be subject to offense level 26. Of course, since no mandatory minimum sentence applies to Ecstasy, reductions in sentence based on role in the offense and acceptance of responsibility would apply throughout offense levels. Similarly, some offenders would qualify for a two-level reduction based on "safety valve" eligibility (see guideline §2D1.1(b)(6)).

As you know, the proposed Ecstasy amendment responds to a directive in the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. No. 106-310, § 3663 (hereinafter "Meth Act"). The Meth Act requires the Sentencing Commission to increase penalties for Ecstasy and directs the Commission to assure that the guidelines reflect the need for aggressive law enforcement, the rapidly growing incidence of abuse of the drug, the recent increase in its illegal importation, and the fact that it is frequently marketed to youth, among other factors. 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 (see 21 U.S.C. § 841(b)(1)(C)).

While the Commission has identified the proposed penalty levels as being the same as those that apply to heroin, it is the dangerous nature of Ecstasy that makes these sentencing levels appropriate, rather than any direct relationship to heroin. In our view, the weight equivalency of the two drugs is coincidental. Ecstasy is a Schedule I controlled substance that has a high potential for abuse, causes widespread actual abuse, and has no acceptable medical use. The target population for Ecstasy consists of teenagers and young adults, and the drug is quickly becoming one of the most abused drugs in the United States. Our prior letter to the Commission concerning Ecstasy outlined the dangers it poses to users, including the death of brain cells. The damage this drug can produce is significant and long-term.

We urge the Commission to adopt the proposed amendment. An amendment such as that proposed is necessary in order to send a strong signal to those who would import or traffic in Ecstasy that it is a serious drug of abuse and that its spread will not be tolerated.

Amendment 5, Sexual Predators

Amendment 5 makes a number of amendments to the sentencing guidelines relating to sexual abuse and child pornography in order to provide increased sentences for such factors as engaging in a pattern of activity and incest. It also creates new guidelines to address repeat and dangerous sex offenders and sexual predators; requires the maximum term of supervised release

for sex offenders; and addresses groups of counts relating to child pornography production, possession, and trafficking offenses. We support much of what the Commission has proposed and believe that the amendments are important to assure adequate punishment for the serious offenses addressed. These amendments respond to directives in the Protection of Children from Sexual Predators Act of 1998 (Sexual Predators Act), Pub. L. No. 105-314.

Pattern of Activity

Part A presents several options to provide enhancements for repeat sex offenders and responds to the directive in section 505 of the Sexual Predators Act. This directive instructs the Commission to promulgate amendments to the sentencing guidelines to increase penalties applicable to specified offenses, including aggravated sexual abuse, sexual abuse, and coercion and enticement of a minor, "in any case in which the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor."

Our preference is for 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 a "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 permit a specific offense increase for those who engage in a pattern of sexual misconduct, even if the misconduct has not resulted in a conviction. We believe that a Criminal History category of not less than IV is appropriate for the proposed, new provision on repeat and dangerous sex offenders.

Within Option 1 there are two options, 1A and 1B, relating to definitions and other aspects of the proposed new guideline on repeat and dangerous sex offenders. Under both options the definition of the present qualifying offense is different from that for the past qualifying offense. We recommend 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. We would define 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. One further modification is that we would not limit Chapter 109A offenses to those perpetrated against a minor. 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 recordkeeping 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, however, adopts Option 1A as proposed, the term "sex offense conviction" refers to 18 U.S.C. § 2426 and should be changed to "prior sex offense conviction" to be consistent with the terminology used in that statute.

We would also recommend deleting proposed Application Note 5 in Option 1, which encourages departure if the application of the proposed guideline overstates or understates the "likelihood that the defendant will commit another sexual offense, or the seriousness of the defendant's criminal history." This proposed departure provision could have the unfortunate effect of undermining the guideline, which is needed for serious offenders. Speculation about a defendant's possible future illegal conduct should not be a basis for departure from the applicable guideline range and could set a dangerous precedent for departures in other areas of guideline practice.

Option 2 proposes a sexual predator guideline with a five-level enhancement above the otherwise applicable offense level or a floor of 30 or 32. Generally, we do not believe that an additional "sexual predator guideline", as proposed in §4B1.6, is necessary to account for serious offenders who do not have a prior sex offense conviction. The proposed suggestion that an expert make a psychosexual evaluation, using risk assessment instruments, concerning whether the defendant will engage in similar behavior in the future is fraught with pitfalls and is as problematic as the departure provision discussed above. There is a distinct danger that a sentencing hearing will become a battle of the experts arguing about the validity of the latest "tools" and "treatments."

The proposed "pattern of activity" increase for sexual abuse offenses, proposed in Option 3, generally mirrors the pattern of activity increase in the child pornography trafficking guideline, and we support it as a means to identify serious offenders. However, if Option 1 is not also adopted, as we suggest, 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. The two definitions should be the same and

should both include trafficking in child pornography as part of a "pattern of activity."

Supervised Release

The proposal amends §5D1.2, Term of Supervised Release, to provide that if the instant offense of conviction is a sex offense, the term of supervised release shall be the maximum permissible. We agree with this proposal, but 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 recordkeeping offenses), and Chapter 117 (except for failure to file factual statements about aliens and transmitting information about a minor). The proposed definition in §5D1.2 is somewhat broader than it needs to be. As we noted previously, the definition in Option 1A, Note 2, is a better definition.

Multiple Counts

Part B of Amendment 5 would resolve a circuit conflict regarding grouping multiple counts in child pornography cases. We support Option 2, which prohibits grouping of multiple counts of child pornography production, trafficking, and possession. The harms identified are separate and should be so recognized in the guidelines. However, there is a confusing statement about grouping in the last paragraph of the synopsis for Part C. 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. We believe that the harms involved in production and distribution are separate and that the non-grouping rule should prevail. At the very least, if the Commission intends for these types of offenses to group but for others not to, as specified in Part B, the guideline should so state.

Additional Enhancements

Finally, the proposal asked, as an "Issue for Comment," whether there should be additional enhancements for sexual abuse offenses involving the transportation, persuasion, inducement, enticement, or coercion of a child to engage in prohibited sexual conduct. We believe that no such additional enhancements are needed at this time.

Amendment 9, Safety Valve

Amendment 9 would extend the reach of the two-level sentence reduction for those who qualify for the "safety valve" exemption created to provide relief from mandatory minimum sentences. In 1994 Congress enacted this exemption for offenders who have no more than one criminal history point, have not threatened or used violence or possessed a weapon, have not been an organizer or leader of others in the offense, have truthfully provided the government with all information and evidence in their possession concerning the offense, and whose offense did not result in death or serious bodily injury. 18 U.S.C. § 3553(f). Currently, the sentencing guidelines provide a two-level reduction in sentence if the defendant satisfies these criteria and if his or her offense level under the drug trafficking guideline is 26 or greater (just over five years of imprisonment for a first offender). The proposed amendment would make this two-level reduction applicable to persons whose offense level under the drug trafficking guideline is below level 26. The amendment also preserves the two-year guideline minimum for those subject to a mandatory minimum sentence.

While we understand that the Commission wishes to lower drug sentences, we do 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. For example, the "safety valve" would provide a benefit to an offloader of a large shipment of cocaine subject to a 10-year sentence because of the size of the shipment if he meets the established criteria. The guidelines reduce an otherwise severe sentence in recognition of the "safety valve" criteria. 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. Relief from high sentences under the "safety valve" and the proposed two-level reduction are simply not needed for this offender.

Amendment 12, Economic Crime Package

The economic crime amendments published for comment by the Sentencing Commission constitute a massive revision of the existing guidelines for fraud, theft, tax, and a number of other white collar offenses. The Department's primary goal is increased sentences related to the amount of loss involved in the offense. Of course, the proposed amendments go far beyond

changes in the relevant sentencing table tied to loss. In particular, they produce significant changes in the way loss is calculated through a new definition of the term "loss" and consolidate the fraud, theft, and property destruction sentencing guidelines.

Both advancing technology and the need for a comprehensive approach to addressing economic crime argue strongly in favor of an improved loss table. Advancing technology has had a major impact on criminal activity. A con artist can attract victims from many countries to a web site with little effort. In many cases the criminal has little need to steal large amounts of money from each one, which would only increase the risk of a criminal investigation, but the total losses, if proved, can be great. Whereas start-up expenses in the past may have been necessary to cover the costs of printing brochures and mailing letters, the Internet has eliminated these expenses while, nevertheless, fostering a dramatic expansion of the target population. The Internet has been used as a vehicle not only to commit product-based consumer fraud but also to foster securities fraud on a wide scale.

While the use of the Internet to commit fraud has been a striking trend in recent years, there is also another trend of great significance: the rise of technology crime in which the target is technology itself. Legitimate e-commerce has fallen prey to malicious computer hackers in the form of "denial of service attacks." We have also seen the emergence of fast-moving viruses that have caused damage to computer systems around the world and have disrupted the computer systems of consumers, businesses, and governments.

Sentencing guideline amendments are needed to assure that the guidelines address new criminal conduct or techniques and at the same time achieve the purposes of sentencing set forth in the Sentencing Reform Act. A comprehensive approach to white collar crime is best achieved by improving the loss table applicable to these crimes. While the Commission has adopted several important amendments addressing specific types of economic crime, such as identity theft and mass-marketing fraud, current guideline sentences for white collar offenders are in many cases inadequate to achieve the statutory purposes of sentencing.

For example, a $100,000 Medicare fraud--say, upcoding to obtain higher reimbursements involving more than minimal planning--results in an offense level of 12 if the defendant accepts responsibility for the offense. This offense level currently permits the judge to impose a sentence of just five

months of imprisonment and five months of supervised release with conditions of confinement. If the offense involved only minimal planning, for example, billing for medically unnecessary services for just a few patients and no cover-up scheme, the defendant would be eligible for a probationary sentence with conditions of confinement, such as home detention. Under proposed amendment 14, which expands zones B and C in the sentencing table, even the more serious offender described would be eligible for probation with home detention. Yet a fraud producing $100,000 in loss is a serious offense, and a short prison term of just five months or a probationary sentence is inadequate to deter this conduct.

At much higher levels of loss, the situation is even worse relative to the magnitude of the offense. For example, if the Medicare fraud were more widespread, involved sophisticated means, and produced over $50 million in loss to the government, the guideline prison sentence could be as low as 51 months, or just over four years, of imprisonment, assuming the defendant accepted responsibility for the offense. An offense of this magnitude should be subject to a sentence that will incapacitate the wrongdoers involved and send a strong message that the public will not tolerate private enrichment at the expense of the public coffers. The same can be said of private gain through economic crimes against private parties.

Our comments below highlight several important issues raised by the economic crime amendments. We will continue to work with the Commission staff as it further refines the proposal to address other details.

Loss Table

We urge 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.

We believe 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 we recommend is incorporating into Option 3 the one-level increase for offenses involving between $2,000 and $5,000 from Option 1.

Thus, offenses involving more than $2,000 but not more than $5,000 would have a one-level increase, and the Option 3 table would continue as set forth for offenses involving more than $5,000. The current fraud and theft tables effectively provide this increase for offenses involving between $2,000 and $5,000 and also include the possibility of a two-level enhancement for more than minimal planning, which the proposal deletes. There is no reason for the proposed guideline amendment to provide an additional windfall to offenders who commit frauds or thefts of amounts less than $5,000. In this regard, we also oppose the proposed two-level decrease in the offense level in proposed §2B1.1(b)(7) for offenses that involve $2,000 or less.

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.

With the increases proposed in this table, for example, an offender who commits the $100,000 fraud described above would face an offense level of 16, assuming the deletion of the enhancement for more than minimal planning, and a guideline range of 21 to 27 months of imprisonment. Even if he accepts responsibility for the offense, he would still face a prison term of between 12 and 18 months. At higher dollar amounts, the sentences proposed would be even more effective in deterring white collar crime.

More Than Minimal Planning

The proposed amendments delete more than minimal planning as a factor, but the amendments carry forward the recently promulgated enhancement for sophisticated means. One goal of eliminating the enhancement for more than minimal planning is to reduce litigation. However, this goal will not be realized if courts are permitted to reduce sentences based on minimal planning. This is a particular problem for offenses involving relatively low dollar amounts. If minimal planning is allowed or not prohibited as a basis for departure, defendants will likely argue it as a matter of course. The net effect will simply be to shift the burden from the prosecution to the defense, without eliminating the factor from consideration.

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.

Loss Definition

We agree 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. We also agree 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 in our view all have inherent problems. If these problems can be resolved in the time remaining this amendment cycle, we favor finalizing amendments to the definition. However, we caution against adopting amendments that may breed increased litigation in the future and recommend that the Commission operate in a very deliberate manner. If necessary, the Commission should delay the redefinition of "loss" until the next amendment cycle.

One problem is reflected in Option 1, which covers the "reasonably foreseeable pecuniary harm that resulted or will result from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct)." Under this formulation, direct harms, including the value of the property taken, that now are included within the concept of "loss" would be subject to a reasonable foreseeability test. The government should not have to argue that it is reasonably foreseeable that $50,000 in loss occurs when an offender actually defrauds a victim of this amount in a telemarketing investment scheme. Nor should the government have to oppose a defendant's theory, for example, that it was reasonable to expect only $20,000 from a victim who unexpectedly inherited $30,000 and decided to invest it in the defendant's scheme. While the "estimation of loss" portion of the definition instructs the court to base the determination of loss on a variety of factors, including the fair market value of the property or other thing of value taken or destroyed, it instructs the court to do so "as appropriate and practicable under the circumstances." Such an instruction will not prevent defense arguments aimed at unduly limiting loss. The Criminal Law Committee's formulation is similar to Option 1 in this respect.

Option 2 of the Commission's proposal includes "pecuniary harm that resulted or will result from the conduct for which the defendant is accountable ...." However, this definition is

overly expansive because it includes downstream harms that may be totally unexpected. It does, nevertheless, clearly include the value of the property taken, damaged, or destroyed.

We favor 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. 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. We find it 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.

The Commission has proposed several options regarding gain. We favor a somewhat different formulation than proposed. The gain to the defendant and other persons for whose conduct the defendant is accountable under §1B1.3 should be used if (1)the gain is greater than the loss, or (2) the loss is difficult or impossible to determine and the loss as measured is likely to underestimate the harm from the offense. This formulation is needed to prevent defense arguments in cases in which loss is difficult to prove that the court should rely on gain as a measure of the harm caused by the offense, despite the fact that the government is prepared to show a greater loss.

With respect to the measure of gain, we disagree 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.

Tax Offenses

We have a number of specific concerns regarding the proposed amendments in relation to tax offenses. We share the concerns expressed by the Internal Revenue Service in this regard and also provide the attached appendix providing an explanation prepared by the Department's Tax Division.

Amendment 13, Aggravating and Mitigating Factors in Fraud and Theft Cases

Amendment 13 is a particularly problematic amendment applicable to fraud and theft offenses that could affect thousands of cases. Option 1 would direct courts to increase or decrease the offense level, by two or four levels, depending on whether the offense involves "aggravating," "significantly aggravating," "mitigating," or "significantly mitigating" factors. In effect, this amendment would create an eight-level range for many economic crimes, corresponding to a potential variation of three or four hundred percent in the amount of prison time, on the basis of a finding under these broad standards. We strongly oppose this amendment.

The judicial discretion this amendment would provide is reflected by the fact that it presents a number of factors for "consideration," but the list of factors is not exclusive, nor is there sufficient guidance regarding the interaction of the factors. The proposed guideline merely instructs the court to consider the "presence and intensity" of aggravating or mitigating factors in making the determination whether to add or subtract two or four offense level.

The loose standard means that identical cases could result in substantially different sentences, depending upon whether the court found the relevant factors to be of sufficient importance to affect the sentence. That is, even if the same factor were present in two cases to the same degree, the standard provided could arguably allow a court to increase or decrease the sentence by a different amount, or possibly not at all. From a policy standpoint this level of judicial discretion is inconsistent with

the goal of the Sentencing Reform Act of 1984 of reducing unwarranted disparity. For example, even a seemingly objective factor--the fact that an offense involved more than 25 victims or some other number the Commission chooses--could lead to inconsistent results. Upon "consideration of the presence and intensity" of this factor, one judge might decide that despite the fact that an offense affected 30 mail fraud victims, the intensity of this factor was not significant enough even for a two-level increase, in light of other harms associated with the case, while another judge considering an identical factual scenario might decide that a two- or four-level enhancement was in order. The same is true of the mitigating factors. For example, one judge may regard the fact that a defendant's gain was substantially less than the loss as a basis for sentence reduction while another may view it as a factor more reflective of the defendant's poor business skills than his or her culpability.

Another problem is that the factors listed in many cases are not appropriate. For example, an offender's effort to limit the pecuniary harm caused by the offense is little consolation to a victim of a retirement fraud who loses his or her life savings. Similarly, a reduction in sentence based on minimal or no planning makes little sense under either the current fraud guideline or the proposed version. Since more than minimal planning is currently the basis for an enhanced sentence for theft and fraud, §§2B1.1(b)(4) and 2F1.1(b)(2), minimal planning is reflected in the base offense level, and no reduction is needed. Similarly, a reduction in sentence for minimal or no planning reflects a lack of coordination between Amendment 13 and the economic crime package, Amendment 12. As previously explained, such a reduction would increase litigation unnecessarily and lower offense levels meant to be increased under the revised loss tables.

While some of the factors listed for consideration are currently included as possible bases for departure from the applicable guideline range, treatment as departure factors is quite different from treatment as guideline factors, as proposed. Loose standards are appropriate for departure factors since the Commission merely identifies issues for which it has not been able to pinpoint specific guideline increases or decreases. Moreover, a court is not compelled to depart on the basis of departure factors, and if it does the government or defendant may appeal the extent of the departure and whether it was reasonable.

Option 2 of Amendment 13 is also based on a list of aggravating and mitigating factors, but there is guidance as to the effect of the presence of these factors on the sentence. It

provides that if the offense involves at least one aggravating factor and no mitigating ones, or if the aggravating factors outweigh the mitigating ones in seriousness, an increase of two levels applies. A similar provision exists for mitigating factors.

While the proposal is preferable to Option 1 with respect to the issue of judicial discretion, we believe it could generate substantial litigation surrounding the relative weights of the various factors. Moreover, its effect is to treat a number of unrelated aggravating or mitigating factors as non-cumulative. For example, causing the insolvency of a victim, such as a health insurance organization billed for many unnecessary procedures, and also endangering public health by performing such procedures are two distinct harms that should not be treated as alternative bases for a single guideline enhancement. We are also troubled by some of the proposed mitigating factors listed. For example, a reduced sentenced based on the lack of a profit motive or intent to cause monetary harm could result in an unnecessary benefit to computer hackers and traditional joy riders.

The Commission should study the list of aggravating factors proposed in Option 2 to determine which are appropriate for inclusion in the fraud and theft guidelines, but it should treat them as cumulative bases for enhancement unless they are closely related to each other. In this regard, we favor a guideline enhancement for offenses that result in the destruction of, or substantial damage to, property of environmental, cultural, historical, or archeological significance--one of the enhancements listed in the amendment. We would also expand it to include items of biological significance in order to include certain wildlife offenses. Monetary loss is an inadequate measure of the harm caused by these categories of crime, which include thefts of unique items from historic burial sites. We urge the Commission to adopt an amendment in this area.

Amendment 14, Sentencing Table and Alternative to Sentencing Table

Amendment 14, Option 1, would change the sentencing table applicable to all offenses by increasing the number of offense levels for which alternatives to incarceration would be permitted for offenders in the two lowest criminal history categories. As a result, offenders in these categories would be eligible for probation with conditions of confinement, such as home detention, instead of imprisonment at two higher offense levels than now provided. Similarly, offenders would be eligible for a "split sentence" (in which the minimum of the guideline range may be met

by a combination of imprisonment for at least half of the minimum term and supervised release with conditions of confinement, such as home detention, for the remainder) at four higher offense levels than now provided. (See guideline § 5C1.1.) A modified version of the published proposal that was offered at the Commission's February meeting would affect only Criminal History Category I and limit Zone C in that category to two offense levels, 13 and 14. The comments which follow address the February version of the proposal.

The February proposal means, for example, that an offender subject to 15 to 21 months of imprisonment under the current guidelines (offense level 14) could satisfy the minimum requirement by a split sentence of 7 ½ months of imprisonment and 7 ½ months of supervised release with home detention. By contrast, another offender at the same offense level and criminal history category could receive the maximum term of imprisonment allowed: 21 months of imprisonment. Thus, the imprisonment range at offense level 14, Criminal History Category I, is 7 ½ to 21 months. This range is inconsistent with the requirement in the Sentencing Reform Act that if a sentence established by the guidelines includes a term of imprisonment, the maximum of the range shall not exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).[1] The proposed amendment also creates wide variation in potential sentences at lower offense levels. At offense level 12 under the proposal, one offender would be eligible to receive a non-imprisonment sentence of probation with home detention for 10 months while another at the same offense level and criminal history category could receive 16 months of imprisonment, and a third could receive a split sentence of five months of imprisonment and five months of supervised release with home detention.

Not only does Option 1 create wide sentencing ranges, it effectively lowers sentences. A variety of serious offenses would be affected, from drug offenses to bribery; white collar, food and drug, and tax crimes; environmental offenses; and civil rights violations. For example, a case involving a $150,000 bribe or benefit in return for a bribe would result in an offense level of 14 after a three-level reduction for acceptance of responsibility--requiring a minimum of 15 months of imprisonment under the current guidelines but only 7 ½ months as part of a split sentence under the proposed amendment. Similarly, a

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[1] The current guidelines also violate the 25% rule in this respect, but the proposal greatly exacerbates this problem.

typical hate-crime, cross-burning offense normally results in an offense level of 15, which includes a three-level enhancement for bias motivation. (This assumes that no count is charged under 18 U.S.C. § 844.) Under the current guideline, after a two-level credit for acceptance of responsibility, the typical defendant would face a year of imprisonment. However, under the proposed change to the guidelines, the defendant would be eligible for a split sentence with just six months of imprisonment. In effect, the proposed shift in zones largely negates the hate-crime enhancement and undermines the goal of deterring these crimes of terror.

The reduction in sentences that Option 1 would bring about is especially troublesome in tax and other white collar crimes. Given the existing tax loss table, a probationary sentence (Zone B) would be available to a defendant with a tax loss up to $40,000, and a split sentence (Zone C) would be available to a defendant with a tax loss up to $120,000, despite the seriousness of these offenses. Defendants who accept responsibility for their offenses would be eligible for the benefits of expanded Zones B and C at substantially greater amounts of tax loss--up to $550,000 for a Zone C split sentence. Similarly, a fraud defendant convicted of up to a $120,000 fraud, which involved more than minimal planning, could receive a probationary sentence with home detention if he accepted responsibility for the offense.

In short, Option 14 does not reflect a coherent sentencing philosophy by the Commission. The Commission has not closely analyzed the effect of the broad-brush approach in Option 14 on specific areas of crime. Nor has the Commission identified areas of crime that it believes should be subject of reduced sentences through the expansion of sentencing discretion. In particular, the Commission has not concluded that tax or other white collar sentences at certain dollar losses should be significantly reduced. On the contrary, it has proposed increases in sentence on the basis of revised loss tables for fraud, theft, and tax. Yet Option 14 runs counter to the goals of those proposals and the goal of deterrence.

Option 2 would provide a 2-level reduction in sentence for many economic crimes, depending on the existence of specified factors, such as the absence of prior criminal history or a weapon. While Option 2 is more modest in its approach than Option 1, it nevertheless provides a significant decrease in sentence for a broad array of offenses, including theft, fraud, and tax offenses, at a time when a great deal of concern exists in the law enforcement community over the increasing use of technology to foster criminal activity. We believe that current

base offense levels already account for the heartland of low level offenders for each offense subject to Option 2 and that the possibility of downward departure meets the need for consideration of the unusually sympathetic offender. Moreover, the qualifying factors listed in Option 2, such as the absence of a dangerous weapon and the lack of bodily injury, contribute little to the identification of low level offenders since they are irrelevant to most of the eligible offenses in any case.

We strongly recommend against the adoption of either option in Amendment 14. They would unnecessarily lower sentences for many defendants. Moreover, the Commission has failed to evaluate the combined effect of these options with other substantive proposals it has put forward in such areas as economic crime and money laundering. We understand the desire of the Commission to increase judicial discretion and flexibility under the guidelines, but this must be accomplished in accordance with the Sentencing Reform Act. The Commission, of course, is free to propose amendments of the statute, and we would be willing to examine whether any amendments to enhance flexibility and reduce the incidence of departures are needed.

Amendment 18, Immigration

A particularly problematic amendment concerns the unlawful entry into the United States of aliens previously deported following conviction of an aggravated felony. Amendment 18 would create significant difficulties in sentencing a large group of offenders, fail to differentiate among offenders on the basis of the seriousness of their offense, and reduce sentences sharply in some cases.

Currently, unlawful reentry by a previously deported aggravated felon carries a sentence ranging from about four to ten years of imprisonment, depending upon the defendant's criminal history. The sentence is not otherwise subject to variation on the basis of the seriousness of the past aggravated felony, except on the basis of departure from the applicable guideline range. Under the proposed amendment the length of time served for the past offense would be the primary basis for determining the sentence for the unlawful reentry offense. For the least serious category of prior offenses (less than two years of imprisonment served), the amendment would reduce the sentence to just over a year of imprisonment for a person in the lowest criminal history category.

The amendment includes several alternative options for weighing the seriousness of past offenses, including an enhancement if the prior offense involved death, serious bodily

injury, use of a weapon, or a serious drug trafficking offense, regardless of the time served, and we believe that this approach deserves the Commission's attention. Another option presented by the Commission would address the seriousness of the past offense through the possibility of upward departure from the applicable guideline range, rather than as a guideline factor, but this plan would lead both to a lack of proportionality in sentencing and unwarranted sentencing disparity.

We strongly oppose this amendment for a variety of reasons. First, it could lower sentences severely in some cases and send a message that unlawful reentry by previously deported aggravated felons is not a serious offense. For example, a prior offense that resulted in less than two years of imprisonment served can be a serious offense that produced a low sentence because of state prison crowding problems or the lenient sentencing practices of a particular judge.

Next, a guideline based on the time served for past offenses is ill-conceived because time served is not a particularly good measure of the seriousness of an offense. Not only may time served understate the seriousness of a prior offense because of prison crowding problems, but establishing time served for past offenses is difficult. It could substantially slow the prosecution of alien offenders and increase litigation at sentencing and appeal. The proposed change to time served would seriously hamper the Department's ability to process thousands of criminal alien cases along the southwest border.

As the Commission knows, there has been a significant increase in the number of alien cases prosecuted over the last several years. An amendment of the sentencing guidelines on immigration should address the need to prosecute these cases in an expeditious manner. Finally, a proposal on illegal reentry should prevent creative bases for downward departure that have arisen, particularly in districts that do not have "fast track" policies. In this regard, we are extremely troubled by the proposed downward departure provision in Amendment 18 for cases in which a defendant was not advised at the time of the previous deportation or removal of the criminal consequences of reentry. There is no need to inform an alien being deported who was previously convicted of an aggravated felony in the United States that reentry is against the law, and a violator should derive no benefit from the failure to receive a specific warning. The proposed provision would potentially create unnecessary litigation in many cases and become a departure basis that spills over into other crimes in which the defendant was not warned about the consequences of repeat offenses.

In sum, we reiterate our request that the Commission refrain from acting on any amendments in the areas described above until the next amendment cycle so as to allow the Department to examine the ramifications of these important proposals fully, and to provide the Commission with alternative approaches.

Amendment 19, Nuclear, Biological, and Chemical Weapons

Amendment 19 raises penalties for offenses involving the evasion of export controls, §2M5.1, and for offenses involving the exportation of arms, munitions, or military equipment or services without a validated export license, §2M5.2. In addition, the proposal expands the current guideline on the unlawful acquisition, use, possession, and related offenses involving nuclear material, weapons, or facilities, §2M6.1, so that it covers two relatively new offenses relating to biological and chemicals weapons. We strongly urge the Commission to adopt Amendment 19.

Importation and Exportation Offenses

The proposed amendments of §§2M5.1 and 2M5.2 respond to the National Defense Authorization Act for Fiscal Year 1997, which urged the Commission to provide increased penalties for offenses relating to importation, exportation, and attempted importation or exportation of nuclear, biological, or chemical weapons or related materials or technologies under specified provisions of law. The proposed amendments increase offense levels by four levels for these offenses and would recognize the seriousness of the unlawful importation and exportation of nuclear, biological, and chemical weapons and related items.

Amendment of §2M6.1

The proposed amendment to §2M6.1 incorporates offenses relating to biological weapons, 18 U.S.C. § 175, and those relating to chemical weapons, 18 U.S.C. § 229. These are relatively new statutes for which there is no applicable guideline. A guideline is needed to assure appropriate sentences for these serious offenses.

As the Commission is aware, the Department of Justice strongly supports the development of specific guidelines for these offenses and appreciates the Commission's significant efforts in this regard. The Commission's proposed amendment to §2M6.1, in our judgment, appropriately addresses deficiencies in the current guidelines and, as a general matter, we find it very

satisfactory. We set forth below our views on the issues on which the Commission has specifically invited comment.

The Commission has invited comment on whether section 175 and 229 offenses are more appropriately addressed through a guideline that incorporates aggravating factors into the base offense level, or whether the factors should be addressed as specific offense characteristics. In our view, the proposed guideline strikes an appropriate balance by singling out several of the more important aggravating and mitigating factors as specific offense characteristics (i.e. distinguishing threat cases based on evidence of intent or ability; and distinguishing cases based on the dangerousness of the materials, the severity of physical injury inflicted, and the economic disruption and expense associated with these offenses). These factors differentiate chemical, biological, radiological and nuclear cases and are appropriate in determining greater or lesser punishment. At the same time, the specific offense characteristics do not attempt to cover every possible eventuality, and hence the appropriate references to departures in the application notes.

The Commission has also invited comment on whether there should be a greater differentiation between offenses involving threats to use nuclear, biological or chemical weapons and other conduct punished under the proposed guideline. In addition, the Commission has asked whether the threatened use of such weapons should be punished under §2A6.1, and, if so, how severely.

Threats involving nuclear, biological, chemical, and radiological (NBCR) materials are fundamentally different from other threat cases and merit individualized treatment under the guidelines. In our view, NBCR threats should not be treated under the generic guideline for threats, §2A6.1, which "includes a particularly wide range of conduct" (see Application Note 1 to that guideline), and whose base offense levels reflect that range. Unlike some of the offenses captured under §2A6.1, such as harassing telephone calls or threats to injure property or reputation, NBCR threats typically involve a threat of death or serious physical injury and unique psychological harm to victims. Further, unlike other threats, such as threats involving conventional explosives, the harm associated with a threat relating to NBCR is not dispelled by removing oneself from the targeted location. Indeed, a substantial period of time may elapse during which victims may be subjected to decontamination, testing, and prophylaxis before there are any definitive assurances of safety. Unless a threat involving NBCR is immediately dismissed as not credible, the threat may also result in significant disruption and response costs. For example, in a

recent case in Cape Corral, Florida, 18 individuals at a food processing company were exposed to an envelope that contained a threat letter stating that the powdery substance contained therein was contaminated with anthrax. In response, local and federal law enforcement and health authorities secured the site for more than two days, decontaminated fifteen individuals, and treated three others with prophylactic antibiotics. In addition, a confirmative analysis that the substance did not contain anthrax was not finalized by the Center for Disease Control for 48 hours after the incident.

Congress' view of the relative seriousness of threatened NBCR offenses is reflected in the greater statutory maximum penalties provided for those offenses as compared to those statutory threat provisions which fall under §2A6.1. For instance, a threat to use a biological weapon (U.S.C. § 175) or other weapon of mass destruction (18 U.S.C. § 2332a) subjects an offender to a potential life sentence. By contrast, mailing threatening communications (18 U.S.C. § 876) carries a potential penalty ranging from no more than two years to no more than 20 years of imprisonment, depending on the nature of the threat. Bomb threats (18 U.S.C. § 844(e)) carry a maximum 10-year sentence. It is important that NBCR threats be punished commensurate with the greater harm they cause.

For these reasons, in our view, NBCR threats should not be engulfed in the broad range of conduct encompassed by §2A6.1, nor are the specific offense characteristics of that guideline germane to NBCR cases (i.e. violation of court order, number of threats). While we believe that threat offenses should be treated separately from §2A1.6, the differentiation in the proposed guideline between threat offenses and other conduct could be expanded somewhat, to a level 18 or 20 where there is no evidence of intent or ability to complete the threatened offense.

The Commission has also invited comment on whether attempts, conspiracies and solicitations should be expressly covered by the proposed guideline or by §2X1.1. We strongly urge the Commission to treat these offenses under the proposed guideline. The significant weakness of §2X1.1 is that it allows for a three level reduction "unless the defendant completed all the acts the defendant believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control." Such a benefit runs contrary to the primary objective of law enforcement in the NBCR context, which is to intervene as early as possible in the chain of events leading to actual weapon use and to prevent such use. In light

of the potentially catastrophic consequences of a completed NBCR weapon offense, conduct constituting attempts, solicitation, and conspiracies to commit NBCR offenses should be severely punished and should not, under any circumstances, be favorably treated. It is of particular note that Congress has provided the same statutory punishment for attempt and conspiracy as for the substantive offenses in the NBCR statutes.

The Commission also has two alternative ways of treating the disruption of governmental, business or public services or functions and the response costs associated with NBCR offenses. In our view, it is more appropriate to include these factors as a specific offense characteristic in the same manner as other sentencing guidelines where similar disruption is a common characteristic of an offense. See §2Q1.2 Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce; §2Q1.3 Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification; and §2Q1.4 Tampering or Attempted Tampering with Public Water System.

We note that the proposed guideline has bracketed the provisions relating to particularly dangerous materials. In our view, there should be additional punishment for offenses involving these most lethal substances. If the Commission is inclined to delete this provision, we would favor the base offense level of 30 for all NBCR offenses.

We suggest the deletion of Application Note 5 which exempts those who act in aid of a foreign terrorist organization from the upward adjustment under the terrorism enhancement, §3A1.4. This precludes the automatic application of Criminal History Category VI to such offenders. The exemption leads to an anomalous result in that an offender whose offense was intended to aid a foreign terrorist organization under 2M6.1(a)(1)(B) could get a more lenient sentence than other offenders under 2M6.1 who do not aid a foreign terrorist organization but who are subject to the terrorism enhancement and are automatically treated under Criminal History Category VI.

Amendment 20, Money Laundering

The proposed money laundering amendment represents a substantial revision of the guidelines that currently apply. First, the amendment consolidates two separate guidelines (§§ 2S1.1 and 2S1.2) that separately address offenses under 18 U.S.C. §§ 1956 and 1957. Next, it ties the offense level for money laundering to the underlying criminal conduct in the case of money launderers who commit, or aid or abet the commission of,

the underlying offense. It also differentiates sharply between such direct money launderers and third-party money launderers.

As the Commission is aware, we asked the Commission to delay consideration of this amendment until the next amendment cycle so that the new Administration could be confident that the amendment assures adequate punishment and deterrence. Any change in this area occurs against a backdrop of existing money laundering guidelines that are relatively straightforward, easy to apply, and consistent with the purposes of the money laundering statutes. The Department regards money laundering as a very serious offense. Indeed, Congress has fixed the maximum penalty for the most serious forms of money laundering at 20 years' imprisonment. Yet our analysis of the published proposal raises concerns whether the resulting sentences would be sufficient, particularly for first- and third-party drug money launderers, and whether the distinctions drawn by the new proposal are valid or would give rise to excessive litigation. Moreover, the Commission has not studied the effect on the money laundering amendments of proposed amendments in the white collar crime package and the flexibility proposals in Amendments 13 and 14. In short, while the money laundering proposal would tie the offense level to that of the underlying crime in most cases, the underlying offense level itself and the sentencing table are the subject of possible changes that could significantly alter the sentencing outcome.

Congress in 1995 rejected a proposed amendment of the money laundering guideline that would have dramatically altered the structure of this guideline and substantially lowered sentences. We understand that the primary reason for proceeding with an amendment is the belief that certain sentences under the existing guideline are too severe, especially in certain small-scale fraud cases. We share this concern to some extent and are not averse to an appropriate adjustment, but the money laundering guidelines must remain true to the purposes of the money laundering statutes and the need to punish and deter these offenses. If the Commission decides to move forward with an amendment to the money laundering guidelines despite our request for delay, there are several key provisions that require adjustment to meet our concerns.

Retention of Current Offense Levels for Drug Money Launderers

First, those who launder proceeds derived from drug and other serious offenses identified in proposed §2S1.1(b)(1) should not receive a sentence below current guideline levels. We regard

this as essential both for first- and third-party money launderers. There is no basis for lowering sentences for these offenders, but the proposal would decrease their offense levels in some cases. Sufficient punishment is necessary to deter all money laundering activity relating to serious criminal conduct.

For example, a third-party money launderer who launders $115,000 in drug proceeds and is convicted of a concealment-related money laundering offense under 18 U.S.C. § 1956 would have an offense level of 20 under the proposal if the controlled substance enhancement is just four levels, rather than six, and the proposed enhancement for "sophisticated concealment" applies at two levels. (The offense level would be 21 if the Commission chooses the option of a three-level increase for the concealment enhancement.) By contrast, the defendant would have an offense level of 24 under the current guideline, §2S1.1. The proposed decrease in offense level could send an unfortunate message that drug money launderers are less culpable than they were previously thought to be.

To achieve the goals we outline, it is essential first to provide that no base offense level for first-party money launderers of proceeds derived from the offenses identified in proposed §2S1.1(b)(1) should be below level 24. As to third-party money launderers, we believe the above goal can be achieved by the enhancements that follow:

6 levels for drug/serious crime proceeds

5 levels for being in the business of money laundering;

4 levels for promotion;

4 levels for concealment;

3 levels for evasion of reporting requirements;

2 levels for evasion of tax laws; or attempting, aiding or abetting, or conspiring to commit any offense referred to in subsection (b)(2)(subsection (b)(2)(D));

1 level for offenses greater than $10,000 where proposed subsection (a)(1) applies and (b)(2) does not.

Any lower levels would fail to capture the seriousness of the harm to society generated by the use of criminal proceeds to promote further unlawful activity or to conceal the proceeds of unlawful activity. It should be noted that without the last enhancement listed above an offender who commits both an

underlying offense and a money laundering violation of 18 U.S.C. § 1957 would likely be subject to the same offense level as one who only committed the underlying offense.

We have offered the Commission's staff alternative options for achieving the goals we set forth above, including raising the enhancement under proposed subsection (b)(1) to eight levels for cases in which the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote, a drug trafficking offense or one of the other serious crimes listed. This option would provide lower levels than set forth above for several of the other enhancements.

Specific Offense Characteristics

We are also concerned about some of the specific offense characteristics in the proposed amendment. It is imperative that if a defendant is convicted of an offense involving an aggravated form of money laundering--i.e., under 18 U.S.C. § 1956--an enhancement under the proposed guideline must apply, except in the rare case of an offense that involves only the receipt and deposit of proceeds of specified unlawful activity. Section 1956 carries a 20-year maximum prison term, while the statute for the less aggravated form of money laundering carries only a 10-year maximum term of imprisonment, 18 U.S.C. §1957. However, as drafted, the proposed amendment would not assure that a money launderer convicted of promoting specified unlawful activity or concealing the proceeds of it would receive an enhancement. Under the proposal only "sophisticated concealment" and conduct that "significantly" or "materially" promoted further criminal conduct would result in an enhancement. These qualifiers should not be used, and the language of the proposed amendment should assure that an enhancement applies to a person convicted of an offense under section 1956.

We also object to the reduced sentence under proposed §2S1.1(b)(4) for defendants convicted under 18 U.S.C. § 1957 who did not commit the underlying offense and who did not receive any of the listed enhancements. This reduction is unnecessary since, by virtue of not being subject to the proposed enhancements, those who meet these criteria would receive proportional sentences based on the value of the laundered funds. By contrast, if the Commission adopted the proposed reduction in sentence for these section 1957 violators, a significant cliff would result between offenders who receive an enhancement and those who do not.

Guideline for Violations of 18 U.S.C. § 1960

Another issue for the Commission is the assignment of violations of 18 U.S.C. § 1960, which concerns conducting or owning an illegal money transmitting business, to an appropriate guideline. We strongly recommended that the Commission assign violations of this statute to §2S1.3 (structuring and reporting offenses) rather than §2T2.2 (regulatory offenses). Violations of section 1960 are similar to structuring offenses and warrant treatment under §2S1.3, which not only has a higher base offense level than §2T2.2, but differentiates on the basis of the value of the funds and other factors, such as the defendant's knowledge or belief that the funds were proceeds of unlawful activity or were intended to promote such activity. Given the combination of an offense level of four in §2T2.2 and the absence of specific offense characteristics, that guideline fails to recognize that money transmitters can facilitate the efforts of organized criminals and money launderers.

Commentary

Several issues reflected in the proposed commentary are also important considerations for the Commission. Proposed Application Note 3(C) concerns the value of the funds and addresses the concern that in some third-party cases the value of the laundered funds may exceed the value of the loss that determines the sentence for the underlying offense. Option 1 provides for the possibility of a downward departure in such a case; Option 2 limits the value of the funds for the money laundering guideline to the loss amount under the fraud guideline if it is less than the actual value of the laundered funds; and Option 3 takes no position. We understand that this type of case represents a small minority of money laundering prosecutions. Therefore, we recommend that the Commission adopt Option 3, particularly in light of the complexity of the other options and the confusion either would create.

Another commentary issue surrounds the enhancement for engaging in the business of laundering funds, proposed Application Note 4. The guidance provided describes in excessively narrow terms one who engages in the business of laundering funds. For example, one of the factors for consideration provides that the defendant regularly or routinely engaged in laundering funds <u>during an extended period of time</u>. A person who laundered funds for multiple clients over a two-week period might not be covered by such a provision because he was new to the money laundering business. However, the reason for the enhancement--namely, that such a person greatly facilitates unlawful activity in much the same way that a fence facilitates theft--applies equally to a new money launderer. Similarly, the

proposed consideration that the defendant generated a substantial amount of revenue in return for laundering the funds or that the defendant had a prior money laundering-related conviction are also unnecessarily restrictive in identifying one who is in the business of laundering funds. As written, proposed Application Note 4 would make it very unlikely that the government could establish that a defendant was in the money laundering business. The note would require multiple sting operations over an extended period of time and cause many to go uncounted as being in the business of money laundering. The most meaningful consideration in identifying a person in the business of money laundering is that he had multiple sources of funds. The Commission should not complicate the definition with a great many factors.

Technical Amendments

A technical amendment we recommend to prevent confusion is deletion of the words "because the defendant did not commit the underlying offense" from proposed subsections (b)(1)(A), (b)(2)(A), and (b)(4). These words are unnecessary since each provision in question specifically states that subsection (a)(2) must apply in order for the provision which follows this reference to apply. The words we recommend deleting may suggest that the applicability of the above-listed provisions is limited to cases in which the defendant actually committed the underlying offense, as opposed to those in which he otherwise would be accountable for it under §1B1.3(a)(1)(A).

Conclusion Regarding Money Laundering Amendments

A money laundering amendment along the lines we describe above would reflect the willingness on the part of the Department to evaluate the effect of the current money laundering guidelines, particularly as they relate to the laundering of proceeds of white collar crime. However, any further reductions than would result from the type of guideline we describe above would be unacceptable in light of the fact that the current money laundering guidelines are simple and appropriate in most case. This conclusion presumes that the Commission does not adopt other amendments, such as those in Amendments 13, or 14 (relating to aggravating and mitigating factors and the sentencing table). The effect of these other amendments on the money laundering amendments has not been studied. If the Commission adopted Amendments 13 or 14, we would be compelled to seek retention of the current money laundering guideline.

Mitigating Role

Finally, we would like to offer the following recommendation, in response to the Commission's request at the February meeting, to address the proposed amendment published in November 2000 regarding the circuit conflict on mitigating role. As you know, we previously objected to the proposed amendment, which stated that a defendant who is convicted of a drug trafficking offense, whose role in the offense was limited to transporting or storing drugs and who is accountable only for the quantity of drugs he personally transported or stored, is not precluded from receiving an adjustment for mitigating role. We believe the following amendment strikes an appropriate balance. It ordinarily prohibits a role reduction when a defendant's relevant conduct consists of a drug quantity with which he was personally involved but at the same time recognizes a narrow exception.

The following would amend the Commission's February version of the mitigating role amendment.

The Commentary to §3B1.2 is amended in Application Note 3(A) by striking the second paragraph and inserting:

> "A defendant convicted of a drug or chemical trafficking offense whose Chapter 2 offense level is based only on the quantity of drugs or chemicals with which he personally was involved is precluded from consideration for an adjustment under this guideline, with a single exception. Such a defendant may be considered for an adjustment where his role is significantly less than that of another participant, and the other participant's involvement was limited to the same drugs or chemicals for which the defendant is accountable. The adjustment to be applied in the rare case described herein is limited to a two-level minor role reduction."

The Commentary to §3B1.2 is amended in Application Note 3(B)--

1) by striking the title and inserting "Conviction of Significantly Less Serious Offense or Sentencing Based on Reduced Relevant Conduct."; and

2) by striking the first sentence and inserting:

"If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct or by virtue of being held accountable for a quantity of drugs less than

that for which he would be accountable under §1B1.3, a reduction for a mitigating role under this section is not warranted."

The Commentary to §3B1.2 is amended in Application Note 3 by adding the following new paragraph:

"(C) Relevant Conduct Applicable to Role.--For a mitigating role adjustment to apply, the defendant's role must be determined on the basis of the criminal conduct for which he was held accountable under §1B1.3."

The Commentary to Application Note 4 is amended by inserting at the end:

"It is intended that the downward adjustment for a minimal participant will be used infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marihuana shipment because that person's relevant conduct would include the entire shipment."

We look forward to working with the Commission on these and other sentencing guideline amendments.

Sincerely,

Michael Horowitz
Chief of Staff

Member (ex officio)
U.S. Sentencing Commission

Attachment

APPENDIX

Amendment 12, Economic Crime Package Relating to Tax Offenses

Loss Table for Consolidated Guideline and §2T4.1 (Tax Table)

By this amendment, the Commission proposes three options for a loss table for the consolidated fraud and theft guideline under §2B1.1 and, more significantly for the Tax Division, two options for a tax loss table for §2T4.1. With only one insignificant exception, the proposals involve an attempt to compress the loss table by moving from one-level to two-level increments. According to the Commission, this change is designed to minimize fact-finding and the appearance of false precision. The Commission also is considering whether to change the current relationship between tax offenses and fraud and theft offenses, in which tax offenses now generally face slightly higher offense levels for a given loss amount than fraud and theft offenses.

As a general matter, Option One of the proposed tax table increases offense levels for tax offenders throughout the guideline ranges, and Option Two 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 our focus in tax cases consistently has been on increasing punishment for low-end offenders in order to maximize deterrence, Option One is preferred. We have no objection to moving from one-level increments to two-level increments.

Common sense tells us that the likelihood of imprisonment acts as a powerful deterrent to one contemplating noncompliance with the internal revenue laws of our country. In criminal tax cases, however, a large number of violators do not face that risk. In fiscal year 1999, 54% of the tax defendants received as a sentence some form of probation, with over a quarter (26.2%) receiving a sentence of straight probation. See Table 12 (Offenders Receiving Sentencing Options In Each Primary Offense Category (Fiscal Year 1999)), 1999 Sourcebook of Federal Sentencing Statistics. In other words, over half of the convicted tax violators fell in Zones A, B and C. We prefer Option One because it increases offense levels for offenders at the low end of the Sentencing Table and, thus, increases the chances that a convicted tax violator will receive a sentence of imprisonment.

Without regard to the Commission's proposal to expand the zones, which would have a devastating effect on tax enforcement, Option One 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 One, 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 One from $40,000 to $30,000. Thus, under Option One, a sentence of imprisonment only will be required for a tax loss in excess of $30,000. [2] In view of Option One's greater impact on lower level tax loss offenders, we favor its adoption.[3]

As indicated above, we are strenuously opposed to the Commission's flexibility proposals with respect to zone changes. However, if the Commission were to consider its zone change proposals, which call for an expansion of both Zones B and C by two levels, our preference for Option One becomes even stronger. (See attached chart comparing these proposals in the tax arena.) Under the Commission's zone expansion proposal, a probationary sentence (Zone B) would be available to a defendant with a tax loss up to $40,000, and a split sentence (Zone C) would be available to a defendant with a tax loss up to $325,000. Thus, under the existing table, a defendant would have to have a tax loss in excess of $325,000 before a sentence of imprisonment only would be required. By contrast, under Option One, the break points between Zones B and C, and Zones C and D would be $30,000 and $200,000, respectively. [4] While the results under both the

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[2] To illustrate the unacceptability of Option Two, the requisite zone break tax loss amounts in that option are $30,000 for Zones B and C, and $70,000 for Zones C and D.

[3] At the very least, sentencing levels for tax offenders should not be reduced at the lower end of the Sentencing Table as Option Two proposes to do. Nor should possible sentences for tax violations ever be set at levels lower than the levels for other crimes involving fraudulent conduct. Reducing sentencing levels for tax violations or setting them lower than sentences for other fraud violations will send the wrong message to taxpayers and sentencing courts -- i.e., that tax crimes are not serious violations. Consequently, we also want to make sure that should the fraud guidelines be increased for any reason, the tax guidelines should be increased by the same amount, and that the tax guidelines are not lowered simply to match the fraud guidelines.

[4] In the context of the Commission's proposed zone expansion proposal, the impact of Option Two relative to the existing tax loss table is not so clear cut. Under Option Two,

existing tax loss table and Option One are significantly detrimental to tax enforcement in terms of ensuring that a term of imprisonment is imposed, Option One produces a less significant adverse impact. Thus, we again favor Option One.

Computing Tax Loss Under §2T1.1

In a series of proposals and issues for comment, the Commission seeks to address a circuit conflict, by way of a clarifying amendment, regarding how tax loss under §2T1.1 (Tax Evasion) is computed for cases that involve a defendant's underreporting of income on both individual and corporate income tax returns (Harvey/Cseplo conflict); clarify that tax loss in §2T1.1 refers to federal, and not state and local, tax loss; and, clarify that a tax evasion count and a count charging the offense that provided the income on which tax was evaded are grouped together under §3D1.2(c) to comport with a long-held Commission staff view. In addition, the Commission seeks comment on whether the definition of "tax loss" should include interest and penalties in evasion of payment tax cases, which are distinguishable from evasion of assessment tax cases, and whether the "sophisticated concealment" enhancement in the tax guidelines should be revised to conform to the "sophisticated means" enhancement in the fraud guidelines, including the imposition of a minimum offense level of 12.

Tax Loss: Harvey/Cseplo Conflict

This proposed amendment and issue for comment addresses a circuit conflict regarding how tax loss (i.e., the base offense level) under §2T1.1 is computed for cases involving a defendant's understatement of income on both individual and corporate income tax returns. Typically, these cases involve a corporate skimming operation, where the sole or major shareholder diverts corporate funds to his personal use and then fails to report the diverted funds on the corporate and/or his individual income tax return. The Commission frames the conflict as between the sequential calculation method adopted by the Seventh and Second Circuits in United States v. Harvey, 996 F.2d 919 (7th Cir. 1993), and United

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the break point between Zones B and C is a tax loss of $70,000, while the break point between Zones C and D is a tax loss of $200,000. Using the existing tax loss table, the respective zone break points are tax losses in the amounts of $40,000 and $325,000. Thus, under the existing tax table, Zone C will begin at lower tax loss amounts than under Option Two, while Zone D will begin at a significantly higher tax loss amount than Option Two provides.

States v. Martinez-Rios, 143 F.3d 662 (2d Cir. 1998), and the total aggregation approach adopted by the Sixth Circuit in United States v. Cseplo, 42 F.3d 360 (6th Cir. 1994). Without any explanation, the Commission has adopted the Harvey sequential approach, but it does seek comment on whether the Cseplo approach should be adopted.

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. We have long urged the Commission to adopt the Cseplo approach to the resolution of this conflict.

Although Application Note 7 to §2T1.1 of the Guidelines provides that "[i]f the offense involves both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together," that note does not answer the question how the loss is to be computed. In United States v. Harvey, 996 F.2d 919 (1993), the Seventh Circuit was called upon to determine the "tax loss" in a situation where a taxpayer had distributed the income of a closely-held corporation to himself without reporting the income at either the corporate or the individual level. The court treated the diversion as a constructive dividend and, in calculating the "tax loss," reduced the amount of the constructive dividend received by the defendant by the amount of the income taxes that would have been paid at the corporate level if the income had been properly reported by the corporation, reasoning that not to reduce the constructive dividend "overstates the revenues lost to the Treasury." United States v. Harvey, 996 F.2d at 921. The court reached this conclusion by considering the situation of a corporation that had receipts and profit of $100,000. Ignoring all other deductions and credits, if the corporation obeyed the tax laws, it would pay $34,000 in tax to the Government (at the 34% rate of §2T.1(c)(1)(A)), leaving $66,000 for distribution to its shareholders to be taxed as a dividend (at the 28% rate of §2T.1(c)(1)(A)). The court concluded, therefore, that it was necessary to deduct the amount of the corporate income taxes that should have been paid before determining the amount of the unreported constructive dividend and personal income "tax loss" under the Guidelines. [5]

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[5] Under the Harvey approach, the tax loss on a $100,000 diversion is $52,480 (a corporate tax loss of $34,000 (34% x $100,000) + a personal tax loss of $18,480 (28% x $66,000 ($100,000 - $34,000))).

In United States v. Cseplo, 42 F.3d 360 (Cir. 1994), the Sixth Circuit refused to follow Harvey and reached a different result. The court said it did "not read the guidelines as saying that the tax loss resulting from Mr. Cseplo's failure to report his receipt of diverted funds should be calculated as if he had not received money that he did in fact receive." United States v. Cseplo, 42 F.3d at 364. The court noted that (996 F.2d at 365):

> By choosing to falsify both returns, Cseplo made the deliberate decision to produce separate harm to the government with respect to both tax liabilities. The fact that Cseplo might have been able to claim a corporate salary deduction had he paid himself these money honestly and openly does not relieve him from the responsibility for creating the separate tax losses through the illegal course of conduct he chose in this case. [6]

Noting that the guidelines were silent on this point and that the Sixth and the Seventh Circuits had reached different results, the Second Circuit in United States v. Martinez-Rios, 143 F.3d 662, 672 (1998), opted to follow the Seventh Circuit's approach in Harvey, "primarily because it bases the calculation on a better approximation of the tax revenue lost to the federal treasury." The court said that it "did not think that the framers of the 1991 Guidelines intended to exacerbate the double taxation phenomenon by computing shareholders' tax losses without regard to the corporate taxes that their corporations were obliged to pay, at least in circumstances where the shareholders are being punished for their share of unpaid corporate taxes." Id.

We believe 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. In that situation, there are only after-tax funds available for dividend distribution, and the hypothetical shareholder will not receive more than $66,000. But we are not dealing in these cases with taxpayers who "obey the tax laws." Rather, we are concerned with defendants who have been convicted precisely because they have not obeyed the tax

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[6] Under Cseplo, the tax loss on a $100,000 diversion is $62,000 (a corporate loss of $34,000 (34% x $100,000) + a personal tax loss of $28,000 (28% x $100,000)).

laws. Using the figures from the Harvey example, the corporation does not pay $34,000 in income taxes on $100,000 of unreported income; it pays nothing. The shareholder does not receive an unreported dividend of $66,000; he receives $100,000.

The Seventh Circuit's attempt to deal with the fact that $100,000, instead of $66,000, winds up in the defendant's pocket, is not only unconvincing, it is also incorrect as a matter of settled tax law. Without analysis or citation of authority, the court dismisses, as either a nontaxable return of capital or "an implicit wage or bonus to the recipient" deductible by the corporation, the $34,000 that the defendant receives in addition to the $66,000 that the court assumes is available for distribution to the defendant. United States v. Harvey, 996 F.2d at 921. Neither characterization bears scrutiny where the funds received by the defendant are treated, under the facts of those cases, as constructive dividends. Unless a taxpayer proves there is an absence of corporate earnings and profits, a corporate distribution to a shareholder is treated as a taxable dividend, not as a return of capital. See United States v. Ruffin, 575 F.2d 346, 351 n.6 (2d Cir. 1978). And as the Sixth Circuit observed, "it may also be true that the illicit diversion of funds is unreasonable ipso facto, and that such funds are no more deductible by the corporation than bribes or kickbacks would be." United States v. Cseplo, 42 F.3d at 365 n.6; see 26 U.S.C. 162(c).

The better analysis reflects the reality of the situation: the taxpayer in the Harvey hypothetical is in the position of having stolen the $34,000 in corporate taxes that should have been paid to the Treasury. As the Second Circuit otherwise recognized at another point in its Martinez-Rios opinion (143 F.3d at 673), funds illegally obtained by a taxpayer are nonetheless taxable to him as income. See James v. United States, 366 U.S. 213, 218-20 (1961). Thus the individual income "tax loss" should reflect the fact that the taxpayer in the Harvey hypothetical receives not only the $66,000 that would have been available for distribution had the corporation paid its $34,000 in corporate income taxes, but also the $34,000 in taxes that the taxpayer has in effect "stolen" from the Treasury.

Tax Loss: Exclusion of State and Local Tax Loss

This clarifying amendment, in the form of an addition to application note 1 to §2T1.1, provides that: "Tax loss" means federal tax loss; it does not include state or local tax loss. According to the synopsis of the proposed clarifying amendment, the inclusion of state or local tax loss would "greatly

complicate the guideline because of the multitude of state and local tax rates and provisions." We are opposed to this amendment.

Quite frankly, we are mystified by the inclusion of this proposed amendment in the package. The Guidelines have been in effect since November 1987, and we are unaware that this issue has been a significant concern in the application of the tax loss guideline. To the extent that courts have addressed the issue, they have approved the inclusion of state and local tax loss in the computation of tax loss for sentencing purposes. See United States v. Fitzgerald, 232 F.3d 315, 318 (2d Cir. 2000); United States v. Powell, 124 F.3d 655, 663-64 (5th Cir. 1997). [7]

Moreover, the exclusion of state and local tax loss from the definition of "tax loss" conflicts with one of the underlying principles of Guidelines calculations - all relevant conduct is to be taken into account in determining the base offense level (§1B1.3(a)). In tax cases, relevant conduct includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" (§1B1.3(a)(1)(A)), and "in the case of a jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity" (§1B1.3(a)(1)(B)), "that were part of the same course of conduct or common scheme or plan as the offense of conviction" (§1B1.3(a)(2)). See also USSG §2T1.1, comment. (n.2). In a tax case the connection between the offense of conviction and the related conduct is in many cases quite direct, as it is often the case that the same act evades both the federal and the state tax. Thus, in an appropriate case, such as in a joint federal/state fuel excise tax evasion scheme, the amount of state excise tax loss is clearly "relevant conduct" pursuant to

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[7] In analogous contexts, the Ninth and Eleventh Circuits have concluded that relevant conduct is not limited to federal offenses for sentencing purposes. See United States v. Newbert, 952 F.2d 281, 284 (9th Cir. 1991) (holding that nonfederal offenses may be considered for sentence enhancement under §1B1.3); United States v. Fuentes, 107 F.3d 1515, 1526 (11th Cir. 1997) (holding that state offenses that were part of the same course of conduct or common scheme or plan must be considered relevant conduct under §1B1.3(a)(2)). And, in an unpublished opinion, the Sixth Circuit has also so held. United States v. Bandy, 172 F.3d 49, **2 (6th Cir. 1999) (Table) (holding that relevant conduct under §1B1.3(a) is not limited to conduct that constitutes a federal offense).

§1B1.3(a)(2), and should be included in the base offense level calculation.

A failure to include state tax loss in the tax loss calculus for purposes of determining the base offense level also could result in dissimilarly situated defendants being treated similarly. For example, one defendant might evade federal excise taxes on fuel but pay the state excise tax (we are aware of at least one case where this happened), while another defendant evades both. If the state tax loss is not taken into account, both of these defendants will end up with the same sentence as long as the federal tax loss is the same.

Moreover, no proof is offered to support the justification for the proposed exclusion (i.e., including state and local tax loss would greatly complicate the guideline because of the multitude of state and local tax rates and provisions). In fact, in many cases, the calculations are fairly simple. For example, in the fuel excise tax area, the federal tax is calculated by multiplying a certain number of cents (per gallon rate) times the number of gallons of fuel on which the tax was not paid, and the parallel state excise tax is usually calculated in the same manner, although a different per gallon rate applies. Similarly, in the income tax area, many state income taxes are based upon the federal income tax calculation with a few fairly straightforward adjustments that are not particularly difficult to calculate.

In any event, including state and local tax losses in the tax loss computation for base offense level purposes places no great burden on either the court or the Probation Department. In the first instance, these computations will be prepared by agents of the Internal Revenue Service. The defendant is always free to challenge these calculations, and either Probation or the court can reject them on the ground that they have not been established. Moreover, including state and local tax losses in the tax loss computation will not require a court to get intimately involved in detailed tax computations. The guidelines specifically provide that when the amount of tax loss is uncertain, "the court will simply make a reasonable estimate based on the available facts." USSG §2T1.1, comment. (n.1).

Grouping of Tax Count with Count Charging Offense Providing Underlying Income

To codify the longstanding view of its staff, the Commission proposes to add an application note to §2T1.1 clarifying that a tax evasion count and a count charging the offense that provided the income on which tax was evaded are grouped together under

§3D1.2(c). According to the application note, the counts are to be grouped together whether or not the amount of criminally derived income is sufficient to warrant the income from criminal activity enhancement under subsection §2T1.1(b)(1). We oppose this amendment as inconsistent with the basic premise of the grouping rules and the reason for the §2T1.1(b)(1) enhancement.

We do not disagree with the proposition that clarification of the grouping rules for tax cases is necessary. Courts that have faced this question have reached varying conclusions on the need and method for grouping. United States v. Fitzgerald, 232 F.3d 315, 319-21 (2d Cir. 2000) (holding that tax evasion, fraud and conversion counts should be grouped under USSG §3D1.2(d) and the loss attributable to all of defendant's offenses aggregated); United States v. Vitale, 159 F.3d 810, 813-15 (3d Cir. 1998) (rejecting claim that wire fraud and tax evasion counts should be grouped under USSG §3D1.2(c) as such grouping would result in no incremental effect on sentencing for tax evasion count); United States v. Haltom, 113 F.3d 43, 45-47 (5th Cir. 1997)(holding that tax evasion and mail fraud convictions must be grouped under USSG §3D1.2(c)); United States v. Astorri, 923 F.2d 1052, 1055-57 (3d Cir. 1991) (concluding that wire fraud and tax evasion counts were properly not grouped together under §3D1.2(c), and adding that, under §3D1.4, the court correctly added two units or levels to the fraud offense calculation); United States v. Morris, 229 F.3d 1145, *1 (4th Cir. 2000) (Table) (holding, based upon Vitale, that money laundering and tax evasion counts were not to be grouped under USSG §3D1.2(c), because the victims, harms, and conduct for the offenses were different); United States v. McCormick, 1998 WL 799176 (SD NY 1998) (declining to group conspiracy to commit mail fraud and tax evasion counts under USSG §3D1.2(c).

The proposed addition to the application notes, however, is not an appropriate solution to the grouping issue. Indeed, the proposal is inconsistent with the premise underlying the grouping rules of Chapter 3, Part D of the Guidelines. "This Part provides rules for determining a single offense level that encompasses all the counts of which the defendant is convicted." USSG Ch.3, Pt.D, intro. comment. "The rules in this part seek to provide incremental punishment for significant additional criminal conduct." Id. (Emphasis added.) The rules use the most serious offense as the starting point and then reference the other counts to determine how much to increase the offense level. Id. The grouping rules also are designed to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct.

Generally, counts are grouped together when they involve substantially the same harm. USSG §3D1.2. Section 3D1.2(c), the object of the proposed application note, provides that counts are to be grouped when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts. Application note 5 explains that §3D1.2(c) "prevents 'double counting' of offense behavior."

One of the examples in Application note 5 shows how the provision is meant to work. The note says that the rule applies only if the offenses are closely related and gives as an example of closely related offenses that warrant grouping under this provision use of a firearm in a bank robbery and unlawful possession of that firearm. The robbery would have a base offense level of 20 (§2B3.1(a)), which would be increased 2 levels because the property of a bank was the object of the offense (§2B3.1(b)(1)) and increased 6 levels because a firearm was used (§2B3.1(b)(2)(B)), for a total offense level of 28. Unlawful possession of the firearm would have a base offense level of 20 if the defendant unlawfully possessed a stolen handgun and had a prior felony conviction of a crime of violence (§2K2.1(a)(4)(A)), which would be increased 4 levels because the firearm was used in connection with another felony offense (§2K2.1(b)(5)), for a total offense level of 24. If these two offenses were not grouped together under §3D1.2(c), then there would be two separate groups with offense levels of 28 and 24, and, pursuant to the provisions of §3D1.4, the combined offense level for both groups would be 30. In other words, although six levels of the level 28 for the bank robbery were attributable to the firearm, unlawful possession of the firearm would further increase the final level if it was treated as a separate group and §3D1.4 was applied. In short, without combining the two offenses in one group, the firearm gets counted twice.

Unfortunately, in many criminal tax cases, §3D1.2(c) will not always work this way -- i.e., grouping as contemplated in the proposed application note will not always achieve incremental punishment for significant additional criminal conduct and also avoid double counting. Indeed, the Commission's grouping proposal will result in cases where the harm produced by one count or group of counts will play no part in the determination of the offense level for the group. A couple of examples illustrate the point.

In United States v. Vitale, 159 F.3d at 813-16, the district court did not group tax evasion and wire fraud counts. The adjusted offense levels for the two counts were 25 for the wire fraud count and 23 for the tax count, including a two-offense