Public Comment

Proposed Amendments

2001

PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

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March 5, 2001

The Honorable Diana E. Murphy, Chairman
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Murphy:

The Probation Officers Advisory Group offers the following comments with respect to several of the non-emergency permanent amendments as listed in the *Federal Register*, January 26, 2001:

Amendment Five – Sexual Predators

POAG prefers a combination of Part A, Options One and Three, as an approach to satisfy the congressional directive in the Act that requires penalty increases in any case in which the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor. The creation of §4B1.5 addresses the high-risk sex offender whose instant offense is a sexual abuse conviction and who has a prior felony conviction for sexual abuse. Option One is preferred as it mirrors the present §4B1.1 (Career Offender) and §4B1.4 (Armed Career Criminal) guidelines that enhance a defendant's sentencing range based on the elements of the instant offense of conviction and the defendant's prior convictions.

Although Option One is favored, POAG identified two areas of concern within this option. The first concern is §4B1.5(a)(2), "the defendant committed the instant offense of conviction subsequent to his sustaining at least one sex offense conviction". POAG brings to the Commission's attention that neither the second prong of determining if a defendant is a repeat and dangerous sex offender nor the supporting commentary

commentary addresses whether the prior sex offense conviction is one that has to be counted under the provisions of §4A1.1(a), (b), or (c), or is restricted by the time periods under §4A1.2. POAG would strongly encourage the Commission to consider that the prior sex offense conviction receive criminal history points under the provisions of §4A1.1 in order for the defendant to qualify for the application of §4B1.5.

The second concern lies within the format presentation of §4B1.5(d), "a repeat and dangerous sex offender's criminal history category in every case shall be...". We suggest that this language precede the table at §4B1.5(b). This minor format change becomes consistent with the presentation of a career offender's criminal history category found at §4B1.1. POAG takes no position in recommending the criminal history category for this type of defendant.

With respect to the commentary options for §4B1.5, POAG prefers the commentary as set forth at Option 1B. However, we would strongly encourage that for Option 1B, comment.(n.3), language be included to designate whether the prior sex offense conviction under §(a)(2) is one that has to be counted under the provisions of §4A1.1.

POAG prefers Option Three wherein a specific offense characteristic is included at §2A3.1, that addresses "pattern of activity". This two-level enhancement allows for the consideration of additional sexual abuse or exploitation of a minor behavior that does not necessarily result in a conviction, hence sanctioning the often ongoing activities of many sex offenders.

Amendment Nine – Safety Valve

POAG strongly supports the proposed amendment which allows a two-level reduction for all defendants despite their offense level who meet the criteria of the sub-sections as set forth at §5C1.2. Such change allows for the first-time offender to benefit even if their offense level is below 26.

Amendment 12 – Economic Crime Package

Based on time constraints with respect to our meeting, POAG focused on the proposed loss tables for the consolidated guideline. Of the three options proposed, POAG prefers Option One. POAG's collective opinion is that the penalties in all the proposed tables are too low as we routinely receive comment from our courts that the sentencing ranges for offenses calculated under §§2B1.1 and 2F1.1 do not provide significant punishment at the lower levels where the majority of the defendants prosecuted under these two guidelines fall. However, of the options presented, POAG prefers Option One since the majority of offenses we encounter would receive greater sentences, thus keeping in line with the concerns of our courts. While we recognize the penalties are more substantial at higher loss levels in the recommended tables, it has been our experience that only a minority of cases prosecuted fall within this category.

Amendment 18 – Immigration

POAG appreciates the concerns that have been voiced in reference to the application of §2L1.2(b)(1)(A) wherein a 16-level enhancement is applied if the defendant was previously deported after a criminal

conviction for an aggravated felony, thus often resulting in offense levels that are disproportionate to the seriousness of the prior aggravated felony conviction. POAG concurs that the term "aggravated felony" is broadly defined and that some aggravated felonies are "less serious" than others. Although conceding that a problem exists, POAG nonetheless, has reservations with the proposed remedy. While disproportionality is the stated incentive for revising §2L1.2(b)(1)(A), POAG acknowledges the plight of the border states and the overwhelming number of unlawful entry cases they perennially process. It is believed that distinguishing one aggravated felony from another may benefit certain defendants and expedite the plea/sentencing process in those cases. Like other defendants, aliens are more agreeable when they are facing the possibility of serving less time.

The proposed amendment is intended to achieve proportionate punishment by providing tiered sentencing enhancements based on the period of imprisonment the defendant actually served for the prior aggravated felony conviction. The concerns POAG had with the "time served" approach are three-fold. First, ascertaining reliable information pertaining to the time a defendant actually served is believed to be impractical and in some instances, impossible. Court records are often difficult to acquire. Even if it were possible to obtain reliable jail/institutional/correctional records to determine the actual time served, the already protracted sentencing process may take even longer, thus providing another obstacle for the border states. The solution to the problem is beyond officers merely improving their investigation/research techniques and/or work ethics. POAG is of the opinion that officers already perform an admirable job ferreting available information within a reasonable time period.

A second concern is that the use of the time served methodology is contrary to the philosophical underpinnings of Chapter Four. There has been an ongoing debate as to the propriety and purpose of using criminal history to determine the defendant's sentence. There has also been objection to the *Federal Sentencing Guidelines* because of their relatively unique approach to determining criminal history by measuring the severity of the prior offense by the length of time imposed for the prior conviction. Employing a tiered system at §2L1.2 could possibly fuel the fires of discontent regarding the current approach in determining severity in Chapter Four. We do not suggest, however, that the rationale in Chapter Four is beyond reproach.

As a third issue, even if it were practical or possible to determine time served, the same may not be a fair measure of severity. One would have to wrestle with the issue of the disparity that results in varying charging and plea practices, time served in parole- and non-parole systems, alternative sentences whose custodial component is not the traditional form of incarceration, early releases prompted by prison overcrowding, time served for revocation of supervision, and premature releases to detainers, particularly those in the cases of deportable aliens.

Looking to an alternative to basing the enhancement on time actually served, one option would be predicated on the type of aggravated felony involved. It is noted that this focus is eluded to in Option One. Such alternative may be a feasible approach if the enhancement hinged on real versus charged offense behavior. Given prosecutorial discretion and charge/plea bargaining, reliance on the latter would invite disparity in the application of §2L1.2. The traditional measure of severity, i.e., length of sentence imposed, may still be the preferred approach.

The option of relying on departures was also discussed as an approach to the situation but summarily dismissed by POAG as we are of the opinion that sufficient language presently exists in the guidelines inviting such a departure. It was perceived that given a range of 16 levels, departures without structure would invite an unacceptable degree of disparity.

Lastly, the Commission invited comment as to whether the enhancement for previous convictions for aggravated felony should follow the same counting rules as provided at §4A1.2. POAG generally favors consistency and would recommend that there be a "shelf life" even for aggravated felonies in Chapter Two.

Although not precisely on point, POAG engaged in a brief discussion with regard to "uniformity" in the punishment of aliens. When incarcerated and upon completion of their imprisonment sentence, alien offenders are typically released to a detainer and deported. Although a term of supervised release is applicable, it is seldom imposed. Aliens seldom have to comply with the rigors of supervision. Given this reality, the severity of their sentence is obviously depreciated. An order to remain outside the United States may be consequence enough but it would seem this depreciated sentence undermines the goals of uniformity that Congress sought to achieve by enacting the Sentencing Reform Act. In expediting the disposition of immigration cases, POAG is of the opinion that we must remain cautious so as not to compromise the ability of the criminal justice system to "...combat crime through an effective, fair sentencing system".

Amendment 20 – Money Laundering

The Commission invited comment on four issues with respect to the money laundering proposed amendment.

(1) Whether application of subsection (a)(1) of proposed §2S1.1 should be expanded to include defendants who are otherwise accountable for the underlying offense under §1B1.3(a)(1)(B)(Relevant Conduct), in addition to defendants who commit or are otherwise accountable for the underlying offense under §1B1.3(a)(1)(A).

The consensus of POAG is that relevant conduct should be limited to the defendant's accountability under §1B1.3(a)(1)(A). Incorporating under §1B1.3(a)(1)(B) would more than likely include the "third-party cases", thus, the distinction between the two groups would be lost. It was brought to our attention that the Commission did not want to lose the distinction between the two groups.

(2) Should §2S1.1 include enhancements for conduct that constitutes elements of the money laundering offense, even if the conduct did not constitute an aggravated form of money laundering offense conduct. Specifically, whether, and if so, to what extent, proposed §2S1.1 should include an enhancement if:

(A) The offense involved concealment even if the conduct did not constitute sophisticated concealment.

POAG is of the opinion that concealment is inherent in the offense. Therefore, an enhancement should only be applicable if the offense involved "sophisticated" concealment.

(B) *If the defendant is convicted under various codes indicated referencing Internal Revenue violations:*

The presumption is that tax issues are not necessarily part of every money laundering offense; therefore, POAG is of the opinion that an enhancement treated as a specific offense characteristic would be appropriate. Furthermore, addressing this conduct as a specific offense characteristic would satisfy the grouping issue that exists when there is also a tax count charged.

(C) *If subsection (a)(1) applies and: (1) the defendant did not engage in an aggravated form of money laundering as accounted for by subsection (b)(2), and (2) the value of funds laundered exceeded $10,000.*

POAG is of the opinion that the underlying offense appropriately addresses the seriousness of the amount of laundered funds. Should an aggravating or mitigating factor be identified that has not been captured within the computation, the Court would have the option of departing.

(3) *Whether application of §(b)(2)(A) should be expanded to include defendants: (1) whose base offense level is determined under subsection (a)(1), and (2) who launder criminally derived funds generated by offenses which they did not commit and are not otherwise accountable under §1B1.3(a)(1)(A).*

POAG is of the opinion that application of this subsection should be expanded so a defendant is held accountable for being a direct and a third-party money launderer.

(4) *Whether violations of 18 U.S.C. §1960 should be referenced to §2S1.3.*

POAG has no position with respect to this issue.

In Conclusion

Due to the time constraints of our meeting and the volume of information presented to us, the staff of the Office of Education and Sentencing Practices assisted POAG in prioritizing issues for response. Our lack of response to additional proposed amendments in no way should be interpreted that we do not consider the proposed amendment noteworthy, i.e., *Sentencing Table Amendment* and *Alternative to Sentencing Table Amendment*. We trust that our comments have been beneficial and should you have any questions or need clarification, please do not hesitate to contact me or a circuit representative.

Very truly yours,

Ellen S. Moore

Ellen S. Moore
Chairman

ESM/amc

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March 8, 2001

To: The Chair and Members of the Sentencing Commission:

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

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

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

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

Yours very truly,

Sim Lake

Chair
Sentencing Guideline Subcommittee

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

Proposed Amendment No. 5 -- Sexual Predators

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

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

Proposed Amendment No. 12 -- Economic Crime Package

Loss Definition

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

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

The Basic Definition of "Loss"

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

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

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

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

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

Time of Measurement

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

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

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

Interest

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

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

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

Other Exclusions from Loss

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

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

"Ponzi Schemes" and Other Investment Frauds

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

Gain

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

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

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

Departure Considerations

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

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

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

Loss Tables

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

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

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

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

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

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

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

Proposed Amendment No. 18 -- Immigration

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

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

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

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

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

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN M. HUGHES
Chief

Federal Corrections and
Supervision Division

March 12, 2001

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

Re: Proposed amendment to the Immigration guideline

Dear Ms. Montgomery:

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

As we understand the proposal, it is intended to reflect sentencing enhancements based on the period of time the defendant actually served in prison for a prior aggravated felony conviction. Several chiefs on the border reported that obtaining reliable information pertaining to the time a defendant actually served is impractical and very time consuming. For example:

> Chief Probation Officer Martha Crockett (California, Southern) stated that reliable "time served" information is not readily available. She notes that if officers are required to obtain such information it would cause significant sentencing delays. Further, she adds that it would lead to unfair applications where such information is available for one defendant and not another. She added that she checked with two deputy chiefs and both say that using time served would be a "bad idea."
>
> Chief Probation Officer Jerry Denzlinger (Texas, Southern), notes that his officers can get booking records from Harris County and the Texas Department of Criminal Justice (TDCJ), but are not usually able to get that information from other county facilities.

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

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

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

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

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

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

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

Sincerely,

John M. Hughes

PUBLIC COMMENT

2001 AMENDMENT CYCLE

United States Sentencing Commission *March 2001*

Public Comment Summaries

2001 Amendment Cycle

Proposed Amendment 1 – Ecstasy

Department of Justice (DOJ)
Criminal Division
Michael Horowitz, Ex-Officio Commissioner

DOJ strongly supports this amendment because current ecstasy penalties are too low to serve as an effective deterrent. DOJ states that the proposed penalty levels for ecstasy comply with the statutory directive and are consistent with the 20-year statutory maximum term of imprisonment for a first offense.

Department of Justice
Statement of Robert S. Mueller, III
Acting Deputy Attorney General

The Department of Justice (DOJ) strongly supports the proposed amendment increasing the penalties for ecstasy. Mr. Mueller states that ecstasy has a high potential for abuse, causes widespread actual abuse, and has no acceptable medical use. Further, the target population consists of teenagers and young adults, and the drug is quickly becoming one of the most abused drugs in the United States. DOJ also states that medical evidence demonstrates the serious danger it poses to users, including the death of brain cells. For these reasons, DOJ urges the adoption of this amendment.

Federation of American Scientists (F.A.S.)
307 Massachusetts Avenue, N.E.
Washington, D.C. 20002

The F.A.S. states that because the usual doses of MDMA and heroin differ, treating the substances alike on a weight-for-weight basis would implicitly treat one dose of MDMA as being equivalent to ten doses of heroin. While MDMA has risks, the damage done by heroin to its users, and the damage done by its users and dealers to others, vastly outweighs the damage done by MDMA.

The F.A.S. suggests treating ten doses of MDMA as equivalent, for sentencing purposes, to one

dose of heroin. This implies an equivalency of 1 gram of MDMA to 10 grams of marijuana. Such an equivalency would mean that a single dose of MDMA would be treated as equivalent to approximately eight doses of marijuana. The F.A.S. states that the published proposal would treat a single dose of MDMA as equivalent to eight hundred doses of marijuana, a quantity that would support daily smoking for more than two years. The F.A.S. submits that if the Commission ratifies the published proposed amendment, the resulting change in sentencing would have the effect of diverting enforcement resources away from heroin, cocaine, and methamphetamine toward MDMA. The result of such a diversion would be to make the overall drug abuse problem worse.

The F.A.S. states that weight is not an appropriate basis for comparing drugs for sentencing purposes. A more accurate measure is to convert weight into dosage units for meaning comparisons.

The F.A.S. submits the following additional statements:

- There is growing laboratory evidence suggesting that MDMA is capable of causing lasting neurological changes in some of its users.
- This evidence contradicts earlier claims that MDMA is "harmless" or "non-addictive." Still, while rates of damage on a per-dose basis are difficult to compute, the gross measured damages due to heroin and MDMA differ by orders of magnitude.
- According to the Drug Abuse Warning Network (DAWN) "heroin/morphine" accounted for 4,820 medical examiner mentions (deaths related to acute or chronic use) in 1999, while "MDM" [which the F.A.S. assumes to mean MDMA] accounted for 42 mentions: a ratio of more than 100:1.
- "Heroin/morphine" accounted for 84,409 emergency department mentions (emergency department visits related to acute or chronic use) in 1999, while "MDM" accounted for 2,850 mentions: a ratio of 30:1.
- MDMA, while more widely used than heroin according to surveys, is much less likely to lead to patterns of abuse or dependency requiring clinical treatment.
- Both in its pharmacology and its risk profile, MDMA more closely resembles the hallucinogens than it does heroin. MDMA has some level of toxic risk and has some non-trivial risk of generating addictive-like behavior. MDMA is far less likely than PCP or LSD to generate acute psychological crises ("bad trips") or extreme acting-out behavior. Moreover, unlike the true hallucinogens, MDMA is highly reinforcing, which suggests that the transition from initiation to regular use may be more common among MDMA users than among users of LSD or mescaline. Thus any overall comparison of MDMA with the other hallucinogens would depend on the relative weighting of the risk of acute psychological crisis and related behaviors against addictive and toxic risks.

Mark A. Kroeker, Chief of Police
City of Portland, Oregon
1111 S.W. 2nd Avenue
Portland, OR 97204

Mr. Kroeker encourages the Commission to pass an amendment that will enhance penalties for the manufacture, importation, and exportation or trafficking in Ecstasy. Mr. Kroeker stated that his community has realized a dramatic rise in the distribution and use of Ecstasy of the last year. In November of 2000, Portland recorded its first-ever Ecstasy death, when an 18 year-old man overdosed on Ecstasy at a local "rave club."

Dustianne North
MSW/Ph.D. Candidate, UCLA
3909 Cumberland Avenue
Los Angeles, CA 90027

Francis DellaVecchia
Los Angeles Mayoral Candidate
5850 W. 3rd Street #336
Los Angeles, CA 90036

Ms. North and Mr. DellaVecchia write to express their concern about proposed increases in penalties for MDMA. Both are members of the dance community and state that they strongly believe that tough sentencing guidelines will not address the problem of MDMA abuse and in fact will do further harm to the dance community and persons who use MDMA.

Ms. North and Mr. DellaVecchia recommend that effort be made by government and non-profit agencies concerned about ecstasy use to become more educated about the drug itself, the lifestyles that go along with its use, and the reasons people choose to do it.

Michael A. Greene
263 East 3560 South
Salt Lake City, UT 84115-4720

Mr. Greene writes to request that the Commission admit his report be admitted into the record for the pending proposal to increase ecstasy penalties.

Mr. Greene states that while he neither uses illegal drugs nor encourages the abuse of any drug, he is concerned about the total effect that drug prohibition has had on society.

The essence of Mr. Greene's report is that MDMA has potential positive therapeutic uses. He states that Food and Drug Administration officials have granted permission to demonstrate MDMA efficacy in terminal cancer patients; this is a strong indication that there are potential benefits to the clinical use of MDMA. Further, it is unreasonable to equate a potentially useful drug like MDMA with other "club drugs" like methamphetamine, when MDMA exhibits no more danger than many drugs now prescribed.

Dean Sheldon Serwin
Attorney
1680 N. Vine Street, Suite 1115
Hollywood, California 90028

Mr. Serwin writes to oppose the proposed increase in MDMA penalty. Mr. Serwin believes that our penal system should be used for rehabilitation purposes whenever possible and putting kids in jail and prison where they have easy access to drugs will not rehabilitate them.

Proposed Amendment 2 – Amphetamine

[No public comment submitted for this amendment.]

Proposed Amendment 3 – Trafficking in List I Chemicals

[No public comment submitted for this amendment.]

Proposed Amendment 4 – Human Trafficking

[No public comment submitted for this amendment.]

Proposed Amendment 5 – Sexual Predators

Department of Justice
Criminal Division
Michael Horowitz, Ex-Officio Commissioner

DOJ supports much of what the Commission has proposed and believes that the amendments are important to assure adequate punishment for the serious offenses addressed.

a. Pattern of Activity

DOJ prefers Option 1(which creates §4B1.5, Repeat and Dangerous Sex Offender, for those convicted of a sex offense for the second time) together with Option 3 (which includes an increase for "pattern of activity" within the sexual abuse guidelines). This combination of options would treat repeat sex offenders with appropriate severity, but like the child pornography guidelines, would provide an increase for those who engage in a pattern of sexual misconduct, even if the misconduct has not resulted in a conviction. DOJ believes that a Criminal History Category of not less than IV is appropriate for the proposed, new provision on repeat and dangerous sex offenders.

Under Option 1, DOJ suggests simplifying the proposal by using the same definition for both the present and past conviction of a "sex offense" and using this term in the guideline. DOJ recommends defining this term as it is defined in Application Note 2 of Option 1A but also include state offenses consisting of conduct that would have been a listed offense if the conduct had occurred within the special maritime and territorial jurisdiction of the United States. Thus, the proposed definition of "sex offense" would include all of Chapter 109A, Chapter 110 (except for trafficking, receipt and possession of child pornography, and record-keeping offenses), Chapter 117 (except for failure to file factual statements about aliens and transmitting information about a minor), and state offenses that would constitute such a violation. If the Commission adopts Option 1A as proposed, DOJ suggests that the term "sex offense conviction" be changed to "prior sex offense conviction" to be consistent with the statute.

DOJ also recommends deleting proposed Application Note 5 in Option 1 because this proposed departure provision could have the unfortunate effect of undermining the guideline.

Concerning Option 2, DOJ does not believe that an additional "sexual predator guideline" is necessary to account for serious offenders who do not have a prior sex offense conviction.

If Option 1 is not adopted in conjunction with Option 3, as DOJ suggests, then the scope of Option 3 should be expanded to assure that it applies to all of the offenses covered by the statutory directive on pattern of activity. In addition, the proposed pattern enhancement for the sexual abuse guidelines includes trafficking in child pornography, whereas the existing pattern

enhancement in the child pornography guideline excludes trafficking, §2G2.2., Application Note 1. DOJ states that the two definitions should be the same and should both include trafficking in child pornography as part of a "pattern of activity."

b. Supervised Release

DOJ agrees with this proposal, but states that the guideline's definition of a "sex offense" does not match the definition section of Option 1A. That portion of the proposed amendments defines "sex crime as an instant offense of conviction" as all of Chapter 109A, Chapter 110 (except for trafficking, receipt and possession of child pornography and record keeping offenses), and Chapter 117 (except for failure to file factual statements about aliens and transmitting information about a minor). DOJ suggests the proposed definition in §5D1.2 is somewhat broader than necessary; DOJ prefers the definition in Option 1A, Note 2.

c. Multiple Counts

DOJ supports Option 2; however, the statement about grouping in the last part of the paragraph of the synopsis for Part C is confusing. It states that the addition of an enhancement in §2G2.1 for the production of sadistic or masochistic material would result in the grouping of child pornography trafficking and production counts of conviction under §3D1.2(c), contrary to the non-grouping option in Part B. DOJ believes that the harms involved in production and distribution are separate and that the non-grouping rule should prevail.

d. Additional Enhancements

DOJ believes that no such additional enhancements are needed at this time.

Federal Public and Community Defenders
Jon Sands, Chair
Federal Defender Committee on the Guidelines

The defenders recommend deferring action on the pattern-of-activity and incest amendments and on the increase in the base offense levels in §2A3.2 until after hearing at which Native American tribes, organizations, and individuals can testify.

Part A – If the Commission decides to proceed without hearings, the defenders prefer option 4, adding commentary language encouraging an upward departure. The defenders, however, recommend deletion of that part of option 4 that would amend §5D1.2 to require the maximum term of supervised release if the defendant is convicted of a sex offense. The defenders believe that this part of option 4 unnecessarily restricts judicial discretion. In any event, the defenders recommend excluding acts of incest from a definition of pattern of activity. If the Commission adopts option 1, the defenders recommend a criminal history category of not less than IV (option

1A) and recommends that proposed §4B1.5 have the same temporal limitations under §4A1.2(e) that apply to the career offender guideline. The defenders oppose option 2 because proposed §4B1.6 (1) would vitiate the requirement of proof beyond a reasonable doubt; (2) would be susceptible to prosecutorial manipulation (prosecutors could obtain a greater sentence by changing one count and using other allegations to seek the enhancement under proposed §4B1.6, rather than charging all allegations); and (3) would result in disproportionate sentences among sexual offenders.

Part B – the defenders support option 1, which would call for the grouping of counts under §3D1.2(d), because it will encourage greater uniformity in sentencing, discourage sentence manipulation by plea agreements, and promote judicial economy.

Part C – *Base offense level.* If the Commission decides to act on the base offense level without hearings, the defenders believe that the increase in the base offense levels last cycle are generally sufficient to comply with the congressional mandate, but they would support a new base offense level of 21 that would apply to an offense under 18 U.S.C. ch.117 that involves a sexual act. A base offense level of 18 would apply to a violation of 18 U.S.C. ch.117 that does not involve a sexual act, and a base offense level of 15 would apply in all other cases.

Incest enhancement. The defenders oppose an incest enhancement because of the disparate impact on defendants who are Native Americans.

Probation Officers Advisory Group
Ellen S. Moore, Chairman
U.S. Probation Office
P.O. Box 1736
Macon, GA 31202

The Probation Officers Advisory Group (POAG) prefers a combination of Part A, Option 1, and Option 3 as an approach to satisfy the congressional directive in the Act that requires penalty increases in any case in which the defendant engaged in a pattern of activity involving sexual abuse or exploitation of a minor.

Option 1 is preferred as it mirrors the present Career Offender and Armed Career Criminal guidelines, but POAG does have two concerns regarding Option 1. First, POAG recommends clarifying that the prior sex offense conviction must receive criminal history points under the provisions of §4A1.1 in order for the defendant to qualify for the application of §4B1.5. Second, POAG offers a formatting change to §4B1.5(d). The language "a repeat and dangerous sex offender's criminal history category in every case shall be..." should precede the table at §4B1.5(b). This minor change would be consistent with the presentation of a career offender's criminal history category found in §4B1.1.

POAG prefers the commentary set forth in option 1B. They strongly recommend, however, that comment (n3) for option 1B, language be included to designate whether the prior sex offense conviction under §4B1.5(a)(2) is one that has to be counted under the provisions of §4A1.1.

POAG prefers Option 3, wherein a SOC is included in §2A3.1 that addresses pattern of activity. This allows for the consideration of additional sexual abuse or exploitation of a minor that does not necessarily result in conviction.

Judicial Committee on Criminal Law
Honorable Sim Lake
Chair, Sentencing Guideline Subcommittee
300 East Washington Street, Suite 222
Greenville, South Carolina 29601

The Judicial Committee on Criminal Law (CLC) is concerned with Application Note 2 in Option 2 because it believes the language "is likely to continue to engage in prohibited sexual conduct with minors in the future" is broad and subjective. CLC further believes this determination could be difficult for the sentencing court in cases where no psychosexual evaluation of the defendant was prepared.

The CLC has additional concerns that although it agrees that the maximum term of supervised release is justified for most offenders, requiring that the maximum term be imposed in every case is problematic because of the limited resources available to probation officers. Instead, the CLC recommends alternative language of, "[I]n the majority of cases the Commission believes that the maximum term of supervised release should be imposed."

Proposed Amendment 6 – Stalking and Domestic Violence

[No public comment submitted for this amendment.]

Proposed Amendment 7 – Re-Promulgation of Emergency Amendment Regarding Enhanced Penalties for Amphetamine and Methamphetamine Laboratory Operators as Permanent Amendment

[No public comment submitted for this amendment.]

Proposed Amendment 8 – Mandatory Restitution for Amphetamine and Methamphetamine Offenses

[No public comment submitted for this amendment.]

Proposed Amendment 9 – Safety Valve

Department of Justice
Statement of Robert S. Mueller, III
Acting Deputy Attorney General

The DOJ opposes any expansion of the safety valve. DOJ states that the safety valve was enacted to provide relief for persons who received high sentences and were identified by Congress as the least culpable group of such offenders. The guidelines therefore reduce an otherwise severe sentence in recognition of the safety valve criteria. By contrast, a low-level drug dealer, whose relevant conduct results in an offense level below 26, is subject to a sentence of less than five years, even before consideration of mitigating factors that can reduce the sentence further. DOJ suggests that the proposed 2- level reduction is not needed for this offender.

Department of Justice
Criminal Division
Michael Horowitz, Ex-Officio Commissioner

DOJ does not see the need for this amendment. The "safety valve" exemption from mandatory minimum sentences was enacted to provide relief for persons who received high sentences but who were identified by Congress as the least culpable group of persons subject to such sentences. By contrast, a courier of a small quantity of cocaine whose relevant conduct results in an offense level below 26 would be subject to a sentence of less than five years, even before consideration of mitigating factors, such as acceptance of responsibility and role in the offense, that can reduce the sentence. DOJ states that relief from high sentences under the "safety valve" and the proposed2-level reduction are simply not needed for this offender.

Probation Officers Advisory Group
Ellen S. Moore, Chairman
U.S. Probation Office
P.O. Box 1736
Macon, GA 31202

POAG strongly supports this amendment.

New York Council of Defense Lawyers
711 Fifth Avenue
New York, NY 10022

The New York Council of Defense Lawyers (NYCDL) supports proposed amendment 9 which would eliminate the arbitrary limitation of the2-level downward adjustment for the "safety valve" defendants with a base level of 26 or greater. NYCDL states that the proposed amendment, which will extend the benefit of this reduction to defendants in less serious controlled substances cases, will put less culpable defendants on a level playing field with defendants now eligible for the safety valve.

George P. Kazen, Chief U.S. District Judge
Southern District of Texas
P.O. Box 1060
Laredo, TX 78042

Judge Kazen's primary concern with this proposal is with subsection (5) of §5C1.2. In the large volume of cases with which he is familiar, there is often a problem with scheduling "debriefing" hearings with the defense counsel, the prosecutor, and the law enforcement officer assigned to the case. Requested continuances to reschedule the hearing are not uncommon. Nor are subsequent disagreements on whether the defendant has truthfully provided all of the information known to him. The judge, who did not attend that debriefing, can either hold a hearing on the matter or ask the probation officer to interview the parties and make a recommendation. Judge Kazen states that this effort is worth the result at the higher offense levels, but he is not convinced that it will be useful at lowers levels where the sentencing ranges overlap and the marginal differences in sentences are not large. He questions how diligently subsection (5) will be administered under those circumstances.

Proposed Amendment 10 – Anhydrous Ammonia

[No public comment submitted for this amendment.]

Proposed Amendment 11 – GHB

[No public comment submitted for this amendment.]

Proposed Amendment 12 – Economic Crime Package

Part A. Consolidation of Theft, Property Destruction and Fraud

United States Postal Inspection Service
Office of the Counsel
Lawrence Katz, Counsel/Inspector in Charge
475 L'Enfant Plaza S.W., Room 3411
Washington, D.C. 20260-2181

The USPIS supports the consolidation of guidelines for theft, destruction of property, and fraud, provided the specific offense characteristics for the theft or destruction of mail are preserved in any new guideline.

The United States Postal Inspection Service (USPIS) urges the Commission to retain a2-level increase for the theft or destruction of United States mail above the proposed base offense level of 6, or in the alternative, retain the floor level of 6. The USPIS states that the federal statutes governing the theft and obstruction of mail differentiate United States mail from other stolen or destroyed property. The USPIS believes this distinction was the basis for §2B1.1(b)(3) when it was promulgated and feel strongly that it should be maintained in any general offense level increase proposed for the consolidated guidelines.

Probation Officers Advisory Group
Ellen S. Moore, Chairman
U.S. Probation Office
P.O. Box 1736
Macon, GA 31202

POAG prefers Option 1 for the proposed Loss Tables for the consolidated guideline. POAG's collective opinion is that the penalties in all of the proposed tables are too low. POAG routinely receives comment from the courts that the sentencing ranges calculated under §§2B1.1 and 2F1.1 do not provide significant punishment at the lower levels – where the majority of defendants fall. In Option 1, the majority of defendants would receive greater sentences, keeping in line with the concern of the courts.

New York Council of Defense Lawyers
711 Fifth Avenue
New York, NY 10022

The NYCDL supports the consolidation of §§2B1.1, 2B1.3 and 2F1.1. NYCDL also supports the use of the base offense level of six for the consolidated guideline. Also, the NYCDL believes that the existing fraud table should be used with some modification to address the thefts under $1,000 that are currently treated at offense level 5.

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

Regarding all other portions of Part A, the NYCDL joins in the comments of Federal Public and Community Defenders.

National Association of Criminal Defense Lawyers
Martin G. Weinberg, Chair
Samuel J. Buffone, Vice Chair
1025 Connecticut Avenue, NW, Suite 901
Washington, DC 20036

The National Association of Criminal Defense Lawyers (NACDL) supports consolidating §§2B1.1, 2B1.3, and 2F1.1. Further, the NACDL supports use of the existing fraud table with a base offense level of 6, as long as a one or two point decrease is adopted for cases involving a loss less than or equal to $1,000. The lower levels should be adopted because consolidation requires a choice between the higher levels for fraud and the lower levels for theft at amounts of $1,000 or less, and because the courts are currently sentencing in the minimum range in both theft and fraud cases.

The NACDL also supports the elimination of the "more than minimal planning" enhancement and opposes incorporating the enhancement in a consolidated Loss Table. To do so would impose unwarranted punishment on those few defendants who engage in minimal or no planning. Additionally, if the enhancement is incorporated in a consolidated Loss Table, a specific offense characteristic providing for a two point decrease should be added for those cases in which it does not exist.

With respect to the other proposals and issues for comment, the NACDL joins the Federal and Community Defenders and the New York Council of Defense Lawyers.

Jeffrey S. Parker, Professor
George Mason University
School of Law
Arlington, Virginia 22201

Professor Parker recommends that Amendment 12 be rejected in its entirety. In his opinion, the proposed modifications are likely to make the guidelines more difficult to apply and less effective in meeting the statutory sentencing purposes.

Part B. Loss Tables for Consolidate Guideline and §2T4.1

Department of Justice
Statement of Robert S. Mueller, III
Acting Deputy Attorney General

The Department of Justice (DOJ) believes that sentences in white collar crime cases are far too lenient and need to be increased, not decreased. Accordingly, the Department strongly supports the Commission's effort to change the Loss Tables to increase sentences for mid- and high-level white collar crimes.

Department of Justice
Criminal Division
Michael Horowitz, Ex-Officio Commissioner

DOJ urges the Commission to amend the Loss Table so that the sentencing guidelines more accurately capture the magnitude and seriousness of each offense. Three options for increasing the Loss Table are included in the proposed amendment, all of which raise offense levels for high dollar amounts. However, the proposed Loss Tables would actually lower offense levels or produce the same level as the current guideline at the low end of the dollar scale but begin to climb at $40,000 of loss in the case of Options 1 and 3 and at $120,000 in the case of Option 2.

DOJ believes that Option 3 of the proposed amendments, with a slight modification, would go far in solving the problem of inadequate white collar sentences. The modification DOJ recommends is incorporating into Option 3 the 1-level increase for offenses involving between $2,000 and $5,000 from Option .

DOJ opposes the proposed2-level decrease in the offense level in proposed §2B1.1(b)(7) for offenses that involve $2,000 or less.

DOJ states that Option 3 is preferable to Option 1 for offenses involving between $160,000 and

$1 million, an important range of losses for mid-level frauds. Option 3 is preferable to Option 2 for offenses at somewhat lower levels—another category encompassing a significant number of offenses.

More than Minimal Planning. DOJ states that a balanced approach would be for the Commission to adopt language prohibiting a downward departure on the basis of minimal planning and an upward departure on the basis of more than minimal planning. The promulgation of such language would signal to all parties that the Commission has adequately taken into account the issue of minimal planning and more than minimal planning.

[Note: the following summary of DOJ comment is from the Appendix which DOJ submitted as a supplement to its public comment.]

As a general matter, Option 1 of the proposed Tax Table increases offense levels for tax offenders throughout the guideline ranges, and Option 2 decreases offense levels for tax offenders at the low end of the guidelines and generally increases offense levels for tax offenders whose tax loss exceeds $70,000. As DOJ's focus in tax cases consistently has been on increasing punishment for low-end offenders in order to maximize deterrence, Option 1 is preferred. DOJ has no objection to moving from1-level increments to2-level increments.

Without regard to the Commission's proposal to expand the Zones, which would have a devastating effect on tax enforcement, Option 1 will lower the tax loss levels at which offenders will fall in Zones C and D. For example, under the existing Tax Table, an offender with a tax loss between $5,001 and $13,500 will fall in Zone B, and thus be eligible for a probationary sentence, while under Option 1, Zone B will end at a tax loss level of $12,500. Similarly, the break points between Zone C, where a split sentence is possible, and Zone D will be lowered under Option 1 from $40,000 to $30,000. Thus, under Option 1, a sentence of imprisonment only will be required for a tax loss in excess of $30,000. In view of Option 1's greater impact on lower level tax loss offenders, DOJ favors its adoption.

Judicial Conference Committee on Criminal Law (CLC)
300 East Washington Street, Suite 222
Greenville, South Carolina 29601

Although the CLC prefers its own table, any of the proposed Loss Tables is an improvement over the current table.

Department of the Treasury
James F. Sloan, Acting Under Secretary (Enforcement)
Washington, DC

Tax Table: Treasury supports the Option 1 Tax Table because it appropriately reflects of the seriousness of tax offenses. Treasury prefers Option 1 because it provides a lower loss amount that triggers the first increase above the base offense level ($2000) and achieves mandatory imprisonment at a lower loss amount than Option 2.

Treasury strongly objects to using the same Loss Table for tax, theft, property destruction, and fraud crimes. It argues that the consolidated table would effectively erase the current sentencing policy that tax crime are serious crimes and, as a result, have historically received higher penalties than theft, property destruction, and fraud crimes.

Department of the Treasury
Internal Revenue Service
Charles O. Rosotti, Commissioner of Internal Revenue
Washington, D.C. 20224

The IRS supports the Option 1 of the Tax Table; this provides for a base offense level of six for tax loss amounts equal to or less than $2,000. The IRS stated that Option 1 is an appropriate reflection of the seriousness of tax offenses, provides a lower base offense level loss amount and achieves the current mandatory imprisonment offense level of thirteen at a lower loss amount than Option 2. Additionally, they noted that while the proposed amendment is silent on the issue, there is language in the synopsis of Amendment Twelve, Part B, which discusses using Option 1 Loss Table for theft, property destruction, fraud and tax crimes. The IRS strongly objects to this proposal because it is wholly at odds with long-standing policies that treat tax crimes as serious crimes, warranting higher penalties than theft, property destruction, and fraud crimes.

New York Council of Defense Lawyers
711 Fifth Avenue
New York, NY 10022

The NYCDL is opposed to the Commission's proposal to revise the consolidated Loss Table. Each of the three options would substantially increase the punishments meted out to defendants convicted of theft, property destruction or fraud. The NYCDL states that the Commission offers no rationale for these changes.

The NYCDL urges the Commission to reject each of the three options set forth in Part B of the proposed amendment. Instead, the NYCDL recommends adoption of the current fraud Loss

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

Practitioners' Advisory Group
Jim Felman & Barry Boss, Co-Chairs
c/o Asbill, Junkin, Moffitt & Boss, Chartered
1615 New Hampshire Avenue, NW
Washington, DC 20009

PAG does not believe that any increase in the Loss Table is justified. Although some judges and prosecutors appear to believe strongly that economic offenders are being punished too leniently, especially when compared with drug offenders, PAG believes that the empirical data (e.g. high percentages of defendants sentenced at the bottom of the possible range) refutes this proposition. In addition, PAG argues that using the drug sentences as a base line in determining sentences in economic crime cases merely incorporates an irrational sentencing scheme (driven largely by mandatory minimums) into economic crime sentences. PAG is opposed to both Options 1 and 2 but, if forced to choose, would prefer Option 2.

National Association of Criminal Defense Lawyers
Martin G. Weinberg, Chair
Samuel J. Buffone, Vice Chair
1025 Connecticut Avenue, NW, Suite 901
Washington, DC 20036
§2B1.1(b): The NACDL opposes any revision to the consolidated Loss Table by increasing offense levels beyond those contained in the current fraud table. The NACDL opposes any increase in the Loss Tables for economic crime cases, stating that there is no justification supported in fact or logic for any increase at any level. Amendments to the economic crimes guidelines have kept pace with any real or perceived need for increased sentences. Further, the Loss Tables set in 1989, the specific offense characteristics added subsequently, and the use of the departure power have been more than adequate to reflect the seriousness of economic crime.

Further, the NACDL believes there is no need based on simplification of otherwise to increase current offense levels in order to consolidate the Loss Tables. Concerns about complexity step primarily from inconsistent and unclear definitions and ambiguous instructions in the guidelines rather than the number or breadth of offense levels.

Part C. Revised Definition of Loss for Offenses Sentenced Pursuant to §2B1.1, the Consolidated Guideline

Department of Justice
Criminal Division
Michael Horowitz, Ex-Officio Commissioner

DOJ agrees with the notion of amending the definition of loss to set forth a comprehensive approach for purposes of applying the fraud, theft, and property destruction guideline. DOJ also agrees with the effort to expand the reach of consequential damages beyond the limited classes of offenses now covered—defense procurement fraud, product substitution, and computer crime. Consequential damages should apply to all offenses covered by proposed §2B1.1. However, the options published for comment all have inherent problems. If these problems can be resolved in the time remaining this amendment cycle, the DOJ favors finalizing amendments to the definition. However, DOJ cautions against adopting amendments that may breed increased litigation in the future and recommends that the Commission operate in a very deliberate manner. DOJ suggests that if necessary, the Commission should delay the redefinition of "loss" until the next amendment cycle.

DOJ favors a definition of "loss" that expressly includes the value of the property taken, damaged, or destroyed and that includes additional reasonably foreseeable pecuniary harm. Only consequential damages would be subject to a reasonable foreseeability test. This concept would apply to all fraud, theft, and property destruction cases with a modification necessary for certain computer crime cases. Specifically, with respect to offenses involving the unauthorized access of "protected" computers as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), loss should include all harms currently covered. For such offenses, "loss" currently includes "the reasonable cost to the victim of conducting a damage assessment, restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service." §2B1.1, Application Note 2. While the costs must be "reasonable" in such cases, they need not be reasonably foreseeable. DOJ states that a reasonable foreseeability test would be particularly difficult to apply in such computer crime cases and could lead to uneven results.

Gain. Gain is an important component of a new "loss" definition. DOJ finds this new component particularly important in food and drug offenses and other crimes that violate a regulatory scheme. Actual loss may be little in such cases, but the risk of severe harms and loss may be great—which is why the regulatory scheme exists. The gain produced by the offense is one means of measuring the extent of the offense and the defendant's culpability.

DOJ disagrees with the notion of limiting gain to "pecuniary gain" (before tax profit). Gain as a substitute for loss should reflect the magnitude of the offense, not the level of efficiency of a criminal in operating a fraudulent scheme. In this regard, we also oppose the proposed downward departure for offenses in which the loss significantly exceeds the greater of the

defendant's actual or intended personal gain. A court should not be encouraged to reduce a sentence because a defendant's fraud did not result in the profit he desired or expected.

Department of the Treasury
James F. Sloan, Acting Under Secretary (Enforcement)
Washington, DC

As to the question of *when* loss should be measured for sentencing purposes, Treasury believes that the loss at the time of sentencing (Option 1) is more appropriate and more accurate. The full loss amount of fraud schemes often cannot be measured accurately at the time the offense is detected, additional harm may result as a direct result of the defendant's actions but after his arrest, and the end victim of a fraud scheme (*e.g.*, a credit card holder) may not be notified of the loss until after the fraud has been detected. Treasury believes that these losses would be discounted or ignored under Option 2.

Department of the Treasury
Internal Revenue Service
Charles O. Rosotti, Commissioner of Internal Revenue
Washington, D.C. 20224

Regarding the proposed amendment concerning the definition of tax loss, the IRS opposes adoption of an amendment that would exclude state and local tax loss from consideration. In the IRS's view, basing the sentence exclusively upon federal tax losses does not adequately take all relevant conduct into consideration.

The IRS does, however, support the amendment that would include interest and penalties in the definition of tax loss for evasion of payment cases, because it accurately reflects the total harm to the government in an evasion of payment case.

Judicial Committee on Criminal Law
Honorable Sim Lake
Chair, Sentencing Guideline Subcommittee
300 East Washington Street, Suite 222
Greenville, South Carolina 29601

a. Loss Definition

The CLC supports its proposed loss definition in Option 2 because it is complete, workable and easy to apply. It also supports the approach taken by the Commission in the two minor issues not previously addressed by the CLC.

In Option 1, the CLC believes it is not desirable to include examples, because examples may be over-construed, becoming the focus instead of the language remaining the focus. It recommends that the computer crime example be placed instead in the background commentary, and believes the second example is so complex it will produce more confusion than clarification.

The CLC suggests that including in the definition of "loss" all pecuniary harms that "resulted or will result" from the criminal conduct in Option 2, thereby including every adverse financial consequence of the crime, regardless of how remote, would be unworkable and unjust because the defendant would be held responsible for harms he could not have foreseen. Instead, the CLC adheres to a definition for "loss" which includes a) whether the harm resulted from the crime and b) whether the harm was reasonably foreseeable.

b. Time Measurement

In the proposed Application Notes for §2B1.1, the CLC recommends that "loss" should be measured at the time of detection, and not, as stated in Option 1, at the time of sentencing. Option 1, which proposes that "loss" be measured at the time of sentencing, could not be applied to many common theft and fraud cases. The CLC states that if both Option 1 in the "Time of Measurement" subsection and Option 2 in the "Exclusions from Loss" subsection (which states that interest that is accrued and unpaid "as of the time the defendant knew or should have known that the offense had been detected") were adopted together, the result would be rules in different sections of the definition measuring different components of "loss" on different dates.

c. Interest

The CLC recommends excluding interest of any kind from "loss." The CLC further opposes including "bargained-for" interest in "loss," because there is no rationale for including this interest while excluding from loss imputed interest and other benefits promised by the defendant simply because the defendant did not use the word "interest" in describing the promised benefits.

CLC is also concerned with the use of the phrase "other opportunity costs" in Option 1. The meaning of the phrase is unclear, and no definition is provided, inviting confusion and inconsistent judicial interpretations.

d. Other Exclusions from Loss

The CLC opposes expanding the *de minimis* exclusion to include benefits that have "little or no value to the victim" because they are "substantially different from what the victim intended to receive." The provision would nullify the crediting rules if a defendant received no credit against loss unless the benefit was what the victim expected. Further, this option would require probation officers and judges to determine the victim's subjective expectations, complicating the sentencing process.

e. "Ponzi Schemes" and Other Investment Frauds

The CLC supports the "loss to the losing victims" approach to measuring loss in multi-victim investment frauds in Option 1.

f. Gain

With respect to "gain," the CLC supports Option 2. As long as "gain" is merely an occasionally useful way of estimating "loss," treating a gain of x dollars as a "loss" of x dollars makes sense because the defendant's gain is some victim's loss. Further, the CLC does not see the justification for sentencing a defendant to the same punishment he would have received if he had caused a harm equal to his gain.

g. Departure Considerations

The CLC prefers its own description of the general considerations for departure, which refers to the seriousness of the offense and to the culpability of the defendant. In addition, the CLC does not believe that interest, or the other items listed in Option 4, should be departure considerations.

h. Insider Trading

According to the CLC, the insider trading provision would result in higher sentences than the current guideline for some offenses. Further, because the current insider trading base offense level of 8 includes more than minimal planning, the CLC believes the base offense level for insider trading should be lowered to 6 if a new sentencing table is adopted that incorporates more than minimal planning.

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a. Proposed Change in Definition of "Loss"

The NYCDL objects to the definition proposed in Option 1 whereby actual loss is defined as "reasonably foreseeable pecuniary harm that resulted or will result from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) . . . ."

NYCDL states that Option 1 departs dramatically from the approach of holding a defendant accountable for that over which he had control. This is because it imports into the calculation the notions of foreseeable harm and consequential damages, thus introducing the concept that a defendant might deserve a longer prison sentence because of factors over which he had no control.

NYCDL states that proposed Option 1 appears to run counter to established precedent where there does not appear to be real conflict in the Circuits. While there may be many cases in which foreseeable consequential damages are so significant that an upward departure may be warranted, the NYCDL opposes the proposal to make consequential damages part of the definition of loss.

Additionally, adding consequential damages to the loss definition will generate a significant burden of litigation and fact-finding, to be borne by parties, attorneys, probation officers, district judges, and circuit judges.

NYCDL favors Option 2, however NYCDL objects to the inclusion in this definition of loss which "will result" from the defendant's conduct. This invites speculation and burdensome litigation similar to that caused by Option 1, as to how to determine what losses "will result" from a defendant's conduct and how far in the future a court should look to make such a determination. The NYCDL, therefore, endorses Option 2 of the proposed loss definition with the caveat that it be limited to loss that has already resulted.

b. Time of Measurement for Computing Loss

NYCDL generally favors Option 1 for measuring loss at the time of sentencing. However, NYCDL also believes that for certain theft crimes, where property either appreciates or depreciates after the theft, the appropriate point for measuring loss may be the date of the theft itself.

c. Exclusions from Loss – Interest and Other Opportunity Costs

The NYCDL favors Option 1 because actual loss should ordinarily drive the calculation of the loss enhancement, if any. The length of a jail sentence under the Guideliness should not be determined upon consequential damages, and the same principle, precludes the inclusion of interest and other opportunity costs. The NYCDL submits that sentencing should not be based upon frustrated expectations. For the purposes of calculating loss, the NYCDL does not believe there is a meaningful distinction between time-value of money diverted from a victim who could otherwise have invested his funds, and the interest another victim expected to receive on a fraudulent transaction itself. Therefore, the NYCDL endorses Option 1, excluding all opportunity costs from loss, as an appropriate exclusion which will also resolve a conflict in the circuits.

d. Additional Exclusions from Loss: Government Costs, Victim Costs, and Value of Economic Benefit Transferred to Victim

Although the NYCDL favors the inclusion of government costs, victim costs incurred to aid the government, and the value of the economic benefit the defendant transferred to the victim in "exclusions from loss," the NYCDL is concerned that the list of excludable items may be construed as exhaustive. If the Commission adopts the "reasonably foreseeable" language in its

loss definition, courts will find their hands tied should they wish to exclude unlisted items from the loss definition even where it is unlikely the Commission would have intended such costs be included. The language of the proposed exclusion could indicate to a court that it must include all indirect costs, such as the victim's legal fees, because they are not specifically listed as exclusions and could be construed as "reasonably foreseeable." Thus, the NYCDL proposes adding language similar to that in the proposed guideline regarding Upward Departure Considerations; that is, that the list of Exclusions from Loss is a "non-exhaustive list."

e. Specific Situations Where Economic Benefit to the Victim is Included in Loss

NYCDL suggests that theses examples would be better placed in Upward Departure Considerations than presented as essentially exclusions to Exclusions in the loss definition. Of the two alternative scenarios, NYCDL is opposed to the scenario that states that if the benefit "has little or no value to the victim because it is substantially different from what the victim intended to receive," it cannot be excluded from the loss amount. NYCDL is opposed to this formulation for the same reason it supports the exclusion of interest and opportunity costs from the loss calculation; the criminal law is not there to address frustrated expectations.

NYCDL states that proposed subsection [IV(2)] is an appropriate response to cases such as United States v. Maurello, 76 F.3d 1304 (3d Cir. 1996) and United States v. Barnes, 125 F.3d 1287 (9th Cir. 1997) which held that the value of the services rendered should be offset against the cost of the service. All loss definitions, those currently in the Guidelines and those proposed here, turn on "pecuniary" harm. The value of the services as a factor in measuring "procuring harm" and the Guidelines should not be distinguishing between certain classes of frauds. Therefore, NYCDL believes that such factors too would be more appropriately considered as factors possibly supporting an upward departure rather than creating a blanket exclusion incorporated into the definition of loss.

f. Ponzi-scheme Exclusion

The NYCDL endorses Option 1.

g. Estimation of Loss

The NYCDL states that although factors "such as scope and duration of the offense and revenues generated by similar operations" may have a place in departure considerations, they have limited relevance, if any, to actual or intended pecuniary harm and should thus be moved from the list of factors which may be considered in estimating the amount of the loss to the list of factors under Departure Considerations.

h. Use of "Gain" as an Alternative to Loss

The NYCDL endorses Option 4 where gain may be used as an alternative to loss only where

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

NYCDL does not endorse the proposed Upward Departure provision which speaks of gain in terms of defendant's "anticipated" profits. The NYCDL favors a provision in the Upward Departure Considerations, which would allow the courts to consider taking a defendant's actual gain into account under circumstances where the loss calculation does not fully capture the seriousness of the conduct.

i. Special Rules: Government Benefits

The NYCDL believes that the Commission's resolution is correct in that it follows the fourth circuit holding in United States v. Dawkins, 202 F.3d 711 (4th Cir. 2000). Furthermore, this reasoning is more in line with the Commission's proposal to remove from the loss calculation economic benefits received by the victim.

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PAG recognizes that there are significant problems with the current loss definitions, and they echo the opinions voiced at the economic crimes symposium that the current guidelines overemphasize "loss" as a basis for determining overall culpability. In this regard, PAG welcomes the "flex proposals" that have been promulgated as Amendment 13.

PAG addresses several specific issues:

Intended loss: The PAG respectfully urges the Commission to reconsider whether "intended loss" is needed at all, especially given the amount of work it entails, and the confusion and potential for error that it creates. Sentences are generally based on the actual amount of loss, not on the intended amount of loss. If this change is intended to apply to inchoate offenses, then the PAG suggests that §2X1.1 already accomplishes that goal. Additionally, the amendment seems to require that intended loss be calculated in every fraud and theft case, whether inchoate or not.

If the Commission believes that a special inchoate offense rule is needed for fraud and theft cases, the PAG recommends a rule such as the following:

> For all offenses except inchoate offenses, loss means actual loss. For inchoate offenses, loss is the greater of actual loss and intended loss. "Inchoate offenses" are those offenses in which the defendant is apprehended before the offense has been completed.

The approach also focuses on inchoate offenses that "intended loss" was always meant to cover without creating extra work for the courts by requiring them to determine intended loss in every case.

If the Commission requires intended loss to be calculated in every case, the PAG recommends that the number used be the average, not the greater, of the two losses. If intended loss matters, the PAG argues that it should always matter. Therefore, a defendant who caused more loss than intended, should not be punished as severely as if she had intended the full amount of loss. This is the case for other crimes, such as homicide/manslaughter and some drug cases (§2D1.1, comment (n.12)).

If the "whichever is greater" rule is adopted, the PAG recommends four points of clarification:

1. The definition should be modified to clarify that it measures harm that the defendant intended to cause. A defendant should not be held responsible for what goes on in the heads of other offenders.
2. The definition should be explicit as to the *mens rea* necessary for something to qualify as intended loss. Adding the word "purposely" before the term "intended to result" will avoid a lowering of the standard to reasonable foreseeability.
3. The guidelines should make it clear that no "impossible" intended loss is to be included in the calculation of intended loss. At a minimum, the bracketed language in the proposed amendment needs to be included, so as to distinguish between harm that was intended in a sting operation and harm that was intended in an overly ambitious fraud. A parenthetical should be provided to spell out the difference for those unfamiliar with this issue.
4. The definition should make clear that the credit principle applies to intended loss. If the defendant intended to transfer any economic benefit to the victim, the value of the intended benefit should be deducted from the intended loss.

Interest: PAG believes that interest should be excluded from loss calculation. Defining interest will be complicated and its inclusion would result in increased litigation without noticeable effect on the sentencing outcomes. It also may lead to further disparities in sentencing by making inappropriate distinctions among similar defendants. The PAG states that, even if the Commission chooses not to include interest in the calculation, payments against interest should be allowed. This avoids creating extra work for the courts and will not substantially effect the

defendant's base offense level.

Net Loss: PAG addresses various subsections of Proposed Amendment 12, Part C:
Subsection (IV)(1): The PAG recommends that *de minimus* be defines so as to avoid litigation and potential circuit conflicts on the issue. It also recommends that the portion concerning the victim's determination of "no value" be deleted.
Subsection (IV)(2): The PAG opposes Paragraph (2) of this subsection. This paragraph precludes a reduction in the loss calculation by the value of services competently performed or of adequately functioning goods if the fraud involved persons posing as licensed professionals or if the goods were falsely represented to be legitimately approved by a governmental agency. If the goal of the loss function is to measure economic harm, the loss calculation should be reduced by the value of such goods and services. Whether the defendant's fraud has harmed a specified licensing or regulatory scheme is a separate question and should be resolved accordingly.
Subsection V: The PAG supports Option 1. The PAG further supports the idea that all amounts returned to the investors as a whole should be deducted from the calculation of loss.

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The NACDL opposes intended loss as an alternative measure of loss in completed crimes. The NACDL opposes the General Rule proposed for the commentary to a consolidated guideline that would make loss the greater of actual or intended loss in all cases, and supports instead maintaining the current system of using intended loss if greater than actual loss only in sentencing inchoate crimes. The NACDL supports a proposal for the commentary to a consolidated guideline that reads "For all offenses except inchoate offenses, loss means actual loss. For inchoate offenses, loss is the greater of actual loss and intended loss. "Inchoate offenses" are those offenses in which the defendant is apprehended before the offense has been completed."

The NACDL believes that if intended loss is adopted as an alternative measure of loss if greater than actual loss in sentencing all fraud and theft crimes, the definition of intended loss should be amended to state that "(1) the loss must be 'the pecuniary harm that the *defendant purposely* intended to cause,' (2) the bracketed language concerning impossible intended loss be included at minimum and clarified to ensure that a fraudulent insurance claim seeking $50,000 for a $10,000 car would not be counted, and (3) the credits principle applies."

The NACDL supports the definition of "actual loss" in Option 1 if a limitation is added to the concept of reasonable foreseeability. Further, the NACDL proposes that in the first sentence of the second paragraph, the phrase "as the defendant knew them" be added after "circumstances of

the particular case," and further proposes that an example based on United States v. Marlatt, 24 F.3d 1005 (7th Cir. 1994) be added.

With respect to Exclusion of Interest, the NACDL supports Option 1.

Concerning Unlicenced Services, Unapproved Goods, the NACDL opposes proposed Application Note 2(C)(iii)(IV)(2).

The NACDL supports Option 1 of the Ponzi Scheme proposal.

With respect to Estimation of Loss, the NACDL believes in Application Note 2(D), the language which currently states "the court need only make a reasonable estimate of loss," the word "only" and the absence of reference to the evidence of the case denigrates the court's fact finding function. Instead, the NACDL proposes that the first sentence be replaced with "In order to determine the applicable offense level, the court must make a reasonable estimate of the los based on the evidence in the case."

Further, the NACDL opposes the commentary in Estimation of Loss which purport to dictate a deferential standard or review on appeal. Instead, the NACDL supports deletion of the second and third sentences of proposed Note 2(D) and the citation of 18 U.S.C. § 3742(e) and (f).

Regarding Gain, the NACDL supports Option 4.

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Professor Parker recommends that "gain" should be eliminated from any consideration in the guidelines, except as an estimate of "loss."

Professor Parker also believes there is no current inconsistency regarding the treatment of "loss" as among the various guidelines that use loss as a primary sentencing factor, but instead believes the purported "inconsistencies" are products of the basic policy decision to use a "charge offense" sentencing system. Therefore, every proposal to consolidate guidelines undercuts the logic of this charge-based sentencing system, and would undermine the structural integrity of the existing system. Professor Parker states that a case charged as simple theft should not be treated the same as a case involving fraud because the proof requirements for each on liability are not identical and the interests served by the prohibition of each are not the same.

Further, Professor Parker states that a treatment of direct versus indirect harm is not inconsistent. There is a necessity in most of remedial law of focusing on the direct and immediate harm and

largely excluding the indirect or speculative harm. Thus, the current proposal, which substitutes a vague foreseeability concept for a straightforward loss test, is the worst possible proposal. Focusing on remote effects which may or may not have been foreseeable would increase the cost and complexity of the sentencing system.

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

Department of Justice
Criminal Division
Michael Horowitz, Ex-Officio Commissioner

DOJ shares the concerns expressed by the Internal Revenue Service in this regard. DOJ states that without any explanation, the Commission has adopted the Harvey sequential approach, but it does seek comment on whether the Cseplo approach should be adopted.

DOJ states that the Tax Division has sought to have the Commission address this issue since late 1998 and, in fact, Mary Harkenrider, the Department's then-*ex officio* member of the Commission, sent a letter to the Commission to that effect. DOJ states that it has long urged the Commission to adopt the Cseplo approach to the resolution of this conflict. DOJ believes that Cseplo is the better approach. The flaw in the Seventh Circuit's reasoning in Harvey is its focus on the situation where the taxpayer "obeys the tax laws." United States v. Harvey, 996 F.2d at 921.

Grouping. DOJ opposes this amendment as inconsistent with the basic premise of the grouping rules and the reason for the §2T1.1(b)(1) enhancement. However, DOJ does not disagree with the proposition that clarification of the grouping rules for tax cases is necessary because courts that have faced the question have reached varying conclusions on the need and method for grouping. DOJ states that the proposed addition to the application notes is not an appropriate solution to the grouping issue. Instead, the proposal is inconsistent with the premise underlying the grouping rules of Chapter 3, Part D.

DOJ does not oppose clarification of the grouping question in criminal tax cases. In fact, as evidenced by the varying approaches applied by courts that have considered the question, clarification is needed. But rather than a proposal that produces, in some cases, results at odds with the purpose of the grouping rules and does not serve the reason underlying the specific offense characteristic that is the catalyst for the grouping, DOJ suggests the need a proposal that results in incremental punishment for significant criminal conduct and reflects in the offense level the enhancement giving rise to the grouping, at least where the amount of income from the criminal activity would support the enhancement under §2T1.1(b)(1).

DOJ states that the proposed amendment should not be adopted. Rather, the Commission, with

help from the Department and others, should attempt to come up with a fair proposal. If, however, the Commission is inclined to adopt some proposal during this amendment cycle, language should be added to the effect that when the offense level for the group is no greater than it would have been had the most serious offense been sentenced alone, the offense level of the group should be increased by up to two levels to recognize the significant additional criminal conduct reflected in the other offense or offenses in the group.

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

Department of the Treasury
James F. Sloan, Acting Under Secretary (Enforcement)
Washington, DC

Treasury believes that the Commission should resolve this circuit conflict in favor of the sixth circuit's position that evasion of individual tax and corporate tax are two separate violations. United States v. Cseplo, 42 F.3d 360 (6th Cir. 1994). Similarly, Treasury opposes the proposal to except state and local tax loss from consideration because it under represents the relevant conduct involved in the offense. Treasury supports the inclusion of interest and penalties in the definition of tax loss for evasion of payment tax cases, because it accurately reflects the total harm to the government.

Department of the Treasury
Internal Revenue Service
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Regarding the proposed amendment concerning the computation of tax loss, the IRS stated that adoption of this amendment would confer an unfair sentencing advantage to the convicted tax criminal because the totality of the criminal conduct is not adequately counted. Two separate crimes are committed when an offender executes a scheme to evade taxes or files false returns that affect two taxpayers: one crime arises from the evasion of tax by the corporation. The IRS recommends that because the crimes are separate, tax losses should be calculated separately and then added together to achieve the aggregate loss to the government. Evading one's individual

tax and evading corporate tax are separate violations, and the total tax loss should not be calculated as if only one offense was committed.

Grouping
The IRS opposes adoption of the amendment that mandates grouping tax offenses with other crimes committed in connection with the tax crimes. The amendment in its current form eliminates any incentive to charge a tax crime separately from the crime from which the income for the tax crime was derived. Although clarification is necessary on this issue because of the circuit conflict, this proposed amendment reaches the wrong conclusion. The proposed amendment requires that tax counts be grouped with counts relating to the source of funds that were the subject of the tax crimes. This resolves the circuit conflict in favor of the defendant, because it effectively eliminates the separate tax crime conduct and harm, and only holds the individual responsible for the underlying criminal conduct from which the income was derived.

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

Judicial Committee on Criminal Law
Honorable Sim Lake
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The CLC supports the proposal as explained in New Application Note 7.

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Although NYCDL agrees that the Harvey approach is the more fair of the two options, NYCDL notes that absent the clarifying language of proposed Application Note 7, the new amendment does not make clear that the Commission is adopting the Harvey approach. The language of the proposed amendment does not on its face make clear that the corporate tax exposure is to be deducted from the gross unreported income at the corporate level before the gross unreported income at the individual level is computed. The NYCDL urges that the Commission find clearer language in which to state its intent before adopting any amendment of this sort.