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March 6, 1996

The Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
Federal Judiciary Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Guideline Amendments
& Issues for Comment-1996 Cycle

Dear Chairman Conaboy:

On behalf of the Practitioners' Advisory Group (hereinafter called "PAG"), I am writing to you to provide the views of our Group concerning the proposed amendments and issues for comment which are before the Commission on the 1996 amendment cycle. As in the past, I thank you for the opportunity to express the views of the PAG on pending amendments and requests for comment. We are also especially grateful in regards to the willingness of the Commission to facilitate our monthly PAG meetings by allowing us to teleconference in members of the PAG who are unable to attend the meetings. We also wish to commend the Commission on the willingness of the leaders of the various Working Groups of the Commission to meet and work closely with liaison members of the PAG on the various Working Groups.

TO AMEND OR NOT TO AMEND THE GUIDELINES

The views of the PAG on this issue have been consistent throughout the period of our existence: we favor change where wisdom and experience call for change and where inter-Circuit conflicts cry out for resolution by the Commission--especially in light of the fact that the Supreme Court has indicated that it is looking to the Commission to resolve most of the problems in applying and interpreting the guidelines. See, United States v. Braxton, 111 S. Ct. 1854 (1991) [Commission has been given the power by Congress to amend guidelines to resolve Circuit conflicts]. Changes which experience has shown are necessary to promote the purposes of sentencing should be enacted if the

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Commission is to truly abide by the duties which were entrusted to it by Congress in the enabling legislation.

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COMMENTS ON SPECIFIC AMENDMENT PROPOSALS AND ISSUES FOR COMMENT

The PAG has broken down its comments by following the index to the proposed guideline amendments for public comment (reader friendly version). Thus, our numbered paragraph 1 will be our comment on proposed amendment (or issue for comment) number 1 and so forth.

Issue for Comment #1--Offenses Involving Drugs (Crack Cocaine)

We strongly endorsed the action which the Commission took last year in what was labelled Amendment #5 for 1995. We reaffirm our support for those changes. In its legislation of October 30, 1995, which rejected Amendment #5, the Congress has requested that the new proposed ratio be higher for crack than powder so our and your preferred one-to-one ratios would be inappropriate.

Given this fact, we recommend a five-to-one ratio. We select five to one because it would make the crack cocaine ratio to powder cocaine the same as the ratio for Heroin, PCP, Methamphetamine, and their equivalents, which are clearly among the most dangerous, addictive and destructive drugs, to powder cocaine. Also, a five-to-one ratio preserves the inner harmony of the ratios associated with the drug table which increases penalties systematically as societal harms increase. A five-to-one ratio would recognize that the harms associated with crack are significant, but would lessen somewhat the impact of the current racial inequities of crack sentencing which result because crack use is more popular among minorities.

Obviously, a five-to-one ratio with a ceiling of Level 38 for quantity would, along with §3B1.2, result in longer sentences for wholesale distributors rather than for retailers, so that a five to one recommendation would satisfy the concerns articulated by Congress in Subsection (B) of the legislation which rejected one to one.

That legislation's Subsection (C)'s concern about powder cocaine trafficking defendants who knowingly sell to individuals who will convert to crack are currently adequately met by the Pinkerton doctrine embodied in U.S.S.G. §1B1.3(1)B. Likewise, Subsection (D)'s litany of harms are all addressed by specific offense characteristics or enhancements which already exist or which were part of last year's proposed Amendment 5. We believe that those proposals for violence and weapons should be resubmitted, along with the five-to-one ratio.

We further believe that harms not accounted for by any other

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guideline section or by last year's proposed #5, such as neighborhood deterioration, child neglect by parental users, and the spread of sexually transmitted diseases by users who engage in increased sexual activity are adequately addressed by the illegality of the substance in the first instance, and most definitely by a five-to-one ratio. We note that these harms are extremely difficult to quantify and their existence is largely anecdotal, especially insofar as they supposedly occur with any greater frequency among crack rather than powder users. Also, these behaviors occur more frequently in the lower socio-economic strata so that attributing them to drug use is highly speculative.

We believe that a five-to-one ratio is the right choice for this difficult decision. We also recognize that politics largely influenced the Congress in its rejection of last year's proposal. We believe it would help this Congress for the Commission's action to be approved unanimously. When the Warren Court began to integrate America, they did so by unanimous decision so as to send a clear message. Full support by the Commission for a five-to-one ratio would likewise send a clear message to Congress. We ask that all Commissioners support five to one. Not only is this the right thing to do, but it will aid the Congress in doing the right thing.

Proposed Amendment #2--Money Laundering

Proposed Amendment Numbers 2(A) and 2(B) - Money Laundering

The PAG strongly supports the Commission's proposed amendments to §§ 2S1.1-2S1.2, pertaining to money laundering offenses. Unlike the Department of Justice's proposal, which we oppose, the Commission's suggested amendment would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds. While the Commission's proposal constitutes a much needed reform, we believe that the underlying objective of the amendment, achieving "real offense" sentencing, could best be achieved by incorporating certain modifications which are set forth below.

Initially, the need for some amendment to the existing money laundering guidelines is substantial. The money laundering statutes, 18 U.S.C. §§ 1956 and 1957, are quite expansive. Indeed, the Department of Justice in its policy statement, dated October 1, 1992, recognized that the statutes are "extraordinarily broad," and that they "apply to the movement of funds derived from most serious federal crimes and a larger number of state crimes, as well." In our experience, the statutes have been applied in relatively minor fraud and other cases in which the defendant merely deposited the proceeds of illegal activity into his or her bank account. See, e.g., United States v. Montoya, 945 F.2d 1068, 1076 (9th Cir. 1991) (affirming conviction under 18 U.S.C. § 1956 where state official deposited into his personal checking account a \$3000 check representing a bribe). We note that defense attorneys from around

the country have informed the PAG that certain prosecutors are using the statute to prosecute state misdemeanor offenses (e.g., prostitution, gambling) as federal money laundering and, as such, exposing defendants to significant prison sentences for crimes which would have otherwise resulted in the defendants receiving probation.

Furthermore, as noted by the Money Laundering Working Group, the money laundering statute, 18 U.S.C. § 1956, has been used by prosecutors to "up the ante" in selected cases despite the fact that the charged financial transaction offenses do not differ substantially from the underlying unlawful activity. Money Laundering Working Group, "Explanation of Draft Amendments to §§ 2S1.1 through 1.4" at 1 (November 10, 1992) (footnote omitted). Also, as the Money Laundering Working Group recognized, the existing guideline's high base offense level assumed that large scale, sophisticated money laundering would be the norm. The experience of the PAG is that money laundering counts are often added to other cases to increase prosecutorial leverage and obtain harsher sentences. Accordingly, from the perspective of the PAG, the most important aspect of the proposed amendments is that they significantly reduce the potential for actual or threatened sentence manipulation through charging practices.

Unfortunately, based on the Department of Justice's proposal, it would appear that the Department is intent on maintaining its ability to control sentencing exposure through the charging decision. The Department's proposal to increase the base offense levels in § 2S1.1(a)(2) and (3) by four levels would perpetuate a system in which defendants facing a money laundering charge would be exposed to a greater sentence despite the fact that they did little, if anything, more than commit the underlying offense. We urge the Commission to reject the Department's position because, as the Working Group noted, where "the defendant committed the underlying offense, and the conduct comprising the underlying offense is essentially the same as that comprising the money laundering offense[,] the sentence for the money laundering conduct should be the same as for the underlying offense." Id.

Moreover, the Department's doomsday predictions regarding sophisticated money launderers receiving too light a sentence under the Commission's proposal are unfounded. Initially, we are not aware of any examples provided by the Department which support its claim that penalties under the proposed amendment would be too lenient. In fact, the Commission's own prison impact estimate reveals that passage of the Commission's proposal would actually result in a small net increase in the prison population.

Under the Commission's proposal, for example, there would be little, if any, change in the punishment applicable to those cases involving funds which "were the proceeds of, or were used to promote, an offense involving the manufacture, importation, or distribution of controlled substances...; a crime of violence, or an offense involving firearms or explosives, national security or international terrorism." U.S.S.G. § 2S1.1(a)(2) (as proposed). In addition, the amendment provides for enhancements of up to four

additional points whenever there are actual efforts to conceal or disguise criminal proceeds and where there is "sophisticated money laundering." U.S.S.G. § 2S1.1(b) (1-2) (as proposed). Finally, when a convicted defendant has committed the underlying offense, and the underlying offense carries a heavier penalty than the money laundering offense, the more substantial penalties for the underlying offense will "trump" the money laundering guidelines; indeed, in such situations, the enhancements for sophisticated money laundering would be added to the already substantial offense levels for the underlying offense.

Indeed, the PAG continues to believe that the Commission proposal (while far superior to both the current guideline and the DOJ proposal) does not go far enough in "tying offense levels more closely to the underlying conduct." Accordingly, we recommend that the Commission make the following modifications to its proposal:

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 just 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, we suggest deleting from the instruction in § 2S1.1(a) "(Apply the greatest)" and suggest inserting the term "otherwise" after subparagraph (2).

Without this modification, the proposed guideline, at least in certain situations, would perpetuate the inequitable system of having the sentence based on the charging decision rather than by the defendant's actual conduct. For example, in a situation where the defendant through illegal gambling obtains \$150,000 in proceeds and deposits those proceeds in the bank, the defendant (assuming he was not running a gambling business) would be subject to a base offense level of 6, if charged under the federal gambling statutes. See U.S.S.G. § 2E3.1(a) (2). However, if that same defendant were charged with money laundering, his or her guideline level under the proposed amendment would be 15. See § 2S1.1(a) (3) (base offense level of 8 plus 7 levels based on § 2F1.1). Because the proposed amendment instructs the sentencing judge to "apply the greatest" guideline level, the defendant would receive a nine point enhancement based entirely on the charging decision.¹

Second, the proposed amendment would eliminate reliance on the table found in § 2S1.1(b) (2) and substitute reliance on the fraud table found in § 2F1.1, despite the substantial difference between loss in a fraud case and the value of funds involved in a money laundering transaction. While we understand the Commission's desire to use the fraud table in order to promote uniformity and consistency in economic crime cases, the attempt to equate the value of funds in a money laundering transaction and the loss

¹ The situation would be far worse under the Department's proposal: the defendant would receive a 13 point enhancement based solely on the charging decision.

involved from fraud, is without any basis in logic. Fraud offenses almost invariably involve loss to a victim; and it is this loss which is the driving force behind the table. See § 2F1.1(b). Money laundering offenses involve financial transactions which do not involve loss to a discrete victim; and, at least under the current Guidelines, it is the value of the funds involved in the transaction which is the driving force behind the table. See § 2S1.1(b)(2).

In addition to the difference in the "victim," the two offenses are completely different in terms of the amount of funds generally involved. While money laundering typically involves relatively large sums of money, fraud comes in all shapes and sizes: using a counterfeit telephone credit card to make long distance telephone calls or a scheme to fraudulently collect on a \$5 million dollar insurance policy. See, e.g., United States v. Smith, 13 F.3d 1421, 1428 (10th Cir. 1994) (Noting that money laundering counts should not be grouped for sentencing with wire fraud counts "because there are different victims and separate and distinct losses.")

This difference in the amount of funds involved in each crime and in the nature of the "victim" of each crime makes any reliance on the fraud table ill-advised, and the PAG recommends that the Commission not eliminate the table currently found in § 2S1.1(b)(2), but rather use this table rather than the fraud table as the basis for the adjustments called for in the amendment, §§ 2S1.1(a)(2-3), 2S1.2(1)(1-2). This table should be used in connection with the amendment's proposed lower base offense level in light of the Money Laundering Working Group's recognition that low dollar amount, unsophisticated cases are prosecuted under this statute. In the event that the Commission believes that the existing table is inadequate, a revised money laundering table should be employed.

Third, if the Commission nevertheless determines to incorporate the fraud table into the money laundering guidelines, then the amendment should be revised so that the base offense level in § 2S1.1(a)(3) is the same as the base offense level for fraud and deceit § 2F1.1. The PAG strongly disagrees with the suggestion set forth in last year's Synopsis of Proposed Amendment that the additional two points are required because money laundering typically involves more than minimal planning. As previously noted, our experience is that most money laundering cases involve little more than the deposit of allegedly criminally derived proceeds into a bank account. Indeed, where there is actual money laundering, and not just a bank deposit, the proposed amendment includes a two point adjustment. See § 2S1.1(b)(1). If the base offense level in § 2S1.1(a)(3) is not changed to 6, then the guideline will continue to produce inequitable and irrational sentences. For example, where a defendant commits a \$1,600.00 mail fraud and deposits the proceeds in a savings account, the defendant could be charged with mail fraud and/or money laundering. As a mail fraud case, the defendant's base offense level is 6; but, as a money laundering case under the currently proposed amendment, the

base offense level is 8.²

Fourth, the proposed guideline amendments fail to recognize the unique nature of the money laundering sting provisions of 18 U.S.C. § 1956(a)(3). Under that section the crime is completed if a defendant with the intent (1) to promote specified unlawful activity; (2) to conceal or disguise property believed to be the proceeds of specified unlawful activity; or (3) to avoid a CTR requirement, engages in a financial transaction with property represented by a law enforcement official to be the proceeds of specified unlawful activity. This section has been used in an ever increasing number of undercover sting operations in which federal agents attempt to engage in money laundering activities and represent that their money comes from unlawful sources. This obviously provides continued opportunities for sentence manipulation given that the government controls the "value of funds" involved in the transaction and exacerbates the problem of using the elevated offense levels which would be dictated by the fraud table. The Ninth Circuit has held, in the context of a drug case, that sentencing manipulation/entrapment provided the basis for a downward departure, see United States v. Stauffer, 38 F.3d 1103 (9th Cir. 1994); however, there is little uniformity among the courts on this subject.

In order to prevent such guideline manipulation in sting cases and to promote uniformity in this area of the law, we suggest that the Commission include the following statement as Application Note 6.

If a defendant is convicted in an undercover sting, pursuant to 18 U.S.C. § 1956(a)(3), and the Court finds that the government agent influenced the "value of funds" involved in the transaction in order to increase the defendant's guideline level, a downward departure may be warranted.

Proposed Amendment 3--Food and Drug Offenses

The PAG supports proposed amendments 3.(A) and (B). As to the Issue for Comment under 3.(C) we do not support any change to the Guidelines under § 2F1.1 so as to allow "gain" to be a substitute for "loss" when the essence of the offense is fraud against regulatory authorities with no economic loss. We believe United States v. Chatterji, 46 F.3d 1336 (4th Cir. 1995) and United States v. Andersen, 45 F.3d 217 (7th Cir. 1995) were correctly decided.

We note that Chatterji has been held in its own Circuit not to apply to welfare fraud offenses where "gain" to the defendant can be used to calculate "loss" under §2F1.1. See, United States v.

² Under the Department's proposal, the base offense level is 12.

Adam, 70 F.3d 776 (4th Cir. 1995). In short, both Chatterji and Andersen are fact specific holdings.

No amendment in this area is needed and the Commission should simply leave the matter to the Courts for resolution on a case by case basis.

[END OF COMMENTS]

On behalf of the Practitioners' Advisory Group, we thank you for allowing us to comment on the Proposed Amendments and Issues for Comment and we look forward to working with the Commission during this amendment cycle.

Sincerely,

A handwritten signature in black ink that reads "Fred Warren Bennett". The signature is stylized with a large, sweeping "F" and a long, horizontal stroke at the end.

Fred Warren Bennett
Chairman
Practitioners' Advisory Group