptance adjustment, no role, and Criminal History category I (typical of white collar offenses). The resulting sentencing range is currently only 18-24 months - providing a mere 6-month "range." Suppose that the court believes

that a three or four-year sentence would be just punishment for a $1.5 million case of this kind. Also assume that the government has bargained to recommend a sentence at the low end of the range, partly to avoid a long and costly trial. The court will not necessarily see the adjustment from 18 to 24 months as justifying undercutting the efficacy of the government's plea bargained recommendation in future cases.

Yet, in spite of these practical and real pressures, the data cited above and attached hereto demonstrate that courts often do go ahead and sentence above the low end of the range in higher offense cases. And, when these plea bargaining factors are missing, the data illustrate that the courts also sentence higher in the range, following trials.

Departures

Some observers have cited the infrequency of upward departures to "prove" that courts are satisfied with the offense levels of fraud, theft, and tax cases. In fact, courts cannot simply depart to compensate for what they see as deficiencies in the loss tables. This is true regarding any kind of offense when the issue is whether the offense level is appropriately set or not. That is, a court cannot depart based on the basis for the offense level: courts cannot depart based on what it sees as an inappropriate level for a certain amount of drugs, nor can it do so for what it sees as an inappropriate offense level for a certain loss amount. Those factors (amount of drugs or amount of loss) are factors that the Commission clearly "considered" in generating the drug and loss tables. Nor is it easy to imagine a situation where drug or loss amount could be present "in a kind or to a degree" not considered by the Commission.

Indeed, when courts have tried to depart based on loss amount, whether they depart because they view the loss table offense level as inadequate, or whether they depart because they view the loss table as too "flat," i.e. not distinguishing sufficiently between low and high level offenses, they are not upheld on that basis. Two reported cases illustrate the typical dilemma courts face when they (unsuccessfully) attempt to depart, either upward or downward, on a factor already "taken into account" by the Commission, such as loss amount.

In United States v. Weaver, 126 F.3d 789 (6th Cir. 1997), the district court tried to depart downward in a low level fraud case, finding the lower offense levels of the loss table too high - compared to the only slightly higher levels for much more serious offenses. The court was reversed because the appellate court found that the Commission had already taken into account the loss amount of the offense.

The result would presumably have been the same if the court had tried to depart upward for a higher level fraud, and that in fact is what happened in United States v. McDowell, 109 F.3d 214 (5th Cir. 1997). The court's dissatisfaction with the available sentencing range was held to be an improper basis for the upward departure (although the sentence was ultimately affirmed because there was another, valid basis for the departure). The court was faced with a $300,000 embezzlement case in which the defendant claimed she had spent all but $8,000, making forfeiture and restitution improbable. The available resulting sentencing range was only 18-24 months, at

level 15, which the court said shocked its conscience. The court reasoned that a 2-year sentence would mean that the defendant would be "basically earning $145,000 a year" while in prison, which the court found to be inadequate punishment, considering the benefit and enjoyment she and her family had received from the $292,000. Therefore, the court departed to level 19 and sentenced the defendant to 37 months, to lessen the defendant's "earnings" per year while in prison. However, that basis for departure was found to be erroneous. (We note that the CLC-DOJ table proposal poses level 18 for $150,000 to $350,000 loss, which is near the court's departure attempt.)

For these reasons, we simply request that the Commission be mindful of the many factors, pressures, and parameters that go into any data analysis, and that when it comes to sentencing practice data, the factors are many, some of which relate to the tensions and balancing of interests and practicality integral to criminal litigation practice. We ask that the Commission, in taking into account all the data, as well as proportionality, deterrence and just punishment concerns, continue in its course to significantly raise the loss tables for moderate and high level fraud, theft, and tax offenses, for the reasons we have raised herein.

Proposed Amendment 7(A)

Last week, your staff distributed a proposed amendment 7(A) (Grounds for Departure), and asked for any comments that we might have. We have reviewed the proposed amendment, which redrafts the initial portion of policy statement §5K2.0 and, in response to our request, codifies the holding in Koon v. United States.

We believe that the proposed first sentence of policy statement §5K2.0 goes further than the statute with regard to the court's discretion to depart, and that it may generate needless litigation. We therefore oppose that portion of the amendment. We do, however, appreciate the benefit of reminding courts to consider departures, where appropriate. Therefore, we suggest the following first sentence for policy statement §5K2.0, instead of the proposed first sentence:

> *"After determining the applicable guideline range, the sentencing court has the authority and discretion to determine whether there are case-specific circumstances that may warrant a departure."*

With regard to the summary of Koon v. United States, we caution strongly against trying to summarize the holding, or using different words than those of the Court - particularly where the Court has used rather straightforward and clear language. We refer specifically to the proposed amendments's description of departures as "factual and judgmental" and of courts' "structured discretion."

We respectfully request that the Commission follow the safest, and most effective, course in dealing with a case of this magnitude, which is to directly quote the Court. We have suggested using the following excerpts directly from the case, and ask that the Commission consider using these, or similar, excerpts that convey the same fundamental principles set out by the Court:

A departure decision is highly dependent upon the facts and circumstances of the particular case, and a court's decision to depart should be reviewed for an abuse of discretion...A district court's decision to depart from the guidelines...will in most cases by due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court." Koon v. United States, *116 S.Ct. 2035, 2046 (1996) (citing* Mistretta v. United States, *488 U.S. 361, 367 (1989).*

We appreciate the Commission's responsiveness in considering our request to codify the very important Koon case, and its efforts to remind courts of the statutory and guideline principles regarding departures. Thank you for your consideration of our request on this very important matter, and in making the Guidelines Manual a complete reference for all practitioners of varying levels of federal experience.

Thank you, also, for your consideration of our views on raising the loss tables.

Sincerely,

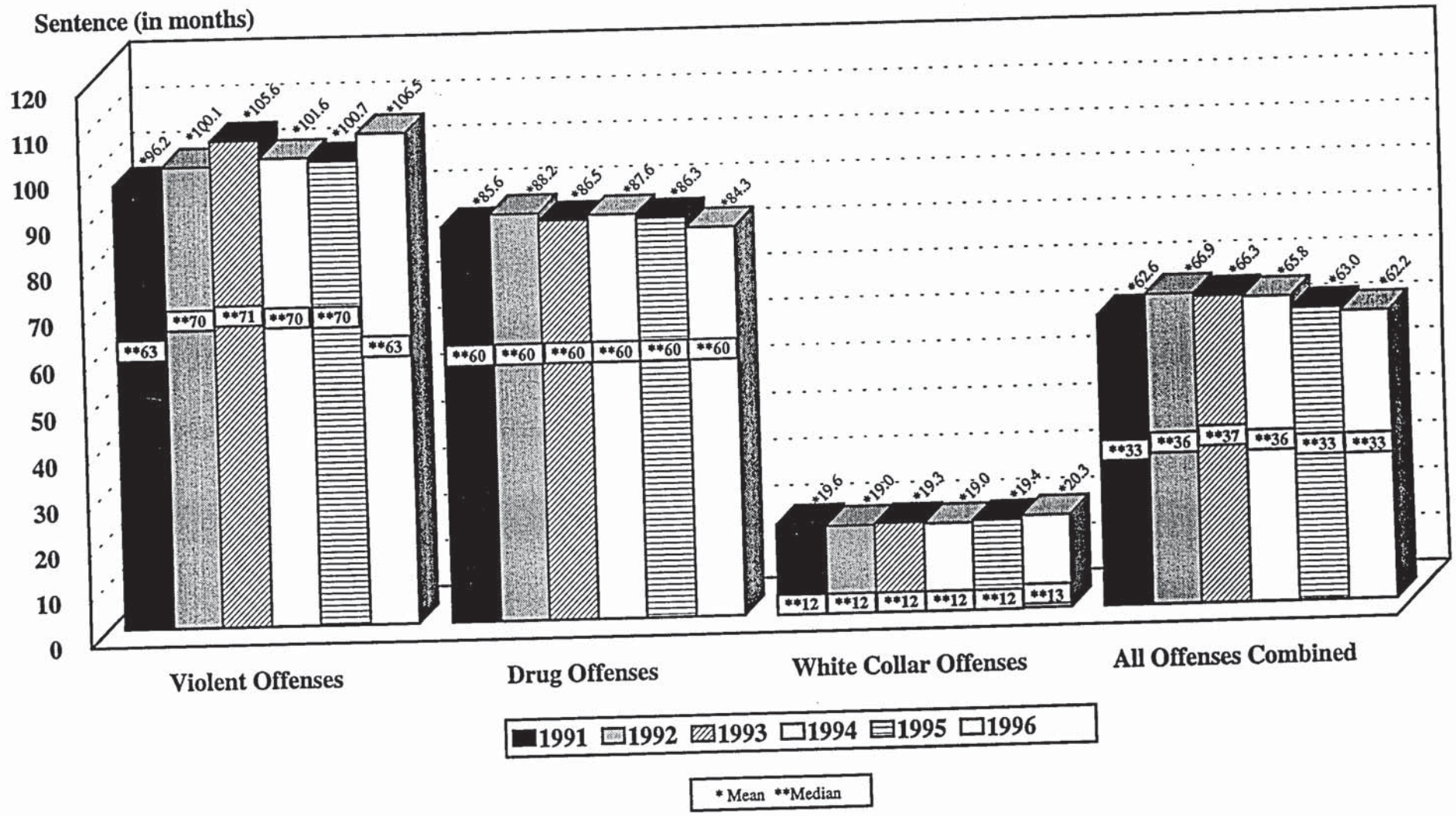
J. Phil Gilbert

Exhibits A, B, C and D, attached
cc: Members of the Sentencing Commission
John Kramer, Staff Director
John Steer, General Counsel
Members of the Committee on Criminal Law
Mr. Leonidas Ralph Mecham
Ms. Karen K. Siegel
Ms. Eunice Holt Jones

EXHIBIT A

Figure E

AVERAGE LENGTH OF IMPRISONMENT BY GROUPED PRIMARY OFFENSE CATEGORIES AND YEAR[1]
(October 1, 1990, through September 30, 1996)



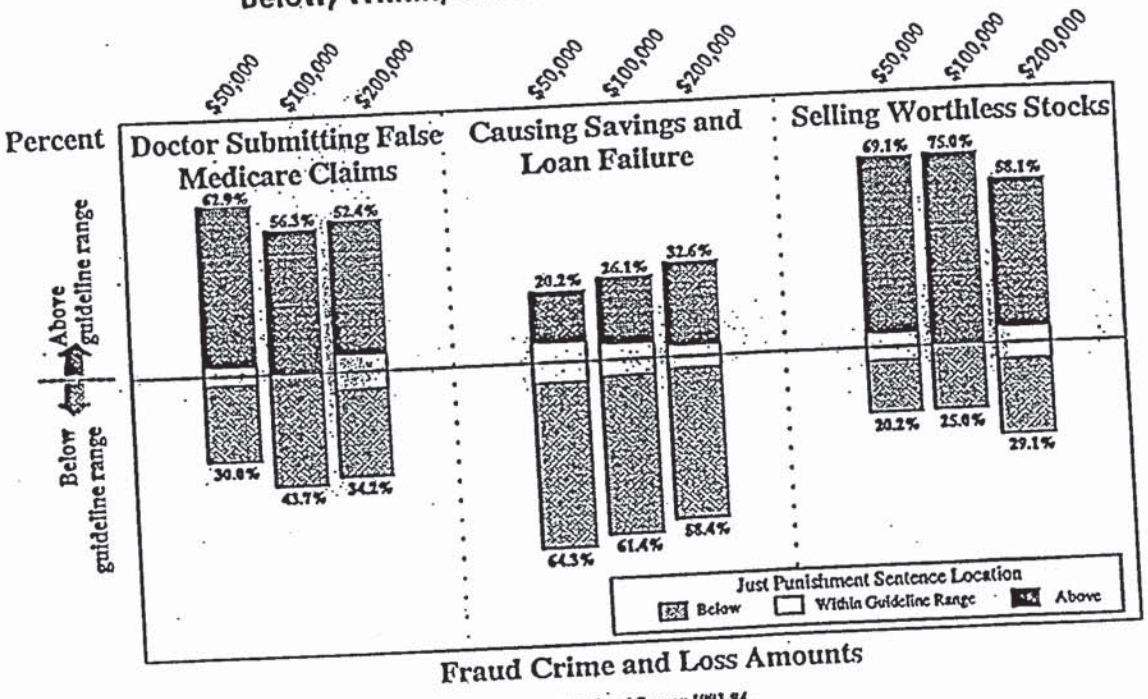
[1]Violent Offenses includes the following offense types: murder, manslaughter, kidnapping, sexual abuse, assault, bank robbery, and arson. Drug Offenses include the following offense types: drug trafficking, drug communication facilities, and simple drug possession. White Collar Offenses include the following offense types: fraud, embezzlement, forgery/counterfeiting, bribery, tax offenses, and money laundering. The information presentented in this table does not include any confinement as defined in USSG §5C1.1. Descriptions of variables used in this figure are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, Monitoring Datafiles, MONFY91 - MONFY96.

EXHIBIT B

Figure 5

Fraud Just Punishment Vignettes:
Percent of Survey Respondents Preferring Punishment
Below, Within, or Above the Guideline Range



SOURCE: U.S. Sentencing Commission, Just Punishment National Survey 1993-94.

EXHIBIT C

DISTRIBUTION OF SENTENCES ACROSS APPLICABLE SENTENCING RANGE

	TOTAL	Downward Departure	Substantial Assistance Departure	First Quarter of Range	Second Quarter of Range	Third Quarter of Range	Fourth Quarter of Range	Upward Departure
TOTAL	100.0	6.9	13.6	53.7	11.0	3.8	10.2	0.9
$70,000 or Less	100.0	4.9	8.1	61.4	11.0	4.2	9.7	0.8
$70,001 to $1,500,000	100.0	11.2	25.1	37.9	11.1	2.6	10.9	1.2
More Than $1,500,000	100.0	12.0	31.9	24.5	11.2	4.2	14.4	1.8
Theft	100.0	5.7	6.9	64.8	9.2	3.8	8.6	0.9
$70,000 or Less	100.0	4.7	4.0	70.1	8.2	3.9	8.3	0.8
$70,001 to $1,500,000	100.0	10.5	21.5	39.5	14.2	3.4	9.7	1.3
More Than $1,500,000	100.0	19.2	15.4	26.9	15.4	3.9	19.2	0.0
Fraud	100.0	7.3	16.5	48.9	11.7	3.7	11.1	1.0
$70,000 or Less	100.0	5.0	10.3	56.6	12.3	4.2	10.8	0.8
$70,001 to $1,500,000	100.0	11.0	26.3	37.4	10.7	2.4	11.0	1.3
More Than $1,500,000	100.0	11.5	32.5	24.6	10.7	4.1	14.5	2.1
Tax	100.0	7.7	13.5	53.1	12.8	4.8	7.7	0.3
$70,000 or Less	100.0	4.6	9.9	59.4	14.3	5.6	5.8	0.5
$70,001 to $1,500,000	100.0	15.9	19.9	39.7	8.6	2.7	13.3	0.0
More Than $1,500,000	100.0	10.5	42.1	21.1	15.8	5.3	5.3	0.0

SOURCE: U.S. Sentencing Commission, 1995 Data File, MONFY95.

DISTRIBUTION OF SENTENCES ACROSS APPLICABLE SENTENCING RANGE

	TOTAL		Theft		Fraud		Tax	
	Bottom 1/2[1] % (n)	Top 1/2[2] % (n)	Bottom 1/2 % (n)	Top 1/2 % (n)	Bottom 1/2 % (n)	Top 1/2 % (n)	Bottom 1/2 % (n)	Top 1/2 % (n)
TOTAL	85.5 (8,421)	14.5 (1,446)	86.8 (2,473)	13.2 (376)	84.5 (5,443)	15.5 (997)	87.1 (487)	12.9 (72)
Plea	86.0 (8,038)	14.0 (1,307)	87.4 (2,400)	12.6 (347)	85.2 (5,163)	14.8 (895)	87.8 (462)	12.2 (64)
Trial	73.4 (383)	26.6 (139)	71.6 (73)	28.4 (29)	73.3 (280)	26.7 (102)	75.8 (25)	24.2 (8)

[1] The "Bottom Half" of the Sentencing Range includes downward departures and substantial assistance departures. The Sentencing Range includes the statutory minimums and maximums.

[2] The "Top Half" of the Sentencing Range includes upward departures.

SOURCE: U.S. Sentencing Commission, 1995 Data File, MONFY95

EXHIBIT D

PROBATION OFFICERS' ADVISORY GROUP
to the United States Sentencing Commission

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Phone # 202-565-1343
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April 4, 1998

The Honorable Richard P. Conaboy, Chairman
U.S. Sentencing Commission
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Washington, D.C. 20002-8002

Dear Judge Conaboy,

The Probation Officers Advisory Group (POAG) would like to thank you for inviting us to the Commission for the purpose of providing input into the current deliberations of the Commissioners in regard to the revision of the definition of fraud, adopting new fraud tables, resolving circuit conflicts, and adopting a telemarketing guideline. After being briefed on these issues and testing one of the new definitions of fraud, the Advisory Group decided on several recommendations with regard to possible amendments and/or modifications to the Sentencing Guidelines. We did not comment on all of the proposed possible amendments, deciding to focus on those amendments that were of our greatest concern. The attached is our position paper in regard to those specific amendments.

Besides making recommendations to the Commission on the above mentioned proposed amendments, POAG discussed several other issues that were of concern to us. One of those issues, which we have previously raised with the Commission, was plea bargaining. Because of our concerns, we had a lengthy, productive meeting with Ex-officio Commissioner Mary Harkenrider and U.S. Attorney Jay McCloskey. This open and frank discussion led to a number

Harkenrider and U.S. Attorney Jay McCloskey. This open and frank discussion led to a number of possible plans to resolve some of the perceived problems. A summary of our discussions is also provided in our position paper. Other issues that concerned POAG members is the apparent devaluation of the reduction for acceptance of responsibility and our continued belief that a person with probation office experience would be an ideal candidate for a position as a Commissioner. These issues are also addressed in this paper.

Finally, there were a few administrative issues we addressed. Some of the administrative issues concerned the adoption of a formal charter, including redefining our role with the Commission and our circuits, creating a newsletter, and adopting rules in regard to disclosure of information. Our plans concerning these matters are addressed at the end of our paper.

We greatly appreciated and thank the Commission for its continued support. We particularly want to thank the Commission for its actions concerning our previous administrative concerns, which have all been resolved. In addition, we want to thank the Commission's staff members, especially Krista Murray and Margaret Glessner for providing the administrative support that allowed us to focus on our deliberations. Lastly, we are very grateful to both Sharon Hennegan and Catherine Goodwin for providing their expertise about the guidelines, the Commission, the Criminal Law Committee and the law. We could not have had such an excellent and productive meeting without everyone's assistance.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Gregory A. Hunt, Chairperson
Probation Officers' Advisory Group and
D.C. Circuit Representative

cc: Catherine Goodwin, Assistant General Counsel (AO)
POAG members

PROBATION OFFICERS' ADVISORY GROUP
to the United States Sentencing Commission

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April 4, 1998

POSITION PAPER: PROBATION OFFICERS' ADVISORY GROUP

The Probation Officers' Advisory Group (POAG) met at the U.S. Sentencing Commission on March 17, 18 and 19, 1998. The Commission's staff presented several issues for the POAG to consider during our meeting. Issues that were presented by the staff were changing the fraud and theft tables, the revision of the definition of "loss," adopting an amendment concerning telemarketing fraud, revision of criminal history, data collection, sentencing alternatives, and resolving several circuit conflicts. In addition, the POAG members continued to discuss the issues surrounding plea bargaining, acceptance of responsibility, and the possibility of having a probation officer as a commissioner. We further had discussions concerning administrative matters, such as formalizing our charter and updating our operations The following are the results of our discussions:

FRAUD

During our meeting, POAG received a presentation by the Commission's Senior Staff Attorney Tom Brown on the new revised definition of loss. We further tested this definition on real cases. After we tested the revised definition of loss, we provided the drafter of the definition our input into possible problems. We further received information about the possible revisions to the fraud table. The following are our recommendations in regard to the amendments.

Loss

POAG lauds the work that the Commission and its staff has done on developing a new definition of loss and we support the Commission's efforts to revise and simplify the definition. In regard to the definition presented to us at our meeting, in general we felt that the definition had some positive elements, such as being easier to read and being better organized then the current version. However, the group was concerned about the lack of a definition for "fair market value" and the inclusion of consequential damages in determining loss.[1] In fact, the group opposed the use of consequential damages as it would increase disparity. We believe it could increase disparity because consequential damages could be the most significant portion of a loss amount. We believe that significant consequential damages could be grounds for a departure. We were also concerned about inclusion in "intended loss" of harm that would be impossible to perpetrate. Recognizing that "sting" operations may need this provision, the group felt that carried to the extreme this provision could lead to some rather ludicrous outcomes. Next, we believe further clarification is needed about the cost of investigation. The definition is not clear on the fact that the victims cost of investigating the offense is to be included in the loss amount. Lastly, in regard to credits against loss, the members would like additional clarification about how these credits should be applied for defendants who are posing as professionals and provide services.

Based on the above analysis, even if our issues are addressed, POAG members believe that this definition should be field tested before it is adopted.

Fraud Table

Unfortunately, due to time constraints, POAG could not effectively evaluate the three fraud tables that are being considered. However, we asked the Commission to consider our general comments on the matter. First, as we prefer more alternatives for lower level offenders, we asked that there be no increase for the lower amounts of loss. Second, we strongly support

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[1] During our test of this definition of loss, POAG members had difficulty in determining consequentially damages. We found that in several of the more complicated cases the amount of fact finding would increase astronomically. Further, we believe it would increase the amount of disputes that would need to be resolved in court.

the incorporation of the more than minimal planning enhancement directly into the tables. Third, we strongly support the increase in punishment for the medium and high level offenders.

CIRCUIT CONFLICTS

POAG decided against addressing all the proposed amendments concerning circuit conflicts. We believe that the Commission need not resolve every circuit conflict with an amendment. It is our belief that amendments should only be adopted in those situations which occur more frequently and, because they occur more frequently, result in an inordinate amount of disparity. The following is the position of POAG on amendments that we believe occur most frequently.

Aberrant Behavior Departure:

We reviewed the proposed amendment, which we strongly support, except for one modification. We support this amendment because it closes the "backdoor" approach for departure through Chapter One. We believe that an aberrant behavior departure should be placed in Chapter Five. However, we believe that the clause "even if the defendant is a first-time offender," be stricken. POAG members were concerned that defining a "first time offender" would be problematic. For example, is a first time offender a person who has never been arrested, or is he a person who only has one conviction. POAG believes that being a first time offender is endemic to a determination of aberrant behavior and any further decision concering prior criminal conduct should be left to the Court.

Grouping of Failure to Appear and Underlying Offense:

We support the amendments as worded and commend the staff of the Commission for providing new wording which is of real assistance in clarifying this very complex grouping issue. However, although these amendments point us in the right direction, they are still is not "crystal clear" for the interpreter of the guidelines and its commentary. On the other hand, POAG was unable to provide any advice as to how to improve these amendments.

Imposter and Abuse of Trust:

POAG continues to stand by its original position that this amendment should reflect the perspective of the victim. Therefore, we *strongly* support the adoption of this amendment as stated.

Obstruction of Justice and Offense of Conviction:

Although most POAG members indicated that this issue does not frequently occur, we decided to comment on it because of its implications. POAG members favor a broader definition, i.e. not limited to the instant offense, of obstruction that is contained in Option One. However, we were concerned about the use of the term "related cases" and its definition. For instance, does "related case" mean something more or less than relevant conduct. In contrast, Option 2 appears to be "cleaner" than the other options. Although we prefer Option One, POAG is "troubled" by this amendment and recommend that there be further clarification about what is meant by "related cases."

Failure to Admit Drug Usage as a Basis for Obstruction:

POAG *strongly* supports this proposed amendment. As stated in our previous position paper, POAG members do not believe that defendants lying about drug usage should be a basis for obstruction. On the other hand, we do believe such lying may be considered for determining acceptance of responsibility.[2]

Meaning of "Incarceration" for Computing Criminal History:

POAG supports the adoption of Option One. Our decision in regard to this amendment followed a lengthy discussions in which members were concerned about "extending the shelf life" of a conviction, determining the difference between "custody of the state vs. custody of the street," and whether there should be additional language to Option One focusing on the "pronouncement" of the sentence following revocation of parole or probation. We decided that we support Option One, but we recommend that it add language that focuses on the "pronouncement" of the sentence. In other words, was the "pronounced" sentence a sentence of custody to the state or was it part of community supervision.[3] We further recommend the use of examples to clarify this issue.

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2 Further reading of this position paper will reveal that POAG members are greatly disturbed by the almost automatic reduction for acceptance of responsibility as long as the defendant pleads guilty. Only one circuit representative indicated that their court denies this reduction for lying about drug usage.

3 POAG members discussed the problems of obtaining information about the "pronounced" sentence, and concluded that there might be some difficulty in obtaining this information. However, we further felt that if we can obtain this information, we should use it to advance the "shelf life" of a conviction.

Definition of "Non-Violent Offense" in Diminished Capacity:

As previously indicated in our past position paper, POAG *strongly* supports Option One. We believe that the "Crime of Violence" definition used in the career offender guideline should be used to determine eligibility for a downward departure for "diminished capacity."

THE POAG ISSUES

POAG had several of its own issues that were discussed during our meeting. The first, an issue that we previous raised with the Commission, was plea bargaining. As this issue concerned the Department of Justice, we invited Ex-Officio Commissioner Mary Francis Harkenrider and U.S. Attorney for the District of Maine Jay McCloskey to meet with us. This meeting opened a dialogue between the POAG and the Department of Justice in regard to our concerns about plea bargaining. Group members indicated to them that there are times, although the extent is unknown, that prosecutors leave out facts of cases and/or misrepresent the facts of a case to bring about a plea agreement. Neither the Commissioner nor Mr. McCloskey believe that prosecutors have "gone soft" on crime and they wanted to know if the problems were on specific cases or epidemic to certain districts. No one knew for sure, but both parties agreed that the perception among the circuit representatives was that there is a problem. Mr. McCloskey was greatly concerned that such a perception, whether real or not, could lead to laws that drastically reduce the discretion of prosecutors, a proposition that no one wanted. Although we had no means of quantifying this issue, both parties agreed that specific actions on both sides could reduce the "adversarial relationship" that has sometimes developed between probation officers and prosecutors. Some of the suggestions included mutual training, meetings between chief probation officers and U.S. Attorneys, and input by probation officers into the annual review of U.S. Attorneys. We believe both parties came away from the discussion with a better understanding of each other's side. However, we still do not know if it is a real problem or just a matter of perception. As U.S. Attorney McCloskey stated, if it is a real problem of abuse of discretion, the remedy would be a further reduction of discretion for all of us.

Besides plea bargaining, POAG member also endorsed the writing of a letter to President Clinton, Attorney General Janet Reno, and Senator Orrin Hatch requesting that when they consider candidates for commissioner position to the Sentencing Commission, they select a person who has knowledge of or experience in the federal probation system. Lastly, because most of our representatives expressed concern that the reduction for acceptance of responsibility has become automatic for any defendant who has pled guilty, we formed a committee, chaired by J. Craig Saigh, 8th Circuit, to examine this issue for possible amendment proposals.

During our meeting, POAG members discussed several administrative matters. The first was the adoption of a written formalized charter. Upon review of our files such a formal written document could not be located, although there were minutes from a previous meeting, which were adopted by the group, which provided the essence of our charter. Since there is no apparent

formal charter, POAG members decided to form a committee, chaired by Vice Chairmen Joseph Napurano, 3rd Circuit, to develop our charter. We would hopefully submit this charter to the Commission for approval in the Fall. Second, we formed an executive committee that would enable us to respond to the Commission's request in a more expedient manner on issues that arise between our semi-annual meetings. The executive committee includes Gregory Hunt, Chairmen, Joseph Napurano, Vice Chairmen, Willie Leday, and Pat Hoffman, both of the 5th Circuit. Lastly, in regard to coverage of the Commission's regular meetings, as the Chairman is unable to attend all of the meetings, several members volunteered to attend, Ellen Moore, 11th Circuit, Joseph Napurano, 3rd Circuit, Beth Ault, 4th Circuit, Kathy Sylvester, 7th Circuit, and Pat Hoffman, 5th Circuit. As some of these volunteers do not live in this area, we ask the Commission whether there is funding for them to attend the Commissions meetings.

April 6, 1998

The Honorable Richard P. Conaboy
and Commissioners
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Chairman Conaboy and Commissioners:

We write to comment on what we believe to be the latest version of the proposed "economic crime package" of amendments and also to comment on two other items on the Commission's agenda for the April meeting.

Economic Crimes - Loss definition

We are cognizant of the intense effort that the Commission has undertaken to address what some believe to be the relatively lenient guideline ranges that result in this area. Nevertheless, we continue to oppose the proposed increases for three reasons: (a) they will overstate the culpability of many defendants, (b) they introduce concepts of tort and contract law -- such as consequential damages -- not otherwise applicable in other guidelines which will unduly complicate sentencing and are better left to civil actions, and (c) they continue the trend of unnecessarily ratcheting up sentences without empirical basis.

First, we believe that because the guideline sentence in economic crimes is driven by the aggregate "loss" determined under relevant conduct, the proposed increases will result in many of the same injustices now permeating sentencing in drug offenses – the guidelines overstate the culpability of non-violent, first time offenders, who are essential but ministerial members of larger criminal enterprises. This problem is particularly serious when one considers that relevant conduct requires proof merely by a preponderance of the evidence and includes acts of others, uncharged conduct, acquitted conduct, and acts beyond the statute of limitations and may amount to acts that are merely the same course of conduct or a common scheme of plan to the offense of conviction.

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Relevant conduct thus compounds the unfairness of "aggregated" offenses for the peripheral but essential participant in a fraudulent scheme. It is not unusual to find an employer or ringleader who devises, controls and puts in place a fraudulent scheme for his own profit but which ensnares ministerial employees who are then drawn into the illegal web by perceived fears of losing their jobs, which are otherwise legitimate. This happens in medical fraud cases, where the secretary is asked to falsify records or in schemes to defraud customers, where the accounting clerk knowingly processes documents reflecting false statements. There are also those cases where there are intervening causes for the loss not related to the defendant's fraud but for which the defendant is nevertheless held accountable. Also , there are those cases where a fraudulent contract is negotiated for the benefit of the employer without any actual gain going to the defendant who negotiates the contract. See United States v. Walters, 67 F.3d 452 (2d Cir. 1995) (downward departure granted for combination of factors where defendant did not personally profit from fraud, the contract was favorable to the government under existing market conditions, and the government received restitution from the employer). The latest proposals make no provision for such overstatement of culpability, particularly where there is no gain to the defendant. Indeed, the proposal effectively cuts back the available grounds currently available for downward departure.

Second, introduction of consequential damages into the loss equation aggravates the problems of overrepresentation for a number of defendants. It also introduces a concept not otherwise applicable in criminal law. It will complicate application of this guideline without any real benefit while at the same time doubly increasing the penalties -- additional amounts will be included in loss at the same time that the loss tables are being increased.

Lastly, the perception that these guidelines do not provide sufficiently severe penalties is belied by the actual sentences being imposed by federal judges on actual defendants. In every quartile, the position of the sentences for larceny, fraud, embezzlement and tax offenders that federal judges are imposing on actual defendants are within, if not below, the relative range of sentences being imposed in all cases:

	1st quarter	2d quarter	3rd quarter	4th quarter
all cases	43.8%	9.6%	3.3%	9.1%
larceny	61.9%	11.6%	2.8%	8.7%
fraud	46.5%	11.8%	2.9%	11.6%
embezzlement	68.2%	8.2%	2.1%	3.5%
tax	57.2%	13.5%	2.6%	8.0%

1996 U.S.S.G. Sourcebook of Federal Sentencing Statistics, table 27.

There is only a 2% difference from the average for all offenses in the last quartile. That increase in sentences however is offset by the the sentences in the first and second quartile. It hardly seems just to increase sentences for all defendant because a very small minority of the most severe fraud offenses may be require higher sentences. The current provisions for departures is sufficient to take care of any real need for more severe sentences.

As we have recommended in the past, there is a greater need to provide for alternatives to incarceration at the less serious offense levels, a policy that is consistent with the congressional mandate of 28 U.S.C. § 994(j). We request the Commission not undertake these proposed changes, particularly when it is acting with less than the full seven Commissioners.

CIRCUIT CONFLICTS

AMENDMENT 7(A) - ABERRANT BEHAVIOR

NACDL opposes the proposal to limit this ground for departure to "a spontaneous and thoughtless act" and to make it unavailable whenever the crime of conviction consists of a "course of conduct composed of multiple planned criminal acts." Whether the crime was spontaneous or thoughtless, or consisted of one or several planned acts, may or may not have a bearing on whether the crime was "aberrant" in the context of the defendant's character and life. Furthermore, as a spontaneous and thoughtless act is not a crime, and even the least complex crimes ordinarily are composed of more than one planned illegal act, the effect of the proposal would be to prohibit aberrant behavior as a ground for departure. This would conflict with congressional mandates and Supreme Court law requiring individualized, case-by-case departure determinations.

Putting aside for the moment the issue of whether a "spontaneous and thoughtless act" constitutes a crime, requiring in all cases that a criminal episode be "spontaneous and thoughtless" in order to be "aberrant" is inconsistent with the plain meaning of the word. "Aberrant" is defined in the dictionary as "[d]eviating from the proper or expected course," or "from what is normal; untrue to type." See American Heritage Dictionary 67 (2d College ed. 1985). "Aberrant behavior" in the sentencing context must mean that which deviates from what is expected or normal for the offender in the context of his or her character and life. Whether the crime was spontaneous and thoughtless, or consisted of only one or a number of planned criminal acts, may or may not have a bearing on whether it was an "aberrant" act for the offender.

The term "spontaneous and thoughtless act" was coined by the Seventh Circuit in United States v. Carey, 895 F.2d 318 (7th Cir. 1990), where the court held that a check-kiting scheme that lasted over fifteen months and involved hundreds of overt acts was not aberrant behavior. The

Seventh Circuit opined that a "spontaneous and seemingly thoughtless act," as opposed to one which was "the result of substantial planning" or a "continued reflective process is one for which the defendant may be arguably less accountable." Id. NACDL does not disagree, but the departure is one for "aberrant" behavior, which may or may not be "spontaneous and seemingly thoughtless." The dichotomy between spontaneity and thoughtlessness on the one hand and substantial planning and repeated similar acts on the other does not take account of a range of behavior in between, including behavior that is not spontaneous or thoughtless, but may nonetheless be aberrant for the offender.

Making thoughtlessness and spontaneity the single prerequisite to departure for aberrant behavior could lead to absurd results. For example, a police officer's beating of a suspect who initially provoked the officer to anger could be characterized as a spontaneous and thoughtless act, or at least one that involved no prior planning. The departure presumably would be available even though the officer beat suspects in the past. See Koon v. United States, 116 S. Ct. 2035, 2041 (1996) (officer radioed after beating that he hadn't "beaten anyone this bad in a long time"). In contrast, a battered woman who premeditated the murder of her abuser as the only means of escape, or a man who intentionally committed fraud or theft to pay the extraordinary cost of his child's medical care, could not receive the departure, even though their lives were otherwise exemplary, because their crimes could not be characterized as spontaneous and thoughtless.

The totality of the circumstances test adopted by the First, Ninth and Tenth Circuits is better suited for the aberrant behavior departure determination because it looks to factors that are relevant to whether the crime represented a deviation from the offender's character and life. See United States v. Bradstreet, Nos. 97-1164, 97-1204, 1998 WL 25231, *11 (1st Cir. Jan. 29, 1998) (finding the departure was not warranted because the defendant intentionally testified dishonestly in his trial for felonious dishonesty, showing that the conduct was not aberrant, isolated or unlikely to recur); United States v. Grandmaison, 77 F.3d 555, 562-64 (1st Cir. 1996) (adopting totality of the circumstances test to determine if crime was aberrant, including consideration of, inter alia, the defendant's first offender status (which is not enough without more), pecuniary gain, charitable activities, prior good deeds, efforts to mitigate the effects of the crime, and whether he was convicted of several unrelated offenses or was a regular participant in elaborate criminal enterprises); United States v. Lam, 20 F.3d 999, 1005 (9th Cir. 1994) (departure justified where otherwise law-abiding immigrant defendant obtained a sawed-off shotgun to protect his family after he and his pregnant sister were robbed at gunpoint at their place of business); United States v. Tsosie, 14 F.3d 1438, 1442-43 (10th Cir. 1994) (departure was justified where victim had an affair with defendant's wife and actively participated in the fight that ended in his death, defendant attempted to provide aid and medical care immediately after the fight, and defendant had no criminal history and a long history of steady employment and economic support of his family); United States v. Morales, 961 F.2d 1428, 1431-32 (9th Cir. 1992) (district court erred in failing to depart where defendant was first time offender, had not been convicted of unrelated offenses, and was not a regular participant in an

on-going criminal enterprise over a substantial period of time); United States v. Takai, 941 F.2d 738, 743-44 (9th Cir. 1991) (departure warranted where defendants had no criminal record, were not motivated by pecuniary gain but by helping members of their community obtain green cards, were influenced by a government agent, and had done outstanding good deeds); United States v. Pena, 930 F.2d 1486, 1495 (10th Cir. 1991) (departure was warranted because possession with intent to distribute was an aberration from defendant's usual conduct which reflected long-term employment, economic support of her family, no abuse of controlled substances, and no prior involvement in the distribution of such substances). It is appropriate to permit district courts to consider spontaneity or that little thought was involved among other factors that might show aberrance, rather than as an absolute prerequisite, Grandmaison, 77 F.3d at 563. For example, spontaneity in response to an opportune moment or unexpected provocation may be a factor indicating that the criminal episode was aberrant.

Furthermore, the proposed definition would effectively eliminate aberrant behavior as a basis for departure. It is hornbook law that a crime (other than a strict liability crime) consists of both an act or omission and a guilty state of mind. See Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 3.4 (1986). "Thoughtless," however, means "devoid of thought," see Merriam Webster's Collegiate Dictionary 1228 (10th ed. 1993), and "spontaneous" implies "action engaging neither the mind nor the emotions." Id. at 1137. Accordingly, a "spontaneous and thoughtless" act is not a crime. See United States v. McCarthy, 840 F. Supp. 1404, 1410 (D. Colo. 1993). Even the crime committed by the defendant in United States v. Russell, 870 F.2d 18 (1st Cir. 1989), widely regarded as fitting even the most restrictive definition of aberrant behavior, would not meet the definition now proposed. Russell, a Wells Fargo driver with no criminal record, agreed with his partner to take and keep a bag of money a bank had mistakenly given them, took the bag, and kept it for a week before admitting what he had done and returning the money. Id. at 19. The crime may have been "spontaneous" at its inception, but it did not remain so and was never "thoughtless." If it had been, Russell could not have pled guilty to bank larceny, which requires an "intent to steal or purloin." 18 U.S.C. § 2113(b). Nor did Russell's course of conduct -- conspiring with his partner to take the money, taking the money, and keeping it hidden for a week -- consist of only one planned criminal act. As the First Circuit noted in holding that "single acts of aberrant behavior" include "multiple acts leading up to the commission of a crime," the "practical effect of [a contrary] interpretation would be to make aberrant behavior departures virtually unavailable to most defendants because almost every crime involves a series of criminal acts." United States v. Grandmaison, 77 F.3d 555, 563 (1st Cir. 1996); see also McCarthy, 840 F. Supp. at 1410 ("Strict and literal adherence to the definition of 'single act' as 'spontaneous' and 'thoughtless' would eliminate the availability of the departure.").

The proposed definition, by precluding as a categorical matter consideration of whether the defendant's crime was aberrant in light of his or her background, character, and conduct, would seem to violate Congress' directive that "[n]o limitation shall be placed on the information concerning the

background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. As Justice Scalia recently pointed out, neither the courts nor the Sentencing Commission have authority to contravene the statute by prohibiting consideration of certain types of evidence at sentencing. See United States v. Watts, 117 S. Ct. 633, 638 (1997) (Scalia, J., concurring).

Whether an offender's criminal conduct was an aberration in the context of his or her character and life, and, in addition, "should result in departure," 18 U.S.C. § 3553(b), "embodies the traditional exercise of discretion of a sentencing court." Koon, 116 S. Ct. at 2046. To resolve this question, a district court should be free to "make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." Id. at 2046-47. Confining the aberrant behavior inquiry to a single factor, especially one that would effectively preclude the departure, would contravene the congressional purpose in reposing in federal district judges discretion to depart under the sentencing guidelines:

> This too must be remembered, however. It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States District Judge. Discretion is reserved within the Sentencing Guidelines . . . .

Id. at 2053.

AMENDMENT 7(I) - DIMINISHED CAPACITY

NACDL supports option four and opposes the options that propose to limit this departure ground to offenses that are not "crimes of violence", as that term is defined in the career offender guideline. Option One would preclude a departure if the offense of conviction is a "crime of violence" based on a categorical consideration of its elements. A categorical approach is inconsistent with the individualized nature of a departure determination and for that reason should not be adopted.

NACDL believes that the better course is option four, which eliminates the restriction on the type of offense altogether. In its place, it permits district judges, on a case-by-case basis, to determine the "extent to which reduced mental capacity contributed to the commission of the offense, provided that consideration of the nature and circumstances of the offense unless the nature and circumstances of the offense or the defendant's criminal history indicates a need for

incarceration to protect the public." This approach is more consistent with departure methodology.

The career offender definition of "crime of violence" should not be used because that definition addresses entirely different and diametrically opposed issues. See United States v. Chatman, 986 F.2d 1446, 1451 (D.C. Cir. 1993). Section 4B1.2 deals with whether a defendant is a "career offender" and should be incarcerated longer than others who have committed the same crime. Higher sentences for "career offenders" are justified based on the greater culpability of recidivists and the general deterrence that results from sending the clear message that "repeated criminal behavior will aggravate the need for punishment with each recurrence." U.S.S.G. Ch. 4, Pt. A, Intro. Comment. (1995). Furthermore, in Congress' view, longer sentences incapacitate those offenders whose criminal record suggests a likelihood that they will commit future violent crimes and result in the efficient use of "[s]hrinking law enforcement resources . . . target[ing] those who repeatedly commit violent crimes". Chatman, at 1451, citing, 128 Cong.Rec. 26,518 (1982) (statement of Sen. Kennedy).

The definition of "crime of violence" in the career offender guideline thus "extends not only to crimes that involve actual violence, but to many crimes that have an "unrealized prospect of violence" as well. Chatman at 1451. As the Chief Judge for the D. C. Circuit explained:

> In short, § 4B1.2 can be read as depriving career offenders of the benefit of the doubt, and assuming the worst. In the service of identifying particular trends within an individual's criminal history, § 4B1.2 appears to characterize as "crimes of violence" many offenses that, taken individually on their facts, might be interpreted as non-violent.

Id.

The policy concerns that animate the definition of "crime of violence" for career offenders are not germane to departures for diminished capacity. Departures for diminished capacity are granted

> to treat with lenity those individuals whose "reduced mental capacity" contributed to commission of a crime. Such lenity is appropriate in part because . . . two of the primary rationales for punishing an individual by incarceration -- desert and deterrence -- lose some of their relevance when applied to those with reduced mental capacity. As to desert, "[p]ersons who find it difficult to control their conduct do not -- considerations of dangerousness to one side -- deserve as much punishment as those who act maliciously or for gain. Further,

> "[b]ecause legal sanctions are less effective with persons suffering from mental abnormalities, a system of punishment based on deterrence also curtails its sanction." Indeed, those defendants whose "significantly reduced mental capacity" is caused by the "voluntary" use of "drugs or other intoxicants" are logically excluded from consideration under § 5K2.13 because they have "diminished" their capacity by choice, and "legal threats may induce them to abandon their habits . . .".
>
> . . .
>
> Consistent with this analysis, a downward departure is disallowed where "the defendant's criminal history . . . indicates a need for incarceration to protect the public." U.S.S.G. § 5K2.13

Id. at 1451-52, citing, United States v. Poff, 926 F.2d 588, 595 (7th Cir.) (en banc)(Easterbrook, J. dissenting), cert. denied, 502 U.S. 827 (1991).

Furthermore, a factual approach which would require the sentencing court to consider the facts of the offense of conviction does not implicate "practical difficulties and potential unfairness". See Taylor v. United States, 495 U.S. 575, 600 (1990) (adopting a categorical approach to determine whether a particular offense is a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA")). A categorical approach "look[s] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions". Taylor, 495 U.S. at 600. This approach avoids requiring "the sentencing court to engage in an elaborate fact-finding process regarding the defendant's prior offenses." Id. In the context of career offender and ACCA cases, the categorical approach avoids the practical problems of "retrying" the predicate convictions, years after a formal conviction was entered. Those considerations do not apply in the departure context.

In the § 5K2.13 departure situation the sentencing court will not be asked to "retry" an old case. Rather, the court must conduct fact-finding with respect to the offense of conviction for which the court will be imposing a sentence. This is a task which the sentencing court is required to conduct in any event. 18 U.S.C. § 3553(a)(1). Individualized fact-finding with respect to the offense of conviction does not impose, therefore, the practical burdens or fairness problems involved in considering past convictions. Furthermore, a factual inquiry into the offense conduct is likely to yield a more accurate picture of the offender and the offense. This facilitates the court's task of determining whether the defendant poses a danger to the public and should not be granted a departure. It also complies with the congressional mandate "to impose a sentence sufficient, but not greater than necessary to comply with the purposes" of sentencing. 18 U.S.C. § 3553(a).

Indeed, such an approach is consistent with the congressional mandate that

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for purpose of imposing an appropriate sentence.

18 U.S.C. § 3661.

Lastly, as with the aberrant behavior departure, whether the defendant's diminished capacity "should result in a departure", 18 U.S.C. § 3553(b), "embodies the traditional exercise of discretion by a sentencing court." United States v. Koon, 116 S.Ct. 2035, 2046 (1996). To resolve this question, a district court should be free to "make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." Id. at 2046-47. Option Four comports with the congressional purpose, as explained by the Supreme Court in Koon, reposing in federal district judges discretion to depart under the sentencing guidelines and in keeping with the "federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate . . . the crime and the punishment to ensue. Koon at 2053.

Thank you for your consideration of NACDL's concerns. Attached are our particularized comments on the proposed emergency amendments. If the Commission desires additional information on any of these matters, we welcome the opportunity to provide it.

Very truly yours,

Gerald Lefcourt /cm

Gerald Lefcourt
President

Alan Chaset
Alan Ellis
Carmen D. Hernandez
Benson Weintraub
Co-Chairpersons
Post-Conviction and Sentencing Committee

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PUBLISHED JANUARY 6, 1998

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[1]WT refers to the volume of written testimony submitted for the public hearing on March 12, 1998.

001-98

COMMITTEE ON CRIMINAL LAW
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March 9, 1998

Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
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Dear Judge Conaboy:

On behalf of the Committee on Criminal Law of the Judicial Conference of the United States, I submit the following comments in response to various proposals and issues published by the Sentencing Commission for comment during the 1998 amendment cycle.

I. Circuit Conflict Resolutions

The Commission published nine circuit conflicts, along with various options for resolving those conflicts, and asked for comment on which option, if any, the Commission should adopt to resolve each conflict. Our Committee discussed the nine conflicts at its December 1997 meeting, and was able to arrive at a consensus for a recommended resolution for most of the conflicts. We strongly believe, however, that even if the Commission disagrees with our proposed resolutions, it is still important that the Commission resolve the conflicts. The Supreme Court has affirmed that the Commission is statutorily mandated to "periodically review the work of the courts, and ...make whatever clarifying revisions to the guidelines conflicting judicial decisions might suggest." United States v. Braxton, 111 S.Ct. 1854, 1858 (1991) (citing 28 U.S.C. § 994(o)). Because the

Commission has this role, the Court said it would be more "restrained and circumspect" in using its certiorari power to resolve circuit conflicts on sentencing matters. Id

This Commission is in an excellent position to resolve these particular conflicts now, given the extensive staff work and public consideration of them since last July. It is especially important for the Commission to resolve conflicts over what the Commission itself intended by its own drafted language. Action by the Commission would not only avoid unnecessary litigation, but also unwarranted disparity in the application of its guidelines, which was one of the primary goals of the Sentencing Reform Act. Our comments are as follows:

Issue 1: Whether filing fraudulent forms with bankruptcy and probate courts violates a judicial order or process. (§2F1.1(b)(3)(B))

The Committee does not have a specific recommendation for this conflict.

Issue 2: Whether an actual employee of a charity or government agency who misapplies funds misrepresents that he/she was acting on behalf of the agency. (§2F1.1(b)(3)(A))

The Committee recommends that the Commission resolve this conflict in favor of the broader view, consistent with the Fourth Circuit approach. That is, we recommend that this adjustment be applicable to actual employees or agents of such agencies, as well as to persons who fabricate their association with such agencies. This is the more victim-friendly view, and one that is consistent with the background commentary to §2F1.1, which emphasizes the victim's susceptibility to charitable causes or trust in governmental agencies.

Issue 3: Whether the Position of Trust adjustment applies to an impostor. (§3B1.3)

The Committee continues to recommend that this conflict be resolved in favor of the majority view, which is a victim-friendly, broader view. For the victim, the abuse of trust is even more egregious if the abuser is also an imposter. Three circuits have endorsed this view. The most recent case involved a pharmacist fraudulently claiming to be a physician. In United States v. Barnes, 125 F.3d 1287 (9th Cir. 1997), the court held that an impostor physician's "abuse of the fundamental trust between doctor and patient is precisely the sort of behavior to which section 3B1.3 is directed." Id. at 1292.

Issue 4: Whether a departure for "aberrant behavior" is limited to only spontaneous and thoughtless acts. (Introduction to Guidelines Manual)

The Committee recommends that the Commission resolve this conflict in accord with the majority of the circuits, by defining the scope of this departure narrowly to focus on spontaneous and thoughtless acts. The current language is ambiguous and misplaced in the manual. Its ambiguity has generated, and will continue to generate, much litigation. Clarification by the Commission would provide more useful guidance to courts, would result in more consistent application, and would

assure more protection for the court's exercise of its discretion within the parameters provided. This departure also should be placed in Chapter Five, along with other suggested departures.

We have carefully considered various recommended resolutions for this departure, and we recommend the following language for your consideration:

> *If the conduct comprising the offense of conviction, including its relevant conduct, represents a single act of aberrant behavior by the defendant, the court may decrease the sentence below the applicable guideline range. In addition, because the Sentencing Commission designed the guidelines to produce an appropriate sentence for a first offender, aberrant behavior means something more than merely a first offense. Aberrant behavior is a spontaneous and seemingly thoughtless act rather than one which was the result of planning or deliberation. This is so because an act that occurs suddenly and is not the result of a continuous reflective process is one for which the defendant arguably may be held less accountable.*[1]

Issue 5: Obstruction of Justice Guideline: Meaning of the Term "Instant Offense." (§3C1.1)

The Committee recommends that the Commission resolve this circuit conflict by defining the scope of the obstruction adjustment broadly to apply to obstructions of justice in closely related cases. This is the majority view and would allow consistent application among the circuits where the issue arises.

Issue 6: Obstruction of Justice Guideline: Failure to Admit Drug Use While on Pretrial Release. (§3C1.1)

The Committee recommends that the Commission resolve this conflict in favor of the majority view. The Commission should clarify that failure to admit drug use while on pretrial release is not ordinarily relevant to obstruction of justice, although it may be relevant to acceptance of responsibility.

Issue 7: Failure to Appear Guideline (§2J1.6, note 3)

The Committee does not recommend a specific resolution for this conflict, but requests that the Commission make clear that the defendant should not receive both an obstruction adjustment and a consecutive separate sentence for failing to appear. Ideally, the sentencing court should have maximum discretion to treat a failure to appear either way, depending on which is most appropriate

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[1]A minority of the Committee would substitute the last two sentences quoted above with the following:

Aberrant behavior is usually spontaneous rather than the result of significant planning or deliberation. It is conduct completely out of character for the accused, coupled with extraordinary extenuation or mitigation.

for the particular case.

Issue 8: Criminal History: Meaning of the Term "Incarceration." (§§4A1.1, 4A1.2)

This conflict primarily involves whether a halfway house commitment is "incarceration" for criminal history purposes, particularly with regard to whether the defendant was "incarcerated" during a certain time prior to the instant offense. This issue often arises where the defendant was revoked from supervision in the past and served the revocation time in a halfway house. The Committee asked the Commission to resolve this circuit conflict in the 1997 amendment cycle. We again ask the Commission to resolve it, with the same recommendation for resolution. Specifically, the Commission should endorse the Sixth Circuit view, which focuses on the purpose and function of the sentence, rather than the type of facility. Hence, a direct commitment to detention in a halfway house, or prison designation for service of time at such a facility, would be "incarceration" for these purposes. However, time spent in a halfway house as a condition of release or bond would not be "incarceration" for these purposes. This approach not only preserves the Commission's stated policy for specific punishment for revocation of release, pursuant to §4A1.2(k)(2), but it is also consistent with the Bureau of Prisons' policy of when it credits time spent in a halfway house as pretrial detention credit.

Issue 9: Diminished Capacity Departure: Definition of "nonviolent Offense" (§5.13)

The Committee recommends that the Commission resolve this conflict in a way that combines published options 2 and 3. That is, we suggest that the Commission define the scope of this departure broadly, to include consideration of the facts and circumstances surrounding the commission of the crime, but, at the same time, specify that such a departure is not available where the offense involved actual violence or a serious threat of violence.

II. Codification of Koon v. United States in the Guidelines Manual

The Commission invited comment on whether Policy Statement 5K2.0 ("Grounds for Departure") should be amended to incorporate the analysis and holding of the United States Supreme Court decision in Koon v. United States, 116 S.Ct. 2035 (1996). It also asked for suggestions on how to accomplish this objective.

The Committee asked the Commission to publish this issue for comment because we believe that a recitation of the main holding and some key findings from this landmark Supreme Court decision on guideline departures would make the guidelines manual more helpful and complete, especially since the manual already contains references to other key cases. Moreover, there are many practitioners who do not frequently use the federal guidelines, and a reference to Koon would enhance their level of advocacy in federal courts. Such a reference would also provide a reminder of the sentencing court's discretion to consider appropriate bases for departure, applying the criteria set out in Koon.

We therefore recommend that the Commission include in Chapter Five the following language:

"A departure decision is highly dependent upon the facts and circumstances of the particular case, and a court's decision to depart should be reviewed for an abuse of discretion . . . A district court's decision to depart from the Guidelines . . . will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court." Koon v. United States, 116 S.Ct. 2035, 2046 (1996) (citing Mistretta v. United States, 488 U.S. 361, 367 (1989)).

III. Recommendations Regarding Manslaughter

The Committee is very pleased to learn of the Commission's letter to Congress, requesting an increase in the statutory penalty for voluntary manslaughter. We also complement your staff's Manslaughter Working Group Report to the Commission, dated December 15, 1997, for its thorough analysis of the issues regarding federal manslaughter penalties. In addition, we appreciate the Commission's having extended the opportunity to one of our members, Chief United States District Judge Richard H. Battey, District of South Dakota, to testify at the Commission's hearing on manslaughter penalties last fall.

Judge. Battey has, at our request, shared with us his comments in response to the Commission's published issues for comment. Attached are his two letters to us, dated January 8 and February 4, 1998, and one letter to the Commission, dated February 26, 1998. Judge Battey has had extensive experience with manslaughter cases, as you know. In the February 4 letter, Judge Battey relates a case in which the penalties for voluntary manslaughter would be little more than that for aggravated assault, illustrating how the current manslaughter guidelines do not sufficiently reflect the relatively more serious factor of a death resulting from the offense.

We endorse his written comments, and add other recommendations for your consideration. We believe these recommendations would better ensure that manslaughter sentences reflect the seriousness of the conduct, and would more appropriately reflect varying degrees of culpability according to offense characteristics. We urge the Commission to make the needed changes to the manslaughter guidelines while the work of its staff and the comments of the public are before it. Our recommendations are the following:

1. The base offense level of involuntary manslaughter should be increased significantly above its current level. The Commission's staff's report clearly indicates the relatively low level of involuntary manslaughter sentences, whether compared to other federal penalties or to similar state penalties. The Commission should also decide whether an increase in the base offense level of voluntary manslaughter is needed, in order to achieve the appropriate proportionality between manslaughter and such offenses as second degree murder, aggravated assault, and assault with intent to kill.

2. Specific Offense Characteristics should be added to the guidelines for both voluntary

manslaughter (§2A1.3) and involuntary manslaughter (§2A1.4), to reflect frequently occurring factors of "heartland" manslaughter cases. We suggest that the Commission consider adding specified upward adjustments for the following factors to the indicated guidelines, in order to avoid very dissimilar cases being sentenced alike:

1. *If the offense involved a victim who is a spouse or member of the defendant's immediate family.* (voluntary manslaughter)

2. *If the offense was in violation of a protection order.* (voluntary manslaughter)

3. *If the offense was conducted while the defendant was under the influence of an alcoholic beverage or illegal drug (whether or not the conduct is reflected separately in criminal history).* (both voluntary and involuntary manslaughter)

4. *If the offense was committed as a pattern of prior violent conduct, with the same or different victims, such as a pattern of domestic abuse.* (both)

5. *If multiple deaths resulted from the offense conduct.* (both)

6. *If the offense involved the intentional or reckless use of a dangerous weapon, including an automobile.* (both)

Other potential adjustments (or suggested departures) might be based on whether the defendant was driving with a revoked or suspended license (involuntary manslaughter), and whether the offense conduct caused a substantial risk of harm to other motorists, pedestrians, witnesses, or other innocent "bystanders." (both involuntary and voluntary manslaughter)

Because these cases are extremely fact-specific, the commentary should make clear that the listing of specific offense characteristics is not all-inclusive, and that departures based on the criteria found at §5K2.0 and 18 U.S.C. § 3553(b) are possible if justified by the peculiar facts of the case.

It may also be appropriate for the Commission to consider adding some of the above listed special offense characteristics to §2A1.2 (Second Degree Murder), to ensure a proportionately greater sentence for that offense than for voluntary manslaughter.

3. Finally, we hope the Commission will continue to urge Congress to increase the statutory penalty of voluntary manslaughter, if Congress fails to do so in this congressional session.

IV. Fraud, Theft, and Loss Tables

The Commission and its respondents have done much work, over two amendment cycles, on proposals for simplifying and significantly raising the loss tables in the guidelines. We again endorse the proposal we submitted last year, along with the Department of Justice, to raise fraud, theft, and tax offense levels. All available data indicate that cases involving losses in the medium and high ranges are under-punished, relative to other offenses.

All the table proposals before the Commission accomplish several additional and worthwhile simplification goals. They combine several loss tables, they utilize two-level increments, and they save much fact-finding by incorporating the element of "more than minimal planning." The proposals would also add a narrow adjustment for use of sophisticated means, which we support. We urge the Commission to take this step in reforming the fraud, theft, and tax guidelines this year, in order to allow the next Commission to focus completely on the loss definitional reform, as we discuss below.

There is one published amendment regarding the loss table and guideline reforms which merits a specific response. We strongly oppose published amendment 5(B), proposed by the practitioners as part of the reform of the fraud guideline. It would provide for a two-level reduction in cases which involve only "limited or insignificant planning, or simple efforts at concealment," as an offset for incorporating more than minimal planning into the new tables. We believe that such a provision would produce litigation in nearly every case, and would eliminate the benefit of having removed the "more than minimal planning" adjustment. Moreover, the new language of "limited or insignificant planning" would invite litigation over the meaning of that phrase.

V. Definition and Commentary on Loss

We received the recent loss proposal on February 24, 1998, and our Guidelines Subcommittee has been carefully considering it. We appreciate the effort that the Commissioners and staff have put into the proposal, and it is a very good start for the much-needed reform of the definition and determination of loss in the guidelines. The loss determination is a fundamentally important computation, involved in at least one out of every four federal cases.[2] The Federal Judicial Center Survey of 1996 indicated that District Judges and Chief Probation Officers believe that determining monetary loss in fraud cases is the second most difficult process in the guidelines,[3] and that fraud, money laundering, and tax are the three least clear guideline computations (out of 12 listed).[4]

The recent proposal is in several ways a marked improvement over the current definition.

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2 The 1996 Sourcebook of Federal Sentencing Statistics, Figure A, indicates that at least 25.5% of federal cases involve the loss determination (Fraud 14.2%, Larceny 5.7%, Embezzlement 1.9%, Forgery and Counterfeiting 1.7%, and Money Laundering 2.0).

3 The U.S. Sentencing Guidelines: Results of the FJC's 1996 Survey, figure 21, p. 98.

4 Id. at figure 36a, p. 111.

However, we believe the issue is so important that it requires study to ensure that it is the best it can be. We are unable to take a specific position on it at this time. We would like to discuss it with other judges in our respective courthouses, experiment with it in cases that we encounter in the next few months, hear from the defenders and the probation officers' group, and perhaps generate other suggested provisions to complement or supplement the proposal. We pledge to begin that process immediately, but it cannot be accomplished during the next few weeks.

While the latest proposal addresses, to some extent, most of the points mentioned in Judge Phil Gilbert's statement last fall, it also removes much of the current commentary, including examples and explanations, some of which may be necessary or helpful. It introduces new concepts, none of which are defined. It does indeed resolve some circuit conflicts, but potentially generates many others. While the proposal may be shorter and contain fewer rules, definitions, examples, or explanations, it is not necessarily "simpler" unless it provides sufficient guidance, not only to ease its application but also to protect courts from appellate reversal. Fewer rules and guidance can sometimes result in more litigation and more disparity, unless there is a "threshold level" of explanation and guidance. The absence of basic rules written in the guideline will mean that the void is filled by appellate court rulings over a period of time, with possible circuit conflicts.

The following is a non-exhaustive list of the issues that we believe need full discussion and analysis before such a reform is enacted:

1. Should there be a definition of "reasonably foreseeable," given its new use in this context?

2. When should loss be measured? Should it be at the time of sentencing, at the time of the offense, or at the time of detection?

3. What credits should be counted and how should those various forms of credit be measured? The proposal's credit measurement provision is confusing and potentially overbroad. For example, if time of detection is used, is the reference to detection by the victim, law enforcement, or defendant?

4. Crediting the defendant for all "economic benefit" to the victims, even in theft cases, is potentially problematic and, at a minimum, presents a significant ideological shift from preceding and current criminal law. Should the rule of allowing no credits for theft be retained? What are the implications of this change in different scenarios?

5. How are "economic benefits" to be determined, since this is a new concept in this context.

6. What is the best way to handle gain? Should it be part of the core definition, such as "Loss is the greater of actual loss, intended loss, or gain"? Or, if it is one of a list of factors, under what circumstances should it be considered? It is not clear whether the proposal would allow consideration of gain when it is less than loss, so long as loss is "difficult to

determine." Is this the best result?

7. The current commentary provides guidance on when to use market value or replacement cost, but the proposal lists each as co-equal considerations. Is this loss of guidance merited?

8. Suggested departures must be adopted with great care, given the importance placed on them under Koon departure standards. The proposal lists several new downward departure suggestions which deserve further study. One such suggestion [G(iii)] apparently overlaps the Credits (C) portion of the proposal.

In sum, we are not able to provide meaningful response from our Committee on this fundamentally important guideline proposal in time to help the Commission complete the task this year. We believe the proposal is too important to rush to adoption without more careful study. We ask that action on the proposal be deferred this year. We pledge to intensify our efforts to study the proposal during the remainder of the year and provide a comprehensive, thoughtful response later this year. I would expect to devote significant time to it at our June meeting, and we hope to maintain regular contact during the year with the Commission and its staff.

VI. Conclusion

We appreciate the hard work that the Commission has done over the past few years, and appreciate your continued solicitation and consideration of our views. We think this amendment cycle can be a very productive one with the resolution of circuit conflicts, needed reform to the manslaughter guidelines, and the reform of the loss tables. We look forward to our conference call with you on March 25, 1998.

Sincerely yours,

George P. Kazen

George P. Kazen

GPK/gsh

xc: Commissioner Michael S. Gelacak
Commissioner Michael Goldsmith
Honorable Deanell R. Tacha
Mary Frances Harkenrider, ex-officio
Michael Gaines, ex-officio
John Kramer, Staff director
John Steer, General Counsel
Members of the Committee on Criminal Law
Chief Judges, U.S. Courts of Appeals
Leonidas Ralph Mecham
Karen K. Siegel

Attachments
March 9, 1998 letter to
Honorable Richard P. Conaboy

UNITED STATES DISTRICT COURT
District of South Dakota
515 Ninth Street, Room 318
Rapid City, South Dakota 57701
(605) 343-7784

RICHARD H. BATTEY
Chief Judge

January 8, 1998

Catherine M. Goodwin
Assistant General Counsel
Administrative Office of the U.S. Courts
One Columbus Circle N.E., Suite 7-290
Washington, D.C. 20544

Dear Catherine:

I appreciated receiving your letter of January 5, 1998, and the Manslaughter Working Group Report to the [Sentencing] Commission.

My interest continues in attempting to provide more appropriate guidelines for these manslaughter offenses. To this end, I believe that (1) Congress should be urged to increase the statutory sentence; (2) appropriate base offense levels should be increased; and (3) specific offense characteristics should be approved in the 1998 amendment cycle.

Regarding the adoption of specific offense characteristics, I realize that these should be limited to the "heartland" cases. Appropriate commentary should be added to point out the fact that the specific offense characteristics are not meant to be all inclusive. This would leave room for departures consistent with the Policy Statement found at § 5K2.0 and 18 U.S.C. § 3553(b). Specific offense characteristics should not be used to provide a departure where otherwise a departure would not be permitted under the guidelines.

In the final analysis, these suggested changes would decrease and not increase disparate sentences. At the time of my appearance before the Commission, I fear that perhaps I did not make this point clear.

Shortly I will follow with my comments and perhaps the committee may want to adopt all or part or maybe just consider and reject them. At any rate, I do appreciate the opportunity to be of assistance.

Very truly yours,

Richard H. Battey
Chief Judge

RHB:kc
cc: Honorable J. Phil Gilbert
Honorable George P. Kazen

UNITED STATES DISTRICT COURT
District of South Dakota
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Rapid City, South Dakota 57701
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RICHARD H. BATTEY
Chief Judge

February 4, 1998

Catherine M. Goodwin
Assistant General Counsel
Administrative Office of the U.S. Courts
One Columbus Circle N.E., Suite 7-290
Washington, D.C. 20544

Dear Catherine:

I am pleased to offer these supplemental comments to the Manslaughter Working Group Report to the Commission. The report was most thorough and should provide detailed guidelines to the Commission.

Last week I conducted a sentencing hearing for a violation of 18 U.S.C. §§ 113(a)(3) and 1153, assault with a dangerous weapon. The offense conduct as set forth in the presentence report indicated that the defendant and his family had a running off again-on again feud with the victim's family. On the day of the offense, the defendant was advised by his brother that the victim had harassed him early that morning. Feeling aggrieved, the defendant went looking for the victim. He found him on the school yard. The defendant approached the victim armed with a golf club. During the course of the argument the victim attempted to walk away in order to avoid further confrontation. The defendant struck the victim on the back with the club. The victim raised his hand to ward off a second blow and was struck on the hand. A minor injury consisting only of bruises occurred.

The base offense level under U.S.S.G. § 2A2.2(a) was 15. Adding 4 levels under U.S.S.G. § 2A2.2(b)(2)(B) for use of a dangerous weapon , the adjusted offense level was 19. A 3-level adjustment for acceptance of responsibility resulted in a total offense level of 16. Applying the criminal history of Category I (two points), the guideline range was 21-27 months. The victim was treated and released at the emergency room. Since the victim sought medical attention, it is arguable that an additional two levels should have been added raising the offense level to 18 for a presumptive sentence of 27-33 months.

Had the victim been killed by a blow to the head, a voluntary manslaughter charge would have resulted in a base offense level of 25 under § 2A1.3. Again, reducing for acceptance of responsibility, the total offense level would be 22. Applying the Criminal History of Category I would result in a presumptive sentence of 46-57 months. The result is that defendant could have received a sentence of 13 months longer by causing death.

I set forth this rather detailed example of how the guidelines actually work in Indian country. Absent the guidelines, I believe judgment would have required a sentence of 12 months at the very most. The case was actually overcharged. The conduct more closely fits 18 U.S.C.

§ 113(4), assault by striking, beating, or wounding (six months statutory penalty). I believe that there were no grounds for a departure under Part K. Since the victim did not precipitate the defendant's conduct, a 5K departure for victim's conduct would not have been applicable.

I conclude where I began with my testimony on November 12, 1997, before the Commission and my letter of January 8, 1998. The answer is to (1) increase the base offense levels of manslaughter to near the statutory maximum; and (2) provide appropriate specific offense characteristics addressing the many disparate fact situations occurring in Indian country. The specific offense characteristics for the assault crimes contain such specific offense characteristics. As to voluntary and involuntary manslaughter under sections 2A1.3 and 2A1.4 I would add to those listed for the assault guidelines the following:

1. An adjustment for crime against a spouse or member of the immediate family.

2. A crime committed in violation of a protection order.

3. A crime committed while under the influence of an alcoholic beverage or illegal drugs.

4. A crime committed as a pattern of conduct or prior violent acts.

5. A crime committed by driving under the influence not included in the criminal history category.

6. A multiple death adjustment.

7. A crime committed by reckless driving of a motor vehicle.

8. A crime committed by use of a dangerous weapon.

Finally, in order to avoid needless appeal issues, I recommend that a departure under these particular guidelines should be given due deference at the appellate level. These cases are extremely "fact sensitive" and as such are not amenable to a strict application of the guidelines.

Very truly yours,

Richard H. Battey
Chief Judge

RHB:kc

UNITED STATES DISTRICT COURT
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RICHARD H. BATTEY
Chief Judge

February 26, 1998

Catherine M. Goodwin
Assistant General Counsel
Administrative Office of the U.S. Courts
One Columbus Circle N.E., Suite 7-290
Washington, D.C. 20544

Dear Cathy:

I have reviewed your letter of February 25, 1998. The draft of the recommendations regarding the manslaughter offense is very well done.

I'm somewhat troubled by the SOC found at paragraph 5 of page 2 regarding multiple deaths resulting from the offense conduct involving involuntary manslaughter. You will recall we discussed this point on the phone. Upon rethinking this SOC, I believe it probably should apply to both voluntary and involuntary manslaughter. My thinking is that while I cannot envision multiple deaths in the case of offense conduct involving involuntary manslaughter, that does not necessarily mean that it could not happen. If it does occur, perhaps it should be considered as outside of the "heartland" of voluntary manslaughter, and therefore, the subject of a departure. I think the safe thing to do would be to perhaps either have it apply to both voluntary and involuntary manslaughter, or provide a special sentence commentary encouraging a departure in such cases. I otherwise endorse your letter completely. It is well done.

Finally, enclosed is a copy of the letter I have sent to Judge Conaboy concerning the manslaughter working group report and his letter of February 18, 1998, to the chairman and ranking member of the Senate Judiciary Committee.

Very truly yours,

Richard H. Battey
Chief Judge

RHB:kc
Enclosure

002-98

National CURE
P. O. Box #2310
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March 2, 1998

United States Sentencing Commission
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Attention: ~~Public Comment~~

CURE respectfully offers its comments to the proposed Guideline Amendments issued on January 14, 1998:

Amendment 1: The Commission proposes two options to clarify the definition of "loss" with respect to sentencing for theft, fraud and tax crimes. Although Option #1 treats very low level losses more leniently than now, any losses over $10,000 for theft, $5,000 for fraud and $40,000 for taxes are treated more harshly. The penalties under Option #2 are treated more sternly than those under Option #1, with increased sentences for even very low level losses. The Commission justifies the increased sentences that either of these two options would create by stating it would "achieve better proportionality with the guideline penalties for other offenses of comparable seriousness."

CURE's position is that "offenses of comparable seriousness" (if one can realistically equate offenses such as tax evasion with offenses such as property destruction) should have their penalties reduced to the current theft, fraud and tax penalties rather than vice versa. The proposed options would result in sentences that significantly exceed anybody's concept of "inflation." CURE strenuously opposes any such increase in sentences for these non-violent crimes.

Amendment 2[A and B]: The problem CURE has with Amendment #2 is the same problem we have with Amendment #1. Presently, it takes a $20,000 theft/fraud to receive a four level increase. The amount of loss under the proposed amendment so as to receive a four level increase would be reduced to $12,500 with correspondingly large sentence enhancements for all other low scale offenses. The Commission insinuates that all losses over $2,000 (or as an option - $5,000) is no longer a low level loss, but should be deemed a medium level loss deserving greater punishment than is presently considered necessary.

CURE disagrees with this presumption. Contrary to one of the Commission's justifications for this change - to "achieve increases in severity for larger-scale referring guideline offenses" - larger scale offenses (those involving over $20,000,000 in losses) show no increase in base offense level. It is only medium level offenses - $2,000 to $20,000,000 - for which the Commission deems sentence inflation a necessity. The elimination of "more than minimal planning" as a criteria for a downward sentence departure is just another elimination of judicial discretion that CURE opposes. A starting point of $5,000 is preferable to $2,000 as the "cutting point" for incremental increases for these relatively minor crimes.

[C]: CURE opposes any change in the present pornography enhancement if the present minimum retail value of the "loss" is not exceeded.

[D]: CURE opposes any change in the present copyright infringement enhancement if the fraud loss of $5,000 is not exceeded.

[E]: CURE opposes the $2,000 threshold for an initial increase in offense level for computer invasion (a crime most often committed by juvenile hackers). Trespass (including computer trespass) should have a $5,000 threshold.

[F]: CURE agrees that the property destruction guideline should be consolidated with the theft guideline, but only

if the threshold for incremental additions begins at $5,000.

[G]: CURE agrees that the bank gratuity and principal gratuity guidelines can be consolidated.

Amendment 3[A and B]: CURE favors any and all amendments that lessen prosecutors' charging selection. For this reason, CURE favors consolidation of the theft, fraud and property destruction guidelines. To eliminate inequities, a minimum base offense level of four (4) should be used for the consolidated guideline.

[C]: CURE favors judicial discretion via an encouraged upward departure as opposed to a required enhancement for violation of a judicial order.

[G]: CURE opposes an increase in the floor level of this offense. No justification for this proposed increase appears anywhere in the text.

[H]: CURE opposes Option #1, which adds a two level enhancement for those involved with "chop shops" because, once again, no justification for such an increase is stated by the Commission.

Amendment 4: CURE makes the following comments regarding the proposed amendments to the definition of "loss:" CURE suggests amalgamation of Options #1 and #2 would be preferable to the adoption of either proposed option as currently specified. Although CURE favors the "maximum discretion to sentencing judges and minimal guidance" that Option #1 envisions, CURE also favors "the possibility of limiting the relevant harm...to economic harm" that Option #2 raises. Whether the harm caused is "intended" or "actual," CURE suggests that a person should only be punished for a consequence "that realistically could have occurred." CURE particularly disfavors any added non-economic provisions used as an invitation for departures, since such departures, at least in the examples enumerated in the proposal, are always foreseen as upward and simply encourage prosecutorial "piling on." CURE strenuously opposes any new rules that would include intended loss amounts that were unlikely or impossible because the only "victims" were government agents. Case law excluding losses caused by sting operations have been correctly decided and should not be circumvented by the Commission.

CURE favors the "reasonable foreseeability" standard of causation. We believe that such a standard would necessarily limit "consequential damages." CURE favors the use of "fair market value" in determining loss, but only if it exceeds "black market value." CURE favors inclusion of interest in calculating loss only when it was bargained-for. CURE favors application of any and all payments by a Defendant as credit against loss for all theft/fraud offenses - no matter who discovered the crime or when it was discovered. CURE favors an invited downward departure when a Defendant demonstrates intent to make additional payments, but is apprehended before he can do so. "Misapplied" funds not actually lost should not count as losses. CURE believes fluctuations in value of collateral should affect loss whether the value increases or decreases, since such fluctuation is "reasonably foreseeable." CURE believes repaid funds to Ponzi scheme victims should be credited when determining amount of loss. CURE believes a Defendant's gain is irrelevant to the concept of victim's loss and should never be used in a loss calculation. CURE believes current rules should be changed to provide that loss is to be based only on actual loss and exclude entirely intended loss. CURE further believes that "risk of loss" has no business being included in loss calculation. CURE emphasizes that where there is no loss, there is no crime.

Amendment 5[A]: CURE does not believe that the theft, fraud and tax tables should be revised to increase penalties. We do not object to the removal of enhancements for more than minimal planning.

[B]: CURE welcomes the addition of a two (2) level reduction for cases involving limited planning if the theft/fraud loss tables are amended.

[C]: CURE strenuously opposes any enhancement for "sophisticated concealment" or "sophisticated means." Prosecutors apply the buzz-word "sophisticated" to any conduct beyond the mentality of a third grader. Unless the vagueness of the word "sophisticated" can be appropriately limited, Option #2 is more favorable than Option #1, but neither option is appealing. After all, when does criminal conduct not include the taking of deliberate steps to

make the offense difficult to detect? Is such conduct really so "sophisticated" so as to allow prosecutors to push for an enhancement? CURE thinks not! Hiding assets and transactions are part and parcel of any criminal conduct and should be recognized as nothing extraordinary.

[D]: CURE has no objection to this proposed amendment.

Amendment 6: CURE believes that current fraud guidelines adequately address telemarketing fraud and that no additional amendments, commentary or departure provisions are necessary to provide appropriate punishment.

Amendment 7[A]: CURE favors a wider definition of aberrant behavior beyond "a single act" and for this reason opposes the proposed change.

[B]: CURE takes no position on this proposed change.

[C]: CURE favors the adoption of Option #2 and agrees with the 1st and 2nd Circuits that "violation of a judicial order" refers to an order issued to a specific person or party.

[D]: CURE takes no position on this proposed change.

[E]: CURE opposes this amendment. An enhancement should not apply to an imposter who can't possibly possess the "special skill" for which the abuse of trust enhancement was designed.

[F]: CURE favors the adoption of Option #2 and agrees with the 2nd and 7th Circuits that obstructing justice in one's case is just that - obstructions directly connected to the Defendant's offense of conviction - not other cases, whether closely related or not!

[G]: CURE favors adoption of this proposed amendment.

[H]: CURE strenuously urges adoption of Option #2. Confinement at home or in a halfway house imposed upon revocation of probation or post-conviction supervision should never count as an additional term of imprisonment for the purpose of computing criminal history.

[I]: CURE urges adoption of Option #4. If a person suffers from diminished capacity deserving of a departure, the nature of the offense is irrelevant to whether the Defendant actually has such an affliction.

Amendment 8[A]: CURE believes the current penalties for second degree murder are adequate and that the Sec. 2A1.2 base offense level should not be increased.

[B]: CURE believes the current penalties for voluntary manslaughter are adequate and that the Sec. 2A1.3 base offense level should not be increased, further upward departures should not be encouraged and periods of post-incarceration supervised release should be left to judicial discretion.

[C]: CURE believes that the current penalties for involuntary manslaughter are adequate and that the Sec. 2A1.4 base offense level should not be increased, further upward departures should not be encouraged and supervised release should be left to a judge's determination. CURE emphasizes that prison does not provide the solution to an accidental death.

Amendment 9: CURE takes no position on this proposed amendment - except to comment that the DOJ proposal simplistically suggests upward departure where the loss can't be calculated. CURE believes that the loss for this type of computer offense will almost always be incalculable.

Amendment 10: CURE takes no position on this proposed amendment.

Amendment 11[A]: CURE opposes this amendment, but realizes the Commission has no choice but to conform to the statute's mandate.

[B]: CURE opposes this amendment and further believes an "actual knowledge" standard should be required to hold the transferor equally responsible as the transferee of a prohibited firearm, rather than apply a "reasonable cause to believe" standard.

Amendment 12[A]: CURE takes no position on this proposed amendment.

[B]: CURE favors adoption of this proposed amendment. "Just punishment" is irrelevant as a factor in supervised release.

[C]: CURE favors adoption of this proposed amendment and agrees that the guidelines for probation and supervised release are discretionary and that such determinations should be left to a judge.

CURE thanks the Commission for consideration of the comments herein to the proposals currently under review.

DATED, this 2nd day of March, 1998.

Kenneth Linn on behalf of
Citizens for the Rehabilitation of Errants
(CURE)

003-98

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March 9, 1998

United States Sentencing Commission
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Suite 2-500
Washington, D.C. 20002-8002

Attn: Public Comment

To Whom It May Concern:

As Chairman of the Practioners' Advisory Group (PAG) I am enclosing here our comments on the Proposed Amendments and Issues for Comment for the 1998 amendment cycle.

Please file this letter as a matter of record and distribute copies to the Commissioners as soon as possible.

Sincerely,

Fred Warren Bennett

[19]

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March 9, 1998

The Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
Federal Judiciary Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Guideline Amendments
& Issues for Comment-1998 Cycle

Dear Chairman Conaboy:

On behalf of the Practitioners' Advisory Group (hereinafter called "PAG"), I am writing to provide the views of our Group concerning the proposed amendments and issues for comment which are before the Commission on the 1998 amendment cycle. As in the past, I thank you for the opportunity to express the views of the PAG on pending amendments and requests for comment. We are also especially grateful in regards to the willingness of the Commission to facilitate our monthly PAG meetings by allowing us to teleconference in members of the PAG who are unable to attend the meetings. We also wish to commend the Commission on the willingness of the leaders of the various Working Groups of the Commission to meet and work closely with liaison members of the PAG on the various Working Groups.

TO AMEND OR NOT TO AMEND THE GUIDELINES

The views of the PAG on this issue have been consistent throughout the period of our existence: we favor change where wisdom and experience call for change and where inter-Circuit conflicts cry out for resolution by the Commission--especially in light of the fact that the Supreme Court has indicated that it is looking to the Commission to resolve most of the problems in applying and interpreting the guidelines. See, United States v. Braxton, 111 S. Ct. 1854 (1991) [Commission has been given the power by Congress to amend guidelines to resolve Circuit conflicts]. Changes which experience has shown are necessary to promote the purposes of sentencing should be enacted if the

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Commission is to truly abide by the duties which were entrusted to it by Congress in the enabling legislation.

* * *

COMMENTS ON SPECIFIC AMENDMENT PROPOSALS AND ISSUES FOR COMMENT

The PAG has broken down its comments by following the index to the proposed guideline amendments for public comment (reader friendly version).

Proposed Amendments 1-6

Theft, Fraud and Tax loss Tables, Consolidation of Theft, Fraud Property Destruction and Fraud, Definition of Loss, Revision of Loss Tables and Telemarketing Fraud.

INTRODUCTION

The PAG opposes the adoption of either option for increasing the severity of the loss tables applicable in economic crime cases because there is no legitimate justification for increasing these sentences over present levels. The perceived disparity between the sentences imposed in drug cases and those imposed in "white-collar" cases simply reflects the excessively high sentences imposed in drug cases. Significantly, the Commission's own statistics reflect that the current sentencing ranges are more than adequate in economic crime cases. However, if the Commission is intent on adopting one of the two loss table options proposed, the PAG strongly prefers Option One since it better achieves the goal of only increasing offense severity levels for mid-to high-range offenders.

The PAG, however, welcomes the Commission's efforts to address the manner in which "loss" is calculated under the guidelines.[1] The PAG believes that the approach to "loss" should be driven by two guiding principles: first, that "loss" should not be thought of as an end in itself, but rather as a rough and approximate proxy for offense severity. The point behind the definition and

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[1] On February 26, 1998, the PAG received a revised proposal regarding the definition of "loss" which appears to supersede the published proposals (#3 and #4). In light of our late receipt of these new proposals and the fact that we have been unable to meet as a group between February 26, 1998 and the date of this letter, this submission addresses the published proposals only. We will submit additional comments on the revised proposal as soon as possible after our next PAG meeting, and well before the Commission formally votes on the revised proposal.

calculation of loss should not be to seek mathematical certainty regarding the precise quantity of funds lost by the victim. Instead, the objective should be a far more limited one: to measure in approximate terms the relative severity of the offense conduct and culpability of the offender. Accordingly, the general approach should be to look only at the loss proximately caused by the defendant's criminal conduct, and then to make every effort to simplify the calculation of that loss in a rough and approximate way. Side issues which require detailed and complex fact finding, particularly where the impact on the total loss figure is small in most cases, should be relegated to departures in unusual cases.

The second guiding principle behind our views is that the use of "loss" as a surrogate for culpability must be coupled with encouraged departures where gain differs significantly from loss. Unlike theft cases, in which gain is likely to match loss, fraud cases often present scenarios in which the defendant's gain bears no relation to the loss. The PAG's experience is that the root cause of dissatisfaction with the actual sentences imposed in fraud cases stems from a significant variance between loss and gain or intended gain. This is a door which swings both ways. Where the loss is minimal or zero but the defendant obtains a significant gain from criminal activity, an upward departure should be encouraged. By the same token, where the loss is extremely large but the defendant's gain is minimal or zero, a downward departure should be encouraged. Unless these departures are encouraged by the guidelines, undue uniformity will result.

Proposed Amendment #1: The loss tables.

We oppose the effort to increase the severity of the loss tables in fraud, theft and tax cases, because there is no legitimate justification for increasing the sentences in economic crime cases over their current levels.

The current effort to increase the sentences in "white collar" cases arises, in large measure, from the perceived disparity between the sentences meted out to drug defendants and those imposed in fraud and theft cases. Indeed, the synopsis of proposed amendment notes that the "purpose of both options is to raise penalties for economic offenses . . . in order to achieve better proportionality with the guideline penalties for other offenses of comparable seriousness." However, by simply focusing on the "quick fix" of increasing the sentences in economic crime cases, the Commission risks compounding, rather than reducing, the irrationality of the current drug sentencing scheme.

The simple fact is that the sentences imposed in these drug cases, due largely to Congressionally-imposed, mandatory-minimum sentences, are excessive, and reflect political pressure rather than a rational sentencing strategy. As we know from our experience with the crack/powder amendment, it is quite difficult for the Commission to restore a measure of rationality in these drug cases. However, the Commission's inability to lower drug

sentences should not serve as a justification for increasing sentences in other types of cases in an effort to achieve proportionality among defendants convicted of different crimes. Such action would simply ensure that the irrationality underlying the sentences in drug cases is incorporated into the sentencing structure for other offenses.

In addition, the Commission's reliance on the sentencing practices in drug cases as a justification for increasing the sentences in economic crime cases is contrary to the congressional directive contained in the enabling statute. There, Congress only directed the Commission to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct. . . ." 18 U.S.C. § 991(b)(1)(B) (emphasis added).

It is also important to note that contrary to the "white collar" stereotype, most defendants in economic crime cases are not "fat cats" who have wrongfully obtained hundreds of thousands, or even millions, of dollars. Rather, the Commission's statistics reflect that most fraud and theft cases (at least those affected by the proposed loss table amendments) involve low loss amounts. For example, according to the Commission's figures, more than one-quarter of theft cases involve loss amounts of less than $2000, and more than half of theft cases involve loss amounts of less than $10,000. More than one-quarter of fraud cases involve loss amounts of less than $10,000, and more than half of fraud cases involve loss amounts of less than $40,000. Less than 1% of theft cases involve loss amounts of more than $1,500,000, and only about 10% of theft cases involve loss amounts of greater than $120,000. Only about 6% of fraud cases involve loss amounts of greater than $1,500,000.[2] Consistent with this data, the amendment impact summary reveals that the current average sentence in theft cases is approximately six to seven months, while the average sentence in fraud cases is approximately twelve months. The majority of fraud, theft and tax defendants, taken as a whole, fall within Zones A-C, with only a little more than one-third who fall in Zone D.[3] Thus, it is not the high end offenders who are most heavily impacted by any changes to the current loss tables.

Interestingly, the empirical evidence fails to support the proposition that the current guidelines are insufficiently onerous even for those individuals convicted of economic crimes involving substantial losses. Although the Criminal Law Committee of the Judicial Conference is a strong proponent for increasing the

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[2] U.S. Sentencing Commission, Pecuniary Loss Amounts For Defendants (table).

[3] U.S. Sentencing Commission, Impact on Defendant's Sentence Zone Resulting From Proposed Changes to Theft, Fraud, and Tax Guidelines, Table 3 (Option Two).

sentences in fraud and theft cases,[4] judges do not currently sentence these "fat cat" defendants at the top of the applicable guideline range. The Sentencing Commission's data reveals that in theft, fraud and tax cases, where the loss exceeds $1.5 million, approximately 25% of defendants receive sentences in the first quarter of the guideline range and less than 15% receive sentences in the fourth quarter of the range. Interestingly, in fraud cases, the percentage of defendants who are sentenced at the top of the applicable guideline range does not change significantly even at the high loss levels. For example, in cases involving losses up to $1,500,000, only about 11% of defendants were sentenced in the top quarter of the applicable guideline range. In cases involving losses over $1,500,000, only about 15% of defendants were sentenced in the top quarter of the range. In theft cases involving losses of greater than $1,500,000, defendants were somewhat more likely to be sentenced at the top of the guideline range, with 19% receiving sentences in the top quarter of the range. Yet, a significantly higher percentage of such defendants, approximately 27%, received sentences in the bottom quarter of the range.[5]

These statistics clearly dispel the proposition that sentencing judges find the current levels of punishment for theft and fraud defendants insufficiently punitive, even for mid-to high-range offenders. During 1995, in theft, fraud and tax offenses involving losses of greater than $1,500,000, a significantly greater percentage of defendants were sentenced at the bottom of the applicable guideline range than at the top of range. Also, although both the theft and fraud guidelines invite an upward departure where the loss does not fully capture the harmfulness of the defendant's conduct, see § 2B1.1, comment. (n.15), § 2F1.1, comment. (n.10), there were no such upward departures in either theft or tax cases, and all upward departures in fraud cases totaled only about 2%. On the other hand, 12% of these high-end theft, fraud and tax cases involved downward departures (other than for substantial assistance).[6] When judges are confronted with a real, not theoretical, individual, and they assess the individual's conduct and background and other relevant sentencing factors, they apparently find, in most cases, that the current guidelines are

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[4] See, e.g., Statement of United States District Judge J. Phil Gilbert, Representative of the Committee on Criminal Law to the United States Sentencing Commission, October 15, 1997, submitted as Written Testimony for the October 15, 1997 Public Hearing on the Definition of Loss (referring to the goal of revising the loss tables to increase punishment "for more serious offenses" and to eliminate the adjustment for more than minimal planning).

[5] U.S. Sentencing Commission, Distribution of Sentences Across Applicable Sentencing Range (table).

[6] See id.

sufficiently punitive.

One reason why these statistics may fail to reflect the proposition that the current loss tables are insufficiently punitive is -- as members of the PAG have experienced -- many defendants who are considered by prosecutors to be serious white collar criminals are charged with money laundering under either 18 U.S.C. § 1956 or § 1957. The guideline range for such defendants, under § 2S1.1, is much higher, starting with a base offense level of 20. In light of the broad definition accorded to the money laundering statutes, virtually every fraud offense can be prosecuted as a money laundering case under either 18 U.S.C. § 1956 or § 1957.[7] Recognizing the disparate impact among defendants who commit similar crimes but are prosecuted under the money laundering statutes instead of the statute directly covering the specified unlawful activity, the Commission amended the money laundering guidelines in 1995 in order to tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds. Unfortunately, the money laundering amendment's fate became intertwined with the Commission's crack/powder amendment, which went to Congress at the same time, and Congress rejected both amendments.[8]

Contrary to popular perception, our admittedly-anecdotal experience is that many of the defendants engaging in large scale fraud are presently being prosecuted under the money laundering statutes, sentenced under § 2S1.1, and receiving ample sentences.[9] This phenomenon helps explain why defendants sentenced under §§ 2F1.1 and 2B1.1, even at the highest levels, might not be receiving sentences at the top of the range. It also highlights the problem with the "quick fix" approach reflected in the current proposals. Finally, the availability of money laundering charges for the major white collar criminals renders any deficiencies in the theft and

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[7] See, e.g., United States v. Paramo, 998 F.2d 1212 (3d Cir. 1993) (cashing and spending fraudulently obtained IRS refund checks constituted violation of § 1956(a)(1)(A) because it "promoted" the underlying embezzlement).

[8] See U.S. Sentencing Commission, Report to the Congress: Sentencing Policy for Money Laundering Offenses, including Comments on Department of Justice Report 9-10 (September 18, 1997).

[9] As the Commission noted in its Report to Congress, due to the Department of Justice's failure to disclose data regarding either the disposition of cases brought under § 1956, or prosecutions brought under § 1957, it is difficult to document the extent to which these charges have been used by prosecutor's to "up the sentencing ante" in economic crime cases. See id. at 14-15.

fraud guidelines for high-end offenders somewhat academic.[10]

The current debate over the loss tables also ignores the fact that when the guidelines were originally promulgated they reflected the notion that pre-guidelines sentences often did "not accurately reflect the seriousness of the offense." 28 U.S.C. § 992(m). In drafting the guidelines for particular offenses, the Commission considered "the average sentences imposed in such categories of cases prior to the creation of the Commission." Id. With regard to economic crimes, the Commission promulgated guidelines designed to subject defendants to even harsher sentences than those to which such defendants had previously been exposed. U.S.S.G. Ch. 1, Pt. A(3) (policy statement). Despite having already made the sentences in economic crime cases more severe than under the pre-guideline regime and despite a lack of any evidence that the initially promulgated guidelines were inadequate, the Commission again increased the severity of the fraud and theft loss tables, effective November 1, 1989, to, among other things, "provide additional deterrence and better reflect the seriousness of the conduct." See Amendment 99 and Amendment 154. Thus, the Commission is now poised to increase the sentences in economic crime cases for the third time since the inception of the guidelines. Such action seems particularly imprudent in light of the empirical evidence demonstrating that sentencing judges find the current guidelines sufficiently punitive.

If Forced to Choose, Option One is Far Superior to Option Two

With this background, we can examine the specific proposals being considered by the Commission. The result under both will be to increase sentences, even though judges who must sentence defendants do not find the present guideline levels inadequate. In light of the questionable assumptions underlying the loss debate, it would appear that any amendment to increase the loss guidelines is unjustified. However, if the Commission is nevertheless going to move forward with this process and adopt one of the two proposals, then Option One is far superior to Option Two because it better accomplishes the goal of increasing sentences for true mid- to high- range offenders.

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[10] This should not be construed as implicit support for the current money laundering guidelines. The PAG strongly supports the Commission's efforts to revise this guideline to tie offense levels more closely to the underlying conduct. However, there is no currently pending proposal to amend § 2S1.1 and, as a result, prosecutors continue to retain discretion to obtain higher sentences than would otherwise be available under the fraud or theft guidelines.

OPTION TWO

By the Commission's estimate, adopting the loss table set forth in Option Two would double the average sentence length in affected theft cases (from 7 to 14 months), would result in a 50% increase in average sentence length in affected fraud cases (from 12 to 18 months), and would result in a nearly 50% increase in the number of defendants who received a sentence of imprisonment in affected cases (from 58.6% to 84.5%).[11] While the amendment would affect less severely those defendants who currently fall within Zone A, there would still be an estimated 57.3% of those cases which would be affected by this proposed amendment. In those affected cases, the average sentence would increase from 0 months to 3 months. Option Two would affect approximately 80% of the defendants who currently fall within Zone B, and the average sentence would triple (from 2 months to 6 months). It would impact 90% of the defendants who currently fall within Zone C, and the average sentence would more than double (from 6 to 13 months).[12] The amendment would result in an approximate 18% decrease in defendants falling within Zone A, a 30% decrease in those falling with Zone B, a 5% decrease in those falling within Zone C, and a 34% increase in those falling within Zone D.[13] Option Two would require an additional 3734 prison beds within five years.[14]

OPTION ONE

Option One presents a slightly better picture. Under that scenario, the Commission estimates that there will be an increase in average sentence length in affected theft cases from 6 to 7 months, an increase in average sentence length in affected fraud cases from 13 to 16 months, and approximately an 11% decrease in the number of defendants who will receive a sentence which does not include imprisonment. Option One would require an additional 1592

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[11] U.S. Sentencing Commission, Amendment Impact Summary (Option Two).

[12] U.S. Sentencing Commission, Sentencing Impact of Proposed Changes to Theft, Fraud, and Tax Guidelines, Table 2 (Option Two).

[13] U.S. Sentencing Commission, Impact on Defendant's Sentence Zone Resulting From Proposed Changes to Theft, Fraud, and Tax Guidelines, Table 3 (Option Two).

[14] U.S. Sentencing Commission, Amendment Impact Summary (Option Two).

prison beds within five years.[15]

Although in Option One the offense levels do not increase over present levels until the loss reaches higher levels than in Option Two, adopting this option would still affect approximately two-thirds of those cases now falling within Zone A and B, and three-quarters of those cases now falling within Zone C. The average sentence of defendants falling in each of these zones would increase from 0 to 1 month for those in Zone A, and from 6 to 9 months for those in Zone C. There would be no change in the average sentence length for those falling in Zone B.[16] This option would cause an approximate 20% increase in defendants falling within Zone A, but a 30% decrease in defendants falling within Zone B and a 25% decrease in defendants falling within Zone C. There would be a 14% increase in defendants falling within Zone D.[17]

Conclusion

As the Commission considers the current proposals for increasing the loss tables in fraud, theft and tax cases, we urge the Commission to examine the underlying assumptions which are fueling the amendment fire. The fact that drug defendants may be receiving disproportionately heavier sentences than some "white collar criminals" reflects the excessively high sentences in drug cases, not the unjustifiably low sentences in theft and fraud cases. By adopting either of the two current proposals, the Commission would not only artificially and unnecessarily be increasing the sentences in these economic crime cases, but also legitimizing as a sentencing baseline the draconian and irrational sentencing scheme in drug cases.

Proposed Amendment #2: Cross-references to fraud and theft tables

In light of the lack of any empirical evidence supporting the need to increase sentences in any of these cases, the Commission should not take any action with regard to these cross-referenced offenses which would increase the sentences in such cases.

Comment on Proposed Guideline Amendment #3: Consolidation of Theft Fraud Property Destruction and Fraud Guidelines

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[15] U.S. Sentencing Commission, Amendment Impact Summary (Option One).

[16] U.S. Sentencing Commission, Sentencing Impact of Proposed Changes to Theft, Fraud, and Tax Guidelines, Table 2 (Option One).

[17] U.S. Sentencing Commission, Impact on Defendant's Sentence Zone Resulting From Proposed Changes to Theft, Fraud, and Tax Guidelines, Table 3 (Option One).

The PAG agrees in principle with the consolidation of the theft and fraud guidelines. The PAG agrees that theft and fraud offenses are conceptually similar and the prosecutor's charging selection, rather than the offense conduct, may determine whether the theft or fraud guideline will apply in any given case. The PAG does not agree with any aspect of this amendment which would increase penalties. Whether or not penalties should be increased for specific offense characteristics for particular types of cases should be the subject of a separate amendment and separate comment and discussion about those specific issues.

Amendment # 4: Definition of Loss

The PAG strongly supports Option 2 over Option 1. By providing the most specific rules possible regarding what is included within and excluded from the loss calculation, the courts will be provided with the maximum commentary available to assist in the resolution of the greatest variety of factual scenarios. Elimination of the current commentary and the promulgation of a dramatically simplified definition of loss such as that provided in Option 1 will, in the view of the PAG, lead to tremendous uncertainty with regard to issues previously believed settled. Because much of the current commentary which can be incorporated into Option 2 settles without uncertainty a number of important issues, the PAG favors the retention of those portions of the current commentary and with the approach embodied in Option 2 regarding additional guidance to the courts on specific issues.

Within Option 2, the PAG opposes the proposed specific offense characteristic (b)(8). Offenses with a primarily non-monetary objective or risk have previously been dealt with through departure. The PAG is unaware of any widespread dissatisfaction with this approach. Having a specific offense characteristic which limits such factors to a two-level increase may unduly hamper the flexibility needed for such matters. Moreover, under some circumstances the fact that the objective or risk of the offense is non-monetary may not justify any increase in offense of any level at all. Each case turns on its own facts. The PAG is particularly concerned with the proposed two-level increase if the offense "was committed for the purpose of facilitating another felony offense other than offense covered by this guideline." Given the range of conduct currently encompassed by the criminal law, and the myriad of factual circumstances which may fall within this specific offense characteristic, the PAG opposes the two-level specific offense characteristic increase. Depending on the nature of the other felony offense allegedly facilitated by the fraud or theft, and the peculiar factual circumstances of each case, a two-level increase in offense level may or may not be appropriate. The guideline will also foster considerable litigation in the effort to determine the circumstances in which a fraud or theft offense was actually committed for the purpose of facilitating some other offense. The PAG is unaware of any category of cases suggesting a need for this two-level specific offense characteristic.

The PAG also objects to a two-level increase where it is reasonably foreseeable that the offense will result in psychological harm or emotional trauma that is substantial or severe. The terms "substantial" and "severe" are terms of degree which do not lend themselves to uniformity in application. Virtually any theft or fraud offense will foreseeably result in psychological harm or emotional trauma. Because of the indefiniteness of terms such as "substantial" and "severe," there is a great likelihood of disparate application with respect to this adjustment. Finally, the PAG objects to a two-level increase where there is a foreseeable risk of substantial loss in addition to the loss that actually occurred. This language is not precise, and it seems likely that many different factual scenarios will, in hindsight, suggest a risk of substantial loss which was reasonably foreseeable.

In sum, the proposed Section 2B1.1(b)(8) appears contrary to the goal of simplification and the notion that loss serves only as a rough proxy for culpability. By adding these five separate and ambiguous factors to the list of issues which must be considered in every case because they are specific offense characteristics, considerable additional and needless complexity will occur. Moreover, the provision that a four-level upward adjustment must occur when two or more of these aggravating factors is present will only increase the stakes of this litigation and result in an additional and compounded complexity. For example, it seems difficult to imagine an offense in which the primary objective of the offense is non-monetary and yet the offense does not risk any substantial non-monetary harm. Accordingly, it would seem that all such "non-monetary" offenses will qualify for a four-level adjustment rather than merely a two-level adjustment. This type of specific offense characteristic adjustment is precisely the type of fact-intensive litigation which is likely to lead to its own common law of interpretation with respect to each new term, which ought to be avoided in the clarification of the definition of loss.

The PAG generally supports the proposed commentary regarding estimation of loss in the time of measuring loss and the credits against loss. With respect to interest, the PAG continues to believe that interest should not be included. Accordingly, the PAG supports Option A on the issue of interest. The PAG respectfully submits that defendants who fraudulently borrow money they promise and actually intend to repay, should not be punished more severely than a defendant who outright steals the same amount of money. Unpaid interest – whether "bargained for" or not – simply has nothing to do with the concept of loss. Instead, it is a measure of lost profit. Moreover, even if there were any connection between the amount of unpaid interest and a defendant's culpability, the added complexity of including such matters – which is likely to be a rather small component of the total loss figure in most cases – is not justified by any measurably increased accuracy in determining culpability or offense severity.

With respect to non-economic factors as departure considerations, the PAG supports the inclusion of such a list of

departure considerations. The PAG supports the use of Option A rather than Option B because Option B includes the proposed vague language regarding "false statements made for the purpose of facilitating some other crime," and "physical or psychological harm or severe emotional trauma." As discussed above with respect to the proposed specific offense characteristic, the PAG believes these terms are sufficiently vague that the potential for disparate application is great.

The PAG specifically urges the Commission to include as a departure consideration the language enumerated in Option A(E)(7). As we have previously stated, the concept of loss is the best initial starting point in determining offense severity and the defendant's level of culpability. Nevertheless, where gain differs significantly from loss, encouraged departures are essential. Unlike theft cases, in which gain is likely to match loss, fraud cases often present scenarios in which the defendant's gain bears no relation to the loss. In many cases in which there is dissatisfaction with the result obtained by looking only at loss, the PAG respectfully submits that the root cause of this dissatisfaction can be traced to a large variant between the loss and gain or intended gain. As a result, where the loss is minimal or zero but the defendant obtains a significant gain from criminal activity, an upward departure may be necessary and should be encouraged. By the same token, where the loss is extremely large but the defendant's gain is minimal or zero, the downward departure may be necessary and should be encouraged. Unless these departures are encouraged by the guidelines through language similar to that contained in Option A(E)(7), undue uniformity will likely result.

The PAG has the same comments with respect to the proposed revisions to Section 2F1.1 (Fraud) as our previously stated comments with respect to 2B1.1 (Theft).

Issues for comment:

The PAG offers the following comment on the issues for comment published by the Commission.

Standard of Causation: Although the PAG supports the inclusion of a "reasonable foreseeability" standard, this standard must be coupled with an additional limitation. First, as with the current definition of loss, "consequential damages" should be excluded. The inclusion of consequential damages within the definition of loss, it is respectfully submitted, frequently causes protracted litigation, uncertainty and disparity and application and, at the end of the entire process sheer speculation. In the interest of simplicity and ease of application, the PAG strongly opposes the use of consequential damages to calculate loss under the guidelines.

As a practical matter, evidence regarding consequential damages will almost never be within the possession of either the government or the defendant. Development of these factual issues will require large amounts of investigation, research, and

discovery from third parties. Determination of consequential damages, by the very "what if" nature of the inquiry, involves litigation of inherently complex issues which may have almost no factual connection to the conduct underlying the charged offense. This type of issue is a perfect candidate for treatment as a departure issue where consequential damages are out of proportion to the direct loss caused by the defendant's conduct.

The PAG strongly suggests that the issue of multiple causation also should be dealt with by the commentary and that the most realistic way to deal with the multiple causation issue is to permit a downward departure in unusual cases.

Intended Loss: The PAG agrees with Judge Tacha's reasoning in United States v. Galbraith, 20 F.3d 1054, 1059 (1994) (holding that "where the scheme could not possibly have resulted in the intended loss under any circumstances, then intended loss should not be used.") (citation and quotations omitted). If the Commission is intent on retaining the concept of "intended loss" without incorporating the economic reality condition, then it is essential that the guideline expressly encourage departures where the intended loss is completely unrealistic, or where it overstates or understates the defendant's culpability.

Proposed Amendment # 5: Deletion of More Than Minimal Planning Adjustment

The PAG, in theory, does not oppose a proposal that would incorporate more than minimal planning into the loss table. However, there are several caveats that should be noted. First, as noted above, we do not see any legitimate justification for increasing the sentences across the board in economic crime cases. Second, in light of the underlying assumption in such a proposal that these economic crime cases invariably involve more than minimal planning, there should be an available downward adjustment for those non-heartland offenses which actually do involve limited or insignificant planning, or simple efforts at concealment.

Issue for Comment # 6: Telemarketing Fraud

The PAG opposes any revision to the current guidelines which would provide an enhancement in cases simply because the offense involved "telemarketing." The PAG believes that the current guidelines are more than adequate in these cases.[18]

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[18] The PAG's views on this issue have been shaped, in large measure, by input that we received from H. Dean Steward, Directing Attorney, of the Santa Ana Office of the Federal Public Defender, Central District of California. That particular office, located in Orange County, has handled dozens of telemarketing cases. Indeed, that county and Newport Beach, in particular, are acknowledged by the FBI and Postal Inspection

. Telemarketing fraud generally

While it is true that these cases often involve unique types of harms, particularly regarding vulnerable victims, each unique harm is currently addressed by some aspect of the guidelines. For example, vulnerable victims are adequately addressed by the enhancement contained in § 3A1.1. Where there are a large number of victims (100+), or other unusual features to an offense, the court can always utilize an upward departure. The PAG's experience in general and Mr. Steward's experience in particular is that most of the cases are similar and routine, and not the type that call for an upward departure. In light of the lack of any empirical evidence that sentencing judges find the current guidelines insufficiently punitive in these cases, there is no basis for building in an additional enhancement to correspond to the statutory enhancement in 18 U.S.C. § 2326.

. Multiple Victims

The guidelines currently address in an adequate manner the fraud harm from telemarketing, including the multiple victim situation. As noted previously, if the situation is truly unusual or outrageous, an upward departure is always available. In addition, in every case, more victims means a greater dollar loss. The greater dollar loss adequately increases a defendant's sentence (particularly so if the Commission decides to adopt one of the pending amendments to further increase the severity of the tables) so that an increase for the number of victims is redundant, and perhaps even double counting.

. Re-victimization

In this area, the vulnerable victim enhancement is adequate to reflect the harm. The PAG agrees that "reloading" is particularly heinous conduct, and that the victims of these offenses are truly vulnerable; however the current vulnerable victim enhancement already directly addresses this particular harm. The PAG would not oppose an amendment to the guidelines which added commentary "to ensure that § 3A1.1 is applicable when the offense involves an individual susceptible to the offense because of prior victimization." And again, should the court find a particularly egregious case, the court can impose an upward departure.

. Departures

As set forth above, the PAG believes that upward and downward departures are the appropriate vehicle for providing relief in unusual cases. Our comments regarding the availability of such departures generally is applicable in this context as well.

Service to be the "boiler room capital of the United States."

. Sophisticated means

The PAG believes that the current guidelines provide sufficient punishment in telemarketing offenses, and that there is no need for any additional enhancement to fulfill the Senate's directive.

Proposed Amendment #7: Circuit Conflicts

(A) Aberrant Behavior

There is no need for a guideline amendment in this area. Under Koon, whether the trial court should depart is a fact intensive determination to be made by the court and the trial court is in the best position to determine whether under all the circumstances a single act of aberrant behavior warrants a downward departure.

(B) Misrepresentation with Respect to Charitable Organizations

We oppose this proposed amendment. We believe United States v. Frazier, 53 F.3d 1105 (10th Cir. 1995) is correctly decided and that §2F1.(b(3) should be interpreted to require that a defendant falsely represent that he has authority to act on behalf of the charitable, educational, religious or political organization or a governmental agency. No change in the Guidelines is necessary.

(C) Violation of Judicial Process

We oppose any change in the Guidelines as being unnecessary. If the Commission is persuaded that it must act, we favor Option 2--the minority view that the scope of the enhancement excludes fraudulent court filings.

(D) Grouping Failure to Appear Count with Underlying Offense

We support this proposed amendment as we believe United States v. Packer, 70 F.3d 357 (5th Cir. 1995), cert. denied, 117 S. Ct. 75 (1996) is wrongly decided.

(E) Imposters and the Abuse of Trust Adjustment

We oppose the proposed amendment and favor the adoption of the Issue for Comment: the Commission should amend §3B1.3 to expressly provide that the adjustment does **not** apply to an imposter. See United States v. Echevarria, 33 F.3d 175 (2d Cir. 1994).

(F) Instant Offense and Obstruction of Justice

We oppose any change in the Guidelines--this proposed amendment is unnecessary in light of the changes to the definition of "offense" under §1B1.1, Commentary, Application Note 1.(l). In the event the Commission feels the proposed amendment is absolutely necessary, we favor the minority view as presented in Option Two.

(G) Failure to Admit Drug Use While on Pretrial Release

We support this proposed amendment but recommend you strike the reference to Acceptance of Responsibility--strike "(e.g., §3E1.1 (Acceptance of Responsibility))." Acceptance of Responsibility should be awarded or not awarded based solely on the language in §3E1.1.

(H) Meaning of "Incarceration" for Computing Criminal History

We strongly favor Option Two which would exclude confinement in a community treatment center, halfway house, or home detention following revocation of parole, probation or supervised release from the definition of incarceration in determining a defendant's subsequent criminal history score.

(I) Diminished Capacity

We favor Option Four--eliminate the "non-violent offense" element. We have never understood the logic of not allowing for a downward departure based on diminished capacity for any type of offense. If a defendant, regardless of the type of offense, suffered from a significantly reduced mental capacity at the time of the offense, he/she is less blameworthy than a defendant who acted with full intent and no mental impairment. There never has been, in the area of the insanity defense or a defense of lack of intent based on diminished capacity, a distinction between non-violent and violent offenses **for purposes of guilt or innocence.** Likewise, there should be no distinction for purposes of sentencing. In short, where a defendant shows **in any case** diminished capacity he/she should be eligible for, in the discretion of the sentencing court, a downward departure.

Proposed Amendment # 7(A)-Issue for Comment.

We favor an amendment to Policy Statement 5K2.0 to incorporate the analysis and holding of the Supreme Court in Koon. As to specific language, the PAG recommends that the Commission incorporate the specific language used by the Supreme Court in the Koon case in determining whether a specific sentencing factor is a basis for a departure.

Proposed Amendment # 8: Issue for Comment (Homicide)

These issues for comment present very complex issues in regards to sentencing for homicide offenses. The Commission should wait until it has a full compliment of members before considering wholesale changes to the Sentencing Guidelines in the areas of second degree murder, voluntary manslaughter and involuntary manslaughter.

Proposed Amendment #9: Electronic Copyright Infringement

We have no objection to the Department of Justice's approach as it appears to be a fair response to the Congressional directive to the Sentencing Commission.

Proposed Amendment #10: Offenses Against Property of National Cemetery

We have no objection to the proposed amendment.

Proposed Amendment #11: Expansion of Prohibited Person in Firearm Guideline

We do not oppose the first part of the two-part proposed amendment--(A), dealing with definitional changes. We oppose the second part--(B), dealing with the offense levels, as being premature unless and until the Senate passes legislation which would increase the base offense level for a defendant who knowingly sells to a prohibited person.

Proposed Amendment #12: Conditions of Probation and Supervised Release

We do not oppose any part of the proposed three-part amendment.

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On behalf of the Practitioners' Advisory Group, we thank you for allowing us to comment on the Proposed Amendments and Issues for Comment and we look forward to working with the Commission during this amendment cycle.

Sincerely,

Fred Warren Bennett

Fred Warren Bennett
Chairman
Practitioners' Advisory Group

004-98

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March 10, 1998

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

Written Testimony and Comments

Dear Sir or Madam:

I am enclosing my written testimony regarding the proposed regarding the changes in the Fraud guidelines, published on January 6, 1998, in the Federal Register.

Thank you for your prompt attention to this matter. Please distribute copies as appropriate.

And, please direct any questions to my attention.

Sincerely yours,

John L. Davidson

Written Testimony
of
John L. Davidson, Esq.
John L. Davidson, P.C.
8015 Forsyth Avenue
Saint Louis, Missouri 63105
314-725-2898

I defend people charged with white collar crimes. Since before 1990 much of my practice has been concentrated in the defense of what another Missourian has, paraphrasing Mark Twain, called America's second native criminal class. They are a criminal class if you read the press releases of the Department of Justice, the newspapers, and pay no attention to either the facts or the law. That class, real estate developers and bank and savings and loan officers and directors, are the targets of the proposal before the Commission to lengthen sentences by making changes in the fraud tables and through other mischief, all for the purpose of increasing sentence length.

I neither support the existing approach of the Guidelines nor do I support the changes proposed by the Commission. Rather, I write to urge the Commission to abandon the entire present approach of the guidelines, with its emphasis on money and incarceration, even for first time offenders. Instead, the Commission should put in place a series of guidelines that focus on: (1) the intent and motives of the defendant; (2) the extent to which the defendant's conduct has departed from occupational norms; and (3) the known or reasonably foreseeable to the defendant, impact on the victim.

While I am no legal historian, I believe that we have a legal system that through about 800 years of intellectual development has come to understand that the moral authority to punish arises only in response to the motive and intent of the offender. A few days ago, in a different context, the Supreme Court reaffirmed this first truth, unanimously. *Kawaauhauet v. Geiger*, ___

U.S. ___, No. 97-115, March 3, 1998. *See also Eddings V. Oklahoma*, 455 U.S. 104 (1982)

Against that first truth is juxtaposed the first flaw of the fraud guidelines and that is its heads the government wins tails the defendant loses approach to loss, all worked by the rule that the amount of loss is the greater of the actual or intended loss. § 2 F 1.1 Application Note 7. This proposition makes both intent and motive irrelevant in the cases where its should have the most impact[1], including the following kinds of cases:

> Those cases of fraud committed by policy-making officials for the corporation, especially when the gist of the prosecution is that the defendant used poor business judgment. An example would be when a bank officer makes a loan which someone later determines was undercollateralized. *E.g., U.S. v. Pribble*, 127 F.2d 583, 593[13](7th Cir. 1997(bank president criminally liable under 18 U.S.C. § 1344 because he "should have known" that the loan's collateral was insufficient).
>
> All cases in which the government relies upon a wilful blindness instruction to obtain a conviction. *Sans* extraordinary circumstances, if the government has to resort to a wilful blindness instruction to obtain a fraud conviction, imprisonment ought not to be a sentencing option. The Securities Laws have long so provided, a Congressional policy which prosecutors routinely step around by indicting, instead, for wire or mail fraud.
>
> All cases in which the government relies upon a recklessness instruction to obtain a conviction. *U.S. v. Ely*, 124 F.3rd 1026, 1033 [12] (9th Cir. 1997)(opinion withdrawn from publication) ("Reckless disregard equally satisfies the intent required under § 1344).

In all of these instances, the focus of the Commission on loss, without regard to intent or motive[2], makes the Commission's approach unsatisfactory. As Holmes observed, even a dog knows the

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[1] Contrary to those who want to lump fraud and theft together, white collar crime is an area in which more rigid procedures are needed to render the classifications of maximum value. *See generally* Geis and Meier, *White Collar Crime Offenses in Business, Politics, and the Professions* 284 (1977).

[2] My choice of both words is deliberate. *See generally* Prosser and Keeton on Torts § 8, at 35 (5th Ed. 1984)(discussing the distinction). It seems to me that, as to loss, that motive and intent can be the same or different and that the guidelines should recognize those cases in which the distinction does make a difference as to the culpability of the defendant.

difference between being tripped over and being kicked. *Prosser and Keeton on Torts* § 8, at 33 (5th Ed. 1984). Where is that distinction made in the fraud guidelines? Why doesn't the Commission recognize the difference?

My second objection to the loss approach is that it is wholly illogical, which is illustrated by a simple robbery example. Assume that D plans to stop an armored truck and to rob its driver and guard, at gun point, of the on-board cash. D picks a truck that, so far as he knows, only distributes cash to small retail stores in a less well to-do part of town. D picks this truck because it carries little money and therefore the least experienced staff and for other reasons doing with his ability to carry out the scheme in the that part of town where the truck operates. Generally the truck carries no more than $50,000, which the defendant knows. Unknown to the Defendant, on the day of the robbery, the truck has on board an additional $10,000,000, destined to the local Federal Reserve Bank for destruction and replacement with new currency. What logical connection does the amount of loss in this case have to do with the sentence this defendant should receive? Did the Defendant intend to steal every dollar on the armored truck?You bet. Any argument for an increased sentence based on his taking the $10,000,000 is only punishing him for his dumb luck. On seeing his bonanza, is the defendant going to pull out his pocket copy of the guidelines and calculate his added sentence? Is not such an approach to sentencing arbitrary? Everything you need to know is known, without regard to the amount of loss. Those who want to quarrel with this proposition should consider the opposite example in which D expects $10,000,000 to be on board but finds only $50,000, because at the last minute the money was sent on a different truck with a more experienced crew. Should this bad fortune result in a reduced sentence, because only $50,000 was available to be stolen? The Commission's guidelines say heads the government wins and the Defendant gets a longer sentence, because he

intended to steal more. It seems to me that both defendants intended the same thing–to steal all the money on the truck--and both should be punished equally.

Other facets of the proposed amendments warrant discussion. First, *sans* any empirical or other supporting evidence, the given reason for change is to result in longer sentences. Like the weather, most every one deploring the present state of our society will sooner or later draw attention to our society's obsession with money. Is not the use of a loss table to determine a sentence likely to only reinforce that negative? And, if someone things our society's obsession with money is not an ill, then they might want to reflect on the following Old Testament passage, which reflected the values of that society and a far different approach to the punishment of cheats and frauds. Leviticus 6:1

> The Lord said to Moses: If anyone sins and is unfaithful to the Lord by deceiving his neighbor about something entrusted to him or left in his care or stolen, of if he cheats him or if he finds lost property and lies about it, or if he swears falsely, or if he commits any such sin that people may do–when he thus sins and becomes guilty, he must return what he has stolen or taken by extortion, or what was entrusted to him, or the lost property he found, or whatever it was he swore falsely about. He must ***make restitution in full, add a fifth*** of the value to it and give it all to the owner on the day he presents his guilt offering. And as a penalty he must bring to the priest, that is , to the Lord, his guilt offering, a ram from the flock, one without defect and of the proper value.

What aspect of our society calls for and makes it appropriate to discuss punishments for cheating or fraud far exceeding that counseled by the Old Testament? What wisdom have we accumulated that better informs us about making judgments about the morality of punishment?

Second is the matter of the combination of the theft and fraud charts or guidelines or both. Apparently this enjoys some academic support. This argument reminds me of the law school professor's reply when asked how a trial court would respond to the proffer of a certain piece of evidence. The professor had to admit that he had no idea what would happen because he

had no idea how the rules and laws were actually applied. I always remind myself of this wisdom by recalling the title of a James W. McElhaney article on the Cleveland exception to the hearsay rule.

There are real life or as applied differences between fraud and theft. Often that difference lies in the conduct of the victim. With the possible exception of actively forged documents, in a commercial setting, it is hard for a fraud to happen without the active interplay of negligence or inattention on the part of the victim. In my experience, theft and fraud defendants are frequently very different kinds of people, coming from different backgrounds, and likely to be differently impacted by a conviction. Generally speaking, a fraud conviction means a lifetime bar of the defendant from his or her chosen occupation. Nor can the impact of conviction or threat of conviction on the fraud defendant, his or her family and friends, be overstated. Fraud prosecutions are like tornados spinning through lives.

Last, brief attention needs to be paid to the impact of the loss on the victim. Presently, the guidelines provide for an upward adjustment for a vulnerable victim, but only for 2 levels. However, the Guidelines wholly fail to consider the foreseeable impact of the loss on the victim. Thus, the guidelines treat cheating $2,000 out of the government the same as cheating a college student of $2,000 saved by working summer jobs and intended to be used only to pay for year tuition at a junior college or the defrauding of a retired person of a substantial part of his or her life savings, which can't be replaced. When a defendant knows that a special injury like this is likely to occur, that fact ought to be considered in setting the sentence. However, care must be taken to avoid inappropriate stereotypes. For example, though not understood by prosecutors, many if not most of our older citizens are not vulnerable, when it comes to financial matters.

of an ephah[g][a] of fine flour[b] for a sin offering. He must not put oil or incense on it, because it is a sin offering. 12He is to bring it to the priest, who shall take a handful of it as a memorial portion[c] and burn it on the altar[d] on top of the offerings made to the LORD by fire. It is a sin offering. 13In this way the priest will make atonement[e] for him for any of these sins he has committed, and he will be forgiven. The rest of the offering will belong to the priest,[f] as in the case of the grain offering.[g]' "

The Guilt Offering

14The LORD said to Moses: 15"When a person commits a violation and sins unintentionally[h] in regard to any of the LORD's holy things, he is to bring to the LORD as a penalty[i] a ram[j] from the flock, one without defect and of the proper value in silver, according to the sanctuary shekel.[h][k] It is a guilt offering.[l] 16He must make restitution[m] for what he has failed to do in regard to the holy things, add a fifth of the value[n] to that and give it all to the priest, who will make atonement for him with the ram as a guilt offering, and he will be forgiven.

17"If a person sins and does what is forbidden in any of the LORD's commands, even though he does not know it,[o] he is guilty and will be held responsible.[p] 18He is to bring to the priest as a guilt offering[q] a ram from the flock, one without defect and of the proper value. In this way the priest will make atonement for him for the wrong he has committed unintentionally, and he will be forgiven.[r] 19It is a guilt offering; he has been guilty of[i] wrongdoing against the LORD."[s]

6 The LORD said to Moses: 2"If anyone sins and is unfaithful to the LORD[t] by deceiving his neighbor[u] about something entrusted to him or left in his care[v] or stolen, or if he cheats[w] him, 3or if he finds lost property and lies about it,[x] or if he swears falsely,[y] or if he commits any such sin that people may do— 4when he thus sins and becomes guilty, he must return[z] what he has stolen or taken by extortion, or what was entrusted to him, or the lost property he found, 5or whatever it was he swore falsely about. He must make restitution[a] in full, add a fifth of the value to it and give it all to the owner on the day he presents his guilt offering.[b] 6And as a penalty he must bring to the priest, that is, to the LORD, his guilt offering,[c] a ram from the flock, one without defect and of the proper value.[d] 7In this way the priest will make atonement[e] for him before the LORD, and he will be forgiven for any of these things he did that made him guilty."

The Burnt Offering

8The LORD said to Moses: 9"Give Aaron and his sons this command: 'These are the regulations for the burnt offering[f]: The burnt offering is to remain on the altar hearth throughout the night, till morning, and the fire must be kept burning on the altar.[g] 10The priest shall then put on his linen clothes,[h] with linen undergarments next to his body,[i] and shall remove the ashes[j] of the burnt offering that the fire has consumed on the altar and place them beside the altar. 11Then he is to take off these clothes and put on others, and carry the ashes outside the camp to a place that is ceremonially clean.[k] 12The fire on the altar must be kept burning; it must not go out. Every morning the priest is to add firewood[l] and arrange the burnt offering on the fire and burn the fat[m] of the fellowship offerings[j][n] on it. 13The fire must be kept burning on the altar continuously; it must not go out.

The Grain Offering

14" 'These are the regulations for the grain offering:[o] Aaron's sons are to bring it before the LORD, in front of the altar. 15The priest is to take a handful of fine flour and oil, together with all the incense[p] on the grain offering,[q] and burn the memorial portion[r] on the altar as an aroma pleasing to the LORD. 16Aaron

5:11 [a] S Ex 16:36 [b] S Lev 2:1
5:12 [c] S Lev 2:2 [d] Lev 2:9
5:13 [e] S Ex 32:30 [f] Lev 2:3 [g] S Ex 29:41
5:15 [h] S Lev 4:2 [i] Lev 22:14 [j] S Ex 29:3; Lev 6:6; Nu 5:8; 6:14; 15:6; 28:11 [k] S Ex 30:13 [l] ver 16,18; Lev 6:5,6; 7:1, 7; 14:12-17; 19:21,22; Nu 6:12; 18:9; 1Sa 6:3; Ezr 10:19; Isa 53:10
5:16 [m] Lev 6:4 [n] ver 15; Lev 27:13; Nu 5:7
5:17 [o] ver 15 [p] S ver 1
5:18 [q] Lev 6:6; 14:12 [r] S ver 15
5:19 [s] 2Ki 12:16
6:2 [t] Nu 5:6; Ps 73:27; Ac 5:4; Col 3:9 [u] Lev 19:11; Jer 9:4,5 [v] S Ex 22:7 [w] S Ge 31:7
6:3 [x] S Ex 23:4 [y] S Ex 22:11
6:4 [z] Lev 5:16; Eze 33:15; S Lk 19:8
6:5 [a] Nu 5:7 [b] S Lev 5:15
6:6 [c] S Lev 5:15 [d] Nu 5:8
6:7 [e] S Ex 32:30
6:9 [f] Lev 7:37 [g] ver 12
6:10 [h] S Ex 39:27 [i] Ex 28:39-42, 43; 39:28 [j] S Lev 1:16
6:11 [k] S Lev 4:12
6:12 [l] S Lev 1:7 [m] S Ex 29:13 [n] S Ex 32:6
6:14 [o] S Lev 2:1; Nu 6:15; 15:4; 28:13
6:15 [p] S Lev 2:1 [q] Lev 2:9 [r] S Lev 2:2

[g] *11* That is, probably about 2 quarts (about 2 liters)
[h] *15* That is, about 2/5 ounce (about 11.5 grams)
[i] *19* Or *has made full expiation for his*
[j] *12* Traditionally *peace offerings*

5:15 *guilt offering.* See further priestly regulations in 7:1–6 (see also Isa 53:10). Traditionally called the "trespass offering," it was very similar to the sin offering (cf. 7:7), and the Hebrew words for the two were apparently sometimes interchanged. The major difference between the guilt and sin offerings was that the guilt offering was brought in cases where restitution for the sin was possible and therefore required (v. 16). Thus in cases of theft and cheating (6:2–5) the stolen property had to be returned along with 20 percent indemnity. By contrast, the sin offering was prescribed in cases of sin where no restitution was possible. The animal sacrificed as a guilt offering was always a ram.

6:3 *lost property.* See Dt 22:1–3.

6:6 *to the priest, that is, to the LORD.* Sacrifices were brought to the Lord, but priests were his authorized representatives.

6:8–7:36 Further regulations concerning the sacrifices, dealing mainly with the portions to be eaten by the priests or, in the case of the fellowship offering, by the one offering the sacrifice.

6:9 *burnt offering.* See ch. 1; Nu 15:1–16 and notes.

6:13 The perpetual fire on the altar represented uninterrupted offering to and appeal to God on behalf of Israel.

6:14 *grain offering.* See ch. 2 and notes.

[43]

argue that because the plaintiffs seek wide-ranging, wholesale institutional reforms of California's prison system, the suit is against the state and thus falls outside the bounds of *Ex parte Young*. No court, however, has carved out an exception to *Ex parte Young* on the basis of the complexity and scope of the prospective injunctive relief sought. To the contrary, many courts have permitted suits to proceed under *Young* where plaintiffs sought comprehensive relief similar to the reforms the plaintiffs seek here. *See, e.g., Committee to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 307, 309–10 (9th Cir.1993) (rejecting Eleventh Amendment immunity claim where defendants were required to devise a remedial plan to remove contaminants); *Parents for Quality Educ. with Integration, Inc., v. Indiana*, 977 F.2d 1207, 1209–11 (7th Cir. 1992) (allowing suit seeking widespread educational reforms against state officials), *modified on other grounds*, 986 F.2d 206 (7th Cir.1993). We, too, see no basis for creating such an exception.

[5] The defendants also maintain that *Ex parte Young* is limited to violations of federal constitutional law and does not permit suits to remedy statutory violations. This argument is without merit. We have held squarely that *Young* applies to suits alleging violations of federal statutes. *See Natural Resources Defense Council v. California Dep't of Transp.*, 96 F.3d 420, 422–23 (9th Cir.1996) (stating that *Young* "applies to violations of federal statutory law" and permitting suit under *Young* for violations of the Clean Water Act); *Almond Hill Sch. v. United States Dep't of Agric.*, 768 F.2d 1030, 1034 (9th Cir.1985) ("The underlying purpose of *Ex parte Young* seems to require its application to claims against state officials for violations of federal statutes.").

Sovereign immunity presents no bar to this suit against state officials seeking prospective injunctive relief against ongoing violations of the ADA and RA in the state penal system. The district court thus correctly denied the defendants' motion for summary judgment.

V. CONCLUSION

Because we conclude that the ADA and RA apply to inmates and parolees in the state penal system and that this suit may proceed in federal court under the doctrine of *Ex parte Young*, we affirm the judgment of the district court.

AFFIRMED.

UNITED STATES of America, Plaintiff–Appellant,

v.

Robert S. ELY, Defendant–Appellee.

UNITED STATES of America, Plaintiff–Appellee,

v.

Robert S. ELY, Defendant–Appellant.

UNITED STATES of America, Plaintiff–Appellee,

v.

Ralph E. WHITMORE, Jr., Defendant–Appellant.

UNITED STATES of America, Plaintiff–Appellant,

v.

Ralph E. WHITMORE, Jr., Defendant–Appellee.

UNITED STATES of America, Plaintiff–Appellee,

v.

William S. SWAIN, Defendant–Appellant.

UNITED STATES of America, Plaintiff–Appellee,

v.

H. Derrell SMITH, Defendant–Appellant.

Nos. 96–30070, 96–30072, 96–30073, 96–30130, 96–30074, 96–30075.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 17, 1997.

Decided Aug. 28, 1997.

The United States District Court for the District of Alaska, H. Russel Holland, J.,

[44]

dismissed several counts of indictment charging defendants with bank fraud, but denied defendants' motions to dismiss indictment on double jeopardy grounds. Government and defendants cross-appealed. The Court of Appeals, Noonan, Circuit Judge, held that: (1) as a matter of first impression in its circuit, reckless disregard satisfies intent required under bank fraud statute; (2) indictment adequately alleged that defendants deprived bank of property; (3) false pretenses were adequately alleged in counts charging defendants with entry of false statements in bank records; (4) indictment stated charge of making, as bank director, false entries in bank records; (5) indictment charged crime under provision of bank fraud statute making it a crime to defraud financial institution; and (6) double jeopardy did not bar prosecutions.

Reversed in part and affirmed in part.

1. Banks and Banking ⇐509.10

Indictment adequately alleged that bank fraud defendants deprived bank of property when it alleged that defendants, who were directors of bank, fraudulently arranged to postpone payment of loans they had each received from bank to buy different bank's stock, in that defendants, if they acted as alleged, would have deprived bank of property by preventing it from collecting loans and interest due and by arranging for bank to create further credit in defendants' favor that would pay interest due. 18 U.S.C.A. § 1344.

2. Banks and Banking ⇐509.10

To deprive bank of property, bank fraud defendant does not have to move cash out of its vaults; defendant can deprive bank of property by preventing its collection of debts that are due or by arranging for bank to credit him or her with payment not made.

3. Banks and Banking ⇐509.10

Indictment alleging that defendants acted with intent to obtain credits from bank by false pretenses sufficiently alleged intent element of bank fraud. 18 U.S.C.A. § 1344.

4. Banks and Banking ⇐509.10

False pretenses were adequately alleged in indictment charging defendants, who were bank's directors, with entry of false statements in bank records in connection with loan renewals, based on alleged omission of vital fact that purpose of loan renewals was to enable defendants to acquire different bank. 18 U.S.C.A. § 1005.

5. Banks and Banking ⇐509.10

Statement may be false, for purposes of statute prohibiting false entries in bank records by bank director, if vital fact is omitted. 18 U.S.C.A. § 1005.

6. Banks and Banking ⇐509.10

Indictment stated charge of making, as bank director, false entries in bank records when it alleged that defendants, who were bank directors, caused other directors to make false borrowers' agreements and, knowing their falsity, caused false agreements to be entered on bank's books. 18 U.S.C.A. § 1005.

7. Banks and Banking ⇐509.10

Mere making of false promise as borrower, knowing that promise would be entered on bank's books, is not within scope of statute prohibiting bank directors and other representatives from making false entries in bank's records. 18 U.S.C.A. § 1005.

8. Banks and Banking ⇐509.10

Counts of indictment charging defendant with making, as bank director, false entries in bank records had to be dismissed as to acts that occurred when defendant was not director, inasmuch as mere making of false promise as borrower, knowing that promise would be entered on bank's books, was not within scope of governing statute. 18 U.S.C.A. § 1005.

9. Banks and Banking ⇐509.10

Indictment failed to charge crime under provision of bank fraud statute prohibiting execution of scheme to obtain bank property through fraudulent means when it alleged scheme by bank directors to cause bank to pay "massive and unprecedented dividends," but did not set out how alleged false representations were means by which disbursement of dividends was achieved. 18 U.S.C.A. § 1344(2).

10. Banks and Banking ⇐509.10

Indictment alleging that defendants, who were bank's directors, declared large dividends with reckless disregard for payments' effect on bank charged crime under provision of bank fraud statute making it a crime to defraud financial institution; fraud consisted of reckless disregard by fiduciaries of property committed to their care, and reckless disregard satisfied intent required under statute. 18 U.S.C.A. § 1344(1).

11. Banks and Banking ⇐509.15

Reckless disregard is equivalent of intent to defraud bank theft statute applicable to bank employees. 18 U.S.C.A. § 656.

12. Banks and Banking ⇐509.10

Reckless disregard satisfies intent required under bank fraud statute. 18 U.S.C.A. § 1344.

13. Double Jeopardy ⇐181

Double jeopardy clause did not bar prosecution of bank directors for bank fraud, despite civil action based on same acts in which Federal Deposit Insurance Corporation (FDIC) sought punitive damages against directors, in that FDIC was acting only as receiver of failed institution in civil action, and not as the United States, and thus the United States was not party to civil action. U.S.C.A. Const.Amend. 5.

Joseph W. Bottini, Assistant United States Attorney, Anchorage, AK, for plaintiff-appellant-appellee.

William Bankston, Bankston and McCollum, Anchorage, AK, and Walter Share, Seattle, WA, for defendant-appellant McSwain.

James H. McComas, Friedman Rubin, White, Anchorage, AK, for defendant-appellee-appellant Ely.

Ronald A. Offret, Anglietti & Offret, Anchorage, AK, for defendant-appellant Smith.

Rich Curtner and Kevin F. McCoy, Assistant Federal Public Defenders, Anchorage, AK, for defendant-appellant Whitmore.

Appeal from the United States District Court for the District of Alaska; H. Russel Holland, District Judge, Presiding. D.C. Nos. CR-94-00136-5-HRH, CR-94-00136-1-HRH, CR-94-00136-4-HRH, CR-94-00136-3-HRH.

Before: WALLACE, JOHN T. NOONAN, and THOMPSON, Circuit Judges.

NOONAN, Circuit Judge:

The United States appeals the dismissal of certain counts of an indictment charging the named defendants with various forms of fraud on Alaska Statebank (Statebank), a federally-insured bank of which they were directors. The district court ruled that the counts in question stated bad banking practices but did not charge crimes. Reviewing the sufficiency of the allegations in the indictment as a matter of law, and of course not determining the truth of the allegations, we agree with the district court that certain counts failed to charge one non-director with a crime but we also hold that otherwise the dismissed counts did sufficiently set forth crimes under 18 U.S.C. § 1344 and § 1005, and § 2 and § 371. Addressing a question of first impression in this circuit, we further hold that a charge of "reckless disregard" of bank property adequately charges the bank's directors with a violation of § 1344. Accordingly, we reverse the judgment of the district court and reinstate the dismissed counts. We affirm the judgment of the district court that the indictment does not violate the constitutional prohibition against double jeopardy.

THE INDICTMENT

In the second superseding indictment of March 1, 1995, the grand jury charged, in substance, as follows:

Ralph E. Whitmore, Jr., chairman of Statebank, entered into a conspiracy with H. Derrell Smith, president and director of the bank, and three other directors, Robert C. Ely, Thomas J. Miklautsch, and William A. Swain. The object of the conspiracy was to obtain funds from Statebank by which Whitmore could buy the stock of Alaska National Bank of the North (ANBN). The conspiracy began in 1984 with loans by Statebank of $500,000 apiece to Ely, Miklautsch, Swain

and one other director (The Director Stock Loans). The loans were renewed in 1985 and 1986. A substantial part of the loans and the renewals was unsecured. The means of obtaining the renewals consisted in false representations to Statebank and false entries on the books of Statebank. The conspiracy deprived Statebank of property and benefited the conspirators. Their agreement and actions violated 18 U.S.C. § 1344, which provided:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Their actions also violated 18 U.S.C. § 1005, which at the time provided:

> Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank
>
> . . .
>
> makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System -
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.
>
> * * * * * *

Their actions also abetted the charged crimes in violation of 18 U.S.C. § 2 and constituted a conspiracy in violation of 18 U.S.C. § 371.

Further, the indictment charged that in 1987 the named defendants (except for Ely, no longer a director) executed a scheme to defraud Statebank by recklessly causing the bank to pay $2.7 million in dividends in violation of §§ 1344 and 2.

Such were the crimes alleged to have been committed by the defendants.

PROCEEDINGS

The district judge had presided over civil litigation against the defendants conducted by the Federal Deposit Insurance Corporation (the FDIC) as receiver of Statebank. The criminal case was assigned to the same judge, who was thus thoroughly familiar with the principals and the principal events in the case. The defendants moved to dismiss certain counts. The magistrate judge, to whom their motions were referred, recommended denial. The district judge, however, in two thoughtful memoranda, comprehending the core of the indictment, granted the dismissal of Count 7 charging the conspiracy to get Statebank funds to purchase the ANBN stock; Counts 8, 9 and 10 charging bank fraud in execution of the conspiracy; Counts 11, 12, and 14–19, charging false entries in execution of the conspiracy; and Counts 21, 22, 23 and 24 charging bank fraud in the declaration of dividends.

The district court laid two foundations for the dismissals of Counts 8–10:(1) To establish bank fraud, the government had to allege and prove a "specific intent to defraud a bank of money or property"—so, the district court reasoned, § 1344 should be construed in parallel with the mail fraud statute, 18 U.S.C. § 1341, as interpreted by *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). The district court not only found no such intent charged but noted that the indictment, ¶ 7.19, declared that the defendants "acted with intent to defraud Alaska Statebank, that is with intent to deceive ordinarily in order to bring about a financial gain to oneself *but not necessarily to harm or cause economic loss to the bank.*" (emphasis added). The specific intent to deprive Statebank of property appeared to be implicitly negated by the italicized words. (2) Counts 8, 9 and 10 alleged that the defen-

dants fraudulently arranged to postpone payment of the loans they had each received from Statebank to buy the ANBN stock. The district court held as to the scheme alleged in the indictment: "this extension of credit was for accruing interest. No money left the bank, although a debt to the bank was plainly created. The bank did not profit from interest it was due on the original stock purchase loans, but the scheme to further the acquisition of ANBN through the renewal of the original, nonfraudulent loans did not result in further money or property passing out of Alaska Statebank. The court holds that Alaska Statebank was not wronged criminally in its property interests through this kind of 'churning' of bank assets so as to keep the original shareholder loans current."

For these two reasons the district court dismissed Counts 8, 9 and 10. The court then turned to Counts 11 through 19 alleging false statements in violation of 18 U.S.C. § 1005. The court interpreted the statute as not criminalizing omissions. The court relied on "the somewhat dated" case of *Coffin v. United States*, 156 U.S. 432, 463, 15 S.Ct. 394, 406, 39 L.Ed. 481 (1895). In Count 11 the defendants were charged with causing the entry of the statement "the additional funds are a necessary injection of capital to enable expansion of business enterprises" and in Count 12 they were charged with causing the entry of the statement that the funds were needed "to maximize [the borrowers] investment." Neither statement, the court concluded, was false except by omission. Consequently, no crime was charged and Counts 11 and 12 should be dismissed.

The court upheld Count 13 and went on to Counts 14 through 19, each of which charged the defendants with causing false entries in the books of Statebank "in that Ralph E. Whitmore, Jr., and H. Derrell Smith caused Thomas J. Miklautsch, William A. Swain and Robert C. Ely, each to sign two Applications for Modification of Loans representing their purported agreements to repay both parts of the stock loans as renewed a second time with interest when, in truth and fact, as each defendant well knew, these agreements were false...." The court ruled that the applications had been executed by the applicants in their capacity as borrowers, not directors. As borrowers, they said they would repay the loans and the interest due. When their representations as borrowers were entered on the books of the bank, nothing untrue was entered; the representations they had made were accurately recorded; as directors, they did not make false entries on Statebank's books. Section 1005 applied only to officers, directors, employees or agents of a bank, not to its borrowers. Consequently no crime was alleged. Counts 14 through 19 were dismissed.

The corollary of dismissing the counts charging the execution of the conspiracy was the dismissal of the conspiracy count itself, Count 7, to the extent that the predicate acts of Count 7 were the bank fraud and false statement counts. As a result, as the district court said, "the government's conspiracy count is in essence a nullity."

The district court also dismissed Counts 21 through 24 of the indictment alleging bank fraud in violation of § 1344 on the part of Whitmore, Smith, Miklautsch and Swain. The indictment stated that during 1987, while Statebank was losing millions of dollars, the defendants declared $2.7 million in dividends "with reckless disregard" for the effect on Statebank. The district court ruled that the counts charged the systematic ignoring of "good banking practices" but no fraud. Everyone knew what was going on. Whitmore with the aid of the other defendants was apparently "able to do whatever he wished" at Statebank. He did "not have to engage in false or fraudulent pretenses, representations, or promises." The indictment's allegations of fraud were negated by the indictment's own description of the openness of the conduct carried out. "Bad judgment, bad banking, arrogance"—all these faults might be found by the FDIC but no criminal conduct was charged. What the defendants had been doing "had to be obvious to everyone; and it was equally obvious that the harm was done when the initial stock purchases were made, not from what followed."

The court added its own commentary on the situation in which the charged activities had arisen. In the 1980's real estate speculation "was rampant in the Anchorage commu-

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nity," fueled by oil development in Alaska. The crash in the world market for oil "burst the bubble of real estate speculation." As a consequence many banks in Alaska failed, among them ANBN and, near the end, Statebank. The FDIC took over as receiver and began to sue the responsible officers civilly. The civil actions, the court implied, were sufficient redress for the unsound, but not criminal, banking practices which a sudden spin in the wheel of fortune had made open to recrimination and harsh criticism. The court, however, denied the defendants' motions to dismiss the indictment on the ground of double jeopardy.

The government appeals all of the dismissals. The defendants appeal the denial of their double jeopardy motions.

ANALYSIS

[1, 2] The Fraudulent Loan Renewals. Counts 8, 9 and 10 adequately alleged that the defendants deprived Statebank of property. Loans and interest were due from the defendants. Instead of collecting, Statebank was manipulated not to collect and was manipulated to extend further credit without security. To deprive a bank of property you do not have to move cash out of its vaults. You deprive a bank of property if you prevent its collection of debts that are due or if you arrange for the bank to credit you with a payment you have not made. That is what these defendants are alleged to have done, to have prevented Statebank from collecting loans and interest that were due and to have arranged for Statebank to create further credit in their favor which would pay the interest due. As § 1344 specifies, it is a crime to obtain bank credits by false pretenses.

[3] The district court focused on the awkward and ungrammatical, if not unintelligible, phrase in ¶ 7.19 of the indictment that the defendants acted "with intent to deceive ordinarily in order to bring about a financial gain to oneself but not necessarily to harm or cause economic loss to the bank." As we conclude that the alleged intent to obtain credits from the bank satisfies § 1344, and that this intent is sufficiently alleged, we do not attach significance to the "not necessarily" clause of ¶ 7.19.

[4] *The False Entries.* False pretenses were adequately alleged as to the false entries. The century-old case relied on by the district court has become obsolete even if it has not received its own burial and coffin. *See United States v. Darby*, 289 U.S. 224, 227, 53 S.Ct. 573, 574, 77 L.Ed. 1137 (1933); *United States v. Luke*, 701 F.2d 1104, 1108 (4th Cir.1983).

Every circuit to interpret either 18 U.S.C. § 1005 or § 1006 (an analogous statute applying to non-bank financial institutions) has determined that material omissions are false statements for the purposes of the statutes. *United States v. Cordell*, 912 F.2d 769, 773 (5th Cir.1990); *United States v. Chandler*, 910 F.2d 521, 523 (8th Cir.1990); *United States v. Rochester*, 898 F.2d 971, 978 (5th Cir.1990); *United States v. Krepps*, 605 F.2d 101, 109 (3d Cir.1979); *United States v. Spector*, 326 F.2d 345, 349 (7th Cir.1963).

[5] Plainly, a statement may be false if a vital fact is omitted. In our case the vital fact allegedly omitted is that the purpose of the loan renewals was to enable the defendants to acquire ANBN. Counts 11 and 12 sufficiently allege false statements.

[6–8] Counts 14 through 19 were dismissed as at the most charging borrower fraud, a crime not within the reach of § 1005. The counts, however, allege that not only were the borrowers' agreements to pay false, but that the defendants, knowing their falsity, caused these false promises to be entered on Statebank's books. The alleged action of the defendants was not borrower fraud but false entries by directors. The government can prove its case in terms of the indictment if it can prove (a) that Whitmore and Smith caused Miklautsch, Swain and Ely to make false agreements and (b) that the defendants in their capacity as directors caused these agreements to be recorded on the books of the bank. If the government should prove (a) only, the government would not satisfy the requirements of § 1005. If the government should prove (a) and (b), it would prove violation of § 1005 as validly charged. The mere making of a false promise as a borrow-

er knowing that the promise would be entered on the bank's books is not within the scope of § 1005. Consequently, the indictment is bad as to Ely who was not a director in 1987. Counts 18 and 19 should be stricken as to him.

With the reinstatement of Counts 11, 12, 14, 15, 16, 17, 18, and 19 the indictment adequately charges the use of false representations to commit the bank fraud alleged in Counts 8, 9, and 10. With the restoration of all these specific counts the conspiracy charged in Count 7 ceases to be a nullity and becomes the comprehensive charge at the core of the government's case. The defendants are accused of agreeing with each other to deprive Statebank of cash and credits by making false representations and by causing false entries to be made upon its books.

[9] *The Dividend Counts.* Counts 21 through 24 begin with a narrative setting out the following: Whitmore was the majority stockholder in Alaska Bancorporation (ABC), whose wholly owned subsidiary was Alaska Bancshares (ABS). Through ABC and ABS Whitmore owned 81% of Statebank. In 1986 he caused ABS to borrow nearly $4.7 million from Mellon Bank, pledging the Statebank shares owned by ABS and ABC. Dividends from Statebank were the only income ABS had from which to repay the loan. This situation created the objective of what the indictment alleges was a scheme to defraud Statebank by causing it to pay "massive and unprecedented dividends" in 1987.

The "manner and means" of the scheme are alleged as follows: Whitmore, Smith, Miklautsch and Swain caused the Director Stock Loans to roll over with additional infusions of unsecured credit. This charge is the same as that made in Counts 7–10, but additional effects are alleged, viz., the bank's income was overstated and a charge off of the loans to the Reserve for Loan Losses was avoided. Whitmore and Smith are additionally alleged to have maintained this Reserve at an inadequate level and to have filed false Consolidated Reports of Condition and Income (Call Reports) with the FDIC. It is then alleged that during 1987 the bank was "suffering huge losses" but the defendant directors went ahead with the declaration of dividends in disregard of the advice of "various bank regulatory agencies." Climactically, it is alleged that Whitmore, Smith, Miklautsch and Swain voted dividends of $1,000,915 on January 16, 1987 (Count 21); $300,274 on March 25, 1987 (Count 22); $600,549 on June 11, 1987 (Count 23); and $800,732 on October 8, 1987 (Count 24).

The indictment is not clear how the allegedly false Call Reports permitted, or related to, the declaration of dividends, especially as banking regulatory agencies are said to have advised against the declarations. The indictment is not clear as to the causal connection between the treatment of the Director Stock Loans and the declaration of dividends. The indictment does not allege that the allegedly improper treatment of these loans made it possible to declare the dividends; it would be a guess, although not an unreasonable guess, that there was some connection between the two. The indictment affords no information about the surplus, if any, of Statebank or the state of its condition when the million dollar dividend was declared on January 16, 1987. The indictment, in short, does not set out how false representations were the means by which the disbursement of dividends was achieved. Consequently the indictment fails to charge a crime under § 1344(2).

[10] The indictment does allege that the defendant directors declared the dividends "without regard to prudent banking practices and with reckless disregard for the effects the payment of these dividends would have on Alaska Statebank." Is that allegation sufficient to charge a crime under § 1344(1), which does not refer to false representation but makes it a crime "to defraud a financial institution?" The fraud charged here consists in the reckless disregard by fiduciaries of the property committed to their care. If the indictment charged the directors in their capacity as directors with throwing the bank's money out the window, or if the indictment charged the chairman, abetted by the directors, of ordering the cashier to turn over $2 million to him for his personal use, it could scarcely be doubted that crimes under § 1344(1) were being alleged. The brazen openness with which these hypothetical

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handouts were made would not remove the stain of fraud. Here, the charge is of the use of a legal form, the declaration of dividends, to extract from Statebank cash that should not have been paid out. Neither the openness of the maneuver nor the legal form in which it was dressed remove the stain of fraud if in fact the fiduciaries acted in reckless disregard of the property of Statebank.

[11, 12] Reckless disregard is the equivalent of intent to defraud under 18 U.S.C. § 656, the parallel bank theft statute applicable to bank employees. *United States v. Crabtree*, 979 F.2d 1261, 1269 (7th Cir.1992), *cert. denied*, 510 U.S. 878 (1993). *United States v. Woods*, 877 F.2d 477, 480 (6th Cir. 1989) (per curiam); *United States v. Cyr*, 712 F.2d 729, 732 (1st Cir.1983); *United States v. Krepps*, 605 F.2d 101, 104 (3rd Cir.1979); *United States v. Larson*, 581 F.2d 664, 667 (7th Cir.1978). Reckless disregard equally satisfies the intent required under § 1344. *See Willis v. United States*, 87 F.3d 1004, 1007-08 (8th Cir.1996). What is charged in the indictment is not mere breach of the duty of a fiduciary to act honestly and prudently but a breach of that duty resulting in the reckless disposition of $2.7 million of Statebank funds. The defendants are adequately apprised of the charge of crimes committed in violation of § 1344(1).

We take the district court's point that if the world price of oil had not fallen, all the troubles that befell the defendants might not have occurred. They might be today rich and respected citizens of Anchorage. They were unlucky in the extreme. Many financial irregularities come to light only in bad times. If the irregularities are criminal, as those charged here are portrayed as being, the defendants cannot excuse criminal conduct by the plea of bad luck.

[13] *Double Jeopardy.* The defendants contend that the Double Jeopardy Clause is offended because they were all sued civilly by the FDIC for the same acts and the FDIC sought punitive as well as actual damages. The defendants' syllogism is simple: The government cannot constitutionally seek to punish us twice for the same acts. Punitive damages, as the name implies, are a form of punishment. Since the government has sought such punishment once, it is disabled from seeking to punish us by criminal proceedings.

This earnest argument does not succeed because the FDIC did not sue the defendants as the United States. The FDIC was "acting only as a receiver of a failed institution." *See Atherton v. FDIC*, — U.S. —, —, 117 S.Ct. 666, 673, 136 L.Ed.2d 656 (1997). The United States was not a party. The Double Jeopardy Clause has no application. *United States v. Heffner*, 85 F.3d 435, 439 (9th Cir.1996).

The dismissed counts should be Reinstated except that Ely is to be struck from Counts 18 and 19. The judgment of the district court denying the motions to dismiss for double jeopardy is AFFIRMED.

UNITED STATES of America, Plaintiff-Appellee,

v.

Robert E. HYDE, Defendant-Appellant.

No. 95-10113.

United States Court of Appeals, Ninth Circuit.

Aug. 28, 1997.

Jonathan D. Soglin, Oakland, California, and Robert E. Hyde, pro se, San Francisco, California, for the defendant-appellant.

Joel R. Levin, Assistant United States Attorney, San Francisco, California, for the plaintiff-appellee.

On Remand from the United States Supreme Court.

Before: FERGUSON, D.W. NELSON, and FERNANDEZ, Circuit Judges.

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NINTH CIRCUIT (Continued)

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005-98

Russell W. Schrader
Vice President and Senior Counsel

March 11, 1998

VIA MESSENGER

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

Re: Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements And Commentary

VISA U.S.A. ("Visa")[1] is submitting this comment letter to the United States Sentencing Commission (the "Sentencing Commission") in response to its proposed amendments to the sentencing guidelines, policy statements and related commentary. The Sentencing Commission published its proposed amendments in the Federal Register (63 Fed. Reg. 602) on January 6, 1998, and these amendments are referred to in this comment letter as the "Proposed Amendments."

Visa is the largest consumer payments system in the United States and the world. Visa is made up of nearly 21,000 financial institution members from around the world that issue Visa brand cards. There are more than 580 million Visa cards held by consumers globally, which are accepted at more than 14 million merchant locations and 350,000 automated teller machines worldwide. Visa -- which provides transaction authorization, clearing and settlement, and risk management services to Visa financial institution members -- supports more than $1 trillion in Visa-related payment transactions annually throughout the world. Visa's transactions volume in the United States is approximately $470 billion per year.

Theft and fraud involving Visa credit and debit cards is a matter of critical importance to Visa, its financial institution members and their customers. Visa and its members have over the years expended substantial resources to develop, refine and

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[1] Visa U.S.A. is a membership organization comprised of financial institutions licensed to use the Visa service marks in connection with payment systems.

VISA U.S.A. INC. • POST OFFICE BOX 8999 • SAN FRANCISCO • CALIFORNIA 94128-8999 • (415) 432-3111 FAX (415) 432-2145

implement a broad range of theft and fraud detection and avoidance programs. These programs are summarized in the attachment to this letter. As a result of these programs -- and close cooperation with law enforcement officials -- the ratio of Visa credit and debit card theft and fraud to card sales has been significantly reduced, even as the volume of card transactions has increased dramatically.

Visa recognizes, however, that these detection and avoidance programs can never completely eliminate credit and debit card fraud and theft. Indeed, notwithstanding these programs, last year Visa credit and debit card theft and fraud losses totaled approximately $485 million.

As a result, Visa and its members have a strong interest in appropriate sentencing guidelines for criminals who are convicted of theft and fraud involving Visa credit and debit cards. Appropriate sentencing guidelines will result in a reduction in credit and debit card theft and fraud for a variety of reasons. They will help ensure that when criminals are caught, they are prosecuted. Without the prospect of sufficient jail time, prosecutors may be reluctant to pursue certain prosecutions. Moreover, once convicted, appropriate sentencing guidelines will ensure that the criminal is off the streets and unable to perpetrate new credit and debit card theft and fraud for a sufficient period of time. Repeat offenders, often working as part of sophisticated and organized criminal gangs, are common among credit and debit card criminals. Finally, appropriate sentencing guidelines will of course serve as a disincentive for those considering this type of crime.

Loss Computation And Loss Tables

In the Proposed Amendments, the Sentencing Commission requested public comment on the definition of "loss," and the weight that it should be given in the theft, fraud and tax guidelines. Visa supports the Sentencing Commission's proposal to provide similar penalties for thefts and frauds involving similar amounts of loss. From a credit and debit card perspective, we see no distinction between theft and fraud. Cards and card account numbers are illegally obtained by criminals through a variety of methods, including through theft (such as by stealing cards from the victim or from the mail) and through fraud (such as by fraudulently applying for and obtaining a card in the name of the victim). The loss caused by this fraud or theft is the same.

Visa also supports the Sentencing Commission's proposal to incorporate the "more than minimal planning" ("MMP") enhancement in the loss tables for both fraud and theft. Credit and debit card theft or fraud always requires more than minimal planning, as the criminal must obtain the card or card number without the victim's knowledge (to avoid the victim canceling the card), and then must misrepresent himself

(such as by forging the victim's signature at the merchant location) when using the card. Moreover, the more significant credit and debit card losses typically involve multiple cards, sometimes numbering in the hundreds or even thousands, that were illegally obtained or manufactured by sophisticated criminal enterprises.

Visa supports loss table option 2 proposed by the Sentencing Commission, which provides for higher offense levels, as compared to option 1, for theft and fraud of various amounts. For the reasons discussed above, Visa believes that these higher levels will result in a reduction in credit and debit card theft and fraud.

Special Rules for Credit Cards and Access Devices

The current commentary to the sentencing guidelines provides that, in cases involving stolen credit cards, the loss includes any unauthorized charges made with the stolen credit cards, but in no event less than $100. Section 2B1.1, Commentary 4. Visa urges the Sentencing Commission to reconsider this rule that, where there have been no unauthorized charges on the stolen credit card, the loss for purposes of the sentencing guidelines is only $100.

This $100 rule means that criminals who are caught before they are able to use the credit card or cards they have stolen have a low score, even if they have stolen a significant number of credit cards. Prosecutors have been reluctant to expend their limited resources to prosecute these cases, since even if the prosecution is successful, the criminal would receive a lenient sentence. Even if the criminal is prosecuted and convicted, he or she will be back on the streets far too soon, and our experience has been that he or she often repeats the credit card fraud or theft or other criminal activity. This $100 rule also undermines the deterrent effect of the credit card fraud and theft laws.

Finally, this $100 rule does not adequately reflect the injury to the innocent victim. The mere fact that a credit card has been stolen can be quite traumatic for the victim, even if the credit card is never actually used by the criminal. At a minimum, the victim's life is disrupted until he or she obtains a replacement card from the card issuer. Criminals have used the stolen credit card as part of their scheme to take over the identity of the victim, and then use the victim's identity to run up substantial losses. Congress has examined the harm that results from these identity frauds to the innocent victims.[2] The stolen credit card can be the key to this identity fraud, even if the criminal never charges anything to the card.

[2] See for example, the September 16, 1997 hearing before the Subcommittee on Financial Services and Technology of the Senate Banking, Housing and Urban Affairs Committee.

Visa recommends that the Sentencing Commission revise this commentary to provide that the loss for a stolen credit card is considered to be the card's available credit line. Once the criminal has possession of the victim's credit card, the criminal has within his or her control access to the full amount of available credit on the card. As recognized by several courts,[3] this approach would more accurately reflect the value of the card stolen by the criminal, as well as the potential loss to the victim. This approach also would be consistent with the treatment under the sentencing guidelines of a stolen check that is in the possession of the criminal, but has not yet been cashed. The sentencing guidelines provide that in these circumstances the appropriate amount of loss is the loss that would have occurred had the check been cashed. Section 2B1.1, Commentary 2 (Example 1).

As an alternative approach for stolen but unused credit cards, a graduated scale based on the number of victims could be used. For example, possession of five or more unused stolen credit cards could result in an automatic two level increase for sentencing purposes, with a larger number of unused stolen credit cards resulting in additional increases (for example, 20 or more unused stolen credit cards could result in a four level increase, 50 or more unused stolen credit cards could result in a six level increase and 100 or more unused stolen credit cards could result in an eight level increase). This approach, like the credit line approach recommended above, would impose greater penalties on the more systemic, organized criminal enterprises.

Visa strongly supports the proposed addition of the reference to "access devices" in this Commentary 4. We presume that this reference is designed to include debit cards and ATM cards, and recommend that the commentary be further clarified by referencing the definition of the term "access device" in Federal Reserve Board Regulation E (12 C.F.R. § 205), which the Federal Reserve Board has promulgated under the federal Electronic Fund Transfer Act (15 U.S.C. § 1693 et seq.).[4]

Debit cards are the fastest growing new consumer payment device in the history of Visa. In the United States, as of June 30, 1997, approximately 50 million Visa debit cards had been issued and transaction volume exceeded $80 billion (on an annual basis). When a person uses a debit card to pay for goods or services, funds are deducted from his or her checking account at the bank issuing the card (in contrast, with a credit

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[3] See U.S. v. Sowels, 998 F.2d (5th Cir. 1993); U.S. v. Egemony, 62 F.3rd 425 (1st Cir. 1995); U.S. v. Ismoila, 100 F.3rd 380 (5th Cir. 1996).

[4] Regulation E defines the term "access device" as a "card, code, or other means of access to a consumer's account, or any combination thereof, that may be used by the consumer to initiate electronic funds transfers." 12 C.F.R. § 205.2(a)(1). This definition includes all types of debit cards and ATM cards.

card, a line of credit extended by the card issuer is accessed). Since debit cards are in effect payment substitutes for credit cards and are subject to the same risks of theft and fraud, Visa believes these access devices should be treated similarly as credit cards under the sentencing guidelines.

For the reasons discussed above in the context of credit cards, Visa urges the Sentencing Commission to reconsider its proposed rule that, where there has been no unauthorized use of the stolen debit card, the loss for purposes of the sentencing guidelines is only $100. For the same reasons why the loss for unused stolen credit cards should be calculated by reference to the available credit line, the loss for an unused stolen debit card should be considered to be the available balance in the victim's account that can be accessed with the stolen debit card. Like the check drawn on the victim's account, the loss in the case of an unused stolen debit card should not be the actual debit to the victim's account, but rather the debits that could have occurred had the criminal used the debit card. Alternatively, the same type of graduated scale based on the number of stolen cards discussed above in the context of credit cards also could be utilized in the case of stolen but unused debit cards.

Finally, Visa also supports the proposed revision to this Commentary 4 that clarifies that this commentary applies to purloined credit card or access device account numbers, even if the criminal never has possession of the victim's actual card or access device. The criminal does not need the card, only the card number, to steal from the cardholder. A criminal with only the card number can engage in a wide variety of transactions where the card need not be present, such as transactions over the telephone. Moreover, certain criminals are able to manufacture their own cards with the victim's number, and then use the manufactured card to engage in the full range of card transactions.

Copyright Infringement

As mentioned above, certain criminals, typically members of sophisticated crime gangs, will manufacture fake credit or debit cards, using stolen card numbers. These fake cards may violate, among other criminal laws, protected trademarks and potentially other intellectual property of Visa and the card issuer. Accordingly, Visa is interested in the proposed revisions to Section 2B5.3(b) addressing penalty levels for crimes involving criminal infringement of copyrights or trademarks.

Visa supports the proposed options that utilize a $2000 starting point (options 2 and 4). The $2000 starting point, rather than the $5000 starting point of the other options, will enable Section 2B5.3(b) to be considered where appropriate in more instances of credit and debit card fraud. Also, for the reasons discussed above, Visa

recommends that this proposed amendment or the related commentary clarify that the retail value of the infringing fake credit or debit card equals the available credit line that can be accessed by the card (for credit cards) or the available balance in the victim's checking account that can be accessed by the card (for debit cards).

Telemarketing Fraud

The Sentencing Commission also requested comment on a number of issues relating to the treatment of telemarketing fraud under the sentencing guidelines. Visa's interest in telemarketing fraud results from the unfortunate fact that many telemarketing fraud criminals obtain from the victim his or her credit or debit card number, typically under fraudulent pretenses, and then use that number to fraudulently obtain the victim's funds.

Given our experiences with telemarketing fraud, Visa believes that the sentencing guidelines should treat telemarketing fraud more severely than other types of fraud involving comparable loss amounts. As recognized by Congress in enacting the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 (15 U.S.C. § 6101 et seq.), which Visa strongly supported, there are unique aspects of telemarketing fraud which support this special treatment under the sentencing guidelines. First, telemarketing fraud criminals frequently target the elderly and others they believe to be particularly susceptible to victimization. This is done for example by using telephone lists of elderly Americans, or by referencing products intended to attract the elderly, such as pharmaceuticals. Second, because these fraudulent schemes operate on an interstate basis and the criminals frequently change locations, it is often difficult for law enforcement to track and apprehend them until after a substantial amount of fraud has occurred. The nature of this fraud typically involves a large number of victims, each victimized for relatively small amounts. Indeed, a successful fraudulent telemarketing operation can victimize thousands in a few weeks. Finally, because of the low cost of establishing and operating a telemarketing scam -- frequently just a telephone and scripts -- it is easy for the criminals to restart and many of these criminals do restart their criminal operations after being shut down. Given these characteristics of telemarketing fraud, Visa believes that the Sentencing Commission should revise the sentencing guidelines to increase the levels for telemarketing fraud in order to further deter telemarketing fraud and more severely punish telemarketing fraud criminals.

* * * * *

Visa very much appreciates this opportunity to comment on the Proposed Amendments. If Visa can be of assistance to the Sentencing Commission in connection with the Proposed Amendments, or there are any questions regarding this letter, please do not hesitate to contact me, at (650) 432-3111.

Sincerely yours,

Russell Schrader
Vice President and Senior Counsel

ATTACHMENT

Fraud Control Programs of Visa and Visa Member Financial Institutions

Visa and the Visa member financial institutions have developed a varied arsenal of fraud control programs. These fraud control programs are described below:

Address Verification Service (AVS)

A fraudulent use prevention system that allows mail-order/telephone-order merchants to automatically verify that a billing address provided by a cardholder is the same as the cardholder's billing address currently on file with the Issuer. This service helps merchants minimize the risk of accepting fraudulent mail and telephone order transactions.

Card Activation

An alternative bank card delivery method in which Issuers wait to confirm that a card has been received by the valid cardholder before activating the account. Cards are blocked at the time of mailing; for a card to be activated, the cardholder must call the Issuer to confirm receipt and provide positive proof of identity.

Card Security Features

Alphanumeric, pictorial, and other design and functional elements on bank cards. The exact physical dimensions and placement of these features are specified by the *Visa U.S.A. Operating Regulations* and are difficult to copy exactly. Card security features are checked by merchants at the point of sale to ensure the card is valid.

Card Verification Value (CVV)

A unique three-digit "check number" encoded on the magnetic stripe of all valid cards. The number is calculated by applying an algorithm — a mathematical formula — to the stripe-encoded account information and is verified on-line at the same time a transaction is authorized.

Cardholder Risk Identification Service (CRIS)

A transaction scoring and reporting service that employs neural network technologies to develop risk-scoring models that identify fraudulent transaction patterns. The service, available by subscription through Visa, can be used by Issuers as a stand-alone fraud detection system or as a complement to their internal fraud detection methods.

Exception File

Visa's worldwide data base of account numbers of lost/stolen or other cards Issuers have listed for pickup, referral, or other special handling. The account numbers for all transactions routed to Visa's stand-in processing system are checked against the Exception File.

Issuers' Clearinghouse Service (ICS)

A bank card application verification system shared by Visa with MasterCard. ICS verifies an applicant's address, phone and Social Security numbers, and whether he or she has a history of excessive applications or credit card fraud or abuse. ICS is a mandated service for U.S. card issuers that are Visa members.

NRI Reporting

A computer program developed by Visa for reporting Not Received Items (NRI). All Visa Issuers are required to report NRI mailing information, whether or not fraud has occurred. Visa will then forward this information along with reported NRI fraud transactions to the U.S. Postal Service on a daily basis. This information will allow the Postal Service to conduct investigations in a more timely manner.

Recovered Account Analysis

Assistance to law enforcement for recovered account numbers due to arrests and/or searches. Individual Issuers are identified, contacted and requested to provide information directly back to the investigating law enforcement agency.

Risk Identification Service (RIS)

The Risk Identification Service identifies concentrations of fraud activity at merchant locations. RIS monitors activity such as reported fraud transactions, suspicious fraud activity, and merchant deposits. By carefully monitoring such activity and imposing timely corrective measures, Visa members can reduce their exposure to fraud and subsequent financial losses.

VisaLine

A subscription service providing an interactive computer network dedicated to the communication of time-sensitive risk management and business information between Visa and its members and their third-party processors.

006-98

INTERNATIONAL ASSOCIATION OF FINANCIAL CRIMES INVESTIGATORS

INTERNATIONAL OFFICE
1620 Grant Avenue
Novato, California 94945
Tel: (415) 897-8800
Fax: (415) 898-0798

Date: March 6, 1998

To: The United States Sentencing Commission
From: Susan Sylstra, Executive Director 916-961-2003
Re: 1998 Sentencing Guidelines

The International Association of Financial Crimes Investigators is the non-profit professional association representing nearly 4000 financial industry investigators world wide including banking, law enforcement, retail and support services such as the bankcard associations, processors, credit bureaus and card manufacturers. The Association offers itself as a resource to the Commission for communication among our members, and responses from them regarding any issues under consideration, via our electronic network.

The International Association of Financial Crimes Investigators supports:

* Proposed Amendment 1, page 602 – 605 – incorporate "more than minimal planning" into the theft loss table, bringing it in line with the base level for fraud.
* Proposed Amendment 3, page 610 - 614 – Consolidate the guideline for theft, fraud and tax crimes as proposed.
* Proposed Amendment 3, page 611 – The two level decrease for offenses of less than $2000 should not apply to mail theft.
* Proposed Amendment 4, page 616, Note 3 – The current method for valuing credit card loss at any unauthorized use or $100 per card is inadequate to indicate the potential seriousness of the loss factor involved. The possession of multiple cards indicates an intent to use those cards to their credit limit and beyond, and therefore should be treated by the number of cards possessed, not the credit limits. Recommended are the following changes in levels:

Number of Credit Cards	Offense Level Increase
5 or more	2 levels
10 or more	4 levels
20 or more	6 levels

* Proposed Amendment 4, page 617 – 618 – Noneconomic factors should affect upward departure where multiple victims are involved, creating a multiple victim table for both consumer theft/fraud and mail theft:

Number of Victims	Increase in Level
10 or more	2
20 or more	4
50 or more	6
100 or more	8

Volume mail theft, telemarketing fraud and identity theft fraud cases where large databases are compromised are particularly applicable to this table.

The Association appreciates the opportunity to comment, and remains a resource for the Commission, fulfilling our mission of training and communications. Thank you.

007-98

UNITED STATES POSTAL INSPECTION SERVICE

OFFICE OF THE CHIEF POSTAL INSPECTOR

March 10, 1998

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

SUBJECT: 1998 Proposed Guideline Amendments

Attention: Michael Courlander
Public Information Officer

Dear Chairman Conaboy:

The United States Postal Inspection Service respectfully submits its comments to the proposed amendments published by the Commission on January 6, 1998. Generally, we support the proposals that provide consistency and uniformity for the theft and fraud loss tables and those amendments that clarify and simplify the guidelines for determining loss. Further, we support the consolidation of the guidelines for theft, destruction of property, and fraud, provided the specific offense characteristics for undelivered mail are preserved in any new guideline. Our specific comments are referenced in the following by the amendment number and Federal Register page number.

Proposed Amendment 1, pages 602-605. This proposed guideline would provide uniformity in the dollar loss ranges and corresponding offense level increases for theft, fraud, and tax offenses and incorporates the more-than-minimal planning element into the loss tables.

We support the loss table amendments provided that these changes do not effect the two level enhancement for the theft of mail currently provided by §2B1.1(b)(3), regardless of the amount of dollar loss or the absence of more-than-minimal planning. See our additional comments on Proposed Amendment 3 and the proposed mail theft guideline, infra.

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Proposed Amendment 3, pages 610 - 614. Generally, this amendment would consolidate the theft, fraud, and destruction of property guidelines into one extensive guideline and retain the specific offense characteristics and commentary for each type of offense. The new guideline proposes a base offense level of six with a loss table and incorporates specific application notes and commentary for each type of offense.

In our response to the Commission's initial notice for comment on the issue of loss (Federal Register, January 2, 1997), we stated our concern about the proposed elimination of the specific mail theft guideline if the base offense level for theft was raised to a level six. We believe the unique character of United States mail justifies an increase above any base offense level established for theft, even if the dollar loss is minimal. We want to ensure that the current offense level enhancement is retained in any new theft guideline. Further, this proposed amendment references the insertion of a loss table for the consolidated guideline. Since the Commission has proposed several loss table options in Proposed Amendment 1, we are unsure which loss table would be used.

Proposed Amendment 3, page 611 (Mail theft guideline). This proposed guideline will effectively maintain the two level increase for mail theft, even if the dollar loss is minimal (i.e., less than $2000 under the proposed amendments). This mail theft guideline language depends on the Commission adopting a loss guideline with a base offense level of six and a guideline which provides for a two-level decrease for minimal dollar loss. If the Commission adopts this new theft guideline, we strongly support the provision that states that the two level decrease for minimal loss would not apply to the theft or destruction of mail.

Proposed Amendment 4, page 6, Note 3. (Credit card guideline). This proposal would move the credit card theft guideline into a "Special Rules" section within the loss guideline. In addition, it would clarify that this guideline applies to "access devices" and loss attributed to "purloined numbers." We support this proposed amendment.

In addition to comments on the proposed amendments, the Commission solicited alternative methods to determine loss. In the area of credit card theft, we request the Commission consider using the credit line of the card as the amount of the intended and potential loss, as an alternative to the current guideline language of "$100 per card."

As another alternative for credit card loss, we propose a narrowly tailored guideline to address the more serious credit card offender, (i.e., a defendant that possesses multiple stolen cards). This concept is based on the presumption that an individual with multiple stolen or unlawfully acquired credit cards intends to use, sell, or fence

the cards based on their credit line. Rather than focus on the credit line and the amount of intended loss, this proposal would increase the offense level based on the number of cards in the possession of the defendant.

Number of cards	Offense level
5 or more	2 levels
10 or more	4 levels
20 or more	6 levels

Proposed Amendment 4, page 617-618 (Noneconomic factors). The Commission also asked for comments on noneconomic factors used for upward departures in loss determinations. One of the proposed factors would consider the number of victims. We support the alternative language of a "large number of victims" rather than limiting the factor to "ten victims or more." In conjunction with a multiple victim factor, we suggest the Commission consider a graduated offense table based on the number of victims. The table would be used if the offense impacts ten or more victims up to a maximum of more than a hundred victims.

Number of victims	Increase in level
10 or more	2
20 or more	4
50 or more	6
100 or more	8

We appreciate the opportunity to comment on these proposed amendments. If you need additional information, please feel free to contact me at (202) 268-5445.

Sincerely,

Daniel F. Mulcahy

for J. M. Boswell
Deputy Chief Inspector
Office of Criminal Investigations

CC&-72

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

COMMENT OF THE FEDERAL TRADE COMMISSION REGARDING PROPOSED AMENDMENTS TO THE U.S. SENTENCING GUIDELINES

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

The Federal Trade Commission ("FTC") submits this comment advocating enhanced sentences for telemarketing fraud offenses. The FTC concurs with the position the U.S. Department of Justice has advocated to the Sentencing Commission on this issue: that telemarketing fraud is a distinctive form of fraud, and that the current sentencing guidelines fail to recognize the seriousness of telemarketing fraud. The FTC therefore encourages the Sentencing Commission to amend the sentencing guidelines to correspond to the statutory enhancements enacted by Congress in the Senior Citizens Against Marketing Scams Act, (SCAMS), 18 U.S.C. §§ 2325-2327.

The FTC is the primary federal consumer protection agency, with wide-ranging responsibilities over nearly all segments of the economy. In pursuing its mandate of protecting consumers, the FTC enforces the Federal Trade Commission Act,[1] which broadly prohibits unfair or deceptive acts and practices, as well as more than twenty other consumer protection statutes and thirty regulations that address such matters as consumer credit, telemarketing, and the sale of funeral goods and services.[2]

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[1] 15 U.S.C. §§ 41 *et seq.*

[2] *E.g.*, the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq., which mandates disclosures of credit terms; the Fair Credit Billing Act, 15 U.S.C. §§ 1666 *et seq.*, which provides for the correction of billing errors on credit accounts; the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*, which establishes rights with respect to consumer credit reports; and the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.*, which provides disclosure standards for consumer product warranties; the Care Labeling Rule, 16 C.F.R. Part 423, which requires the provision of care instructions for wearing apparel; the Franchise Rule, 16 C.F.R. Part 436, which requires the provision of information to prospective franchisees; the Mail and Telephone Order Merchandise Rule, 16 C.F.R. Part 435, which gives consumers certain rights when ordering products through

[66]

Combating telemarketing fraud has been a top priority for the FTC for the past decade. The FTC has committed significant resources to the war against telemarketing fraud -- a type of fraud that frequently victimizes the elderly. Prior to 1994, the FTC brought civil injunctive actions against fraudulent telemarketers alleging they had engaged in unfair and deceptive acts and practices in violation of Section 5 of the FTC Act. In 1994, Congress passed the Telemarketing and Consumer Fraud and Abuse Prevention Act , 15 U.S.C. §§ 6101- 08 ("Telemarketing Act"), giving the FTC additional authority specifically to attack telemarketing fraud. At Congress' direction, the FTC promulgated the Telemarketing Sales Rule, 16 C.F.R. Part 310, which became effective on December 31, 1995. The Rule defines and prohibits deceptive telemarketing practices and prohibits other abusive telemarketing practices.

Typically, the FTC enforces Section 5 and the Telemarketing Sales Rule against fraudulent telemarketers by seeking an *ex parte* temporary restraining order and asset freeze to halt ongoing fraudulent activities and preserve assets for consumer redress. The FTC's ultimate objective in its enforcement actions is to obtain restitution for injured consumers, if possible; if not, disgorgement to the U.S. Treasury of defendants' ill-gotten monies. Violators of the Rule are also subject to civil penalties. The FTC refers civil penalty cases to the Department of Justice, in the first instance, but may prosecute them if the Department declines to do so.

One very important feature of the Telemarketing Act is that it empowers the state Attorneys General to go into federal court to enforce the Telemarketing Sales Rule, to halt fraudulent schemes through nationwide injunctions against companies or individuals that violate the Rule, and to obtain restitution for injury caused to the residents of their states by the Rule violations. This grant of authority to the states has provided the Commission with an enormous opportunity to coordinate and leverage federal law enforcement resources with the states for maximum effect.

With the Telemarketing Sales Rule as part of our law enforcement arsenal, the FTC has led twenty cooperative law enforcement efforts focused upon the most prevalent and harmful types of telemarketing fraud, including telemarketing fraud that targets older consumers, since the Rule's promulgation in 1996. These law enforcement sweeps comprised a total of over 730 federal and state actions, including 112 cases brought by the FTC.

This concerted and aggressive response to deceptive telemarketing has provided the FTC with substantial expertise in this area. The FTC's law enforcement experience has revealed that while telemarketing fraud victimizes consumers of all ages, levels of income, and backgrounds, the elderly are disproportionately represented among victims of telemarketing fraud; and in some scams, 80 percent or more of the victims are 65 or older.[3] Fraudulent telemarketers often

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the mail; and the Funeral Rule, 16 C.F.R. Part 453, which regulates certain pricing and sales practices by funeral providers.

[3] The owner of one boiler room testified that 99 percent of the victims were over sixty and that 90 percent were over seventy. Transcript of Trial, United States v. Brown, Cr. No. 1-96-

deliberately target the elderly and take advantage of the fact that many older people have cash reserves or other assets to spend on deceptively attractive offers. Older Americans seem especially susceptible to fraudulent offers for prize promotions and lottery clubs, charitable solicitations, and investment offers.[4]

In addition to coordinating with other civil enforcement agencies, as part of its battle against telemarketing fraud, the FTC routinely coordinates with, assists, and receives assistance from federal and state criminal authorities. For example, when the Department of Justice launched operation Senior Sentinel in December, 1995, a law enforcement project aimed at telemarketing boiler rooms that targeted the elderly, the FTC complemented its effort by filing simultaneous civil actions against numerous fraudulent telemarketers. Very often, criminal prosecutions of fraudulent telemarketers follow on the heels of FTC civil actions. FTC attorneys have also actively prosecuted fraudulent telemarketers as Special Assistant U.S. Attorneys.[5] The most notable example of this occurred in Chattanooga, Tennessee, where FTC attorneys were cross-designated as Special Assistant U.S. Attorneys and prosecuted criminal actions against telemarketers operating in the area. By the end of 1996, the Chattanooga Telemarketing Task Force had completed its work, having obtained fifty convictions and combined prison sentences against fraudulent telemarketers totaling over 1,695 months.[6]

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50 (E.D. Tenn. 1996) at 45 [testimony of Craig Heaps].

[4] Recent survey research conducted on behalf of the American Association of Retired Persons shows that there is no ready answer explaining why a disproportionate number of telemarketing fraud victims are elderly. The research rebuts the notion that the elderly are vulnerable because they are socially isolated, ill-informed, or confused. The survey shows, however, that older people who fall for telemarketing scams tend to believe the pitches they hear -- that they have a good chance of actually winning the grand prize, and that the products touted are worth the price charged for them. Ninety percent of respondents report awareness of consumer fraud; yet two-thirds said it is hard to spot fraud when it is happening. The survey also shows that elderly victims find it difficult to terminate telephone conversations, even when they say they are not interested in continuing a conversation. They are also reluctant to seek advice or assistance from others about financial matters in general.

[5] These prosecutions have included not only traditional prosecutions for mail fraud and wire fraud, but also prosecutions for criminal contempt when telemarketers violate the terms of injunctions obtained in FTC civil actions. *See, e.g.*, United States v. Jordan, No CR-S-96-113-LCL (D. Nev. 1996).

[6] In recognition of the FTC's contributions, the U.S. Department of Justice honored the FTC attorneys with its John Marshall Award for inter-agency cooperation in support of litigation in 1996. This project was cited by Representative Goodlatte, the author of the House-passed version of H.R. 1847 (105th Cong., 1st Sess.), The Telemarketing Fraud Prevention Act of 1997, to show the need for enhanced penalties for telemarketing fraud. *See*, Cong. Rec. p. H4870 (daily ed. July 8, 1997)(statement of Rep. Goodlatte).