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March 9, 1998

United States Sentencing Commission
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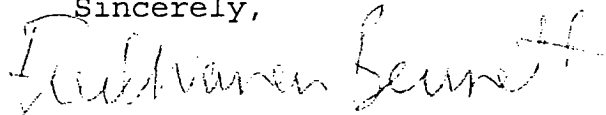
Attn: Public Comment

To Whom It May Concern:

As Chairman of the Practitioners' Advisory Group (PAG) I am enclosing here our comments on the Proposed Amendments and Issues for Comment for the 1998 amendment cycle.

Please file this letter as a matter of record and distribute copies to the Commissioners as soon as possible.

Sincerely,



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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-1998 Cycle

Dear Chairman Conaboy:

On behalf of the Practitioners' Advisory Group (hereinafter called "PAG"), I am writing to provide the views of our Group concerning the proposed amendments and issues for comment which are before the Commission on the 1998 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

[20]

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

* * *

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).

Proposed Amendments 1-6

Theft, Fraud and Tax loss Tables, Consolidation of Theft, Fraud Property Destruction and Fraud, Definition of Loss, Revision of Loss Tables and Telemarketing Fraud.

INTRODUCTION

The PAG opposes the adoption of either option for increasing the severity of the loss tables applicable in economic crime cases because there is no legitimate justification for increasing these sentences over present levels. The perceived disparity between the sentences imposed in drug cases and those imposed in "white-collar" cases simply reflects the excessively high sentences imposed in drug cases. Significantly, the Commission's own statistics reflect that the current sentencing ranges are more than adequate in economic crime cases. However, if the Commission is intent on adopting one of the two loss table options proposed, the PAG strongly prefers Option One since it better achieves the goal of only increasing offense severity levels for mid-to high-range offenders.

The PAG, however, welcomes the Commission's efforts to address the manner in which "loss" is calculated under the guidelines.¹ The PAG believes that the approach to "loss" should be driven by two guiding principles: first, that "loss" should not be thought of as an end in itself, but rather as a rough and approximate proxy for offense severity. The point behind the definition and

¹ On February 26, 1998, the PAG received a revised proposal regarding the definition of "loss" which appears to supersede the published proposals (#3 and #4). In light of our late receipt of these new proposals and the fact that we have been unable to meet as a group between February 26, 1998 and the date of this letter, this submission addresses the published proposals only. We will submit additional comments on the revised proposal as soon as possible after our next PAG meeting, and well before the Commission formally votes on the revised proposal.

calculation of loss should not be to seek mathematical certainty regarding the precise quantity of funds lost by the victim. Instead, the objective should be a far more limited one: to measure in approximate terms the relative severity of the offense conduct and culpability of the offender. Accordingly, the general approach should be to look only at the loss proximately caused by the defendant's criminal conduct, and then to make every effort to simplify the calculation of that loss in a rough and approximate way. Side issues which require detailed and complex fact finding, particularly where the impact on the total loss figure is small in most cases, should be relegated to departures in unusual cases.

The second guiding principle behind our views is that the use of "loss" as a surrogate for culpability must be coupled with encouraged departures where gain differs significantly from loss. Unlike theft cases, in which gain is likely to match loss, fraud cases often present scenarios in which the defendant's gain bears no relation to the loss. The PAG's experience is that the root cause of dissatisfaction with the actual sentences imposed in fraud cases stems from a significant variance between loss and gain or intended gain. This is a door which swings both ways. Where the loss is minimal or zero but the defendant obtains a significant gain from criminal activity, an upward departure should be encouraged. By the same token, where the loss is extremely large but the defendant's gain is minimal or zero, a downward departure should be encouraged. Unless these departures are encouraged by the guidelines, undue uniformity will result.

Proposed Amendment #1: The loss tables.

We oppose the effort to increase the severity of the loss tables in fraud, theft and tax cases, because there is no legitimate justification for increasing the sentences in economic crime cases over their current levels.

The current effort to increase the sentences in "white collar" cases arises, in large measure, from the perceived disparity between the sentences meted out to drug defendants and those imposed in fraud and theft cases. Indeed, the synopsis of proposed amendment notes that the "purpose of both options is to raise penalties for economic offenses . . . in order to achieve better proportionality with the guideline penalties for other offenses of comparable seriousness." However, by simply focusing on the "quick fix" of increasing the sentences in economic crime cases, the Commission risks compounding, rather than reducing, the irrationality of the current drug sentencing scheme.

The simple fact is that the sentences imposed in these drug cases, due largely to Congressionally-imposed, mandatory-minimum sentences, are excessive, and reflect political pressure rather than a rational sentencing strategy. As we know from our experience with the crack/powder amendment, it is quite difficult for the Commission to restore a measure of rationality in these drug cases. However, the Commission's inability to lower drug

sentences should not serve as a justification for increasing sentences in other types of cases in an effort to achieve proportionality among defendants convicted of different crimes. Such action would simply ensure that the irrationality underlying the sentences in drug cases is incorporated into the sentencing structure for other offenses.

In addition, the Commission's reliance on the sentencing practices in drug cases as a justification for increasing the sentences in economic crime cases is contrary to the congressional directive contained in the enabling statute. There, Congress only directed the Commission to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct. . . ." 18 U.S.C. § 991(b)(1)(B) (emphasis added).

It is also important to note that contrary to the "white collar" stereotype, most defendants in economic crime cases are not "fat cats" who have wrongfully obtained hundreds of thousands, or even millions, of dollars. Rather, the Commission's statistics reflect that most fraud and theft cases (at least those affected by the proposed loss table amendments) involve low loss amounts. For example, according to the Commission's figures, more than one-quarter of theft cases involve loss amounts of less than \$2000, and more than half of theft cases involve loss amounts of less than \$10,000. More than one-quarter of fraud cases involve loss amounts of less than \$10,000, and more than half of fraud cases involve loss amounts of less than \$40,000. Less than 1% of theft cases involve loss amounts of more than \$1,500,000, and only about 10% of theft cases involve loss amounts of greater than \$120,000. Only about 6% of fraud cases involve loss amounts of greater than \$1,500,000.² Consistent with this data, the amendment impact summary reveals that the current average sentence in theft cases is approximately six to seven months, while the average sentence in fraud cases is approximately twelve months. The majority of fraud, theft and tax defendants, taken as a whole, fall within Zones A-C, with only a little more than one-third who fall in Zone D.³ Thus, it is not the high end offenders who are most heavily impacted by any changes to the current loss tables.

Interestingly, the empirical evidence fails to support the proposition that the current guidelines are insufficiently onerous even for those individuals convicted of economic crimes involving substantial losses. Although the Criminal Law Committee of the Judicial Conference is a strong proponent for increasing the

² U.S. Sentencing Commission, Pecuniary Loss Amounts For Defendants (table).

³ U.S. Sentencing Commission, Impact on Defendant's Sentence Zone Resulting From Proposed Changes to Theft, Fraud, and Tax Guidelines, Table 3 (Option Two).

sentences in fraud and theft cases,⁴ judges do not currently sentence these "fat cat" defendants at the top of the applicable guideline range. The Sentencing Commission's data reveals that in theft, fraud and tax cases, where the loss exceeds \$1.5 million, approximately 25% of defendants receive sentences in the first quarter of the guideline range and less than 15% receive sentences in the fourth quarter of the range. Interestingly, in fraud cases, the percentage of defendants who are sentenced at the top of the applicable guideline range does not change significantly even at the high loss levels. For example, in cases involving losses up to \$1,500,000, only about 11% of defendants were sentenced in the top quarter of the applicable guideline range. In cases involving losses over \$1,500,000, only about 15% of defendants were sentenced in the top quarter of the range. In theft cases involving losses of greater than \$1,500,000, defendants were somewhat more likely to be sentenced at the top of the guideline range, with 19% receiving sentences in the top quarter of the range. Yet, a significantly higher percentage of such defendants, approximately 27%, received sentences in the bottom quarter of the range.⁵

These statistics clearly dispel the proposition that sentencing judges find the current levels of punishment for theft and fraud defendants insufficiently punitive, even for mid-to high-range offenders. During 1995, in theft, fraud and tax offenses involving losses of greater than \$1,500,000, a significantly greater percentage of defendants were sentenced at the bottom of the applicable guideline range than at the top of range. Also, although both the theft and fraud guidelines invite an upward departure where the loss does not fully capture the harmfulness of the defendant's conduct, see § 2B1.1, comment. (n.15), § 2F1.1, comment. (n.10), there were no such upward departures in either theft or tax cases, and all upward departures in fraud cases totaled only about 2%. On the other hand, 12% of these high-end theft, fraud and tax cases involved downward departures (other than for substantial assistance).⁶ When judges are confronted with a real, not theoretical, individual, and they assess the individual's conduct and background and other relevant sentencing factors, they apparently find, in most cases, that the current guidelines are

⁴ See, e.g., Statement of United States District Judge J. Phil Gilbert, Representative of the Committee on Criminal Law to the United States Sentencing Commission, October 15, 1997, submitted as Written Testimony for the October 15, 1997 Public Hearing on the Definition of Loss (referring to the goal of revising the loss tables to increase punishment "for more serious offenses" and to eliminate the adjustment for more than minimal planning).

⁵ U.S. Sentencing Commission, Distribution of Sentences Across Applicable Sentencing Range (table).

⁶ See id.

sufficiently punitive.

One reason why these statistics may fail to reflect the proposition that the current loss tables are insufficiently punitive is -- as members of the PAG have experienced -- many defendants who are considered by prosecutors to be serious white collar criminals are charged with money laundering under either 18 U.S.C. § 1956 or § 1957. The guideline range for such defendants, under § 2S1.1, is much higher, starting with a base offense level of 20. In light of the broad definition accorded to the money laundering statutes, virtually every fraud offense can be prosecuted as a money laundering case under either 18 U.S.C. § 1956 or § 1957.⁷ Recognizing the disparate impact among defendants who commit similar crimes but are prosecuted under the money laundering statutes instead of the statute directly covering the specified unlawful activity, the Commission amended the money laundering guidelines in 1995 in order to tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds. Unfortunately, the money laundering amendment's fate became intertwined with the Commission's crack/powder amendment, which went to Congress at the same time, and Congress rejected both amendments.⁸

Contrary to popular perception, our admittedly-anecdotal experience is that many of the defendants engaging in large scale fraud are presently being prosecuted under the money laundering statutes, sentenced under § 2S1.1, and receiving ample sentences.⁹ This phenomenon helps explain why defendants sentenced under §§ 2F1.1 and 2B1.1, even at the highest levels, might not be receiving sentences at the top of the range. It also highlights the problem with the "quick fix" approach reflected in the current proposals. Finally, the availability of money laundering charges for the major white collar criminals renders any deficiencies in the theft and

⁷ See, e.g., United States v. Paramo, 998 F.2d 1212 (3d Cir. 1993) (cashing and spending fraudulently obtained IRS refund checks constituted violation of § 1956(a)(1)(A) because it "promoted" the underlying embezzlement).

⁸ See U.S. Sentencing Commission, Report to the Congress: Sentencing Policy for Money Laundering Offenses, including Comments on Department of Justice Report 9-10 (September 18, 1997).

⁹ As the Commission noted in its Report to Congress, due to the Department of Justice's failure to disclose data regarding either the disposition of cases brought under § 1956, or prosecutions brought under § 1957, it is difficult to document the extent to which these charges have been used by prosecutor's to "up the sentencing ante" in economic crime cases. See id. at 14-15.

fraud guidelines for high-end offenders somewhat academic.¹⁰

The current debate over the loss tables also ignores the fact that when the guidelines were originally promulgated they reflected the notion that pre-guidelines sentences often did "not accurately reflect the seriousness of the offense." 28 U.S.C. § 992(m). In drafting the guidelines for particular offenses, the Commission considered "the average sentences imposed in such categories of cases prior to the creation of the Commission." Id. With regard to economic crimes, the Commission promulgated guidelines designed to subject defendants to even harsher sentences than those to which such defendants had previously been exposed. U.S.S.G. Ch. 1, Pt. A(3) (policy statement). Despite having already made the sentences in economic crime cases more severe than under the pre-guideline regime and despite a lack of any evidence that the initially promulgated guidelines were inadequate, the Commission again increased the severity of the fraud and theft loss tables, effective November 1, 1989, to, among other things, "provide additional deterrence and better reflect the seriousness of the conduct." See Amendment 99 and Amendment 154. Thus, the Commission is now poised to increase the sentences in economic crime cases for the third time since the inception of the guidelines. Such action seems particularly imprudent in light of the empirical evidence demonstrating that sentencing judges find the current guidelines sufficiently punitive.

If Forced to Choose, Option One is Far Superior to Option Two

With this background, we can examine the specific proposals being considered by the Commission. The result under both will be to increase sentences, even though judges who must sentence defendants do not find the present guideline levels inadequate. In light of the questionable assumptions underlying the loss debate, it would appear that any amendment to increase the loss guidelines is unjustified. However, if the Commission is nevertheless going to move forward with this process and adopt one of the two proposals, then Option One is far superior to Option Two because it better accomplishes the goal of increasing sentences for true mid-to high- range offenders.

¹⁰ This should not be construed as implicit support for the current money laundering guidelines. The PAG strongly supports the Commission's efforts to revise this guideline to tie offense levels more closely to the underlying conduct. However, there is no currently pending proposal to amend § 2S1.1 and, as a result, prosecutors continue to retain discretion to obtain higher sentences than would otherwise be available under the fraud or theft guidelines.

OPTION TWO

By the Commission's estimate, adopting the loss table set forth in Option Two would double the average sentence length in affected theft cases (from 7 to 14 months), would result in a 50% increase in average sentence length in affected fraud cases (from 12 to 18 months), and would result in a nearly 50% increase in the number of defendants who received a sentence of imprisonment in affected cases (from 58.6% to 84.5%).¹¹ While the amendment would affect less severely those defendants who currently fall within Zone A, there would still be an estimated 57.3% of those cases which would be affected by this proposed amendment. In those affected cases, the average sentence would increase from 0 months to 3 months. Option Two would affect approximately 80% of the defendants who currently fall within Zone B, and the average sentence would triple (from 2 months to 6 months). It would impact 90% of the defendants who currently fall within Zone C, and the average sentence would more than double (from 6 to 13 months).¹² The amendment would result in an approximate 18% decrease in defendants falling within Zone A, a 30% decrease in those falling with Zone B, a 5% decrease in those falling within Zone C, and a 34% increase in those falling within Zone D.¹³ Option Two would require an additional 3734 prison beds within five years.¹⁴

OPTION ONE

Option One presents a slightly better picture. Under that scenario, the Commission estimates that there will be an increase in average sentence length in affected theft cases from 6 to 7 months, an increase in average sentence length in affected fraud cases from 13 to 16 months, and approximately an 11% decrease in the number of defendants who will receive a sentence which does not include imprisonment. Option One would require an additional 1592

¹¹ U.S. Sentencing Commission, Amendment Impact Summary (Option Two).

¹² U.S. Sentencing Commission, Sentencing Impact of Proposed Changes to Theft, Fraud, and Tax Guidelines, Table 2 (Option Two).

¹³ U.S. Sentencing Commission, Impact on Defendant's Sentence Zone Resulting From Proposed Changes to Theft, Fraud, and Tax Guidelines, Table 3 (Option Two).

¹⁴ U.S. Sentencing Commission, Amendment Impact Summary (Option Two).

prison beds within five years.¹⁵

Although in Option One the offense levels do not increase over present levels until the loss reaches higher levels than in Option Two, adopting this option would still affect approximately two-thirds of those cases now falling within Zone A and B, and three-quarters of those cases now falling within Zone C. The average sentence of defendants falling in each of these zones would increase from 0 to 1 month for those in Zone A, and from 6 to 9 months for those in Zone C. There would be no change in the average sentence length for those falling in Zone B.¹⁶ This option would cause an approximate 20% increase in defendants falling within Zone A, but a 30% decrease in defendants falling within Zone B and a 25% decrease in defendants falling within Zone C. There would be a 14% increase in defendants falling within Zone D.¹⁷

Conclusion

As the Commission considers the current proposals for increasing the loss tables in fraud, theft and tax cases, we urge the Commission to examine the underlying assumptions which are fueling the amendment fire. The fact that drug defendants may be receiving disproportionately heavier sentences than some "white collar criminals" reflects the excessively high sentences in drug cases, not the unjustifiably low sentences in theft and fraud cases. By adopting either of the two current proposals, the Commission would not only artificially and unnecessarily be increasing the sentences in these economic crime cases, but also legitimizing as a sentencing baseline the draconian and irrational sentencing scheme in drug cases.

Proposed Amendment #2: Cross-references to fraud and theft tables

In light of the lack of any empirical evidence supporting the need to increase sentences in any of these cases, the Commission should not take any action with regard to these cross-referenced offenses which would increase the sentences in such cases.

Comment on Proposed Guideline Amendment #3: Consolidation of Theft Fraud Property Destruction and Fraud Guidelines

¹⁵ U.S. Sentencing Commission, Amendment Impact Summary (Option One).

¹⁶ U.S. Sentencing Commission, Sentencing Impact of Proposed Changes to Theft, Fraud, and Tax Guidelines, Table 2 (Option One).

¹⁷ U.S. Sentencing Commission, Impact on Defendant's Sentence Zone Resulting From Proposed Changes to Theft, Fraud, and Tax Guidelines, Table 3 (Option One).

The PAG agrees in principle with the consolidation of the theft and fraud guidelines. The PAG agrees that theft and fraud offenses are conceptually similar and the prosecutor's charging selection, rather than the offense conduct, may determine whether the theft or fraud guideline will apply in any given case. The PAG does not agree with any aspect of this amendment which would increase penalties. Whether or not penalties should be increased for specific offense characteristics for particular types of cases should be the subject of a separate amendment and separate comment and discussion about those specific issues.

Amendment # 4: Definition of Loss

The PAG strongly supports Option 2 over Option 1. By providing the most specific rules possible regarding what is included within and excluded from the loss calculation, the courts will be provided with the maximum commentary available to assist in the resolution of the greatest variety of factual scenarios. Elimination of the current commentary and the promulgation of a dramatically simplified definition of loss such as that provided in Option 1 will, in the view of the PAG, lead to tremendous uncertainty with regard to issues previously believed settled. Because much of the current commentary which can be incorporated into Option 2 settles without uncertainty a number of important issues, the PAG favors the retention of those portions of the current commentary and with the approach embodied in Option 2 regarding additional guidance to the courts on specific issues.

Within Option 2, the PAG opposes the proposed specific offense characteristic (b)(8). Offenses with a primarily non-monetary objective or risk have previously been dealt with through departure. The PAG is unaware of any widespread dissatisfaction with this approach. Having a specific offense characteristic which limits such factors to a two-level increase may unduly hamper the flexibility needed for such matters. Moreover, under some circumstances the fact that the objective or risk of the offense is non-monetary may not justify any increase in offense of any level at all. Each case turns on its own facts. The PAG is particularly concerned with the proposed two-level increase if the offense "was committed for the purpose of facilitating another felony offense other than offense covered by this guideline." Given the range of conduct currently encompassed by the criminal law, and the myriad of factual circumstances which may fall within this specific offense characteristic, the PAG opposes the two-level specific offense characteristic increase. Depending on the nature of the other felony offense allegedly facilitated by the fraud or theft, and the peculiar factual circumstances of each case, a two-level increase in offense level may or may not be appropriate. The guideline will also foster considerable litigation in the effort to determine the circumstances in which a fraud or theft offense was actually committed for the purpose of facilitating some other offense. The PAG is unaware of any category of cases suggesting a need for this two-level specific offense characteristic.

The PAG also objects to a two-level increase where it is reasonably foreseeable that the offense will result in psychological harm or emotional trauma that is substantial or severe. The terms "substantial" and "severe" are terms of degree which do not lend themselves to uniformity in application. Virtually any theft or fraud offense will foreseeably result in psychological harm or emotional trauma. Because of the indefiniteness of terms such as "substantial" and "severe," there is a great likelihood of disparate application with respect to this adjustment. Finally, the PAG objects to a two-level increase where there is a foreseeable risk of substantial loss in addition to the loss that actually occurred. This language is not precise, and it seems likely that many different factual scenarios will, in hindsight, suggest a risk of substantial loss which was reasonably foreseeable.

In sum, the proposed Section 2B1.1(b)(8) appears contrary to the goal of simplification and the notion that loss serves only as a rough proxy for culpability. By adding these five separate and ambiguous factors to the list of issues which must be considered in every case because they are specific offense characteristics, considerable additional and needless complexity will occur. Moreover, the provision that a four-level upward adjustment must occur when two or more of these aggravating factors is present will only increase the stakes of this litigation and result in an additional and compounded complexity. For example, it seems difficult to imagine an offense in which the primary objective of the offense is non-monetary and yet the offense does not risk any substantial non-monetary harm. Accordingly, it would seem that all such "non-monetary" offenses will qualify for a four-level adjustment rather than merely a two-level adjustment. This type of specific offense characteristic adjustment is precisely the type of fact-intensive litigation which is likely to lead to its own common law of interpretation with respect to each new term, which ought to be avoided in the clarification of the definition of loss.

The PAG generally supports the proposed commentary regarding estimation of loss in the time of measuring loss and the credits against loss. With respect to interest, the PAG continues to believe that interest should not be included. Accordingly, the PAG supports Option A on the issue of interest. The PAG respectfully submits that defendants who fraudulently borrow money they promise and actually intend to repay, should not be punished more severely than a defendant who outright steals the same amount of money. Unpaid interest - whether "bargained for" or not - simply has nothing to do with the concept of loss. Instead, it is a measure of lost profit. Moreover, even if there were any connection between the amount of unpaid interest and a defendant's culpability, the added complexity of including such matters - which is likely to be a rather small component of the total loss figure in most cases - is not justified by any measurably increased accuracy in determining culpability or offense severity.

With respect to non-economic factors as departure considerations, the PAG supports the inclusion of such a list of

departure considerations. The PAG supports the use of Option A rather than Option B because Option B includes the proposed vague language regarding "false statements made for the purpose of facilitating some other crime," and "physical or psychological harm or severe emotional trauma." As discussed above with respect to the proposed specific offense characteristic, the PAG believes these terms are sufficiently vague that the potential for disparate application is great.

The PAG specifically urges the Commission to include as a departure consideration the language enumerated in Option A(E) (7). As we have previously stated, the concept of loss is the best initial starting point in determining offense severity and the defendant's level of culpability. Nevertheless, where gain differs significantly from loss, encouraged departures are essential. Unlike theft cases, in which gain is likely to match loss, fraud cases often present scenarios in which the defendant's gain bears no relation to the loss. In many cases in which there is dissatisfaction with the result obtained by looking only at loss, the PAG respectfully submits that the root cause of this dissatisfaction can be traced to a large variant between the loss and gain or intended gain. As a result, where the loss is minimal or zero but the defendant obtains a significant gain from criminal activity, an upward departure may be necessary and should be encouraged. By the same token, where the loss is extremely large but the defendant's gain is minimal or zero, the downward departure may be necessary and should be encouraged. Unless these departures are encouraged by the guidelines through language similar to that contained in Option A(E) (7), undue uniformity will likely result.

The PAG has the same comments with respect to the proposed revisions to Section 2F1.1 (Fraud) as our previously stated comments with respect to 2B1.1 (Theft).

Issues for comment:

The PAG offers the following comment on the issues for comment published by the Commission.

Standard of Causation: Although the PAG supports the inclusion of a "reasonable foreseeability" standard, this standard must be coupled with an additional limitation. First, as with the current definition of loss, "consequential damages" should be excluded. The inclusion of consequential damages within the definition of loss, it is respectfully submitted, frequently causes protracted litigation, uncertainty and disparity and application and, at the end of the entire process sheer speculation. In the interest of simplicity and ease of application, the PAG strongly opposes the use of consequential damages to calculate loss under the guidelines.

As a practical matter, evidence regarding consequential damages will almost never be within the possession of either the government or the defendant. Development of these factual issues will require large amounts of investigation, research, and

discovery from third parties. Determination of consequential damages, by the very "what if" nature of the inquiry, involves litigation of inherently complex issues which may have almost no factual connection to the conduct underlying the charged offense. This type of issue is a perfect candidate for treatment as a departure issue where consequential damages are out of proportion to the direct loss caused by the defendant's conduct.

The PAG strongly suggests that the issue of multiple causation also should be dealt with by the commentary and that the most realistic way to deal with the multiple causation issue is to permit a downward departure in unusual cases.

Intended Loss: The PAG agrees with Judge Tacha's reasoning in United States v. Galbraith, 20 F.3d 1054, 1059 (1994) (holding that "where the scheme could not possibly have resulted in the intended loss under any circumstances, then intended loss should not be used.") (citation and quotations omitted). If the Commission is intent on retaining the concept of "intended loss" without incorporating the economic reality condition, then it is essential that the guideline expressly encourage departures where the intended loss is completely unrealistic, or where it overstates or understates the defendant's culpability.

Proposed Amendment # 5: Deletion of More Than Minimal Planning Adjustment

The PAG, in theory, does not oppose a proposal that would incorporate more than minimal planning into the loss table. However, there are several caveats that should be noted. First, as noted above, we do not see any legitimate justification for increasing the sentences across the board in economic crime cases. Second, in light of the underlying assumption in such a proposal that these economic crime cases invariably involve more than minimal planning, there should be an available downward adjustment for those non-heartland offenses which actually do involve limited or insignificant planning, or simple efforts at concealment.

Issue for Comment # 6: Telemarketing Fraud

The PAG opposes any revision to the current guidelines which would provide an enhancement in cases simply because the offense involved "telemarketing." The PAG believes that the current guidelines are more than adequate in these cases.¹⁸

¹⁸ The PAG's views on this issue have been shaped, in large measure, by input that we received from H. Dean Steward, Directing Attorney, of the Santa Ana Office of the Federal Public Defender, Central District of California. That particular office, located in Orange County, has handled dozens of telemarketing cases. Indeed, that county and Newport Beach, in particular, are acknowledged by the FBI and Postal Inspection

Telemarketing fraud generally

While it is true that these cases often involve unique types of harms, particularly regarding vulnerable victims, each unique harm is currently addressed by some aspect of the guidelines. For example, vulnerable victims are adequately addressed by the enhancement contained in § 3A1.1. Where there are a large number of victims (100+), or other unusual features to an offense, the court can always utilize an upward departure. The PAG's experience in general and Mr. Steward's experience in particular is that most of the cases are similar and routine, and not the type that call for an upward departure. In light of the lack of any empirical evidence that sentencing judges find the current guidelines insufficiently punitive in these cases, there is no basis for building in an additional enhancement to correspond to the statutory enhancement in 18 U.S.C. § 2326.

Multiple Victims

The guidelines currently address in an adequate manner the fraud harm from telemarketing, including the multiple victim situation. As noted previously, if the situation is truly unusual or outrageous, an upward departure is always available. In addition, in every case, more victims means a greater dollar loss. The greater dollar loss adequately increases a defendant's sentence (particularly so if the Commission decides to adopt one of the pending amendments to further increase the severity of the tables) so that an increase for the number of victims is redundant, and perhaps even double counting.

Re-victimization

In this area, the vulnerable victim enhancement is adequate to reflect the harm. The PAG agrees that "reloading" is particularly heinous conduct, and that the victims of these offenses are truly vulnerable; however the current vulnerable victim enhancement already directly addresses this particular harm. The PAG would not oppose an amendment to the guidelines which added commentary "to ensure that § 3A1.1 is applicable when the offense involves an individual susceptible to the offense because of prior victimization." And again, should the court find a particularly egregious case, the court can impose an upward departure.

Departures

As set forth above, the PAG believes that upward and downward departures are the appropriate vehicle for providing relief in unusual cases. Our comments regarding the availability of such departures generally is applicable in this context as well.

Service to be the "boiler room capital of the United States."

Sophisticated means

The PAG believes that the current guidelines provide sufficient punishment in telemarketing offenses, and that there is no need for any additional enhancement to fulfill the Senate's directive.

Proposed Amendment #7: Circuit Conflicts

(A) Aberrant Behavior

There is no need for a guideline amendment in this area. Under Koon, whether the trial court should depart is a fact intensive determination to be made by the court and the trial court is in the best position to determine whether under all the circumstances a single act of aberrant behavior warrants a downward departure.

(B) Misrepresentation with Respect to Charitable Organizations

We oppose this proposed amendment. We believe United States v. Frazier, 53 F.3d 1105 (10th Cir. 1995) is correctly decided and that §2F1.(b)(3) should be interpreted to require that a defendant falsely represent that he has authority to act on behalf of the charitable, educational, religious or political organization or a governmental agency. No change in the Guidelines is necessary.

(C) Violation of Judicial Process

We oppose any change in the Guidelines as being unnecessary. If the Commission is persuaded that it must act, we favor Option 2--the minority view that the scope of the enhancement excludes fraudulent court filings.

(D) Grouping Failure to Appear Count with Underlying Offense

We support this proposed amendment as we believe United States v. Packer, 70 F.3d 357 (5th Cir. 1995), cert. denied, 117 S. Ct. 75 (1996) is wrongly decided.

(E) Imposters and the Abuse of Trust Adjustment

We oppose the proposed amendment and favor the adoption of the Issue for Comment: the Commission should amend §3B1.3 to expressly provide that the adjustment does not apply to an imposter. See United States v. Echevarria, 33 F.3d 175 (2d Cir. 1994).

(F) Instant Offense and Obstruction of Justice

We oppose any change in the Guidelines--this proposed amendment is unnecessary in light of the changes to the definition of "offense" under §1B1.1, Commentary, Application Note 1.(1). In the event the Commission feels the proposed amendment is absolutely necessary, we favor the minority view as presented in Option Two.

(G) Failure to Admit Drug Use While on Pretrial Release

We support this proposed amendment but recommend you strike the reference to Acceptance of Responsibility--strike "(e.g., §3E1.1 (Acceptance of Responsibility))." Acceptance of Responsibility should be awarded or not awarded based solely on the language in §3E1.1.

(H) Meaning of "Incarceration" for Computing Criminal History

We strongly favor Option Two which would exclude confinement in a community treatment center, halfway house, or home detention following revocation of parole, probation or supervised release from the definition of incarceration in determining a defendant's subsequent criminal history score.

(I) Diminished Capacity

We favor Option Four--eliminate the "non-violent offense" element. We have never understood the logic of not allowing for a downward departure based on diminished capacity for any type of offense. If a defendant, regardless of the type of offense, suffered from a significantly reduced mental capacity at the time of the offense, he/she is less blameworthy than a defendant who acted with full intent and no mental impairment. There never has been, in the area of the insanity defense or a defense of lack of intent based on diminished capacity, a distinction between non-violent and violent offenses **for purposes of guilt or innocence**. Likewise, there should be no distinction for purposes of sentencing. In short, where a defendant shows **in any case** diminished capacity he/she should be eligible for, in the discretion of the sentencing court, a downward departure.

Proposed Amendment # 7(A)-Issue for Comment.

We favor an amendment to Policy Statement 5K2.0 to incorporate the analysis and holding of the Supreme Court in Koon. As to specific language, the PAG recommends that the Commission incorporate the specific language used by the Supreme Court in the Koon case in determining whether a specific sentencing factor is a basis for a departure.

Proposed Amendment # 8: Issue for Comment (Homicide)

These issues for comment present very complex issues in regards to sentencing for homicide offenses. The Commission should wait until it has a full compliment of members before considering wholesale changes to the Sentencing Guidelines in the areas of second degree murder, voluntary manslaughter and involuntary manslaughter.

Proposed Amendment #9: Electronic Copyright Infringement

We have no objection to the Department of Justice's approach as it appears to be a fair response to the Congressional directive to the Sentencing Commission.

Proposed Amendment #10: Offenses Against Property of National Cemetery

We have no objection to the proposed amendment.

Proposed Amendment #11: Expansion of Prohibited Person in Firearm Guideline

We do not oppose the first part of the two-part proposed amendment--(A), dealing with definitional changes. We oppose the second part--(B), dealing with the offense levels, as being premature unless and until the Senate passes legislation which would increase the base offense level for a defendant who knowingly sells to a prohibited person.

Proposed Amendment #12: Conditions of Probation and Supervised Release

We do not oppose any part of the proposed three-part amendment.

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,



Fred Warren Bennett
Chairman
Practitioners' Advisory Group