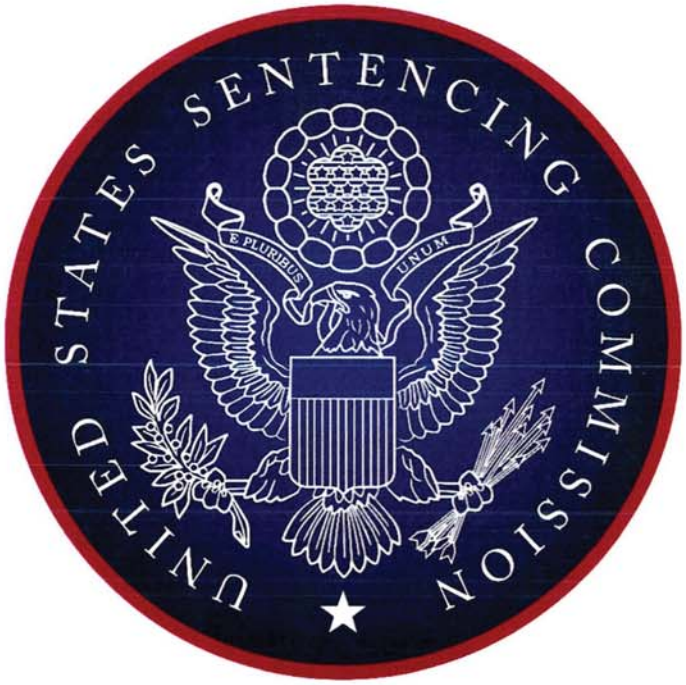
# UNITED STATES SENTENCING COMMISSION




## WRITTEN TESTIMONY

## PUBLIC HEARING
## MARCH 5, 1998

## VOLUME I

# AGENDA AND MATERIALS

United States Sentencing Commission

*in conjunction with the*
*1998 National Institute on White Collar Crime*

# PUBLIC HEARING

Thursday, March 5, 1998
1:15 p.m. - 3:40 p.m.

## "KEY ISSUES: REASSESSING SENTENCES FOR FEDERAL THEFT, FRAUD, AND TAX CRIMES"

Parc 55 Hotel
Sienna Room, Third Floor
San Francisco, CA

# PUBLIC HEARING AGENDA

1:15 p.m. **Introductory Remarks by Chairman Richard P. Conaboy and John Kramer, Staff Director**

1:30 p.m. **Panel on Tax Amendment Issues**

TAX ISSUES ONE AND TWO: **Proposed Changes to the Tax Table and the Enhancement for Sophisticated Means**

Opening statement by defense attorney (**10 minutes**)
**James A. Bruton III**, Washington, DC
Williams & Connolly
Former Deputy Assistant Attorney General, Tax Division

Opening statement by DOJ representatives (**10 minutes**)
**Mark Matthews**, Deputy Assistant Attorney General, Tax Division, DOJ
**Richard Speier, Jr.**, Director of Investigation, Western Region, Internal Revenue Service

Response by defense attorneys (**5 minutes**)
**Charles M. Meadows, Jr.**, Dallas, TX
Meadows, Owens, Collier, Reed, Cousins & Blau, L.L.P.
Chair, Criminal Development Subcommittee of the Civil and Criminal Penalties Committee of the ABA Tax Section
**Paula Yunghans**, Baltimore, MD
Martin, Junghans, Snyder & Bernstein, P.A.

1:55 p.m. Testimony by **Justin Thornton, Esq. (5 minutes)**, Washington, DC
Co-chair, Tax Enforcement Subcommittee, ABA White Collar Crime Committee

2:00 p.m. **Additional Discussion and Questions** (**15 minutes**)

# PUBLIC HEARING MATERIALS - TABLE OF CONTENTS

2:15 p.m. **Panel on Theft and Fraud Amendment Issues**

ISSUES ONE AND TWO: **PROPOSED CHANGES TO FRAUD AND THEFT TABLES AND PROPOSAL TO DELETE "MORE-THAN-MINIMAL PLANNING" AND ADD "SOPHISTICATED MEANS"**

**Issue One: Loss tables** - Opening statement by defense attorney (**5 minutes**)

**Gerald H. Goldstein, Esq.**, San Antonio, TX
Goldstein, Goldstein, and Hilley
Former President of the National Association of Criminal Defense Lawyers (NACDL)

**Issue Two: More-than-minimal planning/sophisticated means** - Opening statement by defense attorney (**5 minutes**)

**David Axelrod, Esq.,** Columbus, Ohio
Vorys, Sater, Seymour and Pease, LLP
Former Assistant U.S. Attorney (S.D. Florida)
Former Trial Attorney, Tax Division, DOJ

Opening statement by DOJ regarding **both issues** (**10 minutes**)

**Mary Spearing, Esq.**, Chief Fraud Section, DOJ
Former Assistant U.S. Attorney (E.D. Pa.)

**Katrina C. Pflaumer, Esq.**, U.S. Attorney, Western District of Washington

Response by defense attorneys (**5 minutes**)

**Ephraim Margolin, Esq.**, San Francisco, CA
Former President of the National Association of Criminal Defense Lawyers (NACDL)

**David Axelrod, Esq.,** Columbus, Ohio

**Gerald H. Goldstein, Esq.**, San Antonio, TX

**Additional Discussion and Questions** (**10 minutes**)

2:50 p.m. **NON-TAX ISSUE THREE - PROPOSED REVISIONS TO DEFINITION OF LOSS**

Opening statement by defense attorney (**5 minutes**)

**T. Mark Flanagan, Esq.**, Washington, DC
McKenna & Cuneo
Chair, Subcommittee on Procurement Fraud, ABA White Collar Crime Committee
Former Assistant U.S. Attorney (DC)

Opening statement by DOJ (**5 minutes**)

**Mary Spearing, Esq.**, Chief Fraud Section, DOJ
**Katrina C. Pflaumer, Esq.**, U.S. Attorney, Western District of Washington

Response by defense attorneys (**5 minutes**)

**David Axelrod, Esq.**, Columbus, Ohio
Vorys, Sater, Seymour and Pease, LLP
**Gerald H. Goldstein, Esq.**, San Antonio, TX
Goldstein, Goldstein, and Hilley
Former President of the National Association of Criminal Defense Lawyers (NACDL)

**Additional Discussion and Questions (10 minutes)**

3:15 **Testimony from Members of the Audience (25 minutes)**

**Frank Bowman** (tentative), Spokane, WA
Visiting Professor, Gonzaga University Law School
Former Assistant U.S. Attorney (S.D. Florida)

3:40 **Hearing concludes**

# REVISED DEFINITION OF LOSS — PRINCIPAL FEATURES

1. **Provides a unified definition of loss instead of the current division among several guidelines.**

2. **Provides clear, concise, generally applicable definitions of "loss," "actual loss," and "intended loss."**

3. **Causation Standard**

   a. Reasonable foreseeability

      Adopts familiar, traditional standard of reasonable foreseeabililty

   b. Consequential damages

      Allows use of reasonably foreseeable consequential damages in all cases (whereas current rule only expressly allows in procurement fraud, product substitution, and computer property damage cases).

4. **Intended Loss**

Overrules courts that exclude loss amounts that are impossible (*e.g.*, reverse sting cases) or highly unlikely (*e.g.*, insurance fraud where claim exceeds property value).

5. **Determination of Actual Loss**

   a. Provides large measure of court responsibility to measure loss in the most practicable and appropriate manner.

   b. Lists examples of alternative approaches courts can use to measure loss.

   c. Misapplied versus misappropriate funds

      Adds "misapplied" funds to listing of what is included in loss. Resolves circuit split to provide that loss includes misapplied funds (*e.g.*, funds illegally moved to an account under the defendant's control, but not yet withdrawn), and not just misappropriated funds.

6. Gain

Allows use of gain as an alternative way of approximating loss in situations where gain is greater than known loss, in addition to current situations where loss is difficult or impossible to calculate.

7. Credits

a. Credits in thefts and fraud - General rule

Expands current crediting of repayments in loan cases to cover credits in all theft and fraud cases where economic benefit is conveyed to the victim before defendant is aware of offense's detection. Provides that credited repayments generally will be valued according to the fair market value at the time of transfer to the victim.

b. Collateral

Continues current rule that liquidated collateral is valued at amount recovered. Collateral not liquidated before sentencing to be valued as of that time.

8. Interest (To be decided)

Provides two options: one to include interest due and owing that was bargained for as part of a lending transaction; the other to leave all interest for departure consideration only.

9. Special Rules

a. Fraudulent investment schemes

Resolves a circuit split and adopts a loss determination based on aggregate losses of victims who lost money (11th Circuit rule). Overrules case law that allows crediting of payments made to victims who did not lose money and, in fact, made a profit; also overrules case law basing loss on total amount "invested," without regard to any amounts returned to investors.

b. Credit cards/access devices

Expands coverage of current special rule to include purloined numbers or codes; expands the minimum loss rule of $100 per credit card to include each access device, number, or code.

10. Departures (to be decided)

a. Risk of Loss

Provides clear statement that risk of loss is an encouraged departure factor.

b. Multiple victims

Provides encouraged departure for "loss to numerous victim and the aggregate harm to those victims is substantially understated by the loss determination."

c. Inept defendants

Provides encouraged downward departure where the offense was committed in such a inept manner that there was no likelihood of success.

d. Extraordinary restitution

Provides encouraged downward departure where the defendant made restitution before detection of the offense.

e. Reasonably foreseeable, yet unexpected losses

Provides encouraged downward departure where the loss was substantially increased by an improbable intervening cause.

REVISED DEFINITION OF LOSS - MARCH 1998 OPTION

2. *Loss.*

(A) *General Rule. For purposes of subsection (b)(1), loss is the greater of the actual loss or the intended loss.*

*"Actual loss" means the reasonably foreseeable economic harm that (i) has resulted, as of the time of sentencing, from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct); and (ii) is reasonably ~~certain~~ expected to result after that time from such conduct.*

*"Intended loss" means the economic harm intended to be caused by the conduct for which the defendant is accountable under §1B1.3, even if the harm intended to be caused would have been unlikely or impossible to accomplish (e.g., as in a government sting operation).*

(B) *Determination of Loss. The amount of the loss need not be determined precisely. The court need only make a reasonable estimate of the amount of the loss, based on available information and using, as appropriate and practicable under the circumstances to best effectuate the general rule in subdivision (A), factors such as the following:*

(i) *The fair market value of the property, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated, or destroyed.*

(ii) *The cost to the victim of replacing property taken or otherwise unlawfully acquired or destroyed.*

(iii) *The cost of repairs to damaged property, not to exceed the replacement cost had the property been destroyed.*

(iv) *The approximate number of victims and an estimate of the average loss to each victim.*

(v) *More general factors, such as the scope and duration of the offense and revenues generated by similar operations.*

(vi) *The gain to the defendant and other persons for whose conduct the defendant is accountable under §1B1.3, if gain is ~~greater than loss~~ or if ~~loss~~ is ~~difficult or impossible~~ impracticable to determine.*

(C) *Credits Against Loss. In determining the amount of the loss, the court shall credit an amount equal to the value of the economic benefit the defendant transferred to the victim before the defendant knew or had reason to believe that the offense had been detected.*

any benefit having substantial economic value, including

*For purposes of this subdivision: (i) "economic benefit" means money, property, or services performed, ~~or other economic benefit~~; and (ii) "transferred" means pledged or otherwise provided as collateral, returned, or otherwise conveyed.*

*The value of the economic benefit under this subdivision is its fair market value as of the time the defendant transferred it to the victim, except that the value of pledged or otherwise provided collateral is the amount that has been recovered as of the time of sentencing from disposition of the collateral, or if not disposed of by that time, its fair market value as of the time of sentencing.*

*Option 1:*

*(D) Opportunity Costs. Interest, anticipated profits, and other opportunity costs shall not be included in determining loss. However, there may be cases in which the amount of interest, anticipated profits, and other opportunity costs is so substantial that not including that amount as part of the loss would substantially understate the seriousness of the offense or the culpability of the defendant. In such cases, an upward departure may be warranted.*

*Option 2:*

*(D) Interest. Interest shall be included in determining loss only if it is bargained for as part of a lending transaction that is involved in the offense. The court shall include any such interest that is accrued and unpaid as of the time of sentencing.*

*(E) Special Rules. The following special rules shall be used to assist in determining loss in the cases indicated:*

*(i) Fraudulent Investment Schemes. In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss is the sum of the losses of each victim who lost all or part of that victim's principal investment as a result of the fraudulent investment scheme.*

*(ii) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes. In a case involving stolen or counterfeit credit cards (see 15 U.S.C. § 1602(k)), stolen or counterfeit access devices (see 18 U.S.C. § 1029(e)(1)), or purloined numbers or codes, the loss includes any unauthorized charges made with the credit cards, access devices, or numbers or codes. The loss determined for each such credit card, access device, or number or code shall be not less than $100.*

*(iii) Diversion of Government Program Benefits. In a case involving diversion of government program benefits, loss is the value of the benefits diverted*



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*from intended recipients or uses.*

*(iv)* *Davis-Bacon Act Cases. In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the loss is the difference between the legally required and actual wages paid.*

(v) Theft or Damage to Computer System. In a case involving unlawfully accessing, exceeding unauthorized access to, or damaging, or destroying a "protected" computer, ...

*(F)* *Upward Departure Considerations. There may be cases in which the loss substantially understates the seriousness of the offense or the culpability of the defendant. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:*

*(i)* *A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.*

*(ii)* *The offense caused or risked substantial non-monetary harm.*

*(iii)* *The offense created a risk of substantial actual loss beyond the loss determined under subsection (b)(1).* For example, in a case in which the defendant fraudulently misstated his assets in order to obtain a loan that he nevertheless repaid, the loss determined above (zero loss) will tend not to reflect significantly the risk of loss created by the defendant's conduct.

*(iv)* *The offense caused physical or psychological harm or severe emotional trauma.*

*(v)* *The offense endangered national security or military readiness.*

*(vi)* *The offense caused a loss of confidence in an important institution.*

*(vii)* *The offense endangered the solvency or financial security of one or more victims.*

*(viii)* *The offense involved a substantial invasion of a privacy interest.*

*(ix)* *The offense impacted numerous victims and the loss determination substantially understates the aggregate harm.*

*(x)* *The offense was committed for the purpose of facilitating another offense.*

*(G)* (X1) ~~Substantial performance~~ *Downward Departure Considerations. There may be cases in which the loss substantially overstates the seriousness of the offense or the culpability of the defendant. In such cases, a downward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in*

*determining whether a downward departure is warranted:*

*(i)* *A primary objective of the offense was a mitigating, non-monetary objective. For example, a primary objective of the offense was to fund medical treatment for a sick parent.*

*(ii)* *The offense was committed in such an inept manner that no reasonable likelihood existed that any harm could have occurred.*

*(iii)* *The defendant made complete, or substantially complete, restitution prior to the detection of the offense.*

*(iv)* *The loss was substantially increased by an improbable intervening cause.*

*(H)* *Appropriate Deference. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. Accordingly, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).*

= 4)

### Current §2B1.1

| Loss | Increase | Total OL |
|---|---|---|
| $100 or less | none | 4 |
| More than $100 | +1 | 5 |
| More than $1,000 | +2 | 6 |
| More than $2,000 | +3 | 7 |
| More than $5,000 | +4 | 8 |
| More than $10,000 | +5 | 9 |
| More than $20,000 | +6 | 10 |
| More than $40,000 | +7 | 11 |
| More than $70,000 | +8 | 12 |
| More than $120,000 | +9 | 13 |
| More than $200,000 | +10 | 14 |
| More than $350,000 | +11 | 15 |
| More than $500,000 | +12 | 16 |
| More than $800,000 | +13 | 17 |
| More than $1.5 M | +14 | 18 |
| More than $2.5 M | +15 | 19 |
| More than $5 M | +16 | 20 |
| More than $10 M | +17 | 21 |
| More than $20 M | +18 | 22 |
| More than $40 M | +19 | 23 |
| More than $80 M | +20 | 24 |

### Option 1

| Loss | Increase | Total OL |
|---|---|---|
| $2,000 or less | none | 4 |
| More than $2,000 | +2 | 6 |
| More than $5,000 | +4 | 8 |
| More than $10,000 | +6 | 10 |
| More than $20,000 | +8 | 12 |
| More than $40,000 | +10 | 14 |
| More than $80,000 | +12 | 16 |
| More than $200,000 | +14 | 18 |
| More than $500,000 | +16 | 20 |
| More than $1,200,000 | +18 | 22 |
| More than $2,000,000 | +20 | 24 |
| More than $7,500,000 | +22 | 26 |
| More than $20,000,000 | +24 | 28 |
| More than $50,000,000 | +26 | 30 |
| More than $100,000,000 | +28 | 32 |

### Option 2

| Loss | Increase | Total OL |
|---|---|---|
| $100 or less | none | 4 |
| More than $100 | +1 | 5 |
| More than $1,000 | +2 | 6 |
| More than $2,000 | +4 | 8 |
| More than $5,000 | +6 | 10 |
| More than $12,500 | +8 | 12 |
| More than $30,000 | +10 | 14 |
| More than $70,000 | +12 | 16 |
| More than $150,000 | +14 | 18 |
| More than $350,000 | +16 | 20 |
| More than $800,000 | +18 | 22 |
| More than $2,500,000 | +20 | 24 |
| More than $7,500,000 | +22 | 26 |
| More than $20,000,000 | +24 | 28 |
| More than $50,000,000 | +26 | 30 |
| More than $100,000,000 | +28 | 32 |

### Option 3 (April 1997 Proposal)

| Loss | Increase | Total OL |
|---|---|---|
| $2,000 or less | none | 4 |
| More than $2,000 | +2 | 6 |
| More than $5,000 | +4 | 8 |
| More than $10,000 | +6 | 10 |
| More than $20,000 | +8 | 12 |
| More than $40,000 | +10 | 14 |
| More than $80,000 | +12 | 16 |
| More than $200,000 | +14 | 18 |
| More than $500,00 | +16 | 20 |
| More than $1,200,000 | +18 | 22 |
| More than $2,500,000 | +20 | 24 |
| More than $7,500,000 | +22 | 26 |
| More than $20,000,000 | +24 | 28 |
| More than $50,000,000 | +26 | 30 |
| More than $100,000,000 | +28 | 32 |

# ALTERNATIVE FRAUD LOSS TABLE PROPOSALS
## (BOL = 6)

### Current §2F1.1

| Loss | Increase | Total OL |
|---|---|---|
| $2,000 or less | none | 6 |
| More than $2,000 | +1 | 7 |
| More than $5,000 | +2 | 8 |
| More than $10,000 | +3 | 9 |
| More than $20,000 | +4 | 10 |
| More than $40,000 | +5 | 11 |
| More than $70,000 | +6 | 12 |
| More than $120,000 | +7 | 13 |
| More than $200,000 | +8 | 14 |
| More than $350,000 | +9 | 15 |
| More than $500,000 | +10 | 16 |
| More than $800,000 | +11 | 17 |
| More than $1.5 M | +12 | 18 |
| More than $2.5 M | +13 | 19 |
| More than $5 M | +14 | 20 |
| More than $10 M | +15 | 21 |
| More than $20 M | +16 | 22 |
| More than $40 M | +17 | 23 |
| More than $80 M | +18 | 24 |

### Option 1

| Loss | Increase | Total OL |
|---|---|---|
| $5,000 or less | none | 6 |
| More than $5,000 | +2 | 8 |
| More than $10,000 | +4 | 10 |
| More than $20,000 | +6 | 12 |
| More than $40,000 | +8 | 14 |
| More than $80,000 | +10 | 16 |
| More than $200,000 | +12 | 18 |
| More than $500,000 | +14 | 20 |
| More than $1.2 M | +16 | 22 |
| More than $2.5 M | +18 | 24 |
| More than $7.5 M | +20 | 26 |
| More than $20 M | +22 | 28 |
| More than $50 M | +24 | 30 |
| More than $100 M | +26 | 32 |

### Option 2

| Loss | Increase | Total OL |
|---|---|---|
| $2,000 or less | none | 6 |
| More than $2,000 | +2 | 8 |
| More than $5,000 | +4 | 10 |
| More than $12,500 | +6 | 12 |
| More than $30,000 | +8 | 14 |
| More than $70,000 | +10 | 16 |
| More than $150,000 | +12 | 18 |
| More than $350,000 | +14 | 20 |
| More than $800,000 | +16 | 22 |
| More than $2.5 M | +18 | 24 |
| More than $7.5 M | +20 | 26 |
| More than $20 M | +22 | 28 |
| More than $50 M | +24 | 30 |
| More than $100 M | +26 | 32 |

### Option 3 (April 1997 Proposal)

| Loss | Increase | Total OL |
|---|---|---|
| $2,000 or less | none | 6 |
| More than $2,000 | +1 | 7 |
| More than $5,000 | +2 | 8 |
| More than $10,000 | +4 | 10 |
| More than $20,000 | +6 | 12 |
| More than $40,000 | +8 | 14 |
| More than $80,000 | +10 | 16 |
| More than $200,000 | +12 | 18 |
| More than $500,000 | +14 | 20 |
| More than $1.2 M | +16 | 22 |
| More than $2.5 M | +18 | 24 |
| More than $7.5 M | +20 | 26 |
| More than $20 M | +22 | 28 |
| More than $50 M | +24 | 30 |
| More than $100 M | +26 | 32 |

# ALTERNATIVE TAX LOSS TABLE PROPOSALS

## Current §2T4.1

| Tax Loss | Offense Level |
|---|---|
| $1,700 or less | 6 |
| More than $1,700 | 7 |
| More than $3,000 | 8 |
| More than $5,000 | 9 |
| More than $8,000 | 10 |
| More than $13,500 | 11 |
| More than $23,500 | 12 |
| More than $40,000 | 13 |
| More than $70,000 | 14 |
| More than $120,000 | 15 |
| More than $200,000 | 16 |
| More than $325,000 | 17 |
| More than $550,000 | 18 |
| More than $950,000 | 19 |
| More than $1.5 M | 20 |
| More than $2.5 M | 21 |
| More than $5 M | 22 |
| More than $10 M | 23 |
| More than $20 M | 24 |
| More than $40 M | 25 |
| More than $80 M | 26 |

## Option 1

| Tax Loss | Offense Level |
|---|---|
| $1,700 or less | 6 |
| More than $1,700 | 7 |
| More than $3,000 | 8 |
| More than $5,000 | 9 |
| More than $8,000 | 10 |
| More than $13,500 | 11 |
| More than $23,500 | 12 |
| More than $40,000 | 14 |
| More than $80,00 | 16 |
| More than $200,000 | 18 |
| More than $500,000 | 20 |
| More than $1.2 M | 22 |
| More than $2.5 M | 24 |
| More than $7.5 M | 26 |
| More than $20 M | 28 |
| More than $50 M | 30 |
| More than $100 M | 32 |

## Option 2

| Tax Loss | Offense Level |
|---|---|
| $2,000 or less | 6 |
| More than $2,000 | 8 |
| More than $5,000 | 10 |
| More than $12,500 | 12 |
| More than $30,000 | 14 |
| More than $70,000 | 16 |
| More than $150,000 | 18 |
| More than $350,000 | 20 |
| More than $800,000 | 22 |
| More than $2.5 M | 24 |
| More than $7.5 M | 26 |
| More than $20 M | 28 |
| More than $50 M | 30 |
| More than $100 M | 32 |

## Option 3 (April 1997 Proposal

| Tax Loss | Offense Level |
|---|---|
| $2,000 or less | 6 |
| More than $2,000 | 8 |
| More than $5,000 | 10 |
| More than $12,500 | 12 |
| More than $30,000 | 14 |
| More than $80,000 | 16 |
| More than $200,000 | 18 |
| More than $500,000 | 20 |
| More than $1.2 M | 22 |
| More than $2.5 M | 24 |
| More than $7.5 M | 26 |
| More than $20 M | 28 |
| More than $50 M | 30 |
| More than $100 M | 32 |

## OPTION 1
## Amendment Impact Summary
## Theft, Fraud, and Tax Amendment

The "Option 1" tables present the results of an analysis using the USSC Prison Impact Model to determine the sentencing impact of altering the loss tables in accordance with Option 1 of the Proposed Guideline Amendments for Public Comment released by the U.S. Sentencing Commission on January 14, 1998. Tables 1-6 display the impact of the change in the loss table for cases sentenced under §2F1.1 (fraud), as well as all cases sentenced under guidelines that refer to the loss tables in either §2B1.1 (theft) or §2T4.1 (tax). The effects of two other proposed changes have been considered simultaneously with the change to the table, the elimination of the "more than minimal planning" enhancement in the theft and fraud guidelines and the amendment to the "sophisticated means" enhancement in the tax guidelines. Table 7 displays the impact of the creation of a new loss table (§2X6.1) for cases sentenced under guidelines that referenced the loss table in §2F1.1.

With the exception of Table 3, all of the tables give the percent of cases affected by the proposed amendment in each relevant sub-group. It is important to consider these percentages when analyzing the associated sentence impacts. Table 3 displays the effect of the proposed amendment on the distribution of cases across zones, including both cases that were affected and those that were unaffected.

- 7,441 cases will be affected out of 10,060 sentenced under the relevant guidelines.
- For all affected cases, average sentences will increase 30% from 10 months to 13 months. (For all cases sentenced under the relevant guidelines, sentences will increase 22%.)
    - For all affected Theft cases, sentences will increase 17% from 6 months to 7 months.
    - For affected Fraud (§2F1.1) cases, sentences will increase 23% from 13 to 16 months.
    - *For all affected Fraud "Reference" (non-§2F1.1) cases, sentences will increase 33% from 15 to 20 months.*
    - For affected Tax cases, sentences will increase 42% from 12 months to 17 months.
- *1,535 total additional prison beds will be required within five years.*

*Italicized findings include results of impact analysis using the proposed table (§2X6.1) for fraud referring guidelines.*

# OPTION 1
## Table 1
## Sentencing Impact of Proposed Changes to Theft, Fraud, and Tax Guidelines[1]

| | Total Cases | Affected Cases | | | | | |
|---|---|---|---|---|---|---|---|
| | | Cases Affected | Percent Affected | Current Sentence Average (months) | Estimated Sentence Average (months) | Average Change (months) | Percent Change |
| **Changing the Loss Table, incorporating More Than Minimal Planning Adjustment into the Table, and adding an adjustment for Sophisticated Means with a value of +2 and a floor of 12** | | | | | | | |
| TOTAL | 10,060 | 7,441 | 74.0% | 10 | 13 | 3 | 30% |
| Theft | 3,260 | 2,448 | 75.1% | 6 | 7 | 1 | 17% |
| Fraud | 6,087 | 4,680 | 76.9% | 13 | 16 | 3 | 23% |
| Tax | 713 | 313 | 43.9% | 12 | 17 | 5 | 42% |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that will refer to the proposed loss tables for §2B1.1,§2F1.1, or §2T4.1. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases, including both cases with sentences affected by the policy change, and those left unaffected. Of the 10,175 cases sentenced under guidelines that reference the three loss tables, 115 were excluded due to incomplete guideline information. The proposed adjustment for "sophisticated means" was not factored into the analysis for theft or fraud cases. For fraud cases, it is believed that the three cases that currently receive the adjustment under §2F1.1(b)(5) (for "use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct...") would be eligible for this new enhancement for "sophisticated means". Eleven tax cases were affected by the proposed floor (of 12) for "sophisticated means".

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

# OPTION 1
## Table 2
## Sentencing Impact of Proposed Changes to Theft, Fraud, and Tax Guidelines[1]

| | Total Cases | Affected Cases | | | | | |
|---|---|---|---|---|---|---|---|
| | | Cases Affected | Percent Affected | Current Sentence Average (months) | Estimated Sentence Average (months) | Average Change (months) | Percent Change |
| **Changing the Loss Table, incorporating More Than Minimal Planning Adjustment into the Table, and adding an adjustment for Sophisticated Means with a value of +2 and a floor of 12** | | | | | | | |
| TOTAL | 9,980 | 7,441 | 74.6% | 10 | 13 | 3 | 30% |
| Zone A | 2,808 | 1,860 | 66.2% | 0 | 1 | 1 | N/A |
| Zone B | 2,241 | 1,482 | 66.1% | 2 | 3 | 1 | 50% |
| Zone C | 1,393 | 1,053 | 75.6% | 6 | 9 | 3 | 50% |
| Zone D | 3,538 | 3,046 | 86.1% | 22 | 27 | 5 | 23% |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that will refer to the proposed loss tables for §2B1.1,§2F1.1, or §2T4.1. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases, including both cases with sentences affected by the policy change, and those left unaffected. Of the 10,175 cases sentenced under guidelines that reference the three loss tables, 115 were excluded due to incomplete guideline information. Of the remaining 10,060, 80 were excluded due to missing zone information. The proposed adjustment for "sophisticated means" was not factored into the analysis for theft or fraud cases. For fraud cases, it is believed that the three cases that currently receive the adjustment under §2F1.1(b)(5) (for "use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct..." ) would be eligible for the new enhancement for "sophisticated means".

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

OPTION 1

Table 3

## Impact on Defendant's Sentence Zone Resulting From Proposed Changes to Theft, Fraud, and Tax Guidelines for All Cases[1]

| | CURRENT | | ESTIMATED | | PERCENT CHANGE |
|---|---|---|---|---|---|
| | n | % | n | % | |
| TOTAL | 9,980 | 100.0 | 9,980 | 100.0 | |
| Zone A | 2,808 | 28.1 | 3,428 | 34.3 | 22.1 |
| Zone B | 2,241 | 22.5 | 1,625 | 16.3 | -27.5 |
| Zone C | 1,393 | 14.0 | 979 | 9.8 | -29.7 |
| Zone D | 3,538 | 35.5 | 3,948 | 39.6 | 11.6 |
| THEFT | 3,248 | 100.0 | 3,248 | 100.0 | |
| Zone A | 1,401 | 43.1 | 1,669 | 51.4 | 19.1 |
| Zone B | 779 | 24.0 | 529 | 16.3 | -32.1 |
| Zone C | 402 | 12.4 | 264 | 8.1 | -34.3 |
| Zone D | 666 | 20.5 | 786 | 24.2 | 18.0 |
| FRAUD | 6,041 | 100.0 | 6,041 | 100.0 | |
| Zone A | 1,202 | 19.9 | 1,572 | 26.0 | 30.8 |
| Zone B | 1,260 | 20.9 | 911 | 15.1 | -27.7 |
| Zone C | 901 | 14.9 | 625 | 10.3 | -30.6 |
| Zone D | 2,678 | 44.3 | 2,933 | 48.6 | 9.5 |
| TAX | 691 | 100.0 | 691 | 100.0 | |
| Zone A | 205 | 29.7 | 187 | 27.1 | -8.8 |
| Zone B | 202 | 29.2 | 185 | 26.8 | -8.4 |
| Zone C | 90 | 13.0 | 90 | 13.0 | 0.0 |
| Zone D | 194 | 28.1 | 229 | 33.1 | 18.0 |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that will refer to the proposed loss tables for §2B1.1,§2F1.1, or §2T4.1. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases in each zone, including both cases with sentences affected by the policy change, and those left unaffected. Of the 10,175 cases sentenced under guidelines that reference the three loss tables, 115 were excluded due to incomplete guideline information. Of the remaining 10,060, 80 were excluded due to missing zone information.

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

OPTION 1

Table 4

Sentencing Impact of Proposed Changes to Theft Guidelines[1]

| AMOUNT | Total Cases | Affected Cases | | | | | |
|---|---|---|---|---|---|---|---|
| | | Cases Affected | Percent Affected | Current Sentence Average (Months) | Estimated Sentence Average (Months) | Average Change (Months) | Percent Change |
| **TOTAL** | **3,250** | **2,444** | **75.2** | **5.7** | **7.3** | **1.6** | **28.1** |
| $2,000 or Less | 880 | 570 | 64.8 | 2.0 | 1.6 | -0.4 | -20.0 |
| More Than $2,000 | 394 | 385 | 97.7 | 2.1 | 1.4 | -0.7 | -33.3 |
| More Than $5,000 | 438 | 281 | 64.2 | 2.7 | 2.0 | -0.7 | -25.9 |
| More Than $10,000 | 383 | 374 | 97.7 | 3.2 | 3.0 | -0.2 | -6.3 |
| More Than $20,000 | 396 | 104 | 26.3 | 2.9 | 8.2 | 5.3 | 182.8 |
| More Than $40,000 | 251 | 225 | 89.6 | 8.5 | 11.9 | 3.4 | 40.0 |
| More Than $80,000 | 258 | 257 | 99.6 | 10.4 | 17.1 | 6.7 | 64.4 |
| More Than $200,000 | 140 | 139 | 99.3 | 16.0 | 23.2 | 7.2 | 45.0 |
| More Than $500,000 | 65 | 64 | 98.5 | 23.6 | 30.1 | 6.5 | 27.5 |
| More Than $1,200,000 | 33 | 33 | 100.0 | 29.2 | 38.2 | 9.0 | 30.8 |
| More Than $2,500,000 | 11 | 11 | 100.0 | 24.8 | 32.5 | 7.7 | 31.0 |
| More Than $7,500,000 | 1 | 1 | 100.0 | 41.0 | 77.6 | 36.6 | 89.3 |
| More Than $20,000,000 | 0 | -- | -- | -- | -- | -- | -- |
| More Than $50,000,000 | 0 | -- | -- | -- | -- | -- | -- |
| More Than $100,000,000 | 0 | -- | -- | -- | -- | -- | -- |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that refer to the loss table in §2B1.1. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases, including both cases with sentences affected by the policy change, and those left unaffected. Of the 3,260 theft cases, 10 were excluded due to incomplete guideline information. Of the 2,448 cases affected by changes to the theft loss table, 4 were excluded due to incomplete guideline information. The proposed adjustment for "sophisticated means" was not factored into the analysis.

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

OPTION 1

Table 5

Sentencing Impact of Proposed Changes to the Fraud Guideline (§2F1.1)[1]

| AMOUNT | Total Cases | Affected Cases | | | | | |
|---|---|---|---|---|---|---|---|
| | | Cases Affected | Percent Affected | Current Sentence Average (Months) | Estimated Sentence Average (Months) | Average Change (Months) | Percent Change |
| **TOTAL** | **6,039** | **4,653** | **77.0** | **12.5** | **15.7** | **3.2** | **25.6** |
| $5,000 or Less | 1,139 | 741 | 65.1 | 3.3 | 2.3 | -1.0 | -30.3 |
| More Than $5,000 | 518 | 404 | 78.0 | 4.2 | 3.1 | -1.1 | -26.2 |
| More Than $10,000 | 635 | 619 | 97.5 | 6.4 | 5.5 | -0.9 | -14.1 |
| More Than $20,000 | 805 | 107 | 13.3 | 2.4 | 7.6 | 5.2 | 216.7 |
| More Than $40,000 | 719 | 599 | 83.3 | 10.0 | 13.0 | 3.0 | 30.0 |
| More Than $80,000 | 822 | 808 | 98.3 | 12.5 | 17.9 | 5.4 | 43.2 |
| More Than $200,000 | 601 | 597 | 99.3 | 17.1 | 22.6 | 5.5 | 32.2 |
| More Than $500,000 | 334 | 324 | 97.0 | 23.6 | 29.6 | 6.0 | 25.4 |
| More Than $1,200,000 | 217 | 210 | 96.8 | 28.7 | 37.7 | 9.0 | 31.4 |
| More Than $2,500,000 | 147 | 143 | 97.3 | 33.4 | 42.9 | 9.5 | 28.4 |
| More Than $7,500,000 | 68 | 67 | 98.5 | 45.2 | 57.9 | 12.7 | 28.1 |
| More Than $20,000,000 | 17 | 17 | 100.0 | 46.8 | 49.1 | 2.3 | 4.9 |
| More Than $50,000,000 | 14 | 14 | 100.0 | 90.3 | 105.0 | 14.7 | 16.3 |
| More Than $100,000,000 | 3 | 3 | 100.0 | 79.7 | 85.8 | 6.1 | 7.7 |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that refer to the loss table in §2F1.1. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases, including both cases with sentences affected by the policy change, and those left unaffected. Of the 6,087 fraud cases, 48 were excluded due to incomplete guideline information. Of the 4,680 cases affected by changes to the fraud loss table, 27 were excluded due to incomplete guideline information. The proposed adjustment for "sophisticated means" was not factored into the analysis. It is believed that at least the three cases that currently receive the adjustment under §2F1.1(b)(5) (for "use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct..." ) would receive this new enhancement for "sophisticated means".

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

OPTION 1

Table 6

Sentencing Impact of Proposed Changes to Tax Guidelines[1]

| AMOUNT | Total Cases | Affected Cases | | | | | |
|---|---|---|---|---|---|---|---|
| | | Cases Affected | Percent Affected | Current Sentence Average (Months) | Estimated Sentence Average (Months) | Average Change (Months) | Percent Change |
| TOTAL | 691 | 303 | 43.8 | 11.8 | 16.6 | 4.8 | 40.7 |
| $1,700 or Less | 49 | 3 | 6.1 | 0.0 | 6.0 | 6.0 | -- |
| More Than $1,700 | 12 | 0 | 0.0 | -- | -- | -- | -- |
| More Than $3,000 | 16 | 1 | 6.3 | 0.0 | 6.0 | 6.0 | -- |
| More Than $5,000 | 33 | 3 | 9.1 | 0.0 | 2.0 | 2.0 | -- |
| More Than $8,000 | 71 | 2 | 2.8 | 2.5 | 0.5 | -2.0 | -80.0 |
| More Than $13,500 | 75 | 0 | 0.0 | -- | -- | -- | -- |
| More Than $23,500 | 118 | 1 | 0.8 | 4.0 | 6.0 | 2.0 | 50.0 |
| More Than $40,000 | 115 | 99 | 86.1 | 4.9 | 7.4 | 2.5 | 51.0 |
| More Than $80,000 | 101 | 96 | 95.1 | 11.3 | 16.1 | 4.8 | 42.5 |
| More Than $200,000 | 39 | 38 | 97.4 | 16.1 | 22.5 | 6.4 | 39.8 |
| More Than $500,000 | 20 | 19 | 95.0 | 18.2 | 23.8 | 5.6 | 30.8 |
| More Than $1,200,000 | 21 | 20 | 95.2 | 20.8 | 27.9 | 7.1 | 34.1 |
| More Than $2,500,000 | 11 | 11 | 100.0 | 27.0 | 33.4 | 6.4 | 23.7 |
| More Than $7,500,000 | 8 | 8 | 100.0 | 29.1 | 40.0 | 10.9 | 37.5 |
| More Than $20,00,000 | 2 | 2 | 100.0 | 44.5 | 83.3 | 38.8 | 87.2 |
| More Than $50,000,000 | 0 | -- | -- | -- | -- | -- | -- |
| More Than $100,000,000 | 0 | -- | -- | -- | -- | -- | -- |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that refer to the loss table in §2T4.1. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases, including both cases with sentences affected by the policy change, and those left unaffected. Of the 713 tax cases, 22 were excluded due to incomplete guideline information. Of the 313 cases affected by changes to the tax loss table, 10 were excluded due to incomplete guideline information. Eleven tax cases were affected by the proposed floor (of 12) for "sophisticated means".

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

## Table 7
## Sentencing Impact of Proposed Changes to Fraud Referring Guidelines[1]
## Guideline § 2X6.1

| | AFFECTED CASES | | | | | | | Zone Impact | | |
|---|---|---|---|---|---|---|---|---|---|---|
| GUIDELINE | Total Cases | Cases Affected | Percent Affected | Current Sentence Average (Months) | Estimated Sentence Average (Months) | Average Change (Months) | Percent Change | Percent Decrease Zone | Percent Same Zone | Percent Increase Zone |
| TOTAL | 1,309 | 572 | 43.7 | 14.7 | 19.7 | 5.0 | 34.0 | 4.2 | 82.7 | 13.1 |
| §2B5.1 | 427 | 122 | 28.6 | 14.4 | 17.8 | 3.4 | 23.6 | 0.0 | 94.3 | 5.7 |
| §2B6.1 | 71 | 51 | 71.8 | 24.8 | 29.6 | 4.8 | 19.4 | 0.0 | 94.1 | 5.9 |
| §2F1.2 | 7 | 7 | 100.0 | 0.0 | 1.7 | 1.7 | -- | 0.0 | 71.4 | 28.6 |
| §2B4.1 | 65 | 40 | 61.5 | 15.6 | 25.5 | 9.9 | 63.5 | 2.5 | 87.5 | 10.0 |
| §2B3.3 | 6 | 3 | 50.0 | 8.0 | 9.0 | 1.0 | 12.5 | 0.0 | 100.0 | 0.0 |
| §2Q2.1 | 117 | 37 | 31.6 | 7.8 | 10.4 | 2.6 | 33.3 | 2.7 | 89.2 | 8.1 |
| §2C1.1 | 208 | 87 | 41.8 | 20.1 | 27.7 | 7.6 | 37.8 | 21.8 | 78.2 | 0.0 |
| §2C1.2 | 35 | 13 | 37.1 | 16.2 | 18.1 | 1.9 | 11.7 | 0.0 | 92.3 | 7.7 |
| §2C1.7 | 21 | 15 | 71.4 | 20.7 | 26.7 | 6.0 | 29.0 | 6.7 | 93.3 | 0.0 |
| §2E5.1 | 26 | 17 | 65.4 | 34.1 | 43.5 | 9.4 | 27.6 | 11.8 | 82.4 | 5.9 |
| §2G2.2 | 5 | 4 | 80.0 | 37.5 | 42.8 | 5.3 | 14.1 | 0.0 | 100.0 | 0.0 |
| §2G3.1 | 0 | -- | -- | -- | -- | -- | -- | -- | -- | -- |
| §2G3.2 | 0 | -- | -- | -- | -- | -- | -- | -- | -- | -- |
| §2B5.3 | 90 | 43 | 47.8 | 4.2 | 8.7 | 4.5 | 107.1 | 0.0 | 58.1 | 41.9 |
| §2S1.3 | 231 | 133 | 57.6 | 9.6 | 13.7 | 4.1 | 42.7 | 0.0 | 72.9 | 27.1 |
| §2B2.3 | 0 | -- | -- | -- | -- | -- | -- | -- | -- | -- |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that refer to the loss table in §2F1.1, excluding guideline §2F1.1, itself. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases, including both cases with sentences affected by the policy change, and those left unaffected.

[2]The zone impact is included to give some indication of the difference in incarcerative alternatives available at sentencing.

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

## OPTION 2
### Amendment Impact Summary
### Theft, Fraud, and Tax Amendment

The "Option 2" tables present the results of an analysis using the USSC Prison Impact Model to determine the sentencing impact of altering the loss tables in accordance with Option 2 of the Proposed Guideline Amendments for Public Comment released by the U.S. Sentencing Commission on January 14, 1998. Tables 1-6 display the impact of the change in the loss table for cases sentenced under §2F1.1 (fraud), as well as all cases sentenced under guidelines that refer to the loss tables in either §2B1.1 (theft) or §2T4.1 (tax). The effects of two other proposed changes have been considered simultaneously with the change to the table, the elimination of the "more than minimal planning" enhancement in the theft and fraud guidelines and the amendment to the "sophisticated means" enhancement in the tax guidelines. Table 7 displays the impact of the creation of a new loss table (§2X6.1) for cases sentenced under guidelines that referenced the loss table in §2F1.1.

With the exception of Table 3, all of the tables give the percent of cases affected by the proposed amendment in each relevant sub-group. It is important to consider these percentages when analyzing the associated sentence impacts. Table 3 displays the effect of the proposed amendment on the distribution of cases across zones, including both cases that were affected and those that were unaffected.

- 7,520 cases will be affected out of 10,060 sentenced under the relevant guidelines.
- For all affected cases, average sentences will increase 45% from 11 months to 16 months. (For all cases sentenced under the relevant guidelines, sentences will increase 34%.)
    - For all affected Theft cases, sentences will increase 57% from 7 months to 11 months.
    - For affected Fraud (§2F1.1) cases, sentences will increase 38% from 13 to 18 months.
    - *For affected Fraud "Reference" (non-§2F1.1) cases, sentences will increase 46% from 13 to 19 months.*
    - For all affected Tax cases, sentences will increase 63% from 8 to 13 months.
- *2,663 total additional prison beds will be required within five years.*

*Italicized findings include results of impact analysis using the proposed table (§2X6.1) for fraud referring guidelines.*

## OPTION 2
## Table 1
## Sentencing Impact of Proposed Changes to Theft, Fraud, and Tax Guidelines[1]

| | Total Cases | Affected Cases: Cases Affected | Affected Cases: Percent Affected | Affected Cases: Current Sentence Average (months) | Affected Cases: Estimated Sentence Average (months) | Affected Cases: Average Change (months) | Affected Cases: Percent Change |
|---|---|---|---|---|---|---|---|
| **Changing the Loss Table, incorporating More Than Minimal Planning Adjustment into the Table, and adding an adjustment for Sophisticated Means with a value of +2 and a floor of 12** | | | | | | | |
| TOTAL | 10,060 | 7,520 | 74.8% | 11 | 16 | 5 | 45% |
| Theft | 3,260 | 2,168 | 66.5% | 7 | 11 | 4 | 57% |
| Fraud | 6,087 | 4,849 | 79.7% | 13 | 18 | 5 | 38% |
| Tax | 713 | 503 | 70.5% | 8 | 13 | 5 | 63% |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that will refer to the proposed loss tables for §2B1.1,§2F1.1, or §2T4.1. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases, including both cases with sentences affected by the policy change, and those left unaffected. Of the 10,175 cases sentenced under guidelines that reference the three loss tables, 115 were excluded due to incomplete guideline information. The proposed adjustment for "sophisticated means" was not factored into the analysis for theft or fraud cases. For fraud cases, it is believed that the three cases that currently receive the adjustment under §2F1.1(b)(5) (for "use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct..." ) would be eligible for this new enhancement for "sophisticated means". Eleven tax cases were affected by the proposed floor (of 12) for "sophisticated means".

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

# OPTION 2
## Table 2
## Sentencing Impact of Proposed Changes to Theft, Fraud, and Tax Guidelines[1]

| | Total Cases | Affected Cases | | | | | |
|---|---|---|---|---|---|---|---|
| | | Cases Affected | Percent Affected | Current Sentence Average (months) | Estimated Sentence Average (months) | Average Change (months) | Percent Change |
| **Changing the Loss Table, incorporating More Than Minimal Planning Adjustment into the Table, and adding an adjustment for Sophisticated Means with a value of +2 and a floor of 12** | | | | | | | |
| TOTAL | 9,980 | 7,520 | 75.4% | 11 | 16 | 5 | 45% |
| Zone A | 2,808 | 1,494 | 53.2% | 0 | 2 | 2 | N/A |
| Zone B | 2,241 | 1,618 | 72.2% | 2 | 5 | 3 | 150% |
| Zone C | 1,393 | 1,213 | 87.1% | 6 | 11 | 5 | 83% |
| Zone D | 3,538 | 3,195 | 90.3% | 22 | 29 | 7 | 32% |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that will refer to the proposed loss tables for §2B1.1,§2F1.1, or §2T4.1. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases, including both cases with sentences affected by the policy change, and those left unaffected. Of the 10,175 cases sentenced under guidelines that reference the three loss tables, 115 were excluded due to incomplete guideline information. Of the remaining 10,060, 80 were excluded due to missing zone information. The proposed adjustment for "sophisticated means" was not factored into the analysis for theft or fraud cases. For fraud cases, it is believed that the three cases that currently receive the adjustment under §2F1.1(b)(5) (for "use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct..." ) would be eligible for the new enhancement for "sophisticated means".

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

2 of

OPTION 2

Table 3

**Impact on Defendant's Sentence Zone Resulting From Proposed Changes to Theft, Fraud, and Tax Guidelines for All Cases[1]**

| | CURRENT | | ESTIMATED | | PERCENT CHANGE |
|---|---|---|---|---|---|
| | n | % | n | % | |
| TOTAL | 9,980 | 100.0 | 9,980 | 100.0 | |
| Zone A | 2,808 | 28.1 | 2,676 | 26.8 | -4.7 |
| Zone B | 2,241 | 22.5 | 1,709 | 17.1 | -23.7 |
| Zone C | 1,393 | 14.0 | 1,262 | 12.6 | -9.4 |
| Zone D | 3,538 | 35.5 | 4,333 | 43.4 | 22.5 |
| THEFT | 3,248 | 100.0 | 3,248 | 100.0 | |
| Zone A | 1,401 | 43.1 | 1,335 | 41.1 | -4.7 |
| Zone B | 779 | 24.0 | 619 | 19.1 | -20.5 |
| Zone C | 402 | 12.4 | 384 | 11.8 | -4.5 |
| Zone D | 666 | 20.5 | 910 | 28.0 | 36.6 |
| FRAUD | 6,041 | 100.0 | 6,041 | 100.0 | |
| Zone A | 1,202 | 19.9 | 1,185 | 19.6 | -1.4 |
| Zone B | 1,260 | 20.9 | 917 | 15.2 | -27.2 |
| Zone C | 901 | 14.9 | 767 | 12.7 | -14.9 |
| Zone D | 2,678 | 44.3 | 3,172 | 52.5 | 18.4 |
| TAX | 691 | 100.0 | 691 | 100.0 | |
| Zone A | 205 | 29.7 | 156 | 22.6 | -23.9 |
| Zone B | 202 | 29.2 | 173 | 25.0 | -14.4 |
| Zone C | 90 | 13.0 | 111 | 16.1 | 23.3 |
| Zone D | 194 | 28.1 | 251 | 36.3 | 29.4 |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that will refer to the proposed loss tables for §2B1.1,§2F1.1, or §2T4.1. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases in each zone, including both cases with sentences affected by the policy change, and those left unaffected. Of the 10,175 cases sentenced under guidelines that reference the three loss tables, 115 were excluded due to incomplete guideline information. Of the remaining 10,060, 80 were excluded due to missing zone information.

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

OPTION 2

Table 4

Sentencing Impact of Proposed Changes to Theft Guidelines[1]

| AMOUNT | Total Cases | Affected Cases | | | | | |
|---|---|---|---|---|---|---|---|
| | | Cases Affected | Percent Affected | Current Sentence Average (Months) | Estimated Sentence Average (Months) | Average Change (Months) | Percent Change |
| **TOTAL** | **3,250** | **2,163** | **66.6** | **7.1** | **10.9** | **3.8** | **53.5** |
| $100 or Less | 351 | 53 | 15.1 | 1.7 | 1.0 | -0.7 | -41.2 |
| More Than $100 | 354 | 105 | 29.7 | 1.8 | 1.2 | -0.6 | -33.3 |
| More Than $1,000 | 175 | 74 | 42.3 | 3.6 | 3.0 | -0.6 | -16.7 |
| More Than $2,000 | 394 | 385 | 97.7 | 2.1 | 2.1 | 0.0 | 0.0 |
| More Than $5,000 | 528 | 242 | 45.8 | 8.6 | 10.3 | 1.7 | 19.8 |
| More Than $12,500 | 481 | 344 | 71.5 | 3.5 | 7.2 | 3.7 | 105.7 |
| More Than $30,000 | 426 | 423 | 99.3 | 6.6 | 11.6 | 5.0 | 75.8 |
| More Than $70,000 | 221 | 218 | 98.6 | 8.9 | 16.6 | 7.7 | 86.5 |
| More Than $150,000 | 176 | 176 | 100.0 | 14.9 | 23.5 | 8.6 | 57.7 |
| More Than $350,000 | 75 | 74 | 98.7 | 19.5 | 28.7 | 9.2 | 47.2 |
| More Than $800,000 | 57 | 57 | 100.0 | 29.6 | 39.6 | 10.0 | 33.8 |
| More Than $2,500,000 | 11 | 11 | 100.0 | 24.8 | 32.5 | 7.7 | 31.0 |
| More Than $7,500,000 | 1 | 1 | 100.0 | 41.0 | 77.6 | 36.6 | 89.3 |
| More Than $20,000,000 | 0 | -- | -- | -- | -- | -- | -- |
| More Than $50,000,000 | 0 | -- | -- | -- | -- | -- | -- |
| More Than $100,000,000 | 0 | -- | -- | -- | -- | -- | -- |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that refer to the loss table in §2B1.1. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases, including both cases with sentences affected by the policy change, and those left unaffected. Of the 3,260 theft cases, 10 were excluded due to incomplete guideline information. Of the 2,168 cases affected by changes to the theft loss table, 5 were excluded due to incomplete guideline information. The proposed adjustment for "sophisticated means" was not factored into the analysis.

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

OPTION 2

Table 5

Sentencing Impact of Proposed Changes to the Fraud Guideline (§2F1.1)[1]

| AMOUNT | Total Cases | Affected Cases | | | | | |
|---|---|---|---|---|---|---|---|
| | | Cases Affected | Percent Affected | Current Sentence Average (Months) | Estimated Sentence Average (Months) | Average Change (Months) | Percent Change |
| **TOTAL** | **6,039** | **4,819** | **79.8** | **12.7** | **17.6** | **4.9** | **38.6** |
| $2,000 or Less | 738 | 347 | 47.0 | 3.4 | 2.8 | -0.6 | -17.6 |
| More Than $2,000 | 401 | 395 | 98.5 | 3.1 | 2.8 | -0.3 | -9.7 |
| More Than $5,000 | 667 | 254 | 38.1 | 3.7 | 4.1 | 0.4 | 10.8 |
| More Than $12,500 | 893 | 525 | 58.8 | 6.2 | 9.3 | 3.1 | 50.0 |
| More Than $30,000 | 989 | 983 | 99.4 | 8.8 | 13.0 | 4.2 | 47.7 |
| More Than $70,000 | 695 | 684 | 98.4 | 12.0 | 18.3 | 6.3 | 52.5 |
| More Than $150,000 | 639 | 633 | 99.1 | 15.0 | 22.4 | 7.4 | 49.3 |
| More Than $350,000 | 427 | 422 | 98.8 | 21.1 | 29.5 | 8.4 | 39.8 |
| More Than $800,000 | 341 | 332 | 97.4 | 27.9 | 37.4 | 9.5 | 34.1 |
| More Than $2,500,000 | 147 | 143 | 97.3 | 33.4 | 42.9 | 9.5 | 28.4 |
| More Than $7,500,000 | 68 | 67 | 98.5 | 45.2 | 57.9 | 12.7 | 28.1 |
| More Than $20,000,000 | 17 | 17 | 100.0 | 46.8 | 49.1 | 2.3 | 4.9 |
| More Than $50,000,000 | 14 | 14 | 100.0 | 90.3 | 105.0 | 14.7 | 16.3 |
| More Than $100,000,000 | 3 | 3 | 100.0 | 79.7 | 85.8 | 6.1 | 7.7 |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that refer to the loss table in §2F1.1. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases, including both cases with sentences affected by the policy change, and those left unaffected. Of the 6,087 fraud cases, 48 were excluded due to incomplete guideline information. Of the 4,849 cases affected by changes to the fraud loss table, 30 were excluded due to incomplete guideline information. The proposed adjustment for "sophisticated means" was not factored into the analysis. It is believed that at least the three cases that currently receive the adjustment under §2F1.1(b)(5) (for "use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct..." ) would receive this new enhancement for "sophisticated means".

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

OPTION 2

Table 6

Sentencing Impact of Proposed Changes to Tax Guidelines[1]

| AMOUNT | Total Cases | Affected Cases | | | | | |
|---|---|---|---|---|---|---|---|
| | | Cases Affected | Percent Affected | Current Sentence Average (Months) | Estimated Sentence Average (Months) | Average Change (Months) | Percent Change |
| **TOTAL** | **691** | **492** | **71.2** | **8.5** | **13.2** | **4.7** | **55.3** |
| $2,000 or Less | 54 | 7 | 13.0 | 0.0 | 2.6 | 2.6 | -- |
| More Than $2,000 | 23 | 6 | 26.1 | 0.0 | 1.0 | 1.0 | -- |
| More Than $5,000 | 96 | 34 | 35.4 | 2.1 | 2.9 | 0.8 | 38.1 |
| More Than $12,500 | 140 | 79 | 56.4 | 2.5 | 4.4 | 1.9 | 76.0 |
| More Than $30,000 | 163 | 159 | 97.5 | 4.8 | 8.4 | 3.6 | 75.0 |
| More Than $70,000 | 94 | 89 | 94.7 | 11.2 | 16.6 | 5.4 | 48.2 |
| More Than $150,000 | 48 | 47 | 97.9 | 13.3 | 21.0 | 7.7 | 57.9 |
| More Than $350,000 | 18 | 18 | 100.0 | 12.0 | 19.9 | 7.9 | 65.8 |
| More Than $800,000 | 34 | 32 | 94.1 | 21.6 | 30.3 | 8.7 | 40.3 |
| More Than $2,500,000 | 11 | 11 | 100.0 | 27.0 | 33.4 | 6.4 | 23.7 |
| More Than $7,500,000 | 8 | 8 | 100.0 | 29.1 | 40.0 | 10.9 | 37.5 |
| More Than $20,00,000 | 2 | 2 | 100.0 | 44.5 | 83.3 | 38.8 | 87.2 |
| More Than $50,00,000 | 0 | -- | -- | -- | -- | -- | -- |
| More Than $100,000,000 | 0 | -- | -- | -- | -- | -- | -- |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that refer to the loss table in §2T4.1. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases, including both cases with sentences affected by the policy change, and those left unaffected. Of the 713 tax cases, 22 were excluded due to incomplete guideline information. Of the 503 cases affected by changes to the tax loss table, 11 were excluded due to incomplete guideline information. Eleven tax cases were affected by the proposed floor (of 12) for "sophisticated means".

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

# Table 7
## Sentencing Impact of Proposed Changes to Fraud Referring Guidelines[1]
## Guideline § 2X6.1

| | AFFECTED CASES | | | | | | | Zone Impact | | |
|---|---|---|---|---|---|---|---|---|---|---|
| GUIDELINE | Total Cases | Cases Affected | Percent Affected | Current Sentence Average (Months) | Estimated Sentence Average (Months) | Average Change (Months) | Percent Change | Percent Decrease Zone | Percent Same Zone | Percent Increase Zone |
| TOTAL | 1,309 | 705 | 53.9 | 13.3 | 19.2 | 5.9 | 44.4 | 2.6 | 72.2 | 25.3 |
| §2B5.1 | 427 | 164 | 38.4 | 13.7 | 19.0 | 5.3 | 38.7 | 1.8 | 72.0 | 26.2 |
| §2B6.1 | 71 | 61 | 85.9 | 21.5 | 26.9 | 5.4 | 25.1 | 1.6 | 85.3 | 13.1 |
| §2F1.2 | 7 | 7 | 100.0 | 0.0 | 2.6 | 2.6 | -- | 0.0 | 71.4 | 28.6 |
| §2B4.1 | 65 | 44 | 67.7 | 14.2 | 24.6 | 10.4 | 73.2 | 4.6 | 75.0 | 20.5 |
| §2B3.3 | 6 | 3 | 50.0 | 8.0 | 11.0 | 3.0 | 37.5 | 0.0 | 100.0 | 0.0 |
| §2Q2.1 | 117 | 42 | 35.9 | 8.6 | 13.1 | 4.5 | 52.3 | 4.8 | 71.4 | 23.8 |
| §2C1.1 | 208 | 92 | 44.2 | 21.1 | 29.7 | 8.6 | 40.8 | 7.6 | 90.2 | 2.2 |
| §2C1.2 | 35 | 10 | 28.6 | 20.2 | 24.5 | 4.3 | 21.3 | 0.0 | 90.0 | 10.0 |
| §2C1.7 | 21 | 16 | 76.2 | 19.9 | 26.3 | 6.4 | 32.2 | 6.3 | 93.8 | 0.0 |
| §2E5.1 | 26 | 18 | 69.2 | 32.9 | 43.4 | 10.5 | 31.9 | 5.6 | 83.3 | 11.1 |
| §2G2.2 | 5 | 4 | 80.0 | 37.5 | 42.8 | 5.3 | 14.1 | 0.0 | 100.0 | 0.0 |
| §2G3.1 | 0 | -- | -- | -- | -- | -- | -- | -- | -- | -- |
| §2G3.2 | 0 | -- | -- | -- | -- | -- | -- | -- | -- | -- |
| §2B5.3 | 90 | 55 | 61.1 | 3.5 | 8.8 | 5.3 | 151.4 | 0.0 | 41.8 | 58.2 |
| §2S1.3 | 231 | 189 | 81.8 | 7.6 | 11.9 | 4.3 | 56.6 | 0.5 | 63.0 | 36.5 |
| §2B2.3 | 0 | -- | -- | -- | -- | -- | -- | -- | -- | -- |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that refer to the loss table in §2F1.1, excluding guideline §2F1.1, itself. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases, including both cases with sentences affected by the policy change, and those left unaffected.

[2]The zone impact is included to give some indication of the difference in incarcerative alternatives available at sentencing.

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

## OPTION 3
## Amendment Impact Summary
## Theft, Fraud, and Tax Amendment

The "Option 3" tables present the results of an analysis using the USSC Prison Impact Model to determine the sentencing impact of altering the loss tables in accordance with the Third Option (originally proposed April 18, 1997). Tables 1-6 display the impact of the change in the loss table for cases sentenced under §2F1.1 (fraud), as well as all cases sentenced under guidelines that refer to the loss tables in either §2B1.1 (theft) or §2T4.1 (tax). The effects of two other proposed changes have been considered simultaneously with the change to the table, the elimination of the "more than minimal planning" enhancement in the theft and fraud guidelines and the amendment to the "sophisticated means" enhancement in the tax guidelines. Table 7 displays the impact of the creation of a new loss table (§2X6.1) for cases sentenced under guidelines that referenced the loss table in §2F1.1.

With the exception of Table 3, all of the tables give the percent of cases affected by the proposed amendment in each relevant sub-group. It is important to consider these percentages when analyzing the associated sentence impacts. Table 3 displays the effect of the proposed amendment on the distribution of cases across zones, including both cases that were affected and those that were unaffected.

- 7,508 cases will be affected out of 10,060 sentenced under the relevant guidelines.
- For all affected cases, average sentences will increase 30% from 10 months to 13 months. (For all cases sentenced under the relevant guidelines, sentences will increase 22%.)
    - For all affected Theft cases, sentences will increase 33% from 6 months to 8 months.
    - For affected Fraud (§2F1.1) cases, sentences will increase 23% from 13 to 16 months.
    - *For affected Fraud "Reference" (non-§2F1.1) cases, sentences will increase 35% from 17 to 23 months.*
    - For all affected Tax cases, sentences will increase 44% from 9 to 13 months.
- *1,637 total additional prison beds will be required within five years.*

*Italicized findings include results of impact analysis using the proposed table (§2X6.1) for fraud referring guidelines.*

# OPTION 3
## Table 1
## Sentencing Impact of Proposed Changes to Theft, Fraud, and Tax Guidelines[1]

| | | Affected Cases | | | | | |
|---|---|---|---|---|---|---|---|
| | Total Cases | Cases Affected | Percent Affected | Current Sentence Average (months) | Estimated Sentence Average (months) | Average Change (months) | Percent Change |
| **Changing the Loss Table, incorporating More Than Minimal Planning Adjustment into the Table, and adding an adjustment for Sophisticated Means with a value of +2 and a floor of 12** | | | | | | | |
| TOTAL | 10,060 | 7,508 | 74.6% | 10 | 13 | 3 | 30% |
| Theft | 3,260 | 2,452 | 75.2% | 6 | 8 | 2 | 33% |
| Fraud | 6,087 | 4,567 | 75.0% | 13 | 16 | 3 | 23% |
| Tax | 713 | 489 | 68.6% | 9 | 13 | 4 | 44% |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that will refer to the proposed loss tables for §2B1.1,§2F1.1, or §2T4.1. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases, including both cases with sentences affected by the policy change, and those left unaffected. Of the 10,175 cases sentenced under guidelines that reference the three loss tables, 115 were excluded due to incomplete guideline information. The proposed adjustment for "sophisticated means" was not factored into the analysis for theft or fraud cases. For fraud cases, it is believed that the three cases that currently receive the adjustment under §2F1.1(b)(5) (for "use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct..." ) would be eligible for this new enhancement for "sophisticated means". Eleven tax cases were affected by the proposed floor (of 12) for "sophisticated means".

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

3

## OPTION 3
### Table 2
### Sentencing Impact of Proposed Changes to Theft, Fraud, and Tax Guidelines[1]

| | Total Cases | Affected Cases | | | | | |
|---|---|---|---|---|---|---|---|
| | | Cases Affected | Percent Affected | Current Sentence Average (months) | Estimated Sentence Average (months) | Average Change (months) | Percent Change |
| **Changing the Loss Table, incorporating More Than Minimal Planning Adjustment into the Table, and adding an adjustment for Sophisticated Means with a value of +2 and a floor of 12** | | | | | | | |
| TOTAL | 9,980 | 7,508 | 75.2% | 10 | 13 | 3 | 30% |
| Zone A | 2,808 | 1,905 | 67.8% | 0 | 1 | 1 | N/A |
| Zone B | 2,241 | 1,492 | 66.6% | 2 | 3 | 1 | 50% |
| Zone C | 1,393 | 1,056 | 75.8% | 6 | 9 | 3 | 50% |
| Zone D | 3,538 | 3,055 | 86.3% | 22 | 27 | 5 | 23% |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that will refer to the proposed loss tables for §2B1.1,§2F1.1, or §2T4.1. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases, including both cases with sentences affected by the policy change, and those left unaffected. Of the 10,175 cases sentenced under guidelines that reference the three loss tables, 115 were excluded due to incomplete guideline information. Of the remaining 10,060, 80 were excluded due to missing zone information. The proposed adjustment for "sophisticated means" was not factored into the analysis for theft or fraud cases. For fraud cases, it is believed that the three cases that currently receive the adjustment under §2F1.1(b)(5) (for "use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct..." ) would be eligible for the new enhancement for "sophisticated means".

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

OPTION 3

Table 3

Impact on Defendant's Sentence Zone Resulting From Proposed Changes to Theft, Fraud, and Tax Guidelines for All Cases[1]

| | CURRENT | | ESTIMATED | | PERCENT CHANGE |
|---|---|---|---|---|---|
| | n | % | n | % | |
| TOTAL | 9,980 | 100.0 | 9,980 | 100.0 | |
| Zone A | 2,808 | 28.1 | 3,244 | 32.5 | 15.5 |
| Zone B | 2,241 | 22.5 | 1,708 | 17.1 | -23.8 |
| Zone C | 1,393 | 14.0 | 1,049 | 10.5 | -24.7 |
| Zone D | 3,538 | 35.5 | 3,979 | 39.9 | 12.5 |
| THEFT | 3,248 | 100.0 | 3,248 | 100.0 | |
| Zone A | 1,401 | 43.1 | 1,559 | 48.0 | 11.3 |
| Zone B | 779 | 24.0 | 594 | 18.3 | -23.7 |
| Zone C | 402 | 12.4 | 291 | 9.0 | -27.6 |
| Zone D | 666 | 20.5 | 804 | 24.8 | 20.7 |
| FRAUD | 6,041 | 100.0 | 6,041 | 100.0 | |
| Zone A | 1,202 | 19.9 | 1,529 | 25.3 | 27.2 |
| Zone B | 1,260 | 20.9 | 933 | 15.4 | -26.0 |
| Zone C | 901 | 14.9 | 643 | 10.6 | -28.6 |
| Zone D | 2,678 | 44.3 | 2,936 | 48.6 | 9.6 |
| TAX | 691 | 100.0 | 691 | 100.0 | |
| Zone A | 205 | 29.7 | 156 | 22.6 | -23.9 |
| Zone B | 202 | 29.2 | 181 | 26.2 | -10.4 |
| Zone C | 90 | 13.0 | 115 | 16.6 | 27.8 |
| Zone D | 194 | 28.1 | 239 | 34.6 | 23.2 |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that will refer to the proposed loss tables for §2B1.1,§2F1.1, or §2T4.1. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases in each zone, including both cases with sentences affected by the policy change, and those left unaffected. Of the 10,175 cases sentenced under guidelines that reference the three loss tables, 115 were excluded due to incomplete guideline information. Of the remaining 10,060, 80 were excluded due to missing zone information.

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

OPTION 3

Table 4

Sentencing Impact of Proposed Changes to Theft Guidelines[1]

| AMOUNT | Total Cases | Affected Cases | | | | | |
|---|---|---|---|---|---|---|---|
| | | Cases Affected | Percent Affected | Current Sentence Average (Months) | Estimated Sentence Average (Months) | Average Change (Months) | Percent Change |
| TOTAL | 3,250 | 2,447 | 75.3 | 5.6 | 7.5 | 1.9 | 33.9 |
| $2,000 or Less | 880 | 718 | 81.6 | 1.6 | 1.9 | 0.3 | 18.8 |
| More Than $2,000 | 394 | 240 | 60.9 | 2.7 | 1.9 | -0.8 | -29.6 |
| More Than $5,000 | 438 | 281 | 64.2 | 2.7 | 2.0 | -0.7 | -25.9 |
| More Than $10,000 | 383 | 374 | 97.7 | 3.2 | 3.0 | -0.2 | -6.3 |
| More Than $20,000 | 396 | 104 | 26.3 | 2.9 | 8.2 | 5.3 | 182.8 |
| More Than $40,000 | 251 | 225 | 89.6 | 8.5 | 11.9 | 3.4 | 40.0 |
| More Than $80,000 | 258 | 257 | 99.6 | 10.4 | 17.1 | 6.7 | 64.4 |
| More Than $200,000 | 140 | 139 | 99.3 | 16.0 | 23.2 | 7.2 | 45.0 |
| More Than $500,000 | 65 | 64 | 98.5 | 23.6 | 30.1 | 6.5 | 27.5 |
| More Than $1,200,000 | 33 | 33 | 100.0 | 29.2 | 38.2 | 9.0 | 30.8 |
| More Than $2,500,000 | 11 | 11 | 100.0 | 24.8 | 32.5 | 7.7 | 31.0 |
| More Than $7,500,000 | 1 | 1 | 100.0 | 41.0 | 77.6 | 36.6 | 89.3 |
| More Than $20,000,000 | 0 | -- | -- | -- | -- | -- | -- |
| More Than $50,000,000 | 0 | -- | -- | -- | -- | -- | -- |
| More Than $100,000,000 | 0 | -- | -- | -- | -- | -- | -- |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that refer to the loss table in §2B1.1. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases, including both cases with sentences affected by the policy change, and those left unaffected. Of the 3,260 theft cases, 10 were excluded due to incomplete guideline information. Of the 2,452 cases affected by changes to the theft loss table, 5 were excluded due to incomplete guideline information. The proposed adjustment for "sophisticated means" was not factored into the analysis.

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

OPTION 3

Table 5

Sentencing Impact of Proposed Changes to the Fraud Guideline (§2F1.1)[1]

| AMOUNT | Total Cases | Affected Cases | | | | | |
|---|---|---|---|---|---|---|---|
| | | Cases Affected | Percent Affected | Current Sentence Average (Months) | Estimated Sentence Average (Months) | Average Change (Months) | Percent Change |
| **TOTAL** | **6,039** | **4,540** | **75.2** | **12.8** | **16.1** | **3.3** | **25.8** |
| **$2,000 or Less** | 738 | 347 | 47.0 | 3.4 | 2.8 | -0.6 | -17.6 |
| **More Than $2,000** | 401 | 281 | 70.1 | 3.5 | 2.3 | -1.2 | -34.3 |
| **More Than $5,000** | 518 | 404 | 78.0 | 4.2 | 3.1 | -1.1 | -26.2 |
| **More Than $10,000** | 635 | 619 | 97.5 | 6.4 | 5.5 | -0.9 | -14.1 |
| **More Than $20,000** | 805 | 107 | 13.3 | 2.4 | 7.6 | 5.2 | 216.7 |
| **More Than $40,000** | 719 | 599 | 83.3 | 10.0 | 13.0 | 3.0 | 30.0 |
| **More Than $80,000** | 822 | 808 | 98.3 | 12.5 | 17.9 | 5.4 | 43.2 |
| **More Than $200,000** | 601 | 597 | 99.3 | 17.1 | 22.6 | 5.5 | 32.2 |
| **More Than $500,000** | 334 | 324 | 97.0 | 23.6 | 29.6 | 6.0 | 25.4 |
| **More Than $1,200,000** | 217 | 210 | 96.8 | 28.7 | 37.7 | 9.0 | 31.4 |
| **More Than $2,500,000** | 147 | 143 | 97.3 | 33.4 | 42.9 | 9.5 | 28.4 |
| **More Than $7,500,000** | 68 | 67 | 98.5 | 45.2 | 57.9 | 12.7 | 28.1 |
| **More Than $20,000,000** | 17 | 17 | 100.0 | 46.8 | 49.1 | 2.3 | 4.9 |
| **More Than $50,000,000** | 14 | 14 | 100.0 | 90.3 | 105.0 | 14.7 | 16.3 |
| **More Than $100,000,000** | 3 | 3 | 100.0 | 79.7 | 85.8 | 6.1 | 7.7 |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that refer to the loss table in §2F1.1. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases, including both cases with sentences affected by the policy change, and those left unaffected. Of the 6,087 fraud cases, 48 were excluded due to incomplete guideline information. Of the 4,567 cases affected by changes to the fraud loss table, 27 were excluded due to incomplete guideline information. The proposed adjustment for "sophisticated means" was not factored into the analysis. It is believed that at least the three cases that currently receive the adjustment under §2F1.1(b)(5) (for "use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct..." ) would receive this new enhancement for "sophisticated means".

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

OPTION 3

Table 6

Sentencing Impact of Proposed Changes to Tax Guidelines[1]

| AMOUNT | Total Cases | Affected Cases | | | | | |
|---|---|---|---|---|---|---|---|
| | | Cases Affected | Percent Affected | Current Sentence Average (Months) | Estimated Sentence Average (Months) | Average Change (Months) | Percent Change |
| TOTAL | 691 | 479 | 69.3 | 8.5 | 12.7 | 4.2 | 49.4 |
| $2,000 or Less | 54 | 7 | 13.0 | 0.0 | 2.6 | 2.6 | -- |
| More Than $2,000 | 23 | 6 | 26.1 | 0.0 | 1.0 | 1.0 | -- |
| More Than $5,000 | 96 | 34 | 35.4 | 2.1 | 2.9 | 0.8 | 38.1 |
| More Than $12,500 | 140 | 79 | 56.4 | 2.5 | 4.4 | 1.9 | 76.0 |
| More Than $30,000 | 176 | 159 | 90.3 | 4.8 | 8.4 | 3.6 | 75.0 |
| More Than $80,000 | 101 | 96 | 95.1 | 11.3 | 16.1 | 4.8 | 42.5 |
| More Than $200,000 | 39 | 38 | 97.4 | 16.1 | 22.5 | 6.4 | 39.8 |
| More Than $500,000 | 20 | 19 | 95.0 | 18.2 | 23.8 | 5.6 | 30.8 |
| More Than $1,200,000 | 21 | 20 | 95.2 | 20.8 | 27.9 | 7.1 | 34.1 |
| More Than $2,500,000 | 11 | 11 | 100.0 | 27.0 | 33.4 | 6.4 | 23.7 |
| More Than $7,500,000 | 8 | 8 | 100.0 | 29.1 | 40.0 | 10.9 | 37.5 |
| More Than $20,000,000 | 2 | 2 | 100.0 | 44.5 | 83.3 | 38.8 | 87.2 |
| More Than $50,000,000 | 0 | -- | -- | -- | -- | -- | -- |
| More Than $100,000,000 | 0 | -- | -- | -- | -- | -- | -- |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that refer to the loss table in §2T4.1. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases, including both cases with sentences affected by the policy change, and those left unaffected. Of the 713 tax cases, 22 were excluded due to incomplete guideline information. Of the 489 cases affected by changes to the tax loss table, 10 were excluded due to incomplete guideline information. Eleven tax cases were affected by the proposed floor (of 12) for "sophisticated means".

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

## Table 7

## Sentencing Impact of Proposed Changes to Fraud Referring Guidelines[1]

## Guideline § 2X6.1

| | | AFFECTED CASES | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | Zone Impact | | |
| GUIDELINE | Total Cases | Cases Affected | Percent Affected | Current Sentence Average (Months) | Estimated Sentence Average (Months) | Average Change (Months) | Percent Change | Percent Decrease Zone | Percent Same Zone | Percent Increase Zone |
| TOTAL | 1,309 | 478 | 36.5 | 16.8 | 22.9 | 6.1 | 36.3 | 2.6 | 72.2 | 25.3 |
| §2B5.1 | 427 | 80 | 18.7 | 19.0 | 24.8 | 5.8 | 30.5 | 1.8 | 72.0 | 26.2 |
| §2B6.1 | 71 | 51 | 71.8 | 24.8 | 29.6 | 4.8 | 19.4 | 1.6 | 85.3 | 13.1 |
| §2F1.2 | 7 | 7 | 100.0 | 0.0 | 1.7 | 1.7 | -- | 0.0 | 71.4 | 28.6 |
| §2B4.1 | 65 | 37 | 56.9 | 16.5 | 26.9 | 10.4 | 63.0 | 4.6 | 75.0 | 20.5 |
| §2B3.3 | 6 | 3 | 50.0 | 8.0 | 9.0 | 1.0 | 12.5 | 0.0 | 100.0 | 0.0 |
| §2Q2.1 | 117 | 23 | 19.7 | 12.6 | 16.5 | 3.9 | 31.0 | 4.8 | 71.4 | 23.8 |
| §2C1.1 | 208 | 66 | 31.7 | 25.7 | 35.9 | 10.2 | 39.7 | 7.6 | 90.2 | 2.2 |
| §2C1.2 | 35 | 10 | 28.6 | 20.2 | 23.0 | 2.8 | 13.9 | 0.0 | 90.0 | 10.0 |
| §2C1.7 | 21 | 14 | 66.7 | 21.5 | 28.1 | 6.6 | 30.7 | 6.3 | 93.8 | 0.0 |
| §2E5.1 | 26 | 15 | 57.7 | 38.7 | 49.3 | 10.6 | 27.4 | 5.6 | 83.3 | 11.1 |
| §2G2.2 | 5 | 4 | 80.0 | 37.5 | 42.8 | 5.3 | 14.1 | 0.0 | 100.0 | 0.0 |
| §2G3.1 | 0 | -- | -- | -- | -- | -- | -- | -- | -- | -- |
| §2G3.2 | 0 | -- | -- | -- | -- | -- | -- | -- | -- | -- |
| §2B5.3 | 90 | 36 | 40.0 | 4.9 | 10.3 | 5.4 | 110.2 | 0.0 | 41.8 | 58.2 |
| §2S1.3 | 231 | 132 | 57.1 | 9.4 | 13.5 | 4.1 | 43.6 | 0.5 | 63.0 | 36.5 |
| §2B2.3 | 0 | -- | -- | -- | -- | -- | -- | -- | -- | -- |

[1]The U.S. Sentencing Commission's Prison Impact Model was applied to all cases sentenced during FY1996 under guidelines that refer to the loss table in §2F1.1, excluding guideline §2F1.1, itself. This model assigns a loss amount to each case corresponding to the adjustment received for loss and calculates a new sentence based on changes to the loss table. The numbers in the table reflect the total number of cases, including both cases with sentences affected by the policy change, and those left unaffected.

[2]The zone impact is included to give some indication of the difference in incarcerative alternatives available at sentencing.

SOURCE: U.S. Sentencing Commission, 1996 Datafile, MONFY96.

# WRITTEN TESTIMONY
## MARCH 5, 1998
## PUBLIC HEARING
### 1998 AMENDMENT CYCLE

*United States Sentencing Commission* *March 1998*

# INDEX TO WRITTEN TESTIMONY
# MARCH 5, 1998 HEARING, SAN FRANCISCO, CA
# 1998 PROPOSED AMENDMENTS
# TO FRAUD, THEFT, AND TAX GUIDELINES

AMENDMENT/AUTHOR OF SUBMISSION — PAGE

PUBLISHED JANUARY 6, 1998

# Testimony

## Before the United States Sentencing Commission

## March 5, 1998, San Francisco, CA

******

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United States Attorney, Western District of Washington

and

Mary C. Spearing
Chief, Fraud Section, Criminal Division
Department of Justice

Mr. Chairman and members of the Commission,

We are pleased to appear before you today to discuss the proposed amendments to the fraud and theft guidelines. We appreciate the Commission's efforts to address the important area of fraud and theft and to search for ways to improve the guidelines that affect these cases. We also appreciate the parallel efforts to address the tax guidelines. Our comments will focus on the three areas of the Commission's inquiry today: the loss tables, more than minimal planning and sophisticated means as sentencing factors, and finally, the definition of loss.

As an initial matter, we urge the Commission to move ahead to revise the loss tables and, at the same time, enact the changes closely related to that revision. These changes would include amendments regarding more than minimal planning, the sophisticated means enhancement, and the referring guideline amendments. The Commission has received extensive public input on these issues over multiple guideline cycles. These issues are ripe for decision.

In contrast, we are concerned that the loss definition issues are being rushed to decision without sufficient study and public input. As we believe changing the loss definition is not integral to changes in the tables, we caution the Commission to move slowly in its consideration of a wholesale revision to the loss definition. We support the amendment of the tables in this amendment cycle and remain ready and willing to

work with the Commission on the complex definition issue regarding loss in the upcoming year.

## LOSS TABLES

Turning to the proposed revision of the fraud and theft loss tables, we applaud the Commission for recognizing the importance of improving the tables that, to a significant extent, control the sentences applicable to a myriad of white collar offenses.

The Commission has proposed two options to amend the loss tables in the fraud and theft guidelines and is also considering a third option developed in April 1997. Recognizing that all of the options improve the current sentencing structure, the Department prefers Option 2 especially in the mid- to high-dollar range, where it increases sentences more quickly for offenses at dollar amounts between $70,000 and $1.2 million. Offenses at these levels are serious and common. The loss amount for approximately one-fourth of the defendants sentenced in fiscal year 1996 under guideline §2F1.1 fell within this range. Option 2 would place an offender who commits a fraud of just over $70,000 at offense level 16 (21-27 months of imprisonment for a first offender or 12-18 months with a three-level reduction for acceptance of responsibility) and one who commits a $1.2 million fraud at level 22

(41-51 months or 30-37 months with a three-level reduction for acceptance), with graduated increases between.

By contrast, Options 1 and 3 rise more slowly for offenders in the $70,000 to $1.2 million range. For example, both of these options would place a defendant whose offense involved just over $70,000 at offense level 14 (15-21 months or even a split sentence with as little as five months of imprisonment after acceptance of responsibility) -- exactly where such an offender is under the current guideline if the offense involved more than minimal planning, as the vast majority do at this level. Similarly, at $1,000,000 Option 2 would result in an offense level of 22 (41-51 months or 30-37 months with a three-level reduction for acceptance), while Options 1 and 3 would produce offense level 20 (33-41 months or 24-30 months with a three-level reduction for acceptance), just one level above the current level with more than minimal planning.

To deter serious offenses in the range of $70,000 to $1.2 million, improvement in the fraud and theft loss tables is needed. All three options recognize this need where larger dollar amounts are involved: at amounts of $1.2 million and greater, all three options are the same and reflect significant increases over current sentences. We applaud the Commission in recognizing the seriousness of these extensive offenses and

urge the Commission to acknowledge the need for increases in the mid- to high range discussed.

## MORE THAN MINIMAL PLANNING AND SOPHISTICATED MEANS

We support the deletion of the enhancement for more than minimal planning or a scheme to defraud more than one victim. We view the deletion of these factors and their incorporation into the loss tables as a positive step in reducing litigation. However, the goal of reduced litigation will not be realized if courts are permitted to reduce sentences based on minimal planning.

We strongly oppose the addition of language providing a reduction in the offense level because of "limited or insignificant planning" or "simple efforts at concealment," as proposed. The table does not incorporate more than minimal planning at all offense levels; therefore no basis at all exists for a reduction at lower dollar amounts. More importantly, however, if minimal planning is allowed or not prohibited as a basis for departure, defendants will likely argue it as a matter of course. The result will be that minimal planning will become a frequent litigation issue, just as more than minimal planning has been a litigation issue under the current guidelines, and uneven results will be likely. The net effect will simply be to shift the burden from the prosecution to the defense, without eliminating the factor from consideration.

A balanced approach would be for the Commission to adopt language prohibiting a downward departure on the basis of minimal planning and upward departure on the basis of more than minimal planning, as presented by the Commission in an issue for comment. The promulgation of such language would signal to all parties that the Commission has adequately taken into account the issue of minimal planning and more than minimal planning, as reflected in the loss tables for fraud and theft. If, on the other hand the Commission remained silent on the departure issue, that silence will likely result in litigation as defendants and prosecutors seek to test the views of the courts of appeals on minimal planning as a basis for downward departure and more than minimal planning as a basis for upward departure. This is an issue the Commission can decide before a circuit conflict develops.

The Commission has also proposed a specific offense characteristic providing a two-level increase for sophisticated concealment or for either sophisticated concealment or commission of the offense from outside the United States. An enhancement for sophisticated means used to impede the discovery of the existence or extent of the offense currently is found in the tax evasion guideline, §2T1.1(b)(2). The proposed new factor for the fraud and theft guidelines would expand an existing specific offense characteristic in the fraud guideline, which provides a floor of offense level 12 if an offense "involved the use of foreign bank accounts or transactions to

conceal the true nature or extent of the fraudulent conduct." USSG §2F1.1(b)(5). The proposed enhancement would broaden this concept to apply to other means besides the use of foreign bank accounts or transactions aimed at concealing the fraudulent conduct and would provide for a two-level enhancement above level 12 as well.

Two options are presented. We prefer the one that specifically provides for the commission of the offense from outside the United States. We also recommend that the proposed specific offense characteristic for theft and fraud be as close to the tax provision on this issue as possible so that the existing body of case law on the current tax guideline can apply to the proposed addition of this factor to the theft and fraud guidelines.

## LOSS DEFINITION

We understand that the purpose of revising the loss definition is to simplify the fraud and theft guidelines, to reduce litigation, and to reflect better the seriousness of the offense and the culpability of the offender. We appreciate the Commission's efforts at simplification. We also appreciate that the proposed loss definition expands coverage in a significant way that we regard as a positive step by the Commission. The current commentary to the guidelines limits consequential damages to two classes of offenses -- defense procurement fraud and product substitution cases. USSG

§2F1.1, comment. (n.7(c)). By contrast, the proposed definition is not so limited and includes reasonably foreseeable harm resulting from any fraud or theft offense. This broader approach should provide a more accurate view of the seriousness of the offense in many cases.

Nonetheless, we fear that the proposed definition, rather than reducing the amount of litigation, may have precisely the opposite effect and that practically every detail of the loss definition will involve new issues for the courts. Unlike the tables, as to which the Commission has received substantial and detailed public comment, the loss definition should be the subject of more time and study before it is entirely rewritten by the Commission. However, if the Commission is intent upon amending the definition of loss this amendment cycle, we would like to work with the Commission to address several significant issues, including the treatment of gain, credits against loss, and departures.

Gain. As to gain, we believe that it can be a useful tool in determining the seriousness of an offense and can serve as a proxy for loss in cases where the extent or risk of loss cannot readily be shown. Such cases would include, for example, food and drug offenses and other crimes that violate a regulatory scheme. Actual loss may be little in such cases, but the risk of severe harms and thereby loss may be great --

which is why the regulatory scheme exists. The gain produced by the offense is one means of measuring the extent of the offense and the defendant's culpability.

Ensuring that gain may be used as the measure of harm when it is greater than the reasonably calculable loss would be consistent with the treatment of gain in the organizational guidelines, where the fine is based on the greatest of the amount from the relevant table, the pecuniary gain to the organization from the offense, or the pecuniary loss from the offense to the extent it was caused intentionally, knowingly, or recklessly. USSG §8C2.4. To assure that the loss definition guarantees the use of gain as a measure of the harm in appropriate cases, we urge the Commission to include gain in the general rule in Note 2(A), rather than in the provisions on the determination of loss in Note 2(B). As proposed, Note 2(B) treats gain as one of six factors the court is directed to use in making a reasonable estimate of the amount of the loss. This provision may be subject to arguments that it provides a measure of flexibility that would allow the sentencing judge to ignore gain, even where it is shown to be greater than loss. Alternatively, the Commission could amend the introductory portion of Note 2(B) to impose a hierarchy in applying the various formulations of loss that would clarify when gain and other factors are to be used as the basis for determining loss in cases where several factors might apply.

We are also concerned that the Commission's proposed treatment of gain may inadvertently result in the use of gain to limit the measure of harm. Proposed Note 2(B)(vi) sets forth the following provision defining gain as a factor to be used in the determination of loss: "The gain to the defendant and other persons for whose conduct the defendant is accountable under §1B1.3, if gain is greater than loss or if loss is difficult or impossible to determine." Under this provision defendants may argue in a case in which loss is difficult to prove that the court should rely on gain as a measure of the harm caused by the offense, despite the fact that the government is prepared to show a greater loss. We do not believe the Commission intends this result. Therefore, proposed Note 2(B)(vi) should be amended to limit the use of gain in cases where loss is difficult or impossible to determine to situations where loss as measured is likely to underestimate the harm from the offense.

Credits Against Loss. Another concern we have with the proposed loss definition relates to the issue of computing credits against loss. Proposed Note 2(C) would instruct the court in determining the amount of loss to "credit an amount equal to the value of the economic benefit the defendant transferred to the victim before the defendant knew or had reason to believe that the offense had been detected." This provision will likely result in litigation in every case. Issues will be raised as to whether the defendant provided an economic benefit, the value of the benefit, and the timing of the defendant's action. While the current rule recognizes credits in certain

types of cases, such as product substitution, the proposed rule makes the credit theory potentially applicable to all frauds and thefts. For example, telemarketers often provide trinkets to their victims to lure them into telemarketing schemes. The items provided have no real value relative to what the victim paid, but the proposed rule will create litigation regarding the value of such items as grocery store coupons and phony Rolex watches.

The proposed credits rule fails to reflect that some items or services may carry no economic benefit to the victim even though there may be some intrinsic market value. For example, in a product substitution case involving orange sugar water sold as orange juice, the water carries no value when labeled as orange juice. Yet under the proposed rule, as well as the current commentary on product substitution, USSG §2F1.1, comment. (n.7(a)), defendants will argue that there is value to the sugar water sold as orange juice. This problem might be rectified by the addition of language at the end of the second paragraph of proposed Note 2(C) such as: "The 'economic benefit' should be considered in light of the victim's intended transaction and may be zero even though some economic benefit would have been present in the absence of a fraud or theft."

The proposed credits rule also presents a problem with regard to property pledged or otherwise provided as collateral. The proposed rule states that the value of

the economic benefit is its fair market value as of the time the defendant transferred it to the victim, except that value of pledged or otherwise provided collateral is the amount that has been recovered as of the time of sentencing or its fair market value if it has not been disposed of by the time of sentencing. This exception for collateral works well when property decreases in value and a bank that was the victim of a fraudulent loan application recovers only a portion of the amount originally pledged. However, where the value of the collateral stays the same or increases, the credit will eliminate loss, and the fraud will result in an offense level of six, regardless of whether the defendant placed the bank at risk with respect to a $50,000 loan or a $5 million loan. We recommend that the Commission include language, such as that presently found in Note 7(b), recognizing that in such a case the loss may understate the seriousness of the offense.

Departures. Our final major concern with the loss definition is the section on downward departure considerations in proposed Note 2(G). The proposed bases for downward departure are overly broad and are not limited to factors that signify an unusual case. For example, the first -- the fact that a primary objective of the offense was a mitigating, non-monetary objective -- is likely to arise in every prosecution of a corporate executive, who will claim that his or her actions were motivated not by personal greed but by a desire to keep the company afloat and to retain jobs for employees.

The three following downward departure considerations all reflect a troubling inconsistency with the general rules on loss and credits against loss. The first of these -- that the offense was committed in such an inept manner that no reasonable likelihood existed that any harm could have occurred -- is at best questionable where reasonably foreseeable harm in fact occurs. In any case, it seems to run counter to the notion that loss should be measured by the reasonably foreseeable harm resulting from the offense, or the intended harm "even if the harm intended to be caused would have been unlikely or impossible to accomplish ..." as set forth in proposed Note 2(A).

The next downward departure consideration is inconsistent with the general rules set forth on credits against loss. It suggests the appropriateness of a downward departure where the defendant made complete, or substantially complete, restitution prior to the detection of the offense. However, the provisions on credits against loss address this factor and reduce the amount of loss by the credit. This inconsistency suggests the Commission needs to review further when credits should be handled in the calculation of the loss amount and when they should serve as a ground for departure.

The last downward departure consideration is also inconsistent with the general rule set forth on the definition of loss. It provides for the appropriateness of a

downward departure where the loss was substantially increased by an improbable, intervening cause. However, if such a cause were reasonably foreseeable, the general rule would provide for the inclusion of losses so caused. Thus, the very factors that determine the definition are made bases for departure.

Additional Issues. We have several other concerns with the proposed loss definition that we would also urge the Commission to address. We prefer Option 2 regarding interest to Option 1 on opportunity costs and interest. Agreed-upon interest should be provided for in the guidelines, not a provision on upward departure, since the latter will produce uneven consequences for a commonly occurring factor. Some courts will choose to depart upward, while others will not in an identical case. Moreover, even Option 2 may be overly narrow in including only interest that has accrued and is unpaid at the time of sentencing.

We are troubled by the deletion of a special rule from the commentary to existing guideline §2B1.1 regarding protected computers. The current rule indicates that loss includes the reasonable cost to the victim of conducting a damage assessment, restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service. Even if the Commission intends for the general definition of loss to cover these items, the deletion of the special rule will likely give rise to arguments that the Commission does not intend such coverage.

Additionally, the proposed loss definition seems to be silent as to attempted and partially completed offenses, although the current guidelines are not. Reliance on "intended loss" may understate the harm that was reasonably foreseeable had the offense been completed in such cases. The failure to address this concern is another indication that more work is needed on the loss definition.

Despite our many concerns, we would like to continue working with the Commission to develop fraud, theft, and tax guidelines that will be workable and that will improve sentences for these offenses.

CORRECTED VERSION

# PREPARED REMARKS FOR THE UNITED STATES SENTENCING COMMISSION SAN FRANCISCO, CALIFORNIA, MARCH 5, 1998

JAMES A. BRUTON, III
WASHINGTON, D.C.

## Comments on Proposed Changes in the Tax Guidelines

1. **Introduction** -- This panel has been asked to comment on two sets of proposed amendments to the guidelines affecting the sentencing of tax cases. The proposals under Options 1 and 2 in the Proposed Guideline Amendments for Public Comment, and the recently circulated Option 3, essentially seek to raise and harmonize the loss calculations and the consequent sentences resulting under the fraud, theft, and tax guidelines. The Synopsis of Proposed Amendment states that "[t]he purpose of both options [and now presumably all three] is to raise penalties for economic offenses that have medium to high dollar losses in order to achieve better proportionality with the guideline penalties for other offenses of comparable seriousness."

These remarks are my own, but the members of the panel: Justin A.Thornton, Paula M. Junghans, and Charles M. Meadows, Jr. are all practitioners with extensive experience handling the sentencing aspects of tax cases. They have asked me to advise the Commission that, although our reasons may vary, we are in complete harmony in our bottom line recommendations. In this connection, we favor retaining the current tax loss table without regard to whether the fraud and theft loss tables are changed. We also agree that the 12 level increase for low tax loss offenses in both Options 1 and 2 for "sophisticated means" or "sophisticated concealment" should be rejected and that this specific offense characteristic should remain a two level increase at all tax loss levels. I will discuss some of our reasons

for urging these results, and the other panelists will be expressing their views after Mr. Matthews has had an opportunity to offer the Justice Department's view.

Prior to the November 1993 amendments the tax and fraud loss tables were essentially mirror images of each other. In 1993, the Commission severed this relationship at the request of the Justice Department's Tax Division and the Internal Revenue Service. I was one of the Justice Department representatives that appeared before the Commission, endorsing the view that the existing tax table should be adjusted upward to produce higher sentences for tax crimes regardless of what was done with the fraud table. In fact, during that amendment cycle the fraud table was not touched. The Commission nevertheless, adopted the Department of Justice and IRS's view that the tax table needed to be raised, and the existing tax table reflects those increases.

Today, I have the privilege of appearing before a new Chairman and a number of new members of the Commission -- again in support of the 1993 tax table. My 23 years of experience as a practitioner representing both the IRS and taxpayers convinces me that changing the tax table at this time is unnecessary, potentially harmful, and may not achieve "better proportionality" with the penalties for other offenses. As the supervisor of roughly 100 prosecutors in the Tax Division during the years 1989 through part of 1993, I helped compile the Tax Division's annual wish list for submission to this body. In most, if not all, of those years we urged one or another adjustment in the tax guidelines -- sometimes to respond to a troubling court decision and others to address practical problems prosecutors were having in the field -- always seeking change. I believe I was involved in requesting some change -- from minor tightening to a major change in the tax loss table -- in every

amendment cycle I was there. But I did not spend any time considering what change, even well-intentioned, rock-solid, impeccably logical change, does at the in-court, practitioner level where those changes have to be implemented.

One thing I did not foresee in 1993 was that in 1998 different guideline books would still govern the outcome of tax cases sentenced the same year. In fact, the Justice Department is still handling in 1998, and will be handling for the next couple years, cases that involve 1990, 1991, 1992, and conceivably earlier tax returns. Many of those cases will be sentenced using the pre-1993 tax loss table. As a result, the Commission's sentencing statistics are unlikely to reflect much experience using the 1993 tax loss table. Knowing how cases are sentenced under the current table, when all cases are sentenced under that table, would give the Commission better information about whether the tax table needs to be adjusted to make it proportional to the punishments for other offenses. But more significantly, two defendants charged with roughly similar crimes involving roughly similar dollar amounts can be sentenced on the same day under two different tax tables and receive disproportionate sentences. I have come to the firm conclusion that changing fundamental elements of the sentencing of tax offenses creates disproportionality within the sentencing of those offenses over time and creates the appearance of arbitrariness when the same tax offense for different tax years results in vastly different sentences.

Part of this results from skillful charge bargaining by prosecutors and defense counsel but the rest is an unavoidable consequence of the non-retroactivity rule. Today the Commission is being asked to consider and adopt one of three options that would markedly increase guideline levels for taxpayers who commit their offenses on returns filed after

November 1, 1998. Cases involving those returns will start entering the prosecution pipeline three or more years after that. Therefore, sentencing disparities and sharp charge bargaining to avoid the increases in the 1998 tax loss table will unavoidably span at least the next five years. In my view, it trivializes the sentencing guidelines when the length of a defendant's sentence is dependent upon the year the tax crime was committed, and I believe that the arithmetic problems the government will urge on the Commission -- i.e., not a high enough percentage of tax defendants go to prison for a long enough time -- can and ought to be remedied by the IRS's giving the courts more substantial cases and more thorough investigations to sentence.

**2. <u>Are the Sentences in Tax Cases too low?</u>**

**a. Attitude of the Sentencing Courts** --The A, B, and C ranges of the Sentencing Table provide the courts in the lower ranges of almost all tax offenses the flexibility to adjust the duration and terms of imprisonment to reflect the seriousness of the crime, the need for deterrence, the possibility of recidivism, and steps taken to redress the wrong. Although the Justice Department is unlikely ever to say so, it must either perceive that judges are uniformly biased against prison sentences in the smaller variety of tax cases or that these same judges are uniformly unenlightened as to their power to sentence tax offenses to prison at the upper end of the range. The Justice Department's apparent view is that the current tax guidelines are inadequate, because they do not *compel* courts to sentence low-range tax violators to prison rather than probation, home or community confinement, or some

other alternative to prison.[1]

When the guidelines permit a judge to sentence a tax defendant to probation, the judge, nevertheless, has the authority under the current tax table to sentence the defendant to prison in the upper end of the range. Option 2, favored by the Justice Department, is calculated to narrow the court's discretion to sentence a tax defendant to anything other than a full term of prison only in the most minuscule tax cases -- cases that are too small to meet the IRS's internal guidelines imposing dollar limits for recommending prosecution.

The available statistics reveal an almost uniform rejection by the district courts of prison sentences for low-end of the tax table violators. Part of this may be historic. Pre-guideline tax cases, even very large cases, most often resulted in probation. The original guidelines were intended to send a higher percentage of tax violators to prison, and it appears that they have. But they have done so at a time when the IRS's criminal enforcement program has been in severe decline. In the early 1970's, the IRS's criminal enforcement activities were almost exclusively directed to what were called "general program" cases. The program was focussed on investigating and prosecuting "pure" tax violations, unadorned by non-tax crimes, and on deterring the taxpaying public at large from engaging in tax fraud and

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[1] This view may be a consequence of prosecutors and IRS agents who have become accustomed to handling money laundering, currency, and related offenses and are jaded by the relatively severe prison sentences produced by those guidelines and the leverage they extend to the government. Unless an offense draws a lengthy, virtually mandatory sentence, these agents believe it is not worth investigating. But pandering to this "agents' mind-set" could easily undermine any systematic criminal enforcement of the tax laws, where the IRS cannot show that the reasonable judicial discretion contemplated by the current tax loss table has been harmful, rather than beneficial. It certainly does not justify increasing the tax loss table to shift discretion away from judges to prosecutors and agents in sentencing low-end tax cases.

evasion -- in sum, enforcing the tax laws exclusively. In the late 1970's or early 1980's, the Service began diverting its criminal agents' time away from general program cases to narcotics, organized crime, general white collar crime, and participation in a variety of criminal enforcement "task forces" with FBI and other law enforcement agencies. Today, despite efforts to reverse the trend, relatively few general program cases are developed, and the few that are prosecuted are of considerably lower quality than the cases developed by the IRS in past years.

Despite efforts to rejuvenate the general program by instituting "non-filer" initiatives or by attacking the "tax gap," the fact remains that the Service's criminal tax enforcement program appears to be at a loss for a rationale. This lack of a rationale has resulted in questionable case selection, low quality cases, disproportionate enforcement, and, most troubling of all, investigative short cuts. I have heard these concerns expressed by many tax prosecutors and CID agents and have absolutely no doubt that district court judges, who see the parade of cases produced by the Service today, are making their sentencing decisions in low-end cases based upon these same concerns. The inescapable perception that a low-end tax violator before the court is simply the victim of bad luck, while the IRS's own statistics reveal the existence of vast hordes of worse violators who are not even investigated, cannot give any judge confidence that he or she is doing justice by sending that violator to prison.

Upping the tax table at this juncture in the IRS's history is unlikely to help it restore rationality to its investigative program and may, in fact, be harmful. Tax crimes are different from other theft/fraud-type offenses largely because (1) they generally involve taxpayers' concealing their own income or assets from the IRS rather than affirmatively

taking anything from anybody;[2] (2) the vast majority of tax violators have no other criminal involvement and would never consider engaging in some other form of fraud, theft, or criminal wrongdoing; and (3) statistics show that tax violators -- in spite of the sentences the IRS finds so offensively low -- are extremely rare recidivists. Another practical difference, for the purpose of guideline sentencing, is the extensive role played by relevant conduct in computing tax loss. The guidelines allow the sentencing court to take into account losses in uncharged tax years, tax losses occurring outside the six-year statute of limitation, and the duration of a tax scheme. The IRS virtually always investigates and recommends prosecution of multiple-year cases. As a result, fair and proportionate calculation of tax loss and appropriate sentencing presupposes a thorough investigation of the offense charged and all relevant conduct.

For example, a taxpayer who makes $40,000 per year and is charged with evading $5,500 in one year may not at first blush appear to be an appropriate candidate for prison. But what if a thorough investigation reveals that the same taxpayer's scheme spanned eight years? Without a thorough investigation, the current tax table would initially produce level 8 and permit the court to sentence the taxpayer to probation. But with the benefit of a thorough investigation and all the facts, the court would sentence an eight year tax violator in level 13, facing almost certain prison and no chance for probation even with acceptance of responsibility. An increase in the tax loss table that rewards agents' poor case selection and sloppy or less-than-thorough investigations will do little to help the Service restore its

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[2] False refund cases, although nominally tax cases, are generally prosecuted as violations of 18 U.S.C. §§ 286 or 287 and are sentenced under the fraud guidelines using the fraud loss table in U.S.S.G. § 2F1.1.

enforcement program and risks making the punishment for such offenses less proportional with the severity of the sentences for the remaining handful of thorough investigations, tax offenses of shorter duration, and non-tax offenses generally.

**b. Role of Charge and Loss Bargaining --** The Commission's sentencing statistics for tax crimes reveal that a lower percentage of tax violators are sentenced to prison than the Department of Justice believes should be. What these statistics do not show is the extent to which this percentage is skewed by charge and loss bargaining to produce particular sentences. I have already mentioned the problem of incomplete investigations that prevent the sentencing court from knowing the full extent of the defendant's conduct. A related problem stems from the fact that tax offenses are often used to "plead down" more severe non-tax offenses to obtain cooperation or dispose of another type of offense. In task force investigations, tax offenses often appear as statistical add-ons to give the IRS some credit for participating in a joint effort. Today it is the rare case that is investigated and prosecuted as a tax violation without some other criminal involvement. In such cases, dispositions are achieved, not based on what is good for the tax enforcement program or the taxpaying public at large, but to achieve a preordained result for a non-tax purpose.

In addition, courts often see, indeed expect to see, cases in which a defendant is sentenced to an agreed upon tax loss. The process of disputing tax loss at a sentencing hearing is cumbersome and time consuming. As a result, prosecutors and agents agree, with considerable regularity, to present the sentencing court with an agreed-upon tax loss that effectively preordains a non-prison outcome. To the extent that the sentencing statistics reflect this phenomenon, reliance on the statistics to adjust the tax table upward would be

severely misleading and unfair to tax violators who cannot benefit from such agreements.

This poses a particularly troubling problem. We know that the overwhelming majority of tax cases result in pleas and that a large proportion of these are the result of bargains. This is a practical necessity, because tax trials consume disproportionality large amounts of court time. But when we use statistics generated as the result of such plea bargains to assess proportionality with the sentences for other tax offenses and non-tax offenses generally, we are likely to leave those who are unable to bargain with extraordinarily disproportionate sentences. If the Commission's sentencing statistics are at all skewed by charge and loss bargaining, is it reasonable to change the current tax table in the name of achieving some undefined, perhaps undefinable, proportionality?

In fact, raising the tax loss table under either formulation, together with the proposed changes in the "sophisticated means" or "sophisticated concealment" offense characteristics, will increase prosecutors' leverage, and tax defendants' incentive, to obtain more and earlier bargained-for pleas. There is no criminal tax defense lawyer alive who has not been told that if he or she does not plead the client immediately, the tax loss will increase with further investigation and sophisticated means will be added. The proposed increases in the tax loss table will raise the stakes and intensify pressure to work out some kind of early "deal." As a result, the Justice Department and IRS are likely to be back five years from now, after a stretch of rampant charge and loss bargaining, wringing their hands over statistics that continue to show that tax crimes produce too low a percentage of prison sentences or sentences that appear to them disproportionately low.

Perhaps the correct gauge of whether tax sentences are long enough or involve

enough prison would be to consider only cases tried to conviction. In those cases, the courts see the taxpayers' entire crime, and prosecutors have no incentive, and defendants no means, to hold anything back. With nothing more than anecdotal evidence to back me up, I am virtually certain that the percentage of substantial prison sentences in tax cases tried to conviction is extremely high. Of course, this manner of calculation would focus on an inordinately small number of cases. Change is certainly not warranted when we cannot determine with statistics and experience whether the current tax loss table is capable of generating appropriate, proportional results.

**c. Will raising the tax loss table deter tax fraud?**

In 1993, the primary reason the Tax Division and IRS urged for increasing the tax guidelines was that higher sentences for tax convictions would deter other taxpayers from doing the same. Every year more than 100 million tax returns are filed with the IRS, and IRS projects that each year there is a "tax gap" (an under-reporting and under-paying of taxes actually due) in excess of $100 billion. In enforcing the tax laws the IRS conducts civil audits to collect additional taxes and penalties for about 1% of the returns filed. Less than 1/100th of a percent of all returns are examined for criminal liability. Since it would be impossible to prosecute anywhere near all of the taxpayers who are believed to commit tax crimes, the historical focus of the IRS's criminal enforcement program had been careful, systematic case selection aimed at deterring other taxpayers from committing fraud.

When the IRS and I asked the Commission in 1993 to raise the guidelines to deter tax fraud, I was not asked whether I had any statistical or other support for my contention. I did not, and I suspect that Mr. Matthews still does not. The IRS has tried, but

has not been able to demonstrate persuasively, that the criminal prosecution of one taxpayer has ever resulted in greater tax collections from others. The more difficult, and again unanswerable, question is whether increasing *prison* sentences for the few haphazardly selected tax prosecutions now produced will result in greater collections from other taxpayers. One commentator, Professor Michael Graetz of Yale Law School, has suggested that greater investigative coverage by IRS criminal investigators, rather than the results of the few investigations conducted, would deter more would-be tax violators. In his non-statistical view, systematic investigative presence, not the size of the ultimate penalty creates deterrence. In fact, there is no statistical basis for determining whether the 1993 increase in guideline sentences has had the slightest impact on deterrence.

On the basis of the same intuitive, arithmetic argument we made in 1993, the Department of Justice now asks for a further, even more substantial increase. Perhaps, the argument should run that if we had only asked for and gotten more from the Commission in 1993 the tax gap would now be gone. If deterrence is the standard, we may never know when we have reached the one "right" level for the tax loss table, but increasing the tax loss table in the name of deterrence, without knowing whether the changes are likely to deter anyone from doing anything, hardly seems justified.

### 3. Sophisticated Means or Sophisticated Concealment?

The Commission is also considering another amendment consisting of two options relating to the "sophisticated means" specific offense characteristic found in several tax guidelines. Contrary to the statistics showing its application in only approximately 16% of all tax cases, experience tells us that this increase is threatened or used in most every tax

case and that very few of the more recent cases are not treated as "sophisticated." The change in definition proposed in Option 2 will probably only lead to litigation. Furthermore, neither Option appears definitively to resolve the question whether individual conduct or offense conduct of others ought to control.

Our primary concern with both of these options is the increase to offense level 12 for tax losses too small otherwise to generate a level 12. Under any of the three proposed tax loss tables, and even under the current table, a $1,000 tax loss accompanied by sophisticated means or sophisticated concealment would generate punishment at level 12 (before acceptance). With the increasing prevalence of this specific offense characteristic in presentence reports, this amendment would generate unduly harsh results for nearly minuscule tax violations. There is no reason to believe that under the current guidelines a judge concerned about particularly egregious concealment conduct by a low-end taxpayer would not sentence the defendant to prison in the upper end of the range or decline to provide an alternative to prison in Zones B or C.

**Conclusion**

For all these reasons, the members of this panel favor maintaining the *status quo* for tax offenses. The need for increased sentences is, at best, unclear. Indiscriminate raising of sentences relating to low-end taxpayers will not cure long-standing, fundamental defects in IRS's criminal enforcement program and might actually create harmful disincentives to reform. There is no evidence that when presented with a thoroughly investigated tax offense the courts will not use the tools available to them under the current guidelines to sentence appropriately. In sum, there is no reason to believe that the current tax

loss table is inadequate to meet this need or that there is a need to increase it by bolstering the existing "sophisticated means" offense characteristic.

## Comments for the United States Sentencing Commission Concerning Proposed Amendments for 1998

I want to thank the Commissioners for allowing the Internal Revenue Service, Criminal Investigation, to appear today. The prosecution and imprisonment of tax offenders is our primary reason for existence, and we are grateful for the opportunity to let you know why it is essential that the sentencing table for tax crimes be reformed as soon as possible. Every year that the Commission delays has the potential to further erode compliance with tax laws, thereby costing the government billions of dollars in lost revenue.

Federal criminal income tax prosecutions are complex, take a long time to investigate, and involve a substantial commitment of time and money from the Internal Revenue Service, the Department of Justice, and the Federal Judiciary. They are also quite rare. Convictions for tax offenses involving legal source income (income unrelated to illegal activities such as narcotics or organized crime) only number approximately 1,500 per year nationwide. Of these, less than 1,000 result in a sentence with true imprisonment.

When one considers that over 115,000,000 individual tax returns are filed per year, and there are millions of illegal non-filers, this situation is clearly intolerable. Tax evaders realize that their chances of being punished for their crimes are minuscule. As a result, honest taxpayers are being forced to pay an ever greater share of the burden. The estimated "tax gap" continues to grow to the point that it now exceeds $100,000,000,000 ($100 billion) per year. Without the effective deterrence of meaningful prison sentences for tax evaders this trend will continue, and the entire system of tax compliance will be in danger of collapse.

We are not asking for unduly harsh or severe sentences. We are asking for sentences that provide a reason for honest taxpayers to remain honest, and for dishonest taxpayers to fear detection. If tax criminals, most of whom are otherwise law-abiding businesspersons, knew that their chances of being prosecuted and imprisoned were greater, compliance would increase proportionately.

Since its inception, the Sentencing Commission has professed to believe that tax evasion is a serious matter. Adopting Option 2 would be a chance to deliver this message in a meaningful way.

3/11/98

The Internal Revenue Service is in favor of any modification to the Federal Sentencing Guidelines which would increase the likelihood that convicted tax criminals would be imprisoned. The deterrent effect for each tax criminal sentenced to imprisonment ranges far beyond the individual sentenced. It extends to the entire surrounding community, the profession, industry, coworkers and business associates of the individual, and in notorious cases, to the entire nation. Conversely, news of tax criminals who are not imprisoned tend to undermine voluntary compliance and weaken enforcement efforts.

The current Sentencing Table does not require imprisonment for offenses in Zone A or B, which includes Offense Levels 1 through 10. Therefore, a minimum Offense Level of 11 must be attained to ensure some incarceration. Since the two level acceptance of responsibility reduction is virtually automatic in all guilty pleas, this means that a Tax Loss in the Offense Level 13 range (Over $40,000 to $70,000) is necessary to be assured of obtaining any imprisonment at all. This tends to exclude all but high income individuals from prosecution.

We must have a balanced enforcement program, which requires that tax evaders from most segments of the income spectrum be prosecuted. If only the wealthiest taxpayers face criminal sanctions, there is no real incentive for the overwhelming majority of the population to comply.

By way of illustration, 96% of all individual returns report adjusted gross incomes of less than $100,000. The average tax on returns with adjusted gross incomes between $75,000 and $100,000 is $12,625. Therefore, for these taxpayers even three years of evading all tax owed would not achieve the $40,000 threshold for 96% of the public.

Therefore, we urge the Sentencing Commission to adopt Option 2 (for revising the Tax Loss Table) contained within Proposed Amendment Number 1, as listed in the January 6, 1998 Federal Register (Vol. 63, No. 3, Part II).

As for Proposed Amendment Number 5(C), concerning "sophisticated means," we agree with raising the base offense level to 12 which is contained in both options. We also are in favor of resolving the circuit conflict so that the element of sophistication is offense specific rather than offender specific, since this goes to the heart of deterrence.

However, we do not see any need to introduce the new terminology of "sophisticated concealment," nor do we approve of the dilution of language relating to the use of foreign bank accounts and financial transactions, and the use of corporate shells and fictitious entities. I believe that these changes will lead only to needless confusion and points of contention. I believe that the existing language is sufficiently clear, especially as it has been interpreted over the ten years that the guidelines have been in existence.

Thank you.

Internal Revenue Service

# memorandum

CC:EL:CT
MFKlotz

date: MAR - 5 1998

to: Assistant Commissioner (Criminal Investigation) CP:CI

from: Assistant Chief Counsel (Criminal Tax) CC:EL:CT

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subject: Proposed 1998 Sentencing Guideline Amendments

The purpose of this memorandum is to apprise you of our views on the 1998 proposed amendments to the sentencing guidelines to the extent they relate to offenses involving taxation. As an overview, we wish to point out our perspective when examining sentencing issues relating to federal criminal tax statutes.

**Background**

On January 6, 1998, the United States Sentencing Commission set forth six proposed amendments which it may submit to Congress no later than May 1, 1998. The proposed amendments appeared in the Federal Register, (Vol. 63, No.3, Part II) and the United States Sentencing Commission's Proposed Guideline Amendments for Public Comment (January 14, 1998). Written public comment should be received no later than March 12, 1998, by Mr. Michael Courlander, Public Information Specialist, at the United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500 Washington, D.C. 20002-8002. The Commission has scheduled a public hearing on the proposed amendments for March 12, 1998, at the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, D.C. An additional hearing focusing primarily on proposed amendments to the theft, fraud and tax guidelines is scheduled for March 5, 1998, at the Parc Fifty-Five Hotel in San Francisco, California, in conjunction with the American Bar Association's 1998 National Institute on White Collar Crime.

Notwithstanding that the Internal Revenue Service's current philosophy of tax administration focuses on taxpayer education and relies on the compliance of the educated taxpayer, it is, nevertheless, important that there is an adequate sentencing mechanism which effectively addresses noncompliance. Although the Service is continually increasing its efforts to foster taxpayer compliance rather than relying solely on after the fact enforcement, some segments of the population will continue to refuse to comply voluntarily. Accordingly, the focused use of enforcement tools and sanctions

against intentional noncompliance remains essential. To this end, substantial but fair sentencing guidelines permit courts to send the message that tax offenses are serious and intentional violators will be punished seriously. With this concept as our matrix, we offer our comments on the following proposed amendments.

**Discussion**

Proposed Amendment 1 - Fraud, Theft, and Tax Loss Tables (§§2B1.1, 2F1.1, 2T4.1)

Proposed Amendment 1, inter alia, "presents two options for revising the tax loss table to raise penalties for . . . [offenses involving taxation] . . . that have medium to high dollar losses in order to achieve better proportionality with guideline penalties for other offenses of comparable seriousness." Pursuant to Option 1, for tax losses of $40,000 or less, the offense levels of the proposed tax table would remain the same as the current tax loss table. For losses of more than $40,000, the proposed increases in offense levels are the same as the increases in offense levels (two level increments) in the proposed theft and fraud loss tables. Option 2, on the other hand, increases the offense levels in increments of two throughout the proposed tax table.

Considering the two tax table options, Option 2 is our preference. Our preference is based on the fact that, in Option 2, lower tax losses result in higher offense levels than in either Option 1 or the existing tax table, which is consistent with the Commission's intention to treat tax violations as serious crimes. For instance, Zone D (mandatory prison)[1] is reached under Option 2 with a tax loss that exceeds $30,000 while to reach Zone D under Option 1 and the current tax table requires a tax loss in excess of $40,000. Option 2 enables courts to more effectively address a significant area

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[1] A sentence falling within Zone D of the Sentencing Table mandates that the minimum term shall be satisfied by a sentence of imprisonment. This would amount to 12 months in jail for an offense level of 13, the first offense level in Zone D.

of noncompliance within the segment of the income spectrum which files the majority of tax returns or fails to file tax returns for any given taxable period.[2]

As we noted above, the tax table in Option 2 incorporates two level increases as opposed to the one level increments in the first part of Option 1 and the present tax loss table, but we do not find this objectionable. In fact, Option 2's tax table seems to provide a somewhat smoother progression through the loss amounts than Option 1's progression from single to double level increments and the current table's single level increments.

Proposed Amendment 5 - Theft, Fraud and Tax Related Issues

Proposed Amendment 5(C), inter alia, provides for the modification of the existing sophisticated means enhancement in the tax guidelines and the addition of a "floor" offense level of 12. Once again, two options are presented for comment. Option 1 includes minor non-substantive modifications to the existing sophisticated means specific offense characteristic plus the addition of the "floor" offense level of 12. Option 2, on the other hand, changes the specific offense characteristic from sophisticated means to sophisticated concealment, thus conforming to the proposed language for the fraud and theft guidelines, and also includes the "floor" offense level of 12.

It is our opinion that the important aspect of this proposed amendment is twofold. First, there is the "floor" offense level of 12 which is contained in both options. An offense level of 12 places the offender in Zone C of the Sentencing Table with range of 10 - 16 months imprisonment.[3]

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[2] According to the SOI Bulletin (Fall 1997), for 1995, the average tax on returns in the adjusted gross income range of $75,000 to $100,000 was $12,625. Returns with adjusted gross income of less than $100,000 accounted for approximately 96 percent of all returns filed for 1995. As an unfortunate consequence, under either option the vast majority of taxpayers, even if they are completely noncompliant, would not face mandatory prison.

[3] Zone C of the Sentencing Table provides for a sentence of imprisonment or a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention provided that at least one-half of the minimum term is satisfied by imprisonment. For offense level 12, one-half of the minimum term would be five months.

It is also noted that it currently takes a tax loss of more than $23,500 to reach level 12. Pursuant to Option 2, level 12 would be reached with a tax loss of more than $12,500. Second, the difference between retaining the specific offense characteristic of "sophisticated means" (Option 1) as opposed to replacing it with "sophisticated concealment" (Option 2) is that the language in the latter specifically pertains to overall offense conduct as opposed to offender conduct,[4] thus, favorably resolving a conflict between the circuits. See, United States v. Lewis, 93 F.3d 1075 (2d Cir. 1996); United States v. Fishman, 93 F.3d 1085 (2d Cir. 1996); and, United States v. Kraig, 99 F.3d 1361 (6th Cir. 1996).

Based on the foregoing, we endorse the "floor" offense level of 12 contained in both Options and the concept set forth in Option 2 which makes clear that the enhancement is offense specific rather than offender specific. However, we believe that it is unnecessary to change the enhancement from "sophisticated means" to "sophisticated concealment." "Sophisticated means" has been a specific offense characteristic in Part T of Chapter 2 of the Guidelines since their inception. Judges, defense attorneys, probation officers and prosecutors have become familiar with the term "sophisticated means" and the body of law concerning its interpretation. Changing "sophisticated means" to "sophisticated concealment" seems unnecessary and destined to cause confusion and needless litigation over whether there is a definitional difference between the two terms. We believe it is in the best interests of all concerned to retain the "sophisticated means" specific offense characteristic and supplement the commentary thereto with language that clearly establishes that "sophisticated means" is offense specific rather than offender specific.

Proposed Amendment 4 - Definition of Loss (§§2B1.1 and 2F1.1)

Proposed Amendment 4, inter alia, addresses competing proposals for redefining "loss" in regard to fraud and theft offenses. There is no mention of this proposed amendment relating to offenses involving taxation but, not withstanding that disclaimer, we mention it because of the concept which is present in the taxation guidelines. Both of the options in Proposed Amendment 4 define loss as the greater of the actual or intended loss. Specifically, actual loss is defined to include reasonably foreseeable harm resulting from a defendant's relevant conduct. Intended loss is defined as harm

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[4] Sophisticated concealment means complex or intricate offense conduct that is designed to prevent the discovery of the offense or its extent.

intended to be caused by the defendant and other persons for whose conduct the defendant is accountable under the relevant conduct provision.

By contrast, for the purpose of defining tax loss, §2T1.1(c)(1) provides that the tax loss in regard to tax evasion or filing a false return, statement or other document "is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed)." Section 2T1.1(c)(2) provides that the tax loss in regard to a failure to file violation is "the amount of tax that the taxpayer owed and did not pay." Section 2T1.1(c)(3) provides, in regard to wilful failure to pay violations, "the tax loss is the amount of tax that the taxpayer owed and did not pay" and in regard to false claims for refund violations §2T1.1(c)(3) provides that "the tax loss is the amount of the claimed refund to which the claimant was not entitled." And, §2T1.1(c)(5) provides that "the tax loss is not reduced by any payment of the tax subsequent to the commission of the offense." Although these provisions, in conjunction with existing case law, results in the greater of the intended or actual tax loss being used for determining the offense level in the tax tables, §§2T1.1, 2T1.4, 2T1.6, 2T1.7 and 2T1.9 would benefit from the inclusion of similar language as used in Proposed Amendment 4, Option 1, §2F1.1 Application Note 7.[5] In addition, this would avoid confusion as to whether the concept of loss being the greater of the actual or intended loss was applicable to the tax guidelines.

Related to Proposed Amendment 4 is also Issue for Comment (3) which is, in essence, how to deal with an intended loss pursuant to §2F1.1. The concept of this issue seems to provide the framework for Option 2 of Proposed Amendment 4. More broadly stated, the issue becomes whether the current rule should be changed to provide that a loss should be based primarily on the actual loss, with the intended loss available only as a possible ground for departure or whether, if the substance of the current rule is retained, the magnitude of the intended loss should be limited by the amount that a defendant realistically could succeed in obtaining. In other words, whether the intended loss should be limited by concepts of "economic reality" or "impossibility." We believe that the current rule should be retained with no modification for the amount that the defendant realistically could have succeeded in obtaining.

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[5] Loss is the greater of the actual or the intended loss.

Basing loss on actual loss has the potential to reward defendants for factors beyond their control. For instance, a defendant who intended a large loss but who was discovered before he/she could consummate the offense would be treated less seriously than a defendant who was not discovered until after the offense was completed. Sentencing a defendant based on the intended loss still permits courts to take into account the value of pledged collateral in cases involving fraudulently obtained loans and actual performance in cases involving falsification to obtain contracts.

In addition, basing a determination of loss on the economic reality of a defendant's scheme would require courts to make speculative judgments and quite probably would lead to similarly situated defendants being treated differently. Regardless, change is unnecessary considering the fact that the concept of current Application Note 10 to §2F1.1 which provides that, "[i]n a few instances, the loss determined . . . may overstate the seriousness of the offense . . . [and] in such case, a downward departure may be warranted" would be incorporated in Proposed Amendment 4, Application Note 7. Specifically, Proposed Amendment 4, Application Note 7 provides that "[t]here may be cases in which the loss substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, a departure may be warranted." We believe that this is adequate to address the issue without encumbering the courts with restrictive definitions and special rules.

## Conclusion

We recommend that the Assistant Commissioner (Criminal Investigation) submit written comments to the United States Sentencing Commission which support Option 2 of Proposed Amendment 1 and the "floor" offense level of 12 and offense specific aspects of Proposed Amendment 5. In addition, opposition should be voiced in regard to basing the determination of any loss primarily on the actual loss and limiting intended loss by concepts of economic reality or impossibility.

BARRY J. FINKELSTEIN

# *STATEMENT OF*
# *GERALD H. GOLDSTEIN, ESQUIRE*

## *PAST PRESIDENT,*
## *NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS*

## Public Hearing
## United States Sentencing Commission

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March 5, 1998
San Francisco, California

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.ıe Sentencing Commission proposes to "raise penalties for economic .nses." This is wrong for three very obvious reasons.[1]

**First**, it flies in the face of Congress' mandate to the Commission. Congress directs us to impose a sentence that does not involve imprisonment when dealing with a "first offender who has not been convicted of a crime of violence or an otherwise serious offense."[2] There's the rub. The overwhelming majority of these nonviolent offenders who will be covered by the proposed sentencing amendments have no prior criminal history. Yet, the proposal insists on a longer prison term. This is not a rational sentencing policy.[3] Given the plainly worded mandate of Congress, I ask you how the Commission can amend the loss table to require imprisonment for a new universe of first time fraud offenders?[4] Given this same congressional mandate, how can the Commission possibly justify limiting the discretion of a federal judge to implement that mandate? How can the Commission limit a judge's ability to impose a sentence of home-detention and community confinement when in his or her considered judgment that is the appropriate sentence, and that sentence would plainly appear to be what Congress envisioned for this class of defendants?

**Second** what we have here is one bad policy begetting a worse sentencing policy. The Commission's stated reason for contravening Congress and for limiting judicial discretion is to achieve better proportionality. For what, for the sake of proportionality? The primary source of that disproportionality is the penalties for crack cocaine offenses. The Commission is on record, with a 242-page report followed by shorter report, that crack cocaine penalties were, and still are, too severe.[5] The Commission recommended that the crack cocaine penalties should be reduced. But they haven't been. So now you propose to increase the penalties for fraud and other so-called "white-collar" offenses "to achieve better proportionality with the guideline penalties for other offenses of comparable seriousness." But that makes no sense, particularly if the relationship between other crimes, at least when it comes to sentencing is arbitrary. While Congress, as a legislative body, is free to act for political reasons this Commission is not. Two wrongs have never added up to a right, and they still don't.

**Third**, and perhaps this is a corollary of my first and second reasons, increasing penalties and the likelihood of imprisonment without good reason to do so is not justified. Indeed, it is shameful. The Commission is charged with developing sentencing guidelines that "provide certainty and fairness"

d on rational distinctions. 18 U.S.C. § 991. As the Supreme Court explained just last summer:

> The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice.

Koon v. United States, 116 S. Ct. 2035, 2053 (1996). Anecdotal reports that may be driving the concern about an unjustified disproportionality between fraud and other offenses should not form the basis for the Commission's proposed enhancements when the empirical evidence does not justify the enhancements.

The Commission's own data reflect that most fraud defendants are being sentenced at the low end of the range calculated under the current guidelines. If judges in fact believed that current penalties for fraud defendants were too lenient, they would sentence at the high end of the range. In fact, 70% of fraud defendants who are eligible for non-prison sentences are being sentenced to sentences that do not include imprisonment.[6] Judges are also not departing up in cases involving fraud.[7]

In addition, fraud sentences were set disproportionately higher

ɔnces for other offenses when the Commission first formulated ɹidelines. In 1989, the Commission once again raised the penalties ɔr fraud offenses, without any intervening congressional action or other empirical evidence. This will have been the third time that these sentences have been raised without empirical support. This is not the role Congress entrusted to the Commission.

The Commission should not increase the loss table or otherwise enhance the penalties for fraud and the related theft and tax offenses.

## ENDNOTES

1. This year, the Sentencing Commission is proposing substantial increases in the penalties for white collar offenses. Half of the amendments the Commission has published this year for public comment relate to theft, fraud and tax offenses.

> During the 1997-98 amendment cycle, the Sentencing Commission has identified as a priority issue for consideration the definition of "loss" and the weight it is given in the theft, fraud, and tax guidelines. **The purpose of both options is to raise penalties for economic offenses that have medium to high dollar losses in order to achieve better proportionality with the guideline penalties for other offenses of comparable seriousness.**

U.S.S.C., Synopsis of Proposed Amendment 1, 63 Fed. Reg.--- (Jan. 6, 1998) (emphasis added).

2. In relevant part, 28 U.S.C. § 994(j) provides:

> The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other

than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . .

3. The Commission's statistics reflect that 62% (2360/3801) of fraud offenders sentenced to terms of imprisonment are in Criminal History Category I. U.S. Sentencing Commission, 1996 Sourcebook of Federal Sentencing Statistics, Table 14 at 24 (1996). It would appear, furthermore, that an additional 10 to 15% of fraud offenders, those who receive no sentence of imprisonment, also have limited or no prior criminal history. Compare Id. at n.1 with Table 3 at 7. The statistics also reflect that an even higher percentage of tax offenders who are sentenced to terms of imprisonment, (77% or 255/331) are in Criminal History Category I.

Generally, the percentages for 1995 were the same as those for 1996. U.S. Sentencing Commission, Annual Report, Table 19 at 62 (1995) (62 % (2262/3638) of fraud offenders sentenced to terms of imprisonment were in Criminal History Category I; 73% (195/266) of imprisoned tax offenders were in Criminal History Category I).

4. The proposed loss tables will require a full term of imprisonment (zone D) for all first time offenders engaged in fraud offenses involving a loss in excess of $70,000 (option 2) or $80,000 (option 1) down from the current amount of $120,000 or more. Similarly, to obtain home detention or community confinement without requiring that any part of the sentence be satisfied by imprisonment (zone B), currently the loss cannot exceed $ 40,000; under the proposed amendment (option 2), the loss cannot exceed $30,000 to obtain a sentence in zone B.

5. U. S. Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy, (as directed by § 280006, Pub. L. 103-322), Feb. 1995; U. S. Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy, (as directed by § 2, Pub. L. 104-38), Apr. 1997.

6. U. S. Sentencing Commission, 1996 Sourcebook of Federal Sentencing Statistics, Figure F, at 28 (1996).

7. Upward departure were imposed in only 1.3% of fraud cases. U. S. Sentencing Commission, 1996 Sourcebook of Federal Sentencing Statistics, Table 27, at 44 (1996).

**Statement of David F. Axelrod**
**Vorys, Sater, Seymour and Pease LLP**
**to the United States Sentencing Commission**
**March 5, 1998**

## Introduction

Thank you for this opportunity to address a topic of great importance. I appear today to discuss the proposed "More than Minimal Planning" ("MMP")[1] and "Sophisticated Concealment" amendments that would apply to fraud and theft cases (which I will refer to simply as the "Proposed Amendments"). As a practicing attorney who deals with the Guidelines almost every working day, I hope to help you focus on the "real-world" effects those proposed amendments may have on individuals and trial courts.

I testify from the perspective of one who has wrestled for years with Guidelines issues, both as a prosecutor and defense attorney. My first exposure to fraud cases came as a young associate in a law firm that specialized in white collar defense. I subsequently served as a federal prosecutor for seven years, during which I focused on the prosecution of economic crimes. In the middle of my prosecutorial career, the implementation of the Guidelines immediately and dramatically changed the nature of my job. Several years later, I returned to private practice in Columbus, Ohio, where I focus on the defense of economic crimes.

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[1] For consistency and convenience, this testimony adopts the MMP abbreviation as it is used by the Commission in the Proposed Amendments.

## I. Operative Principles

There are several principles that should guide consideration of the Proposed Amendments. They are, in my opinion, principles which should be applied to all aspects of the Sentencing Guidelines. Some represent my own value judgments; others represent views previously expressed by the Commission. I identify those that I believe most important in this context:

1) Simplicity in the Guidelines is desirable. In the Commission's own words, "The larger the number of subcategories of offense and offender characteristics, the greater the complexity and the less workable the system.... The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce." U.S.S.G. Ch. 1., Pt. A.3.

2) Special Offense Characteristics invite litigation.

3) Each relevant factor should be considered only once in the imposition of a criminal sentence. No factor should be double or triple-counted.

4) Judges should retain significant flexibility to deal with differing offenses and offenders. Again in the Commission's own words, "The appropriate relationships among ... different factors are exceedingly difficult to establish, for they are often context specific." U.S.S.G. Ch. 1, Pt. A.3.

## II. General Comments on the Proposed Amendments.

My preference is that the Proposed Amendments not be adopted. As noted above, I believe that the Guidelines should be kept as simple as possible, and that

judges must retain the flexibility to consider the context in which each factor exists and the relationships among them. More importantly, my experience in dealing with the Guidelines for almost ten years teaches that the addition of specific offense characteristics will magnify the complexity of the sentencing process without improving the quality of justice.

Additional Offense Characteristics add complexity by encouraging litigation over their existence in almost every case. On the other hand, the concerns that underlay the Proposed Amendments may be addressed without incorporating this undesirable side-effect. The sophistication of an offense may presently be considered in selecting the defendant's offense level within the guideline range. To the extent that greater flexibility is desired, the Commission may add commentary that explicitly recognizes judges' authority to depart upward in cases of unusual sophistication, and downward in cases involving only minimal planning.

However, if current proposals are adopted, it is essential that it not be done piecemeal. To the contrary, the Commission should consider the Proposed Amendments only in context of an overall plan for how culpability in fraud and theft cases should be determined. Therefore, if new Offense Characteristics are adopted, they should consist of a three-tiered structure that would provide judges with sufficient flexibility to deal with different gradations of complexity and concealment, including:

1) Incorporation of the MMP enhancement into the loss tables for fraud and theft;

2) Adoption of the Practitioners' Advisory Group's proposal for a two-level reduction in the fraud and theft guidelines for cases that involve only limited or insignificant planning; and

3) Adoption of a two-level enhancement for Sophisticated Concealment.

I strongly oppose other changes that would result in unjustified increases in the lengths of sentences under the fraud and theft guidelines. The most significant of those changes would increase the loss tables substantially more than necessary to incorporate the MMP enhancement, even at middle levels of the loss tables. The Proposed Amendments state that such additional increases are to achieve better proportionality with the penalties for comparable offenses. The Proposed Amendments neither identify such comparable offenses, nor offer empirical data to support the proposed changes.

I place in the same category the proposed "floor" offense level of 12 for crimes involving Sophisticated Concealment. It is reasonable to infer that, even without this feature, most crimes that may be categorized as involving Sophisticated Concealment will score at level 12 or more because they will involve significant sums or will constitute money laundering. Nevertheless, experience teaches that zealous prosecutors will advocate this enhancement for even low level crimes. Where such offenses involve only a small amount of money, a two level increase is sufficient to penalize the additional culpability involved in efforts at concealment.

My overall concern as a defense lawyer, and as one who is forced to view the results of such proposals in human terms, is that offense levels not creep upward without sufficient evidence that increases are necessary or appropriate, especially at the

lower and middle levels of the loss tables. Across-the-board increases should not be approved without a much better foundation than presently exists. Therefore, I strongly urge that any increases at the lower and middle levels be confined to the two levels necessary to compensate for the elimination of MMP as a specific offense characteristic, and that the Sophisticated Concealment enhancement also be limited to two levels.

The comments which follow are applicable only if the Commission decides to amend the fraud and theft guidelines, and should not be understood as detracting from my overall opposition to the Proposed Amendments.

**III. MMP Is Inherent in Most Thefts and Frauds.**

The present MMP specific offense characteristic may be unsatisfactory in that it defines the covered conduct so broadly that it literally applies to any fraud or theft that was not "purely opportune." U.S.S.G. § 1B1.1, Application Note 1(f). "More than 80% of all defendants sentenced under the fraud guideline and nearly 60% of those sentenced under the theft guideline are assessed the two additional levels for more than minimal planning."[2]

In the present Guidelines structure, the MMP enhancement may also be too inflexible in providing judges with only two options (to enhance or not). Consequently, it may not sufficiently assist sentencing judges in distinguishing among simple, moderately complex and highly sophisticated criminal schemes.[3] As noted above, I believe these deficiencies can be addressed by recognizing the sophistication of an offense, or its lack of sophistication, as possible reasons for departure.

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[2] Bowman, Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines, ___ Vand. L. Rev. ___, Manuscript at 50 (1998) ("Coping With Loss") (citing U.S. Sentencing Commission, 1995 Datafile MONFY 95).

[3] Coping With Loss, Manuscript at 50-51.

My personal experience supports the view that most frauds involve MMP. Indeed, I have rarely seen a court decline to apply this adjustment in a fraud case, as is apparent in the reported cases. For instance, in United States v. Pooler, 961 F.2d 1354 (8th Cir. 1992), the enhancement was applied where a bank official made a single false entry in the bank's books. In United States v. Sanchez, 914 F.2d 206 (10th Cir. 1990), the enhancement was applied in a simple case of fraud by unauthorized use of a credit card, even though the defendant did nothing but use the card, since "[e]ach purchase involved several calculated falsehoods including a forged signature." Id. at 207. In United States v. Fox, 889 F.2d 357 (1st Cir. 1989), the Court stated that "[w]e cannot conceive of how obtaining even one fraudulent loan would not require more than minimal planning." In United States v. Garcia, No. 96-2453, 1996 U.S. App. LEXIS 31074 (7th Cir. Nov. 26, 1996), the MMP enhancement was predicated on the repetitive nature of the defendant's conduct, despite the Court's conclusion that the scheme was not complex.

The enhancement is also applied in the majority of theft cases, often on remarkably simple facts. For example, in United States v. Harrison, 42 F.3d 427 (7th Cir. 1994) the Court applied the enhancement where a contract custodian had removed envelops containing food stamps from a cart in the post office. The defendant's efforts at observing Post Office operations to ascertain the location of the envelops containing food stamps warranted the sentencing enhancement. Id. at 432-33.

I concede that an enhancement that applies in the majority of cases may lose meaning as a specific offense characteristic. Nevertheless, it should be incorporated in the loss tables *only* as part of a larger picture that includes a two level *reduction* for

defendants whose crimes involved *less* planning than is typical for commission of the offenses in a simple form.

**IV. The Multiple Victim Enhancement Should Not Be Retained.**

If MMP is incorporated in the loss tables, I oppose retention of the two-level enhancement for "a scheme to defraud more than one victim" that is presently contained in U.S.S.G. § 2F1.1(b)(2)(B). This enhancement currently exists as an alternative to the MMP enhancement. Thus, under the current system, a defendant's sentence may*not* be enhanced for *both* MMP and the involvement of multiple victims. This limitation makes sense since it is reasonable to infer that MMP exists in virtually every multiple victim case, and it therefore would be redundant to increase a defendant's sentence for both reasons.

Retention of the multiple victim enhancement in addition to incorporating MMP into the loss tables will *double* the potential sentencing increase. The proposal notes that empirical evidence is not well developed, and the Guidelines should not be changed unless and until strong empirical evidence demonstrates that such a change makes sense.

**V. "Sophisticated Concealment" is a Legitimate Consideration in Sentencing.**

The addition of a Sophisticated Concealment specific offense characteristic would complete the proposed three-tier measure of culpability. For the reasons stated above, I prefer identifying Sophisticated Concealment as a potential ground for departure, but acknowledge the validity of increasing a defendant's sentence for this reason.

Conduct that readily warrants an enhancement for more than minimal planning does not necessarily rise to the level of sophisticated concealment. See United States

v. Madoch, 108 F.3d 761, 766 (7th Cir. 1997) (conduct that "does not necessarily demonstrate 'sophisticated means' . . . may show 'more than minimal planning'"). The distinction is workable. For instance, United States v. Rice, 52 F.3d 843 (10th Cir. 1995) involved a false tax refund scheme. Because the defendant was convicted of offenses under both Titles 26 and 18, the Court had the option of applying both the MMP enhancement, and the enhancement for sophisticated means to impede discovery under § 2T1.1(b)(2). The Court found that the scheme was unsophisticated but persisted over three years, and therefore increased the sentence for MMP but not for sophisticated means to conceal. Id. at 849-50. Similarly, In United States v. Bhagavan, 911 F. Supp. 351 (N.D. Ind. 1995), the court refused to enhance the sentence in a tax evasion case for sophisticated means, although it noted that the defendant's conduct would have warranted an enhancement for more than minimal planning.

## VI. The Sophisticated Means Enhancement Should Apply to Overall Offense Conduct Only if Reasonable Foreseeability Requirements are Strictly Applied.

The proposed enhancement specifically raises the question whether it should be limited to the personal conduct of the defendant, or reach the overall offense conduct for the which the defendant is accountable. The latter approach was used in drafting the Proposed Amendment.

Consideration of this issue must occur in the overall context of the Sentencing Guidelines. U.S.S.G. §1B1.3 ("Relevant Conduct") establishes the framework under which all Guidelines, including specific offense characteristics, are applied. Referring to § 1B1.3(a)(1)(B), Application Note 2 to that section states that:

> a defendant is accountable for conduct (acts and omissions) of others that was both:

(i) in furtherance of the jointly undertaken criminal activity; and

(ii) reasonably foreseeable in connection with that criminal activity.

This reasonable foreseeability requirement should limit the reach of the proposed enhancement. In other words, no defendant's sentence should be increased for acts of concealment by others that were not reasonably foreseeable to him or her.

Reasonable foreseeability is employed as a measure of culpability in both the criminal law in general, and the Sentencing Guidelines in particular, to avoid punishing defendants for harm that was neither intended nor could reasonably have been anticipated. On the other hand, defendants may appropriately be punished based on harms that they intend or that obviously will follow from their conduct.

Reasonable foreseeability, however, means different things in different contexts. Because the sentencing process focuses on culpability, it is appropriate for the requirement to be strictly construed in this context. Before increasing a sentence based on acts by third parties, the sentencing court should require that a reasonable person in the defendant's position would have foreseen the harm in question as a probable result.[4] This is considerably more specific than the definition presently contained in the Guidelines. Therefore, I urge the Commission to include additional commentary to more clearly define what is deemed reasonably foreseeable for purposes of the Sophisticated Concealment enhancement in particular, and sentencing in general.

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[4] Coping With Loss, Manuscript at 144-45.

## VII. "Committing the Offense From Outside the United States" Should be Included as One Form of Sophisticated Concealment Rather Than as an Alternative Enhancement.

Two options are proposed for the Sophisticated Concealment enhancement. Under Option 1, the commission of any part of the offense from outside the United States would be an alternative ground for enhancement. Option 2 would have an application note state that the commission of an offense from outside the United States is ordinarily indicative of sophisticated concealment.

Option 1 is overbroad. It is easy to imagine offenses in which trivial activity outside the United States would be urged by the government to trigger the enhancement. For example, the existence of a single mail fraud victim across the Canadian border from Detroit arguably would trigger the enhancement under Option 1, even though the offense might otherwise be crude and unsophisticated.

Furthermore, such an overly-specific offense characteristic is entirely unnecessary. Option 2 would provide judges with sufficient flexibility to punish the use of foreign bank accounts, etc., wherever common sense dictates.

## VIII. The Loss Tables Should be Not be Amended More Than Necessary to Incorporate MMP.

Elimination of MMP as a specific offense characteristic would result in a two level across-the-board reduction unless a compensating adjustment is made elsewhere. However, the current proposals to amend the loss tables would increase sentences, even at lower levels, much more than necessary to compensate for the elimination of the MMP offense characteristic, and therefore should be rejected.

Both proposals recognize the obvious correlation between the amount of money involved in a fraud or theft, and its planning and sophistication. Smaller, simpler offenses are indicative of a less culpable mental state. Therefore, the Proposed Amendments would appropriately refrain from increasing sentences at the lower end of the loss tables. Where larger losses are involved, the revised tables would increase the sentences to punish the greater sophistication and planning that is ordinarily involved.

However, the line of loss demarcation is drawn too low. Under Option 1, MMP would be presumed for all offenses involving more than $5000. Under Option 2, the increase would start at offenses involving as little as $2000. The level at which such increases should begin is partly a value judgment. However, even $5000 cannot be considered a large sum in our present economy. Therefore, I suggest that MMP not be presumed in offenses involving less than a significantly larger amount.

I find even more disturbing proposals that would increase sentences at the middle levels of the guidelines far more than necessary to account for the incorporation of MMP. For instance, Option 2 would result in a three level increase over the present loss table for offenses involving more than $40,000 and a five level increase for offenses involving more than $150,000. Throughout the middle levels, Option 2 would increase sentences by approximately 40% to 50%. No justification is offered other than the vague suggestion that this would make fraud sentences more proportionate to sentences for unspecified other offenses.

Recognition that loss is a proxy for other sentencing factors, including mental state, becomes explicit with the incorporation of MMP in the loss tables. However, even if one concedes that sentences should be increased for truly high-level offenses,

increases beyond that are unjustified. Additional increments of sophistication and planning may be punished through upward departures or the two-level enhancement for Sophisticated Concealment. In most cases, to include the Sophisticated Concealment enhancement *on top of* already increased offense levels would be to punish the same conduct twice.

### IX. Justice Requires That a Downward Adjustment be Permitted for Cases of Limited or Insignificant Planning.

The Commission's Practitioners' Advisory Group suggests a two-level reduction for cases of limited or insignificant planning if the MMP enhancement is incorporated into the tables. I strongly support such a recommendation. If MMP is incorporated into the Guidelines, the Commission should preserve a mechanism to deal with "purely opportune" conduct. The best way to do so would be to permit a reduction for insignificant or limited planning.

### Conclusion

I am concerned that the overall result of the Proposed Amendments may be unjustified increases in a broad category of sentences, and penalizing the same conduct several times. I urge the Commission to exercise care not to include specific offense characteristics that are overbroad, or would punish the same conduct that is used to justify increases in the loss tables.

I thank the Commission and its able staff for permitting me the opportunity to share these views with you. I will be happy to answer any questions you may have.

Testimoy of David F. Axelrod Summary
Vorys, Sater, Seymour and Pease LLP

Additional Offense Characteristics add complexity by encouraging litigation over their existence in almost every case . . . However, if current proposals are adopted, it is essential that it not be done piecemeal. To the contrary, the Commission should consider the Proposed Amendments only in context of an overall plan for how culpability in fraud and theft cases should be determined. Therefore, if new Offense Characteristics are adopted, they should consist of a three-tiered structure that would provide judges with sufficient flexibility to deal with different gradations of complexity and concealment . . .

**Incorporation of the MMP enhancement into the loss tables for fraud and theft.**

The present MMP specific offense characteristic may be unsatisfactory in that it defines the covered conduct so broadly that it literally applies to any fraud or theft that was not "purely opportune." USSG § 1B1.1, Application Note 1(f). . . In the present Guidelines structure, the MMP enhancement may also be too inflexible in providing judges with only two options (to enhance or not). . . [and] may not sufficiently assist sentencing judges in distinguishing among simple, moderately complex and highly sophisticated criminal schemes. . . I believe these deficiencies can be addressed by recognizing the sophistication of an offense, or its lack of sophistication, as possible reasons for departure. [Or the MMP enhancement] should be incorporated in the loss tables only as part of a larger picture that includes a two-level reduction for defendants whose crimes involve less planning than it typical for commission of the offenses in a simple form.

*Response:* *Witness concedes that "most frauds involve MMP" and that courts rarely decline to apply this adjustment. If that is the case, why not save the courts the effort of making the factual determination of whether the conduct involved MMP by incorporating it into the tables. Under this scenario, courts still could depart downward in those rare cases where "less than typical" planning is present. Why is that not sufficient?*

**Multiple Victim Enhancement Should Not Be Retained**

If MMP is incorporated in the loss tables, I oppose retention of the two-level enhancement for "a scheme to defraud more than one victim" that is presently contained in USSG § 2F1.1(b)(2)(B). This enhancement currently exists as an alternative to the MMP enhancement. Thus, under the current system, a defendant's sentence may not be enhanced for both MMP and the involvement of multiple victims. This limitation makes sense since it is reasonable to infer that MMP exists in virtually every multiple victim case, and it therefore would be redundant to increase a defendant's sentence for both reasons.

*Response: Although MMP may exist in every multiple victim case, not every case with MMP has multiple victims. Why shouldn't those cases were more people are impacted*

*receive an additional enhancement?*

**Sophisticated Concealment**

The addition of a Sophisticated Concealment specific offense characteristic would complete the proposed three-tier measure of culpability. For the reasons stated above, I prefer identifying Sophisticated Concealment as a potential grounds for departuare, but acknowledge the validity of increasing a defendant's sentence for this reason.

The proposed enhancement specifically raises the question whether it should be limited to the personal conduct of the defendant, or reach the overall offense conduct for which the defendant is accountable. . . No defendant's sentence should be increased for acts of concealment by others that were not reasonably foreseeable to him or her . . . [and should be] strictly construed in this context. . . Therefore, I urge the Commission to include additional commentary to more clearly define what is deemed reasonably foreseeable for purposes of the Sophisticated Concealment. . .

*Response: Why is further commentary needed on the definition of reasonably foreseeable when courts have used this concept and applied it for ages.*

**Committing the Offense From Outside the United States**

Under Option 1, the commission of any part of the offense from outside the United States would be an alternative ground for enhancement. Option 2 would have an application note state that the commission of an offense from outside the United States is ordinarily indicative of sophisticated concealment. Option 1 is overbroad. It is easy to imagine offenses in which trivial activity outside the United States would be urged by the government to trigger the enhancement.

*Response: Has the current SOC regarding foreign bank accounts created problems? Doesn't it have the same structure?*

**Loss Tables**

Under Option 1, MMP would be presumed for all offenses involving more than $5,000. Under Option 2, the increase would start at offenses as little as $2,000. . . [E]ven $5,000 cannot be considered a large sum in our present economy. Therefore, I suggest that MMP not be presumed in offenses involving less than a significantly larger amount.

I find even more disturbing proposals that would increase sentences at the middle levels of the guidelines far more than necessary to account for the incorporation of MMP. . . Throughout the middle levels, Option 2 would increase sentences by approximately 40% to 50%.

*Response: The revision of the loss table was undertaken not just to incorporate MMP.*

*Afterall, even the witness conceded that courts rarely refused to apply the MMP enhancement. Thus, it was undertaken to address the perception that fraud cases were underpenalized. How else to rectify this problem without addressing the loss tables?*

DAVID FREEMAN AXELROD
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Mr. Axelrod is a partner in our Columbus office where he represents corporations and individuals in both federal and state criminal cases. Mr. Axelrod's experience includes the defense of cases involving allegations of health care fraud, defense procurement fraud, tax fraud and money laundering, and claims for civil and criminal forfeiture. Recently, he served as a Special Prosecutor for the State of Ohio in the largest securities fraud case in the history of the state. Mr. Axelrod is a former Assistant United States Attorney for the Southern District of Florida, and a former Trial Attorney for the Tax Division of the United States Department of Justice. Before joining the Department of Justice, Mr. Axelrod practiced in New York City, where he represented clients in both civil and criminal matters. Immediately following his graduation from law school, Mr. Axelrod served as a law clerk for United States District Judge David S. Porter in Cincinnati, Ohio.

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Mr. Flanagan has substantial experience in conducting corporate internal investigations, and in making voluntary disclosures to the government under such programs as the Department of Defense Voluntary Disclosure Program. He also has assisted companies in creating corporate compliance programs and has counseled businesses in highly regulated areas, such as defense contracting, environmental and health care, on compliance issues relating to the Federal Sentencing Guidelines.

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Mr. Flanagan also has congressional investigative experience, having served from 1977 to 1979 on the staff of the Select Committee on Assassinations, United States House of Representatives, during which time he assisted in an investigation of the death of President John F. Kennedy.

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- How to Handle a Tax Controversy, 1986

Colorado Bar Association Tax Specialist Institute, 1988
Maryland Institute for Continuing Professional Education of Lawyers:
- NITA Program, 1984 - 1993
- Anatomy of a Tax Controversy, 1989

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b. Shanley v. North East Independent School District, 462 F.2d 960 (5th Cir. 1972) [student newspaper].

c. DeVonish, et al vs. Copeland, et al, 510 F.Supp 658 (W.D. Texas, 1973) [class action on behalf of pretrial detainees to improve living conditions in county jail];

d. Piper v. Hauck, 532 F.2d 1016 (5th Cir. 1976) [jail conditions];

e. Iranian Muslin Organization v. City of San Antonio, 604 SW2d 379 (Tex.Civ.App. 1980) [free speech];

f. League of United Latin American Citizens, Etc. vs. William P. Clements, Etc., Et Al.; Jim Mattox, Et Al., Appellants vs. Judge F. Harold Entz, Et Al., Appellants and Tom Rickhoff, Et Al., Appellants (Consolidated with No. 89-8095, League of United Latin American Citizens, Etc., Et Al. vs. William P. Clements, Etc., Et Al.,; Jim Mattox, Etc., Et Al., Appellants, Fifth Circuit No. 90-8014, in the United States Court of Appeals for the Fifth Circuit [statewide election of judges].

i. Carl and Margaret Clayton vs. City of New Braunfels, Civil Action No. SA-89-CA-550 [excessive force against handicapped citizen];

j. Texas Farmers Union, Et al vs. The City of McAllen, Texas, et al, Civil Action No. B-78-92 [First Amendment and excessive force - Class action on behalf of American Farmers on right to speak and assembly];

k. Natalia Flores vs. Cameron County, Texas; et al, Civil Action No. B-88-145 [juvenile death case involving excessive force];

l. Andrew Jackson Spruill, et al vs. Benny C. Sanders, et al, Fifth Circuit No. 91-5514 [death case involvingexcessive force and failure to provide medical treatment];

m. Dennis Allen, Individually and as Chief of Police for the City of Silsbee, Texas, et al vs. Jerry Lynn Weaver, Fifth Circuit Nos. 91-4917 & 91-4691 [excessive force - broken neck - after traffic stop];

n. J.T. Neal vs. City San Marcos, No. A-87-CA-379, In the United States District Court, Western District of Texas, Austin Division [excessive force]; and

o. Farris Williams vs. A.P. Lacy, et al, No. V-87-11, In the United States District Court for the Southern District of Texas, Victoria Division [jail condition case out of Port Lavaca, Texas].

Chairman, Legal Committee, National Organization for the Reform of Marijuana Law [1979 to present];
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b. Durrough v. State, 562 SW2d 488 (Tex.Cr.App. 1978);
c. Hawkins v. State, 613 SW2d 720 (Tex.Cr.App. 1980);
d. Brooks v. Estelle, 697 F.2d 586 (5th Cir.) 103 S.Ct. 1490;
e. Barefoot v. Estelle, 697 F.2d 593 (5th Cir.) 103 S.Ct. 1765 (1983);
f. Muriel Don Crawford, Jr. vs. Lynaugh, Director, Texas Department of Corrections, Civil Action No. CA2-85-193, In the United States District Court, Northern District of Texas, Amarillo Division;
g. State v. Julian Hernandez, No. 89-CR-3036-B (Bexar County, Texas) [pending capital case];
h. State v. Powell, No. 911,524 (Travis County, Texas) [capital case - reversed];
i. State v. Martinez, No. ____ (Webb County, Texas) [pending capital case].

Service to the National Association of Criminal Defense Lawyers Association (NACDL):

President, NACDL [1994-1995];
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Served as Amicus on behalf of the NACDL in:

add: Ritchie
John Wesley Hall's client
a. Oscar Goodman, Witness-Petitioner vs. USA, No. ____, Petition for Certiorari to the Supreme Court;
b. State of Texas vs. Millard Farmer, et al, Cr. No. 92-415,861 and 92-415,862, in the 72nd Judicial District Court of Lubbock County, Texas; and Millard Farmer, et al vs. Randall Sherrod, et al, No. 2:93-CV-0017-J, In the United States District Court for the Northern District of Texas, Amarillo Division;
c. USA vs. William Paul Covington [Moffitt/Zwerling], Criminal No. 91-00425-A, In the United States District Court for the Eastern District of Virginia,

Alexandria Division;

d. John Doe, John Doe I, John Doe II through John Doe VIII, vs. USA [Ritchie/Fels], No. ____, Petition for Certiorari to the Supreme Court; from the United States District Court, Eastern District of Tennessee, Northern Division, Misc. No. 90/998/999/1000, ;

e. In Re Grand Jury Proceedings, Jean Auclair [Burton], No. 92-1116, in the United States Court of Appeals, for the Fifth Circuit;

f. Cable News Network, Inc., et al vs. Manual A. Noriega, Et al, Nos. A-370 and 90-767, In the Supreme Court of the United States, October Term, 1990;

g. USA vs. David Z. Chesnoff, No. 91-17-H-CCL, In the United States District Court for the District of Montana, Helena Division;

h. In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Jose Evaristo Reyes-Requena [DeGuerin], John Doe, Intervenor-Appellant, 926 F.2d 1423 (5th Cir. 1991);

i. USA vs. Jose Orlando Lopez, et al [Osterhoudt], No. CR. 89 0687 FMS, In the United States District Court, Northern District of California;

j. USA vs. In Re: Grand Jury Subpoena for Attorney Dan C. Guthrie, No. ____, in the District Court, Criminal Court No. 2, Dallas County, Texas;

k. In re Grand Jury Subpoena (James Stafford), Sundry No. 90-0080, In the United States District Court, Western District of Louisiana, Lafayette Division,

My practice is primarily devoted to defending citizens accused of crime in State and Federal Trial and Appellate Courts (90% of practice devoted to criminal defense work) and approximately 15% of our firm's work is pro bono.

US v. Clayton, et al [BRILAB], No. H-80-74-CR (S.D. Tex. 1980);
US v. Davis ["PIEDRAS NEGRAS JAILBREAK" CASE], 583 F.2D 190 (5th Cir. 1978) [jury selection specific intent reversal];
US v. Kelley [ABSCAM], 491 F.Supp 21 (D. D.C. 1982) [pre-indictment discovery];
US v. D.K.G. Appaloosas, Inc., 630 F.2d 1540 (E.D. Tex. 1986), 829 F.2d 532 (5th Cir. 1987) [forfeiture];
US v. Ebertowski, 896 F.2d 906 (5th Cir. 1990) [sentencing guidelines reversal];
US v. McCraney, 33 Cr.L. 2131 (5th Cir. 1981) [applying Edwards v. Arizona to inquiry for consent to search];
US v. Zabaneh, 837 F.2d 1249 (5th Cir. 1988) [404(b) other crime reversal];
US v. Amuny, et al (Hebert), 767 F.2d 1113 (5th Cir. 1988) [reversal of aircraft search];
US v. Becton (Mirojnick), 632 F.2d 1294 (5th Cir. 1980) [double jeopardy];
US v. Butts, 710 F.2d 1139 (5th Cir. 1983) (en banc), 729 F.2d 1514 [aircraft beeper];
US v. Cofer (Brennan), 444 F.Supp 146 (W.D. Tex. 1978) [aircraft beeper];
US v. Ebertowski, 896 F.2d 906 (5th Cir. 1990);
US v. Gant, 587 F.Supp 128 (S.D. Tex. 1984) [good faith];

US v. Geittmann, 733 F.2d 1419 (10th Cir. 1984) [conflict of interest reversal];
US v. Galloway, 951 F.2d 64 (5th Cir. 1992);
US v. Hawkins (Gerdes), 658 F.2d 279 (5th Cir. 1981) [jury selection reversal];
US v. Henrickson, 564 F.2d 197 (5th Cir. 1977) [Sixth Amendment compulsory process reversal];
US v. Hogan, 763 F.2d 697 (5th Cir. 1985) [hearsay reversal];
US v. Ortiz, 942 F.2d 903 (5th Cir. 1991);
US v. Salinas, 601 F.2d 1279 (5th Cir. 1979) [jury instruction reversal];
US v. Watson (Parker), 669 F.2d 1374 (11th Cir. 1982) [deprivation of character testimony reversal];
In re Grand Jury Proceedings (Manges), 745 F.2d 1250 (9th Cir. 1984) [grand jury witness];
Batres v. State, 762 SW2d 611 (Tex.Cr.App. 1988) [jury misconduct];
Wheeler v. State, 659 SW2d 381 (Tex.Cr.App. 1982) [reversal of binocular search];
Meeks v. State, 692 SW2d 504 (Tex.Cr.App. 1985) [reversal of roadblock search];
Cruz v. State, 586 SW2d 861 (Tex.Cr.App. 1979) [reversal illegally obtained confession];
Dexter v. State, 544 SW2d 426 (Tex.Cr.App. 1976) [reversal prosecutorial misconduct];
Harding v. State, 500 SW2d 870 (Tex.Cr.App. 1973) [search reversal];
Universal Amusements vs. Vance, 445 US 308; 587 F.2d 177 (5th Cir. 1978) (en banc), cert. denied, 99 S.Ct. 2859, 559 F.2d 1286 (5th Cir. 1977) (panel); 404 F.Supp 33 (1975) ["Deep Throat"];
Mauldin v. Coats, 1989 WL 139110 (Tex.App.-Tyler, 1989) [Texas wiretap statute];
State v. Williams, 780 SW2d 891 (Tex.App.-San Antonio, 1989) [office misconduct];
Norton v. State, 771 SW2d 160 (Tex.App.-Texarkana, 1989) [murder reversal]; and
Ybarbo v. State, 659 SW2d 898 (Tex.App. 1988).

# EPHRAIM MARGOLIN

Hebrew University, Jerusalem, EBA, 1949
Yale Law School, LLB, 1952
Clerk, Supreme Court of Israel, 1955
Adjunct Professor, Criminal and Constitutional Law, University of California, Hastings College of Law, 1971-72, 1980
Founding President, California Attorneys for Criminal Justice, 1973-74
President, San Francisco Lawyers Club, 1982-83
Lecturer, University of California, Boalt Hall 1983 - present, Advanced Criminal Law
Lecturer, University of California, Hastings 1997 - present, Defense Problems in Criminal Trials
Adjunct Professor, University of Santa Clara School of Law, 1987 - present, Advanced Criminal Law & Procedure
President, Northern California Trial Lawyers Association, 1988 - 89
President, National Association of Criminal Defense Lawyers, 1989-90
Chairman, Jewish Community Relations Council of San Francisco, 1989-91
Member, American Academy of Appellate Lawyers
Secretary-Treasurer, California Academy of Appellate Lawyers, 1997-1998
Fellow, The American Board of Criminal Lawyers
Provisional Member, American Academy of Forensic Science
Co-Chairman, Amicus Committee of the National Association of Criminal Defense Lawyers, 1994-95

Founder and First President of California Attorneys for Criminal Justice (the California criminal defense bar), 1973. CACJ is presently comprised of 3000 attorneys active in criminal law in California.

From 1973 to 1989, Chair of the statewide Amicus Committee of CACJ, filing in excess of 100 briefs a year in the United States Supreme Court, California Supreme Court, Ninth and other Circuits, and other California courts; Vice-chair of Committee on Programs of the ABA Criminal Law Section; General Counsel, American Civil Liberties Union, Northern California, 1970-74; Advisory Counsel since 1974; Member, International Bar Association; Member, The California Academy of Appellate Lawyers; Fellow of the American Board of Criminal Lawyers, past Member of the Executive Committee of State Bar Criminal Law Section; Chief Justice's Blue Ribbon Committee on Media and the Courts, and numerous other committees.

Lectured the California Conference of Municipal Court Judges on three separate occasions; the California Cow County Judges Association twice; the California Conference of Judges twice; the California State Bar/Court Annual Meeting twice; the ABA/ALI on a dozen occasions, including such subjects as grand jury practice, use of state constitutions, evidence, forensics, ethics, attorney fees, constitutional issues, and trial tactics; Chaired the Practicing Law Institute's 14th, 15th, 16th and 17th Annual Defending Criminal Cases seminars in New York, Chicago and San Francisco; Chair of Georgetown University Defending Criminal Cases National Institutes in 1980-83; was a panelist or

moderator in numerous programs for PLI, Continuing Education of the California Bar on criminal law and procedures, on attorneys' fees, on the law of contempt, on civil sanctions, on experimentation at trial, and the concept of a private attorney general; headlined or participated on a dozen State Bar panels; has addressed several annual state bar gatherings from South Dakota to Washington to Texas to Florida; lectured for CACJ, CTLA, ATLA; CEB; International Bar Association; Georgia 'Superstar' seminar; NORML annual meeting; Federal Public Defenders training sessions and San Francisco Public Defender training program; Aspen seminar; Drug Policy annual meeting, and a host of other organizations, including several programs for the National Association of Criminal Defense Lawyers and the California Attorneys for Criminal Justice.

Expert witness in numerous criminal cases.

PUBLICATIONS INCLUDE:

State, School and Family (co-author) (a case book), Matthew Bender, 1972, 1975, 1980.

Prosecutorial Discretion (co-author), CEB, (1979), 1983.

Trial Objections, (co-author), CEB, 1982. (1995 edition is currently in the planning stages.)

Ethics and Discipline, (co-author), CEB, 1995 (edition is now in the planning stages).

Jefferson on Evidence, 3d Edition, Contributor

Four volumes for Practicing Law Institute on Criminal Law.

Four volumes for Georgetown series on Recent Developments in Criminal Law.

More than two dozen articles on criminal and constitutional law.
Member of Board of Editors, Matthew Bender - Criminal Defense Techniques; Criminal Law Advocacy Reporter

AWARDS:

Recipient of the Lawyer of the Year award, Students' Council for Civil Rights, 1979; the Matthew O. Tobriner Award (Public Advocates), 1982; the Robert C. Heeney Award of the NACDL, 1984; listed among leading San Francisco attorneys by Town and Country magazine, 1985; California Magazine ("Ten Lawyers With Clout"), 1982; San Francisco Examiner ("10 Super Lawyers"); and several professional directories (eg, Best Lawyers in America (all editions), Directory of Lawyers of National Law Journal); California Lawyer Magazine "Most Respected Lawyers", September, 1989.

REPRESENTATIVE CLIENTS:

State of Israel, Consulate General of Israel for Pacific Northwest, State of California Department of

Transportation, from time to time United States of Mexico, Embassy of Tunisia, California State Assembly, State of California Public Utilities Commission, City and County of San Francisco, City of Fresno, Butte County, Bank of America, University Students Cooperative Association, and San Francisco Street Artists. Also, matters known in public, Finley-Kimble, Baker & McKenzie, Lieff, Cabraser & Heimann, Sheriff (and later Police Chief) Richard Hongisto, Sheriff Winter (Santa Clara), Assemblyman Pat Nolan, John Gotti on appeal, Dean Prunty of Hastings Law School, Lyle Menendez (one motion), and on appointment: Charles Ng.

Currently, representation of 98 judges before the California Commission on Judicial Performance and countless lawyers before the California State Bar. Also acts as a consultant to the California Trial Objections, 4th Ed., CEB (1997), and to the Jefferson's California Evidence Benchbook, CEB, (1997).

**Mark E. Matthews** has been the Deputy Assistant Attorney General responsible for criminal matters within the Tax Division since February 1994. From August 1993 through February 1994, he served as the Director of the Treasury Department's Money Laundering Review Task Force and as a Senior Advisor to the Assistant Secretary for Enforcement, Ronald K. Noble. From 1988 to 1993, Mr. Matthews was an Assistant United States Attorney and then a Deputy Chief of the Criminal Division in the Southern District of New York. He has served in other governmental positions as a Special Assistant to Director William H. Webster, both at the F.B.I. and the C.I.A.

# BIO OF CHARLES MEADOWS - TAX PRACTITIONER

Charles Meadows is a C.P.A and an attorney. He is Board Certified in Tax Law by the State of Texas. He has represented several hundred taxpayers involved in criminal tax investigations and charges. He is currently the Subcommittee Chair on Current Developments in Criminal Tax Penalties for the Committee on Civil and Criminal Penalties for American Bar Association. He has spoken on Criminal Tax topics to various national and state seminars including: White Collar Seminars sponsered by the ABA in 1994,96,97and will speak in March of 1998; State Bar of Texas Advanced Tax Seminar 1996;TSCPA Tax Conference 1997; and numerous other institutes sponsored by the ABA , State Bar of Texas , TSCPA and AICPA.

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# BIOGRAPHICAL INFORMATION

# ON

# KATRINA C. PFLAUMER

Put forward by Senator Patty Murray, nominated by President Bill Clinton, and confirmed by the U.S. Senate, Katrina C. Pflaumer has served as U.S. Attorney for the Western District of Washington since December, 1993. The United States Attorney's Office represents the federal government in most civil litigation and federal criminal prosecutions arising in the Western District, which is comprised of 19 counties, 22 recognized Indian tribes, and approximately 4.5 million residents. Attorney General Janet Reno has twice appointed Ms. Pflaumer to serve on her Advisory Committee and Ms. Pflaumer serves on subcommittees addressing Health Care Fraud, Civil Rights, Native American Issues, Sentencing Guidelines, and Domestic Security.

Prior to becoming U.S. Attorney, Ms. Pflaumer spent 13 years in private practice, representing defendants, plaintiffs, witnesses, and victims in both criminal and civil cases. She also has served as a *pro tem* judge, has taught numerous trial advocacy programs, has been president of the Federal Bar Association of the Western District of Washington, and a lawyer representative at the Ninth Circuit Judicial Conference.

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## EXPERIENCE

### U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION

**Chief, Fraud Section,** 1994-present.
Supervise 100 plus prosecutors and staff, including a field office in Boston and a task force in San Diego. Responsible for the most complex, significant white collar prosecutions covering a broad spectrum of enforcement, including health care fraud, securities fraud, bank fraud, telemarketing, and defense procurement fraud. Work with senior management at various enforcement agencies, including the Federal Bureau of Investigation, Treasury Department, Securities and Exchange Commission, to develop initiatives and set priorities in the area of white collar crime. Work closely with the members of the Attorney General's Council on White Collar Crime and the Attorney General's Advisory Committee of U.S. Attorneys to form policies with respect to issues particular to white collar crime.

Serve as Vice-Chair of the American Bar Association's White Collar Crime Committee.

**Chief, General Litigation Section,** 1991-1994.
Supervised 40 lawyers who provided legal advice to the U.S. Attorneys' offices and were involved in the prosecution of cases around the country. The Section had jurisdiction over general federal crimes, including obstruction of justice, perjury, intellectual property, computer crimes, custom and immigration fraud, and Indian gaming.

**Deputy Chief, Child Exploitation and Obscenity Section,** 1989-1991.
Supervised and managed litigation regarding child exploitation, child pornography, and obscenity cases across the country, dealing with First Amendment related litigation and privacy issues. Responsible for a major multi-defendant Rico obscenity prosecution in Nevada.

### U.S. ATTORNEY'S OFFICE, MIDDLE DISTRICT OF PENNSYLVANIA

**Assistant U.S. Attorney,** 1984-1988.
Prosecuted numerous federal criminal cases, including multi-defendant narcotics cases, murder on federal lands, fraud, child pornography.

### U.S. ATTORNEY'S OFFICE, EASTERN DISTRICT OF PENNSYLVANIA

**Assistant U.S. Attorney,** 1981-1984.
Prosecuted many federal criminal cases, particularly narcotics, fraud, art theft, racketeering. Wrote numerous appellate briefs and argued before the Third Circuit Court of Appeals.

# MARY C. SPEARING

**U.S. DEPARTMENT OF ENERGY, OFFICE OF SPECIAL INVESTIGATIONS**
Attorney, 1979-1981.
Investigated and litigated fraud cases against major oil companies during the time when the oil companies were regulated.

**NEW YORK CITY DEPARTMENT OF INVESTIGATION**
Attorney, 1976-79.
Investigated cases involving corruption between New York City employees and contractors, including in the housing field, construction industry, and poverty programs. Conducted extensive litigation and disciplinary proceedings and hearings against employees and contractors charged with corruption.

## EDUCATION

**FORDHAM LAW SCHOOL**
Juris Doctor, May 1976
Articles Editor, Fordham Urban Law Journal

Member of the New York Bar.

**VASSAR COLLEGE**
Bachelor of Arts degree, 1972
Major: Art History

**Richard Speier, Jr.**
**Internal Revenue Service**
**Director of Investigations**
**Western Region Criminal Investigation**

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Mr. Speier is the principal assistant to the Assistant Commissioner for Criminal Investigation for planning, coordinating and evaluating Criminal Investigation activities throughout the Western Region which includes the areas of California, Colorado, Wyoming, Montana, Utah, Nevada, Arizona, New Mexico, Washington, Alaska, Hawaii, Idaho and Oregon. That responsibility includes the enforcement of criminal tax statutes and nationwide programs for investigating suspected tax violations of the Internal Revenue Code, the Money Laundering Control Act and the Bank Secrecy Act, and recommending prosecution.

Criminal Investigation's top law enforcement priorities are: the investigation of income tax evasion, which involves fraud in both the legal industries (such as health care, gaming, telemarketing) and in illegal industries (such as narcotics and organized crime); domestic and international money laundering; and violations of the Bank Secrecy Act, which involves the proper reporting of currency transactions.

Mr. Speier began his IRS career in 1977 as a special agent in Los Angeles, California. He has held increasingly responsible positions as a group manager and branch chief in Los Angeles; executive assistant in San Francisco, California; Chief in San Jose, California, and Chief in Los Angeles, until his selection as Director of Investigations in 1996. He has testified extensively in courts throughout the United States as a government expert witness in the field of narcotics and money laundering.

Mr. Speier is a graduate of California Polytechnic University in Pomona, California. He is a native of Indianapolis, Indiana.

JUSTIN A. THORNTON
Attorney at Law

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PRIVATE LAW PRACTICE, Washington, DC

1987-Present Engaged in the private practice of law, primarily in the area of white collar criminal defense, with special emphasis on tax fraud litigation, financial crimes and investigations, and corporate compliance. Sole practitioner since January 1993. Previously a partner in the Washington offices of the law firms of Smith Helms Mulliss & Moore, of North Carolina (1991-92); Bell, Boyd & Lloyd, of Chicago (1990-91); and, Adams, McCullough & Beard, of North Carolina (1987-90). Rated "AV" in Martindale-Hubbell Law Directory.

U.S. DEPARTMENT OF JUSTICE, Washington, DC

1979-1987 *Senior Trial Attorney with Tax Division:* Extensive litigation experience in all phases of federal criminal prosecutions. Successfully prosecuted in federal courts throughout the United States more than 75 fraud cases involving complex financial crimes. Supervised and trained numerous other trial attorneys.

*Award Recipient:* Tax Division's Outstanding Attorney Award (1984); IRS Assistant Commissioner's Award and designation as Honorary IRS Special Agent (1987) for successful prosecution of tax fraud and related crimes.

1978-1979 *Trial Attorney with Criminal Division:* Prosecuted 500 non-felony criminal cases as a Special Assistant U.S. Attorney. Assisted in the review and drafting of criminal legislative proposals and departmental policies.

## *Professional Organizations*

- United States Sentencing Commission, Practitioners' Advisory Group (charter member, and advisor on federal sentencing guideline matters)(1989- ); attorney working group on corporate sanctions (1988-1989).
- American Bar Association: Section of Criminal Justice, White Collar Crime Committee; Chair/Co-Chair, Tax Enforcement Subcommittee (1992- ); Liaison to Section of Taxation. Section of Litigation, CLE coordinator for Complex Crimes Committee (1989-1992); and Liaison to Tax Division, Department of Justice, for Tax Litigation Committee(1988- ). Section of Taxation, Committee on Civil & Criminal Tax Penalties; Subcommittee on Criminal Tax Policy.
- National Association of Criminal Defense Lawyers; District of Columbia Association of Criminal Defense Lawyers, Board of Directors (1996- ).
- District of Columbia Bar; Vice-Chair, Tax Audits & Litigation Committee (1996- ).
- International Bar Association, Committees on Business Crime and Criminal Law.

## *Publications*

- Author: "Legal Briefs: The Case of the Non-Filer," CPA Report, August, 1993; Co-Author: "May a Foreign National Successfully Assert a Fifth Amendment Claim for Fear of Foreign Prosecution," International Enforcement Law Reporter, Vol.10, Issue 9, September, 1994; "Crime Doesn't Pay - But Counsel May: Criminal Exposure in the Everyday Practice of Law," Criminal Justice, Vol. 8, No. 3, Fall 1993, republished in Corporate Counsel's Quarterly, Vol. 10, No. 1, January, 1994; "Corporate Punishment: The New Federal Sentencing Guidelines for Organizations," South Carolina Lawyer, Vol. 4, No. 2, September/October, 1992.

## *Speaking Engagements*

- Frequent speaker to numerous professional groups on white collar criminal matters, including American Bar Association meetings in New York, Toronto, Honolulu, Chicago, Orlando, Atlanta, and Washington; and, various other lawyer and CPA groups in Florida, Georgia, Maryland, Ohio, North Carolina and South Carolina. Commentator on National Public Radio's "All Things Considered" program concerning criminal tax fraud investigation and prosecution procedures (1997).

## *Bar Memberships*

- District of Columbia (1979), North Carolina (1988) and South Carolina (1977).

## *Education*

- University of South Carolina, Columbia, SC; Juris Doctor degree (1977).
- University of Exeter, Exeter, England; International Law Program (1976).
- University of North Carolina, Chapel Hill, NC; Bachelor of Arts degree (1971).

## *Practice Areas*

TAX FRAUD - Representative clients include:

- Principal officer of one of the world's largest non-profit organizations under federal grand jury investigation for misappropriation of funds, tax fraud and obstruction of justice. Prosecution declined.
- Prominent North Carolina attorney who was the target of an Atlanta federal grand jury investigation of fraudulent off-shore tax shelter. Prosecution declined.
- Prominent restaurateur in southern U.S. and Mexico under lengthy IRS criminal investigation, followed by federal grand jury investigation, for multiple allegations of tax fraud. Prosecution declined.
- Key witness subpoenaed in the grand jury investigation and trial of the former President of the United Way of America. Client was granted immunity from prosecution.
- CPA who was the target of an IRS undercover investigation of an allegedly fraudulent tax shelter scheme and of conspiracy to prepare false tax returns. Prosecution declined.
- Majority-shareholder of a New Jersey corporation under IRS criminal investigation for personal and corporate income tax evasion. Prosecution declined.
- President of a New York City service company, and a president of a North Carolina industrial manufacturer, both charged with tax evasion. Plea bargains resulted in probation in both cases.
- A Maryland healthcare consultant, a North Carolina physician, a Florida CPA, a Northern Virginia businessman and a Washington, D.C. minister & community leader, each of whom failed to file tax returns for multiple years. Physician and CPA received probation following plea bargain; healthcare consultant received minimal term of community confinement and home detention following plea bargain; prosecution was declined in the other cases.
- Maryland restaurateur under IRS criminal investigation for alleged tax evasion. Prosecution declined.
- Targets, subjects and witnesses in ongoing and expansive federal grand jury and IRS administrative criminal investigations in various federal judicial districts throughout the United States.

BUSINESS CRIMES & INVESTIGATIONS - Representative clients include:

- Michigan corporation under criminal investigation by the Department of Defense for alleged government contract fraud. Prosecution declined.
- Maryland physician investigated by U.S. Department of Justice for alleged antitrust and health care violations. Civil settlement in lieu of criminal prosecution.

- A French national who served as a corporate officer of a major helicopter manufacturer, under federal criminal investigation by the FBI and Department of Defense for allegations of submitting false and fraudulent certifications to the federal government. Criminal prosecution not pursued.

- North Carolina businessman charged with conspiracy and failure to report the international transportation of monetary instruments. Plea bargained from felony to misdemeanor with no fine or incarceration imposed.

- District of Columbia mental health center under criminal investigation for alleged Medicaid fraud. No charges filed.

- North Carolina businessman committing securities fraud and embezzlement by defrauding investors of several million dollars. Plea bargain resulted in substantially reduced sentence.

- Northern Virginia corporation and president indicted under the 1986 Immigration Reform Act for bringing in, harboring and employing illegal aliens. Plea bargain resulted in probation.

- District of Columbia bank teller charged with felony theft. Plea bargain to misdemeanor resulted in probation.

- International banking promoter under investigation by the FBI, SEC & Canadian authorities for alleged violations of securities and mail fraud statutes.

- District of Columbia businessman subpoenaed as witness in bank fraud investigation. Granted immunity.

- North Carolina businessman investigated by U.S. Postal Service for pyramid mail scheme. Civil settlement.

- District of Columbia attorney indicted for conspiracy to commit wire fraud in furtherance of mortgage loan scam against three financial institutions. Plea bargain resulted in reduced sentence.

- Key witness in multi-million dollar international SEC investigation of insider trading.

- Northern Virginia corporation under criminal investigation by EPA for government contract fraud.

- Former HUD official subpoenaed by Office of Independent Counsel as witness in ongoing investigation of alleged improprieties at HUD.

- Several Washington area accounting firms subpoenaed as witnesses in Iran-Contra and Pentagon procurement fraud investigations.

- Arkansas state law enforcement official subpoenaed by the Office of Independent Counsel in ongoing investigation of Whitewater Development Corporation and Madison Guaranty Savings & Loan.

- Targets, subjects and witnesses in numerous federal grand jury investigations in various federal judicial districts throughout the United States.

OTHER:

- Key witness in the Clarence Thomas/Anita Hill hearings before the U.S. Senate Judiciary Committee.

- Resident of southern Virginia indicted on arson charges. Jury trial resulted in complete acquittal.

- Northern Virginia businessman mistakenly identified as armed robber. No charges initiated.

- Former IRS and FBI officials engaged in employment disputes with their agencies. Civil settlements.

*January, 1998*

## Frank Bowman

Home Address:
332 West 37th Avenue
Spokane, WA 99203
509-456-2583

Business Address:
Gonzaga Univ. Law School
P.O. Box 3528
Spokane, WA 99220
509-328-4220 x3777


## EDUCATION

| | | |
|---|---|---|
| 1976-79 | **Harvard Law School**<br>J.D., June 1979 | **Cambridge, MA** |
| 1972-76 | **The Colorado College**<br>B.A., **cum laude** | **Colorado Springs, CO** |

## TEACHING EXPERIENCE

1996-98 **Gonzaga Univ. School of Law** **Spokane, WA**

Visiting Professor of Law. Subjects: Criminal Law, Constitutional Criminal Procedure (4th, 5th, 6th Amendment), Criminal Procedure ("Bail-to-Jail"), UCC-2, Law & Literature. Voted 1996-97 *Professor of the Year*.

1996 **Office of Legal Education, U.S. Department of Justice** **Washington, D.C.**

Lecturer on U.S. Sentencing Guidelines in programs offered by the Office of Legal Education to Department of Justice personnel.

1994-95 **Washington & Lee Univ. Law School** **Lexington, VA**

Visiting Professor of Law. On sabbatical from Department of Justice. Taught Criminal Law, Criminal Procedure (post-arrest), Trial Advocacy, and Introduction to the Lawyer's Role (1st yr. writing/skills course).

Sept. 1985 to June 1989 **University of Denver College of Law** **Denver, CO**

Adjunct Professor of Law. Trial Tactics and Criminal Law.

## PRACTICE EXPERIENCE

Sept. 1995 to April 1996 — **United States Sentencing Commission** — **Washington, D.C.**

Special Counsel to United States Sentencing Commission. On loan from U.S. Department of Justice.

Sept. 1989 to May 1996 — **United States Attorney's Office, So. Dist. of Florida** — **Miami, FL**

Assignments included: Deputy Chief, Southern Criminal Division, as well as line AUSA in the Major Crimes Section and the Economic Crimes Division. Specialty: complex white collar crime. Approximately twenty-five jury trials.

January 1987 to Sept. 1989 — **Anderson, Campbell & Laugesen, P.C.** — **Denver, CO**

Mid-sized firm specializing in tort litigation and workers compensation law. My practice also included construction and gen'l business litigation.

August 1983 to Dec. 1986 — **Denver District Attorney** — **Denver, CO**

In charge of criminal prosecutions in the Consumer Fraud Division for 14 months; 6 months in Juvenile Division; remaining time assigned to felony prosecutions in District Court. Forty-two jury trials.

Sept. 1982 to Aug. 1983 — **Yates & Crane** — **Durango, CO**

Civil (torts and general business) and criminal litigation.

Oct. 1979 to Sept. 1982 — **U.S. Department of Justice** — **Washington, D.C.**

Entered the Department as part of the Honor Graduate Program. During three years as a Trial Attorney for the Criminal Division, assignments included:

Feb. 1980 to Sept. 1982 — **General Litigation & Legal Advice Section** — **Washington, D.C.**

Trial and appellate litigation, including criminal regulatory enforcement (NRC, MSHA, OSHA), immigration, prison/parole matters, crimes against the public and against government operations.

| | | |
|---|---|---|
| Sept. 1981 to Jan. 1982 | **Special Assistant U.S. Attorney** | **Philadelphia, PA** |
| | Detailed as AUSA trying criminal cases in Eastern Dist. of Pennsylvania. | |
| Oct. 1979 to Jan. 1980 | **Office of Enforcement Operations** | **Washington, D.C.** |
| | Federal witness protection program and electronic surveillance requests. | |
| June 1978 to Aug. 1978 | **Paul, Hastings, Janofsky & Walker** | **Los Angeles, CA** |
| | Summer associate. | |

## PUBLICATIONS

**Treatises, Books & Newsletters**

Roger W. Haines, Jr., with Jennifer C. Woll and Frank O. Bowman, III, FEDERAL SENTENCING GUIDELINES HANDBOOK (West Publishing 1997)

Frank O. Bowman, III and Roger W. Haines, Jr., FEDERAL FORFEITURE GUIDE (James Publishing 1996).

Roger W. Haines, Jr. and Frank O. Bowman, III, NINTH CIRCUIT CRIMINAL LAW REPORTER (Newsletter), Vol. 9, No. 28, July 9, 1997 (James Publishing).

**Journal Articles**

*Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VANDERBILT L. REV. -- (1998) (scheduled for publication April 1998).

Ronald J. Allen, Frank O. Bowman, III, et al., *Foreward: Montana v. Egelhoff -- Reflections on the Limits of Legislative Imagination and Judicial Authority*, 87 J. CRIM. LAW & CRIMINOLOGY 633, 684-691 (1997) (an article by Ron Allen followed by an on-line symposium about *Egelhoff*).

*The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WISCONSIN L. R. 679 (1996).

*A Bludgeon By Any Other Name: The Misuse of "Ethical" Rules Against Prosecutors to Control the Law of the State,* 9 GEORGETOWN JOURNAL OF LEGAL ETHICS 665 (1996).

*Playing "21" With Narcotics Enforcement: A Response to Professor Carrington*, 52 WASHINGTON & LEE LAW REVIEW 937 (1995); *see also* reply of Prof. Carrington, 52 WASH.& LEE L.R. 987 (1995).

*Guest Editor's Observations: Back to Basics: Helping the Commission Solve the "Loss" Mess With Old Familiar Tools,* 10 FEDERAL SENTENCING REPORTER 115 (Nov/Dec 1998). (I was Guest Editor for this edition of FSR.)

*Places in the Heartland: Departure Jurisprudence After* Koon, 9 FEDERAL SENTENCING REPORTER 19 (July/August 1996).

*To Tell the Truth: The Problem of Prosecutorial "Manipulation" of Sentencing Facts,*8 FEDERAL SENTENCING REPORTER 324 (May/June 1996).

*A Federal Prosecutor Returns to School,* 44 VIRGINIA LAWYER 22 (1996).

## OTHER ACTIVITIES

Member of Editorial Board of CRIMINAL JUSTICE REVIEW, a peer-reviewed social science journal published by Georgia State University (1996 - present).

Member of ABA Committee on Federal Sentencing Guidelines (1998 - ).

## PERSONAL

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PREPARED STATEMENT
of
MARK FLANAGAN
to the
UNITED STATES SENTENCING COMMISSION

March 5, 1998 Public Hearing

Let me begin by thanking the Commission for extending to me an invitation to testify in the March 5, 1998 public hearing. I welcome the opportunity. I have closely followed the Commission's efforts this past year to clarify and to improve the definition of loss as used in the Theft and Fraud guidelines. The views expressed here are refinements of those presented in my article published last September in *The Legal Times*. I am appearing in my capacity as a member of the private defense bar.

**Introduction**

The Commission has proposed numerous amendments relating to the guidelines for Fraud and Theft, but, in my view, Proposed Amendment No. 4--the definition of "loss"--is by far the most critical. "Loss" is the bedrock upon which the guidelines for fraud and theft rest. Indeed, the calculation of a sentence begins with the calculation of loss. A fair and uniform application of the loss tables depends upon this concept.

Nonetheless, the current guidelines definition has no causation requirement, and places no true limit on the amount of damages for which a defendant can be held responsible. The guidelines all but eliminate the connection between a defendant's act, the effect of the defendant's act, and the defendant's punishment. There is no clear definition of loss, and as a result,

different courts use different approaches when measuring loss, and different defendants get different--and perhaps unjust--sentences.

The Commission's Proposed Amendment No. 4, as refined in its February 1998 Working Draft, goes a substantial way towards accomplishing the Commission's mission to promote uniform and just sentences. The first order of business, as reflected in these papers, must be to better define loss. The February Working Draft already captures much of what needs to be done, and in and of itself represents a remarkable improvement and many hours of hard work. My comments below are intended to emphasize the compelling need to go forward with the concepts embodied in the February Working Draft and to consider additional revisions to make it even better.

Within this context, I believe the Commission could markedly improve the definition of loss if it were to do the following: 1) Define and adopt, as proposed, a "reasonably foreseeable" causation standard; 2) Eliminate "intended loss" from the definition of loss, and use it only as a grounds for departure; 3) Eliminate, as proposed, consequential damages as a term used in the definition of loss, and predicate loss on the recovery of reasonably foreseeable damages only; and 4) Eliminate defendant's gain from the definition of loss, and use it only as a grounds for departure.

**Add A Causation Element**

The most serious flaw of the current definition is that there is no causation requirement. Under the current guidelines, loss can conceivably include *all* harm, no matter how remote, from the acts or omissions of a defendant. Section 1B1.3(a)(3) defines "harm" to include "all harm" resulting from a defendant's acts

or omissions, and the guidelines state that loss need not be determined with precision. This combination of holding a defendant responsible for "all harm" while at the same time applying a loose standard of proof does not promote fairness, uniformity, or proportionality in sentencing. A court may hold a defendant criminally responsible for losses that were, at best, remotely caused and unforeseen. But if a purpose of the guidelines is to deter a defendant's conduct, the defendant only should be held liable for the reasonably foreseeable results. The guidelines cannot justly deter conduct that has unforeseeable results.

That is why the single most important improvement offered by Proposed Amendment No. 4 and the February Working Draft definition of loss is the addition of the "reasonably foreseeable" standard. For the first time since the introduction of the U.S. Sentencing Guidelines, the Commission has proposed a recognizable link between a defendant's criminal conduct and the damages caused by that conduct. This causation standard puts coherent limits on the amount of harm attributable to a defendant. It will prevent such anomalous sentences as in United States v. Neadle, 72 F.3d 1104 (3rd Cir. 1996), where a defendant who had posted a $750,000 bond to open an insurance company was held responsible $20 million in unpaid property damage that resulted from a hurricane. The Court in Neadle imposed a sentence on the defendant without applying any causation standard whatsoever.

I strongly support the Commission's effort to define loss by introducing the "reasonably foreseeable" standard. But it must go a step further by defining "reasonably foreseeable;" if it does not, it will be left to the courts to define this causation standard and the results may vary. For example, the Commission

should consider adopting the definition offered by Professor Frank Bowman in his proposed definition of loss set forth in his law review article scheduled for publication this Spring. The definition defines "reasonably foreseeable" as harm that "ordinarily follows from one or more of the acts . . . in the usual course of events, or that a reasonable person in the position of the defendant would have foreseen as a probable result." Adopting such a definition will promote uniformity of interpretation.

**Eliminate Intended Loss From Definition of Loss**

Section § 2F1.1, Application Note 7(b) of the current guidelines specifies that "where the intended loss is greater than the actual loss, the intended loss is to be used," but nowhere in the guidelines is "intended loss" defined. I understand that use of "intended loss" is primarily meant to ensure that inchoate crimes are punished, but "intended loss" is an unnecessarily vague concept which seems to require a court to analyze a defendant's deepest thoughts on what the benefits of a particular crime might be. It is a complex and uncertain analysis, and depends not on evidence of what the defendant actually did, but what the defendant had hoped, thought, or dreamed of doing. It is time consuming, with no uniform result. It should be employed in limited circumstances only, not in the ordinary course.

Unfortunately, Proposed Amendment No. 4 and the February Working Draft definition retain "intended loss" as a key component. Both provide that loss is the "greater of the actual loss or the intended loss," thus requiring a court to contemplate intended loss in every case. Using "the greater of the actual loss or the intended loss" is unduly confusing because it requires the court to choose

between the objective standard of "reasonably foreseeable" and the subjective standard of "intended loss." While in a perfect world, with unlimited resources and time, it might be preferable for a court to always consider what intended loss might be, we do not live in such a world.

The solution is to remove "intended loss" from the definition of loss and to make it available as a possible grounds for an invited departure to cover those limited cases when a defendant's intended gain is so markedly different from the actual loss that a different punishment is warranted. In the ordinary case, though, the defendant should only be held responsible for the actual loss caused.

**Eliminate Consequential Damages**

The current guidelines single out procurement fraud and product substitution cases as the only cases where consequential damages are recoverable. The sole justification given for limiting consequential damages to these two types of cases is the summary and questionable assertion in § 2F1.1, Application Note 7(c), that such damages "frequently are substantial." Singling out these cases also implies that all other cases are limited to direct damages. The result is that there is confusion among the courts as to whether to include consequential damages.

The February Working Draft definition of loss resolves this issue. By adopting a "reasonably foreseeable" standard, the Commission has obviated the need to include the term consequential damages in the guidelines. Under the reasonably foreseeable standard, a defendant will be held liable for damages that are foreseeable. There is no need to attempt to apply a consequential damages analysis to determine if the damages are immediate and direct or indirect; include

only those damages that are reasonably foreseeable regardless of whether they are direct and immediate or indirect damages.

But for one caveat, I recommend that the Commission proceed with its proposal to eliminate the term consequential damages from the guidelines, and to use only the reasonably foreseeable standard. The caveat concerns the suggestion that costs incurred by government agencies in a criminal investigation or prosecution of a defendant routinely should be considered reasonably foreseeable damages. I disagree. The Commission should consider adding language to the definition of reasonably foreseeable, as Professor Bowman has proposed in his article, to make it clear that loss does not include such costs.

**Make Gain a Departure**

The current guidelines seem to allow courts to use the offender's gain as the measure of loss instead of the victim's loss. See § 2F1.1, Application Note 8. The February Working Draft definition of loss expressly incorporates gain as a factor in the determination of loss. The Commission should not include gain in the definition of loss because it muddles the calculation of loss. To simplify and to promote clarity and uniformity, the Commission should focus only on the harm to the victim when determining loss. For those unusual cases when the loss does not reflect the seriousness of the offense, or when gain is vastly lower than the actual loss, the Commission should propose language to invite an upward or downward departure. For example, a defendant who is only a pawn or functionary--like an employee of a corporate defendant in a complex white collar case--may gain little or none of what the victim has lost. In such cases, it may well be unfair to sentence the individual based on actual loss.

**Conclusion**

My colleague, Will O'Brien, and I focused on the proposed amendments to the Theft and Fraud Guidelines when we realized that the Commission was considering amending the loss tables without correcting the defects in the definition of loss. Since then, various groups from a variety of sources have urged the Commission to tackle the tough issue of defining loss either before or together with amending the loss tables. It is a tribute to the Commission that it has acted so swiftly to meet this challenge.

**TESTIMONY BEFORE THE U. S. SENTENCING COMMISSION**
**MARK E. MATTHEWS**
**DEPUTY ASSISTANT ATTORNEY GENERAL**
**TAX DIVISION**
**DEPARTMENT OF JUSTICE**

**SAN FRANCISCO, CALIFORNIA**
**MARCH 5-6, 1998**

Good morning. I am Mark Matthews and I am pleased to appear before the Commission today on behalf of the Tax Division. My testimony today will focus on the need for increased severity in the tax table, especially at the lower range of the table, in order to ensure a substantial likelihood of some prison time for more defendants convicted of tax violations. I also will speak about our support for certain proposed changes and clarifications in the "sophisticated means" enhancement in criminal tax cases. The Commission came very close to making such changes last year, and it should not allow another amendment cycle to pass without taking action to promote increased deterrence in criminal tax cases.

One of the primary goals of the Tax Division is to promote the public's voluntary compliance with the federal tax laws through the investigation and prosecution of violations of the federal criminal tax laws. We believe that by prosecuting and punishing those who violate our tax laws, we deter others who might be contemplating similar conduct.

We are faced, however, with the task of deterring more Americans (over 200 million) with fewer prosecutions (approximately 1500) than any other area of law enforcement. By way of contrast, a much smaller percentage of the American public is even remotely likely to consider committing an offense against our narcotics statutes, yet we appropriately bring many more such prosecutions against such violators with much greater sanctions at our disposal. In the tax administration business, our goal is not primarily to punish clearly unlawful conduct, but to influence hundreds of millions of Americans every year to take

the affirmative steps of honestly filling out and filing often complex tax returns and making substantial payments to Uncle Sam.

Our central concern is with those otherwise law-abiding citizens who might be tempted to cheat on their taxes. Almost all Americans are required to file income tax returns. Consequently, large numbers of citizens are presented with an annual opportunity on April 15 to cheat on their taxes. These potential tax violators are our primary concern and the focus of our mission.

By any measure, ours is a difficult mission. One measure of our success is the "tax gap," or the difference between what should be reported as owing and paid to the Government each year on legal source income versus what is actually reported and paid. That figure is currently estimated to be in excess of $100,000,000,000 ($100 Billion) per year. The IRS estimates that the compliance rate is approximately 83%.

We cannot afford to let that compliance rate drop any further. As my boss, Assistant Attorney General Loretta C. Argrett of the Tax Division, wrote to Chairman Conaboy last April:

> To maximize the deterrent value of criminal tax prosecutions and to reverse or limit the increasing tax gap, we desperately need to enhance the probability of imprisonment in more tax cases.

If taxpayers perceive that they can cheat the system without suffering any serious consequence, they will be less inclined to comply with the law and more willing to take the chance of not reporting and paying all the taxes that they owe. We believe that the prospect of a fine, home detention, or confinement in a halfway house does little to dissuade anyone tempted to cheat on their taxes. The idea, however, that one will spend time in jail if caught and convicted of a tax violation is a powerful disincentive to willfully disobeying the tax laws. As the Commission itself has stated in discussing certain economic crimes, including tax evasion, "the definite prospect of prison, even though the term may be

short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm." United States Sentencing Commission, Guidelines Manual, Ch.1, Pt. A-Introduction, 4(d), p.s. -- The Guidelines' Resolution of Major Issues-Probation and Split Sentences.

We believe that, unfortunately, the current Tax Table does not do a good enough job of making the possibility of imprisonment upon conviction for a tax violation enough of a realistic threat for many taxpayers. For example, the Commission's own statistics, as reflected in its 1996 Annual Report, reveal that for the total universe of federal criminal cases sentenced in Fiscal Year 1996, more than 80% of all guideline sentences included a term of imprisonment and only 11.5% of defendants sentenced received straight probation. In contrast, in tax cases, only 40% of all guideline sentences included a term of imprisonment, while 60% of the convicted defendants received a

sentence including probation and more than 30% received a term of straight probation.

The need for higher offense levels at lower loss amounts is brought into even sharper focus when one considers the number of individual taxpayers who actually face a real risk of imprisonment under the guidelines. Under the current guidelines, because almost 88% of convicted tax defendants receive a reduction for acceptance of responsibility, the certainty of prison time is generally faced only when the loss amount exceeds $40,000. Below that amount, most tax defendants can fall into Zone B or lower, and, thus, receive a sentence that does not require imprisonment. But the number of taxpayers who could cheat on their taxes to the tune of $40,000 is minuscule. For tax years 1992 through 1995, somewhere between 95% and 97% of the individual income tax returns filed reported an adjusted gross income of $100,000 and less. The average tax liability reported for those years in the adjusted gross income range of $75,000 to $99,999 was between

$12,625 and $12,936. In other words, if those approximately 95% of all individual taxpayers cheated on every dollar of tax liability for three consecutive years, they still would not reach the $40,000 tax loss level that would guarantee them some prison time under the guidelines. Only by increasing the offense levels at lower dollar amounts can the risk that most taxpayers face the likelihood of prison time become something more than a theoretical possibility.

Among the various tax loss table options, our clear preference is Option 2 of the published version, although the April 1997 staff proposal, to which we agreed last year, is also acceptable. Except between a tax loss of $1,701 and $2,000, Option 2 and the April 1997 staff proposal tables would be higher than the existing tax table, thereby increasing the likelihood of prison exposure. Both tables also move tax violators beyond offense level 12 (to offense level 14) more quickly than does the current table (at the $30,000 tax loss level rather than at the $40,000 level), thus making it impossible to reach, through an

acceptance of responsibility reduction, Zone B and a sentence that does not require the service of any prison time. Moreover, large losses are punished much more severely under both of these proposals. We prefer Option 2 to the April 1997 staff proposal because of the slightly lower loss amount breakpoints in Option 2 at mid to upper level income ranges.

The Commission also seeks comments on several proposals regarding "sophisticated means," an enhancement that has been a part of the tax guidelines since the inception of the Sentencing Guidelines. We support the Commission's proposal to add a floor of "12" to the enhancement. We also endorse the Commission's proposal to resolve a circuit conflict by clarifying that the sophisticated means enhancement is offense, rather than offender, specific. That the enhancement is offense specific is consistent with the "relevant conduct" provisions of the Guidelines, and enhancements and reductions related to offender characteristics are already covered in the role-in-the offense provisions.

Moreover, one does not have to be the creator of the sophisticated means used to impede discovery of the existence or extent of the offense to benefit from them. The fact that the defendant did not create the sophisticated means but merely utilized them does not make his or her scheme any easier to detect or punish.

We would urge the Commission to include in Appendix C, as reasons for the amendment, language similar to that employed in the synopsis to the proposed amendment to the "sophisticated means" enhancement in tax cases published in the Federal Register. This will make clear that the enhancement applies based on the overall offense conduct for which the defendant is accountable and not the personal conduct of the defendant. In this way, the Commission's purpose and intent regarding its resolution of the circuit conflict in this area will be plain. In our view, the mere language of the proposed guideline modification is cryptic and needs additional amplification by way of background.

We believe that of the two proposals in this area, Option 1 is far superior. "Sophisticated means" has been a specific offense characteristic in the Chapter 2, Part T guidelines since their inception. A body of law has developed concerning its interpretation, and interested parties (i.e., judges, defense attorneys, defendants, probation officers and prosecutors) have become accustomed to dealing with this definition. Changing the definition of this sophisticated offense characteristic potentially would confuse and complicate sentencing proceedings without any demonstrated benefit flowing from the proposed change.

The proposed change in Option 2 narrows the scope of the sophisticated means enhancement to sophisticated concealment. No claim is made, nor can it be made, that the dramatic changes proposed by Option 2, the "sophisticated concealment" option, are necessary. Moreover, Option 2 dilutes the language of the existing guideline that the enhancement applies where the offense involved the use of foreign bank accounts or foreign transactions, or transactions through corporate

shells or fictitious entities for language that such actions "ordinarily indicate" sophisticated concealment. In our view, absolutely no case has been made for the need to adopt Option 2, much less propose its adoption.

In closing, I would again like to thank the Commission for the opportunity to appear before it and present the case for meaningful deterrence in criminal tax enforcement through enhanced offense levels at virtually all income levels.

# U.S. Sentencing Commission Hearing, March 5, 1998
## PREPARED STATEMENT:
**Frank Bowman**
**Gonzaga University School of Law**

## I. INTRODUCTION

I would like to begin by thanking the Commission for once again giving me the opportunity to address you on the important subject of economic crime sentencing. Both Commissioners and Staff deserve the highest praise for the difficult work you have done in bringing reform of so vexed and important an area of sentencing law close to fruition. I am hopeful that you will be able to resolve any remaining difficulties and adopt in this amendment cycle a comprehensive new approach to economic crime sentencing to which you can point with pride as a lasting legacy of your simplification effort.

The remarks that follow presuppose some familiarity with proposals I have previously presented to the Commission.[1] I have tried not to repeat myself here. Rather, what follows is a detailed analysis of the most recent draft of a consolidated theft-fraud guideline prepared by Commission staff and dated 2/20/98. I have also appended a proposed consolidated theft-fraud guideline that builds on the 2/20/98 Staff draft.

A final introductory comment: What follows is a fairly long paper. Its length should not be taken as an implicit judgment that the Commission cannot complete its work on a consolidated

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[1] For a detailed analysis of "loss" and economic crime sentencing, *see* Bowman, *Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VANDERBILT L. REV. -- (forthcoming, April 1998). For an abridged version of this analysis and the text of a proposed consolidated theft-fraud guideline, *see* Bowman, Written Statement for October 15, 1997, Sentencing Commission Hearing, and Bowman, *Back to Basics: Helping the Commission Solve the "Loss" Mess With Old Familiar Tools*, 10 FED. SENT. R. 115 (Nov-Dec 1997).

economic crime guideline this year. The 2/20/98 draft should not become law in present form. Without several key changes, its adoption might well create more problems than it would solve. However, the 2/20/98 draft has much to commend it. With relatively modest changes, it could be transformed into a coherent, workable approach to measuring "loss."

## II. THE BASIC APPROACH

The basic approach of the 2/20/98 Staff draft is sound. First, the theft and fraud guidelines *should* be consolidated, and the draft consolidates them. Second, the current rule that "loss" is the greater of actual or intended loss *should* be retained, and the draft retains it. Third, "loss" *should* be redefined in terms of causation -- cause-in-fact and the foreseeability to defendants of the economic harm they cause -- and the draft's core loss definition is cause-based. The Commission's decision to base its reform effort on these principles is a huge step in the right direction. Nonetheless, some challenging questions of implementation and drafting remain.

The three keys to a successful solution of the "loss" problem are: (1) a doctrinally sound core definition of the term "loss," supplemented by (2) coherent definitions of the concepts that make up the core definition, and (3) instructions to courts on how to deal with the most commonly recurring problem cases, instructions that are themselves both comprehensible to courts and consistent with the core definition. The Commission's 2/20/98 draft satisfies the first condition, a good core definition, reasonably well. Conditions (2) and (3) are not quite so fully realized.

## III. The Core Definition of "Loss"

### A. Actual Loss

The 2/20/98 draft defines "actual loss" as *"the reasonably foreseeable harm that (i)*

*resulted, as of the time of sentencing, from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct); and (ii) is reasonably certain to result after that time from such conduct."* There are at least three difficulties with this language:

1. "Loss" Is a Measurement of Economic Harm

The 2/20/98 draft language does not limit "loss" to economic or pecuniary harm. Language imposing such a limitation should be added, for a number of reasons:

First, the subject matter of this proposal is economic offenses, that is crimes made punishable because they harm victims by depriving them of property interests. Sentence levels for theft and fraud crimes, federal and state, have traditionally been based in large measure on the sound intuition that stealing more is worse than stealing less, primarily because stealing more causes greater economic harm than stealing less. This traditional ranking method is reflected in the current Guidelines Although the existing theft and fraud guidelines do not expressly limit "loss" to pecuniary harm, even a cursory reading of the application notes relating to "loss" in §2B1.1 and §2F1.1 establishes that both guidelines were written with that unstated understanding.

It would be unwise to adopt a core definition of "loss" that leaves open the possibility of including non-economic harms in the calculus. First, the most common non-economic harms associated with property crimes are already accounted for in other provisions of substantive or sentencing law, or if they are not, should be addressed separately and specifically and not by vague implication in the core "loss" definition:

** For example, most criminal conduct which involves stealing but which also invades other interests (such as bodily integrity or the security of one's home) is punished not as theft or fraud, but under other statutes such as robbery or extortion or burglary. Both the Guidelines and pre-Guidelines law treat such offenses as qualitatively different than theft and fraud, and sentence them accordingly.

** Moreover, the special harm inflicted on particularly vulnerable classes of victims such as the elderly or those targeted by hate crimes is addressed by the "vulnerable victim" enhancement of §3A1.1.

** In addition, if the Commission desires to make special provisions for unusually severe *effects* of theft crimes that are not necessarily a function of dollar amount of the loss, such as bankruptcy, the loss of a home, or the like, it can and should do so through a separate enhancement targeting such circumstances.[2]

** Finally, both the current fraud guideline and the 2/20/98 draft contain departure provisions for "non-monetary" harms.

Second, "loss" is a number which must be calculated in every case. A "loss" definition that invites inclusion of non-economic harms needlessly complicates the calculation and the evidentiary hearings necessary to create a record in support of the calculation. If "loss" is not limited to pecuniary harms, aggressive prosecutors will argue that the court should assign monetary values to, and then include in "loss," harms like victims' embarrassment, emotional distress, psychiatric counselling, marital stress, and the like.

Third, in the 2/20/98 draft, upward departure considerations (F)(i), (F)(ii), and F(iv), as well as downward departure consideration G(i), all contemplate departures for "non-monetary" harms or objectives, thus strongly implying that "loss" is intended to embrace only economic harms. If that is indeed the Commission's intention, why not say so plainly in the core definition and remove all doubt?

2. Is It Prudent to Include in "Loss" Harms "Reasonably Certain" to Occur in the Future?

The 2/20/98 draft definition includes in "loss" harms that have not occurred as of the time of sentencing, but which are "reasonably certain" to occur in the future. This seems a potentially

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[2] I have proposed such an enhancement for "significant financial hardship" in *Coping With "Loss," supra* 54-55 (manuscript).

troublesome innovation.

The desire to include such unconsumated harms in "loss" is understandable.[3] There are occasions when the full scope of the economic damage to a victim will not be conclusively established by the sentencing date. Collateral posted by the defendant in a fraudulent loan transaction may not have been liquidated. Other chains of economic cause and effect started by the defendant's crime may not have run their full course.

Nonetheless, the language proposed here presents numerous difficulties. The first is that by insisting future harms be "reasonably certain" to occur, the draft creates immense confusion about the burden of proof for such harms. *Query*: Under this rule, would the prosecution have to prove present or past harms by a preponderance of evidence,[4] but prove that future harms are "reasonably certain"? Or would the prosecution have to prove by a preponderance of evidence that future harms were "reasonably certain"? In either case, what does "reasonably certain" mean? Does it mean "more probable than not" (in which case the standard is nothing more than another way of saying preponderance)? Or does it mean "by clear and convincing evidence"(in which case the Commission should say so)? If, however, it means neither "by a preponderance of evidence" or "by clear and convincing evidence," the Commission should think carefully about whether it wishes to complicate the lives of both district and appellate court judges by creating a unique and undefined burden of proof solely for one subcategory of "loss."

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[3] Moreover, it is not unconstitutional to punish a defendant based in part on a prediction that a past crime will cause harms that occur or persist after sentencing. For example, we sentence murderers not merely because but for the murder the deceased victim would have been alive at sentencing, but also because the deceased and his survivors were deprived of a life that would probably have extended on long past sentencing. *See Payne v. Tennessee*, 501 U.S. 808 (1990) (upholding admission of victim impact evidence on ground that future effect of killing on survivors is ordinarily foreseeable to defendant).

[4] The burden of proof at sentencing is preponderance of the evidence. [cite]

Unconsumated harms, if they are to be addressed at all, should not be addressed in the core "loss" definition..

3. Time of Measurement of "Loss" Should Not Be Part of the Core Definition

The question of when to measure "loss" is too complicated to be woven into the core definition of "actual loss." It should be treated separately in a subsection devoted to that subject. (See discussion below.)

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In sum, the core definition of "actual loss" should read simply:

*"Actual loss" means the reasonably foreseeable harm caused by the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).*

**B. Intended Loss**

1. The Definition of Intended Loss

The 2/20/98 draft defines "intended loss" as "*the harm intended to be caused by the conduct for which the defendant is accountable under §1B1.3, even if the harm intended to be caused would have been unlikely or impossible to accomplish (e.g., as in a government sting operation).*" This approach represents a perfectly sound policy choice and is, moreover, in accord with the overwhelming weight of current case law.

Nonetheless, the language of the 2/20/98 draft should be modified somewhat because its blanket cross-reference to §1B1.3 (Relevant Conduct) will create unnecessary complications. Section 1B1.3(a)(1)(A) of the relevant conduct guideline makes a defendant accountable for his own conduct, as well as the conduct of others that he caused, commanded, or induced. By contrast, §1B1.3(a)(1)(B) renders a defendant accountable for harms resulting from the

"reasonably foreseeable" conduct of co-conspirators. By cross-referencing §1B1.3 in its entirety, the 2/20/98 draft seems to define "intended loss" to include harms the defendant *intended* to be caused by co-conspirator conduct which, from the defendant's point of view, was *foreseeable* but not necessarily intended.[5] We should avoid asking courts to unravel the enigma of whether a defendant can intend harms caused by the foreseeable but unintended actions of others. A solution to this difficulty might read roughly as follows:

> *"Intended loss" means (i) the harm the defendant intended to be caused by the conduct for which the defendant is accountable under §1B1.3(a)(1)(A), and (ii) in the case of jointly undertaken criminal activity, the harm the defendant intended to be caused by the acts and omissions of others in furtherance of the jointly undertaken criminal activity. A harm otherwise includable in intended loss shall not be excluded because it would have been unlikely or impossible to accomplish (e.g., as in a government sting operation).*

2. Departure for "inept manner"

The 2/20/98 draft contains a provision for a downward departure where "*[t]he offense was committed in such an inept manner that no reasonable likelihood existed that any harm could have occurred.*" Application Note 2(G)(ii). This provision could only apply to cases in which the "loss" for loss table purposes is intended loss. Note 2(G)(ii) should be deleted or redrafted.

First, Note 2(G)(ii) is theoretically unsound. The substantive criminal law does not exonerate offenders from liability for incompetence. Similarly, nowhere else in the Guidelines is there a provision for reducing a sentence for ineptitude. We do not reduce the punishment of those who conspire to rob banks or sell drugs because they are bunglers. It is difficult to see why

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[5] This is not a problem in the definition of "actual loss" because actual loss is itself defined in terms of reasonable foreseeability.

untalented would-be thieves should get a special break.

Second, Note 2(G)(ii) will generate unnecessary litigation because, as written, it seems somewhat at odds with the basic definition of "intended loss" in the 2/20/98 draft. The apparent intention of the 2/20/98 draft is to ensure that intended loss be used in all cases, particularly government sting cases, in which actual loss was factually improbable or impossible. If Note 2(G)(ii) is adopted, creative defense counsel in every case involving unconsumated economic harm will argue that the failure was due to the client's manifest incompetence. Not even government stings will be entirely exempt from this argument, because defense counsel will contend that the government snare was so obvious that only an inept (and by implication inexperienced and naive) person like the defendant would have fallen for it.

I assume that the true purpose of Note 2(G)(ii) is to leave open a very narrow window for departure in genuine cases of factual impossibility, excluding government undercover operations. A better solution to this problem would be to draw from the well-established substantive criminal law of impossible attempts and permit departure in those rare cases in which no loss could have occurred *even if the facts were as the defendant believed them to be*. This approach would eliminate impossibility arguments by defendants in government sting cases (because the success of any sting depends on the defendant's belief that government informants or undercover agents are something they are not), while retaining some flexibility to accomodate the truly unusual case in which a defendant neither caused nor created a risk of any actual harm whatever.[6]

The following language might meet the purpose:

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[6] *See, Coping With "Loss", supra* at 137-39 (manuscript).

[A departure may be warranted where:] *The conduct for which the defendant is accountable under §1B1.3 caused no actual loss, and the loss intended by the defendant could not have occurred even if the facts were as the defendant believed them to be. A departure on this basis is not available in cases involving government undercover operations or "stings".*

## IV. Defining the Concepts in the Core "Loss" Definition

As noted above, the core "loss" definition in the 2/20/98 draft is a giant leap toward the goal of sensible reform. Nonetheless, this strong beginning could be dramatically improved by giving sentencing courts additional guidance in the form of brief definitions of the critical concepts that make up the core definition. In particular, the Commission should: (i) state in plain language the standard of cause-in-fact it intends courts to apply; (ii) define the term "foreseeable;" and (iii) help courts identify the "victims" whose economic injuries are to count in measuring "loss."

### A. A Standard for "Cause-in-Fact"

The core "loss" definition in the 2/20/98 draft embodies the sound judgment that loss should include all harms that: (1) were caused in fact by defendant's conduct, and (2) were reasonably foreseeable to the defendant. However, the 2/20/98 draft does not identify or define a standard for cause-in-fact. In past submissions to the Commission, I have urged the adoption of a cause-in-fact standard (the "substantial factor test") more stringent than "but for" causation.[7] I am increasingly disposed to think that any standard other than "but for" causation introduces more practical complications than the possible gain in analytical precision is worth. The key point, however, is that different standards do exist and the Commission should specify the standard it wants the courts to apply.

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[7] *See* Bowman Prepared Statement, Hearing of U.S. Sentencing Commission, October 15, 1997; and *Coping With "Loss," supra at* 91, 93-95 (manuscript).

The 2/20/98 draft says only that loss is harm "resulting from" defendant's conduct. Sentencing courts may infer from this language that the cause-in-fact standard is "but for"causation, but that is not a necessary implication. Over the centuries, courts have applied various cause-in-fact standards depending on the subject matter and the circumstances. If it is the Commission's intention to make the standard of cause-in-fact "but for" (*i.e.*, to include in "loss" harms reasonable foreseeable to the defendant that would not have occurred "but for" the defendant's conduct), then the guideline should say so plainly and eliminate a source of confusion that has created problems in cases such as *U.S. v. Neadle*.[8]

**B. Defining "Foreseeability"**

The 2/20/98 draft wisely makes reasonable foreseeability the touchstone of whether an economic harm is to be included in "loss." However, the Commission should go one step further and include carefully crafted language defining the term "foreseeable." Foreseeability is a remarkably elastic term. What the law finds "foreseeable" in a tort case is often very different than what it views as "foreseeable" in a contracts case or a case of criminal negligence. Absolute precision is, of course, impossible, but the commission can and should give sentencing courts some guidance about whether foreseeability is to be construed very broadly or somewhat more conservatively in the "loss" context. There are several reasons for favoring a conservative approach:

First, to a far greater extent than other legal fields (such as torts, which focuses on compensation of the injured and encouraging social mechanisms such as insurance for sharing the cost of injuries), the emphasis in criminal law is on fault. Therefore, sentencing courts should

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[8] 72 F.3d 1104 (3d Cir. 1995).

insist that a defendant be punished only for harms that would realistically have been foreseeable to *this* defendant given the facts available to him at the time he acted.

Second, one of the legitimate concerns about a foreseeability-based "loss" definition is that it may tempt some courts and litigants into disputes over tangential issues remote from the essence of the defendant's crime. A limiting definition of forseeability reduces the chances of such distractions.

I would suggest addition of the following definition of "foreseeable":

> *A "reasonably foreseeable harm" is one that ordinarily follows in the usual course of events from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct), or that a reasonable person in the position of the defendant would have foreseen as a probable result of such conduct.*[9]

**C. Who are the "victims"?**

The 2/20/98 draft, like the current guidelines, does not tell the courts who the "victims" are; that is, it does not identify the persons or entities whose economic injuries are to be counted in calculating "loss." This void is the source of many loss calculation quandaries under the current guidelines.[10] It may be that an explicit definition of the vicim class was omitted because it was felt that the question of victim identity is answered implicitly by the core loss definition. In other words, since "loss" is the sum of the reasonably foreseeable harms caused by a defendant's conduct, then it follows without elaboration that victims are simply those who suffered the

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[9] For a full discussion of the derivation of this language, *see, Coping With "Loss," supra* at 98-102 (manuscript).

[10] For a discussion of a number of cases illustrating the "who's the victim?" problem, *see, Coping With "Loss", supra* at 58-67 (manuscript). These cases include *United States v. Harper*, 32 F.3d 1387 (9th Cir. 1994); *United States v. Maurello*, 76 F.3d 1304 (3d Cir. 1996); *United States v. Sapp*, 53 F.3d 1100 (10th Cir. 1995). *Also, compare United States v. Marcus*, 83 F.3d 606, 610 (4th Cir. 1996), *with United States v. Chatterji*, 46 F.3d 1336, 1340 (4th Cir. 1995).

foreseeable harms. That is indeed the correct answer to the question of who is the victim, *so why should the Commission not say so and remove any litigation-generating doubt*?

**V. Calculating "Loss"**

A. Gain

I have hitherto argued that the concept of "gain" is superfluous in a properly drafted loss guideline because "gain" is unnecessary if the victims of defendant's conduct are accurately identified.[11] Although I continue to think this is true in most cases, I have become convinced that cases do exist in which calculation of loss on a victim-by-victim basis is impracticable, but calculation of defendant's gain is readily achievable and represents a reasonable approximation of the harm to the victims. Accordingly, Application Note 2(B)(vi) from the 2/20/98 draft, or something very like it, should be adopted.[12]

B. Interest

The provisions of the 2/20/98 draft regarding interest are a signal improvement over the January 1998 proposal which relegated interest to a departure factor. Fair arguments can be made for either including or excluding interest from "loss." But the Commission must decide and

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[11] *See, Coping With "Loss", supra* at 62-65, 102 (manuscript).

[12] I remain doubtful about the notion of using gain as a measure of loss when it is "greater than loss." First, I have yet to see a case in which this was true. In every case brought to my attention in which it has been alleged to be true, the victims have not been properly identified. Second, using gain as loss in a case where gain exceeds loss gives gain an independent significance. There is no theoretical problem with using gain as an alternate measure of loss when defendant's gain is known to be less than the victims' loss. In such a case, we are merely conceding that we cannot as a practical matter discover the entire loss, and so are content with using gain to establish a reliable minimum figure to use in setting a sentence. However, if gain can indeed exceed loss and the court sets a sentence based on gain instead of on loss, the court would be punishing the defendant, not for the harm he had done, but for the benefit he had obtained. Nonetheless, I would be disposed to leave proposed Application Note 2(B)(vi) as written. If I am correct in thinking that gain never exceeds loss, then this provision will seldom be invoked. In the cases the provision is most likely to be used, particularly cases of regulatory crime, it will provide judges a tool to reach the correct result for the wrong reason.

state its conclusion unambiguously. Without a decision, the interest question will generate endless litigation and unavoidable disparity.

The best solution to the interest question is a simple solution. The consolidated economic crime guideline should either: (1) exclude all interest, including both bargained-for and opportunity cost interest, or (2) include interest in all cases in which the promise of a return on investment was part of the inducement to fraud, but make the interest rate uniform in all cases.

1. *Arguments for Inclusion of Interest*

Consistency with the core definition of loss suggests inclusion of interest. If a criminal steals money that the victim would otherwise have loaned to or invested with an honest person or institution, it is reasonably foreseeable that the victim will lose not only his principal, but also the time value of that money. But the consistency argument proves too much. If we are going to include in "loss" the time value of the stolen money, then consistency dictates that we include time value not only when the defendant defrauds a victim by promising payment of "interest," but also when he promises a return on investment in the form of "dividends," "capital gains," or "profits." A defendant's sentence should not turn on the fortuity of the name used to characterize the promised return on investment.

If interest is to be included in "loss," the Commission should strongly consider using a standard interest rate for all defendants. This for two reasons: First, "loss" is primarily a measurement of actual harm actually suffered by the victim, not of the magnitude of the false promises of the crooked defendant. If a defendant defrauded Victim A by promising payment of 10% interest monthly, A's "actual loss" is not his principal plus 120% annual interest *because there was never a realistic possibility that the defendant or anyone else would pay him interest at*

*that rate*. The only reliable measure of what the victim lost by giving his money to the defendant rather than investing it with an honest person is the market rate for invested money. Second, using the interest rate promised by defendants creates a disparity of punishment between similarly situated defendants. Two defendants who stole the same amount of money should not receive different sentences merely because one falsely promised his victims a 50% return, and the other promised 100%. Third, using different interest rates in every case adds to sentencing complexity. Federal law establishes a rate to be paid to litigants in civil cases in 28 U.S.C. §1961. If interest is to added into "loss," the simplest, most equitable, and most theoretically sound way of doing so is to use a standard statutory rate.

2. *Arguments for exclusion of interest*

Increasingly, I am disposed to think that simplicity should trump consistency, and therefore that interest should simply be excluded from "loss." Including interest introduces all the problems of equity between defendants and complexity of calculation just discussed, but it does little to make "loss" a more accurate measure of relative offense seriousness. Indeed, particularly if interest is assessed at a standardized market rate, the interest component of "loss" is really a proxy measurement, not of relative offense seriousness, but of the length of time elapsed between the taking of the money and the date of sentencing. For example, if two defendants each steal $10,000 by the same means on the same date, but one is sentenced six months after the crime, and the other is sentenced eighteen months after the crime, the defendant sentenced later would have more interest added to his "loss" figure and therefore, at least potentially, would receive a longer

sentence.[13] This is an absurd and unjust result.

3. *Recommendations*

If the choice were mine, I would exclude interest and use language signalling to the courts that the Commission means exactly what it says.[14] At present, I am unsure about Option 1 regarding interest in the 2/20/98 draft. Excluding "anticipated profits and and other opportunity costs" has some appeal; however, I am concerned about confusion that may result when defendants seek to characterize reasonably foreseeable harms otherwise includable in "loss" under the core definition as "profits" or "opportunity costs" in order to exclude them.

If the Commission were to decide to include interest, then the inclusion should extend to all cases in which a defendant's promise of a return on investment induces a victim to part with his money in reliance on that promise. Limiting such a provision to cases where the promised return was labelled "interest" is irrational. *Option 2* should be redrafted along the following lines:

> *(D) Interest. Interest shall be included in loss only if the defendant promised to pay interest or otherwise promised a return on investment as part of the inducement upon which a victim relied in deciding to part with his money, property, or other thing of value. The court shall include interest calculated from the time at which the victim was deprived of the money, property, or other thing of value until the [time of sentencing] or [time the crime was detected].*

C. "Credits Against Loss" and Time of Measurement

The provisions of the 2/28/98 draft that need the most significant revision are that section of Application Note 2(A) governing time of measurement, and the "Credits Against Loss" section

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[13] This assumes that accrued interest is to be measured at the date of sentencing, as the 2/20/98 draft proposes. If interest is measured only until the time of detection, then interest becomes a proxy measurement for the length of time the defendant evaded detection, a factor which arguably bears at least some relation to culpability.

[14] For example: *"(D) Interest. Loss does not include either bargained-for interest or opportunity cost interest."*

(Application Note 2(C)). The two questions are inescapably intertwined and will be addressed together here.

1. *The proposed "time of measurement" rules are confusing and unwieldy.*

Leaving to one side for the moment the question of whether the approach to time of measurement taken in the 2/20/98 draft is substantively sound, as a practical matter the proposed rules are almost unusably complex. According to the 2/20/98 draft:

*(i)* The basic rule (App. Note 2(A)) is that "loss" is measured "*as of the time of sentencing.*"

*(ii)* But that same basic rule also provides for including in loss some harms that *have not even occurred by sentencing.* However, the rule gives no indication how such future harms are to be valued.

*(iii)* Under Application Note 2(C), the aggregate "economic benefit[s] the defendant transferred to the victim" are *credited* only up to the *time of discovery.*

*(iv)* However, those same "economic benefits" are *valued* when the transfer from the defendant to the victim occurred, ***unless...***

*(v)* The "economic benefit" takes the form of "collateral," in which case it is valued *when liquidated* (at liquidation price), ***unless ...***

*(vi)* The collateral has not been liquidated by the time of sentencing, in which case it is valued at its market price on the *date of sentencing.*

The complexity of the timing scheme is exacerbated by the imprecision in the terminology, particularly in App. Note 2(C):

**"Economic benefit"**: This term is defined as "money, property, services performed, *or other economic benefit.*" In short, "economic benefit" means "economic benefit."

**"Pledged or otherwise provided collateral":** The defining feature of "collateral" is

precisely that it *is* pledged, *i.e.*, that the pledgee receives a security interest in the property which can be speedily liquidated with minimum legal formalities upon the occurrence of a default by the pledgor or of some other specified condition. It is unclear how collateral could be "provided" other than by being "pledged." The language of the 2/20/98 draft obscures the distinction between genuine collateral and other sources of potential repayment that thoughtful courts have struggled to maintain under the present guidelines.[15] Moreover, if "collateral" is not limited to property in which defendant has transferred a security interest to the victim (a reasonably discrete, legally recognizable event), but instead includes other kinds of property and other less formal varieties of "transfers" of contingent interests in property, then in many cases it will be extremely difficult to determine when the "transfer" occurred and thus to determine when the collateral should be valued.

Consider the following examples:

*(i) Precious metals / rare coins boiler room*: The defendants sell over the telephone to hundreds of victims supposedly "rare" coins or ingots of precious metals at vastly inflated prices. The defendants do send coins to the victims, and the coins have some value. However, the value of the coins is much less than represented *and* the value fluctuates over time. In such a case, the 2/20/98 draft would require the court to determine the date of every "transfer" of coins, and determine the value of the coins for every date on which a transfer occurred. In a routine boiler

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[15] *See, e.g., United States v. Chorney*, 63 F.2d 78, 82 (1st Cir. 1995)("To give the defendant credit for other, unpledged assets is simply a free ride for the wealthy defendant and wholly at odds with the underlying purpose of the guideline.") *See also, United States v. Rothberg*, 954 F.2d 217, 219 (4th Cir. 1992) (holding in case concerning damages that could be recovered by the victim in a civil proceeding that assets other than collateral which a bank may recover are "akin to restitution and [are] not a proper consideration in determining the loss suffered as a result of the fraud."). *Accord, United States v. Lucas*, 99 F.3d 1290, 1298-99 (6th Cir. 1996); *United States v. Estari*, 46 F.3d 1127 , 1995 WL 44656 (4th Cir. 1995)(unpublished).

room case, this would involve hundreds or even thousands of different valuations.

*(ii) Stock fraud*: Defendant makes an initial stock offering in the penny stock market, and makes inflated and untrue claims in the prospectus. Hundreds of victims buy the stock over a six month period, during which time the stock steadily gains in value. At the end of the six month period, the defendant's falsehoods come to light and the value of the stock plunges to zero. In such a case, not only would the 2/20/98 draft's "valuation at time of transfer" rule require the court to determine the fluctuating price of the bogus stock on every date on which there was a purchase, but it would produce the absurd result that *the victims would be found to have no "loss" at all.* Since the amount of money the victims paid to the defendant would be offset by a credit for the market value of the stock *on the date of transfer*, by definition the "loss" would be zero.

2. *The proposed "credits against loss" and time of measurement rules are substantively problematic.*

a) Measuring "loss" at time of sentencing: It is unclear why the 2/20/98 draft adopts the general rule that "loss" should be measured at the time of sentencing. The current guidelines do not employ such a rule. Only two circuits (the Third and Seventh) have ever suggested such a rule[16] (and both of those circuits have also written opinions stating that "loss" should be measured at other times[17]). Most importantly, a time of sentencing rule has significant

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[16] *United States v. Kopp*, 951 F.2d 521, 535-36 (3d Cir. 1991) (Fraudulent loan application case -- "[F]raud 'loss' is, in the first instance, the amount of money the victim has actually lost (*estimated at the time of sentencing*), not the potential loss as measured at the time of the crime. However, the 'loss' should be revised upward to the loss that the defendant intended to inflict, if that amount is higher than actual loss." Emphasis added.); *United States v. Chevalier*, 1 F.3d 581, 585-86 (7th Cir. 1993) (citing *Kopp*).

[17] *United States v. Shaffer*, 35 F.3d 110 (3d Cir. 1994)(time for determining loss is time crime is detected); *United States v. Carey*, 895 F.2d 1336 (7th Cir. 1990) (finding time for determining loss is time crime is detected).

practical and theoretical drawbacks.

At least seven circuits have written opinions measuring "loss" at the *time of detection.*[18] For most cases, it makes the best sense. Once a crime is discovered by its victims, they can take steps to prevent further losses. Likewise, once a crime is detected, defendants will ordinarily stop their criminal behavior, either because they have been arrested or because they fear arrest and do not wish to make their punishment worse. Thus, in the ordinary case, the time of detection will be the point of maximum loss.

Even though losses may sometimes continue to accrue after detection up until sentencing despite the cessation of a defendant's active criminal efforts, there is far too great a potential for arbitrariness in measuring loss at the date of sentencing. If defendants were credited with repayments made after detection, but before sentencing, the rich (or those who had not yet spent their criminal earnings) could buy themselves out of prison time.[19] Conversely, defendants should not have to spend more time in prison because losses mount while the government or the court delays a prosecution or sentencing.

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[18] *United States v. Fraza,* 106 F.3d 1050 (1st Cir. 1997) (holding loss is amount of fraudulent loan not repaid at time offense was discovered); *United States v. Stanley*, 54 F.3d 103, 106 (2d Cir. 1995) ( Bank trust officer buys bonds at high price for trust clients of bank. As bonds begin to devalue, officer misstates their value in bank records and in statements sent to clients. Hence, neither bank nor clients could act to sell and stem losses. Court finds loss is amount of devaluation in period between misstatements to bank and customers and the time at which fraud was discovered.); *United States v. Shaffer*, 35 F.3d 110 (3d Cir. 1994)(time for determining loss is time crime is detected); *United States v. Bolden*, 889 F.2d 1336 (4th Cir. 1989) (same); *United States v. Akin*, 62 F.3d 700, 701 (5th Cir. 1995) (rejecting argument of check kiting defendant that the loss figure should be reduced by restitution payments made between time of discovery of kite and sentencing, and holding loss to be measured at time of discovery of scheme); *United States v. Frydenlund*, 990 F.2d 822 (5th Cir.), *cert. denied* -U.S. - , 114 S.Ct. 337, 126 L.Ed.2d 281 (1993) (rejecting argument that check kiting should be treated like fraudulently obtained loan and instead measuring loss at time of discovery of scheme); *United States v. Flowers*, 55 F.3d 218, 220-22 (6th Cir. 1995) (holding in check kiting scheme that loss is to be amount of outstanding bad checks, less any amount in accounts at time of discovery.); *United States v. Carey*, 895 F.2d 1336 (7th Cir. 1990) (finding time for determining loss is time crime is detected).

[19] *See, e.g., United States v. Wright*, 60 F.3d 240 (6th Cir. 1995).

b) Credits Against "Loss":

The fundamental principle embodied in the credits section of the 2/20/98 draft is sound. If "loss" is to have any meaning as a measurement of economic harm to victims, it must be a measurement of *net* economic deprivation. There is a difference between:

(i) a man who steals my wallet containing $10,000, and

(ii) a man who convinces me to give him $10,000 in exchange for stock he knows to be worth $5,000, and

(iii) a man who convinces me to give him $10,000 in exchange for his promise to pay me $13,000 next Tuesday, but actually pays me only $8,000, and

(iv) a man who lies about his assets and convinces me to loan him $10,000 in exchange for an unfulfilled promise to repay the money with interest, collateralized by a security interest in real property worth $9,000.

In each case, the defendant receives $10,000 of my money, but (leaving aside considerations of interest) most of us would agree that my loss in the first case is $10,000, in the second case $5,000, in the third case $2,000, and in the fourth case $1,000. A useful rule on credits against loss must account for these and other commonly occurring situations.

The flaw in Application Note 2(C) of the 2/20/98 draft is that it tries to shoehorn too many different situations into the same language. Notably, the 2/20/98 draft lumps together as "economic benefit[s] ... transferred to the victim": pre-detection repayments of stolen or embezzled money, property transferred from the defendant to the victim in the course of committing the crime (*e.g.*, over-valued stock or coins, Ponzi scheme "dividends,"), and collateral pledged as part of a fraudulent loan transaction. In fact, we probably want to treat these items

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somewhat differently. In particular, we probably want to treat outright property transfers differently than pledges of collateral. An outright transfer gives the victim complete control over the property; a pledge of collateral is nothing more than a contingent, legally unperfected interest. Brevity is, of course, desirable, but sometimes brevity must be sacrificed for clarity.

3. *A Simpler Solution*

a) Time of measurement: The 2/20/98 draft is unnecessarily complicated because it requires the court to measure and value different components of "loss" on many different days. A good time of measurement rule will have the court measure and value all the components of the "loss" calculation -- both the property of which the victim was deprived and any thing of value provided to the victim by the defendant -- on the same day. Some narrow and carefully crafted exceptions to this principle may be required, but they must remain narrow and infrequent if the rule is to be simple and easy to apply.

The general rule should be that "loss" is measured at the time the crime is detected. The principal difficulty with a pure "time of detection" rule concerns defendants who steal or embezzle and then pay back the money before they are caught, for example, a bank officer who embezzles funds to speculate in the stock market, succeeds in the speculation, and pay back the funds before anyone is the wiser. The Commission could either: (1) Take the charitable view and allow the repayed money to reduce the loss amount, or (2) craft an exception to the "time of discovery" rule to penalize such a defendant for imposing a risk of loss, and to deter others from doing the same in the future.

A simplified general time of measurement rule might read as follows:

*Loss should ordinarily be measured at the time the crime is detected.* [NOTE:

**Insert following language if desire is to give no credit for funds repaid by thief or embezzler before detection**: *However, if the loss was higher at the time the crime was legally complete, the loss should be measured at that time.*] *For purposes of this guideline, a crime is detected the defendant knows or has reason to believe that the crime has been detected.*

b) Credits against "loss"

A slightly longer, but one hopes more precise, credits rule might read as follows:

> *The loss shall be the net loss to the victim(s).*
>
> *(i) The amount of the loss shall be reduced by the value of money or property transferred to the victim(s) by the defendant in the course of the offense. However, where there is more than one victim, the loss will be the total of the net losses of the losing victims.*
>
> *(ii) The amount of the loss shall be reduced by the value of property pledged as collateral as part of a fraudulently induced transaction. Where a victim has foreclosed on or otherwise liquidated the pledged collateral before detection of the crime, the loss shall be reduced by the amount recovered in the foreclosure or liquidation. Where a victim had not foreclosed on its security interest in the pledged collateral at the time of detection of the crime, the loss shall be reduced by the fair market value of the pledged collateral at the time of detection.*
>
> *(iii) With the exception of amounts recovered by a victim through liquidation or foreclosure of collateral pledged by the defendant as a part of the illegal transaction(s) at issue in the case, the loss shall not be reduced by payments made by the defendant to a victim after detection of the crime. With the same exception, loss shall not be reduced by amounts recovered or readily recoverable by a victim from the defendant through civil process or similar means after detection of the crime.*

## VI. Departure Considerations

A. Upward Departures

1. *Reasonable foreseeability:* In the current guidelines, the departure considerations relating to non-monetary harms (§2F1.1, app. notes 10(a), (c)) both refer to "reasonably

foreseeable" harms. For some reason, the analogous provisions in the 2/20/98 draft, app. notes 2(F)(ii), (iii), and (iv), *omit* the foreseeability limitation. Such a limitation is, if anything, more necessary in a regime in which "loss" is expressly defined as reasonably foreseeable harm.

2. *Multiple victims*: My own preference is for a separate enhancement in the guideline itself for multiple victims.[20] However, if consideration of multiple victims is to remain a departure factor, the Commission may wish to give courts some guidance on the meaning of "numerous victims." It seems a term open to numerous constructions.

B. Downward Departures

1. "*Improbable intervening cause*": Application Note 2(G)(iv) permitting downward departure where "loss was substantially increased by an improbable intervening cause" is both unnecessary and a potential source of mischief. If "loss" is by definition limited to reasonably foreseeable harms, then it excludes harm resulting from "an improbable intervening cause." Conversely, if an intervening cause is sufficiently improbable that its effect should be considered only by departure, then it is not reasonably foreseeable. Thus Note 2(G)(iv) is unnecessary. Nonetheless, creative defense counsel will argue at every opportunity that Note 2(G)(iv) applies to their clients. Courts will be compelled by principles of statutory construction to assume that the Commission envisioned a category of reasonably foreseeable, but improbable, intervening causes, and therefore will be obliged to create a distinction which as a matter of logic and of policy should not exist. The core definition of "loss" already deals with the problem Note 2(G)(iv) is intended to address, and does it better. Note 2(G)(iv) should be deleted.

2. "*Inept manner*": See comments above in Section III(B)(2).

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[20] *See Coping With "Loss," supra* at 53-54, 144 (manuscript).

3. "*Restitution prior to detection*": If the Commission adopts the rule on credits against loss from the 2/20/98 draft (Application Note 2(C)), then the downward departure in Note 2(G)(iii) for a defendant who makes "*complete, or substantially complete, restitution prior to the detection of the offense*" is superfluous. Such "restitution" would already be deducted from loss under the credits rule.

## VII. CONCLUSION

I believe the Commission can complete a clarifying and simplifying reform of economic crime sentencing this year. Some changes in the 2/20/98 draft will be required. In particular, without significant revisions of the rules governing time of measurement and credits against loss, this proposal will cause more problems than it solves. Likewise, the current definitions of actual and intended loss need some revision, and several of the departure provisions are troublesome. Finally, I believe courts and litigants would be grateful for guidance in the form of definitions of the standard of cause-in-fact and forseeability. If changes in these areas are made, however, the Commission will be able to proceed this year with justifiable confidence that it has fulfilled its mandate.

# *Revised Definition of "Loss" and Accompanying Commentary*

**Frank Bowman**

**THE LANGUAGE IN BOLD IS SUGGESTED NEW LANGUAGE. THE LANGUAGE IN REGULAR ITALICS IS THE UNCHANGED LANGUAGE FROM THE 2/20/98 STAFF PROPOSAL.**

2. *Loss.*

(A) *General Rule. For purposes of subsection (b)(1), loss is the greater of the actual loss or the intended loss.*

*"Actual loss" means the reasonably foreseeable* ***pecuniary harm [language deleted]*** *caused by the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).*

***"Intended loss" means (i) the*** **pecuniary** ***harm the defendant intended to be caused by the conduct for which the defendant is accountable under §1B1.3(a)(1)(A), and (ii) in the case of jointly undertaken criminal activity, the*** **pecuniary** ***harm the defendant intended to be caused by the acts and omissions of others in furtherance of the jointly undertaken criminal activity. A harm otherwise includable in intended loss shall not be excluded because it would have been unlikely or impossible to accomplish (e.g., as in a government sting operation).***

***A harm has been "caused" for purposes of this guideline if it would not have occurred but for one or more of the acts or omissions for which the defendant is accountable under §1B1.3 (Relevant Conduct).***

***A "reasonably foreseeable" harm is one that ordinarily follows in the usual course of events from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct), or that a reasonable person in the position of the defendant would have foreseen as a probable result of such conduct.***

(B) *Determination of Loss. The amount of the loss need not be determined precisely. The court need only make a reasonable estimate of the amount of the loss, based on available information and using, as appropriate and practicable under the circumstances to best effectuate the general rule in subdivision (A), factors such as the following:*

(i) *The fair market value of the property, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated,* **damaged,** *or destroyed.*

(ii) *The cost to the victim of replacing property taken or otherwise unlawfully acquired,* ***misapplied, misappropriated, damaged,*** *or destroyed.*

(iii) *The cost of repairs to damaged property, not to exceed the replacement cost had the property been destroyed.*

(iv) *The approximate number of victims and an estimate of the average loss to each victim.*

(v) *More general factors, such as the scope and duration of the offense and revenues generated by similar operations.*

(vi) *The gain to the defendant and other persons for whose conduct the defendant is accountable under §1B1.3, if gain is greater than loss or if loss is difficult or impossible to determine.*

(C) *Time of measurement of loss: Loss should ordinarily be measured at the time the crime is detected.* **[NOTE: Insert following language if desire is to give no credit for funds repayed before detection by thief or embezzler:** ***However, if the loss was higher at the time the crime was legally complete, the loss should be measured at that time.]*** ***For purposes of this guideline, a crime is detected when the defendant knows or has reason to believe that the crime has been detected.***

(D) *Credits Against Loss:* ***The loss shall be the net loss to the victim(s).***

***(i) The amount of the loss shall be reduced by the value of money or property transferred to the victim(s) by the defendant in the course of the offense. However, where there is more than one victim, the loss will be the total of the net losses of the losing victims.***

***(ii) The amount of the loss shall be reduced by the value of property pledged as collateral as part of a fraudulently induced transaction. Where a victim has foreclosed on or otherwise liquidated the pledged collateral before detection of the crime, the loss shall be reduced by the amount recovered in the foreclosure or liquidation. Where a victim has not foreclosed on its security interest in the pledged collateral at the time of detection of the crime, the loss shall be reduced by the fair market value of the pledged collateral at the time of detection.***

***(iii) With the exception of amounts recovered by a victim through liquidation or foreclosure of collateral pledged by the defendant as a part of the illegal transaction(s) at issue in the case, the loss shall not be reduced by payments made by the defendant to a victim after detection of the crime. With the same***

***exception, loss shall not be reduced by amounts recovered or readily recoverable by a victim from the defendant through civil process or similar means after detection of the crime.***

*Option 1:*

***(E)*** ***Interest.*** ***Loss does not include either bargained-for interest or opportunity cost interest.***

*Option 2:*

***(E)*** ***Interest.*** ***Interest shall be included in loss only if the defendant promised to pay interest or otherwise promised a return on investment as part of the inducement upon which a victim relied in deciding to part with his money, property, or other thing of value. In such a case, the court shall include interest at the rate specified in 28 U.S.C. § 1961 calculated from the time at which the victim was deprived of the money, property, or other thing of value until the [time of sentencing] or [time the crime was detected].***

*(F)* *Special Rules. The following special rules shall be used to assist in determining loss in the cases indicated:*

*(i)* ***[Deleted]***

*(ii)* *Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes. In a case involving stolen or counterfeit credit cards (see 15 U.S.C. § 1602(k)), stolen or counterfeit access devices (see 18 U.S.C. § 1029(e)(1)), or purloined numbers or codes, the loss includes any unauthorized charges made with the credit cards, access devices, or numbers or codes. The loss determined for each such credit card, access device, or number or code shall be not less than $100.*

*(iii)* *Diversion of Government Program Benefits. In a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses.*

*(iv)* *Davis-Bacon Act Cases. In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the loss is the difference between the legally required and actual wages paid.*

*(G)* *Upward Departure Considerations. There may be cases in which the loss substantially understates the seriousness of the offense or the culpability of the*

*defendant. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:*

*(i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.*

*(ii) The offense caused or risked **reasonably foreseeable** substantial non-monetary harm.*

*(iii) The offense created a **reasonably foreseeable** risk of substantial actual loss beyond the loss determined under subsection (b)(1).*

*(iv) The offense caused **reasonably foreseeable** physical or psychological harm or severe emotional trauma.*

*(v) The offense **reasonably foreseeably** endangered national security or military readiness.*

*(vi) The offense caused a **reasonably foreseeable** loss of confidence in an important institution.*

*(vii) The offense **reasonably foreseeably** endangered the solvency or financial security of one or more victims.*

*(viii) The offense involved a substantial invasion of a privacy interest.*

*(ix) The offense **had a reasonably foreseeable** impact on numerous victims and the loss determination substantially understates the aggregate harm.*

*(x) The offense was committed for the purpose of facilitating another offense.*

***(H)*** *Downward Departure Considerations. There may be cases in which the loss substantially overstates the seriousness of the offense or the culpability of the defendant. In such cases, a downward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a downward departure is warranted:*

*(i) A primary objective of the offense was a mitigating, non-monetary objective. For example, a primary objective of the offense was to fund medical treatment for a sick parent.*

Koon - intentional - consistent w/ statutes & policy

- Vol, consent & dysentation ⇒

108 F.3d 31 - Black

Walters - 87 F.3d 663 - 5th Cir. - no pers. gain

Bart.

Kalb - aberrant behavior

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How to deal w/ P.O.'s:

UNITED STATES SENTENCING COMMISSION

in conjunction with the

1998 NATIONAL INSTITUTE ON WHITE COLLAR CRIME

PUBLIC HEARING

THURSDAY

MARCH 5, 1998

"KEY ISSUES: REASSESSING SENTENCES FOR FEDERAL THEFT, FRAUD, AND TAX CRIMES"

Parc 55 Hotel.

Sienna Room, Third Floor

San Francisco, California

MILLER REPORTING COMPANY
507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

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"KEY ISSUES: REASSESSING SENTENCES FOR FEDERAL THEFT, FRAUD, AND TAX CRIMES"

The United States Sentencing Commission met in the Sienna Room, Parc 55 Hotel, San Francisco, California, at 1:15 p.m., The Honorable Richard P. Conaboy, United States District Court Judge, Chair, presiding.

COMMISSION MEMBERS PRESENT:

MICHAEL S. GELACAK, Vice Chair

MICHAEL GOLDMSITH, Commissioner

The Honorable DEANELL R. TACHA, United States Circuit Judge, Tenth Circuit, Commissioner

EX-OFFICIO MEMBER PRESENT:

MARY FRANCIS HARKENRIDER

STAFF PRESENT:

JOHN H. KRAMER, PH. D., Staff Director

PAMELA MONTGOMERY

DONALD A. PURDY

JIM GIBSON

KEN COHEN

JOHN STEER

PAULA DESIO

# A G E N D A

P R O C E E D I N G S

1:19 p.m.

DR. KRAMER: Good afternoon!

I would like to convene this public hearing of the United States Sentencing Commission. I'm certainly pleased that we are able to be here in San Francisco at your session so that we can entertain and receive your testimony and input this afternoon.

This has actually been a series of hearings for the Commission: In October, we had a hearing on loss in Washington, D. C. In December, we had a hearing on manslaughter; February, we had a hearing on telemarketing; today, we have a hearing on fraud and loss tables, and the loss definition, of course. Next week, we will have another hearing in Washington, D. C. which will cover some of these topics, as well as additional topics that are on the Commission's agenda plate.

We want to emphasize that we've done this, and we've tried to open up to receive more testimony, to allow for more input in our decision-making process. So we really welcome this chance to listen to you.

My job, right now, is to introduce the commissioners; and, then, we will start at 1:30 with the panel. We have a very busy afternoon, so I've warned a few of the panelists that we will try to watch the time

fairly closely so everybody gets a chance. At the end of the day, we have scheduled a time for unscheduled comments to be made, and we have two commissioners who have to leave towards the end of the afternoon. I want to make sure we get to that as we have scheduled it. So, apologies if we push you a little bit.

First, let me introduce members of the Commission.

First, we have Mary Harkenrider, who is an ex officio member of the Commission. She is counsel to the Assistant Attorney General for the Criminal Division of the Department of Justice.

Next to her, we have Commissioner Michael Goldsmith, from Salt Lake City. He is a professor of law at Brigham Young University.

Beside Commissioner Goldsmith, we have Judge Deanell Tacha, of Lawrence, Kansas, from the Tenth Circuit, United States Circuit Court Judge, of the Tenth Circuit.

And this very dashing figure, beside me here, is Michael Gelacak. Commissioner Gelacak is vice chairman, and he's from Centerville, Virginia.

To my left, we have the chair, Judge Richard Conaboy, of Scranton, Pennsylvania. He has been the chair, since 1994. He will now take it over and deal with

the rest of it.

OPENING STATEMENT

THE HONORABLE RICHARD P. CONABOY,

UNITED STATES DISTRICT COURT JUDGE

CHAIRMAN, U. S. SENTENCING COMMISSION

JUDGE CONABOY: Thank you, John, very much, and good afternoon, everybody.

As our staff director said, I am Richard P. Conaboy, and I am presently a United States District Judge. I've been a judge since 1962, although I went on the federal bench in 1979.

And I mention that not to indicate that the years passing give you any greater grasp of the issues that are involved; but it is amazing, in the last 35 years, how many changes have taken place in the system of justice that we have in the United States — the best, I'm convinced, anywhere in the world — in how far we've come and how many changes have been made. And, more importantly, in the sentencing area, it amazes me that, for the last 35 years that I know of, we've been struggling with the same problems over and over again, sometimes running into ourselves as we try to come up with solutions, particularly in this very troublesome area of sentencing.

As I indicated to you, when I first went on

the bench, there were no Sentencing Guidelines. There was no aspect of being a judge that caused me, and I think almost any other judge, as much consternation as the very difficult job of imposing a sentence on the criminal defendant.

In many civil cases, you do your best to study the issues that are involved, and listen carefully to the arguments that are made; and, then, you make a decision and, generally speaking, you feel you've tried your best and you made a judgment that's based on reason and good sense, and followed the law as you saw it. That's never quite so with imposing a sentence. You walk away from most sentencing wondering how much was enough and at what point should punishment go beyond what we reasonably think is appropriate in the given case, and was my sentence too severe, or was it too lenient under the circumstances. And why, what end were we trying to achieve in imposing the sentence?

As a result, there was often disparity among courts an judges in imposing sentences, and the implementation of Sentencing Guidelines was the natural outgrowth of a desire to try to put some sense into the sentencing process, and to see that, at least in the federal court system, sentences imposed in California, for similar crimes on similar defendants, were the same as

those imposed in New York or Florida, or anywhere else in the country. And it has helped. The concept of Sentencing Guidelines has helped immensely in that area. And it has reduced the disparity that we used to find sometimes in sentences around this country. And it also has helped, I think, to raise the public perception of how hard we try, in the federal system, to impose sentences that are fair and just. So now judges can look to the Sentencing Guidelines and look to a method which helps them arrive at a given sentence in a given case, and all of that is very good.

One of the big concerns that I have, and others join me in this, is that, as newer people, particularly, take the bench, they will not take the sentencing process and sentencing obligation as seriously, perhaps, as they should.

We had a judge testify before us out in Denver, Colorado about a year ago. He very strongly pointed out to us how sentencing used to bother him. That he would go home the night before a sentence and wouldn't enjoy his supper, and didn't sleep very well, and that he carried it around in his stomach, wondering what was the right thing to do. But he said, "I don't find that anymore, because I come in the morning of a sentence and it's all computed for me, and the sentence is already laid

out, and I don't have to worry even whether it's right or wrong; under the circumstances, it's the one commanded by the guideline system."

Well, whether you agree or disagree with that kind of statement or testimony, it's a bothersome thing. And we are struggling, as a Commission, as it's presently peopled nowadays, to constantly remind judges of the great responsibility they still have when they're imposing sentences. That there are times when a judge must go beyond in the mathematical computation and look carefully to see is this the right sentence under the circumstances. And, if it's not, there are many ways and many times when the sentences must be adjusted to make sure that the sentence does fit the purposes for which sentencing is to be imposed in this country. And we're — in trying to do that, we're looking at the Sentencing Guidelines constantly and bearing in mind that even those who originally drafted and wrote the initial Sentencing Guidelines poin living body of law, subject to change as we learn more about human behavior and as we learn more about how the sentencing process was being carried on in the federal courts. So, we're engaged in this kind of process constantly.

In this fraud and loss and theft area, as you all know, and as John Kramer just pointed out, we have

been looking at this now for several years. We've had several other hearings. We've invited people to come in and testify to us and submit to us a variety of suggestions and ideas on what's to be done in this area. Which comprises, by the way, a very, very large portion of the sentences imposed under the Federal Sentencing Guidelines are in the fraud, loss and theft area.

So we appreciate your, all of you who are here today to help us, coming once again to give us your opinions on some of these areas.

We've broken this focus on this part of the guidelines into approximately four areas: One is the definition of loss; the other is the tables that are involved in this. The third is what we call referring guidelines, other guidelines that refer to the tables, and how they will be handled if there are changes to be made. Finally, one of the most important things that we're trying to do, from the standpoint of simplification, is to combine the guidelines, as they now exist, into one guideline. Make it easier for all involved, we hope.

So we've asked, then, and received, and we appreciate recommendations from the Criminal Law Committee, and we received help and advice and guidance from the Practitioners Advisory Group and the Department of Justice, and many other individuals, and we thank you

all for your interest in what we're doing. We feel and hope that your suggestions will enable us to make a final determination which will be the most appropriate and the most just under all of the circumstances.

We have several panels here today and a number of people who are going to speak to us. Let me get to the first panel, and John Kramer has agreed to take on the job of keeping track of time here for us. We'll try to not interrupt you; but, just in an effort to try to move this along, maybe remind us, ourselves, if we're over time.

PANEL ON TAX AMENDMENT ISSUES

TAX ISSUES ONE AND TWO:

PROPOSED CHANGES TO TAX TABLE AND THE

ENHANCEMENT FOR SOPHISTICATED MEANS

JUDGE CONABOY: On the first panel here, we have Mark Matthews, who is a Deputy Assistant Attorney General in the Tax Division. Richard Speier, who is Director of Investigation of the Western Region of the Internal Revenue Service.

And we have James Bruton, who is with Williams & Connolly in Washington, D. C., and a former deputy attorney general in the Tax Division.

Charles Meadows of Texas, who is with the Criminal Development Subcommittee of the Civil and

Criminal Penalties Commission of the ABA.

Paula Junghans of Baltimore, a great city on the East Coast, of Martin, Junghans, Snyder & Bernstein.

We welcome you all here, and if we can start from left to right, if that doesn't interrupt the way the panel wants to go?

MR. BRUTON: I think, actually, there was an agenda. Mr. Purdy wanted me to start; and, then, we would go down —

JUDGE CONABOY: Very good. All right. Thank you.

STATEMENT OF

JAMES A. BRUTON, III, ESQ.

WILLIAMS & CONNOLLY

WASHINGTON, D. C.

MR. BRUTON: I've been asked — well, first, it's a pleasure to be here, Mr. Chairman, and members of the Commission.

I haven't been before you in a number of years, and it's — I regard it as a great honor to be here today to have my comments heard on the subject of the changes that have been proposed. The way this is set up is: I would go ahead and speak for a few minutes. I think Mr. Matthews will then present his; and, then, the other panelists will present a rejoinder to some of the

things that Mr. Matthews says. I think that's way it we'll go.

JUDGE CONABOY: That's fine.

MR. BRUTON: The remarks that I put in, you're missing the last three pages. They are a little long for me to read in this format. So, I'm going to have to condense down a little bit, but they're available. I understand Mr. Purdy has all the pages now so that it actually is a complete record.

The guideline proposals, or the amendments that we're asked to discuss in this panel, relate to, first, possible changes in the sentence — the Tax Loss Table, which is 2T4.1. There are three proposals on the table, two that are in the public statement, and a third which is, I believe, an amalgam of the other two statements. It blends the others.

The Option 1 basically makes no changes in the current table until about $40,000; and, then, breaks with more severe sentences, or larger increments of loss applied in the later periods. Although, all these proposed tables go in two-step, rather than one-step, increments, which is the current circumstance.

The Alternative 2 actually decreases the dollar amount at which sentences will produce jail, and,in fact, will actually compel imprisonment by an individual.

And the other provision that we're dealing with, or the third provision, is just the amalgam of the two, which is intended to, I assume, cover the best of both of those issues.

My view on that, or our view, collectively, from the defense bar side is: We should not make a change in the tax tables. I was in Mark Matthews seat in 1993 when we came to the Commission and asked to increase from the levels that existed prior to that time. And, if the Commission recalls, at that time, the broad guidelines, and the tax guidelines, were identical. And the burden that we carried with us was not should we move both of them; but, rather, the only proposal that the Commission would consider at that point was whether to change tax individually. And, so, I carried the burden up with me of having to say: Well, we should make tax independent of fraud.

Our position was — and I think, today, I'm in the unique position of being back before you again defending the guidelines that I defended as a proposal five years ago. They were a major increase over what had previously existed. Our concern was that not enough taxpayers who had been engaged in fraud would be seeing sentences that produced prison, and that there were too many opportunities for probation, and too many

opportunities for alternative sentences. So, we asked the Commission to move that up; and, in fact, that took place.

What I didn't realize at the time, and I was here, and I've mentioned in my remarks that I think I was, at least, involved in sending something up to the Commission virtually every year I was there. So we always had something on the agenda that we wanted you to do, and we were always running up with a new opportunity for change in the guidelines.

I have seen — and I have seen it the hard way over the last five years — that change in the tax area should be approached very cautiously. I say that because of the way tax cases are generated. Tax cases generally take several years, and usually they're closer to the end of the statute of limitations, which is six years, than the earlier part of the statute of limitations. So, if we change the guidelines this year, for all practical purposes, we won't see cases being sentenced, a meaningful number of cases being sentenced, under that for maybe three years, four years, or more years out. In fact, there's still cases involving the 1992 book that are existing now that Mark's office is recommending prosecution in, as we speak. And that will happen for the next couple of years, in any event.

That's sort of the natural consequence of the

nonretroactivity rule that we abide by. But what it puts the position -- it creats the position in the tax arena where there is multiple books, and the plea bargaining and the resolution of cases is dependent largely on which book you land in. So that you can have two people sentenced the same year, for the same offense, for roughly the same tax amount, and, yet, you'll have disparate sentences right within maybe a month. So that's a very difficult thing to deal with. I think it creates a perception that just the bad luck of being investigated for this, or another crime, is the issue. Whether one year the offense level should be higher than another year, I think is something of major gravity. And I think it's an issue that lingers with us as time goes on. And I didn't perceive that at the time. I certainly see it now.

Are criminal sentences in tax cases too low?

I came up here in 1993 and argued that we needed deterrence. I was with Mike Dolan, who is the Deputy Commissioner of Internal Revenue Service. I helped him prepare his remarks. And the one thing that I was deathly afraid of is that one of the Commissioners would ask me: How do you know? Because there were studies being undertaken in the Service to try see if one criminal prosecution would increase collections anywhere else. And there were studies, but they haven't really gotten very

far.

The question here is even more precise. Not just whether there is a criminal prosecution, but whether a certain level of jail, for certain offense level, will the desired effect: Deterring. The reason why this is important is: Unlike most crimes, I think the federal prosecutors try to prosecute almost every other offense that they can find because the offense needs a response. In the tax arena, the government knows, going in, that it can't even come close to scratching the surface of the number of people who are involved in tax evasion crimes of various kinds.

There's a tax gap, which I'm not even sure how large it is now. It was $120 billion when I was in the government; and I don't know if it's the same, or roughly the same, each year, a shortfall in collections over what ought to be gotten. And the question is: If you prosecute 1,500 cases a year, what's the effect of that? And, in turn, what's the effect of sending a certain number of people to jail? That is not an answerable question. There are no statistical bases to be able to make that determination.

When you see the dislocations that are caused, and the relative disparities that are caused, by

making a change like this, I think it's one of the things where the government has a very, very heavy burden to come forward and say: This is really what we need, and these are the areas. Not just to put numbers down there, because they essentially become arbitrary. I could have come in, five years ago, and maybe I should have, by the government's presentation, and argued for more; but how could we know? We wouldn't have known at that time. Should it have been higher? Should we have it 70 percent of all taxpayers, tax evaders, in jail? Should we have 30 percent? What's the right number? That's not an answerable question.

The other thing is that I think we have to be careful when we use the statistics in the tax area to make determinations about these issues of how many people should go to jail. The tax area is unique, in that: There are very many people who are prosecuted for other crimes that end up in the tax arena. Plea bargains go there. There are a lot of resolutions in the government is general enforcement program, which is really relatively small. And the question is: Do these plea bargains, do agreements as to tax loss, do other agreements that go into these things skew the numbers in such a way that, when the Commission attempts to determine whether those numbers have meaning, I don't think they are very useful

in that respect. And I think seeing, trying to target a certain percentage of people to be incarcerated is probably -- No. 1, it may not work. Because the plea bargaining still has to be put into the equation to determine what the likely outcome would be.

Finally, let me just mention, in passing, or quickly, so I can finish up the issue with the proposed change in sophisticated means.

The experience of our panel, the defense lawyers, is that we see it raised in almost every case. The statistics show that it is only in 16 percent of the cases that it's actually imposed. I think that tells you, right away, that the plea bargaining issue there may be significant. It also, I think, suggests that the probation offices are becoming more and more accustomed to applying it, and you'll see a natural increase as time goes on.

The real problem that concerns us, or concerns me, particularly, is the initial jump to the level 12 in low-end cases, where there's is sophisticated means or sophisticated concealment. I'm not sure I can tell from the definitions the difference between the two, but the question is: Taking, say, a $1,000 tax-evasion case, and finding that the individual had altered documents, or created a phony document, or attempted to present some

false material to somebody to conceal the crime, that that could be construed as sophisticated means or sophisticated concealment and push that person to a level 12, for that small a tax, it seems to me is close to unconscionable.

I'd say that the courts are well equipped with the existing guidelines to impose the sentences that are needed when there is a showing that there is something egregious that's going on. And I think the problem of compartmentalizing this, both from the tax table and this, is: A thorough investigation, showing multiple years, will tend to increase in these tax years in a way that other crimes don't. A tax evader who is shown to have engaged in this conduct for eight years, rather than one year, will certainly have more tax loss and spend more time in jail, and the sophisticated-concealment issues will come out more likely.

I'll just conclude with that. I think the others will pick up for me where I have failed to cover things.

Thank you.

JUDGE CONABOY: Pam Montgomery is very kindly holding up signs for us over there, so we won't have to interrupt you if you keep your eye on the signs.

Mark, do you want to proceed, please.

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STATEMENT OF

MARK MATTHEWS,

DEPUTY ASSISTANT ATTORNEY GENERAL, TAX DIVISION

DEPARTMENT OF JUSTICE

MR. MATTHEWS: I want to thank you, again, for the opportunity to appear here. This is my second appearance before the Commission. We had an opportunity to speak almost a year ago.

I am not going to read my testimony, but will submit it for the record; but I will mention a couple of the high points in it, or, at least, high points from the government's perspective. They may be low points from the defense bar's perspective.

The thrust of the testimony is to focus on the need in the tax world for us to increase the severity in the Tax Tables, especially at the low levels. We talked about that last year, talked about some statistical evidence last year, and I think we had some substantial support for the notion of evaluating those Tax Tables at the lower end last year. I just hope that we can act this year and not let another year pass, frankly, for one of the reasons that Mr. Bruton, and that's the delayed effect, particularly in the tax area, for when these go into effect.

We have a huge general deterrence requirement in

the tax program. We are trying to deter more Americans on fewer prosecutions than in almost any other area of law enforcement. There are approximately 200 million Americans who are touched by the income tax laws and have an affirmative obligation to citizenship to complete and file those returns, as well as make a payment. We prosecute about 1,500 of those cases a year. And, frankly, when we look at the real legal source income cases that we think have the greatest deterrent effect on the Americans who are not otherwise committing crimes, other than tax crimes, we only have about 700 or 800 prosecutions a year.

To address that, we came up with this tax-gap project. The tax gap is the difference between those sums that should have been reported and paid each year, and the sums that are actually reported and paid each year. As Jim stated, that is a very large number. It is still over $100 billion. We haven't gotten it down, since Jim left, despite all of our best efforts. The compliance rate is about 83 percent.

One of the things that —

JUDGE TACHA: But if I understand his point correctly, it is that it got raised in '93, and most of those are not through the pipeline yet. So, how do we know, how do we know, whether, as a matter of fact, it is

— I mean, even given your purpose, you can accomplish that?

MR. MATTHEWS: Exactly. I think my point is less made, is honestly less made on an analysis, even though I'm going to talk about where we are in terms of the incarceration right now. It's more of an analysis of the strict application of the dollars to what we know about taxpayers out there in the world. We are very interested in uniformity and fairness in the tax system. We're trying to reach these 200 million Americans. The reason why the Tax Division exists is to see that we try to act in an uniform and fair way.

What I can tell about the Tax Tables, even without having seen the sentencing results, is that it takes something like a $40,000 tax loss, assuming acceptance of some responsibility, to put a defendant, a putative defendant, into a range in which there is not a certainty, but a virtual certainty, of some sort of incarceration.

When I look at that $40,000, and look at the very good statistical evidence about what taxpayers owe what amount of money, that's where I come up with some of the numbers we have in our testimony where we have 95 percent, or more, of the American public literally does not pay enough in taxes, that if they cheated to the full

extent of their tax liability for three years, which is the average case, that they could possibly get themselves into an incarceration zone.

I don't even like saying this publicly. This is the only place I do because you are the ones who can effect that. That, I don't -- you know, that stands alone, regardless of the incarceration rate. One of the things that Mr. Speiers is going to talk about is the way they look at their program when they go out and make cases. One of the things they look to in their cases is the possibility of the deterrence message, and possibility that someone might go to jail. Now that's not to say that everybody has to go to jail in the tax world, by no means; but we do look -- he looks primarily, as he spends his resources, to send that general deterrence message, he looks to that. So, even with the tables, as they are now, we have somewhat, just under 40 percent, of our cases with the defendants receiving some sort of incarceration time, as opposed to the guidelines, as a whole, where it's something like over 80 percent of the cases.

So the break mark for us, you know, 97 percent of the reason why I'm here today is, is not the upper end of the table, although that's important to us and we support that, but the really important break mark for us is that level 12.

Right now, as I understand, Option 2 is the one that would essentially put the Option 12 at the $30,000. I don't purport to say that $30,000, I don't — you know, Jim is correct. You know, in a lot of law enforcement, the statistical evidence is hard to gather. The deterrence is something you understand in your gut. And the Commission, in its experience and statistics, I'm not saying that I — that there's some magic about $30,000. What I do know, from what all we know about all the taxpayers at large, is it will open the range of taxpayers and take the CID's focus, it will give them the opportunity to look not just at the upper end of the taxpayers, a very small percentage of the taxpayers, but expand it further.

That's one of the things we have to do as mission. We have to show that, no matter what your income level is, if you go about a sustained pattern of cheating on your taxes, you will, that will be addressed. Now, you might not have to go to jail, but we will try, will try to address that conduct. So we need to bring that benchmark down.

JUDGE TACHA: You agree with his statement that most of the District Courts are showing a lot of reluctance to send low-end tax violators to prison?

MR. MATTHEWS: Well, when you say "low-end," do

you mean low end in —

JUDGE TACHA: Well, what do you — I don't know what anybody means by low end. I guess that's the debate here: Who is low end?

MR. MATTHEWS: Right. I think, you know, it's certainly true that, when we have a defendant who is in a 10, 12, who is in the low-end range, there is some sort of span, or when there is some sort of incarceration, there's no doubt that we have a lot of judges who will, who will give, who will give some sort of probation or split sentence, or some sort of that.

One of the things — and I think that relates to some of the difficult individual judging points, with a judge with an individual defendant. Sometimes, our own statistics hurt us when a judge in a community sees as much tax fraud out there as we do, and you realize that there are millions of other similarly situated people who the system has not addressed. I guess I can understand, in individual case, why that, you know, why that happens, why that judge does that. The beauty of the guidelines are that we don't have to stand with an individual. We take a more systemic view. And I would think that, when we get above that level, when we get above the level 12, we're not going to, we're not going to see all those cases at the low end of the range. Although, as the Commission

even recognizes in its manual, some even small portion of the imprisonment, a very small portion of imprisonment in the tax world, carries a particularly large deterrent effect, given the community we're looking at. These are not people, in the heartland that we're looking at, who are committing other bad crimes out there. I'm not saying tax isn't bad, but their tax is the only violation they're committing here. So, I don't, I hope we wouldn't, wouldn't see that.

I want to be very careful with my time and give Mr. Speier a few moments, despite questions, if I can.

JUDGE CONABOY: Mr. Speier, do you want to proceed.

MR. SPEIER: Thank you very much.

This is my first opportunity to address the Commission; and, on behalf of IRS Criminal Investigation Division, I want to thank you for the opportunity.

Like Mr. Matthews, I'm going to focus my comments primarily on the need to reform the Tax Tables, specifically at the lower end. I'd like to, hopefully, give you some insight as to the way the Criminal Investigation Division does business and the types of cases that we do work.

Criminal Investigations Division's workload has changed dramatically through the years, from the times

where Mr. Bruton was in the Tax Division. I think he saw us go away from the period where we were working almost 50 percent, or more, of our cases in the narcotics and money laundering area. We're no longer there. Sixty percent of the CID resources are addressing what Mr. Matthews referred to as tax-gap type crime, white collar income tax crime, related to legal source income. This represents a tremendous departure from where we were ten years ago, and it's a strategy that is trying to address what — we'll pick a number — $120-some million tax gap.

MR. MATTHEWS: Billion.

MR. SPEIER: Billion, excuse me. Thank you. We're definitely not that efficient.

Our role in criminal investigation is to provide a deterrent, and we try and commit our investigations to those cases that, if successful, will yield us deterrent publicity. And, in the Western Region, of which I'm in charge, that's basically the western quarter of the United States. IRS Special Agents in those states, and in those IRS districts, are instructed to work those income tax investigations that are likely to yield deterrent publicity and have a very good likelihood of generating prison time. That's pretty much our yardstick and our guideline.

JUDGE CONABOY: Can I interrupt you there?

MR. SPEIER: Please, sir.

JUDGE CONABOY: I don't know, maybe we shouldn't be interrupting; but I think it's along the same lines that you're talking, Richard.

Several of you now have mentioned the increases that went into effect three or four years ago. Is there any indication that that has had anymore of a deterrent effect, or can you judge that? Somebody has said it's hard to judge.

MR. SPEIER: That's a correct statement: It's very, very hard to judge. I see certain types of tax crime that are increasing, and I can address trends in certain types of tax crime. It's pretty difficult to be directly responsive. I don't have the evidence, statistical type of evidence, to address that.

MR. MATTHEWS: Can I make one minor point?

I have actually spent some recent time speaking to some Europeans, as well, with their tax systems. One of the things I fear, when I'm in bed at night thinking about my job, is: I'm afraid that we are living on some past gas in this country. That we fortunately had a culture, we've had a country where, for a long time, we have a rock solid 80-plus percent compliance in this country because there was a time, and because it's good publicity, good work, early on in our, in our culture. I

worry about the slippery slope when, if and when, the public understood some of the numbers that we actually talk here about here: 10 million nonfilers, less than 200. Not 200,000 — 10 million, now 200 prosecuted a year. I worry about losing the edge. And, rather than the idea that those cases are increasing — I wish I could prove that. I can 't. I think our fear is that, if we don't do what we do and, given the number of our prosecutions, we have only a handful per state each year that get statewide publicity, I guess it's a more guttural, you know, reaction. What happens if we don't get those 2 or 3 cases that get publicity?

JUDGE CONABOY: What I was wondering — and I think probably everyone would agree with that, that that is a major concern. But my question, I guess, goes more to what can you do about that? Is putting people in jail, more people in jail, the only thing, or the right thing, for us to be doing? I don't know whether you can address that in context or not.

MR. SPEIER: Certainly, addressing tax issues, criminal enforcement is only one aspect of this. And, with the criminal enforcement, given that there is only 3,200 Special Agents nationwide addressing all the millions of tax returns that are filed, and those that need to be filed and are not filed, we have to be real

choosy about the ones we get. And the ones that we choose to investigation, we need to insure that we get the type of deterrent publicity that we're looking for; and that is: A message that there is a down consequence to evading your taxes, defrauding the government, or willfully not filing your tax return. We also have to be very cognizant that we don't get into a posture where we media stating that an individual has been indicted and convicted for tax crime and there was no deterrent, there was no prison time. That's obviously something that, in our case selection, we have to be very careful of.

MR. MATTHEWS: She's calling time. We'll have to go on to the next point.

STATEMENT OF

CHARLES M. MEADOWS, JR.

MEADOWS, OWENS, COLLIER, REED, COUSINS & BLAU,

DALLAS, TEXAS

CHAIR, CRIMINAL DEVELOPMENT SUBCOMMITTEE

of the

CIVIL AND CRIMINAL PENALTIES COMMITTEE

of the

ABA TAX SECTION

MR. MEADOWS: My name is Chuck Meadows. This is my first time to be able to address the Commission. I thank you for that opportunity.

I would like to talk about two particular areas: No. 1, and that's, first of all, the lower income. I'm not sure that that's a good allocation of resources of the Service to prosecute those people. We have civil penalties, 75 percent fraud penalties, that can take care and serve as a deterrent in that area. But the bigger crime, the larger crime, how can we look at that area?

I see, in the guidelines, two proposals. One is to combine the fraud counts with the tax loss issues, which would significantly increase tax penalties, criminal penalties.

The First Circuit, just in January, released an opinion, United States v. Brennick, B-r-e-n-n-i-c-k. I do not have a citation for that. But, in that case, it recognized the difficulty in computing tax loss versus fraud loss. Someone steals $200,000 from the bank and doesn't pay it back, we know pretty much what the loss is. But in the tax loss area, we apply an arbitrary percentage, 29 percent or 34 percent, or 20 percent in the case of nonfilers. We have even different calculations of tax loss among the tax loss guidelines. We don't have one consistent guideline. And I know, from the judges, at least my experience is, you don't want to conduct an audit in your courtroom to determine actually what the tax loss is. You don't have the time to do that. We need to have

at least some — and that's one reason, I think, that justifies the lower penalties in this area, because we know we're dealing with an arbitrary figure.

The second area I would deal with is just simply the two-level increase that has been proposed for higher crimes, instead of going up one level each time. Would the Commission consider the possibility of having the judges, the District Judges, have the opportunity to make a sentence within that two-level increase so that they can have the discretion to view the loss? Instead of having automatically go up two levels, maybe they should be able to say it goes up one or two levels depending upon the judges determination of loss. I know we've gone away from getting judge's discretion in that area in order to try to make more uniform sentencing, but there are differences in the crimes that are committed.

Those are the two points I'd like to emphasize in addition to my written remarks.

MR. GOLDSMITH: The problem with that latter point, at least in theory, though, is that it violates the 25 percent rule. That the sentencing needs to be within 25 percent of the upper range, needs to be within 25 percent of the lower range. If you allow the judge discretion to go up and down two levels, that goes well beyond the parameters of 25 percent. So that alone,

without any accompanying criteria, would not be possible under the statute.

MR. MEADOWS: That issue, though, if you go into that level by jumping two levels, you're going to set up a situation where there will be more appeals, in my opinion as a practitioner. Because you are no longer going to have an overlap at the District Judge level where the appellate court can say there is harmless error here because a 33-month sentence falls within both guidelines. When you go up two levels, the lowest guideline sentence will be higher than the highest guideline sentence for the previous offense, and you're going to have a gap in there. That loss area is going to mean more litigation over what that loss number was. It's going to have a real meaningful impact.

Now, appellate courts say harmless error, don't worry about it, you could sentence from that guideline range. But, if you go to two levels, and maybe you should just go to one level, if, in fact, that's the statute; but I would oppose the two-level increase because of that reason.

JUDGE CONABOY: Paula.

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STATEMENT OF

PAULA JUNGHANS, ESQ.

MARTIN, JUNGHANS, SNYDER & BERNSTEIN

BALTIMORE, MARYLAND

MS. JUNGHANS: Good afternoon.

My name is Paula Junghans. I appreciate your inviting me to speak today. Since I'm last, I'll try to be quick. I would like to talk for a few minutes about the deterrence issue, which seems to be the focus of Mr. Matthews' and Mr. Speier's proposals.

I've been doing criminal tax cases for 21 years. I've represented dozens of people who have been prosecuted and hundreds more who are committing tax evasion, who have either not been caught at all, or who have not been recommended for prosecution.

I haven't yet met a single person who told me that, when he was committing his crime, he sat down and calculated what his potential sentence was going to be. I don't think that's what deterrence comes out of. I think what deterrence comes out of is what Mister, is what the government representatives recognize, and that is the possibility of being caught. The way to achieve that, in my view, is for — and I realize you can't control this entirely — is for Congress to allocate to the Internal Revenue Service more money for more enforcement. It is

not to impose harsher enforcement on smaller existing cases.

It seems to me the proposals that we're talking about here will involve spending a lot of money on additional beds in jails, and nobody is talking about where that money is going to come from.

I also do not understand what appears to be the perception that anything other than jail does not serve as a deterrent. Community confinement is a punishment. Home detention is a punishment. Being a felon is an enormous punishment, particularly if you prosecute people who are professionals and who have collateral consequences coming out of their convictions. Those range of punishments are in place now, and will be in place, as well, with these harsher penalties. But to focus the effort, it seems to me, on harsher penalties, on smaller cases, is the wrong cure.

I think we all agree what the problem is, but I think that's the wrong cure. And I don't think that what we have now under the '93 guidelines is broken; and, therefore, I don't we should fix it.

JUDGE CONABOY: Does anyone want to respond to that? Mark, Richard?

MR. MATTHEWS: Without taking too much time, there have been a couple of references, I think, by all

the defense attorneys to the notion of the government aiming at the small guy, or the low-end taxpayer. The numbers that we're trying to talk about I don't think, by any means, reach into low-end taxpayers. We're saying that there's 95 percent of the taxpayers are essentially beyond the reach of the imprisonment possibility.

Again, I agree, there are cases where imprisonment is not appropriate. That is a sanction, a felony punishment is. But we are trying to broaden the range, and it's not to reach down to the little guy. It's to reach into the upper middle class, with the possibility of imprisonment in some of these cases. So, I — you know, there was reference to a thousand dollar tax case. Those don't exist. I mean, we are talking about much bigger cases than that.

One last point is: We talked about $40,000/$30,000. Remember, those are — there was the notion of the difficulty of computing that. And nobody wants to do all this. I don't think that's happening in the courtrooms in tax cases. We're so careful about that. That $40,000 represents what we call the "criminal numbers" in the tax world, as opposed to the civil numbers.

In most of our tax-gap cases, the agents are trained to avoid the gray areas. Don't — you know, we

focus on where — you know, tax cases are difficult enough to convict as it is. You're trying to show real, show the jury real, willfulness, to show what they're doing. You focus on the black and white tax crimes. And our average cases, there may be as many as two times, three times the civil numbers. Those aren't included in the calculations most of the time. Not to say we ignore relevant conduct. Those have not been investigated. So it's not as — I don't think the defendants are suffering, for any of this gray area, the notion of tax cases.

MR. BRUTON: If I may just add one point, though, that Mr. Matthews has referred to, to the possibility of incarceration. The fact is that, under the current guidelines the possibility of incarceration exists at every single level from zero right on up the scale. It's the certainty of incarceration that the government is trying to deal with, and the question is: Are the courts capable of responding to this in situations where they feel that there's an appropriate case before them that requires the right kind of sentence? It seems to me they've got the tools and I don't think we can assume that they're not willing to exercise that authority.

MR. GOLDSMITH: May I question, Mr. Chairman?

JUDGE CONABOY: Yes.

MR. GOLDSMITH: Focusing on this $40,000 amount,

I see that the thoughts being expressed here is that the provision will hit the little guys too hard. But to produce a tax loss for $40,000, we're talking about, for example, deductions that have been overstated to the tune of $150,000.

MS. JUNGHANS: Only in a one-year case.

MR. BRUTON: Only in a one-year case.

MR. GOLDSMITH: In a one-year case, okay. So, you know, over a three-year span of time, so it's $50,000 per year, which is a fair amount of money. I mean, I'm kind of wondering what kind of little people we're talking who are overstating deductions like $50,000 a year.

MR. BRUTON: I gave an example in my paper, that $5,500 a year. The single year case, makes $40,000 a year, and $5,500 evaded during that year, which wasn't an outlandish number. If that same evader is found by the IRS to have done that in eight years, you've broken your $40,000 mark immediately.

The IRS -- one of the questions here is how thoroughly do you investigate the cases? And the question is: Do you make tax cases, such that very little investigation can go in, with the certainty of a one-year case, where you can't differentiate taxpayers? One person who does it one year is different than another person who does it eight or nine years, and the government can reach

back beyond the statute of limitations and produce that, and they do in most cases.

MR. GOLDSMITH: Well, would you concede that, if it were done in the situation of a one-year violator, that this is a tax loss of $40,000, in those circumstances, wouldn't this appropriate all other things being equal?

MR. BRUTON: Conceivably, but I can say this: It is rare. Historically, the IRS has prosecuted multi-year cases for a reason. The reason is that a single year is not an attractive case to prosecute so they bring multiple cases. I think the judges on the Commission probably have, if they've seen a single-year case, it would be a rarity. It's just — I've seen them maybe a couple of times in my whole career.

MR. MATTHEWS: We don't do eight-year cases, which is what it took in the example. We don't have judges finding relevant conduct over eight years. It's the difference between the one year, $150,000 a year, and the eight years. We're not touching much of that difference, I think, by option 2.

MR. GOLDSMITH: Do you know what the increase would be in terms of the incarceration? Excuse me, I'm sorry.

JUDGE CONABOY: That's all right, but we'll have to end with this question.

MR. GOLDSMITH: Do we know what the increase would be in incarceration by changing the figure $40,000 to $30,000? Are we talking about, all of a sudden, dramatically increasing the number of prison beds and the number of people that would be close to this?

MR. MATTHEWS: You know, I saw something the staff had put together in trying to determine impact. I guess — I don't think it's that much, honestly, in the case of agreement. I think maybe we can provide something —

MR. GOLDSMITH: I'd like to see if you can get that.

MR. MATTHEWS: I will do that.

MR. SPEIER: I would further, just quickly, argue that there is no way that, given that, that we would lower our standards of what we're going to be investigating. We're still going to be looking at the most, best deterrent taxpayers, most egregious taxpayers, in any given district, in any given area.

DR. KRAMER: Before we — I would ask the panel to remain; but we want to move to Justin Thornton now, who is — we're a little behind schedule, but we'll try to get to you. And, then, what we'll allow is some questioning for everyone when Justin finishes.

So, if you're ready, Justin, you may begin.

STATEMENT OF

JUSTIN THORNTON, ESQ.

CO-CHAIR, TAX ENFORCEMENT SUBCOMMITTEE,

ABA WHITE COLLAR CRIME COMMITTEE

MR. THORNTON: Thank you, Your Honor.

Judge, I'll be as brief as I can here with my remarks in order to keep the dialogue going.

I've been practicing in the criminal sector for 20 years now; the first 10 years as a prosecutor, and the the past 10 years in private practice. Also, I might offer the disclaimer that, while I am holding an ABA leadership role in the criminal tax area, I'm also a member of the Practitioners Advisory Group. I'm appearing here and expressing my own personal view, not those of any professional organization with which I'm affiliated.

With that, I understand and I appreciate the Commission's desire to simplify the Sentencing Guidelines. The point that I would like to make here today, though, is that criminal tax cases really are different than other kinds of fraud cases and should be treated accordingly. And I join my other panel members, for the defense bar, in our opposition to the adoption of the proposed changes to the guidelines for the tax, for tax expenses.

The '93 amendments still aren't in effect now. It's as if we have a cake baking in the oven, which isn't

out yet, and we're asked to change the recipe. And, so, I would urge the Commission to consider just not adopting any of these options at this point. Criminal tax cases, as it's been mentioned, have a six-year statute of limitations. They span multiple years. They have all the pattern of filing. Defendants are subject to subsequent and severe civil tax adjustments, with interest and penalties, in the tax area, unlike in your usual fraud case.

Proof of a tax loss, as Mr. Meadows pointed out, it really is subject to complex, technical tax laws. And I think it's fair to say the recidivism is much lower in the tax area than it is in other fraud areas. And, importantly, most judges in tax cases, I believe it is fair to say, are sentencing at the low end of a particular guideline level. Accordingly, they already have the discretion, under the current guidelines, to impose lengthier sentences should they wish to do so.

I also concur with my fellow panelists that the empirical data is just simply not existent at this time to establish, I think, a good reason that the guidelines should simply be increased, for the jail time to be imposed on tax criminals, for purposes of deterrence. I don't think the data is there to show that, if one goes to jail longer and reads about it in the paper, there is

going to more deterrence.

I will tell you that I think there is deterrence about the publicity which the IRS will seek to achieve whenever there is a tax indictment. As night follows day, there will be a press release when there is an indictment charging someone with tax offenses. The public can read about it in the paper, that the maximum penalties are 5 years per count, and they go to jail for 15 or 20 years. There's some deterrence right there.

Now what happens to alternatives to incarceration, I don't know that those are inappropriate to be imposed in tax cases. Nor am I convinced that, in a normal tax case, that home detention, for instance, is not an appropriate sentence. I was surprised -- I had a client, one time, who told me he'd much rather do his time in the federal penitentiary than to spend an equal amount of time with his spouse in home detention.

I would urge the Commission not to adopt any of those.

JUDGE CONABOY: Let me just ask, before I ask some of the other Commissioners, allow them some questions, on the statute of limitations and the fact that some of the, as you said, the 1993 amendments haven't kicked in, would that create a dilemma if we were to follow that reasoning, that we would never change them

because we'd always have that problem?

MR. THORNTON: I think we at least wait to see what the effect is.

JUDGE CONABOY: How long do we wait? I mean —

MR. THORNTON: Until we have the necessary empirical data, I don't know the answer to that. But that data simply does not exist at this point. And I agree with Mr. Bruton, the point that he makes, where you can have two tax defendants, down the hall from one another in the same federal courthouse, receiving disparate sentences, depending upon which guidelines are in effect. And, here, we're being asked to look at even, yet, another set of guidelines.

JUDGE TACHA: But that's happening in a lot of areas.

JUDGE CONABOY: Do you have any information on recidivism?

MR. THORNTON: I don't have any information. It is, it is very low. I mean, and I — I mean, I think it's sort of understandable from the nature of the crime and the subjects.

JUDGE CONABOY: So you don't contest that?

MR. THORNTON: I don't contest it. It's not, it's not a business where we have repeat people. We're trying to deter the repeat offender. We're trying to

deter the first-time offender, really.

JUDGE CONABOY: Commissioner Gelacak, you have some questions?

MR. GELACAK: Yeah, I guess.

Mr. Matthews, I take it, from your comments, your concern over this $120 billion tax gap, or whatever it is, that you would, by the nature of that number, you'd support a change from the current IRS system to a value-added tax that we could —

(Laughter.)

MR. MATTHEWS: One of the blessings of my job is that they tell me not to address tax policy. I enforce the laws that are there. I don't — if they change to that, we'll try to bring those cases.

MR. GELACAK: Well, if you enforce tax policies, then I'm also kind of dazzled by your statement you don't comment on tax policy. I'm kind of dazzled by the statement that you presented us. On page 5 —

MR. MATTHEWS: Page 5?

MR. GELACAK: This is your statement.

MR. MATTHEWS: Sure.

MR. GELACAK: I assume it's yours. It was handed to me. I assumed it was handed to me by you. On page 5, the first full paragraph, you say: "We believe ...," and I assume you're speaking for the Tax

Division:

"We believe that, unfortunately, the current Tax Table does not do a good enough job of making the possibility of imprisonment upon conviction for a tax violation enough of a realistic threat for many taxpayers."

Do you really mean to say that?

MR. MATTHEWS: Yes.

MR. GELACAK: So you're —

MR. MATTHEWS: I don't know what portion of it you're going to quibble with. I'm happy to hear —

MR. GELACAK: Well, I'd like to quibble with the language "of a realistic threat," if you will. I've been around, maybe I've been around too long, but I've never seen anybody come in and say that the purpose of their mission was to create a threat to the American public.

MR. MATTHEWS: Well, I — I see your point. I don't think the — I'm using a term of art, "realistic threat.". I don't mean to say that the IRS has threatened people. I think —

MR. GELACAK: Well, what do you mean, sir?

MR. MATTHEWS: Well, I do think that you do want a perception on the part of the American public that, if they engage in tax crimes of the kind of magnitude, complexity, where the willfulness is so evident — the

very few cases that we pull out of the tens of millions of Americans who probably could potentially be charged, we're down to about 700 of those. Yes, I do want the people to believe that, if they put themselves, committed those sorts of acts against the tax system, which funds all of our government, our national defense, our roads, our highways, that, yes, there is a realistic threat, realistic possibility — I could use the words, "realistic possibility," if that would be — that's what I mean.

MR. GELACAK: But isn't what you're saying now the point — we've had this debate before, and I doubt that either one of us is going to change the other's mind. But Ms. Junghans was correct, I think, in saying that what you're talking about is the need for more enforcement dollars.

You started to draw some analogy, which I had a little trouble following, about how IRS enforcement was better years ago because of some initial success. I take it, by that, you meant some initial success in prosecutions. But I have to be honest with you. I honestly believe that, if I were to walk outside this building right now, and I asked a thousand people, the first thousand people that I came in contact with on the street, if they could tell me of all of the terrible tax prosecutions that have caused them some concern, I don't

believe I'd come with one case.

I don't think anybody cares about the prosecutions. I think you care about the prosecutions. I think the prosecutions are important. I think people who evade the law ought to be in some way dealt with, but I don't think 1,500 cases a year deters anybody from doing anything. And I don't think dollar figures deter people doing those things. I think we're talking about the need for more law enforcement, perhaps. I personally think, I think the value-added tax is a better solution to getting at that number than you do, and I'm a Democrat.

(Laughter.)

I just don't buy your arguments for deterrence. I know you have to come up here and make them. And I remember, I remember, because I was here. I was here and I remember the Tax Division and the IRS coming up and saying: These changes are enough. These changes will do it. Now, we're not sure that they did anything. We don't know what they did; but whatever it is they did, we need more of it. It's kind of a strange way to go about making policy, I guess.

I'm not sure I've asked you a question.

MR. MATTHEWS: No. I think you stated — I think there probably is a difference in our view of deterrence. And given the — I think, probably, the

difficulty for each of us to prove it statistically in some way, you're sort of there. And, you know, my view, my conversations with people, the number of audiences I speak to, you get humorous, yet nervous, laughter about the possibility of a criminal case, and that leads me to believe that there are a lot of people at some level who do fear that possibility when they're filling out those returns, and they're thinking about, well, are the recipes there, or should I exaggerate this, or what about that deduction, or what about my — but I don't think we can convince each other. But I will take you up on the more resources. I'd love to double my 1,500, if we could do so.

MR. GELACAK: I wish you the best of luck. I'd be happy to support your request for — if you think it will help you in any way — your request for more resources. I don't know if my support is going to help you.

MR. MATTHEWS: I might take you up on that.

JUDGE CONABOY: Judge Tacha, do you have any other questions? I'm going to down the table, Mike.

MR. MATTHEWS: Sure.

JUDGE TACHA: No, no.

JUDGE CONABOY: Mike, do you have any questions.

MR. GOLDSMITH: I want to stress that,

notwithstanding the apparent orientation of my questions, I have not made up my mind about this issue at all. Having said that, though, Mr. Thornton, I'm unsure of your example about how the IRS certainly achieved significant deterrence by issuing a press release, saying that someone is subject potentially to 10 to 15 years imprisonment for a tax violation. That would be very hard to do under the present tables. For example: Right now, they would have to take more than $80 million to be at offense level 26, than if you had two sophisticated means and two of something else. I mean, we're going to be at level 30, which produces, at that point, a maximum of 10 years.

MR. THORNTON: I'm sorry. I'm addressing only the issue of deterrence as it relates to maximum penalty. I'm not suggesting that one could reasonably get there under the guidelines. It's just a matter of statutory maximum penalties as it relates to deterrence.

MS. JUNGHANS: Might I say something? I mean, I think Justin's point, which all of us have experienced, is: It's very interesting that, when the IRS issues these press releases, it always reports what the potential statutory maximum is. It never reports what the guideline application would be, because it doesn't — and, frankly, whether the guideline application came out at 14 months or

18 months, I seriously doubt would make any difference. They want the statutory maximum. They don't want people to know what the guidelines are.

MR. MATTHEWS: I mean, the reasons why we don't try to put guideline calculations into the announcement of an indictment, and we're —

JUDGE CONABOY: You can't figure out the guidelines.

MR. MATTHEWS: You can't figure that out.

(Laughter.)

I mean, I think we'd be in real trouble if we were trying to do that math, and we try to, try to get away from, you know, it's 10 counts, so it's 50 years. That happens in districts. I'm not going to deny that. They add it up that way. To the extent that we see them in the Tax Division, we try to bring that back and talk about a realistic — you know, there are 10 counts, each of which are 5 years. So, we're not intentionally making the point we're being accused of making.

JUDGE CONABOY: That's a good point, though, in many ways. Because, traditionally, not only in tax prosecutions, not only in federal prosecutions, when there is an indictment, there is an arrest, the maximums are always mentioned. We use an example of a sign that's up on of the ski lodges, up where I live, that has a huge

sign, right at the bottom of the ski lift, there's a huge sign that says: "Every person, including children, must have a ski lift ticket. Violators will be punished to the full extent of the law. $500 penalty, or 10 years in prison." You got to figure, for a ski lift ticket, that's pretty severe.

MR. MATTHEWS: Especially for children.

MR. GOLDSMITH: I'd rather spend 10 years in prison than ski Pennsylvania.

(Laughter.)

JUDGE CONABOY: Mary Harkenrider, do you have questions?

MS. HARKENRIDER: No.

JUDGE CONABOY: Okay. Well, we thank this panel. We want to move to the next panel because we are very close to time, and we appreciate your comments very, very much.

ISSUES ONE AND TWO:

PROPOSED CHANGES TO FRAUD AND THEFT TABLES AND PROPOSALS TO DELETE "MORE-THAN-MINIMAL PLANNING" AND ADD "SOPHISTICATED MEANS"

JUDGE CONABOY: All right. This panel is proposed to talk about changes to the tables and the proposal to delete "more-than-minimal planning" and add "sophisticated means," and other matters, if you wish to

do so.

Let me just introduce, first, Gerald Goldstein, who is a another Texas here today, former president of the National Association of Criminal Defense Lawyers.

And, by the way, I probably should have stated, at the beginning, and I think it's probably true, Gerald, with your situation, that none of our speakers here today, or panelists, are here representing or speaking on behalf of their associations; but they are appearing here, rather, as individuals. We want to make that clear, that we're not trying to associate any of the various groups that these people belong to with the comments that are made here today.

MR. GOLDSTEIN: That's correct, Mr. Chairman.

JUDGE CONABOY: If I didn't make that disclaimer, I'm sure the group would.

And David Axelrod is from Columbus, Ohio and a former assistant U.S. Attorney in Florida, and a former trial lawyer with the Tax Division of the Department of Justice.

Mary Spearing is the Chief of the Fraud Section of the Department of Justice, and a former U.S. Attorney in the Third Circuit, or in the Eastern District, and appeared, occasionally, in the Middle District.

MS. SPEARING: Yes, before Your Honor.

JUDGE CONABOY: With great distinction.

Katrina Pflaumer is the U.S. Attorney for the Western District of Washington.

Finally, Ephraim Margolin — is it Margolin?

MR. MARGOLIN: Yes.

JUDGE CONABOY: Very good. Mr. Margolin is a former president of the National Association of Criminal Defense Lawyers and from San Francisco.

We've had sunny weather for a few days.

MR. MARGOLIN: You are welcome to my city.

JUDGE CONABOY: Well, we thank you all for being here. I guess, Gerald, you're going to lead off the commentary.

STATEMENT OF

GERALD H. GOLDSTEIN, ESQ.

GOLDSTEIN, GOLDSTEIN, AND HILLEY

SAN ANTONIO, TEXAS

MR. GOLDSTEIN: Mr. Chairman, Commissioners, fellow gentle persons, I'd like to address the overriding concern that I have about the general policy consideration — reflected, by the way, in both of the new options regarding the loss tables — that there is a perceived need to raise penalties for economic offenses to achieve what I think we all can agree is a laudatory objective of better proportionality of guideline penalties between

economic crimes and other offenses of comparable seriousness.

I think the defense bar generally — I think I can speak for the defense bar, generally, that we don't quarrel with a need for a punishment rationale that reflects proportionality between economic crimes often committed by white collar corporate types in boardrooms, that they ought to be similarly situated in terms of punishment to similarly situated serious crimes committed by minority members or disadvantaged use on the street. In fact, I find myself representing more and more, as they are described, three-piece, flannel-mouth types, as opposed to gang colors. And the idea that we should treat the poor and the disadvantaged that find their way into the criminal justice system more severely than the well-heeled is something that I think is offensive to the defense bar, as it probably is to you.

However, I would suggest to you that the empirical data that the Commission has generated does not support the commonly held notion that these, that the typical offender of an economic crime is a well-heeled fat cat, with a high-priced, high-powered defense lawyer. Your own figures indicate that, for the most part, they are minor-league small-timers, who are represented, generally speaking, by public defenders or appointed

counsel under the CJA.

There is no question that disproportionality between the high sentences meted out against drug offenders, compared to those in fraud and theft cases, is offensive. It's offensive to all of us. But I would suggest to you that that is as much a result of congressionally mandated minimum mandatory sentences and political reality as it is to any rationally based sentencing policy. And even if we could get parity between the two, I'd suggest that you can achieve that in ways without yet again raising the penalty scheme for economic crimes.

That's not the only means of reaching parity. You had this fight once before in the powder versus crack cocaine situation; but we find ourselves, like a gutter ball, going in the same direction each time. And as desirable as some sort of proportionality may be, raising sentences for economic crimes to the draconian level of drug offenses may create more problems than we will be solving.

I'd like to suggest to you that whether we're talking about the definition of loss, or whether we're talking about loss tables, and granted the goal of reduced litigation is a laudatory one, I'd suggest to you that 90 percent of these criminal cases are resolved by plea.

That the sentencing hearing is, in reality, the only real criminal hearing most citizens, accused of crime in America today in federal court, receive. And, as far as hearing go, with all due candor, it's a sham. You get more due process when they take away your food stamps, under Goldberg v. Kelly than when they take away your liberty at a federal sentencing hearing. You have no confrontation rights. There's no rules of evidence, and hearsay is the rule, rather than the exception. I mean, any defense lawyer will tell you what it's like to — what are you going to do, cross-examine the probation officer about what an agent told him about what some undisclosed confidential informant told him?

And, so, whatever we say about these loss tables, the actual determination is made that a citizen watches being made is a fairly hopeless, hopeless process in terms of what we normally consider to be process that's due. And these are factual findings. We've gone from a purely discretionary system to a factual finding.

The American College of Trial Lawyers, not your liberal bastion of defense lawyers, criminal defense lawyers, has even issued a pamphlet, "The Law of Evidence in Federal Sentencing Proceedings." I image you're familiar with it. But it suggests the danger of having a system that's going to be the only hearing somebody is

going to have on a sentencing process without any rules.

MR. GOLDSMITH: I'm surprised it's that thick.

MR. GOLDSTEIN: Actually, it's fairly interesting reading. And what these, primarily civil lawyers — some of you might be familiar with the American College. I was not a member of this committee, but I am a fellow. I did go to some of these meetings and it was interesting to watch these —

One of the problems is that, what's driving this constant upward spiral of the need to constantly move up the Sentencing Guidelines, I would suggest, is our perception of the public's perception. Quite frankly, if we went over to the real lawyers, the civil lawyers, that try cases in civil courts everyday, they wouldn't know what we were talking about.

The general public, I would suggest to you, still has the perception that the federal sentencing scheme is this revolving door that paroles people long before their sentences are up. And perhaps if we spent some of the money that we're going to spend on all these beds we're going to have to build and staffing these new prisons on educating the general public, maybe we'd find out what deterrence might mean.

We don't know, and I was interested, and I won't reiterate it because I think you all — I'm appreciative

of the — everybody is concerned about the fact that we don't know what the deterrent effect is of the last upward movement of these guidelines. This will be the third time we've raised the economic guidelines. And, while that natural tendency is understandable, it is, I would suggest, not based on any empirical data, but, rather, on anecdotal concerns that many of us have.

What we're going to do under either of these new proposals is create a whole new universe of first-time fraud offenders, with judicially mandated prison sentences. We're going to limit Title III District Judges discretion to impose home detention, and alternative means of confinement, all without any congressional intervention, and without any empirical data to back it up.

A good example would be, for example, the safety valve for first-time offenders, despite the congressional, at least mandate, that first-time offenders be treated in some fashion other than by imprisonment. We've got a safety valve for drug offenders, but we don't have a safety valve for first-time economic offenders. Why not? What is the difference? Why shouldn't they be given the same opportunity as their brethren and sisteren [sic] of the criminal law, defendant class?

The Criminal Law Committee of the Judicial

Conference, for example, appears to be a proponent of increasing the guidelines for economic crimes; and, yet, the empirical data that the Commission has generated indicates that the District Judges obviously are sentencing at the low end of the current guidelines. Don't do what they say, do what they do. They appear to be satisfied with the punishment scheme, if they are not even sentencing at the high-end of the guidelines.

In conclusion, because I know we've got a lot to do here, may I just suggest that, rather then raise the economic crime sentences to the level -- and I would suggest irrationally high level -- of drug offenses and enable proportionality, I would suggest we're trading one problem for a bigger one. It's unsound policy, and I'd suggest it's unsound economics. Perhaps we could spend that money informing the public that building, staffing and maintaining prisons at a cost that they could be sending most of these folks to Harvard, quite frankly, for a good year, is irrational criminal justice policy. More importantly, to them, in their pocketbooks, it's irrational economic policy.

JUDGE CONABOY: Thanks, Gerald.

David, are you going to proceed next?

MR. AXELROD: Yes, sir.

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STATEMENT OF

DAVID AXELROD, ESQ.

VORYS, SATER, SEYMOUR & PEASE

COLUMBUS, OHIO

MR. AXELROD: Thank you, Mr. Chairman, Commissioners. I haven't had an opportunity to address the Commission, for some years now. I appreciate the opportunity to do so now.

I did discuss, in some detail, in my written statement the proposed adjustments for more-than-minimal planning, or in the change in the way that would be handled, and proposed specific offense characteristics for sophisticated concealment. Rather than repeat that, I'm going to direct myself to some what I think are bigger picture issues which relate to those two specific offense characteristics.

The major points that I want to make to the Commission today are: These sorts of changes should only be considered as part of an overall plan for rationalizing how we view and how we sentence economic crimes, and they should only be viewed in context of one another. I don't think that it's proper or particularly useful to look at them one at a time because none of them operate in a vacuum. They all operate together and they combine to

achieve, sometimes, results that are beyond that which might be expected when you consider them only one at a time.

My two major criticisms of the proposed amendments are that they are overly complex and they will result in what I view as unwarranted increases in sentences imposed on defendants even at the middle levels of the loss table. I'm not going to address myself to the upper levels of the loss tables. I think that that's already been discussed and will be discussed further. But, even at the middle level, sentences would rise in what I view as a fairly dramatic way.

Furthermore, I don't believe that these sorts of specific offense characteristics are required to deal with the concern that courts need a bit more flexibility in reflecting the planning and the evils that come with sophisticated concealment in imposing sentences. I think that can be appropriately dealt with simply by recognizing the court's authority to depart upward in cases involving unusual sophistication and unusual efforts at concealment.

I want to comment a bit about the complexity.

The adoption of these sorts of specific offense characteristics that we're talking about. These, the two that I've discussed in my written testimony, and all of the ones that are under discussion in connection with the

economic crimes amendments, introduce or increase specific problems in the sentencing process.

I may be too late, in fact, I think I am about 10 years too late, with the comment that trying to go over, with your client, how he or she is going to be sentenced shouldn't resemble preparing an income tax return, but it does. And it probably has about the same rate of accuracy and error, and we're now proposing, I suppose, to add additional kinds of schedules. We're going to have a Schedule C now, and, someday, we may be talking about net operating loss carryovers in connection with sentencing. And I don't think that's particularly desirable.

You don't need a specific offense characteristic for every feature that may be present in a crime. Some features of the acts which comprise criminal activity are not appropriate measures of culpability and others punish the same harms so that you have redundancy. What specific offense characteristics do do, in my 10 years of experience, that dealing with the guidelines, is they invite litigation in every case. If you adopted a specific offense characteristic that says that there's a 2-level bump and a 12-level floor for crimes of unusal sophistication, then, my experience teaches that aggressive assistant U.S. Attorneys will be advocating

that in almost every fraud case. And I don't think that's particularly desirable, either.

Another problem with them is that they're too inflexible. The original Sentencing Commission recognized the need for flexibility in dealing with various features of criminal activity when it prepared the first set of guidelines and adopted commentary that is still in Chapter 1, Part A. When the Commission said that the appropriate relationships among different factors are exceedingly difficult to establish, or they are often context-specific, we deprive the courts of the ability to deal with the context in which violations occur, and in which these features occur, when we adopt the mechanical specific offense characteristics.

Another problem that specific offense characteristics create is: They introduce, they have the potential to introduce, the very sort of disparity that the guidelines were intended to eliminate. The original Commission, in the commentary in Chapter 1, gave a hypothetical that I think tells something about these proposed amendments, and I'm going to read it. This is offered as an illustration of how a sentencing system, tailored to fit every conceivable wrinkle of each case, would become unworkable. What the Commission wrote was:

"For example: A bank robber with or without a

gun, which the robber kept hidden, or brandished, might have frightened, or merely warned, injured, more seriously or less seriously, tied up or simply pushed, a guard, teller or customer, at night or at noon, in an effort to obtain money for other crimes, or for other purposes, in the company of a few, or many, other robbers for the first or fourth time."

That was given as an example of bad practice in sentencing. And I think that, when we consider adopting too many new specific offense characteristics, we're working our way towards.

The other problem is that I think we're going —

MR. GOLDSMITH: Mr. Axelrod, let me just interrupt for a moment, if I can. How many new sophisticated offense characteristics are you talking about that makes this too many?

MR. AXELROD: Well, it's not, it's not strictly a numerical function, but I've reviewed all the proposals for redefinition of loss, and the one that would have been — I don't think it's in the February working draft; but was 2F1.1B7. It had a number of different features that could have generated a two-level bump, or four levels, if there were more than — if more than one was present, and

there's sophisticated means. There will be more-than-minimal planning that will disappear. Then, there's the issue of whether or not there should be a sophisticated offense characteristic for only minimal planning. We're talking about making this significantly more complex than it needs to be. Those sorts of things can be dealt with through departure authority where unusual planning, unusual concealment, or less than typical planning or concealment are present.

MR. GOLDSMITH: Isn't the ballpark issue here, the ball game issue, and the one you're really focusing on now, sophisticated means? If that's the case, we're really only talking about one characteristic here.

MR. AXELROD: Well —

MR. GOLDSMITH: The definition of loss involves a variety of other issues, but your principal concern seems to be sophisticated means. That may pass and fail on it's merit, having to do with whether it's appropriate to have that can of enhancement, as such. But I don't see that adding that specfic — that single specific offense characteristic adds much by way of complexity. It may be that it's too broadly framed, or too narrowly framed, or that there may be other problems with it. But just adding that sophisticated offense characteristic, specifically an addition of one characteristic, as such —

MR. AXELROD: Well, my problem with these — yes, sir?

JUDGE CONABOY: Commissioner Goldsmith has run you out of time.

MR. GOLDSMITH: I'm sorry. My apologies.

JUDGE CONABOY: He even says nasty things about Pennsylvania skiing. He spares no one.

MR. GOLDSMITH: I would rather listen to your answer, though, than ski Pennsylvania.

JUDGE CONABOY: We'll get back to that, but let's move this along.

Mary, you're going to go next.

MS. SPEARING: Yes.

STATEMENT OF

MARY SPEARING, ESQ.

CHIEF, FRAUD SECTION

UNITES STATES DEPARTMENT OF JUSTICE

MS. SPEARING: Mr. Chairman, members of the Commission, this is my first time appearing before the Commission, and I'm pleased to be here.

Ms. Pflaumer and I are going to address all of the remaining issues. I'm going to first deal with the loss tables more than minimal planning and sophisticated means as sentencing factors; and, then, she's going to deal with the definition of loss.

JUDGE CONABOY: Would you move the mic over, please. I don't know whether this room is ——-

MS. SPEARING: As an initial matter, we urge the Commission to move ahead to revise the loss tables; and, at the same time, enact the changes closely related to that revision. These issues are ripe for decision. The Commission has received extensive public input on these issues over multiple guideline cycles.

Turning to the proposed revision of the fraud and theft loss tables, we applaud the Commission for recognizing the importance of improving the tables that, to a significant extent, control the sentences applicable to myriad of white-collar offenses. The Commission has proposed two options to amend the loss tables in the fraud and theft guidelines, and is also considering a third option developed in April 1997.

Recognizing that all of the options improve the current sentencing structure, the Department prefers option No. 2, especially in the mid- to high-dollar range, where it increased sentences more quickly for offenses of dollar amounts between $70,000 and $1.2 million. Offenses at these levels are serious and common. The loss amount for approximately 25 percent of the defendants sentenced in fiscal year 1996 under guideline 2F1.1 fell within this range. Option 2 would place an offender, who commits a

fraud of just over $70,000 at offense level 16; and one who commits a $1.2 million fraud at level 22.

By contrast, options 1 and 3 rise more slowly for offenders in the $70,000 to $1.2 million range. For example: Both of these options would place a defendant, whose offense involves just over $70,000, a offense level 14, 15 to 21 months, or even a split sentence, with as little as 5 months of imprisonment after acceptance of responsibility, exactly where such an offender is under the current guidelines if the offense involved more-than-minimal planning, as the vast majority do.

Similarly, a $1 million option 2 would result in an offense level of 22, while options 1 and 3 would produce offense level 20, just one level above the current level, with more-than-minimal planning.

To deter serious offenses in the range of $70,000 to $1.2 million, improvement in the fraud and theft loss tables is vitally needed. All three options recognize this need where larger dollar amounts are involved. At amounts of $1.2 million and greater, all three options are the same and reflect significant increased over current sentences.

We applaud the Commission in recognizing the seriousness of these expense offenses and urge the Commission to acknowledge the need for increases in the

mid- to high-dollar range.

I want to turn my attention to more-than-minimal planning and sophisticated means.

We support the deletion of the enhancement for more-than-minimal planning or scheme to defraud more than one victim. We view the deletion of these factors and their incorporation into the loss tables as a positive step in reducing litigation. However, the goal of reduced litigation will not be realized if courts are permitted to reduce sentences based on minimal planning.

We strongly oppose the addition of language providing a reduction in the offense level because of limited, or insignificant planning, or simple efforts at concealment, as proposed. The table does not incorporate more-than-minimal planning at all offense levels; therefore, no basis at all exists for a reduction at the lower dollar amount.

More importantly, however, if minimal planning is allowed or not prohibited as a basis for departure, defendants will likely argue it in most cases. The result will be that minimal planning will become a frequent litigation issue, just as more-than-minimal planning has been a litigation issue under the current guidelines, and uneven results will be likely. The net effect will simply be to shift the burden from the prosecution to the defense

without eliminating the factor from consideration.

A balance approach would be for the Commission to adopt language prohibiting a downward departure on the basis of minimal planning and upward departure on the basis of more than minimal planning, as presented by the Commission in an issue for comment. The promulgation of such language would signal to all parties that the Commission had adequately taken into account the issue of minimal planning and more-than-minimal planning, as reflected in the loss tables.

If, on the other hand, the Commission remains silent on the departure issue, that silence will likely result in litigation as defendants and prosecutors seek to test the views of the Courts of Appeals on minimal planning as a basis for downward departure and more-than-minimal planning as a basis for upward departure. This is an issue the Commission should decide before a circuit complaint develops.

The Commission has also proposed a specific event characteristic providinng a two-level increase for sophisticated concealment, or for either sophisticated concealment or commission of the offense from outside the United States. An enhancement for sophisticated means used to impede the discovery of the existence or the extent of the offense currently is found in the Tax

Evasion Guidelines.

The proposed new factor for fraud and theft guidelines would expand an existing sophisticated offense characteristic in the fraud guideline, which provides the floor of offense level 12 if an offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct. The proposed enhancement would broaden this concept to apply to other means besides the use of foreign bank accounts. Few options are presented. We prefer the one that specifically provides for the commission of the offense from outside the United States.

Thank you.

JUDGE CONABOY: Thank you, Mary.

Katrina, do you want to proceed?

MS. PFLAUMER: Do you want me to proceed to loss definition, Mr. Chairman? I'm prepared to speak on that. Or, should we proceed to Mr. Margolin?

JUDGE CONABOY: We were going to move to that next, but —

MS. PFLAUMER: That's what I'm going to speak on. We tried to save more time for that because we think it's maybe a little more complex.

JUDGE CONABOY: All right. While, why don't we just hold that, for a minute, and let me see. Is there —

we were going to give some time for responses. Ephraim, you were going to lead the, according to my notes here, a response to some of these comments.

MR. MARGOLIN: I'll be glad to try.

JUDGE CONABOY: All right. You can proceed, if you will.

STATEMENT OF

EPHRAIM MARGOLIN, ESQ.

SAN FRANCISCO, CALIFORNIA

MR. MARGOLIN: I would like to suggest three major areas of my concern. The first area has to do with the whole notion that, every time a body politic gets together, the result is increased penalties, the notion of increasing penalties under whatever banner. Because narcotics get very heavy sentences, or whatever, we do not think of reducing narcotics. We think of increasing everybody else. And, before you know it, the result of that is that, in my mind, we're getting a society which is bound to penal solution to the point where other solutions become impossible to accomplish.

My second point has to do with the number of increases. It is true that the present law does have something like 20 or 25 different hundred dollars or less silly situations. And, yes, it is necessary to do something about that. I think that it is totally out of

whack with what people make and how people live.

However, when you look at the three options, which I have -- which were given to me, I see three different areas of concern.

The first one has to do with the small cases. And, in the small cases area, it would seem to me that, if you went, say, to under $50,000, if you stated that in that area, as an experiment, judges will be given greater authority for downward departure. If you simplify the whole thing into four or five different data, you would be doing us a lot of favor.

I do not know the empirical basis for what you have here, but the very closeness of some of the arguments, here are one or two things: $30,000, one thing; $40,000, one thing; $50,000. They are equally kind of your thoughts. I mean, where do they come from? The suggestion I am making is sufficiently broad at least to start a discussion over the introduction of simplification and downward departure.

The final thing is: You know, I go to court, I reach the time of sentencing, I have an inconsequential guy whose life now is going to be impacted forever; and, in the final account, the importance of your guidelines to me is whether I reached level 12. Because, until that point, most people will not get the benefit of the doubt.

Those who deserve it might, because the judge has the power at that point to impose probation or house detention, or whatever, rather than prison. And by playing the game of numbers, as we do in our different plans, this gets lost. And it is very important for me that you realize this is 30 or 40 percent of all the cases. And those cases need to be looked at with some, I wouldn't say compassion; I will say with some logic.

JUDGE CONABOY: Thank you. Anyone else have any comment on any of the matters we've covered? We're going to move to the revisions to the loss —

MS. PFLAUMER: Could I respond to that?

JUDGE CONABOY: Sure, sure.

STATEMENT OF

KATRINA C. PFLAUMER, ESQ.

UNITED STATES ATTORNEY

WESTERN DISTRICT OF WASHINGTON

MS. PFLAUMER: I'm surprised to hear how many inconsequential guys Mr. Goldstein and Mr. Margolin represent.

MR. GOLDSTEIN: I cop to it.

MS. PFLAUMER: The tables proposals, as I understand them, have very little effect at that range. In fact, in some cases, the proposal would lower the guidelines at that range.

I think the area that is of critical importance to the justice department — and I think I am supposed to be speaking for them, actually, my organization — is the area of cases above $70,000, particularly between $70,000 and $1.3 million, which is an area where we think that the penalties are improperly low and should be raised. That is an area, as Mary Spearing said, of importance to us and represents about 25 percent of the cases which have a huge impact on the public.

MR. MARGOLIN: Would you agree with me, then, on everything under $70,000?

MS. PFLAUMER: I think the tables, as proposed, agree with you. I would not, from the standpoint of the Justice Department, agree with you that a $50,000 theft might not and should not be assumed to include more-than-minimal planning, if that's where you're going.

MR. GOLDSTEIN: I think one of the places we're going is the hopes that we might, if we're going to ratchet up at the higher end, we might think about providing more secure due process rights in the process of determining those by whatever definition we establish, and providing greater discretion to District Judges in the areas where we're at a point where there still is some discretion to exercise. That would be by, perhaps, moving in two directions. If we're going to move up after

$70,000, move down below it.

JUDGE CONABOY: All right. Well, I thank all of you, again. I'm going to — do you want to ask some questions?

MR. GOLDSMITH: I do.

JUDGE CONABOY: Let me ask each of you, then — what I'm afraid of is that some of you want to leave early, and I'd like to get everybody in before people have to leave. So, let me ask each of you to keep your questions brief.

Mike Gelacak, Commissioner Gelacak, do you have any questions, brief questions?

MR. GELACAK: Brief questions. Well, just one, I guess.

I'm fascinated by the Department's argument, if you will, that what is the best way to go about this is to eliminate the requirement for them to prove up any more-than-minimal planning. Because, it seems to me, that the only logical conclusion of making that go away is that the people who are going to suffer are the people who don't have more-than-minimal planning. They are going to get whacked. What's wrong — what offends me, not today, but what offends me all the time with this argument is: What is wrong with the prosecutor having to prove more-than-minimal planning? It seems to me that's the

job.

MS. SPEARING: Well, if one of the goals is to reduce litigation, and —

MR. GELACAK: Well, I don't think the goal, for me, is to reduce litigation. Either you can prove that or you can't. We shouldn't give that to you on a platter.

MS. SPEARING: Well, if — but, if one of the goals is to reduce litigation, and you look at one of the factors in sentencing where prosecutors have sought and succeeded in a high percentage of cases in proving more-than-minimal planning, it would seem that you ought to build it into the tables, rather than have that litigation ensue in every case. The —-

MR. GELACAK: Why? So that those people, who do not engage in more-than-minimal planning, should suffer a higher penalty? That's the logical consequence, isn't it?

MS. SPEARING: No. The logical, the logical point is to avoid what is already existing in every — why make the prosecutor in every case prove what is in every, in almost every case, in terms of the higher guideline? I mean, the elimination of more-than-minimal planning is not built into the lower end of the guidelines —

MR. GELACAK: Because I always understood our system of justice to be designed to protect the least amongst us. And that would be the individual, or two, or

three, or ten, or fifty, who do not engage in more-than-minimal planning. Why should they go to jail automatically? Why should their time be increased automatically because everybody else does, we don't want to have to take our time proving that?

MS. SPEARING: I think, in the end, the usual situation where we have a uniform rule that builds it into the table, where there is a presumption that, at a certain point, you probably had to plan, more than minimally, to steal $50,000. If you're the extraordinary teller, who had $50,000 at hand in his or her drawer, and took it out and took off out of the bank that afternoon, I am sure that you would get a downward departure motion —

MR. GELACAK: Well, but we just heard —

MS. SPEARING: I know.

MR. GELACAK: We just heard the argument that we should not have that downward departure. We should do it both ways. We should eliminate — we should include it in the bump, and we should also not allow the departure for minimal planning.

MS. SPEARING: Well, there will be other — there will be other downward departure bases if you put it in as more-than — as less-than-minimal planning itself. What I'm saying is, is that you're opening up yourself to the same problem that we have now, which is: Different

standards and different courts, endless fact hearings different ideas about what more or less minimal planning is. But there are other bases for downward departure, which are usually that the less culpable person, who is not seriously involved with the scheme. When you're up at that size of a scheme, it's almost never a single person. That's just a reality of it.

JUDGE CONABOY: Can I move to Commissioner Tacha? Do you have any questions?

JUDGE TACHA: No.

JUDGE CONABOY: Commissioner Gelacak, or Goldsmith? Go on, say it.

MR. GOLDSMITH: No, go on. I'll hold back.

This issue is one that point in conflicting directions. For example: The need for reform in this area, I think, is illustrated by a statement in the *Federal Sentencing Reporter*, recently, by a leading scholar in this country, in which he said:

> "Under the current guidelines, a defendant can steal a very substantial sum without being required to serve any prison time. For example: A first-time offender must steal more than $70,000 before his sentence to imprisonment is mandated. And the amount rises to $200,000 for a one-time occurrence

involving only minimal planning."

So, on the one hand, I see that as problematic with the current guidelines and something the needs to be addressed. On the other hand, I am — I'm have been troubled, for quite some time, about the fact that the judges, as represented by the Judicial Conference Criminal Law Committee, have apparently been pushing for, or have endorsed the need for an increase in the area; but the numbers suggest that the judges have not been sentencing at the high end of the range. And so, I'd like to ask our Justice Department representatives if they could possibly explain that apparent anomaly?

JUDGE CONABOY: Mary, can you explain why judges are not?

MR. GOLDSMITH: — being too low, why are they all of sudden saying —

MS. SPEARING: I can explain —

JUDGE CONABOY: Without naming any judges.

MS. SPEARING: I can describe our frustration with judges not sentencing at the high end of the range. But I can't, I can't explain why, on the one hand, they see that the tables are not adequate in terms of loss, the guidelines are not; and, yet, they don't take advantage of the situations where they can sentence higher.

MS. PFLAUMER: In my experience, it's the

presentation with an individual before you in your courtroom, and the sympathetic factors of that individual, which presents you with a choice. You have a range that's available to you, and you may stay proportionally in that range, given that this is what is deemed to be the appropriate sentence for this offense, for this law, I find this person to this degree of sympathetic. Whereas, if you ask me where this range should be, I will tell you, as the overwhelming majority of judges did in response to surveys, the appropriate range for this should be higher.

MR. GOLDSMITH: I've read the survey and I'm concerned, I'm most concerned, that next time they're going to come back and say: These penalties, for white-collar crime, are too draconian and need to be lowered.

JUDGE CONABOY: David, we need to —

MR. GOLDSMITH: That's the —

JUDGE CONABOY: Let me hear David.

MR. AXELROD: I think the answer is something entirely different; and that is: As we sit here today, and we look at the loss tables, it's an abstraction, and we're not dealing with concrete cases. When judges are faced with human beings and real facts, real cases, they find that the loss tables and phases give them the opportuntiy to impose sentences that are as severe as they

feel they need to. As a result, you find that the overwhelming majority are sentenced, as Commissioner Goldsmith pointed out, at the middle and bottom of the guidelines.

JUDGE CONABOY: Gerald, were you going to say something?

MR. GOLDSTEIN: I can only say that it's the difference of perception and reality. I understand all these anecdotal speculation about what might be if it weren't like it is. What we need to look at is the empirical data. The judges, obviously, have plenty of room to exercise that limited amount of discretion we give them, and they seem to be exercising it at the low end. And, by and large, whether it's because they are confronted with real situations, in real life, effecting real people, rather than sitting around here picking, with a pointy pencil, and just saying: Well, we're going to change the difference between $30,000 and $40,000.

That's not a criticism of you. It's what I was trying to do, and I was sitting there trying to do it. It's an impossible task in the abstract. It's why, perhaps, we're going in the wrong direction. But whichever direction we go, what we might want to look at is: What is reality? What are they doing? When they've got that kind of discretion, they use it at the low end.

Maybe that ought to tell us something about whether we need to right —

MR. MARGOLIN: It is a difference between the rhetoric and practice, yes.

JUDGE CONABOY: Let me be arbitrary here. Mary, do you have questions?

MS. HARKENRIDER: No.

JUDGE CONABOY: If not, we want to move on.

Well, let me thank you. Some of you are going to remain on this last one. I want to get to this definition of loss issue. So, can we thank this panel. Those of you, who are not on it, we'll excuse you, and Mark Flanagan is going to be added.

NON-TAX ISSUE THREE

PROPOSED REVISIONS TO DEFINITION OF LOSS

JUDGE CONABOY: Mark Flanagan is from Washington, D. C., and is chairman of the Subcommittee on Procurement Fraud, of the ABA White Collar Crime Committee, and a former Assistant U.S. Attorney. A lot of U.S. Attorneys interested in this now. Let's see, the rest remain the same here.

Mark, if you're ready, which you like to proceed and make your comments. We're into, now, the proposed revision to the definition of loss, which is, as we all know, is an extremely important area that we're struggling

with. We would appreciate, again, the input that all of you give you to us on this.

STATEMENT OF

T. MARK FLANAGAN, ESQ.

MC KENNA & CUNEO

WASHINGTON, D. C.

MR. FLANAGAN: Thank you, Judge Conaboy.

Good afternoon. I'm glad to be here. I've been following closely, over the last year, some of the work of the Commission, having to do with the proposed amendments for the theft and fraud guidelines.

I think it's a critical concept, one of the most critical concepts you've been discussing here this afternoon. And I encounter it, really, in two ways in the work I do. First of all, in sentencing, it obviously comes up. But it also comes up, very importantly, in negotiations, in resolving things that are short of going to trial and having indictments, where you need really firm guidelines to predict what would be happening. And there's a lot of disparity in the various jurisdictions around the country as to what the definition of loss is and how it works.

If I had any theme here today, I think the Commission has the opportunity to move forward to clarify and improve upon the definition now, while still having

uniformity and proportionality. I think Judge Rosen, i the hearing in October that you had held, had noted that about 20 percent of all cases involved the loss provisions. And some of the work I did, in looking at some of the data, showed that 35 percent of organizational sentencing involved the theft, fraud, mostly the fraud, guidelines.

In coming here today, I'm going to keep these remarks very brief. I had prepared some other remarks; but, after reading the written statement of the Justice Department, I really decided to make some more global remarks in light of that written statement. And I'd like to make three comments.

The first comment is: I believe the bedrock o the theft and fraud guidelines — and let's concentrate more on the fraud — is the definition of loss. You form, first, the definition. You take all the harm that would to into the definition; and, then, you go to the loss tables.. The Justice Department is inviting the Commission to only go forward with the loss tables at this time, and to table, if you will, the definition of loss, claiming that it would be too impractical to go forward at this time, too tough to go forward at this time.

I really disagree with that format, for several reasons. First of all, I think the Commission, in it's

February Working Draft, has already gone a very long way in tackling some of the tough problems; and, I think, in short order, they could resolve any remaining issues. Also, I think it just is not the right way to go. It is putting the cart before the horse. I think, first, you need to address the definition, and then move to the loss tables. Otherwise, it is very difficult to assign and give real meaning to your loss tables if you don't have a definition that the courts are uniformly dealing with across the country, and that the prosecutors and defense counsel are also uniformly dealing with.

The second comment really deals with the treatment of gain. In the written statement I prepared, and elsewhere, I have argued that I believe gain is really something that should be a grounds for departure. That the ordinary focus should be on the loss to the victim. The Commission, in its current February Working Draft, has elevated gain into one of several factors. I still believe it would be better grounds for departure.

The Justice Department, however, is arguing and urging that gain should be part of the core definition of loss. I think that's a fundamental change to do so. Right now, in your February Working Draft, that would mean that you would be taking your concepts of actual loss and intented loss and, now, adding gain into the mix. I think

that is just going to unnecessarily make something that needs to have clarity more complex and you will muddy the waters. I don't think it's the way to go.

A third comment has to do with the overall theme. I think, if you had to isolate one issue that the definition of loss should have, that issue is to have a causation standard in your guidelines. In the work that I've read about, in the October hearing, in the commentators, there is almost uniform acclaim that you need to do that, and your February Working Draft does just that.

The Justice Department seems to walk around that issue. And I don't think it is really the time or the place, when you are so close, to take the loss tables and go forward with them and not to simultaneously be addressing the definition.

Thank you very much.

JUDGE CONABOY: Thank you, Mark.

Katrina, were you going to come in at this point?

MS. PFLAUMER: Yes, if I may. Thank you.

JUDGE CONABOY: I didn't mean to skip over Mary. If you want to comment on this one, too.

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STATEMENT OF

KATRINA C. PFLAUMER, ESQ.

UNITES STATES ATTORNEY

WESTERN DISTRICT OF WASHINGTON

MS. PFLAUMER: We tried to save our ten-minute segment for the loss definition because we think that that is an area that has received less comment that is less fully developed and, frankly, is really not quite ready for enactment. We do think that the fraud tables are sufficiently distinct and serve a different purpose, and that the public comment has been slowly received and they're fairly well refined, and would hope that you go forward with the fraud tables.

I think that there is an obvious relationship between the two; but what we don't have, and I don't think we will have in the foreseeable future, is a way of measuring what exactly the change in the loss definition is going to do to the various levels of the fraud table. Therefore, waiting and saying that they're linked is fine; but, unless we can measure the impact and the linkage, there is no real reason to separate the two. From our point of view, we should go forward with the changes in the loss table that have been fully — excuse me, in the punishment tables that have been fully discussed, and continue to work with you on trying to revise the loss

definition.

Our understanding of the purposes of revising the loss definition is to simplify the fraud and theft guidelines, to reduce litigation, and to better reflect the seriousness and culpability of the offender. We appreciate the proposed loss definition expands the coverage in a significant way, and we think that that is a positive step.

In the present guidelines, consequential damages are limited to two small classes of cases: defense procurement fraud and product substitution. The proposed definition would expand that concept through the use of a well, we believe, well-understood term, "reasonably foreseeable harm," that criminal lawyers deal with on both sides of the bar at the present time.

Despite this improvement, this improvement is accomplished with reasonably foreseeable harm that enfolds consequential damages. We fear that the proposed definition, in its present state, really will complicate and confuse and spawn litigation, rather than reduce litigation. We'd like the loss definition to be the subject of more time and study.

The three issues I want to touch on briefly here are: The treatment of gain, the credit against loss, and the departures that are listed in the proposal.

It is the position of the Department that gain can be a useful tool in a small minority of cases. That minority of cases is where there is no loss, or whether the loss is very difficult to calculate, not across the board.

Those kinds of cases that we see in our office are where someone pretends to be doctor, pretends to be a lawyer, serves the clients. It is very difficult to say, to measure the service that the client got, versus what they would have gotten with a real lawyer or a real doctor; but it's certainly not what they bargained for.

Another example would be where a drug company fails to perform tests and falsely certifies that it has, puts a product on the market that we can't say has really hurt anyone yet; but they're certainly not buying what they think they're buying.

Those are the kinds of cases where the loss is zero or it's very difficult to calculate, but the gain to the drug company may be immense. The gain to the fake doctor or lawyer may be immense.

So, we would propose that gain be used, and that it should be used, as a third type of measurement of loss; that is: in 2A, as opposed to 2B, because it's really not — it's a proxy for loss; it's not a measurement of loss. And again, I think that we would avoid the issues that Mr.

Flanagan worries about if we recognize that it's in tha small minority of cases where there is no appreciable loss, or where it's impossible to calculate.

We certainly don't want to be in an inadvertent situation that could result from the way it's phrased now, where gain is proposed as an alternative in every case, where people look at it as an alternative when it is less than the loss.

The second issue I wanted to raise briefly is credits against loss. Again, we have problems with the proposed definition here in this area. Primarily, that the treatment of credit will result in greatly enlarged litigation over whether the defendant provided an economic benefit, the value of the benefit, the timing of the benefit. The problem is that this credit, which now, in the present guideline, is only in a very small group of cases in 7(b) would be extended across the board, and the problem areas would be expanded.

The proposed credit rules also fail to reflect some of the items or services that may carry no economic benefit, such as I just talked about, or, for instance, a case where you sugar water being sold as orange juice. There may be a fair-market value to the sugar water; but, again, it is not the value of what they're selling, which is, supposedly, orange juice. So the credit with

fair-market value should be considered in light of what the victim thinks the victim is getting, in other words, the intended transaction.

The proposed credit rule also presents a problem with regard to property pledged, or otherwise provided as collateral. Where the value of the collateral stays the same or increases, the credit will eliminate loss in a rising market. And this is a substantial problem in the cases we have of HUD fraud, where it is a rising real estate market in many of our cities. You then fail to distinguish between the defendant who walks into the bank meaning to commit a $50,000 fraud, and a defendant who walks in intending to commit a $5 million fraud, and who reaps the windfall of the rising real estate values.

So, again, we feel we need to work through a variety of these scenarios and apply them in the area of credit.

Thirdly, the area of departures. We feel that the departures that are proposed are, in some cases, overly broad and not limited to factors that signify an unusual case. And I see Mr. Goldstein's earlier argument about the numbers of sentences and what we can take from that empirical data. Since the empirical data is that the overwhelming number of departures are to go downward, I think we can clearly say that we don't need anymore bases

for downward departures.

MR. GOLDSTEIN: So the suggestion is 11 up and 4 down.

MS. PFLAUMER: In any case, the first is the one that says if a primary objective of the offense was a mitigating or nonmonetary objective. This promises a great deal of expanded litigation. I've never met a corporate executive who didn't tell you that what he was doing was for the good of the company and to keep the employees in the company.

Three additional downward departure considerations also reflect troubling inconsistency with the general rules that are proposed on loss and the definition. The first is that the offense was committed in an inept manner. The inept downward departure is one that troubles a lot of us in a lot of different districts.

To give you an example: In my district, we have a lot of militiamen who are passing false paper because they have decided that the governor was not properly sworn in, and, so, the state owes them $4,000, and they are entitled to write their own cashier's checks on the $4,000. Now, if you look carefully at these cashier's checks, you will understand that these are inept and probably shouldn't be cashed. But should the state or should the Federal Government be — or should the persons

be not held responsible if the person representing the government didn't get that message?

JUDGE TACHA: Mr. Chairman, can I just interrupt. I am apologizing to you and to all the people who are after you. I have a pre-existing commitment. I have to go. But I will, I assure you, listen very carefully to the tapes, and I have a law clerk listen very carefully.

MS. PFLAUMER: All of ours in in writing.

JUDGE CONABOY: I was trying to squeeze in as much as I could. I knew that some of our — that's why I've been pushing everybody a little bit. I appreciate your all rushing as much as you can.

MS. PFLAUMER: I have very little more, a couple more notes on the difficulty, the tension between some of the principles that are stated in this definition and the proposed downward departures.

One is for a credit, so to speak, where a defendant has made complete, or substantially complete, restitution prior to the detection of the offense. That is a principle that obviously ought to be taken into account, but it runs counter to the definition of credit that has been the proposal that we have now, or at least was its intention. Where is this going to be handled?

The last downward departure where I think

there's a potential tension with the general rule is in the area of the loss which has been substantially increased by an improbable or intervening cause. Again, this runs at some odds or tension with things that are now included in the core definition.

Other members of the Justice Department have asked to be sure mention a couple of other very serious concerns here. One of those is the elimination of the protected computer section. That's an area where we're seeing very scary and enlarging crimes happening everyday.

The interest area, where we have in our written testimony opted for option B, and the attempted and partially completed defenses section which we think should be there.

JUDGE CONABOY: Give me that last one again?

MS. PFLAUMER: The attempted and partially completed offenses.

JUDGE CONABOY: Oh, yes.

MS. PFLAUMER: We've tried, in our written testimony, to outline the chief concerns that we have, and we want to continue to work with the Commission on this definition of loss. We think things are going in the right direction, but we really question whether we are at the point now where using this definition would really simplify or make more fair the guidelines.

DR. KRAMER: Thank you very much, Katrina.

Jerry or David, did you want to get some response in here to these assertions?

MR. AXELROD: Yes, please.

STATEMENT OF

DAVID AXELROD, ESQ.

VORYS, SATER,SEYMOUR & PEASE

COLUMBUS, OHIO

MR. AXELROD: I think the three defense lawyers, the four defense lawyers at the table, are all in agreement with the government, that the definition of loss is not yet well enough developed for the Commission to proceed with it. Where we disagree is with the idea that the Commission should proceed with changing the loss tables, simply because the proposed changes in the loss tables have received public comment.

The problem is: The comments that have been received may be invalidated by what happens to the definition of loss. The loss tables are predicated on a determination that certain conduct should be punished at a certain level. And, if the loss table, if the loss tables are changed to accomplish that and the definition of loss is expanded, it can completely skew the work that the Commission does on the loss tables and completely destroy the assumptions on which the loss tables are established.

A perfect example is consequential damages. If particular conduct under the present loss definition is determined to be punishable at a level 15 — just to pick one out of the air — and then the definition of loss is expanded to include consequential damages, the numbers could skyrocket, and the same conduct that the Commission has previously decided should be punished at level 15 suddenly might be at level 25.

So you need to have the definition of loss in place before you decide how to amend the table. The solution, of course, is to wait and not to do either one of them until the Commission is prepared to do both of them, and that is the course that I advocate.

One other word about consequential damages, which is something that concerns me. We need to keep in mind why we talk about loss; and that is because it's a measure of culpability. And consequential damages, I do not believe are a valid measure of culpability.

I mean, I deal with people who are facing sentencing and who commit crimes all the time. Normally, I say all of my clients are innocent; but, occasionally, one of them may have done something. And I know that criminal defendants think about gain and they think about loss when they decide what crimes to commit. One thing they don't think about is consequential damages. Because

that is not something that enters into their thought processes when deciding what they're going to do, it doesn't really measure how culpable they are. It doesn't measure their personal blame-worthiness. We use it in contract cases and in other contexts because we are more concerned with establishing dollars for the sake of establishing dollars. Here, we try to establish dollars only for the sake of establishing culpability, and I don't think consequential damages does that.

JUDGE CONABOY: Gerald, do you want —

STATEMENT OF

GERALD H. GOLDSTEIN, ESQ.

GOLDSTEIN, GOLDSTEIN & HILLEY

SAN ANTONIO, TEXAS

MR. GOLDSTEIN: I don't think it will come as a shock to anyone that some of my clients have an unfortunate familiarity with the facts of the offense, as well. I also don't think it will come as a shock to anyone that all the prosecutors think we ought to up the guidelines and have more upward departures, and all the defense lawyers think we ought to lower guidelines and have more downward departures.

JUDGE CONABOY: We hear that occasionally.

MR. GOLDSTEIN: And I think Commissioner Goldsmith's suggestion about the reality check when the

District Judges are sentencing at the low end of th guideline range, and the fact that — I think Katrina pointed it out very correctly — there are a lot more downward departures than there are upward departures it is an indication that, with respect to real people, in real life situations — if we're going to have a reality check here — both the level of sentences and the numbers and direction of departures is an indication that the District Judges in this country, when it comes down to the hard decision in reality, find that the current guidelines are severe enough.

Lastly, I want to readdress the continuing return to the theme of reducing litigation. I understand that's necessary. I watch what happens in courtrooms, an I realize that the real litigators, the lawyers that practice in the civil bar, never get there cases in most of your courts. At the same time, it seems to me that, while that may be a legitimate goal, litigation was a natural and built-in consequence of the Federal Sentencing Guidelines.

When we had absolute discretion in sentencing, nobody appealed the sentence because you weren't going to get anywhere, and you were told that in advance. When we built the guidelines, we built in a specific, fact-specific, fact-finding process in which we have no

rules, no one knows where we're going, and we built in an appeal process. We told everyone: This is where we're going to be in litigation. So, the fact that altered the goal of reducing litigation shouldn't blind us to the fact that it ought to be a fair process. Fair, with respect to, I think, what many of you have described as the disparity with the have-nots, not having the same consideration for the lack of planning that the haves might have, and consideration for the due process rights of everyone, from the top of the ladder to the bottom, when they get into this process. I don't think that we should throw out the baby with the bath water.

JUDGE CONABOY: We have some members of the audience. I would like the panel members, if you could, even if you have to move from here, to kind of remain, because we may have some more questions for you. But I'd like to get in -- hear from others, as well as the questioning. I know Professor Bowman was ready to give us some comments, and there may be others. So, if you don't mind, I'm going to move to that area at this point.

Just give us another chair.

MR. BOWMAN: I can do it from here, Judge.

JUDGE CONABOY: Can you do it from there.

MR. BOWMAN: I assume that's what Andy had in mind.

TESTIMONY FROM MEMBERS OF THE AUDIENCE

STATEMENT OF

FRANK BOWMAN

VISITING PROFESSOR

GONZAGA UNIVERSITY SCHOOL OF LAW

MR. BOWMAN: I want to keep this, keep my comments brief. I want to thank the Commission, once again, for having the forbearance to listen to me once again on this subject. The details of my comments are contained in the written statement that you have from me, so I'm going to try not to repeat myself. That said, I'm going to disagree with everybody on the panel, in one way or another.

First of all, I think that this — I'm confining my comments now to the redefinition of loss. I believe this is a desirable reform. I think you are very, very close to bringing it to fruition.

Unlike virtually everybody up there, I think it is doable in the time frame that you have remaining in this year. I'm not saying it necessarily will be done, but I think it can be done. And an awful lot of the objections that are — you hear to this particular proposal that you have are fixable. I think they're fixable in reasonably short order. If you have the will to fix them, and if you put some pressure on the

interested groups not merely to say what's wrong with this proposal; but, more particularly, if they have a particular complaint about a portion of the proposal, to come forward with specific language that would fix the complaint that they have.

I think that the Justice Department, in a number of places, has provided some commendable first steps in that direction, because of the document that's been provided you by Ms. Pflaumer and Ms. Spearing contains a number of places in which they've actually suggested some alternative language. Regardless of the merits or demerits of that particular language, I think that, in each case, that's a step forward and one that I think the Commission should encourage within the limits of its power.

With respect to specifics -- again, I'm not going to get into details, because I've written you a long and tedious paper on that subject -- a couple of things I want to say.

First, I think that the draft that you currently have, the one that's dated February 20, 1998, should not be adopted as it currently stands. I agree with the Department to this extent: I think, if it were adopted as it currently stands, it would be cause far more problems than it would be worth. But I think the problems with it

are discrete. I think they can be fixed. And, in particular, I will try to prioritize the ones that I think need fixing the most.

I think that the section, with respect to credits against loss and time of measurement, needs significant rethinking. Simply because, in its current form, in ways I outline in my written remarks, I think it's almost entirely unusable and so complicated, requiring, as it would, the measurement of things on many different dates and in rather confusing ways. I think it has to be fixed. That's the primary one.

To my mind, if I were emperor of the universe, that the would be the deal breaker. That would be the thing that, if it were not fixed, I could, I could never support this proposal. But I think it can be fixed, and I think it's the one thing that you need to — that you should focus your attention on the most.

Second on that list of things that really ought to be, perhaps absolutely must be, addressed would be departures, particularly the one for inept manner, which I think is just an invitation to chaos. And in that regard, I agree with the Department.

Extremely desirable things I think you should address, but which are not absolutely necessary, are: There are some small fixes I think you should make in the

core definitions, some changes in wording to eliminate some complexity.

I think it would be desirable — as had been suggested from the panel already, and as I think the judges, the Judicial Conference is likely to suggest — I think the addition of some definitions of some core concepts, particularly definition of how you would like to see foreseeability treated by the courts, would be extremely useful. I think I simply can't agree with the notion that foreseeability, reasonable foreseeability, is so well-understood a concept that we all know what it means. In fact, if you think about it for only a moment, you recognize that reasonable foreseeability is a term which is used in very, very different ways, in different areas of the law, and I think it would be very appropriate for the Commission to consider how you want it used, at least in general terms, in the criminal law context, and to define reasonable foreseeability in a way that gives the judges some guidance as to whether you want this to be an extraordinarily torts-like foreseeability inquiry, or a more limited one. I myself, as I think the Commission knows, favor a much more limited one.

Finally, the final thing I want to see is simply, I guess, a reiteration of the point with which I began. I think this can be done. I think what the

Commission needs to do is to invite and, frankly, plac some pressure on the participants, the institutional participants, and the interest group participants, to come forward not only with complaints, but with specific proposals, specific language that would fix the problems that they have. I think time remains enough to do that. I think you should force them to do that. And, if you do, I think you can do this job within the time remaining. And I think what you will have when you're done is a reform of the guidelines that will be simplifying and that will, indeed, be an appropriate, lasting and desirable legacy of your tenure and at this particular period of the Commission's existence.

JUDGE CONABOY: Thank you very much.

MR. GOLDSMITH: Before you leave, let me turn to my — well, I certainly concur that we ought to encourage the various participants to come up with language that might somehow help us forge a compromise. Along those lines, I'd like to ask you if you, time permitting in your busy schedule, if you could try to provide language you think might help.

MR. BOWMAN: Commissioner Goldsmith, I think I've actually done that.

JUDGE CONABOY: He's already done that.

MR. GOLDSMITH: Well, I've never seen your

statement.

MR. BOWMAN: I have, in fact, attached — what I've done in the statement that you have is: I've gone through the February 20, 1998 proposal pretty much line by line, and I've suggested, working off that draft, specific changes that I think would meet a number of the concerns, among them many of the concerns raised by the Justice Department. I don't suggest that those, that that's the last word; but, in effect, I think what I was trying to do is to say this is doable and here's at least one way that you might do it.

MR. GOLDSMITH: Good. I'll take a closer look at your statement. Thank you.

MR. BOWMAN: Thank you.

JUDGE CONABOY: I think I saw some other hands of people who — yes, would you use the microphone for us, please, and would you, each of you who comment, if you would, identify yourselves and who you represent, if anyone.

STATEMENT OF

DAVID COHEN, ESQ.

SAN FRANCISCO, CALIFORNIA

MR. COHEN: Hi! My name is David Cohen. I'm a federal criminal practitioner here in San Francisco.

I've been practicing federal criminal defense

for approximately 10 years. I got my first federal criminal case in 1988, not long after November 1, 1987, so I consider myself to be a person who has practiced during the course of the guideline era.

What I've noticed, other than the change in the color of the books during the time — and, by the way, I've never had the opportunity to look the Commission in the eye before, which I'm relishing.

(Laughter.)

MR. GOLDSMITH: Do you think the book should have pictures?

MR. COHEN: Pictures, changing the colors. Changing the colors have been, have been good.

The one thing that I've noticed is a trend toward more complicated guidelines and fatter books. And almost universally, the amendments have resulted in increased sentences.

I know the safety valve has been instituted and there have been other minor exceptions. But, for the most part, the guidelines have gotten higher and higher. And it's very, very difficult, and I haven't seen any ability for them to be reduced. The only time that there was a significant proposal to reduce the guidelines in 1996, in connection with fraud, in connection with money laundering and crack, the only amendment that was rejected by

Congress.

My concern is that, when you talk about raising the guidelines, whatever the merits, there's a significant risk because you're not going to be able to lower them politically. I mean, politically, it's very, very difficult. I'm very, very concerned, and I just wanted to raise this with the Commission because you guys and women are trying to do a good job. But the problem is, is that this is an election year. You raise them, it's instituted, it's very difficult to lower them. I noticed, in 1997, there weren't significant amendments of this type, such as the ones in '96 or '98 that were proposed.

So, I just urge the Commission to be very, very careful because the defendants aren't here. And it's very rare for people to be able to speak directly to the Commission. I'd urge the Commission — it would be nice if politics were not involved, but politics is involved — and I'd urge the Commission to very, very careful in raising guidelines in general, and these guidelines in particular. And I'd just like to say that, I think, on behalf of many, many people who are appearing for sentencing in courts everyday.

Thank you.

JUDGE CONABOY: Thank you, Mr. Cohen.

Now, there are some others, I think. Yes, sir.

STATEMENT OF

EARL J. SILBERT, ESQ.

MEMBER, PRACTITIONERS ADVISORY GROUP

MR. SILBERT: Mr. Chairman, members of the Commission, my name is Earl Silbert. I'm a member of the Practitioners Advisory Group.

From the time of the promulgation of the regulations, of the Sentencing Guidelines, in the area of theft and fraud, I've been concerned about the primary emphasis, almost dispostive emphasis, they have placed on the concept of loss.

As a prosecutor, for 15 years, and 10 as Assistant U.S. Attorney, and 5 as the United States Attorney, I always thought and practiced the principle, as did our office in the District of Columbia, that, in investigating and prosecuting fraud cases, you follow the money. That is: You look to see who gained the money. It was not our experience that I had, both as a prosecutor and confirmed as a defense attorney, that defendants thought in terms of loss of their victims. They thought in terms of gain. And to me, and our staff, that was the proper measure to assess their culpability and the nature of both the prosecution and the punishment that they should receive.

For example: If you had a fraud procurement

case, in which a middle manager participated in a widespread conspiracy to commit fraud in the government contract, for which the loss might have been, say, $300,000 or $400,000, and that middle manager received no gain. In our view, the person who stole $100,000 from his employer, or her employer, and put that money in their pocket, was more culpable and deserving of greater punishment. Yet, under the guidelines, as they are now, as they were promulgated, and as they are under consideration, under your consideration, the reverse would be true: The person, who participated in that fraud for $300,000 or $400,000, would receive a significantly greater punishment than the person who put $100,000 in his or her own pocket.

It is for that reason that I would suggest, or just express my concern, that there is an inhumane quality about measuring the time that a person will serve in prison based primarily on the amount of loss, the numerical amount of loss, that he or she caused, without further consideration of the other factors that, in our — in my experience primarily as a prosecutor, with the appropriate measure of their culpability.

The second ground, the second point, I would welcome the opportunity simply to make is — and it's been articulated here earlier — is: In trying to assess and

look at the role of sentencing in white-collar crime, and considering the purposes of the criminal law, our experience — and, again, I'm drawing primarily on my experience as a prosecutor — was that there were a number of cases in the area of theft and fraud that did not require imprisonment. There were a number that did. And I certainly, as a prosecutor — if you check the record — was active in seeking confinement in appropriate cases involving theft and fraud. In order to accomplish the purposes of the criminal law, whether you're looking at the punishment, or retributive factor, the deterrent factor — which, to us, was always the primary factor in the area of theft and white-collar crime — the sentence of impriosnment of 6 months, a year, year-and-a-half, and two, accomplished all the purposes that the criminal law could fairly and appropriately serve. And sentences above and beyond that, in terms of the necessary or appropriate punishment, but particularly in terms of the necessary deterrence, both deterrence of the individual and deterrence of others, was simply not necessary.

Now, it's easy. There was always the temptation in our office to seek increased enhancements of penalties and punishment. I'm somewhat disappointed with my friends in the Department that they seek that today. Because, as I look at the guidelines that you have in the theft and

sentencing factors, I respectfully submit to you that, by and large, they do provide for adequate punishment if you look at the overall purposes and evaluate the overall purposes of the criminal law.

I would urge and suggest to the Commission that, in assessing whether or not to increase the tables, the loss tables, that they consider not only the measure, the amount of incarceration, but whether or not the appropriate factors are being considered in evaluating what I think is the bedrock of our criminal justice process, which is moral culpability in the commission of crimes and the appropriate steps that we, as a society, should take to respond to it.

Thank you.

JUDGE CONABOY: Thank you very much.

STATEMENT OF

JAMES E. FELMAN, ESQ.

SAN FRANCISCO, CALIFORNIA

MR. FELMAN: Thank you members of the Commission. I simply cannot resist a microphone in front of you all. It's Jim Felman. I'm also with the Practitioners Advisory Group. You've heard some of what I have to say in October.

I want to emphasize one point that Mr. Silbert has just made about gain. I don't think any fair-minded

person can differ with the proposition that someone who gains zero is fundamentally different from the person who gains 100 percent of the loss. I don't think any fair-minded person can differ with that. Knowing that doesn't answer the problem.

I noted in what you published for comments had a proposed downward departure where gain was significantly different from loss. That has been deleted from the February draft. I imagine because there was probably a concern that, with that as departure ground, it would apply to too many cases. Everybody would be arguing in many, many white-collar cases that gain is significantly less so there should be a departure, and the purposes of guideline sentencing would be undermined.

First, I have to say that you have to worry when an obviously agreed-upon mitigating factor would apply in too many cases. That ought to bother you a little bit. Now, what to do about it? I, of course, would be in favor of having the downward departure suggested.

I agree with the proposition of using loss as a first point. If I could think of some mathematical way to average gain and loss, or take both of them into account somehow in setting the offense level, I'd do it. It's too complicated. I can't do it. You have to start somewhere. I'm okay with starting with loss. But, if you've got an

obviously undisputable serious mitigating factor that applies in many, many cases, you've got to do something with it, if you're going to do your best. Uniformity is easy. But if you're going to do your best at distinguishing among different levels of culpability, it's an issue that ought to be addressed. I would only suggest that, if you're not comfortable with it as a departure ground, you consider it as a sophisticated offense characteristic.

I never thought I'd be here in front of this Commission asking for a sophisticated offense characteristic because it invites litigation. If we can't have the departure ground, I'm here to ask for it. Give me one point. I don't want to argue about how much it is. Those are political issues. I'm talking about making it rational in trying to differentiate different degrees of culpability. I don't think it would require that much litigation if you're going to have to consider gain, anyway, to figure out whether it's more or less loss — although, I can't agree with that.

I would urge you to consider Mr. Silbert's point. As a suggestion for how to enact it if you're not comfortable with the downward departure, use it as a sophisticated offense characteristic.

I'll mention the consequential damages. If you

include them in all cases, as the February draft does, they will probably engender more litigation, in the real world, than any amendment consideration that you've got.

I practice criminal defense law. I go to sentencing from time to time. And I can tell you, as a defense lawyer, that, if consequential damages are included, it will be very much more complicated. I don't know how you could — how to describe that adequately, except to say that, if in a typical case, where consequential damages were excluded, the loss is generally about what we just tried this case about, where it's what we negotiated the plea agreement about. Consequential damages have nothing about either. They are generally about information that is not going to be in the possession of the prosecutor's office, that's not going to be in the possession of the defense attorney, it's not what the case was about. It's about consequential things that happen to the victim later on. We're going to show up at a sentencing hearing and I'm going to get a bill for the victim's lawyer's fees. I'm going to get a bill for the time that the victim took to detect the offense. The complexity of these issues is going to be enormous.

If you look at the factors that are considered consequential damages when they're counted, you're talking about very fact-intensive litigation. And, if you get

back to the point that the whole point of it is to just make it a rough surrogate for culpability, it's litigation that is completely not worth the trouble to measure culpability. I would urge you not to include consequential damages in all cases.

I'll finish by just pointing out that I would note that, before we had guidelines, a lot of people got probation. And I didn't think there was any hue and cry that that was such a horrible thing. The Commission made a political judgment that, for white-collar offenses, the penalty should be higher than pre-guidelines experience. So there was a decision made to increase penalties for white-collar cases when, for pre-sentencing practices, unlike everything else, when the guidelines were first enacted. Two years later, you did it again, in 1989, when you raised the tables. I don't know why. And, now, we're talking about doing it again. In my judgment, without any empirical basis to suggest why this is necessary, I would at least urge that you do it in connection with the definitional issues. If we don't know what the impact of the definitional issues are going to be on how much loss gets included, how can we make a decision to increase the tables now and worry about an unknown additional increase later?

Finally, the sophisticated concealment, as it's

currently drafted, I think is far too broad. It applies to anyone who makes deliberate steps to make their offense difficult to detect. I would suggest anyone who fails to do that ought to get a downward adjustment for diminished mental capacity. That needs to be rethought, if it's going to be there at all.

Thank you.

JUDGE CONABOY: Is there anyone else? We can take one more; and, then, I think we'll have to conclude.

STATEMENT OF

BENSEN WEINTRAUB, ESQ.

MIAMI, FLORIDA

MR. WEINTRAUB: Thank you. My name is Bensen Weintraub. I'm an attorney in Miami.

I have one comment, which is common to each issue that we discussed today, starting with the proposed increases in the tax tables, to the 2F guidelines, as well; and that is: It appears to me that the guideline amendments under consideration appear to be inconsistent with the enabling legislation which created the Commission.

The principle of parsimony is specifically incorporated into the Sentencing Reform Act, and I fail to see how the discussion of this type, which necessarily increases the guideline range, provides for the type of

sentences within the purpose of — within the meaning of 3553(a) that mandates that a court impose a sentence that is sufficient, but not greater than necessary. I think, at this juncture, the amendments are clearly greater than necessary, particularly in the absence of empirical evidence to substantiate the lack of deterrent value as to the existing guidelines.

Thank you.

JUDGE CONABOY: Thank you very much.

Well, I thank all of you for coming, and we're almost on time. We had hoped to finish at 3:40. I think it's a little bit beyond that, but I'd rather conclude on that note.

We do appreciate — as we demonstrate here again today, some of these issues are very ticklish, very hard to resolve, particularly in a way to resolve them that everyone would agree is the best way. I guess that's the essence of our system. If we ever get to that point, God help our clients; they'll all be in trouble.

I think we reiterated here in many ways how difficult the whole process of sentencing is; and, that, perhaps, some thought has to be continually given to the idea that, when we're depriving people of their freedom, we have to give them at least as much due process as when we deprive them of their property. That's an age-old

concept in this country, and we're sliding away from it little bit. It was mentioned here today, in passing, by a number of people, the old concept of plea bargaining has replaced, in large measure, the concept of taking each other on in a competitive way in the courtroom, for better or worse.

We need committed people. We need concerned people. And I can just tell you, from all of the discussions we've had at the Sentencing Commission, everyone is struggling with this in trying to arrive at the best conclusions we can.

So, we thank you all again, and we'll consider the meeting adjourned at this point.

(Whereupon, at 3:50 p.m., the hearing was concluded.)

# C E R T I F I C A T E

I hereby certify that this is the transcript of the proceedings held before the

**UNITED STATES SENTENCING COMMISSION**

on Thursday, March 5, 1998 at San Francisco, California, in the "Key Issues: Reassessing sentences for federal theft, fraud and tax crimes," and that this is a full and correct transcription of the proceedings.

JAMES W. HIGGINS, CVR
Reporter