



DEPARTMENT OF THE TREASURY

WASHINGTON, D.C.

March 9, 2001

UNDER SECRETARY

The Honorable Diane E. Murphy
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500 South
Washington, DC 20002-8002

Re: Proposed Changes to Sentencing Guidelines

Dear Judge Murphy:

On behalf of the Department of the Treasury, I would like to note our appreciation for the efforts of the Commission and its staff to address the ambitious range of important sentencing guideline proposals in this amendment cycle. As you know, we enjoyed a good working relationship with the staff as the Commission addressed counterfeiting issues, and we look forward to continuing to exchange views freely as the current package of proposals moves ahead. This letter addresses proposed amendments published by the Commission in January, 66 Fed. Reg. 7962 (Jan. 26, 2001).

Firearms

The Commission published two proposals to amend Guideline 2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms or Ammunition), 66 Fed. Reg. 8006. As you know, in 1998, then-Treasury Under Secretary for Enforcement James E. Johnson and then-Director of the Bureau of Alcohol, Tobacco and Firearms John W. Magaw, each wrote to the Commission to recommend that Guideline 2K2.1(b)(1) be amended to provide an additional one-level increase for crimes involving 100 to 199 firearms, and a two-level increase for crimes involving 200 or more firearms. Under the current guidelines, unless an upward departure is issued, a defendant who traffics 200 firearms receives the same base offense level as a defendant who traffics 50 firearms.

The most recent package of proposed amendments contained our suggested amendment (Option One), as well as a second proposal for amending Guideline 2K2.1, which would provide increases in two-level increments (Option Two). Compared to the current guidelines, Option Two would result in a one-level increase for crimes involving 3-4 firearms, 8-12 firearms, and 25-49 firearms; a two-level increase for crimes involving 100-199 firearms; and a four-level increase for crimes involving 200 or more firearms.

Although Option One (our original proposal) and Option Two each would improve the guidelines' approach to firearms trafficking, we prefer Option Two. Because Option Two would provide higher sentences than Option One in certain cases involving less than 50 firearms, and higher sentences than Option One in all cases involving 100 or more firearms, it better reflects

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the serious threat firearms trafficking poses to public safety. Option Two has the added benefit, pointed out in the Commission's proposal, of diminishing some of the fact-finding required to determine how many firearms were involved in an offense.

In addition to these comments, Bradley Buckles, the Director of the Bureau of Alcohol, Tobacco and Firearms, will send the Commission a letter which provides even more case-related details relevant to the two proposals to amend Guideline 2K2.1. Also, John P. Malone, ATF's Assistant Director of Firearms, Explosives and Arson, will speak in support of these proposals (in particular, Option Two) at the Commission's public hearing on this matter.

Economic Crime Package

The Commission's Economic Crime Package, 66 Fed. Reg. 7985, addresses a broad variety of sentencing issues and guidelines, including a proposed overhaul of the loss table for certain crimes. The appropriate base amount in a loss table for the offenses addressed in this proposal (theft embezzlement, fraud, etc.) is \$2,000. The Commission invited comment on whether the proposed enhancements in 2B1.1(b)(1) should begin at the \$2,000 or the \$5,000 level, 66 Fed. Reg. 7987; we support the former. Along the same lines, we favor Option One of the three proposed loss tables, 66 Fed. Reg. 7994, as it begins at \$2,000 (rather than the \$5,000 base amount in Options Two and Three). In addition to our general preference for appropriately graduated penalties for increasing levels of fraud, the Commission is aware that counterfeiting offenses, in particular, now tend to involve smaller loss amounts which can be linked definitively to the defendant, so Treasury favors a lower base for enhancements to address this growing problem.

The Commission also invited comment on when loss should be measured for sentencing purposes, 66 Fed. Reg. 7994. Treasury strongly favors Option One, measuring harm at the time of sentencing, rather than Option Two, which would measure loss at the time the offense is detected. Option Two has numerous practical pitfalls. Most notably, for offenses involving the manufacturing of counterfeit checks or credit cards, the counterfeit items manufactured by a defendant can still be used by unidentified co-conspirators to inflict additional loss after the crime is detected, and even after the defendant has been arrested; yet these are losses for which the manufacturer/defendant is directly responsible. Also, the full loss amount of involved fraud schemes often cannot be measured accurately at the time the offense is detected. For example, it takes time to determine how many fraudulent checks the defendant passed, or how many fraudulent transactions the defendant made with counterfeit credit cards. Lastly, the end victim of a fraud scheme may not be notified of a loss until well after the fraud is detected. For example, if a defendant used a stolen credit card to commit fraud and is arrested (thus the fraud is detected), the true cardholder may not be aware of the fraud until she or he receives a monthly statement or is contacted by the government or an issuing bank. In these circumstances, loss might not be identified, nor the end victim known, until well after the crime was detected. All of

these pitfalls would be avoided with the adoption of Option One, which measures harm at the time of sentencing.

Both the Commission's and the Criminal Law Committee's proposals contain definitions of "Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes." We strongly prefer the definition in the Commission's proposal, 66 Fed. Reg. 7994, as it includes a minimum loss amount for unauthorized access devices which were only possessed, and not used, during the commission of the offense. The Criminal Law Committee's proposal, 66 Fed. Reg. 7996, excludes this important element.

Tax Table

The Commission proposed two options to replace the current Tax Table, § 2T4.1, 66 Fed. Reg. 7992. Each option would compress the current Tax Table by moving from one level to two level increments, thus increasing the range of losses that correspond to an individual increment. We support the Option One Tax Table.

Option One provides a base offense level of six for tax loss amounts up to \$2,000. The offense levels increase by two levels thereafter, depending on the tax loss amount. The current mandatory imprisonment offense level of thirteen is reached with more than \$30,000 in loss. Option Two also provides a base offense level of six, but keeps this base level for tax loss amounts up to \$5,000. Option Two achieves the current mandatory imprisonment offense level of thirteen at a loss amount of more than \$70,000. We prefer Option One, as it is an appropriate reflection of the seriousness of tax offenses. Option One provides a lower base offense level loss amount (\$2,000 or less); and achieves the current mandatory imprisonment offense level of thirteen at a lower loss amount than Option Two.

In addition, we note that while the proposed tax table amendment itself is silent on this issue, the synopsis of the amendment discusses using one loss table for theft, property destruction, fraud and tax crimes. As that synopsis notes, "If a decision is made to use the same table, the effect would be to sentence the offenses under both guidelines in a similar manner. This would represent a change from the current relationship in which tax offenses generally face slightly higher offense levels for a given loss amount than fraud and theft offenses." 66 Fed. Reg. 7992. We strongly object to this proposal, as it would effectively erase the current sentencing policy that tax crimes are serious crimes and, as a result, have historically received higher penalties than theft, property destruction, and fraud crimes.

Computing Tax Loss

The Commission proposed an amendment to Guideline 2T1.1(c)(1) to address cases that involve a defendant's underreporting of income on both individual and corporate tax returns. The proposed amendment, 66 Fed. Reg. 8004, resolves the circuit conflict regarding the method

of calculating aggregate tax loss in accord with the Second and Seventh Circuits, United States v. Martinez-Rios, 142 F.3d 662 (2d Cir. 1998); United States v. Harvey, 996 F.2d 919 (7th Cir. 1993); and against the Sixth Circuit. This result bestows an unfair sentencing advantage to the convicted tax criminal because the totality of the criminal conduct is not adequately counted.

Application Note 2 to Guideline 2T1.1 states that "[i]n determining the total tax loss attributable to the offense, all conduct violating the tax laws should be considered as part of the same course of conduct..." Two separate crimes are committed when an offender evades his or her taxes or files false returns: one crime arises from the individual income tax being defeated and the second crime arises from the evasion of tax by the corporation. Therefore, since the crimes are separate, the tax losses should be calculated separately and then added together to achieve the aggregate loss to the government.

Evading one's individual tax and evading corporate tax are separate violations, and the total tax loss should not be calculated as if only one offense was committed. The Sixth Circuit reached that conclusion in United States v. Cseplo, 42 F.3d 360 (6th Cir. 1994), and we believe the Commission should resolve the circuit conflict in favor of the Sixth Circuit's decision.

Similarly, the proposal to except state and local tax loss from consideration does not adequately take all relevant conduct into consideration. Consequently, we oppose this proposed amendment to the application notes, 66 Fed. Reg. 8004. Currently, the Guidelines do not limit the computation of tax loss to federal tax loss, nor do the Guidelines limit relevant conduct to federal offenses. Where federal tax and state tax violations have occurred in the same years and for the same type of tax, the state and local tax loss is relevant conduct and therefore proper for inclusion in computing the base offense level. For the same reasons, we support the inclusion interest and penalties in the definition of tax loss for evasion of payment tax cases, because it accurately reflects the total harm to the government in an evasion of payment case. The Commission invited comment on this last issue, 66 Fed. Reg. 8004.

In addition to these comments, Internal Revenue Service Commissioner Charles O. Rossotti will write you a letter which includes even more detailed discussion of the tax-related sentencing proposals. Mark Matthews, Chief of Criminal Investigation at the IRS plans to testify at the Commission's hearing.

Aggravating and Mitigating Factors in Fraud and Theft Cases

Treasury opposes both options in this proposal, 66 Fed. Reg. 8004. Allowing for such a range of potential adjustments to sentencing levels would loosen the entire sentencing scheme, and leave too much discretion to the courts. Depending on the individual court's decision, defendants with the same pre-adjustment offense level and the same criminal history could be sentenced quite differently, which defeats consistency and fairness.

For example, Option One provides for an increase of two to four levels in the offense level, or an equivalent decrease, depending on the court's assessment of aggravating and mitigating factors. This creates the possibility that two defendants convicted of a fraud offense involving \$50,000 could receive wildly disparate sentences because of the circumstances of the offense. If one were to receive a four level increase due to aggravating factors, he or she would have an adjusted offense level consistent with someone guilty of a \$350,000 fraud that was absent unusual circumstances, whereas the other were to receive a four level decrease resulting in an adjusted offense level consistent with someone guilty of a \$15,000 fraud with no unusual circumstances. In other words, the one \$50,000 fraud could be sentenced like a \$15,000 fraud, or like a \$350,000 fraud, depending upon the circumstances. Option Two, 66 Fed. Reg. 8005, allows for a four-level range, rather than an eight-level range, which nonetheless has serious consequences.

Both options ignore the importance of the loss table to sentencing. Both options would place a considerable burden on courts, prosecutors, defense counsel, and others to analyze, justify, and argue the aggravating and/or mitigating circumstances of each offense — a burden which could not be ignored because of the significant impact the final decision would have on sentences.

In addition to the overall problems with these proposals, certain of the specific aggravating and mitigating factors countervail other elements of the sentencing guidelines, or do not recognize law enforcement realities. For example, adjusting sentences based on whether the loss amount is at or near the highest or lowest amount possible for the range of loss amounts that corresponds to the applicable offense level in the loss table, 66 Fed. Reg. 8005, would be contrary to the purpose of using and revising the loss tables in the first place.

Treasury also believes that the fact that the defendant's attempted offense was "impossible or extremely unrealistic" should not be a mitigating factor, 66 Fed. Reg. 8005. Fraudsters often propose deals or transactions that are in reality schemes that could never really be carried out, yet victims are duped and suffer losses as a result. For example, criminals attempt to negotiate fictitious instruments or to use them as collateral for loans or lines of credit. Others propose schemes where the victim is promised a percentage of multi-million dollar payments in exchange for providing "up-front" money.

We also believe that defendants should not enjoy reduced sentences if their "actual or intended gain was substantially less than the loss" amount determined using the loss tables. Using this reasoning, a criminal who puts fraudulently-obtained cash in his mattress, from which some other criminal steals it, or a bank robber who drops some of the cash as she escapes, could get a reduced sentence. Similarly, we do not believe a reduction in sentence is appropriate if "the offense was not committed for commercial advantage or financial gain," 66 Fed. Reg. 8005. Computer hackers who break into a bank's system just to see if they can do it, can cause serious harm, regardless of whether they move funds to accounts they control. These proposed

mitigating factors obviously are not a fair reflection of the harm to the victims or the intent of the criminals.

Sentencing Table Amendment and Alternative to Sentencing Table Amendment

We strongly oppose both of the options proposed to make changes to the Sentencing Table or provide an alternative to reduce sentences, 66 Fed. Reg. 8006. Option One would expand Zones B and C of the sentencing tables, increasing the offense level at which Zone D starts to seventeen in Criminal History Category I. Currently, imprisonment would be required at offense level thirteen for a Criminal History Category I offender. If Option One is adopted, imprisonment would not be required until an offense level of seventeen is established.

Tax enforcement is just one area where this proposal would have a devastating effect. Under the current Sentencing and Tax Tables, a Criminal History Category I tax offender does not qualify for the mandatory imprisonment in Zone D unless a tax loss of greater than \$40,000 is established, which translates into an estimated taxable income of approximately \$142,857. To achieve that same result with the new proposed Sentencing Table, the tax loss would have to be greater than \$325,000, which translates into an estimated taxable income of approximately \$1.16 million. In other words, the proposed sentencing table amendment would require eight-fold greater tax loss and eight times the current adjusted gross income level to merit mandatory imprisonment for a tax offense. This would reduce to almost nothing the number of tax criminals who qualify for mandatory sentences of imprisonment for their offenses.

Option Two, the proposed alternative to changing the sentencing table, similarly operates in opposition to the long-standing sentencing policy that tax offenses are serious economic crimes. This proposal would reduce offense levels by two levels for economic criminals who meet certain criteria. To use a practical example, this would mean that a first-time tax offender stands a good chance of having his or her offense categorized as a "less serious economic crime" — contradicting not only long-standing policy, but also defeating any offense level increases in the proposed new tax tables.

Money Laundering

The United States Sentencing Commission has proposed conflating the sentencing guidelines that apply to violations of 18 U.S.C. § 1956 (laundering of monetary instruments) and 18 U.S.C. § 1957 (engaging in monetary transactions in property) by combining current Guideline sections 2S1.1 and 2S1.2. Treasury supports, in principle, holding a money launderer accountable for the underlying offense committed. However, Treasury has serious reservations about proposed changes to the guidelines that would decrease the seriousness of money laundering offenses. Treasury believes that the crime of money laundering is as grave, or graver, a crime as many of the possible underlying offenses that set the base offense level under (a)(1) of the proposal, since money laundering typically helps the criminals to fund their activities and to avoid detection. We

therefore believe that a minimum base offense level of 13 is appropriate for violations of 18 U.S.C. 1956 and 1957. This lower base offense level would balance the Commission's desire to reduce the perceived disparity between the sentencing guidelines for money laundering and the underlying offenses with a base offense level that recognizes the seriousness of a money laundering offense. Treasury supports increasing this base level where justified by the particular circumstances of the underlying offense.

Money laundering not only facilitates drug trafficking, organized crime, international terrorism, and other crimes, but it also poses a threat in and of itself, by tainting our financial institutions and undermining confidence in parts of the international financial system. Money laundering also facilitates foreign corruption, undermining U.S. efforts to promote democratic political institutions and stable vibrant economies abroad. The fight against money laundering allows the U.S. government to pursue those who commit the underlying crimes that produce dirty money and those who ensure that the money is available for criminal misuse.

While the U.S. is leading the international community in the fight against money laundering, the Commission's proposal risks sending the message that the U.S. Government no longer thinks that money laundering is as serious an offense as it once did. This is the wrong message to communicate both to those in the U.S. who are considering whether to launder monies and to our international partners in the effort to combat money laundering.

The Commission's proposal has the potential to result in significantly lower sentences for money laundering offenses. Treasury recommends that the Commission delay consideration of the proposed amendments for the money laundering guidelines until the next amendment cycle, especially since the Sentencing Commission is also considering proposals to revise the sentencing tables and the offense levels for fraud offenses. Our comments on the various specific proposals in the Commission's proposal follow.

(a) Base Offense Level

As discussed above, Treasury supports a minimum base offense level of 13 where money laundering offenses are involved. This lower base offense level balances the Commission's desire to reduce the perceived disparity between the sentencing guidelines for money laundering and the underlying offenses with a base offense level that recognizes the seriousness of a money laundering offense.

(b) Specific Offense Characteristics

Treasury supports the types of enhancements proposed in (b)(1) and (b)(2). Treasury believes that a 6 level enhancement is appropriate for the offenses detailed at (b)(1)(i, ii, and iii).

Treasury also supports enhancements for those engaged in the business of laundering criminal funds (b)(2)(A), laundering funds to promote additional criminal conduct (b)(2)(B), concealment of laundered funds (b)(2)(C), and for tax evasion or avoiding a transaction reporting requirement (b)(2)(D). However, we believe that a court should have the option to impose one or more of the enhancements in a given case instead of applying only the "greatest" enhancement as called for in the proposed (b)(2).

We believe that a 4-level enhancement, or higher, is appropriate for an individual engaged in the business of laundering funds. We do not object to the "totality of the circumstances" test proposed in Application Note 4(A) to determine whether an individual is subject to the enhancement, but we do not endorse the "Factors to Consider" language in Application Note 4(B) as it is currently written. Specifically, we recommend that the words "regularly [routinely]" be struck from 4(B)(i); the phrase "during an extended period of time" be struck from 4(B)(ii); and that the words "a substantial amount of" be struck from 4(B)(iii).

We also recommend that a 3-level enhancement apply in (b)(2)(B) if the laundered funds promoted further criminal conduct. The 3-level enhancement is consistent with the current 3-level difference in Guideline sections 2S1.1(a)(1) and (a)(2) for instances where the defendant intended "to promote the carrying on of specified unlawful activity." A 3-level enhancement also recognizes that society faces an additional harm from those who launder funds to fuel additional criminal activity. Treasury does not support modifying the word "promotion" with the adjectives "significant" or "material" as proposed in Application Note 5.

We support a 3-level enhancement for concealment in (b)(2)(C) to reflect the fact that investigating and prosecuting complex money laundering cases involves a substantial investment of government resources. We believe that the proposed enhancement should apply to cases involving any level of concealment, and should not be limited to those cases involving "sophisticated" concealment. Our suggestion comports with the statutory language in 18 U.S.C. § 1956(a)(1)(B)(i). Any attempt to conceal money laundering, regardless of the level of sophistication, makes money laundering more difficult to detect and increases the risk to the integrity and stability of U.S. financial institutions. The absence of an enhancement for concealment would also provide those who launder money with an additional incentive to conceal their illegal activity from government investigators since there would be no adverse consequence associated with the concealment activity.

Treasury also supports a 2-level enhancement for (b)(2)(D). The conduct penalized in (b)(2)(D) is directed at violations of laws that are not necessarily related to the specified unlawful activity, tax evasion and avoiding a transaction reporting requirement. These activities undermine the regulatory structure of the anti-money laundering laws, and providing an enhancement for tax evasion offenses reinforces the message that the commission of tax crimes is a serious matter.

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Finally, Treasury does not support the proposed 2-level downward departure in (b)(4). A section 1957 violator who does not meet any of the proposed enhancement factors in (b)(2) does not need to have a lower sentence imposed for failure to be a worse offender than the person otherwise could have been by meeting the enhancement criteria.

Referencing 18 U.S.C. 1960 Offenses to 2S1.3

The proposed amendment currently provides that convictions under 18 U.S.C. § 1960 be referenced to §2T2.2 (Regulatory Offenses), but the Commission solicited comments on whether such violations are more appropriately referenced to §2S1.3 (Structuring Transactions to Evade Reporting Requirements). Section 2S1.3 (Structuring) carries a higher base offense level than §2T2.2 (Regulatory Offenses). FinCEN, the agency responsible for the registration and oversight of money services businesses such as wire transmitting businesses, believes that the reference to Structuring, with its higher base offense level, is more appropriate.

Under § 1960, it is a criminal offense intentionally to conduct, control, manage, or own an unlicensed money transmitting business. While such a violation might appear to be regulatory in nature, § 1960 offenses are more akin to the conduct involved in structuring and should be punished at that section's higher base offense level.

Money transmitters and other non-bank businesses providing money services can easily be exploited by criminal organizations laundering funds. As a practical matter, criminal proceedings brought under § 1960 will generally involve those money transmitters or similar businesses (i) that have intentionally failed to register in order to avoid detection and audit, (ii) that deal in large numbers of unreported, apparently structured, transactions, (iii) that are otherwise at high risk for manipulation by money launderers, or (iv) businesses whose regulatory compliance is so poor that they may be willfully blind to laundered funds passing through the business. The statutory violation requires a finding of willful failure to obtain a state license or, once the registration requirement goes into effect in January 2002, to register with the Department of the Treasury.

Congress intended to increase the pressure on money services businesses that operate at the fringe of legality, and to tighten control over underground money movement mechanisms. If the §2S1.3 guidelines applied to these offenses, the potentially higher sentences for offenders would track the Congressional intent to combat illegal activities by some money services businesses.

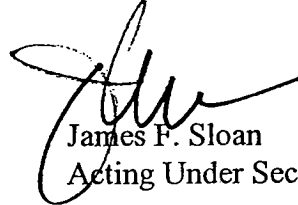
Federal registration and state licensing requirements are the first line of defense in dealing with the abuse of money services businesses by criminals. The preamble to recent federal regulations requiring the federal registration of some money services businesses notes that Congress has found that money services businesses "are largely unregulated and are frequently used in sophisticated schemes to transfer large amounts of money that are the proceeds of unlawful enterprises." 64 FR 45438 (August 20, 1999). As a result, a money services business' intentional failure to obtain a license is far more serious than another business' failure to comply with other types of regulatory requirements, and the punishment

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level should reflect that fact. The Structuring Section, §2S1.3, is an appropriate reference because it deals with the punishment of an activity that can facilitate laundering by others.

On behalf of the Department of the Treasury, I thank the Commission and its staff for considering our comments on the proposed changes to the Sentencing Guidelines.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Sloan', with a stylized flourish at the end.

James F. Sloan
Acting Under Secretary (Enforcement)