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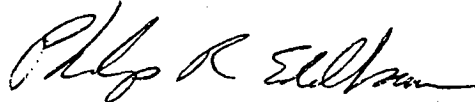
March 13, 1997

United States Sentencing Commission
1 Columbus Circle NE
Suite 2-500
Washington, DC 20002-8002
Attention Public Information

Dear Sirs:

On behalf of the Association of the Bar of the City of New York, I enclose the comments of the Committee on Criminal Advocacy, on the Proposed Amendments to the United States Sentencing Guidelines. If there are any questions feel free to contact me. Thank you.

Very truly yours,



Philip R. Edelbaum

Enc.

**REPORT OF THE CRIMINAL ADVOCACY COMMITTEE
OF THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK CONCERNING
PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES**

INTRODUCTION

The Committee on Criminal Advocacy (the "Committee") has reviewed the proposed changes to the Sentencing Guidelines which are being considered by the Sentencing Commission. This report describes the proposed changes to the Sentencing Guidelines on which the Committee reached consensus.

**THE PROPOSED CHANGES TO THE GUIDELINES
AND THE CONSENSUS REACHED**

1. The Issue of Including or Excluding Acquitted Conduct From The Calculation of "Relevant Conduct" Under Sentencing Guidelines Section 1B1.3.

The proposed changes to Section 1B1.3 of the Sentencing Guidelines ("Relevant Conduct") include three proposals which would affect the inclusion of acquitted conduct in the calculation of "relevant conduct" for sentencing purposes. As the law now stands, see United States v. Watts, 117 S.Ct. 633 (1997), acquitted conduct is included in the calculation of relevant conduct. The Sentencing Commission solicits comment on three new "options" for dealing with this issue. Under the first option, acquitted conduct would not be considered relevant conduct. A "sub-option" proposed by the Commission would exclude acquitted conduct, unless proven by independent evidence not submitted at trial. Under the second option, acquitted conduct would not be considered relevant conduct unless "established by clear and convincing evidence." (This option does not appear to require explicitly that the evidence be independent of the evidence submitted at trial). Under the third option, acquitted conduct would be considered relevant conduct, but the District Judge would be permitted to depart downward to a degree equal to the amount of relevant conduct associated with the acquitted conduct, to ensure "fundamental fairness."

The Committee believes the Sentencing Commission's Option 2 should be endorsed, with the proviso that the "clear and convincing" evidence establishing the conduct be evidence other than the evidence presented by the Government at trial. The presently drafted version of Option 2 appears to the Committee's members to permit the Court to include acquitted conduct in virtually any case in which an acquittal occurs.

**2. The Proposed Amendment to Sentencing Guidelines
Section 2X1.1 (Conspiracies and Attempts).**

The Commission invites comment on its proposal to eliminate this section from the Guidelines, which allows for a downward adjustment of three levels in limited circumstances relating to conspiracies that are interrupted by an arrest prior to nearing the

completion of the object of the conspiracy. The Commission expresses the view that this situation may be better addressed by a downward departure, given the relatively rare circumstances in which this adjustment has been granted.

The Committee's consensus view is that this section should be left in place, and that replacing this section with a departure will add to confusion in this area.

3. The Proposal to Amend the "Financial Institution"
Adjustment to the Larceny Guideline, Sentencing Guidelines Section 2B1.1(b)(6).

As presently drafted, the Larceny Guideline requires an upward adjustment of four levels if a defendant steals more than \$1,000,000 from a financial institution, and a minimum base offense level of 24 in such circumstances. The Commission proposes to delete the four level upward adjustment, but keep in place the floor of a base offense level of 24. Thus, under the proposed change in Section 2B1.1 of the Guidelines, in the event a defendant steals more than \$1,000,000 from a financial institution, his or her base offense level will be no less than 24, but won't be adjusted upward another four levels simply because the defendant's victim was a financial institution.

The Committee agrees that the proposed change was a good one. A base offense level of 24 requires a sentencing range of at least 51-63 months absent a downward departure, and the Committee believes this sentencing level is adequate to deter and punish a defendant who steals \$1,000,000 from a financial institution.

4. The Proposal to Amend the Sentencing Table,
Sentencing Guidelines Section 5A1.1.

The Commission proposes to amend the Sentencing Table to reduce the number of automatic life sentences required by the Guidelines. As it presently works, the Sentencing Guidelines Sentencing Table often requires a life sentence for serious narcotics traffickers whose base offense levels are adjusted upward for a management role, firearms and other adjustments. The proposed amendment will generally limit automatic life sentences under the Guidelines to treason and homicides, and will cap a narcotics defendant's (or other defendant's) exposure at a range of 360 months to life. Thus, the District Court will still have the discretion to impose a life sentence if it sees fit, but will not be required to do so.

The Committee agrees that the proposed amendment to the Sentencing Table was a good one, and would like to recommend the amendment to the Commission.

5. The Proposed Amendments to the Fraud Guideline,
Sentencing Guidelines Section 2F1.1.

There are many proposed amendments to the Fraud Guideline, and the Committee's discussion of them was lively. The Committee agreed on the following issues raised by the Commission:

a. The Committee agrees with the Commission that repayments to victims in a Ponzi scheme or other scheme, which are made prior to the discovery of the scheme by law enforcement, should be used to reduce the calculation of "loss" under Section 2F1.1. If accepted, the amendment to the Sentencing Guidelines that would express this view would effectively overrule United States v. Mucciante, 21 F.3d 1228 (2d Cir.), cert. denied, 115 S.Ct. 361 (1994) and its progeny. The Committee believes that it is unfair to extend a defendant's prison term for monies he has already repaid.

b. The Commission raises the issue of whether, in certain fraud schemes, the "retail market," "wholesale market" or "black market" prices of goods, and consequential damages and costs should be used in calculating loss in a fraud. The Committee was of the view that either the "retail" or "wholesale" market value of goods can be appropriate measures of loss in some cases, but the Committee was also of the view that the "black market" measure of loss would be impossible to prove and should not be incorporated in the Guidelines. The Committee was also of the view that consequential damages, costs and interest should not be included in the measure of "loss" under the fraud guideline. The Committee believes that a simple, "bright line" measure of loss is best, and will reduce the amount of litigation and confusion that exists in this area.

c. The Commission also raises the issue of whether "gain" to a wrongdoer should be used to calculate the base offense level in some frauds rather than "loss" to a victim. The Commission invites comment on whether a disparity between "gain" and "loss" should be a ground for an upward departure in cases where the gain to the wrongdoer exceeds loss to his victim. The Committee agreed that the Guidelines should permit "gain" to be used as a substitute measure to determine a defendant's base offense level, where there is a significant disparity between the wrongdoer's gain and a victim's loss or the intended loss. The Committee further proposes, that a gross disparity between "gain" and "loss" might also be a basis for a downward departure in some circumstances -- for example, where an employee of a business operated as a Ponzi scheme knows the full extent of the scheme, but gains only his salary from the fraud, and the amount of the loss caused by the scheme vastly exceeds the amount of salary obtained by the employee.

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Dated: New York, NY
March 13, 1997