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SUITE 300 EAST
1025 THOMAS JEFFERSON STREET, N. W.
WASHINGTON, D. C. 20007-5207

TELEPHONE (202) 965-7910

FACSIMILE (202) 337-0676

*NOT ADMITTED IN D.C.

WRITER'S DIRECT DIAL

OF COUNSEL
ELLEN KABCENELL WAYNE

February 3, 1994

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Mr. Courlander:

I am writing in response to the United States Sentencing Commission's request for public comment upon the proposed amendments to the Sentencing guidelines published in the December 21, 1993 edition of the Federal Register (Vol. 58, No. 243, Part V). Part of my law practice in Washington, D.C. is in the area of white collar crime. I also have the opportunity to serve on the Practitioners' Advisory Group to the Sentencing Commission. The purpose of this letter is to comment on proposed amendment number 11, which would amend and consolidate U.S.S.G. §§ 2S1.1 and 2S1.2 governing money laundering offenses.

I urge adoption of proposed amendment number 11 with the modifications suggested below. The proposal would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds. The suggested modifications are intended to help ensure this result.

The commission's proposed amendment constitute a much needed reform. The current Guidelines encourage prosecutors to seek money laundering convictions in non-narcotics related money laundering cases because the resulting sentences under the money laundering sentencing guidelines are much harsher than for the underlying offense, and asset forfeiture (which is not taken into consideration under the current Guidelines) is available. As the October 14, 1992, report to the Commission Staff Director from the Commission's Money Laundering Working group clearly demonstrates,

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there are cases around the country in which the government has been able to obtain a significantly higher guideline sentencing range than the underlying offense would yield simply by adding a violation of 18 U.S. §§ 1956 or 1957 to the indictment. Moreover, the results of the Working Group's study of fiscal year 1991 sentences showed that 40 percent of the underlying crimes in money laundering cases were not related to drug trafficking but were characterized as "white collar," and that the offense level for the money laundering conduct exceeded that for the underlying conduct 96 percent of the time in non-drug cases.

The proposed amendment seems to recognize that §§ 1956 and 1957 are broad and can apply even in relatively simple fraud and other cases. such cases often involve transactions that are normally not thought of as "money laundering," no less sophisticated money laundering, but which nonetheless are proscribed by §§ 1956 and 1957. Indeed, in some cases, the money laundering offense is difficult to distinguish from the underlying crime. United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991), is a perfect example. In that case, a state public official was convicted for money laundering under 18 U.S.C. § 1956 based upon the deposit into his personal checking account of a single \$3,000 check representing a bribe.

There also are instances when the government can substantially influence plea bargaining negotiations by merely threatening to include in the indictment a count charging a violation of § 1956 or § 1957. The proposed amendment goes a long way towards addressing this problem and ultimately will help to achieve the Commission's stated goal of "eliminating unfair treatment that might flow from count manipulation." U.S.S.G., Chapter 1, Part A, Paragraph 3.

While I support the Commission's objective, I strongly urge the Commission to make the following modifications to the proposed amendment to achieve the Commission's stated goal of "relating the offense levels more closely to the offense level for the underlying offense from which the funds were derived."

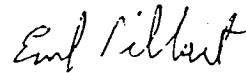
First, where the defendant committed the underlying offense and the offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not only in those cases where the base offense level would exceed the base offense level in proposed § 2S1.1(a)(2) or (3). This offense level then would be increased by any specific offense characteristics under proposed §2S1.1(b). To achieve this result, I would suggest deleting from the instruction in § 2S1.1(a) "(Apply the greatest)" and suggest inserting the term "otherwise" after subparagraph (3).

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Second, I would strongly urge the Commission to make the base offense level in proposed § 2S1.1(a)(3) the same as the base offense level for fraud and deceit (§ 2F2.2). To do this, proposed § 2S1.1(a)(3) should be changed to a base offense level of 6 plus the number of offense levels from the table in § 2F1.1.

The proposed amendment with the suggested modifications would result in a significant improvement to the money laundering guidelines as they presently exist.

Sincerely,



Earl J. Silbert

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