to locations outside the United States may be a necessary part of legitimate and routine business transactions. Again, the inclusion of an intent element will limit the sophisticated concealment adjustment to conduct intended to conceal the transaction.

The NACDL opposes the inclusion of Specific Offense Characteristic (b)(2)(D). The list of subsections in § 1956 includes most of the major subsections contained in that statute. We can perceive little rationale for increasing a sentence for the large majority of cases that will be prosecuted under the money laundering statutes through the Specific Offense Characteristic.

The NACDL supports the two-level downward adjustment under proposed § (b)(4) in cases where the defendant has done little more than knowingly receive the proceeds of illegal activity. In such cases a less severe penalty is justified.

The NACDL supports an addition to Application Note 3 regarding the value of laundered funds for certain defendants. Whether the departure language of Option 1 or the approach of Option 2 is adopted, the Commission should include a provision designed to deal with the situation where the amount of laundered funds derived from a fraud transaction could be greater than the fraud loss itself. A failure to adopt one of these options could produce anomalous guideline applications. For example, in a white collar fraud case, a defendant could pad a legitimate claim by a small percentage. This padding would be accomplished by fraudulent misrepresentations. A party who was convicted of the fraud would in many cases be sentenced under section 2F1.1 based upon the amount of the misrepresentational element of the claim, not the legitimate underlying claim itself. For money laundering purposes, however, the total amount of the claim would be the funds laundered. Absent one of these options, money laundering will become a more significant offense than the underlying

offense. A defendant convicted of the underlying fraud would be punished less severally than an individual who laundered the proceeds.

The Commission is aware from its staff working papers of the circuit conflict on grouping money laundering and fraud or drug counts. The proposed amendments will effectively eliminate the circuit conflict because of the coupling of direct money laundering to the underlying offense. The Commission should, however, address the cases that will not be sentenced under the amended guideline prior to its adoption or because of *ex post facto* problems. The Commission's commentary on the adoption of any amendment should address its preferences regarding retroactive application of the principle that direct money laundering in fraud and drug cases should be sentenced under the underlying fraud or drug guidelines.

We appreciate the opportunity to provide our comments to the Commission and are prepared to provide any additional information that may be of use to the Commission.

Very truly yours,

Martin G. Weinberg, Chair
NACDL Money Laundering Task Force

Samuel J. Buffone, Vice Chair
NACDL Money Laundering Task Force

* * *

NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's 10,000 direct members — and 80 state and local affiliate organizations with another 28,000 members — include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

March 26, 2001

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

Dear Judge Murphy:

We write on behalf of the National Association of Criminal Defense Lawyers (NACDL), the preeminent national association of criminal defense attorneys with 10,500 members and 30,000 state and local affiliate members who are private defense attorneys, public defenders, law professors, and judges. Each of us is committed to ensuring fairness and due process of law for persons accused of or convicted of crime. These comments relate to the Economic Crime Package and related amendments, i.e., Amendments 12, 13 and 14. NACDL will submit separate comments on the Money Laundering guidelines and the Immigration guidelines.

As you prepare to vote on this year's proposed amendments, we ask you to keep in mind that the rate of incarceration in the United States is the greatest of any civilized nation. In this regard, we quote the Honorable Richard A. Posner, Chief Judge, United States Court of Appeals for the Seventh Circuit, who describes the "disturbing state of affairs," in which our criminal justice systems finds itself.

> Our retention, indeed our expanding use, of capital punishment, our other exceptionally severe criminal punishments, (many for intrinsically minor, esoteric, archaic, or victimless offenses), our adoption of pretrial detention, as a result of which some criminal defendants languish in jail for years awaiting trial, and our enormous prison and jail population, which has now passed the one-million mark [since Judge Posner wrote this in 1995, the prison population now exceeds two-million persons], mark us as the most penal of civilized nations...

[150 A]

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> [W]e have had slavery, and segregation, and criminal laws against miscegenation ("dishonoring the race"), and Red Scares, and the internment in World War II of tens of thousands of harmless Japanese-Americans; and most of our judges went along with these things without protest....
>
> Perhaps in the fullness of time the growing of marijuana plants, the "manipulation" of financial markets, the sale of pornographic magazines, the bribery of foreign government officials, the facilitation of suicide by the terminally ill, and the violation of arcane regulations governing the financing of political campaigns will come to seem objects of criminal punishment not much more appropriate than "dishonoring the race." [J]udges on the one hand should not be eager enlisters in popular movements, but on the other hand should not allow themselves to become so immersed in a professional culture that they are oblivious to the human consequences of their decisions, and in addition should be wary of embracing totalizing visions that ... reduce individual human beings to numbers or objects...

Richard A. Posner, Overcoming Law 157-58 (Harvard U. Press 1995). Chief Judge Posner's advise to judges applies with equal force to you, who as Sentencing Commissioners, have been entrusted with establishing federal sentencing guidelines.

We are cognizant that with respect to these amendments, the Commission is responding to those critics who believe that sentences with respect to economic crimes are too lenient. No empirical evidence to support increased penalties has been submitted by the government or by those judges on the Judicial Conference of the United States who propose increased penalties, however. Indeed, any perception that these guidelines do not provide sufficiently severe penalties is belied by the actual sentences being imposed by federal judges on actual defendants. In most cases, judges are sentencing at the lowest ends of the guideline range.

In addition, the government itself has conceded that it lacks any empirical evidence that harsher penalties will deter persons from committing economic crimes.

Further, because these guidelines are driven by the aggregated amount of "loss" as determined under relevant conduct, the proposed increases will result in the same injustices that now permeate drug sentences – an overstatement of the culpability of non-violent, first-time offenders, who are essential but ministerial members of larger criminal enterprises. It is not unusual, for example, to find an employer or ringleader who devises, controls and puts in place a fraudulent scheme for his own profit but which ensnares ministerial employees who are then drawn into the

illegal web by perceived fears of losing otherwise legitimate jobs. This happens in medical fraud cases, where the secretary is asked to falsify records or in schemes to defraud customers, where the accounting clerk knowingly processes documents reflecting false statements. There are also those cases where there are intervening causes for the loss not related to the defendant's fraud but where the defendant is nevertheless held accountable for the entire amount of loss. Also, there are those cases where a fraudulent contract is negotiated for the benefit of the employer without any actual gain to the defendant. Quite often also, persons committing these crimes are motivated by misguided attempts to salvage a failing enterprise or by other dire financial circumstances not subject to consideration under the federal sentencing guidelines as a ground for downward departure but which nevertheless mitigate the circumstances of the offense.

Lastly, to the extent that the concern of those advocating increased penalties for economic crimes is really one of discomfort with draconian sentences for drug offenders, NACDL shares the concern that those sentences are excessive, and further, that they are largely the result of mandatory minimum legislation without basis in sound sentencing policy. As studies have shown, federal drug sentences are not just viscerally disturbing, but create a host of problems not encountered elsewhere in the Guidelines, including guideline circumvention, disparity among sentences depending on the bent of the prosecutor, and undue prosecutorial power in inducing plea bargains. The cure surely cannot be to make the misguided drug sentencing policy a benchmark for sentencing in other types of cases, thus infecting the system with all of its problems.

In sum, it hardly seems sound to increase penalties for all offenses because a very small proportion of the most severe fraud offenses may warrant harsher penalties. For those cases, an upward departure is the more appropriate solution. In the absence of any empirical evidence to support increased penalties, the Commission should not adopt amendments that will limit the number of persons who will be eligible to receive a "sentence other than imprisonment." Accordingly, rather than raise penalties for economic crimes, the Commission should abide by the congressional mandate in 28 U.S.C. §994(j) which requires it to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first time offender who has not been convicted of a crime of violence or an otherwise serious offense...."

Amendments 12, 13 and 14.

Our comments here focus on the Economic Crime Package and related amendments, i.e., Amendments 12, 13, and 14. The Practitioners' Advisory Group, the Federal Public and Community Defenders, and the New York Council of Defense Lawyers have provided extensive written comments on these proposals. Our purpose here is to express NACDL's support for positions treated in more detail in those organizations' submissions, and to add our thoughts and contribute alternatives where appropriate.

NACDL will comment in a separate submission on proposed Amendment 20 regarding money laundering. We understand that the Department of Justice has asked the Commission to delay consideration of changes to the money laundering guidelines until the next amendment cycle. If the Commission does defer consideration of Amendment 20, NACDL requests that the Commission also defer consideration of the Economic Crime Package because of the close relationship between the two.

I. NACDL Supports Consolidation of the Theft, Property Destruction, and Fraud Guidelines (Amendment 12, Part A).

NACDL joins the other defense organizations in supporting consolidation of USSG §§ 2B1.1, 2B1.3 and 2F1.1. We support use of the existing fraud table with a base offense level of six as long as a one or two-point decrease is adopted for cases involving a loss less than or equal to $1,000. As the Federal and Community Defenders note in their submission, at very low levels one level can dictate available sentencing options. Since consolidation requires a choice between the higher levels for fraud and the lower levels for theft at amounts of $1,000 or less, and since courts are sentencing at the minimum of the range in the vast majority of both theft and fraud cases, the Commission should adopt the lower levels.

NACDL also supports the elimination of the "more than minimal planning" enhancement. As the Commission notes, there is potential overlap between this and the sophisticated means enhancement. The sophisticated means enhancement is a superior indicator of heightened culpability by virtue of its definition; while the broad "more than minimal planning" enhancement has become routine in most cases. NACDL opposes incorporating the "more than minimal planning" enhancement in a consolidated loss table because to do so would impose unwarranted punishment on those few defendants who engage in minimal or no planning. If the enhancement is incorporated in a consolidated loss table, a specific offense characteristic providing for a two-point decrease should be added for those cases in which it does not exist.[1]

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[1] See United States Sentencing Commission, White Collar Working Group Report (April 1993) at 23, 36.

NACDL joins the Federal and Community Defenders and the New York Council of Defense Lawyers with respect to the other proposals and issues for comment in Proposed Amendment 12, Part A.

II. NACDL Opposes Any Revision to the Consolidated Loss Table by Increasing Offense Levels Beyond Those Contained in the Current Fraud Table (Amendment 12, Part B).

NACDL joins the Practitioners' Advisory Group, the Federal Public and Community Defenders, and the New York Council of Defense Lawyers in opposing any increase in the loss tables for economic crime cases. The Committee on Criminal Law of the Judicial Conference of the United States, along with the Department of Justice, have spearheaded efforts to implement an increase. The Committee states that offense levels for white collar offenses are "too low" based on considerations of proportionality, deterrence, and just punishment, and that there is a need to simplify which would be advanced by consolidating the loss tables for the fraud and theft guidelines with fewer, 2-level loss tables.[2] With no attempt at justification, the Department of Justice baldly claims that sentences in white collar crime cases are "far too lenient." Neither offers any empirical or other support for a supposedly necessary increase.

NACDL believes that there is no justification supported in fact or logic for an increase in the loss table at any level. As the Commission has said, "the guidelines represent an approach that begins with, and builds upon, empirical data."[3] If so, any increase in the loss tables would be unwarranted and unwise.

- At the inception of the Guidelines, offense levels for economic crimes (among all others) were set above the average reflected in pre-Guidelines practice.[4] Offense levels in the fraud and theft tables were increased again in 1989 "to provide additional deterrence and better reflect the seriousness of the conduct,"[5] though without empirical evidence indicating a failure of prior levels to adequately deter or punish.

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2 Summary: Proposed Definition of Loss and Loss Table by the Committee on Criminal Law at 1.

3 USSG, Ch.1, Pt.A, intro. comment. 3.

4 Id.

5 USSG App. C, amendments 99 and 154.

- Amendments to the guidelines applicable to economic crimes have kept pace with any real or perceived need for increased sentences.

  - Over the years since 1989, specific offense characteristics have been added to reflect increased seriousness based on a particular factor in a particular case. See USSG §§ 2B1.1(6)(A), 2F1.1(7)(A) (substantially jeopardized safety and soundness of a financial institution); USSG §§ 2B1.1(6)(B), 2F1.1(7)(B) (affected a financial institution and the defendant derived more than $1 million in gross receipts); USSG § 2B1.1(7) (misappropriation of trade secrets and defendant knew or intended it to benefit a foreign entity); USSG § 2B1.1(7) (theft from a national cemetery); USSG § 2F1.1(5) (sophisticated means, etc.); USSG § 2F1.1(3) (mass marketing).

  - To encourage greater flexibility to increase or decrease sentences for economic crimes, the commentary to USSG § 2F1.1 was amended in 1993 to invite upward or downward departure when the loss overstates or understates the seriousness of fraud offenses. See USSG § 2F1.1, comment. (n.11). The commentary to USSG § 2B1.1 was amended in 1997 to invite upward departure when the loss understates the seriousness of theft offenses. See USSG § 2B1.1, comment. (n.14).

- Empirical data collected by the Commission demonstrates that in the judgment of sentencing courts in individual cases, the loss tables set in 1989, specific offense characteristics added subsequently, and use of the departure power have been more than adequate to reflect the seriousness of economic crime.

  - The percentage of sentences for economic crimes at the guideline minimum far exceed those at the guideline maximum. For example, in 1999, 61.9% of defendants sentenced for fraud received the guideline minimum while only 12.2% received the maximum. Similarly, in theft cases, the minimum was imposed in 68.8% of the cases while the maximum was imposed in only 10.4% of the cases.[6]

  - The trend in sentencing economic crime offenders at the minimum end of the range has increased. For example, the percentage of fraud defendants sentenced at the minimum has risen from 46.5% in 1996 to 58.3% in 1997 to 59.7% in 1998

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[6] 1999 Sourcebook of Federal Sentencing Statistics, Table 29. Statistics for the year 2000 are not yet available.

to 61.9% in 1999.[7] The same is true of the percentage of minimum larceny sentences, which has increased from 61.9% in 1996 to 68.8% in 1999.[8] Data from 1998 and 1999 reflects a trend to sentence slightly fewer defendants at the guideline maximum, with the percentage for fraud defendants decreasing from 13.7% in 1998 to 12.2% in 1999, and that for theft defendants decreasing from 11.6% to 10.4%.[9]

- In those cases where departures were granted in fraud and larceny cases for reasons other than substantial assistance, downward departures have increased slightly, ranging in fraud cases from 8.5% in 1996 to 9.7% in 1999, and in larceny cases from 6.5% in 1996 to 7% in 1999. At the same time, upward departures have decreased slightly, ranging in fraud cases from 1.3% in 1996 to .7 % in 1999, and in larceny cases from 1.4% in 1996 to .3% in 1999.[10]

In sum, judges are not prevented by the current system from imposing sentences in economic crime cases that are as high as those judges, in their considered judgment in individual cases, determine are necessary to achieve just punishment. Whatever sense the judges on the Criminal Law Committee or the Department of Justice might have to the contrary, it is unsubstantiated and not representative of the views of the broader judiciary.

To the extent that the concern of the Committee on Criminal Law for proportionality is really one of discomfort with draconian sentences for drug offenders, NACDL shares the concern that those sentences are excessive,[11] and further, that they are largely the result of mandatory minimum

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[7] 1996 Sourcebook of Federal Sentencing Statistics, Table 27; 1997 Sourcebook of Federal Sentencing Statistics, Table 29; 1998 Sourcebook of Federal Sentencing Statistics, Table 29; 1999 Sourcebook of Federal Sentencing Statistics, Table 29.

[8] Id.

[9] 1998 Sourcebook of Federal Sentencing Statistics, Table 29; 1999 Sourcebook of Federal Sentencing Statistics, Table 29.

[10] 1998 Sourcebook of Federal Sentencing Statistics, Table 27; 1999 Sourcebook of Federal Sentencing Statistics, Table 27.

[11] We do not believe this issue is properly characterized as one of disproportionality or unwarranted disparity as would require the Commission to raise penalties for economic crimes. Congress directed the Commission to avoid "unwarranted sentencing disparities among defendants with similar records who

legislation without basis in sound sentencing policy. As studies have shown, federal drug sentences are not just viscerally disturbing, but create a host of problems not encountered elsewhere in the Guidelines, including guideline circumvention, disparity among sentences depending on the bent of the prosecutor, and undue prosecutorial power in inducing plea bargains.[12] The cure surely cannot be to make the misguided drug sentencing policy a benchmark for sentencing in other types of cases, thus infecting the system with all of its problems. A fair and rational system of sentencing can be achieved only by repealing the mandatory minimum laws and adjusting the Guidelines accordingly.[13]

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have been found guilty of similar conduct." 18 U.S.C. § 991(b)(1)B). As the Commission has recognized, "Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity," and "[s]imple uniformity – sentencing every offender to five years – destroys proportionality [by] lump[ing] together offenses that are different in important respects." See USSG Ch. 1, Pt. A, intro. comment. 3. There can be no doubt that drug and white collar offenses differ in important respects, though we believe that sentences in drug cases are unwarrantedly severe largely due to Congress's choice to impose mandatory minimum sentences in these cases.

[12] Studies conducted by Professor Stephen Schulhofer and former Commissioner Ilene Nagel have found that bargaining in contravention of strict Guidelines requirements occurs in at least 20-35% of cases resolved through guilty plea and up to 90% in some jurisdictions. See Stephen J. Schulhofer & Ilene H. Nagel, Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period, 91 Nw. U. L. Rev. 1284, 1290-92 (1997) (hereinafter "Guideline Circumvention"). They found that guideline circumvention is "particularly pronounced in drug cases in which guideline sentences are anchored by mandatory minimum sentence levels." See Ilene H. Nagel & Stephen J. Schulhofer, A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines, 66 S. Cal. L. Rev. 501, 535 (1992). This, they found, was often attributable to individual prosecutors' sense that the correct sentence was "unfair," "unnecessarily long and overly harsh." Id. at 535-35; see also Guideline Circumvention, 91 Nw. U. L. Rev. at 1306. See also U.S. Gen. Accounting Office, Sentencing Guidelines: Central Questions Remain Unanswered 16 (1992) (study showed that prosecutors who affected sentences through bargaining did so "largely to 'circumvent' the guidelines for sympathetic offenders, especially to avoid mandatory minimum sentences"). Schulhofer and Nagel found that this created wide disparity among and within jurisdictions since it depends on the views of individual prosecutors. The other side of the coin, of course, is the threat of sentencing "by the book," making a plea offer "irresistible, even for the defendant with a legitimate legal defense, or the factually innocent defendant with a substantial likelihood of acquittal at trial." See Stephen J. Schulhofer & Ilene H. Nagel, Negotiated Please Under the Federal Sentencing Guidelines: The First Fifteen Months, 27 Am. Crim. L. Rev. 231,

[13] See Justice Stephen Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent. R. 180 (Jan./Feb. 1999) (advocating abolition of mandatory minimum sentences which frustrate the careful calibration of sentences the Guidelines were intended to accomplish); Julie R. O'Sullivan, In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System, 91 Nw. U. L. Rev. 1342, 1416-17 (1997) ("obvious solution" to improper prosecutorial manipulation "is for Congress and the Commission

Moreover, the proponents of increased offense levels have pointed to no evidence that longer terms of imprisonment deter economic crime better than current levels. As IRS Commissioner Rossotti conceded at the hearing on March 19, 2001, there is no evidence indicating that higher sentences deter tax evasion offenses. Nor is there any evidence of which we are aware that higher sentences deter any other type of economic crime. Indeed, as noted by the Practitioners' Advisory Group, there is empirical evidence that the deterrent impact in economic crime cases comes from the criminal process itself rather than the period of imprisonment.[14]

Finally, there is no need based on simplification or otherwise to increase current offense levels in order to consolidate the loss tables. Concerns about complexity stem primarily from inconsistent and unclear definitions and ambiguous instructions in the guidelines rather than the number or breadth of offense levels.[15]

III. NACDL Opposes Any Listing of Aggravating and Mitigating Factors as Specific Offense Characteristics in Fraud and Theft Cases (Amendment 13).

NACDL opposes both options that have been proposed for the courts' consideration of a list of aggravating and mitigating factors with corresponding two- or four-level increases and decreases. While we do agree that loss is not the only or necessarily the best indicator of culpability, we believe, at this time, that other factors are best left to the more refined, individualized determinations available through the departure power. As the empirical data shows, judges are sentencing at the minimum in the majority of those cases in which the departure power is not used, demonstrating that sentences in most cases are as high as the judiciary believes necessary, and are departing infrequently (up or down) in cases that for one reason or another are unusual.

NACDL, moreover, has serious misgivings about the use of the listed factors as specific offense characteristics. As a general matter, we are aware of no evidence and feel no confidence that these particular factors necessarily reflect increased or decreased culpability in cases across the board. We believe that a number of these by virtue of their broad definitions create the danger of

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to reconsider whether the onerous levels of punishment mandated by statute and Guidelines, particularly in drug cases, are truly necessary given penal goals.").

[14] Submission of the Practitioners' Advisory Group to the United States Sentencing Commission Regarding Proposed Economic Crimes Amendment at 6.

[15] United States Sentencing Commission, Staff Discussion Paper, Level of Detail in Chapter Two at 13.

being applied as routinely and meaninglessly as the 'more than minimal planning" enhancement.[16] If one or more of them are present in an individual case, certainly the parties can bring them to the attention of the court for its careful consideration as a basis for departure. Moreover, many of the aggravating factors in both options appear to present double counting,[17] significant overlap,[18] and inconsistencies[19] with other guideline provisions. Finally, both options would invite unnecessary litigation, with the prosecution claiming the presence of as many aggravating factors as possible in every case, and the defense claiming the presence of as many mitigating factors as possible in every case, with the likely result a wash.

Though both options state that a sentencing court would not be precluded from departing based on a listed factor by virtue of its having applied that factor, we believe that overall these provisions would undermine and dilute the departure power and the body of law that has developed around it. All of the proposed aggravating and mitigating factors are available now as bases for departure in an unusual case. NACDL believes that current application note 11 and Chapter 5 provide as much guidance as is needed.

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[16] Examples include "non-monetary" harm, psychological or emotional harm (always reasonably foreseeable), and endangerment of the solvency of a victim (often the case). As to aggravation for making a false statement to facilitate another crime, examples of frauds not furthered by false statements do not easily come to mind.

[17] For example, both options call for consideration of the number of victims, a factor already taken into account in proposed § 2B1.1(b)(2) and which would create the anomalous results pointed out by the Federal and Community Defenders. Another example is Option 1, proposed aggravating factor ii (false statements to facilitate another crime), which in a bankruptcy fraud case would double count the defendant's false statement pursuant to proposed specific offense characteristic (b)(8)(B).

[18] A number of the proposed aggravating factors overlap with other specific offense characteristics. For example, reasonably foreseeable physical harm is nearly indistinguishable from conscious or reckless disregard of death or serious bodily injury, and loss of confidence in an important institution significantly overlaps with jeopardizing the safety and soundness of a financial institution.

[19] For example, defining a loss at or near the high or low end of the range as an aggravating or mitigating factor undermines the purpose of the loss table, and is likely to be completely fortuitous and therefore without bearing on culpability. As to aggravating factors for making false statements/committing the crime in order to facilitate another crime, it appears that this factor could operate inconsistently and create double counting with respect to the guideline for the "other crime" and the grouping rules, and may too easily permit the government to obtain an increase for "another crime" in a case in which there is insufficient evidence not only to charge and prove that crime beyond a reasonable doubt, but to obtain an upward departure on that basis.

However, an expanded list of suggestions for both upward and downward departure in the commentary is preferable to the proposals defining these various circumstances as specific offense characteristics to be weighed and balanced. NACDL therefore proposes non-exhaustive lists based on current application note 11, the Commission's proposals for aggravating and mitigating circumstances, and its proposals for suggested grounds for departure.

Upward Departure

- NACDL proposes amending the Commission's proposed application note 2(G)(i)(I), as follows:

> A primary objective of the *defendant in committing the* offense was an aggravating, non-monetary objective. For example, a primary objective of the *defendant in committing the* offense was to inflict emotional harm.

The italicized language makes clear that only the defendant's intent may be considered, and not that of someone for whose conduct he is accountable under § 1B1.3.

- NACDL proposes amending the Commission's proposed application note 2(G)(i)(I), as follows:

> The offense caused substantial non-monetary harm *of a kind or to a degree that is extraordinary and that was reasonably foreseeable to the defendant under the circumstances as he or she knew them.* For example, the offense caused *reasonably foreseeable* physical harm, *severe* psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest.

As written, application note 2(G)(i)(II) would invite departure in a case that is not out of the ordinary. It can be said that almost any theft or fraud causes some psychological discomfort and that any crime risks even severe psychological or emotional harm, depending on the victim. NACDL believes that deleting the word "risked," inserting the concept of reasonable foreseeability (both as in current application note 11(c)) and inserting the other italicized language will cover only those circumstances that may warrant departure.

- NACDL opposes the Commission's proposed application note 2(G)(i)(III) suggesting upward departure for interest, finance charges, late fees, penalties, anticipated profits, amounts based on an agreed-upon return or rate of return, or other opportunity costs, not included in the determination of loss, for all of the reasons that these matters should not be included in loss, including difficulty of definition and measurement and that it would treat similar defendants differently. The Committee on Criminal Law apparently agrees with this view, as it has not included this as a suggested basis for upward departure.

- NACDL opposes the Commission's proposed application note 2(G)(i)(IV) because it is too broadly applicable and therefore does not describe an unusual case. It also runs contrary to the concepts of both actual and intended loss. If the Commission decides to include it, NACDL suggests the following replacement:

> The *defendant knowingly* created a *significant* risk of substantial loss beyond the loss determined for purposes of subsection (b)(1).

- NACDL does not oppose inclusion of the following suggestion for upward departure:

> In committing the offense, the defendant knowingly or recklessly destroyed or damaged irreplaceable items of cultural, historical or archeological significance.

- NACDL does not object to inclusion of the remaining factors in current application note 11, i.e., (b) false statements to facilitate another offense, (d) national security or military readiness, (e) loss of confidence in an important institution, and (f) solvency of one or more victims.

Downward Departure

- NACDL supports the Commission's proposed application note 2(G)(ii)(I).

- NACDL joins the Federal and Community Defenders in recommending that proposed application note 2(G)(ii)(II) be amended as follows:

> The loss significantly exceeds the greater of the defendant's actual or intended personal gain *or otherwise* significantly overstates the culpability of the defendant.

- NACDL proposes adding the following further suggestions for downward departure:

Prior to detection of the offense, the defendant made significant efforts to limit the harm caused by the crime.

The defendant's attempted offense was impossible or extremely unrealistic.

The defendant did not commit the offense for commercial advantage or financial gain.

The defendant committed the offense because of extreme financial hardship not caused by the defendant and beyond the defendant's control.

The defendant neither intended to profit nor actually profited from the offense, and did not commit the offense for the purpose of inflicting non-monetary harm.

IV. NACDL Opposes Intended Loss as an Alternative Measure of Loss in Completed Crimes (Amendment 12, Part C).

NACDL opposes the General Rule proposed for the commentary to a consolidated guideline that would make loss the greater of actual or intended loss in all cases. For the reasons stated in the submissions of the Federal and Community Defenders and the Practitioners' Advisory Group, we strongly support maintaining the current system of using intended loss if greater than actual loss only in sentencing inchoate crimes, and the following proposal for the commentary to a consolidated guideline:

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

If the Commission adopts intended loss as an alternative measure of loss if greater than actual loss in sentencing all fraud and theft crimes, the definition of intended loss should be amended to clarify, as set forth in the submissions of the Federal and Community Defenders and the Practitioners' Advisory Group, that (1) the loss must be "the pecuniary harm that the *defendant purposely* intended to cause," (2) the bracketed language concerning impossible intended loss be included at minimum and clarified to ensure that a fraudulent insurance claim seeking $50,000 for a $10,000 car would not be counted, and (3) the credits principle applies.

V. NACDL's Positions With Respect to Other Proposals for the Definition of Loss (Amendment 12, Part C).

NACDL takes the following positions with respect to the other proposals for the definition of loss:

- Actual Loss NACDL supports the definition of "actual loss" in Option 1 if a limitation is added to the concept of reasonable foreseeability, for the reasons set forth in the submission of the Federal and Community Defenders. NACDL proposes that in the first sentence of the second paragraph, the phrase "as the defendant knew them" be added after "circumstances of the particular case." NACDL also proposes that an example based on United States v. Marlatt, 24 F.3d 1005 (7th Cir. 1994) be included as an illustration.

- Exclusion of Interest NACDL supports Option 1 which would exclude interest of all kinds from the calculation of loss for the reasons set forth in the submissions of the Federal and Community Defenders, the Practitioners' Advisory Group and the New York Council of Lawyers.

- Unlicensed Services, Unapproved Goods NACDL opposes proposed application note 2(C)(iii)(IV)(2), which would not permit exclusion from loss the value of goods and services that, though unlicensed or unapproved, do have value, for the reasons set forth in the submissions of the Practitioners' Advisory Group and the New York Council of Lawyers.

- Ponzi schemes NACDL supports Option 1 which would exclude from loss the value returned up to the amount of the principal investment but no more for the reasons set forth in the submissions of the Federal and Community Defenders, the Practitioners' Advisory Group and the New York Council of Lawyers.

- Estimation of Loss Proposed application note 2(D) begins by stating that "the court need only make a reasonable estimate of the loss." NACDL believes that the word "only" and the absence of reference to the evidence in the case, denigrates the court's fact finding function as to a factor with a large impact on the ultimate sentence. NACDL proposes that the first sentence be replaced with the following: "In order to determine the applicable offense level, the court must make a reasonable estimate of the loss based on the evidence in the case." NACDL also joins the Federal and Community Defenders in opposing the commentary which purports to dictate a deferential standard of review on appeal because, as the Defenders note, an appellate court may be in just as good a position to determine loss based on the evidence in the record. NACDL therefore supports deletion of the second and third sentences of proposed note 2(D) and the citation to 18 U.S.C. § 3742(e) and (f).

- Gain NACDL supports Option 4, which would require the use of gain only if the victim's loss cannot reasonably be determined for the seasons set forth in the submissions of the Federal and Community Defenders and the New York Council of Lawyers.

VI. NACDL Supports the Sentencing Table Amendment and the Alternative Sentencing Amendment (Amendment 14).

NACDL supports both Option 1 and Option 2 and joins with the New York Council of Criminal Defense Lawyers in urging the Commission to adopt both proposals. If the Commission is willing to adopt only one or the other, NACDL supports Option 1. Expanding Zones B and C of the sentencing table for defendants in criminal history categories I and II will give judges greater flexibility in imposing an appropriate sentencing option for a defendant with little or no criminal history where home detention or probation will serve the goals of sentencing as well as or better than incarceration. As the Committee on Criminal Law notes in its submission, the data shows that judges use their discretion to fashion non-incarceration sentences sparingly.[20]

We greatly appreciate the Commission's consideration of NACDL's comments. If the Commission desires additional information on any of these matters, we welcome the opportunity to provide it.

Very truly yours,

Edward A. Mallett,
NACDL President

Carmen Hernandez, Chair
Amy Baron-Evans

NACDL Federal Sentencing Guidelines Committee

[150 07]

[20] Summary: Proposed Definition of Loss and Loss Table by the Committee on Criminal Law at 8 & n.11.

PRACTITIONERS' ADVISORY GROUP
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March 16, 2001

via hand delivery
The Honorable Diana E. Murphy
Chair, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: PAG's submission on proposed amendments

Dear Judge Murphy:

During the course of the cycle, the PAG has attempted to provide the Commission with its perspective on the pending proposed amendments. At this juncture, the PAG wishes to comment on a few of the pending amendments for which public comment is now being solicited. Please do not construe our failure to provide written submissions on each amendment as an indication that we do not consider a particular amendment to be significant; rather, we have focused this submission on just a few of the proposed amendments for which we believe we may have something to add beyond that of the other defense organizations that have submitted written comments to the Commission, particularly The Defenders and the New York Council of Defense Lawyers.

Specifically, the PAG wishes to provide the Commission with its perspective on the economic crime package, amendments 12-13, and the money laundering amendment, amendment 20.

With regard to the economic crime package, the PAG does not believe that any increase in the loss tables is justified. Although some judges and prosecutors appear to believe strongly that economic offenders are being punished too leniently,

particularly when compared with drug offenders, the empirical data clearly refutes this proposition. In addition, using the sentences in drug cases (driven largely by the congressionally-imposed mandatory minimum terms of imprisonment) as a baseline for determining sentences in economic crime cases merely incorporates the irrational sentencing scheme in drug cases into economic cases. We have addressed these issues in more detail in the attached memorandum.

While we recognize that there are significant problems with the current loss definitions, we echo the numerous opinions voiced at the Commission's economic crime symposium that the current guidelines overemphasize "loss" as a basis for determining overall culpability. In this regard, we welcome the "flex proposals" that have been promulgated as amendment 13, and strongly support option one, assuming that the bracketed language in (B) is included in the final amendment.

Regarding the specific loss definition issues, the PAG has provided the Commission with its perspective on these issues during our meeting on February 12th. In the attached memorandum, we address several issues of importance: intended loss, interest, and "net loss."

Finally, we are compelled to comment on amendment 20, money laundering. Although we have not separately submitted written comments on this proposed amendment, the PAG has over the last 6 or so years been a steady voice in favor of reforming this area of the guidelines. The defense bar, and for that matter judges and line prosecutors, recognize that the existing money laundering guidelines grossly over-punish offenders and are used for plea leverage in many cases. The guidelines were drafted under the assumption that the Department of Justice was going to use these statutes to prosecute drug king-pins and organized criminals, but as we know the statutes have been used to prosecute garden variety fraud and drug cases. The money laundering guidelines are desperately in need of repair.

Amendment 20 represents the product of many hours of meetings with Commission staff members, the Department of Justice and the defense bar. We will concede that from the defense perspective, amendment 20 is not perfect; but, it is a vast improvement over the existing guidelines.[1] We are, to say the least, disappointed that after spending so many hours in meetings with representatives from the Department of Justice and producing the draft of the amendment that is presently before the Commission that the Department is now opposing passage of amendment 20 during this amendment cycle. We remain hopeful, however, that the Commission during this cycle will amend these guidelines so as to bring a measure of rationality to sentencing in money laundering cases.

As always, we appreciate the opportunity to provide the Commission with our

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[1] With regard to the issues that remain in brackets, we have previously presented our perspective to the staff and the Commission.

input. Please do not hesitate to contact us if you have any questions or would like additional information.

Sincerely,

Barry Boss
James Felman

cc: Andy Purdy, Esq.

SUBMISSION OF THE PRACTITIONERS' ADVISORY GROUP TO THE UNITED STATES SENTENCING COMMISSION REGARDING PROPOSED ECONOMIC CRIMES AMENDMENT

1. THERE IS NO JUSTIFICATION FOR INCREASING THE SENTENCES IN ECONOMIC CRIME CASES

In the 2001 amendment cycle, the Sentencing Commission is again considering proposals to increase the loss tables in order to increase the sentences for individuals convicted of economic crimes. During the 1998 cycle, similar proposals were made, but none garnered the necessary votes for passage. At that time, the PAG argued that there was no justification for increasing the loss tables. Unfortunately, despite the passage of two amendment cycles, the justification for this change has yet to be provided, but the vigor with which proponents for higher loss tables have sought their objective has not abated.

At the outset, it is important to remember that when the guidelines were first drafted in 1987, the offense levels were set with the objective of keeping sentences at their present levels, except in the area of economic crime cases. In those cases, the Commission decided that the present sentences were not sufficiently punitive and it issued offense levels designed to increase sentences above their then-current levels. In 1989, without any empirical justification that the PAG is aware of, the offense levels were increased again. Since that time, there have been a number of upward adjustments added to the fraud and theft guidelines (e.g., mass marketing, sophisticated means, financial institutions), but no significant downward adjustments of which we are aware. Now, the Commission is poised to again increase offense levels across-the-board in economic crime cases despite the fact that the empirical data conclusively demonstrates

[1547]

the existing sentencing ranges are sufficiently punitive.

The 2001 Proposals to Amend the Loss Tables[1]

There are presently three specific proposals to amend the loss tables in theft, fraud and tax cases. These proposals, referred to in Commission materials as Option One, Option Two, and Option Three, increase the severity of the offense levels for most offenders in economic crime cases. As in the 1998 amendment cycle, the 2001 proposals eliminate the current upward adjustment for more than minimal planning in theft cases, §2B1.1(b)(4)(a), and in fraud cases § 2F1.1(b)(2).

Option One[2] incorporates a one level enhancement over current levels beginning at $40,000 and provides for two additional enhancements at $80,000. The current Option One, beginning at levels of $40,000, provide for guideline ranges that are higher than those which currently exist for defendants in theft and fraud cases who would have been subject to an enhancement for more than minimal planning.

Option Two[3] revises the cliffs which control the specific upward adjustments and, for the most part, is more lenient for offenders with loss amounts under $70,000. Although Option Two may provide beneficial sentencing to individuals in those limited categories, Option Two enacts significant upward adjustments from existing guidelines if the offense involves loss amounts of greater than $120,000. At $120,000, Option Two mandates a one-level enhancement to 16 from the current level of 15. At $200,000, there

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[1] All references to "Options" are to the sentencing options for the 2001 amendment cycle unless specifically stated otherwise.

[2] Option One of the 2001 amendment cycle was Option Three in the 1998 amendment cycle.

[3] Unlike Option One and Option Three, this option was not proposed in any form during the 1998 amendment cycle.

is a two-level enhancement to 18 from the current level of 16. At $400,000, a three level enhancement is required bringing the offense level to 20 from the current level of 17. Thus, in cases involving higher loss amounts, defendants will see much harsher sentences.

Option Three, which is a variation of 1998 sentencing Option Two, is nearly identical to 2001 Option One in that it calls for an upward adjustment of one offense level to 14 for loss amounts involving $40,000. Both Option One and Option Three would have a two-level enhancement over existing guidelines to 16 for loss amounts in excess of $80,000. At $160,000, Option Three would impose a three-level enhancement from existing guidelines to 18. Option One would impose a three-level enhancement from existing guidelines to 18 at $200,000. Thus, consistent with the other options of this amendment cycle, Option Three, if adopted, will substantially increase the sentences of defendants convicted of crimes involving mid to high loss amounts.

The Criminal Law Committee of the Judicial Conference has led the efforts to increase the sentences in economic crime cases. In the 1998 amendment cycle, "Option Two," which as noted above has been revised and submitted as 2001 Option Three, was attributed to the joint efforts of the Committee and the Department of Justice. In September 1997, despite strenuous objections by Commissioner Gelacak, the Commission published 1998 "Option Two." As in the 1998 sentencing revision debate, the recommendations in the 2001 Options seem to have arisen in response to criticisms that "fat cat" white collar offenders who committed crimes involving loss amounts in the hundreds of thousands or millions were not receiving adequate sentences.

[156]

The Proposals Continue to Represent Unsound Sentencing Policy

Our collective conscience balks at the notion that these "fat cat" defendants seem to be receiving such relatively light sentences, at least compared to individuals sentenced in drug cases. Our concern is heightened by the fact that many of the defendants in drug cases are from low income backgrounds and are minorities.[4] However, by simply focusing on the "quick fix" of increasing the sentences in economic crime cases, the Sentencing Commission risks compounding, rather than reducing, the irrationality of the current drug sentencing scheme. The simple fact is that the sentences imposed in these drug cases, due largely to Congressionally-imposed, mandatory-minimum sentences, are excessive, and reflect political pressure rather than a rational sentencing strategy. There is little, if anything, that the Commission can do to restore a measure of rationality in these drug cases. However, the Commission's inability to lower drug sentences should not serve as a justification for increasing sentences in other types of cases in an effort to achieve proportionality among defendants convicted of different crimes. Such action would simply ensure that the irrationality underlying the sentences in drug cases is incorporated in the sentencing structure for other offenses.[5]

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

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[4] See United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 156 (1995).

[5] It should be noted that Congress only directed the Commission to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . ." 18 U.S.C. § 991(b)(1)(B) (emphasis added).

theft cases,[6] judges do not currently sentence these defendants at the top of the applicable guideline range. The Sentencing Commission's data[7] reveals that in theft, fraud and tax cases, where the loss exceeds $1.5 million, approximately 25% of defendants receive sentences in the first quarter of the guideline range and less than 15% receive sentences in the fourth quarter of the range. Interestingly, in fraud cases, the percentage of defendants who are sentenced at the top of the applicable guideline range does not change significantly even at the high loss levels. For example, in cases involving losses up to $1,500,000, only about 11% of defendants were sentenced in the top quarter of the applicable guideline range. In cases involving losses over $1,500,000, only about 15% of defendants were sentenced in the top quarter of the range. In theft cases involving losses of greater than $1,500,000, defendants were somewhat more likely to be sentenced at the top of the guideline range, with 19% receiving sentences in the top quarter of the range. Yet, a significantly higher percentage of such defendants, approximately 27%, received sentences in the bottom quarter of the range.[8]

What does this data mean? For one thing, it does not support the proposition that sentencing judges find the current levels of punishment for theft and fraud defendants insufficiently punitive, even for mid- to high-range offenders. During 1995, in theft,

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

[7] We were unable to obtain from the Commission the most recent break-down of sentences categorized by loss amount and the guideline range; however, there is no indication that the trends reflected by the Commission's 1997 data are no longer accurate).

[8] U.S. Sentencing Commission, Distribution of Sentences Across Applicable Sentencing

fraud and tax offenses involving losses of greater than $1,500,000, a significantly greater percentage of defendants were sentenced at the bottom of the applicable guideline range than at the top of range. Also, although both the theft and fraud guidelines invite an upward departure where the loss does not fully capture the harmfulness of the defendant's conduct, see § 2B1.1, comment (n.14), § 2F1.1, comment (n.11), according to the Commission's FY 1999 statistics, judges implemented upward departures in less than 1% of the cases in both theft (0.5%) and fraud (0.9%) matters. On the other hand, 12% of these high-end theft, fraud and tax cases involved downward departures (other than for substantial assistance).[9] When judges are confronted with a real, not theoretical, individual, and they assess the individual's conduct and background and other relevant sentencing factors, they apparently find, in most cases, that the current guidelines are sufficiently punitive.

The empirical data also fails to support the proposition that heavy sentences in white collar sentences are necessary for deterrence. Rather, when white collar criminal defendants who received non-prison sentences were compared with those who received a sentence of incarceration, a study found no specific deterrent impact upon the likelihood of re-arrest over a ten year period. Weisburd, Waring and Chayet, Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes, 33 Criminology 587 (1995). The authors suggest that for many white collar individuals, who otherwise have a high degree of stability in their personal and professional lives, the punitive impact comes from the arrest, prosecution and sentencing. "Whatever specific deterrence is gained may be produced before the imprisonment sanction is imposed." Id. at 599. The authors

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Range (table).

conclude by noting the assumption "by scholars and policymakers that white-collar criminals will be particularly affected by imprisonment." However, the authors conclude that this assumption is wrong, "at least as regards official reoffending among those convicted of white collar-crimes in the federal courts." Id. at 601.

Similarly, the notion that the general public believes that higher sentences are called for in white-collar cases should not serve as a basis for increasing the loss table. To the extent that the public perceives that white-collar defendants are "getting off easy," it is undoubtedly based on its image of the stereotypical defendant like Marc Rich or Michael Milken. Any such generalized opinions fail to reflect the actual characteristics of the vast majority of "white collar" defendants. Furthermore, the public mis-perception in this regard is certainly based on a comparison of the relatively lenient sentences meted out in economic cases compared to those in drug cases. Finally, the public's perspective on these issues must be considered in light of the omnipresent impression that criminals "get off" too easily. As Paul J. Hofer and Courtney Semisch point out in their recent article in the Federal Sentencing Reporter, the public's general perception that criminals are not being punished harshly enough remains constant despite the fact that sentences across the board have been increased significantly over the past twenty years. 12 Federal Sentencing Reporter (July/August 1999).

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[9] See id.

CONCLUSION

Although the prison impact statements were not available as of the date of this submission, the data generated during the 1998 amendment cycle make plain that Option One and Option Three would result in significant increases in sentences for white collar defendants. While Option Two represents a definite improvement over the options that were previously presented during the 1998 amendment cycle, the existence of a better option does not address the underlying issue of whether there is a justification for any increase in the severity of the loss tables at any level. If forced to choose between bad policy decisions, Option Two is the least offensive.[10] But, regardless of whether or not Option Two is more palatable, in light of the questionable assumptions underlying the loss debate, it would appear that any amendment to increase the loss guidelines is unjustified.

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

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[10] Actually, the PAG "Option Four" is the best of a bad lot, but this submission only addresses the published alternatives.

[161]

2. THE PAG QUESTIONS THE NEED FOR INCLUDING "INTENDED LOSS" IN THE LOSS CALCULATION AND OPPOSES THE COMMISSION'S PROPOSED AMENDMENTS IN THIS AREA

In the current Guidelines, the only reference to "intended loss" is found in the following sentence from Application Note 8 to § 2F1.1: "Consistent with the provisions of § 2X1.1 (Attempt, Solicitation, or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss." No further definition of "intended loss" is provided.

The Commission's Economic Crime Package includes proposed amendments which would make the following changes with respect to "intended loss":

1. Create a new application note stating explicitly that for purposes of applying the loss table (subsection (b)(1) of § 2B1.1), the "General Rule" is that "loss is the greater of actual loss or intended loss," subject to the exclusions in subdivision (B) (emphasis added);

2. Include in that same application note, the following definition of "intended loss:"

1. "Intended loss" means the pecuniary harm that was intended to result from the conduct for which the defendant is accountable under §1B1.3. "Intended loss" includes intended harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value) [so long as the intended loss reasonably would have resulted if the facts were as the defendant believed them to be].

3. Make "intended loss" applicable to cases involving theft and property damage or destruction crimes, as well as fraud and deceit crimes (by combining the theft and fraud guidelines).

The Practitioners' Advisory Group ("PAG") urges the Commission not to adopt the proposed amendments concerning "intended loss." The proposed amendments would increase the workload

of courts, probation officers, and lawyers and create potential confusion and possible error. No countervailing benefit exists. The cases to which "intended loss" would apply can be dealt with adequately by the existing rules for determining the offense level in cases involving inchoate crimes.

Alternatively, if the Commission does adopt the proposed amendments concerning "intended loss," the PAG submits that several changes should be made to clarify the meaning of intended loss, and how it is to be calculated.

1. **Do We Need Intended Loss?**

In considering the proposed "intended loss" amendments, the PAG respectfully urges the Commission to consider first the question of whether "intended loss" is needed at all, especially given the amount of work it entails, and the confusion and potential for error it creates.

The sentencing guidelines do not generally calculate punishment based on what a defendant might have intended (other than in instances in which the defendant's intended conduct has advanced to the stage of being an inchoate offense, such as conspiracy or attempt). For example, sentences are not generally based on the amount of money a bank robber intended to take, the number of aliens someone intended to smuggle, or the amount of drugs someone intended to distribute. Even the current theft guideline has no intended loss concept. Why then should it be used in fraud offenses?

The present and proposed guidelines suggest that intended loss is meant to apply to inchoate offenses. To the extent the guidelines need to address the punishment of fraud (and theft) offenders in conspiracy, attempt and other inchoate crime cases, it is already accomplished by application of § 2X1.1.

Moreover, intended loss creates more work for judges, probation officers, and the parties. Under the present Guidelines, an "intended loss" amount is to be calculated in fraud cases "if an intended loss that the defendant was attempting to inflict can be determined . . ." The proposed

amendments remove the limitation that an "intended loss" be calculated only in those cases where it "can be determined," and thus seem to require that an "intended loss" amount be calculated in every case. In addition, because the theft and fraud guidelines would be combined under other amendments proposed as part of the Economic Crime Package, the calculation of an "intended loss" would seem to be required in every theft case as well.

The additional effort caused by the requirement that an intended loss amount be calculated in every fraud and every theft case is especially significant because of the difficulty and confusion associated with the task of discerning the dollar-figure loss a given defendant intended. As Judge Newman so eloquently pointed out at the Economic Crimes symposium last year, the answer to the question, "How much did the defendant intend to steal?" is invariably, "As much as he could."

The PAG believes that the above reasons all strongly support abandonment of intended loss as a special inchoate-crime rule that must be calculated in every fraud and theft case, regardless of whether the case actually involves an inchoate crime. To the extent the Commission believes a special rule is appropriate for fraud and theft cases, the PAG would urge the Commission to replace the "whichever is greater" rule, with a rule such as the following:

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

The advantage of this approach is that it makes less work for courts, which would no longer have to calculate both actual loss and intended loss in every case. Another advantage is that this approach focuses on those inchoate offenses that intended loss was always meant to cover.

If the Commission continues to require that intended loss be considered in every fraud and

theft case, the PAG submits that loss should be defined as the *average*, rather than the *greater*, of actual loss and intended loss. If intended loss matters to sentencing, it should matter all the time, even when it is *not* greater than actual loss. A defendant who causes a loss beyond what he or she intended should not be punished as if he or she intended that loss. After all, we do not punish a defendant who accidentally causes someone's death as severely as someone who intentionally murders someone. *See* James Gibson, *How Much Should Mind Matter?* Mens Rea *in Fraud and Theft Sentencing*, 10 Fed. Sentencing Rep. 136 (1997).

Indeed, the guidelines' treatment of drug offenses incorporates this idea. If the quantity of drugs a defendant agrees to sell is greater than the quantity actually sold, the lower quantity may be used for sentencing purposes. U.S.S.G. § 2D1.1, comment. (n.12). And if a defendant in a reverse sting can prove that he or she did not intend to provide the agreed-upon quantity of drugs, the quantity that was not intended is excluded from the sentencing calculation. *Id.*

2. **If Adopted, Four Points Of Clarification Should Be Made In The Definition Of Intended Loss**

If the Commission adopts the proposed intended loss amendments, including the "whichever is greater" rule, the proposed definition of intended loss should be modified to provide clarification as to four issues.

First, the definition should be modified to clarify that it measures harm that the *defendant* intended to cause. The current guidelines make this point clear, as they refer to "an intended loss that the defendant was attempting to inflict . . ." The proposed definition, however, refers only to the harm that "was intended to result." This phrase might be read as suggesting a defendant should be held responsible for the intent of anyone who participated in a "jointly undertaken criminal activity" under the relevant conduct rules. A defendant should not be held responsible for what goes

on in the brains of other offenders. The definition should therefore focus on just the defendant's intent: "the pecuniary harm that the defendant intended to cause."

Second, the definition should be explicit as to the *mens rea* necessary for something to qualify as intended loss. The field testing the Commission did several years ago showed some confusion as to the *mens rea* necessary for something to qualify as intended loss. Some people were confused by the "actual loss" concept of reasonable foreseeability and imported it into the intended loss definition as well, defining intended loss as all loss that was reasonably foreseeable. Although it seems obvious that intended loss must be *intended*, not just foreseen or foreseeable, the potential for confusion can be removed by adding the word "intentionally" or "purposely" before the term "intended to result."

Third, the guidelines should make it clear that no "impossible" intended loss is to be included in the calculation of intended loss. Such a rule is justified because a defendant who cannot cause any loss poses less of a threat to society (and therefore deserves less punishment). At a minimum, the bracketed language in the proposed amendment regarding impossibility needs to be included, so as to distinguish between harm that was intended in a sting operation, and harm that was intended in an overly ambitious fraud (such as an insurance claim that seeks $50,000 in insurance payout for a $10,000 car for an accident that never happened). Also, because the parenthetical may be confusing to those unfamiliar with this issue, the definition should instead spell out the difference between a sting operation (an example of counting impossible harm) and the insurance fraud (an example of not doing so).

Fourth, the definition should make clear that the credits principle apply to intended loss. The best way to deal with this issue is to include in the definition a statement that makes it clear that if the defendant intended to transfer any economic benefit to the victim, the value of that economic

benefit should be deducted from the intended loss, consistent with the section on credits against loss. Concern that such a rule would lead every defendant to claim that they intended to transfer economic benefit to the victim (e.g., by paying back the fraudulent loan), is answered by the requirement that the defense would have the burden of proof on this issue and would have a tough time convincing the judge without some corroboration of intent.[1]

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[1] On a related point, the PAG suggests the "Exclusions from Loss" section be renamed "Exclusions from Pecuniary Harm."

3. INTEREST SHOULD NOT BE INCLUDED IN THE LOSS CALCULATION

Interest of all kinds should be excluded from the calculation of loss for two reasons. First, including interest would result in increased litigation without noticeable effect on sentencing outcomes. Second, for those few cases in which inclusion of interest would make a difference, the effect of the inclusion would be to treat similar defendants differently.

The guidelines should also ensure that interest payments that the defendant makes to the victim of the offense are deducted from the loss amount.

A. Increased Litigation

If interest is included, how will it be defined? Will it be "bargained-for" interest, i.e., interest to which the defendant agreed in the course of the transaction? Or will it include other forms of opportunity cost, such as reasonably anticipated profits and stock dividends? (If the answer is yes to the first question and no to the second, why the difference? What makes bargained-for, transactional interest more important to loss calculation than equally reliable means of making a profit?) What if the victim removes money from an interest-bearing investment and gives it to the defendant - should the interest that the investment was accruing be used? What about speculative or unrealistic interest rates promised by a defendant - is there an "economic reality" limitation on the interest that would count? If a defendant's fraudulent $100,000 mortgage loan is discovered the day after it is procured, is the defendant accountable for $100,000 plus one day's interest or $100,000 plus the total interest that would have accrued over the life of the loan? What if the loan agreement includes an acceleration clause that makes all principal and interest due on default?

It may be possible to agree on answers to these questions, but incorporating such agreement into the guidelines would require a lot of language, and lots of language leads to lots

of litigation. What would be the upside of all this litigation? Given the limited number of break points in the loss tables (and the even fewer break points contemplated under the proposed loss tables), in how many cases would the inclusion of interest actually make a difference in the offense level?

B. Treating Similar Defendants Differently

Even if excess litigation and minimal results did not argue against inclusion of interest, it would still be a bad idea because it would lead to inappropriate distinctions between similar defendants. No one has identified any sound policy reason to punish crimes that involve interest more than those that do not.

Suppose that bargained-for interest is included in loss, and that we have a defendant who fraudulently procured a $100,000 loan. He or she would be accountable for $100,000 plus interest-perhaps as much as $350,000 for a mortgage loan, depending on the mortgage rate and how interest is calculated for sentencing purposes. But if another defendant simply embezzles $100,000 from the bank, he or she would be accountable for only $100,000, with no interest. In both cases, the bank is out $100,000, but one defendant is accountable for a greater loss amount simply because of the *means* by which he or she swindled the bank. No one has identified a good policy reason to differentiate between these two types of defendant, i.e., to punish crimes that involve interest more than those that do not.

Proponents of the inclusion of interest might respond that the interest should be included because in a bargained-for interest scenario the court can determine the exact interest that would have accrued. One problem with this response is that it assumes that the rules on calculation of included, bargained-for interest would be so clear that each judge would arrive at roughly the same loss figure. But the main problem is that this response confuses the *availability* of

information with the *appropriateness of using* information. The fact that we may know a lot about the interest that would have accrued in a given situation does not make interest any more applicable to loss calculation; it simply makes it easier to include *if there are good reasons to include it*.

Proponents of counting interest may also argue that the solution is to include more than just bargained-for interest, to include *all* opportunity costs. Under this approach, the thief who stole from the vault should be accountable for the same amount as the fraudulent debtor: $100,000 plus interest. This view at least recognizes one of the fundamental problems of the interest issue: *all money has time value*, whether one steals it from the vault, cookie jar, or escrow fund. The solution, however, is not to include interest in all cases; it is to include interest in *no* cases. This is a much more efficient solution because it avoids all the litigation worries described above without changing the proportionate sentencing balance among similar defendants.

C.. <u>Excluding Interest Payments from the Loss Amount</u>

If interest is not included in loss, the question will arise as to whether payments against interest should be credited against the loss amount. Although at first blush it might seem unfair to allow the defendant to benefit from interest payments when interest was not included in the loss amount, a more thorough analysis of this issue reveals that crediting such payments is the equitable result. In fact, the same reasons that militated against including interest in loss argue in favor of crediting interest payments: doing so will reduce unwarranted litigation and ensure that similar defendants are treated similarly.

First, excluding interest payments will create more litigation, or at least more work for courts, attorneys, and probation officers. Rather than simply totaling the payments the defendant

made on a fraudulently procured loan, the court will have to figure out what payments were made against interest and then discount them. Second, the result of this exercise will probably rarely affect the defendant's offense level; such small amounts are involved that it would not be worth the court's time to worry about it.

Finally, the exclusion of interest payments from credits will again irrationally disadvantage those defendants who happened to steal money by means of a transaction that involved interest. This is especially true for those many lending transactions that are structured so that early payments go almost entirely toward interest. Suppose Defendant *A* fraudulently borrows $100,000 at 10% annual interest and Defendant *B* fraudulently borrows the same amount interest-free. After one year, both have made $35,000 in payments. *B* has a loss amount of $65,000. Assuming that 85% of *A*'s payments are earmarked against interest, *A* has a loss amount closer to $95,000. If the Commission has decided not to include opportunity costs in loss, is there a good reason to treat these defendants differently?

4. SPECIFIC "NET LOSS" ISSUES

The following comments address certain portions of Proposed Amendment 12, Part C which appear in Volume II of the January 24, 2001 Commission's Proposed Amendments.

PART (C) "Exclusions from Loss" [appearing on page 120 of Volume II)

Subsection (IV)(1):

PAG opposes this proposed subsection as drafted. Paragraph (1) precludes reduction of the loss calculation by the value of items having only a "de minimus" value or having "no value" to the victim because it is substantially different that what the victim had anticipated receiving. First, there is no Guideline definition of de minimus which will lead to litigation over the issue and possibly conflicting circuit decisions.

Second, the present draft conflates what we see as two separate issues. Whether an item is only of de minimus value is distinct from whether an item has "no value" to a particular individual because the item received is "substantially different" from the victim's expectations. For example, if a wealthy victim had intended to receive a Mercedes-Benz as part of some sort of fraud scheme, but instead received only a base model Ford, conceivably it could be argued that the Ford has "no value" to the victim notwithstanding that it has real market value. Concepts of loss as a measure of economic harm should not be pressed into duty as also measuring a victim's disappointment.

PAG recommends that "de minimus" be defined and that the portion concerning the victim's determination of "no value" be deleted.

Subsection (IV)(2):

PAG opposes proposed Paragraph (2) to this subsection. This paragraph precludes a reduction in the loss calculation by the value of services competently performed or of adequately

functioning goods if the fraud involved persons posing as licensed professionals or if the goods were falsely represented to be legitimately approved by a governmental agency. If the goal of the loss function is to measure economic harm, then the loss calculation should be reduced by the value of such goods and services. Competently performed services and adequately functioning goods have bona fide economic value to the victim-consumer. It is a separate issue whether the defendant's fraud has harmed a specified licensing or regulatory system. That separate question should be resolved in a manner other than by reference to the victim's economic loss, *e.g.*, in a separate count or prosecution other than one dealing with a fraud against the individual. In addition, the base offense level accounts for the intangible harms done to a licensing or regulatory system.

Subsection V:

PAG supports Option 1. If loss is a measure of economic harm, a principled application of such a measure requires deducting from loss any value returned to the investor up to the amount of the principal investment. That individual suffered no loss and thus the total harm is reduced.

PAG further supports the idea that all amounts returned to the investors as a whole should be deducted from the calculation of loss. Loss is a measure of economic harm. Amounts returned, regardless of the perceived motive for the return, reduces the total loss. Civil law allows individual victims of these types of fraud to seek a remedy to make them whole. Criminal law, on the other hand, should look to the overall economic harm done by the fraud. The overall economic harm is reduced by all amounts returned to the investors as a whole.

FEDERAL DEFENDERS OF SAN DIEGO, INC.

The Federal Community Defender Organization for the Southern District of California

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March 15, 2001

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

Attention: Public Affairs/ Michael Courlander

Dear Sentencing Commission,

We are excited to learn that the Sentencing Commission is considering amending the Sentencing Guidelines, and we appreciate the opportunity to weigh in with our comments.

The Federal Defenders of San Diego is the community defender organization for the Southern District of California, which is one of the busiest federal districts in the country. The bulk of the crimes in our district result from our proximity to the U.S.-Mexican border; thus, we have a great deal of experience with drug smuggling and illegal immigration cases. The proposed amendments to the Guidelines would affect defendants convicted for both of these crimes.

We specifically comment on proposal 7, which addresses drug defendants and mitigating role, and proposal 18, which addresses the increased adjustment, under section 2L1.2(b)(1), for aggravated felons charged with illegal entry. We also include some miscellaneous proposals at the end.

Most of our suggestions and comments are general, without providing specific examples. We would be happy to provide the Commission with examples and cases to support our comments.

Thank you for the opportunity.

Sincerely,

Ross E. Viselman
Federal Defenders of San Diego, Inc.

Please see additional attached signatures.

[175]

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Sign-in

Proposed Amendment 7 : Circuit Conflict Concerning Certain Drug Defendants and Mitigating Role

Many of our clients are drug couriers, as described by the Guidelines, and deserve a downward adjustment for minor or minimal role. The government and its agents would likely agree that drug smuggling ventures require the efforts of multiple participants.

Issues for Comment:

1. With respect to a defendant whose role in a drug offense is limited to transporting or storing drugs, should the Commission, as an alternative to the proposed amendment, preclude such a defendant from receiving any mitigating role adjustment under §3B1.2? Alternatively, should the Commission provide that such a defendant may qualify only for a minor role adjustment, but not a minimal role adjustment?

Comment: Defendants who transport or store drugs should be entitled to mitigating role adjustments. As the Application Notes suggest, the analysis of a mitigating role adjustment should be made on a case by case basis. There are cases in which a defendant who stores the drugs or transports the drugs from point A to point B is less culpable than other participants. The Commission should also not limit the ability of the judges to adjust downward on the basis of minor or mitigating role. The decision to grant a mitigating role adjustment should be made on a case by case basis with input from defense counsel, the government, and the probation officers.

2. Should the example in proposed Application Note 3(C) (i.e., that a defendant whose role in a drug trafficking offense is limited to transporting or storing drugs and who is accountable under §1B1.3 (Relevant Conduct) only for the quantity of drugs the defendant personally transported or stored is not precluded from receiving a mitigating role adjustment) be broadened to make clear that the rule is intended to cover defendants convicted of offenses other than drug trafficking offenses who have a similarly limited role in the offense? Specifically, should the example be expanded to make clear that the rule is intended to apply to a defendant who has a similarly limited role in any offense and who is accountable under §1B1.3 only for that portion of the offense for which the defendant was personally involved?

Comment: The downward adjustment for mitigating role should not just apply to drug smugglers. Specifically, it should also apply to alien smuggling cases. Alien smuggling cases are similar to drug smuggling cases. The government would probably agree that alien smuggling can entail a large organization with multiple participants, including couriers. An alien smuggler might play a minor or minimal role in a much larger alien smuggling enterprise. Often an alien smuggler plays no more a substantial role than a drug courier. The crimes are comparable and the Guidelines should make clear that the drug smuggling examples are illustrative only and not exclusive.

[177]

Proposed Amendment 18: Immigration

We agree with the Commission that the increase under 2L1.2 "often results in offense levels that are disproportionate to the seriousness of the prior aggravated felonies, " especially in light of the circumstances of the case and the background of the defendant.

Issues for comment: *The Commission invites comment regarding whether the enhancement in §2L1.2(b)(1) for a previous conviction for an aggravated felony should be graduated based on a factor other than, or in addition to, the period of imprisonment the defendant actually served for the aggravated felony. Should the enhancement be graduated based on the type of aggravated felony involved? For example, should the approach of Option One for subsection (b)(1)(A)(i) be extended to subdivisions (ii) through (iv) of subsection (b)(1)?*

We agree with the proposal to graduate the increase in the adjustment by time served. It is an easy and predictable rule to follow. Option 1, on the other hand, is less predictable and more difficult to apply. Increasing the adjustment based on the type of crime will result in further litigation regarding the definitions of the crime, and make it more difficult to advise clients and negotiate pleas. We would not recommend Option 1.

We agree with Option 2(B), which provides "*A downward departure may be warranted in a case in which the defendant was not advised, at the time the defendant previously was deported or removed, of the criminal consequences of reentry after deportation or removal.*"

Issues for comment: *The Commission also invites comment on whether the enhancement in §2L1.2(b)(1) for a previous conviction for an aggravated felony should take into consideration only aggravated felonies that were committed within a specified time period, e.g., fifteen years, or the counting rules provided by §4A1.2 (Definitions and Instructions for Computing Criminal History).*

The Guidelines should only allow a court to consider aggravated felonies that count for criminal history purposes under Chapter 4.

There are other factors the Guidelines should allow a court to consider.

A. **Recency of deportation:** The court should be able to consider the recency of the deportation and the facts underlying the deportation. Someone who is deported for an aggravated felony and then comes back after 10 years should receive a departure.

B. **Cultural assimilation:** Please consider allowing a departure for people who can demonstrate cultural and family ties to the United States. This factor demonstrates a lack of culpability and evil intent. Sometimes, aliens are trying to get back into this country to reunite with their family.

C. **Prior legal status:** Please consider allowing a departure for aliens who at one point had legal status to live here. Again, this is a mitigating factor because it shows that at one point the person was a responsible person with significant ties to the United States.

D. **Grounds for deportation:** Deportations vary widely among defendants. Some defendants are quickly removed; others appeal their cases and are narrowly denied relief. For example, a person might barely fail in a claim to derivative citizenship. A court should be able to consider these circumstances in considering why the defendant committed his crime of reentering the United States

E. **Evidence of rehabilitation:** Courts should be able to depart if the alien can show that since his aggravated felony/ illegal activity he has significantly rehabilitated.

Proposed amendment:

Please include petty theft (e.g., shoplifting) in the category of felonies counted under 4A1.2(c); sentences for petty theft convictions should only be counted "if the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days or (b) the prior offense was similar to an instance offense."

[179]

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March 8, 2001

Honorable Diana E. Murphy
Chair, United States Sentencing Commission
1 Columbus Circle NE, Suite 2-500 South Lobby
Washington, DC 20002-8002

Dear Judge Murphy:

I am writing to express my strong support for the proposed amendment to the illegal reentry guideline. U.S.S.G. § 2L1.2(b)(1)(A) currently requires a 16-level enhancement if a defendant reentered the country after being deported following a conviction for an "aggravated felony." What constitutes an "aggravated felony" is defined by 8 U.S.C. § 1101(a)(42), which was developed for INS exclusion proceedings, not as part of the sentencing guidelines. Thus, although that definition may be appropriate for INS proceedings, the extremely broad definition results in grossly disproportionate sentences when used to determine sentencing ranges within the guideline structure.

The proposed amendment to § 2L1.2 seeks to remedy the unfairness resulting from the fact that the 16-level enhancement applies regardless of the facts or circumstances of the underlying "aggravated felony". The expansive definition of "aggravated" felonies includes relatively minor criminal conduct such as a $20 drug transaction. Presently, these relatively minor convictions increase the defendant's sentence as much as a conviction for murder or truly serious drug trafficking. Moreover, the enhancement also serves as a "double bite" in that the prior conviction already increases a defendant's sentencing range by adding to the Criminal History Category. The proposed amendment would provide graduated sentencing enhancements based on the seriousness of the prior conviction so that the resulting sentence is more individually tailored to reflect the defendant's history and circumstances.

The 16-level enhancement, raising the base offense level of 8 to 24, is severe and virtually unprecedented in the guidelines. The only other 16-level enhancements found in the guidelines cover far more serious conduct, such as that found in U.S.S.G. § 2F1.1 which increases fraud offenses by 16 levels where the loss exceeded $ 20,000,000. An offense level of 24 is deemed appropriate for kidnaping (§ 2A4.1), arson creating a substantial risk of death or serious bodily injury (§ 2K1.4), trafficking in 100 Kilograms of marihuana (§ 2D1.1), or when a defendant manufactured over $10,000,000 in counterfeit currency (§2B5.1). Indeed, an offense level of 24 falls only one offense level short of the offense level for voluntary manslaughter, (U.S.S.G. § 2A1.3).

This drastic increase was intended to punish aliens who return to this country to conduct "serious drug trafficking" operations or other sophisticated criminal activity. In reality, the 16-level enhancement most often affects small time offenders who have rarely served any significant time in jail.

The 16-level enhancement was passed in 1991 in the context of congressional amendments to the underlying statute, 8 U.S.C. § 1326, that increased the maximum penalties. See U.S.S.G. Appendix C, amendment 375. Comments offered in the Congressional debates concerning the statutory amendments refer to the need for increased penalties due to the "expansive drug syndicates established and managed by illegal aliens." 133 Cong. Rec. S4992-01. A sponsor of the amendments gave as an example of the individuals who should be prosecuted under these strict penalties "a Columbian ... [who] was deported previously from the United States and according to the Drug Enforcement Administration (DEA) is linked with 50 drug related murders and is currently the subject of 6 drug killings in the New Orleans area and a series of drug killings in California." 133 Cong. Rec. S4992-01. The testimony claimed that "these aliens are not exceptions but rather common among the 100,000 illegal alien felons in the United States." Id. This cannot be said, however, for the alien felons prosecuted for illegal reentry and subject to the 16-level enhancement under the guidelines. In our district, many "aggravated" felons prosecuted pursuant to 8 U.S.C. § 1326 are agricultural workers who have prior state convictions for only drug possession rather than trafficking.

Finally, the proposal invites comment as to whether the aggravated felony enhancement should not apply to felonies committed more than fifteen years prior, or not counted under § 4A1.2. This change would be appropriate and consistent with the guidelines application in other contexts, such as the use of prior convictions for the Career Offender guidelines. See U.S.S.G. § 4B1.2(c) (the sentences used to invoke career offender guideline must be counted separately under § 4A1.1).

I strongly urge the Commission to implement the proposed amendment to ameliorate the unfairness of the current sentencing scheme for illegal reentry offenses. Thank you for your consideration of these comments.

Very truly yours,

Judy Clarke

cc: All Commissioners

FEDERAL PUBLIC DEFENDER
Western District of Washington

Thomas W. Hillier, II
Federal Public Defender

February 26, 2001

Honorable Diana E. Murphy
Chair, United States Sentencing Commission
1 Columbus Circle NE, Suite 2-500 South Lobby
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Dear Judge Murphy:

I have received a copy of Robert S. Mueller's letter, written on behalf of the Department of Justice, requesting the Commission to defer action on a number of recently published guideline amendments. In support of his request, Mr. Mueller offers that the Department's new administration would like the opportunity to examine the proposals. The process preceding publication of the proposals was thorough and thoughtful. The Department of Justice participated fully in that process and enjoys a continuing presence on the Sentencing Commission. During the ongoing public comment period, the Department and its new leadership will have additional and ample opportunity to provide input concerning the proposals. Thus, there seems to be no need for the delay requested by the Department of Justice through Mr. Mueller.

I am especially concerned that the Department asks to defer discussion and implementation of the proposal that addresses the illegal reentry guideline. Improvement of this guideline is long overdue. Reduced to its essence, the concern with the proposed amendment to this guideline, as expressed in Mr. Mueller's letter, is that the proposal will result in lower sentences in some cases for the offense of illegal reentry following a conviction on an aggravated felony. Mr. Mueller is correct and, of course, that is the point of the amendment.

The amendment would change the way illegal reentry offenses are sentenced by providing graduated sentencing enhancements based on the seriousness of the prior "aggravated felony" conviction. Presently under the guideline a felony conviction for the distribution of a gram of marijuana is scored the same as a previous conviction for murder. While the new leadership in the Department might have a different sentencing philosophy than its predecessor, the most zealous proponent of tough sentencing laws could not reasonably embrace the unfairness of this current scheme.

The 16-level enhancement for all aggravated felonies, regardless of seriousness, makes this guideline an object of universal criticism. Its rote application produces unfair

[183]

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results, a fact that is manifest in the number of downward departures granted under the guideline. By far and away, downward departures for illegal reentry on a percentage basis outnumber downward departures for any other offense type. The amendment addresses the unfairness of the current guideline through the graduated sentencing enhancement approach.

The amendment would mitigate another significant problem. As Mr. Mueller's letter implies, the government in some districts agrees to downward departures in these cases if the defendant agrees to "fast track" the prosecution. Unfortunately, in many districts the government opts against recommending such departures. Government policies vary widely throughout the country. As a result, sentences imposed against similarly situated defendants for this offense vary widely. This government-sponsored disparity would be cured through the amendment.

The amendment would address another serious defect in the current guideline. In thousands of cases, its application results in inappropriately severe sentences. Virtually all of these sentences are imposed against people of color, usually citizens of countries in Latin America. The present guideline offends our constitutional principle of equal justice.

In his letter, Mr. Mueller expresses concern about delay in establishing the actual time served on a particular conviction. There is no reason to fear the amendment will result in delay. The amount of time served on a prior offense is relevant only to the aggravated felony conviction. The presentence reporter will be able to focus on that conviction and obtain needed information well within the 2-3 months generally allowed for preparation of presentence reports.

The reasons and principles that drove publication of the proposed change in the illegal reentry guideline are enormously important. Discussion and, hopefully, implementation should occur in the usual course and without the delay requested by the Department. I appreciate your time and consideration in reviewing these comments.

Very truly yours,

Thomas W. Hillier, II
Federal Public Defender

TWH/kac
cc: All Commissioners

[184]

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February 22, 2001

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

Dear Judge Murphy:

The Federal Public and Community Defenders' Guidelines Committee is preparing its comments to proposed Guidelines Amendment No. 5 which was published on January 24, 2001. This Amendment concerns proposed changes to the sexual offender Guidelines, including the development of a "sexual predator" Guideline, a "pattern of activity" enhancement, increased Guideline ranges for incest, and the Guideline for criminal sexual abuse of a minor (statutory rape).

In our collective experience, most of these Guideline cases tend to involve Native American defendants and their activities on Indian Reservations. While Congress is certainly legislating for the general case and the Commission promulgating Guidelines for that general case, the reality of federal criminal jurisdiction is that most sexual offender cases are crimes committed on Indian Reservations. We recognize that given federal law enforcement's recent emphasis on crimes involving computerized child pornography and interstate travel with the intent to have sex with a minor, there will be more and more non-Native American sexual offender cases. Nonetheless, a great number of such cases, and perhaps a majority, will continue to be Native American defendants acting on Indian Reservations.

Given that reality, we request that the Commission release any studies, date or analysis it may have concerning the impact of the proposed Amendment on the Native American caseload. We remember that prior Commission statistics have revealed that increasing sexual offender Guideline ranges had a tremendous impact on Native American defendants. We suspect that this proposed Amendment is no different.

In addition, we strongly urge the Commission not to submit to Congress any proposed Amendment concerning sexual offenders until after the Commission has had hearings where it can gather evidence of the proposed Amendment's impact on the Native American population. We suggest hearings in South Dakota and in Arizona or New Mexico so that the hearings are more accessible to Native Americans and their leadership. Having these hearings will be instructive to the Commission and will highlight both the similarities and the differences among the Indian tribes.

If you have any questions about our comments and requests, please feel free to contact me. We look forward to receiving the information we have requested so that our comments can be more meaningful and helpful to the Commission.

Sincerely,

JON M. SANDS
Chair, Federal Defender Committee
on the Guidelines

JMS:mlb
murphy3ltr

cc: Tim McGrath

PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

Ellen S. Moore
Chairperson, 11th Circuit

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March 5, 2001

The Honorable Diana E. Murphy, Chairman
United States Sentencing Commission
Thurgood Marshall Building
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Washington, DC 20002-8002

Dear Judge Murphy:

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

Amendment Five – Sexual Predators

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

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