Lisa Monet Wayne
President

March 19, 2012

Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attn: Public Affairs

Re: NACDL Comments on Proposed Permanent Amendments

Dear Judge Saris:

The National Association of Criminal Defense Lawyers (NACDL) submits this response to the Commission's January 19, 2012, request for comment on the proposed permanent amendments to the United States Sentencing Guidelines. NACDL is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. We appreciate the opportunity to provide these comments to the Commission and respectfully urge your utmost consideration.

I. DODD-FRANK/FRAUD

The Commission seeks comments on proposed amendments implementing two directives to the Commission contained in the Dodd-Frank Wall Street Reform and Protection Act (the "Act").[1] NACDL supports a comprehensive review of §2B1.1 and urges the Commission not to respond to the Dodd-Frank directives before the current amendment cycle ends on May 1, 2012. This delayed response is entirely appropriate here because the current specific offense characteristics (hereinafter

[1] Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010).

"SOCs"), on their face, already address the objectives set forth in the directives at §§1079A(a)(1) and (2) of the Act. The Commission should not further complicate the Guidelines unless and until it obtains empirical evidence that establishes that the SOCs, in their current form, fail to comply with the goals expressed by Congress. Further, given the scope and complexity of a comprehensive review of §2B1.1, the Commission should refrain from increasing the complexity of §2B1.1 through the addition of more enhancements and SOCs at this time.

The Commission also seeks comments on proposed amendments responding to concerns suggesting that the impact of the loss table or the victims table (or the combined impact of these two tables) may overstate the culpability of certain offenders in sentences under §2B1.1 that involve relatively large loss amounts. NACDL agrees with these concerns and takes the position that the impact of these tables on the ambiguous concept of "loss" does in fact result in disparate sentences frequently detached from culpability. NACDL applauds the Commission for realizing that the Guidelines should consider the loss relative to the defendant's actual gain from the offense and, as detailed below, supports amendments that limit the effect of the loss and victim tables on calculations under §2B1.1. In addition, NACDL takes the position that any comprehensive review of §2B1.1 should include further consideration of the impact of these tables on calculations under §2B1.1.

A. Harm to Financial Markets

NACDL objects to additional enhancements related to fraud affecting financial markets. Simply adding enhancements will exacerbate what many commentators and judges have already criticized as an unworkable and ineffective approach to sentencing in fraud cases, particularly in cases affecting financial markets. In *United States v. Parris*, the court noted that "we now have an advisory guidelines regime where, as reflected by this case, any officer or director of virtually any public corporation who has committed securities fraud will be confronted with a guidelines calculation either calling for or approaching lifetime imprisonment."[2] The court in *Parris* declined to apply the guidelines, opting instead for a five-year sentence. Similarly, in *United States v. Adelson*, Judge Rakoff ignored the sentencing guidelines in the case of Impath president Richard Adelson, noting that the guidelines would have produced a life sentence for Adelson, a first time offender who did not originate the fraud but concealed its existence.[3]

In considering the necessity for enhancements for fraud affecting financial markets, it should be noted that there are already other enhancements that would almost certainly be triggered in such cases. For example, there is an increase of 6 levels for a crime that involves 250 or more victims. There is also already an increase of 4 levels for being the officer or director of a publicly traded corporation. The broadly applied sophisticated means enhancement would yield

[2] *United States v. Parris*, 573 F. Supp. 2d 744, 751 (E.D.N.Y. 2008).
[3] *United States v. Adelson*, 441 F.Supp.2d 506, 514-15 (S.D.N.Y. 2006).

another 2 level enhancement.[4] No empirical evidence has been presented to justify these additional enhancements and, in anticipation of the Commission's comprehensive review of §2B1.1, now is simply not the time to be making these specific changes.

B. Securities Fraud and Similar Offenses

NACDL opposes the proposed amendments to the Sentencing Guidelines for securities fraud and related offenses.

i. Insider Trading – Should the Commission provide in §2B1.4 one or more specific offense characteristics that use aggravating factors other than gain to account for the seriousness of the conduct and the actual or potential harm to individuals and markets? If so, what should the factor(s) be?

As noted above, the Commission should refrain from adding enhancements pending a comprehensive review of the guidelines applicable to fraud and other financial crimes. At present there is no empirical evidence to suggest that the existing guideline sentences for insider trading are not high enough to comply with the legitimate purposes of sentencing. Absent such evidence, the Commission should refrain from adding enhancements in this area. Specifically, the Commission should not introduce additional aggravating factors in §2B1.4, including those related to (i) the number of transactions; (ii) the dollar value of the transactions; or (iii) the number of securities involved. Such factors will merely have the effect of piling on penalties that are already viewed as ungrounded by sentencing policy.

The commission should also refrain from adding a provision to §2B1.4 analogous to that in §2R1.1 dealing with the fine for an organizational defendant involved in insider trading. The current provision that evaluates a fine in light of pecuniary loss is sufficient. There is no empirical evidence of which NACDL is aware that would indicate otherwise.

ii. Calculation of loss in §2B1.1 – Should the Commission amend §2B1.1 to clarify the method or methods used in determining loss in cases of securities fraud and similar offenses to ensure that the guideline appropriately accounts for the potential and actual harm to the public and the financial markets from those offenses?

The Commission indicates that it has received comment indicating that determinations of loss in cases under §2B1.1 involving securities fraud and similar offenses are "complex and a

[4] *See* Samuel W. Buell, *Overlapping Jurisdictions, Overlapping Crimes: Reforming Punishment of Financial Reporting Fraud,* 28 Cardozo L. Rev. 1611, 1648- 49 (2007) (factors such as sophisticated means and large number of victims "double-count because they are captured by other enhancements or by the loss calculation."); Alan Ellis, John R. Steer, Mark Allenbaugh, *At a "Loss" for Justice: Federal Sentencing for Economic Offenses,* 25 Crim. Just. 34, 37 (2011) ("the loss table often overstates the actual harm suffered by the victim," and "[m]ultiple, overlapping enhancements also have the effect of ‚double counting' in some cases," while "the guidelines fail to take into account important mitigating offense and offender characteristics.").

variety of different methods are in use, resulting in application issues and possible sentencing disparities." This points to the need for comprehensive evaluation of the fraud guidelines, including but not limited to those relating to loss in securities fraud and similar offenses. In *Adelson*, the Court noted "the utter travesty of justice that sometimes results from the guidelines' fetish with absolute arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense."[5]

In sum, while NACDL agrees with the Commission's assessment that the calculation of loss in securities cases has become complex and inconsistent, *any* methodology will lead to results unsupportable by sentencing policy. Instead, NACDL urges the Commission to include the issue of loss calculation in securities cases among the issues in a comprehensive reevaluation of the guidelines in fraud and other financial cases generally.

Should the Commission nevertheless decide to amend §2B1.1 to include a method for determining loss, the appropriate methodology is the a market-adjusted method, under which the loss is based upon the change in value of the security, but excluding changes in value that were caused by external market forces. This methodology has been adopted by the Second and Fifth Circuits and is consistent with the analysis applied by the Supreme Court in *Dura Pharmaceuticals Inc. v. Broudo*, 544 U.S. 336 (2005).[6] While *Dura* was a civil securities fraud case, as the Second Circuit wrote in *Rutkoske*, "[W]e see no reason why considerations relevant to loss causation in a civil fraud case should not apply, at least as strongly, to a sentencing regime in which the amount of loss caused by a fraud is a critical determinant of the length of a defendant's sentence."[7] NACDL believes that this is an appropriate methodology for measuring loss in all securities cases, including those involving fraudulent investments and market or price manipulation fraud.

With respect to Ponzi and other investment schemes, the Commission should repeal Application Note 3(F)(iv), which precludes consideration of actual gain to an investor in excess of their investment. Such actual offsetting gains to an investor are legitimately and appropriately considered in any loss calculation.

iii. Specific provisions in §2B1.1 – Should the Commission expand the scope of the amounts of the increases provided by subsection (b)(15) or (b)(18), or both, to ensure that the guidelines appropriately account for the potential and actual harm to the public and the financial markets? If so, how?

Consistent with NACDL's previous comments and those reflected above, NACDL opposes additions to the patchwork of existing enhancements of §2B1.1. Instead, such issues are more

[5] *United States v. Adelson*, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006).
[6] *See, e.g., United States v. Rutkoske*, 506 F.3d 170, 179 (2nd Cir. 2007); *United States v. Olis*, 429 F.3d 540, 546 (5th Cir. 2005).
[7] *United States v. Rutkoske*, 506 F.3d 170, 179 (2nd Cir. 2007).

appropriately addressed as part of a global evaluation of fraud-related guidelines. In any event, there is no reason to expand the scope of the §2B1.1 enhancements.

C. Mortgage Fraud and Financial Institution Fraud

NACDL supports changes to the guidelines that ensure that the concepts of foreseeability and intent inform the calculation of loss and application of other specific offense characteristics not only in fraud cases generally, but also in mortgage fraud cases specifically.

i. Calculation of Loss – Are there issues involving mortgage fraud cases that are not adequately accounted for in the guidelines and, if so, what changes should be made to how loss is calculated in mortgage fraud cases?

The guidelines provide that the amount of loss in a fraud case is measured by the greater of actual or intended loss.[8] Actual loss is defined as reasonably foreseeable pecuniary harm that resulted from the offense, meaning pecuniary harm that the defendant knew, or should have known, was a potential result of the offense.[9] Intended loss is defined as the "pecuniary harm that was intended to result from the offense."[10] These standards appropriately take into account the concepts of foreseeability and intent.

In the mortgage fraud area, however, the current sentencing guidelines and the proposed amendment to the guidelines concerning credits against loss effectively eliminate these concepts from the loss calculation. Currently, in determining the loss suffered by a lending institution, the guidelines direct the sentencing court to reduce the amount of loss by the "fair market value of the collateral at the time of sentencing," unless the collateral has been sold prior to sentencing, in which case the "amount the victim has recovered at the time of sentencing from disposition of the collateral" provides the offset against loss.[11] The proposed amendment to this section similarly provides: "In the case of a fraud involving a mortgage loan in which the collateral has been disposed of at a foreclosure sale, use the amount recovered from the foreclosure sale."

These standards ignore external and unforeseeable causes of loss that may result in market values or sale proceeds substantially below what was reasonably foreseeable to the defendant at the time of the offense. A foreclosing bank's decision to hold on to a declining property long after it could or should have sold the asset should not drive the length of imprisonment an offender receives. Likewise, precipitous drops in real estate markets, unforeseen by expert appraisers, bankers or real estate experts, should not add years to the sentences of defendants who may never have intended to create any losses at all, and whose faith in the transactions they undertook may have robbed them of their own personal wealth. While the amount recovered from the foreclosure sale may in some cases provide an appropriate credit against loss, a

[8] U.S.S.G. 2B1.1 cmt. n.3(A).
[9] U.S.S.G. 2B1.1 cmt. n. 3(A)(iv).
[10] U.S.S.G. 2B1.1 cmt. n. 3(A)(ii).
[11] U.S.S.G. 2B1.1 cmt. n. 3(E)(ii).

defendant should be permitted to rebut such evidence, as there may well be circumstances that caused a steep drop in value that were neither foreseeable nor intended by the defendant. For these reasons, NACDL opposes the proposed amendment concerning credits against loss, and encourages amendment of the existing commentary.[12]

NACDL likewise encourages further discussion about the proper method of computing loss in mortgage fraud cases in which the original lender has sold or transferred a loan prior to foreclosure. In these circumstances, the government should be required, at a minimum, to present evidence of the amount for which the loan was sold, and profits earned by the original lender should be credited against any loss suffered by the downstream purchaser.[13]

In the securities fraud area, courts do consider extrinsic and unforeseeable forces when calculating loss. For example, in *United States v. Olis*, the Fifth Circuit remanded the case for resentencing because "the district court's approach to the loss calculation did not take into account the impact of extrinsic factors on Dynegy's stock price decline."[14] The court in *Olis* cited with approval the principle of loss causation applied in civil securities fraud cases, in which "there is no loss attributable to a misrepresentation unless and until the truth is subsequently revealed and the price of the stock accordingly declines. Where the value of a security declines for other reasons, however, such decline, or component of the decline, is not a 'loss' attributable to the misrepresentation."[15] This approach ensures, as the Ninth Circuit emphasizes, that district courts must take a "'realistic, economic approach to determine what losses the defendant truly caused or intended to cause.'"[16]

For the same reasons that courts should take extrinsic and unforeseeable forces into account in the securities fraud context, courts should take such forces into account when calculating loss in the mortgage fraud context. Existing guidelines should be amended to permit this, and the proposed amendment, which prevents such consideration, should be rejected.

ii. Fair Market Value – Should the Commission provide an additional special rule for determining fair market value if the mortgaged property has not been disposed of by the time of sentencing? For example, should the Commission provide that, if the mortgaged property has not been disposed

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[12] NACDL does not oppose the proposed amendment including reasonably foreseeable administrative costs of foreclosure in the loss calculation.

[13] *See United States v. James*, 592 F.3d 1109, 1115 (10th Cir. 2010) (holding that loss in such cases should be limited to "the difference between the outstanding balance on the original loan and what the [original] lender received when it sold the loan."); but *see United States v. Washington*, 634 F.3d 1180, 1185 (10th Cir. 2011) (permitting consideration of losses to downstream purchasers if they were reasonably foreseeable to the defendant).

[14] *United States v. Olis*, 429 F.3d 540, 548-49 (5th Cir. 2005).

[15] *Id.* at 546 (citing *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005)).

[16] *Id.* (quoting *United States v. West Coast Aluminum Heat Treating Co.*, 265 F.3d 986, 991 (9th Cir. 2001)); *see also United States v. Rutkoske*, 506 F.3d 170, 179 ("[t]he District Court's basic failure at least to approximate the amount of loss caused by the fraud without even considering other factors relevant to a decline in NetBet share price requires a remand to redetermine the amount of the loss, both for purposes of the sentence and restitution.").

of by that time, the most recent tax assessment value of the mortgaged property shall constitute prima facie evidence of the fair market value, i.e., is evidence sufficient to establish the fair market value, if not rebutted?

NACDL opposes adding any special rules for determining fair market value if the mortgaged property has not been disposed of by the time of sentencing. Each case will present unique facts, property valuations may fluctuate for a variety of reasons, and no single formula for determining fair market value can appropriately anticipate and account for individual circumstances. As discussed, NACDL supports a guidelines framework that permits defendants to present evidence in support of foreseeable and/or intended loss.

In its "Loss Primer (§2B1.1(b)(1))" (March 2011), the Office of General Counsel of the U.S. Sentencing Commission recognizes that in cases where "loss may fluctuate," the sentencing judge "should determine 'fair market value' on the date the fraud ceased operations."[17] The Office of General Counsel likewise recognized that "[t]he courts have ruled that there is 'no error in selecting the end of the conspiracy as an appropriate date from which to calculate loss.'"[18]

NACDL concurs with the Office of General Counsel that, "[i]n a case involving the fair market value of real property that has not been recently sold (at foreclosure or otherwise) . . . the defendant may rebut the government's proposed value or the basis on which that value was calculated. When a current market value for real property is not available, the court need not use the most recent valuation if more than one prior valuation exists."[19]

iii. Changes to §2B1.1(b)(15) – Should the Commission make any further changes to subsection (b)(15), such as by expanding its scope or increasing its penalties, or both, to "ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions"? If so, what changes to subsection (b)(15) should be made?

The proposed amendment provides additional factors for the court to consider in determining whether one or more prongs of subsection (b)(15) apply. NACDL does not object to the proposed amendments, which essentially allow a court to consider the role of government intervention in preventing harms otherwise likely to have resulted from the offense. NACDL opposes, however, any further expansion of subsection (b)(15), as well as any increase in its penalties.

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[17] Off. of Gen. Couns., U.S. Sent'g Comm'n, *Loss Primer(§2B1.1(b)(1))* 14 (March 2011) (citing *United States v. Hart*, 273 F.3d 363, 374 (3d Cir. 2001), in which the court upheld the sentencing judge's decision to decline to calculate loss at the time of sentencing where defendant argued the victims could have mitigated losses by selling at a later date).

[18] *Id.* (quoting *Hart*, 273 F.3d at 374).

[19] *Id.* (citations omitted).

iv. Are there mitigating factors in cases involving mortgage fraud or financial fraud that are not adequately accounted for in the guidelines? If so, how should the Commission amend the Guidelines Manual to account for those mitigating factors?

As noted, NACDL recognizes that numerous mitigating factors may apply in mortgage fraud cases, such as unanticipated declines in the real estate market, deterioration of property values caused by financial institution neglect, or failure of a financial institution to mitigate losses. Because each case and each defendant must be evaluated on an individual basis, NACDL supports guidelines for mortgage fraud and financial fraud that hold defendants accountable only for foreseeable and intended effects of their actions.

D. Impact of Loss and Victims Tables in Certain Cases

NACDL takes the position that the guideline for fraud-based offenses, §2B1.1, which is based primarily on an ambiguous concept of "loss," results in disparate sentences; this is due in part to the guideline's failure to consider other factors, such as the gain to the defendant, the scienter of the defendant, or external factors affecting the loss. NACDL applauds the Commission for realizing that the Guideline should consider the loss relative to the defendant's actual gain from the offense. NACDL supports the Commission's position that the impact of the loss table of §2B1.1 should be limited if the defendant had little gain relative to the loss. NACDL similarly supports the Commission's concept of limiting the effect of the loss table by capping the number of enhancements if the defendant gained little or nothing from the offense (*e.g.*, if the defendant's gain resulting from the offense did not exceed $10,000, the adjustment from application of subjection (b)(1) shall not exceed 14 levels). NACDL believes that the limits should take the form of Specific Offense Characteristics rather than as grounds for departure, to insure more uniformity in application and consistency in sentencing. As the Commission itself observed, courts are routinely departing downward in these circumstances currently.

NACDL disagrees with the Commission's suggestion that the lack of gain to the defendant should be limited to those offenses involving relatively large amounts of "loss," such as those seen in securities fraud. Section 2B1.1 covers a wide array of economic offenses differing in scope and size. Many of the cases sentenced under this section involve individual defendants who are low to mid-level employees who engage in some amorphous fraud scheme at the direction of and/or for the benefit of their employer. Some of those frauds involve "losses" of hundreds of thousands, rather than multi-millions of dollars. The Commission's proposal of limiting the effect of the loss table by placing caps on the enhancements where there is little or no gain to the defendant will not help these "bread and butter" white collar defendants and will lead to even more sentencing disparities under this guideline.

Although the number of Specific Offense Characteristics ("SOC's") (16 in all currently) makes §2B1.1 one of the most complex guidelines, NACDL urges the Commission to consider

lessening the impact of the loss guidelines for all who gain little from the offense. This can be achieved by implementing a 2 to 4-level reduction in the Total Offense Level for all defendants when they receive no or relatively little gain from the offense, in addition to capping the number of adjustments possible for cases involving large scale financial frauds. This approach would treat similarly situated defendants similarly regardless of the scale of the fraud. This approach is also consistent with the reduction for minor and minimal participants set forth in §3B1.2 of the guidelines.

Regardless of the approach adopted by the Commission with respect to limiting the effect of §2B1.1's loss table in cases where there is little to no gain to the defendant from the offense, it should apply to all guidelines that refer to the loss table, rather than simply a subset, as these other offenses raise similar issues. For example, copyright infringement cases often involve corporate officers and employees who seek no personal gain from the offense, but act out of misguided loyalty to their employer. As those defendants are similarly situated with employees involved in other types of financial fraud, they should be treated similarly to avoid further unfair disparities in sentencing.

NACDL also commends the Commission for recognizing that application of the loss table and the victims table contained in §2B1.1(b)(2) can result in double counting. Therefore NACDL supports the Commission's proposal to amend the victim's table in §2B1.1(b)(2) to limit its impact if no victims were substantially harmed by the offense. NACDL suggests that if no victims were substantially harmed by the offense in a direct way, the victim table should not apply at all.

II. DRUGS

A. BZP

As long as drug quantities drive guidelines, a practice that NACDL does not support, then BZP should be included in the drug equivalency table, as this will better position counsel to more accurately advise a client about the guideline range involved in BZP-related cases. Based upon the DEA description of BZP as having 20 times less potency as amphetamine, NACDL supports using a marijuana equivalency of 1 gram BZP to 100 grams of marijuana, which is one-twentieth of the equivalency for amphetamines. This is also consistent with the Alabama and Michigan District Court decisions cited by the Commission (page 36) that found BZP most similar to methylphenidate (Ritalin), which also has an equivalency of 1 gram Ritalin to 100 grams of marijuana. Any higher equivalency for BZP would be excessively harsh in relation to the harms caused by the drug and would result in unwarranted sentencing disparity.

NACDL does not support any guideline distinction between BZP alone and BZP in combination with other substances. The marijuana equivalency table already enables calculation of an offense level for multiple substances by converting each substance to a marijuana

equivalency and then adding them up. Because the possible theoretical combinations of substances are exponential, it would be unrealistic for the Commission to attempt to address these combinations prospectively within the guidelines. Those circumstances are best considered by the trial court based on the actual evidence presented in specific cases.

B. Safety Valve

NACDL supports making the Safety Valve, §5C1.2, explicitly applicable to offenses involving the possession and distribution of precursor chemicals. For first-time, non-violent offenders, it is appropriate that those who distribute precursor chemicals not be treated any more harshly than those who distribute illegal substances made from those chemicals.

III. HUMAN RIGHTS

A. "Human Rights Offenses"

NACDL does not agree with the creation of a new offense category called "Human Rights Offenses." The criminal conduct involved in these offenses (genocide, murder, torture, abduction, sexual assault, etc.) is already covered adequately in the Guidelines, as discussed by the Commission on pages 41-43 of the Notice and Request for Comments. Further, the guidelines for those offenses already take into account variables relevant to the offense, such as severity of injury (e.g., §2A2.1 and §2A2.2), age of victim (e.g., §2A3.2), and number of victims (each offense counted separately under Chapter 3, Part D). Adding this proposed new offense category is unnecessary.

The proposed Option 2, adding an adjustment if the defendant committed a serious human rights offense, is likewise unsupported. Existing enhancements for hate crimes, vulnerable victims, etc. already address the concerns raised by crimes motivated by racial or ethnic hatred, such as genocide. To the victim of a violent crime, such conduct (whether occurring during war or not) is already a "human rights" violation, that is, a violation of the victim's right to bodily integrity. Singling out some crimes as "human rights violations" will result in disparate treatment for the same conduct: killing, maiming, or sexual assault. The already existing enhancement for hate crimes is sufficient to take into account the malevolent intent involved in war crimes.

Further, the proposed guideline enhancement fails to account for mitigating factors such as duress (for example, some prisoners were forced to massacre other prisoners at gunpoint during the Bosnian war) or low-ranking military members who are just following orders and at risk of court-martial or other penalties if they do not comply. The blanket enhancement apparently applies, at the same level, regardless of the underlying nature of the violation and regardless of the relative culpability of the defendant.

Finally, NACDL does not agree with arbitrarily setting criminal history category at V or VI if a human rights enhancement applies. Criminal history category is designed to reflect the extent of an offender's prior criminal involvement, which is relevant to determining risk of recidivism and rehabilitation potential. If the nature of the offense warrants a seriously high penalty, then that should be reflected in the offense level, not by artificially inflating criminal history category. This artificial designation of a criminal history category based on the nature of the offense creates disparity, in that those who really do have a criminal history category of V or VI are not treated any differently from those who have never violated the law before.

B. Immigration Fraud Offenses Committed to Avoid Responsibility for Human Rights Offenses

NACDL objects to this proposed new offense characteristic on several grounds. First, if the alleged war crime occurred in a foreign country and did not involve U.S. citizens, then the U.S. government has no jurisdiction to prosecute such crime directly; adding that as a sentencing guideline factor is nothing more than allowing the government to prosecute an offense it has no jurisdiction over, and worse, it can do so without proving the offense to a jury beyond a reasonable doubt, since judges generally use a preponderance of the evidence standard for sentencing factors. Hearsay, opinion, and other evidence inadmissible in a trial might be considered by the court in applying this factor. Further, the government already has the power to deport the defendant who is convicted of an immigration fraud offense, and the government with proper jurisdiction over the war crime will be able to prosecute that conduct after the defendant has been punished for fraud, which is an entirely separate matter.

Second, the offense characteristic fails to differentiate between types of "human rights violations." Certainly the act of genocide or mass murder carries greater culpability than a single homicide; torture and maiming vary in degree of severity; and the harm caused by the act of humiliation by stripping one of clothing varies from the harm of actually causing permanent bodily injury by breaking bones. The one-size-fits-all enhancement for seeking "to avoid detection or responsibility for a serious human rights offense" fails to recognize the wide range of culpability that may attach to alleged human rights violations.

It is particularly disturbing that the Commission seeks input on whether a person's concealed membership in a foreign military or paramilitary organization should alone be sufficient to support application of the human rights factor to immigration fraud cases. Even where the "military group" committed human rights violations, if the defendant himself has not been shown to have participated, then this enhancement is particularly unwarranted and may infringe the First Amendment's constitutional right to freedom of association.

Finally, no mitigating factors, such as duress or a low-ranking person following orders, are taken into consideration by this proposed characteristic. As discussed previously, nor does it

consider how long ago the alleged human rights violation occurred and whether the defendant has lived a law-abiding life since that time or made efforts to atone for his prior conduct.

IV. REHABILITATION

Pepper v. United States, 131 S.Ct. 1229 (2011), makes §5K2.19 moot. That policy statement is no longer an accurate statement of the law, and NACDL supports repealing §5K2.19.

NACDL does not favor the second option, making pre-sentencing or post-sentencing rehabilitation relevant "if present to an unusual degree." This proposed option attempts to restrict consideration of factors that the Court in *Pepper* has already recognized to be fully relevant to the sentencing court's performance of its duties under the sentencing statute, 18 U.S.C. § 3553(a). The trial court alone is in the position to consider how rehabilitation, either pre-sentencing or post-sentencing, impacts the statutory factors that must be considered when setting a sentence.

CONCLUSION

We are grateful for the opportunity to submit public comment on behalf of our membership and respectfully urge your utmost consideration. Thank you.

Respectfully,

Lisa Monet Wayne
President