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United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
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Washington, D.C. 20004

Attention: Guideline Comments

Dear Commissioners:

I offer the following comments on the January draft of the sentencing guidelines.

The views expressed here are mine alone, and do not represent the views of either the Federal Judicial Center or the Research Division.

Comments of a General Nature

Organization

I regard the present draft as a substantial improvement over prior drafts in terms of ease of use, and I am astonished at the amount that was accomplished in the short time you had after receiving comments on the September draft.

It does seem to me that there remains a good deal of looseness in classifying material as guideline, policy statement, or commentary. I raise some specific examples below of what seems to me to be misclassification, but I think there is a need to review the entire document with this problem in mind. The decision whether material is classified as guideline material or not is particularly important, since guidelines are binding and other things are not. But the document would also be more user-friendly if the commentary were restricted to explanatory material--legislative history, so to speak--and specific advice to judges were put somewhere else. I would put the specific advice in things denominated policy statements, but if the "general policy statements" language of the statute is regarded as inhibiting, some other label would do.

Also under the heading of user-friendliness, it seems to me that the numbering system would be improved if, instead of § A213, you had § 2A13. I think finding one's way around would come much more naturally that way. The normal expectation is that A3 comes soon after A2, but that expectation is regularly defeated by the present numbering system.

Discretion in determining the offense level

I am among those who believe that the wide discretion that the draft gives judges to determine the offense level is inconsistent with the Commission's statutory mandate. I do recognize the difficulty of complying with the twenty-five percent rule, but I think the solution adopted here is not one permitted by the statute.

I believe the appropriate solution is to write narrower guidelines that are tailored to the most common fact patterns, and invite departures from the guidelines in cases in which the facts are sufficiently different. I should have supposed, for example, that most fraud cases are adequately measured by number of transactions, number of victims, and monetary gain or loss, and that you could appropriately invite a judge to depart from the guidelines when a factor such as public corruption is involved. That would eliminate the need, under § F211, for a guideline that tells a judge to increase the base offense level by three to nine levels (40 to 170 percent, I think) when the gravity of the offense is not reflected by the amount of financial loss or gain.

I recognize that this proposal will not be instantly welcomed by appellate judges. But if you succeed in writing narrow guidelines for the kinds of cases that appear in great numbers, and you also make it clear for rarer kinds of cases that, in the Commission's own view, you have not adequately taken certain factors into account, the burden on the appellate courts will be to review relatively rare situations for reasonableness. I believe the burden would not be undue. Over time, of course, the Commission could work to narrow the range of exceptions.

Even if one accepts the legality of guideline provisions that permit a judge discretion in determining the offense level, it seems to me that there is a need for more guidance about how to make the choice. For example, in § A216, the base level is 10 to 14, "depending upon the circumstances of the offense and the degree of recklessness involved." But there is no indication of what "circumstances of the offense" should influence the decision. See also, for relatively egregious examples, §§ E241, G231, and M244. The use of examples in these cases would be very helpful. The Commission might give one example of a 10 case and

one example of a 14 case under § A216, or it might give an example of circumstances that would call for a rating of 12. But some kind of anchor is badly needed.

Comments on Specific Material

Page 2

Of the five general principles toward the bottom of page 2, the fourth seems to me to be very unclear: It says where there is a conflict between retribution and crime control, choose motherhood. If the Commission really has agreed upon a principle for resolving such conflicts, I think it is important that it be stated intelligibly. It should probably be in a policy statement, moreover, so that it will serve as guidance to judges in exercising the discretion that they retain.

Page 11

I think the discussion under the heading "Sentencing Factors" needs a good deal of expansion and elaboration, including the use of some examples. The question of what conduct should be considered in sentencing promises to be one of the more difficult areas in guideline application, and I do not think it is handled adequately here. Nor do I find the references to rules 8(a) and 404(b) particularly helpful. Rule 404(b), for example, may permit evidence of a five-year old crime to be introduced in a current trial. Surely, the Commission does not intend to suggest that a judge could treat the old crime as part of the conduct for which he or she is sentencing.

Section A212

I do not understand the statement in the commentary to the effect that, "as a practical matter," a defendant who causes death during the course of a felony will be subject to life imprisonment even if the felony is not covered by 18 U.S.C. § 1111. It is true that a departure from guidelines is invited in such a case, but it is far from clear that such a departure would always get you up to level 42.

The third paragraph of commentary here appears to misstate the content of § Y224, which by its terms applies to all government employees.

Section A216

The last sentence of commentary would belong in a policy statement if my view of the role of policy statements were accepted.

Sections A221 and A222

The distinction between "assault" and "simple assault" is unclear. Apparently, "assault" does not mean assault with a dangerous weapon, since that is listed separately as a specific offense characteristic.

I also find the enhancement for use of a dangerous weapon somewhat ambiguous. Is it intended to incorporate the expansive interpretation that has been given to the term "deadly weapon" in court decisions?

I believe the definitions of levels of injury belong in the guidelines themselves, not in the commentary. I note that in the definition of "permanent bodily injury," it is grammatically unclear whether "impairment" is modified by "of a bodily function."

The last sentence of the commentary to § A222 is surprising. If you want a stiffer sentence for assault committed by striking, beating, or wounding, say so. If you want a stiffer sentence for minor bodily injury, say so. There is no point in making one a surrogate for the other.

It would be helpful to have a note somewhere indicating that assault with intent to commit murder is covered under § A214 rather than § A221 and that assault with intent to commit rape is similarly covered under § A231.

Section A231

In paragraph (a)(1), consideration might be given to a gradual response between age 12 and age 16, rather than making a three-level jump depend on whether the victim is just short of her twelfth birthday or just past it.

The fourth paragraph of the commentary, dealing with certain forms of coercion, does not seem to reflect the guideline accurately.

Section B232

The last two sentences of the commentary are not appropriately "commentary." They should be included in the guidelines.

Sections B241-B243

The first paragraph of the commentary, telling you when to use the amount of the bribe and when to use the value of the benefit to the briber, should be included as part of the guidelines.

However, I find the instructions very unclear. In the first example, the briber and the bribee have different values placed on their conduct, but nothing in the preceding text suggests that outcome. In the gambler example, the reference to the amount that the gambler "stood to gain" implies that the "monetary benefit" standard should be used even when their wasn't any.

I am not sure I have a good solution, but I also find it somewhat odd that, where the benefit can't be valued, the amount of the bribe becomes the governing standard. There can be some very large transactions in which it is difficult to place a monetary value on the benefit received. For example, a bank officer may approve a very large loan that should not have been made at all under the bank's regulations. It would appear that the offense could be seriously undervalued if the amount of the bribe were determinative.

Section B251

In paragraph (a)(3), does "market value" mean what the market value would be if the counterfeit were accepted as real? It seems to me that this should be the rule: You want to value a counterfeit bond at what an innocent victim would pay for it, not at what it can be sold to a fence for. But I do not think the guideline is clear on this question.

Sections B252-B253

Note the inconsistency between the second and sixth paragraphs of commentary, dealing with whether loss to private individuals should be an explicit sentencing factor.

Sections C211 and C212

The Commission's intention to distinguish between a gratuity and a bribe does not come across clearly.

Section D211

The fourth full paragraph of commentary on page 48 is mysterious. It contradicts the guideline, which states that an amount of heroin between 500 and 999 grams makes a level 30 offense.

The fifth full paragraph on page 48 is an instruction to the sentencing judge, and belongs in the guidelines rather than the commentary.

With regard to the last paragraph of commentary on page 49, I note that "profession" is not included in § 2212.

Section D212

This is another case in which a great deal turns on whether somebody has just passed a particular birthday. It seems like an unnecessarily sharp step.

Section D213

It is not clear what is intended when two or three of the paragraphs of this section are applicable -- for example, if someone sells heroin within 1,000 feet of a schoolyard to a 20-year-old pregnant woman.

Section D217

Should paragraph (2) read "For the second or subsequent conviction"?

Sections E252 and E256

If specific offense characteristics (2) and (3) are intended to be in the alternative, it could be stated more clearly.

Section K214

I suggest that the distinction between paragraphs (1) and (3) be reconsidered. It would appear to me that the severity of the offense should be made to depend upon the objective risk of death or serious bodily injury, or at least the objective risk based on facts known to the defendant. In a case in which the objective risk was high, the guideline as presently drafted makes a great deal depend upon the offender's subjective intent.

It also seems to me that some attention should be paid to the importance of the thing destroyed. It should make some difference whether you burn the mansion or the outhouse.

Importance could usually be measured by dollar value, but there may need to be an exception for unique objects such as paintings, historical documents, and the like. Perhaps judges should be encouraged to go over the guidelines in such cases.

Section M246

Does "time of war" encompass Korea and Vietnam? It appears to me that the draftsmanship here leaves a lot of room for inconsistent characterizations of particular foreign policy adventures.

Section M262

This strikes me as a remarkably severe guideline. As the commentary notes, the offense generally involves people who are engaged in legitimate activity but who have not disclosed their roles.

Section T212

The drafting is unfortunate in that it defines the word "deficiency" to mean something other than its accepted meaning in tax law. It would be better to refer to the deficiency or ten percent of the amount by which the taxpayer's income exceeded \$20,000, whichever is greater.

As I read the guideline, a small deficiency--say, \$100--produces a base level of five, but no deficiency at all produces a base level of six. That seems to be moving in the wrong direction.

Sections T213 and T214

I think paragraph (a)(1) in each of these sections is very easy on the accountant or lawyer who may be in the business of assisting in the preparation of tax returns.

Sections T216 and T217

As I have observed in commenting on a prior draft, I believe the guidelines do not sufficiently distinguish between the cases in which a tax has been withheld from an employee and not paid over or deposited and the case in which the tax has not been withheld at all. Small businessmen in financial difficulty have a strong incentive to look to the withheld taxes. It is money they have no right to use as their own; when they do so and then go belly up, the money is lost to the Treasury. By contrast, the incentive not to withhold at all is much smaller, and in such cases the employee remains liable for the tax.

Sections Y211-Y218

In discussing departures from the guidelines, it seems to me unfortunate to refer to increasing the offense level. The advice should simply be that the court should impose a sentence more severe than the guideline sentence. "Increasing the offense level" refers to guideline manipulation, not to departure.

Section Y224

If you are ultimately going to get to "other government . . . employee," nothing is gained by the listing of particular positions in this section.

Section A311

Query whether a distinction should be made between a sentence of one year and a sentence of more than one year. In the federal system, a sentence of a year and a day has traditionally been regarded as less severe than a sentence of one year because the longer sentence carries parole eligibility and the shorter does not. If the stated sentence is to be used as the indicator of seriousness, almost any other breakpoint would be better. "One year or more" would be my suggestion. It has been suggested that the present distinction reflects a common dividing line between felonies and misdemeanors, but I don't think that should be taken very seriously; a misdemeanor almost never draws a one-year sentence in fact.

I recognize that probation officers tell us that it is difficult to get records of actual incarceration time. I nevertheless am troubled by using the stated sentence as an indicator of seriousness, particularly in light of the movement toward truth in sentencing. Offenders who have been sentenced in jurisdictions that have retained parole are likely to be viewed as more serious troublemakers than similar offenders who have been sentenced in "truth in sentencing" jurisdictions. The Commission probably cannot take account of the fact that people do more time in some states than others, but it should be able to deal in real time.

Paragraphs (d) and (e) of this section both contain the phrase "custody or escape status," which I take to be an erroneous duplication. Even without that, it appears possible under section A311 that a person with one prior conviction can achieve a criminal history score of 7 by violating paragraphs (d) and (e) simultaneously. This would occur, for example, if the current offense was committed within three years of release from

custody on the prior sentence and while the defendant was still on parole. I wonder if this was intended.

In paragraph (e), the language refers to "release from . . . a prior sentence of imprisonment." It is unclear whether that means release from custody or unconditional release from the sentence. The commentary clears it up, but the guideline itself should be clarified.

The first paragraph of commentary at page 163 indicates that an above-guideline sentence is warranted if the defendant has more than ten criminal history points. That seems to me inconsistent with the sentencing table on page 10. If "9 or more" is not what was intended in the sentencing table, it should simply say "9 or 10." But I do wonder whether a great many defendants may not fall in the "over 10" category.

Section A312

In paragraph (a)(2), there is a need for a definition of "related cases."

In the case of someone who has committed a very serious crime and served more than fifteen years for it, the rule of paragraph (e)(1) wipes out any previous criminal record. Even if he returns to crime on the day of his release from custody, the defendant will be treated as if he had only one prior conviction. That suggests that you may wish to provide for ignoring old convictions only if there has been some crime-free period in the community.

Section A316

28 U.S.C. § 994(i)(2) states that the guidelines shall "specify a sentence to a substantial term of imprisonment" for this category of offenders. Telling judges to go over the guidelines does not seem to me to comply.

Section B311

The last paragraph of the commentary belongs in the guidelines.

Also, it is unclear to me whether the rule of § A312(e) applies in determining whether someone is a special offender.

Section C321

One member of the Commission has referred to "acceptance of responsibility" as a code phrase for "pleading guilty." I cannot

urge too strongly that the Commission not deliberately try to communicate with judges and lawyers in code. Some of them will decipher it and others won't, with resulting inconsistent behavior. Deciphering is hard enough when the Commission is trying to communicate in English.

If the Commission is not trying to communicate in code, greater emphasis should be given to the reference in paragraph (a)(8) to "objective conduct." The second paragraph of commentary, in which it is asserted that the sentencing judge is in a unique position to evaluate whether expressions of remorse are sincere or merely self-serving, does not appear to be talking about objective indicators.

Section C324

I find it hard to reconcile this section with 18 U.S.C. § 3553(c). Surely, Congress intended that reasons be given for all sentences. In a case in which a claim is made to the sentencing judge that a discount for acceptance of responsibility is appropriate, it would be an empty set of reasons that didn't deal with it.

Section C331

I believe it should be made clear that this section invites a departure from guidelines, and does not purport to be a guideline. It probably should be in policy statement rather than in the guidelines themselves.

In the commentary, the last sentence of the first paragraph permits the court to provide its reasons to the defendant in camera. I have some question about the authority of the of the Commission to make procedural rules like that.

Section A412

Since this is a policy statement and nonbinding, the language that the court may accept a plea agreement "provided . . ." is unfortunate.

In spite of its nonbinding nature, I regard the section as immensely important, and I think it has some unfortunate ambiguities.

The strict reading is that a court should not accept a plea agreement if it will do the defendant any good. In the case of a charge agreement, for example, you might argue that "the remaining charges or counts reflect the seriousness of the offense behavior" only if they enable the court to impose the

sentence that the guidelines say is appropriate for the offense behavior. Where paragraphs (b) and (c) refer to determining "that reason exists for departure from the guidelines," you could read the language to say that the court must find that an outside-guideline sentence would be warranted even if the defendant had not pled.

At the other extreme, you could read the language about reflecting the seriousness of offense behavior as being an invitation to the judge to exercise his or her independent judgment, without regard to guidelines, and you could read the language about reason existing for departure in a similar manner. Indeed, it is predictable that some judges will conclude that an adequate reason for departure is the defendant's willingness to plead.

Whatever the desired outcome, it seems to me that this section needs a lot of work.

You may also wish to address the question of what happens when a plea agreement is rejected. In spite of rule 11, many trial judges today act upon the view that they are without power to reject a plea agreement. The argument goes that I can't make the United States Attorney prosecute, and therefore I can't reject his deal. If your objective is to encourage more judicial control over plea bargaining, you are going to have a hard time overcoming that view.

Section A511

In paragraph (c), the reference to level 10 should be to level 11. Level 10 has a minimum of exactly six months.

Section A541

Insofar as paragraph (b) suggests that a sentencing judge has an option whether to make restitution an independent sentence or a condition of probation, it is at best doubtful law. See United States v. Kallash, 785 F.2d 26 (2d Cir. 1986).

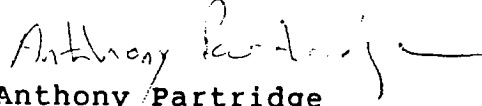
Section A561

The statement in the third paragraph of commentary that section 561 "is not meant to create a presumption either for or against the imposition of concurrent or consecutive sentences" appears to be inconsistent with the last paragraph of the commentary on page 193, which rather clearly creates a presumption in favor of concurrent sentences unless they are inadequate to reach the guideline. I note also that the material

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at the bottom of page 193 is appropriately part of the guidelines
rather than commentary.

Sincerely,


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