



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

ASSISTANT COMMISSIONER
(CRIMINAL INVESTIGATION)

MAR 21 1997

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002-8002

Dear Mr. Courlander:

Enclosed is an 8-page document prepared by Office of Chief Counsel, Criminal Tax Division. It contains technical explanations and legal citations which support our position on the proposed 1997 amendments to the Federal Sentencing Guidelines.

Simply summarized, the enclosed document expresses our long-standing position that criminal tax offenders should be sentenced to longer periods of incarceration at lower tax loss thresholds. We believe that the existing guidelines do not always provide adequate punishment for white collar crimes in general, and tax crimes in particular.

The document also expresses our position that the loss tables for tax offenses should be set at identical amounts as those for theft and fraud. By the same token, we oppose any amendment which would measure the offense level based on the amount of potential benefit to the perpetrator rather than on the potential harm to the victim(s).

Thank you for the opportunity to comment on these matters. If you need further information, please contact Ed Delehanty, Office of Tax Crimes (CP:CI:O:T) at 202-622-5755.

Sincerely,

Ted F. Brown

Enclosure

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MEMORANDUM FOR TED F. BROWN, ASSISTANT COMMISSIONER
(CRIMINAL INVESTIGATION) CP:CI

FROM: Office of Chief Counsel
Criminal Tax Division

SUBJECT: Public Comment on Proposed 1997 Amendments

This document expresses the Internal Revenue Service's views on the proposed 1997 non-emergency amendments to the sentencing guidelines. As an overview, we wish to point out our perspective when examining sentencing issues relating to federal criminal tax statutes.

The Service has increased efforts to help taxpayers comply rather than relying solely on after the fact enforcement. However, we recognize that, despite our most aggressive efforts, some segments of the population refuse to voluntarily comply. To this end, tough but fair sentencing rules permit courts to send the message, tax offenses are serious, and intentional violators will be punished seriously.

With this view in mind, our comments are offered in regard to the following proposed amendments:

Proposed Amendment 9 - Relevant Conduct (§1B1.3)

Proposed Amendment 9 addresses the issue of whether acquitted conduct may be considered for sentencing purposes. Option 1(A) adds language providing that acquitted conduct shall be considered if established independently of evidence admitted at trial. Option 1(B) invites the use of acquitted conduct as a basis for an upward departure. Option 2 excludes conduct from consideration in determining the guideline range unless such conduct is established by the "clear and convincing" standard. Option 3 provides that acquitted conduct should be evaluated using the same standards as any other form of unconvicted conduct.

The Service supports the traditional view of sentencing, *i.e.*, acquitted conduct may be considered by a sentencing court because a verdict of acquittal demonstrates a lack of proof sufficient to meet "beyond a reasonable doubt" standard, a standard higher than that required for considering relevant conduct at sentencing. United States v. Averl, 922 F.2d 765, 766 (11th Cir. 1991). Cf. United States v. Karterman, 60 F.3d 576, 580 (9th Cir. 1995). Consequently, we oppose any amendment that places a limit on the use of acquitted conduct either by definition or standard of proof.

Proposed Amendment 18(A) - Fraud, Theft, and Tax Offenses

Proposed Amendment 18(A), as set forth in the Proposed Guideline Amendments for Public Comment - Part I and the Federal Register (Vol. 62, No. 1, 152-19), the Sentencing Commission, *inter alia*, proposed to make the following changes to §§ 2B1.1, 2F1.1 and 2T1.4: (1) eliminate the more than minimal planning enhancement in §2B1.1 and §2F1.1 and other guidelines, build a corresponding increase into the loss tables, and create a two level enhancement like the one in § 2T1.4¹ for offenses involving "sophisticated means" and provide a level floor of 12 in such cases; (2) increase the base offense level of §2B1.1 (theft guideline) and §2B1.3 (property damage guideline) from level four to level six, and revise the loss tables in §2B1.1, §2F1.1 and §2T4.1 (theft, fraud and tax offenses, respectively); (3) change the current one level increments in the aforementioned loss tables to two level increments or to a combination of one and two level increments; (4) increase the severity of the three loss tables at higher loss amounts.

Subsequently, the Sentencing Commission prepared an "Unofficial Staff Alternative" combined loss table for §§ 2B1.1 and 2F1.1 which includes two options pertaining to "sophistication", and deletes more than minimal planning from both guidelines.

Considering the various loss table options and assuming that the proposed Unofficial Staff Alternative loss table will be modified so as to be applicable to the tax loss table, the latter is our preference. Our preference is based on the fact that, in most instances, tax losses result in higher offense levels in this table than in the existing tax loss table which is consistent with the Commission's intent of treating tax violations as serious crimes. We note that this proposed table incorporates two level increases as opposed to the one level increments in the present tax loss table but we do not find this objectionable. In fact, this table seems to provide a somewhat smoother progression through the loss amounts than the current table. Notwithstanding our endorsement of this proposed table if it is equally applicable to tax losses, if it is not, we oppose the Unofficial Staff Alternative on the ground that we strongly believe that identical loss amounts should be sentenced at least as severely under the tax loss table as losses are under the fraud and theft tables. Any change that would provide for higher sentences for identical amounts under the fraud and theft tables than under the tax table, would clearly send the wrong message as to the seriousness of criminal tax violations.

¹ The same two level enhancement for sophisticated means which the proposed amendment addresses and identifies as appearing in §2T1.4, also appears in §2T1.1 and is set forth in the subsequent text of Proposed Amendment 18(A).

If the Commission considers its original loss table options under proposed amendment 18(A)2 as opposed to the Unofficial Staff Alternative, we favor the proposed tax table for § 2T4.1 as set forth in Option One. We believe that the tax table as set forth in Option One will result in more significant periods of confinement for most of our cases, a result which is vital to our ability to maintain an acceptable level of voluntary compliance. Nevertheless, by way of reiteration, our primary preference between the proposed tables is the one set forth as the Unofficial Staff Alternative.

Proposed Amendment 18(A)1 provides for the elimination of more than minimal planning in the fraud and theft guidelines and replacing it with a two level enhancement, with a floor level of 12, for sophisticated means. This would also include a definitional amendment, concerning "sophistication," to Application Note (f) of §1B1.1. Likewise, §§ 2T1.1 and 2T1.3 which currently contain a two level enhancement for "sophisticated means" would be amended, to provide for a floor level of 12. We are in favor of this amendment.

The Unofficial Staff Alternative also contains two options for sophistication. Option One of the Unofficial Staff Alternative is virtually the same as the sophistication enhancement of proposed amendment 18(A)1, and it contains a provision for conforming §2T1.1(b)(2). We assume there will also be a conforming aspect for §2T1.4(b)(2) and, accordingly, we endorse Option One of the Unofficial Staff Alternative. However, we oppose Option Two of the Unofficial Staff Alternative because it seems to limit its scope of sophistication to the use of foreign bank accounts and transactions, thus making it an unnecessarily restrictive enhancement. Nevertheless, if it is determined that the fraud guideline is to be amended to include a specific offense characteristic with a floor level of 16 for the use of foreign bank accounts or transactions to conceal, we believe that a similar change should be made to the tax guideline.

Another area concerning sophisticated means which we would like the Commission to address is the inclusion of clarifying language that the sophisticated means enhancement is offense specific rather than offender specific. In other words, the enhancement should be applied based on the nature of the scheme and not on the defendant's role in the scheme. This clarification would resolve a circuit conflict between the Second Circuit and the Sixth Circuit. The Second Circuit has held that a sophisticated means enhancement is to be applied regardless of whether the defendant devised the sophisticated means involved in the scheme. United States v. Lewis, 93 F.3d 1075 (2d Cir. 1996); United States v. Richman, 93 F.3d 1085 (2d Cir. 1996). By contrast, the Sixth Circuit has refused to apply the enhancement where the individual defendant's role in an admittedly complex scheme was nominal. United States v. Kraig, 99 F.3d 1361 (6th Cir. 1996). From our perspective, if a defendant takes advantage of a scheme involving the use of sophisticated means to conceal the nature or existence of an offense, the enhancement should be applied even if the defendant had no role in devising the sophisticated means. Typically, a defendant's

role in the offense is addressed by other guidelines. U.S.S.G. §§3B1.1 and 3B1.2.

Proposed Amendment 18(C)(8) - Issue for Comment

This issue for comment is, in essence, how to deal with an intended loss pursuant to §2F1.1. 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.

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.

Proposed Amendment 18(C)(10) - Issue for Comment

This issue for comment is, in essence, whether it is necessary to provide guidance for applying the current provision allowing departure where the loss amount over- or understates the significance of the offense within the meaning of Application Note 10 to §2F1.1. We believe that Application Note 10 is, in its present form, adequate to address the issue without encumbering the courts with restrictive definitions and special rules. However, we are concerned about the situation where the loss amount included pursuant to §1B1.3 (Relevant Conduct) is far in excess of the benefit personally derived by the defendant and the court might depart down to an offense level corresponding to the loss amount that the court determines to more appropriately measure the defendant's culpability. We believe that the potential harm or loss to the victim should be the measure of the seriousness of the offense rather than the actual benefit to the criminal. For instance, a defendant who prepares 100 fraudulent tax returns for \$100 each, may only realize a personal benefit in the amount of \$10,000 while causing hundreds of thousands of dollars of loss to the government.

Consequently, we oppose any language which advocates a downward departure based on the personal benefit derived by a defendant when it is less than the harm caused to the victim.

Proposed Amendments 24, 25 and 26 - Acceptance of Responsibility

Proposed Amendment 24 is purportedly designed to provide greater flexibility to the sentencing judge in determining whether a defendant qualifies for a reduction in sentence, particularly the additional one level reduction in subsection (b). Proposed Amendment 26 is designed to allow consideration of the additional one level reduction for defendants at all offense levels. We oppose both of these proposed amendments. In regard to Proposed Amendment 24, there is no evidence that the proposed changes are needed. Furthermore, the removal of the presently listed factors from §3E1.1(a) will make it more difficult for probation officers to make informed recommendations to trial courts concerning the appropriateness of this reduction.

We are even more opposed to Proposed Amendment 24 which, in essence, dramatically raises the acceptance of responsibility reduction in all cases from two levels to three levels. We note that the factors that would engage the additional one level reduction are of the type which would ordinarily be applicable to the basic two level reduction in its current form. More significantly, if the three level acceptance of responsibility is applied to all offense levels, the potential exists whereby a defendant's sentence can be reduced as many as two sentencing zones. For instance, if a defendant is sentenced at a Zone C offense level of 11 where he/she would serve at least four months, a three level acceptance of responsibility reduction would result in the defendant being sentenced at a Zone A offense level of 8 and possibly receiving no sentence of imprisonment. Once again, this sends the wrong message in regard to all serious crimes and, specifically, to tax crimes where the sentences often fall within the sentencing zones set forth in the foregoing example.

Proposed Amendment 25 resolves a conflict in the circuits by providing an addition to Application Note 4 that commission of an offense while awaiting trial or sentencing, whether or not the new offense is similar to the instant offense, ordinarily indicates that a defendant has not accepted responsibility for the instant offense. We support this amendment which will resolve the conflict consistent with the holding in United States v. Watkins, 911 F.2d 983 (5th Cir. 1990).

Proposed Amendment 28(6) - Issue for Comment

The issue for comment is whether and how to address the circuit conflict of whether "victim of the offense" under §3A1.1 refers only to the victim of the offense of the conviction or to the victim of any relevant conduct. If this issue is to be addressed, we favor the view of the Second Circuit in United States v. Echevarria, 33 F.3d 175 (2d Cir. 1994) which held that a vulnerable victim need not be the victim of the offense of

conviction, as opposed to the limiting view toward relevant conduct taken by the Sixth Circuit in United States v. Wright, 12 F.3d 70 (6th Cir. 1994).

We believe that Wright clearly demonstrates a situation where a victim can be a victim of an offense without being a direct victim of the offense of conviction. In this case, the defendant used the economic vulnerability of several people to induce them to participate in his scheme to defraud the government through the filing of false tax refund claims. In Echevarria, the defendant held himself out as a physician to defraud health insurance providers. The patients were victims of the offense because they believed they were receiving effective medical attention; however, they were not victims of the offense of conviction. In both of these cases, the defendant "used" individuals for their particular criminal scheme based on those peoples' vulnerability and, as such, we believe that this conduct deserves to be dealt with severely through the use of a two level enhancement. One way to resolve this conflict is making it clear in the guideline commentary that the enhancement is meant to encompass such conduct.

Proposed Amendment 28(14) - Issue for Comment

This issue for comment concerns the circuit conflict of whether the collateral consequences of a defendant's conviction can be the basis of a downward departure. We believe that granting a downward departure on the basis of collateral consequences undermines the Congress' goal of achieving uniformity in sentencing. Prosecution of white collar crimes often involve professionals and business persons who, as a result of their convictions and/or sentences, encounter loss of licenses and closure of businesses. To allow these defendants to take advantage of this additional potential windfall which is unavailable to nonprofessional and employee defendants, promotes the unequal treatment of the defendants that the guidelines sought to eliminate.

In addition to the cases cited in Proposed Amendment 28(14), a recent tax case, United States v. Olbres, 99 F.3d 28 (1st Cir. 1996), involved a husband and wife defendants who appealed the denial of a downward departure based on the fact that their business would fail and their 12 employees would lose their jobs if the defendants were imprisoned. The District Court denied the departure because it did not believe that business failure and third party job loss could legally serve as the basis for a downward departure. The first Circuit applying Koon v. United States, 116 S.Ct. 2035 (1996) remanded the case and noted that only a "rare case" falls outside the heartland that "the mere fact that innocent others will themselves be disadvantaged by the defendants' imprisonment is not alone enough to take a case out of the heartland."

Consequently, we believe that collateral consequences should not be the basis for a downward departure.

Proposed Amendments 37(S) and (T) - Consolidation of §§2T1.1 and 2T1.6:

Consolidation of §§2E4.1, 2T2.1 and 2T2.2

Proposed Amendment 37(S) consolidates §§2T1.1 and 2T1.6. Section 2T1.6 applies to 26 U.S.C. § 7202 (Failing to Collect or Truthfully Account for and Pay Over Tax). The consolidation of these guidelines is logical and, therefore, we have no objection to this proposed amendment.

Proposed Amendment 37(T) consolidates §2E4.1 (contraband cigarettes) with §2T2.1 (nonpayment of alcohol and tobacco taxes) and with §2T2.2 (regulatory offenses). All of these are infrequently applied guidelines and we have no objection to this proposed amendment.

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