

COMMENTS ON PROPOSED 1997 GUIDELINE AMENDMENTS

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Proposed amendment number 7. I object to the narrowing of a judge's discretion to use a different guideline than the one set forth in the statutory index. I believe that there are occasionally "atypical" cases where another guideline section is more appropriate.

To my knowledge there has been no abuse of this authority to use other guidelines in atypical cases and I wonder why the Sentencing Commission has chosen this time to make this particular change.

Proposed amendment number 8. I support incorporating the holding in *U.S. v Hill* into the application note.

Proposed amendment number 9. I believe that Option 1a is the fairest way to handle acquitting conduct. However, I would incorporate that part of Option 2 which requires that the conduct be established by clear and convincing evidence.

Proposed amendment number 11. It is bad enough that the Commission must designate an amendment for retroactive application. Now the Commission would suggest that any reduction only be in the term of imprisonment. In fact, if a defendant has already served a lengthier term of imprisonment than the retroactive guideline would require, then a reduction in some other aspect of the sentence might be the only way that the defendant could be treated in a fair and consistent manner with others so situated.

Proposed amendment number 16. I have no objection to this amendment.

Proposed amendment number 18a. The major changes seems to be in replacing the more than minimal planning increase with an increase for use of sophisticated means. If more than a minimal planning is arguably unclear or ambiguous, why does the Commission feel that an enhancement based on "sophisticated means" will be any less so?

I object to all changes in the loss tables and find that the justification that it will reduce probation officer and judicial workload to be nonsense. Most cases are pled and the Commission should encourage plea agreements to stipulation the amount of the loss. Also, I think arriving at a just sentence is more important than reducing probation officer and judicial work.

I do, however, agree that there is no reason why there are different base offense levels for 2B1.1 and 2F1.1 and, with proper study, the two guidelines could probably be consolidated.

As for the definition of loss, it needs a lot of work and certainly is an area that generates the most controversy in white collar cases. The use of "intended" loss is widely misinterpreted as is the use of "gain".

Proposed amendment number 21. Of the three options, I prefer option three. However, I think that the number of participants should be considerably more than 4 and I think the "otherwise extensive" language ought to be deleted. Offenses which are otherwise extensive usually involve money or drugs and the extensiveness is addressed by the increase related to quantity. In the rare situations where that is not the case, and upward departure might be warranted.

I also think that organizing one other participant should not result in a 2 level increase. Come on, not many offenses involve only a sole offender!

Proposed amendment number 23. I oppose the proposed amendment. I suggest a amendment that says that the Court has to find beyond a reasonable doubt that perjury was committed.

Proposed amendment number 24. I support this amendment. I would combine it with proposed amendment number 26.

Issues for comment: I support a statement in § 1B1.8 that information provided not be included in the pre sentence report. I would also like § 1B1.8 to immunize information given by the defendant at the time of arrest, if he later enters into a cooperation agreement.

I also believe that multiple criminal incidents occurring over a period of time may constitute a single act of aberrant behavior warranting a departure in that the collateral consequences of a defendant's conviction can be the basis for a downward departure.

Proposed amendment number 33. I oppose this amendment. I know of no study as to why these factors are not relevant considerations for downward departure.

Proposed amendment number 34. Why not include the rest of the departure language from the introduction in § 5K2.0? I specifically refer to that portion of § 4(a) of chapter 1 part A dealing with manipulation of the indictment.

Proposed amendment number 35. I oppose this amendment.